

Filed: June 6, 2013

IN THE SUPREME COURT OF THE STATE OF OREGON

REBECCA NIDAY,
fka Rebecca Lewis,

Respondent on Review,

v.

GMAC MORTGAGE, LLC,
a foreign limited liability company;
and EXECUTIVE TRUSTEE SERVICES, INC.,
a California corporation,

Defendants-Respondents,

and

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.,
a Delaware corporation,

Petitioner on Review.

(CC CV10020001; CA A147430; SC S060655)

En Banc

On review from the Court of Appeals.*

Argued and submitted on January 8, 2013.

Gregory A. Chaimov, Davis Wright Tremaine LLP, Portland, argued the cause for petitioner on review Mortgage Electronic Registration Systems, Inc. With him on the brief were Frederick B. Burnside and Kevin H. Kono.

W. Jeffrey Barnes, *pro hac vice*, W. J. Barnes, PA, Beverly Hills, argued the cause for respondent on review. With him on the brief was Elizabeth Lemoine, Makler Lemoine & Goldberg, PC, Portland.

Hope A. Del Carlo, Portland, filed a brief on behalf of *amicus curiae* Oregon Trial Lawyers Association.

Rolf C. Moan, Assistant Attorney General, Salem, filed a brief on behalf of *amicus curiae* State of Oregon.

BREWER, J.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is reversed, and the case is remanded to that court for further proceedings.

Kistler, J., concurred in part and specially concurred in part and wrote an opinion in which Balmer, C.J. joined.

*Appeal from Clackamas County Circuit Court, Henry C. Breithaupt, Judge. 251 Or App 278, 284 P3d 1157 (2012).

1 BREWER, J.

2 This is the second of two cases this court decides today that is concerned
3 with the nonjudicial foreclosure of trust deeds under the Oregon Trust Deed Act (OTDA)
4 and the mortgage finance industry's practice of naming the Mortgage Electronic
5 Recording System, Inc., (MERS), rather than the lender, as a trust deed's "beneficiary."
6 In *Brandrup v. ReconTrust Co.*, __ Or __, ___ P3d ___ (June 6, 2013), we answered
7 questions certified to us by a United States District Court about whether and how that
8 practice comports with the OTDA's nonjudicial foreclosure requirements. In the present
9 case, we apply our answers in *Brandrup* to a dispute that comes to this court through a
10 petition for review of a decision of the Court of Appeals.

11 The underlying case is an action for declaratory and injunctive relief,
12 brought by a home loan borrower against MERS and other entities that were attempting
13 to utilize the OTDA's "advertisement and sale" procedure, ORS 86.710, to foreclose the
14 trust deed that secured her promise to repay. Plaintiff argued that, although the trust deed
15 identified MERS as the beneficiary of the trust deed, neither MERS nor any of the other
16 entities involved in the foreclosure had any legal or beneficial interest in the trust deed
17 that would allow them to proceed under the OTDA. The trial court granted summary
18 judgment to defendants, but the Court of Appeals reversed that decision, holding that a
19 genuine issue of material fact existed as to whether all of the requirements for nonjudicial
20 foreclosure set out in the OTDA had been satisfied. *Niday v. GMAC Mortgage, LLC*, 251
21 Or App 278, 300, 284 P3d 1157 (2012). We also conclude that a genuine issue of
22 material fact exists, albeit a different one than the one the Court of Appeals identified.

1 I. BACKGROUND

2 Our analysis in this case relies heavily on our answers in *Brandrup* to the
3 federal court's certified questions, and the reader would be well-advised to review our
4 opinion in that case before delving into the present opinion. Of particular importance is
5 the general discussion of mortgage loans and trust deeds, recordation requirements, and
6 the OTDA that precedes the discussion of the certified questions. *Brandrup*, __ Or at __
7 (slip op at 4-13). Because that portion of the *Brandrup* opinion covers most of the
8 necessary ground, we limit the background discussion in the present case to a brief
9 description of MERS and its function in the home mortgage business.

