

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

BANK OF NEW YORK MELLON,
fka The Bank of New York, as Trustee for the holders of
the Certificates, First Horizon Mortgage Pass-Through
Certificates Series FH04-FA1, by First Horizon Home
Loans, a division of First Tennessee Bank National
Association, Master Servicer, in its capacity as agent for
the trustee under the Pooling and Servicing Agreement,
Plaintiff-Respondent,

v.

Thomas M. OWEN,
Theresa M. Owen, and all other occupants,
Defendants-Appellants.

Jackson County Circuit Court
15LT11669; A164045

David G. Hoppe, Judge.

Submitted October 31, 2018.

Thomas Cutler filed the brief for appellants.

Peter J. Salmon filed the brief for respondent.

Before Ortega, Presiding Judge, and Tookey, Judge, and
Powers, Judge.*

TOOKEY, J.

Reversed and remanded.

* Tookey, J., *vice* Garrett, J. pro tempore.

TOOKEY, J.

In this forcible entry and detainer (FED) action, defendants appeal a stipulated limited judgment that awarded restitution of real property to plaintiff. On appeal, defendants contend that the trial court erred when it granted plaintiff's motion *in limine*, which precluded defendants from presenting any evidence regarding the validity of the underlying nonjudicial foreclosure and sale of the subject property to plaintiff. Defendants argue that the trial court erred when it concluded that "the present FED action is not the appropriate forum to challenge the prior foreclosure." For the reasons that follow, we conclude that the trial court erred when it concluded that an FED action "is not the appropriate forum" to challenge any aspect of the underlying nonjudicial foreclosure. Accordingly, we reverse and remand.

We review a trial court's grant of a pretrial motion *in limine* "in light of the record made before the trial court when it issued the order." *State v. Pitt*, 352 Or 566, 575, 293 P3d 1002 (2012). The following facts are undisputed. In 2004, defendants took out a loan from First Horizon Loan Corporation (First Horizon) that was secured by a trust deed for real property located in Eagle Point, Oregon. First Horizon was the original beneficiary of the trust deed, and Lawyers Title Insurance Corporation (Lawyers Title) was appointed as the original trustee. In addition, both parties asserted that there were subsequent transfers of the trust deed to other beneficiaries and appointments of successor trustees.¹ Ultimately, in 2010, the trust deed was purportedly transferred to plaintiff, Bank of New York Mellon, and, as the new beneficiary, plaintiff appointed First American Title Company (First American) as the successor trustee.²

¹ On appeal, the parties set forth the facts in detail, but their recitations of the facts with regard to the subsequent transfers of the deed of trust differ as they each rely on their own recitation of the facts from their trial memorandums. In this opinion, we set out only the facts necessary to reach the legal questions that we resolve.

² We refer to Bank of New York Mellon as plaintiff, because the amended notice of appeal designates Bank of New York Mellon, fka The Bank of New York, as Trustee for the holders of the Certificates, First Horizon Mortgage Pass-Through Certificates Series FH04-FA1, by First Horizon Home Loans, a division of First Tennessee Bank National Association, Master Servicer, in its capacity as

In 2011, after defendants defaulted on their loan secured by the subject property, First American sold the property to plaintiff at a nonjudicial foreclosure sale. First American executed a “Trustee’s Deed Upon Sale” conveying all interests in the subject property to plaintiff.

In 2015, plaintiff brought this FED action to recover the property from defendants. In its complaint, plaintiff alleged that it was “entitled to possession based on the issuance of a Trustee’s Deed Upon Sale following a nonjudicial foreclosure sale.” In response, defendants filed an answer, asserting several defenses to plaintiff’s claimed right of possession. Defendants argued that plaintiff was not “entitled to possession based on the deed attached to the complaint” and that the trustee had no “authority to conduct the sale or issue any deed in this matter” because, among other things, “[n]o notice of the sale was provided to defendants in violation of the Oregon Trust Deed Act” (OTDA), ORS 86.705 to 86.815.

Plaintiff filed a motion *in limine*, asserting, among other points, that “FED court is not the proper forum to address the validity of the sale” because “FED court is a court of limited jurisdiction,” and also that, “[u]nder ORS 86.797, defendants may not challenge a completed nonjudicial foreclosure after the sale.”³ In response, defendants asserted that “it is perfectly legitimate to raise questions of title to the extent necessary to require a plaintiff to meet its burden of proof, where title is at issue,” and that ORS 86.797 does not bar “all post-sale challenges brought by

agent for the trustee under the Pooling and Servicing Agreement, as plaintiff-respondent. At trial, First Horizon Home Loan Corporation, its Successors and/or Assigns, was originally designated as plaintiff, but plaintiff moved to amend its complaint to designate Bank of New York Mellon as the correct plaintiff in the FED action. The trial court granted that motion, but no amended complaint was ever filed.