10 MERS and its parent company, MERSCorp, were created in the 1990's in
11 response to a sharp increase in trading in mortgage loans that resulted from a developing
12 secondary market for mortgage-backed securities. In an effort to make that market more
13 efficient, companies that were involved in making and trading in mortgage loans,
14 including the Federal National Mortgage Association (Fannie Mae) and the Federal
15 Home Loan Mortgage Corporation (Freddie Mac), combined to create MERS. *See,*
16 *generally*, R. K. Arnold, "Yes, There is Life on MERS," 11 Prob & Prop 33, 34 (1997).
17 MERS operates a national electronic database, the MERS System, which privately tracks
18 transfers of ownership interests and servicing rights in mortgage loans among the lenders,
19 investors, and other companies that are its members.

20 The present case examines the MERS arrangement in the specific context
21 of the OTDA. The OTDA allows for nonjudicial foreclosure of a particular kind of
22 security instrument, a trust deed. A trust deed conveys an interest in real property -- a

1 lien -- to a trustee, who holds that interest, in trust, to secure an obligation owed by the
2 "grantor" of the trust deed to the trust deed's "beneficiary." ORS 86.705(2), (4), (7).
3 Under the OTDA, if the grantor defaults on his or her obligation to the beneficiary (by,
4 for example, failing to repay a loan made by the beneficiary), the trustee may foreclose
5 the trust deed by "advertisement and sale" of the trust property, if certain prerequisites are
6 satisfied. ORS 86.710, ORS 86.735. Among the listed prerequisites is a requirement that
7 "the trust deed, any assignments of the trust deed by the trustee or the
8 beneficiary and any appointment of a successor trustee [be] recorded in the
9 mortgage records in the counties in which the property described in the
10 deed is situated[.]"
11 ORS 86.735(1).

12 II. FACTS AND PROCEDURAL HISTORY

13 With that background in mind, we turn to the facts of the present case. In
14 2006, plaintiff obtained a loan from Greenpoint Mortgage Funding, Inc. to finance the
15 purchase of a home in Clackamas County, memorializing her promise to repay the loan,
16 with interest, in an "adjustable rate note." The note expressly stated that the note might
17 be transferred from "Lender" (Greenpoint) to a different "Note Holder." Along with the
18 note, plaintiff executed a "Deed of Trust" that (1) identified MERS as the trust deed's
19 beneficiary, but solely as "nominee for lender"; and (2) conveyed an interest in the
20 property plaintiff had purchased to a named trustee, to secure the promise of repayment
21 memorialized in the note and other related promises. Specifically, the trust deed
22 provided:

23 "The beneficiary of the Security Instrument is MERS (solely as nominee
24 for Lender and Lender's successors and assigns) and the successors and

1 assigns of MERS. This Security Instrument secures to Lender: (i) the
2 repayment of the Loan, and all renewals, extensions and modifications of
3 the Note; and (ii) the performance of Borrower's covenants and agreements
4 under this security Instrument and the Note. For this purpose, Borrower
5 irrevocably grants and conveys to Trustee, in trust, with power of sale [the
6 property plaintiff had financed], together with all the improvements now or
7 hereafter erected on the property * * *. Borrower understands and agrees
8 that MERS holds only legal title to the interests granted by Borrower in this
9 Security Instrument, but, if necessary to comply with law or custom, MERS
10 (as nominee for Lender and Lender's successors and assigns) has the right:
11 to exercise any or all of those interests, including, but not limited to, the
12 right to foreclose and sell the property, and to take any action required of
13 Lender including, but not limited to, releasing and canceling this Security
14 Instrument."

15 In a separate definition section, the trust deed identified plaintiff as "Borrower,"
16 Greenpoint as "Lender," First American Title Insurance Co. as "Trustee," and MERS as
17 "the beneficiary under this Security Instrument." The trust deed provided that, although
18 "Borrower" would be notified in writing of any change in the entity collecting payments
19 due under the note, "the note or a partial interest in the note (together with this Security
20 Instrument) c[ould] be sold one or more times without prior notice to borrower."

21 The trust deed was recorded in the Clackamas County real property records
22 within a few days after its execution. Shortly thereafter, plaintiff received notice that the
23 servicing rights to her loan had been transferred to GMAC Mortgage, LLC (GMACM).
24 Plaintiff thereafter made her payments to GMACM. At some point, plaintiff allegedly
25 ceased to make payments.

26 In April 2009, plaintiff received a "Trustee's Notice of Sale" from

1 Executive Trustee Services (ETS), which purported to be acting as agent for the trustee.¹
2 The notice referred to the trust deed that plaintiff had signed and stated that, as provided
3 in ORS 86.735, "the beneficiary [MERS] and the trustee" had elected to sell the property
4 identified in the trust deed (*i.e.*, plaintiff's home), at a specified place and time, to satisfy
5 the obligation secured by the trust deed. Plaintiff wrote to ETS, demanding that the
6 scheduled sale be cancelled. In her letter, plaintiff pointed out that the loan had been
7 originated by Greenpoint, that she had never been advised of any assignment of the trust
8 deed to MERS, ETS, or GMACM, that there was no record of any such assignment, and
9 that it thus appeared to her that the trustee's sale had been instituted by a party or parties
10 that had no rights in either the note or the trust deed and, therefore, had no authority to
11 nonjudicially foreclose. The letter ended by demanding copies of various documents
12 relating to the trust deed, including documents establishing the "entire chain of title to the
13 Deed of Trust and note." Plaintiff did not hear back from ETS, but the trustee's sale was
14 rescheduled for a later date.

15 Before the rescheduled sale occurred, plaintiff filed this action for
16 injunctive and declaratory relief, naming MERS, GMACM, and ETS as defendants. In
17 her complaint, plaintiff described the events outlined above, and further alleged that
18 "plaintiff has never been provided with any Assignment or other document
19 demonstrating the transfer of the full and unencumbered interest in both the

¹ ETS purports to be the agent of the current trustee, LSI Title Company of Oregon, LLC. The parties generally refer to ETS as the trustee and, hereinafter, for the sake of simplicity, we do so as well.

1 Note and the Deed of Trust from the original lender * * * to any person or
2 entity * * * and has no knowledge how defendant MERS or defendant ETS
3 ever acquired any legal rights under the Note and Deed of Trust sufficient
4 to institute foreclosure proceedings."

5 Plaintiff sought to enjoin the scheduled sale on the ground that defendants had failed to
6 demonstrate that they had a legal interest in the trust deed or the underlying note that
7 would entitle them to foreclose. Plaintiff also sought declarations that (1) defendants did
8 not have the necessary legal or equitable interests in either the note or the deed of trust to
9 institute a foreclosure under the OTDA; (2) there had been no lawful assignment of the
10 deed of trust "from the original lender to any of the defendants;" and (3) defendant's
11 attempt to foreclose by advertisement and sale was "legally defective and precluded from
12 enforcement."

13 Defendants filed a motion for summary judgment, asserting it was
14 "indisputable" that plaintiff had defaulted on her loan and that ETS and GMACM were
15 proper parties to initiate the foreclosure. With respect to the latter point, defendants
16 asserted that MERS was "the beneficiary of the Deed of Trust, as nominee of the original
17 lender's assignee, Aurora Bank"; that ETS was the agent of the "duly appointed
18 successor" to the original trustee; and that GMACM received the right to "service" the
19 loan from the original lender and, under its servicing agreement with the new owner of
20 the loan, Aurora Bank,² GMACM was authorized to initiate foreclosure on Aurora

² Aurora Bank, the reputed owner of the note, is not a party to this action.

1 Bank's behalf.³ Defendants attached an affidavit by a GMACM employee and certain
2 other materials in support of those assertions. Plaintiff responded that defendants'
3 evidence was insufficient because it failed to show that (1) MERS had a beneficial
4 interest in the property that would allow it to initiate foreclosure or to assign or transfer
5 any interest in the property to other defendants; or (2) GMACM or ETS had obtained an
6 interest in the trust deed by means of valid assignments or transfers that would allow
7 them to foreclose.

8 At the hearing on the summary judgment motion, the parties' arguments
9 shifted away from a general debate about the sufficiency of MERS' and the other
10 defendants' "interests" in the note and trust deed and toward a more specific statutory
11 question -- whether the precondition that "any assignments of the trust deed by the
12 beneficiary * * * [be] recorded in the mortgage records of the [relevant] county," ORS
13 86.735(1),⁴ had been satisfied. Defendants argued that, insofar as the beneficiary
14 originally named in the trust deed remained the beneficiary at the time foreclosure
15 proceedings were initiated, there were no "assignments of the trust deed by the
16 beneficiary" to record. Plaintiff argued that MERS was not the "beneficiary" within the

³ ORS 86A.175 authorizes certain entities to "service or collect" mortgage loans "with the permission of the lender, note owner, note holder or other holder of an interest in a note." For purposes of that statute, "service[ing] or collect[ing]" includes "exercising contractual, statutory or common law remedies, such as * * * judicial or nonjudicial foreclosure." ORS 86A.175(3)(e)(C).