³ ORS 86.797(1) provides:

“If, under ORS 86.705 to 86.815, a trustee sells property covered by a trust deed, the trustee’s sale forecloses and terminates the interest in the property that belongs to a person to which notice of the sale was given under ORS 86.764 and 86.774 or to a person that claims an interest by, through or under the person to which notice was given. A person whose interest the trustee’s sale foreclosed and terminated may not redeem the property from the purchaser at the trustee’s sale. A failure to give notice to a person entitled to notice does not affect the validity of the sale as to persons that were notified.”

grantor-debtors to the legality of an [OTDA] ‘trustee’s sale’ without needing to resolve any factual disputes regarding the legal status of a purported trustee or the legal status or identity of the ‘present beneficiary’ or otherwise show compliance with the act.”

The trial court agreed with plaintiff on the first point and ruled that defendant was precluded from introducing any evidence relating to the validity of the trustee’s sale because “the present FED action is not the appropriate forum to challenge the prior foreclosure.” Accordingly, the trial court granted plaintiff’s motion *in limine* and declined “to address the other basis presented by plaintiff to limit th[e] evidence” under ORS 86.797. Following the trial court’s ruling on plaintiff’s motion *in limine*, the parties stipulated to a limited judgment of restitution because the ruling disposed of “all defendants’ defenses *** relating to the validity of the foreclosure sale and/or the validity of the trustee’s deed.”

On appeal, defendants assign error to the trial court’s grant of plaintiff’s motion *in limine*, arguing that “the trial court erred, as a matter of law, when it ruled that an FED action was not a ‘proper forum’ in which to challenge the purported nonjudicial foreclosure” and by “completely excluding all evidence of, and challenge to, the validity of the supposed trustee’s sale[,] which was the sole basis for [plaintiff’s] claim of right to possession.” Plaintiff acknowledges that, “since this appeal was filed, *** [the Court of Appeals has] issued several decisions finding that FED defendants should have been permitted to challenge the validity of an underlying foreclosure sale.” Plaintiff argues that those cases are inapplicable here because “all of those cases involved Electronic Mortgage Registration Systems, Inc. (“MERS”) as the named beneficiary” and, “[u]nder Oregon case law, MERS does not meet the definition of a ‘beneficiary’” under the OTDA.

We reject plaintiff’s argument that post-sale challenges by defendants in FED actions are permitted only when MERS is a named beneficiary. Plaintiff is correct that, in cases involving MERS, we have rejected a plaintiff’s argument “that ORS 86.797 bars [a] defendant’s post-sale challenge to a foreclosure sale” in an FED action if the defendant does not file

a separate action for declaratory relief. *Federal Home Loan Mortgage Corp. v. Smith*, 287 Or App 42, 45-46, 400 P3d 1009 (2017) (citing *Wolf v. GMAC Mortgage, LLC*, 276 Or App 541, 543, 370 P3d 1254 (2016), and *Bank of America, N. A. v. Payne*, 279 Or App 239, 243 n 2, 379 P3d 816 (2016)). Additionally, in an FED action that did not involve MERS as the named beneficiary, we have also rejected a plaintiff's argument that the defendant "waived his right to challenge the nonjudicial foreclosure sale because he did not seek any judicial intervention after being served with proper notice of the trustee's sale" under ORS 86.797(1). *Troubled Asset Solutions v. Wilcher*, 291 Or App 522, 530-31, 422 P3d 314 (2018), *rev'd in part on other grounds*, 365 Or 397, 445 P3d 881 (2019); *see also Option One Mortgage Corp. v. Wall*, 159 Or App 354, 357-61, 977 P2d 408 (1999) (rejecting the plaintiff's argument that "the trial court did not have jurisdiction to consider [the] defendant's challenge to the underlying nonjudicial foreclosure" based on inadequate notice of the sale of the property, and concluding that "an FED court has authority to consider issues regarding title insofar as necessary for determination of possession" (internal quotation marks omitted)).

As we explain in more detail below, certain post-sale challenges are permitted under the OTDA in an FED action. Accordingly, the trial court erred when it granted plaintiff's motion *in limine* on the basis that "the present FED action is not the appropriate forum to challenge the prior foreclosure."

"The OTDA authorizes the use of trust deeds as security for home loans and allows foreclosure of a defaulting homeowner's interest by means of a privately-conducted, advertised trustee's sale of the home rather than pursuant to a court-ordered, judicial foreclosure—provided, however, that certain statutory requirements are met." *Troubled Asset Solutions*, 291 Or App at 528 (internal quotation marks and brackets omitted). As we have explained, "the OTDA, as a whole, represents a well-coordinated statutory scheme to protect grantors from unauthorized foreclosure and wrongful sale of property, while at the same time providing creditors with a quick and efficient remedy against a defaulting grantor." *DiGregorio v. Bayview Loan Servicing, LLC*, 281 Or

App 484, 492, 381 P3d 961 (2016), *rev den*, 361 Or 100 (2017) (internal quotation marks omitted).