⁴ ORS 86.735(1) is set out in its entirety above, __ Or at __ (slip op at 3).

1 meaning of ORS 86.735(1) and that there was reason to believe that the true beneficiary,
2 Greenpoint, had assigned the trust deed, because a party who was a stranger to the
3 original transaction was trying to foreclose. According to plaintiff, the assignee's failure
4 to record that or any subsequent assignment raised a factual question as to whether a
5 precondition of nonjudicial foreclosure had been satisfied.

6 The trial court granted defendant's motion for summary judgment. The
7 court concluded that MERS was the trust deed's beneficiary, and it also appeared to
8 conclude that ETS was a lawfully appointed trustee that was authorized to foreclose
9 under ORS 86.735 if the statutory requirements were satisfied. The court further
10 concluded that, insofar as there was no evidence of any assignment of the trust deed by
11 ETS or MERS, there was no triable issue of fact with respect to the contention that
12 defendants had failed to satisfy the recording requirement in ORS 86.835(1).

13 Plaintiff appealed, arguing that the summary judgment record contained
14 evidence that Greenpoint, and not MERS, was the trust deed's original "beneficiary," and
15 that Greenpoint had transferred its interest in the trust deed without recording the transfer.
16 Plaintiff argued that, in light of that evidence, questions of fact remained as to (1)
17 whether MERS or the other defendants had a sufficient interest in the trust deed to initiate
18 foreclosure under the OTDA, and (2) whether the recording requirement in ORS
19 86.735(1) had been satisfied.⁵

⁵ The latter point was raised in the Court of Appeals by *amicus curiae* Oregon Trial Lawyers Association (OTLA). The Court of Appeals rejected defendants'

1 The Court of Appeals reversed. *Niday*, 251 Or App at 301. After
2 examining the definition of "beneficiary" in ORS 86.705(2) in the context of the
3 surrounding statutes and case law, it concluded that, regardless of the trust deed's
4 designation of MERS as "the beneficiary under this Security Instrument," Greenpoint, the
5 lender whose right to repayment the trust deed secured, was, at inception, the trust deed's
6 "beneficiary" for purposes of the OTDA. *Id.* at 298-99. After observing that there was
7 evidence in the summary judgment record that Greenpoint had transferred its interest in
8 the promissory note, and that, under this court's cases, a mortgage (or trust deed) is
9 transferred by operation of law when the note it secures is transferred, the court
10 considered whether such a transfer of the promissory note would constitute an
11 "assignment[]" of the trust deed" for purposes of the statutory requirement at ORS
12 86.735(1). *Id.* at 299-300.

13 The Court of Appeals rejected defendants' contention that the statutory term
14 "assignments" refers only to formal, written assignments that are capable of recordation
15 in their own right. It held that the evidence that Greenpoint had transferred the note
16 created a genuine issue of material fact as to whether ORS 86.735(1) had been satisfied.
17 *Id.* Notably, the Court of Appeals did not address plaintiff's other argument for
18 enjoining, and declaring invalid, the contemplated foreclosure -- that MERS and the other
19 defendants had no legal or equitable interest in the trust deed that would permit them to

contention that that argument had not been preserved in the trial court, and gave plaintiffs the benefit of OTLA's argument. 251 Or App at 293 n 11, 300 n 15.

1 initiate foreclosure under the OTDA.

2 III. DOES A GENUINE ISSUE OF FACT REMAIN AS TO WHETHER
3 THE OTDA'S RECORDING REQUIREMENT, ORS 86.735(1), WAS
4 SATISFIED?

5 Before this court, defendants argue that, contrary to the Court of Appeals'
6 decision, there is no evidence in the summary judgment record that creates a triable issue
7 of fact as to whether a "beneficiary" of the trust deed made an "assignment" of the trust
8 deed within the meaning of the recording requirement in ORS 86.735(1). Defendants
9 begin with the Court of Appeals' rejection of MERS's status as "beneficiary." They argue
10 that MERS can be, and is, the "beneficiary" of the trust deed at issue, by virtue of its
11 designation as such in the trust deed.

12 Defendants rely on the OTDA's definition of the term, at ORS 86.705(2):

13
14 "As used in ORS 86.705 to 86.795:

15 "* * * * *

16 "(2) 'Beneficiary' means a person named or otherwise designated in a
17 trust deed as the person for whose benefit a trust deed is given, or the
18 person's successor in interest, and who is not the trustee unless the
19 beneficiary is qualified to be a trustee under ORS 86.790(1)(d)."

20 Defendants contend that the phrase "named or otherwise designated" shows that the
21 legislature intended that the parties to a trust deed have the ability to contractually
22 identify the "beneficiary" without regard to whom the trust deed actually benefits.

23 Defendants posit that the definition must be read consistently with "long established

24 Oregon statutory and common law principles authorizing agents * * * to act as

25 beneficiary and hold legal and record title to interests in real estate." In other words,

26 defendants argue, the "named or otherwise designated" wording shows that the legislature

1 intended to permit the lender (who usually is "the person for whose benefit the trust deed
2 is given") to designate its agent or nominee as the trust deed's beneficiary.

3 This court rejected all of those arguments, and others like it, in *Brandrup*,
4 __ Or at __ (slip op at 13-22). In *Brandrup*, we noted that a proposed interpretation of
5 the definition of the word "beneficiary" in ORS 86.705(2) that is virtually identical to the
6 one that defendants now offer failed to account for a significant portion of the definition's
7 words, which focused on the beneficiary's function in the trust deed arrangement as "the
8 person for whose benefit the trust deed is given." We reasoned that, to give all of the
9 words of the definition their intended meaning, it was necessary to conclude that, *in*
10 *addition to* being the person "for whose benefit the trust deed is given," the beneficiary
11 must be "named or otherwise designated" as such in the trust deed. *Id.* at __ (slip op at
12 15-16). We observed that, in a typical trust deed transaction where the obligation that is
13 secured by the trust deed is memorialized in a promissory note, the "beneficiary" would
14 be the person who is entitled to repayment of the note obligation, that is, either the lender
15 or the lender's successor in interest. *Id.* at __ (slip op at 16). Finally, we concluded that,
16 although a lawful agent might have authority to act on the true beneficiary's behalf with
17 respect to the trust deed, and might even appear on documents in the beneficiary's stead,
18 such an agent "cannot *become* the 'beneficiary' for purposes of [the] statutory requirement
19 [set out at ORS 86.735(1), which] is defined, in part, by the status of the 'beneficiary.'"
20 *Id.* at __ (slip op at 21).

21 In the trust deed at issue here, MERS is "named" as the beneficiary ("The
22 beneficiary of the Security Instrument is MERS (solely as nominee for Lender and

1 Lender's successors and assigns and the successors and assigns of MERS)[.]"). But
2 MERS is not "the person for whose benefit the trust deed is given." Rather, the terms of
3 the trust deed "designate" the "Lender" (Greenpoint) as that person ("This Security
4 Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions
5 and modifications of the Note; and (ii) the performance of Borrower's covenants and
6 agreements under this security Instrument and the Note."). Thus, for purposes of the
7 requirement for nonjudicial foreclosure that "any assignments of the trust deed by the * *
8 * beneficiary" be recorded, the "beneficiary" of the trust deed is Greenpoint or its
9 successors, and not MERS.

10 Defendants argue, however, that even if "naming" MERS as the beneficiary
11 in the trust deed is not sufficient, by itself, to make it so, the fact remains that the trust
12 deed conveys to MERS the right to exercise "all" of the beneficial owner's interests under
13 the trust deed (as the beneficial owner's agent) if that should become necessary to qualify
14 MERS as the trust deed's beneficiary. Defendants refer to the following provision in the
15 trust deed:

16 "Borrower understands and agrees that MERS holds only legal title to the
17 interests granted by Borrower in this Security Instrument, *but, if necessary*
18 *to comply with law or custom, MERS (as nominee for Lender and Lender's*
19 *successors and assigns) has the right: to exercise any or all of those*
20 *interests, including, but not limited to, the right to foreclose and sell the*
21 *property, and to take any action required of Lender including, but not*
22 *limited to, releasing and canceling this Security Instrument."*

23 (Emphasis added.) Anticipating an argument that the trust deed beneficiary must have a
24 right to receive repayment of the loan obligation that the trust deed secures, defendants
25 contend that the foregoing provision conveys to MERS, "if necessary to comply with law

1 or custom," a right to receive payment of the loan obligations on behalf of the lender or
2 noteholder."