To effectuate the legislature’s careful balancing of those interests, “we have *** held that ORS 86.797 cannot provide finality in a fundamentally flawed nonjudicial foreclosure sale,” but a technical defect, such as a “scrivener’s error,” is not significant enough to disturb the finality of a trustee’s sale. *Troubled Asset Solutions*, 291 Or App at 530-31 (citing *DiGregorio*, 281 Or App at 490-94, in which we concluded that the grantor of a trust deed was precluded from challenging a nonjudicial foreclosure sale where the trustee’s notice of sale failed to identify the beneficiary of the trust deed, because the grantor did not contest “that the sale was conducted by a trustee pursuant to her default on her obligations” or that she received notice of the sale “as required by ORS 86.764 and ORS 86.774”). See ORS 86.764 (notice of sale requirements); ORS 86.774 (service and publication of notice of sale). Accordingly, a post-sale challenge is not barred by ORS 86.797 if there was a fundamental flaw in the nonjudicial foreclosure sale. See *Wolf*, 276 Or App at 547-49 (because the OTDA “applies only to a ‘trustee’s sale,’” its provisions “cannot preclude a post-sale challenge to the sale of *** property by someone who was not, in fact, the trustee”); *Staffordshire Investments, Inc. v. Cal-Western*, 209 Or App 528, 542-44, 149 P3d 150 (2006), *rev den*, 342 Or 727 (2007) (observing that there is nothing in the OTDA “to indicate that the legislature intended the auction to be final in the absence of legal authority to sell the property,” and concluding that the sale was void where the grantor was not in default (emphasis in original)); *Woods v. U.S. Bank N.A.*, 831 F3d 1159, 1166 (9th Cir 2016) (“[A] post-sale challenge must be based on lack of notice or some other fundamental flaw in the foreclosure proceedings, such as the sale being completed without the borrower actually being in default. Technical defects that do not have a substantial impact on [a] grantors’ rights *** are not significant enough to warrant upsetting the finality of a trustee’s sale.” (Internal quotation marks and citations omitted.)).

Here, defendants asserted in their answer that plaintiff was not entitled to possession because “[n]o notice of the sale was provided to defendants in violation of the

[OTDA].” *Compare DiGregorio*, 281 Or App at 493 (concluding that the defendant was barred from challenging the underlying trustee’s sale in an FED action, in part, because she did “not contest that she is a person to whom notice of sale was given as required by ORS 86.764 and ORS 86.774”), *with Option One Mortgage Corp.*, 159 Or App at 358-61 (reversing judgment in favor of the plaintiff in FED action because service of the notice of the trustee’s sale was inadequate under *former* ORS 86.750 (1997), *renumbered as* ORS 86.774 (2013)). We therefore reverse and remand the case to the trial court, which should evaluate in the first instance, in light of our decisions in *DiGregorio* and *Troubled Asset Solutions*, whether ORS 86.797 bars defendants’ challenges to the validity of the sale of their home because “the fundamental premises of ORS 86.797(1) [we]re satisfied.” *DiGregorio*, 281 Or App at 494.⁴

Reversed and remanded.

⁴ Plaintiff asserts that, “[t]o the extent that the trial court too broadly concluded that it was not a proper forum for a challenge to the validity of the underlying nonjudicial foreclosure sale, the record in the FED action contains all of the facts necessary for this court to apply the right for the wrong reason doctrine.” We conclude that the record in this case is insufficient for us to evaluate whether there were fundamental flaws in the nonjudicial foreclosure sale. *See Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 659, 20 P3d 180 (2001) (the record must be sufficient to affirm on the alternative basis). In addition to defendants’ claimed lack of notice, defendants also asserted that the trustee’s sale was unlawful “due to unrecorded assignments of the beneficial interests in the deed of trust and [the] invalid appointment of [a] successor trustee.” *See Bandrup v. ReconTrust Co., N.A.*, 353 Or 668, 699-700, 303 P3d 301 (2013) (concluding that “ORS 86.735(1) does not require recordation of ‘assignments’ of the trust deed by operation of law that result from the transfer of the secured obligation,” but noting that “the OTDA is laced with [other] provisions that indicate that the grantor is entitled to know the identity of the beneficiary”); *DiGregorio*, 281 Or App at 493 (ORS 86.797 cannot preclude a post-sale challenge to the sale of property by someone who is not, in fact, an actual trustee).

Plaintiff stated in its trial memorandum that it would offer evidence of the transfer of the deed of trust, the appointment of the successor trustee, and the notice of sale only if its motion *in limine* was denied. Because of the trial court’s ruling on plaintiff’s motion *in limine*, there is no evidence in this record of the notice of sale, or evidence that defendants received notice of the sale as required by ORS 86.764 and ORS 86.774. Nor is there evidence in the record about any transfers of the deed of trust or the subsequent appointments of successor trustees, other than the parties’ divergent assertions about these matters in their trial memorandums. In sum, on this record, we cannot conclude that the defenses raised by defendants were merely technical defects that would not justify disturbing the finality of the trustee’s sale. On remand, the parties and the trial court will have the opportunity to engage in the appropriate analysis of those issues.