3 But the right to "receive" payment on a note "on behalf of" a principal is
4 distinct from the right to repayment on one's own behalf. As discussed above, it is the
5 latter right that defines a trust deed "beneficiary" in the ordinary trust deed transaction.

6 __ Or at __ (slip op at 11) (the beneficiary is the person "entitled to repayment of the note
7 obligation"). Thus, as this court observed in *Brandrup*, with respect to identical wording
8 in the trust deeds at issue in that case, "[u]nless the * * * provision transforms MERS into
9 [the person to whom the obligation that the trust deed secures is owed], it cannot
10 transform MERS into the 'beneficiary' of the trust deed." *Brandrup*, __ Or at __ (slip op
11 at 25).

12 As broad as the "law or custom" provision appears to be, it is not broad
13 enough to convey that particular right. As this court explained in *Brandrup*:

14 "The provision first states that MERS holds 'only legal title to the interests
15 granted by borrower in this Security Instrument.' When the provision
16 thereafter states that MERS has the right 'to exercise any or all of *those*
17 interests, if necessary to comply with law or custom, it refers to the
18 interests 'granted by the borrower in this security instrument.'"

19 *Id.* at __ (slip op at 25) (emphasis in original). But the only interests that are granted by a
20 borrower in a trust deed are a legal interest in the real property that the trust deed burdens
21 and that legal interest's beneficial counterpart. Thus, the "law or custom" provision
22 cannot convey to MERS the right that would qualify it as the trust deed's beneficiary --
23 the right to repayment of the obligation that the trust deed secures. It follows that,
24 regardless of MERS' designation as such in the trust deed, and regardless of wording in

1 the trust deed that purports to grant MERS various "interests" belonging to the lender "if
2 necessary to comply with law or custom," MERS cannot be the beneficiary of the trust
3 deed in this case. Rather, insofar as the trust deed "secures to Lender" the "repayment of
4 the Loan" and other covenants relating to that obligation, the lender (Greenpoint) was the
5 original "beneficiary" of the trust deed for purposes of the OTDA. The Court of Appeals
6 did not err in so holding. *Niday*, 251 Or App at 298-99.

7 Defendants argue that, in any event, the Court of Appeals erred in
8 concluding that an issue of fact existed with respect to whether there had been any
9 "assignment[] of the trust deed" by Greenpoint that triggered the recording requirement in
10 ORS 86.735(1). In so holding, the Court of Appeals relied on (1) evidence that the
11 promissory note secured by the trust deed had been transferred, and (2) the legal premise
12 that a trust deed is "assigned" by operation of law when the underlying promissory note is
13 transferred. *Niday*, 251 Or at 299. But defendants contend that, when, as a prerequisite
14 to nonjudicial foreclosure, the legislature adopted the requirement in ORS 86.835(1) that
15 "any *assignments* of the trust deed by the trustee or the beneficiary" be recorded, it did
16 not intend that "assignments" include transfers of a promissory note that result in an
17 equitable transfer of the associated trust deed by operation of law. To the contrary,
18 defendants argue, the legislature intended to require recordation only of formal, written
19 assignments of the trust deed.

20 Again, this is an issue that was discussed and decided in *Brandrup*, but this
21 time, *Brandrup* supports defendants' interpretation of the statutory phrase. In *Brandrup*,
22 this court concluded that the phrase "any assignments" was not, itself, dispositive. We

1 noted that ORS 86.735(1) -- and the very concept of recordation -- assumes the existence
2 of an assignment in recordable form, *i.e.*, a written document that is separate from the
3 note and that describes the burdened property. We acknowledged that parties to the
4 transfer of a promissory note can always memorialize the transaction in a separate writing
5 that is recordable, but we observed that ORS 86.735(1) does not express any requirement
6 that that be done. *Brandrup*, __ Or at __ (slip op at 31).

7 We noted, further, that ORS 86.735(1) bears a resemblance to a statute that
8 was in effect when the OTDA was enacted in 1959 that provided, in part, that "*every*
9 *assignment* of mortgage shall be recorded," *former* ORS 86.070 (1959).⁶ This court had
10 interpreted that statute in *Barringer v. Loder*, 47 Or 223, 224-28, 81 P 778 (1905), as
11 recognizing that a mortgage could be transferred by indorsement of the associated
12 promissory note, but as only requiring the recording of those assignments of mortgage
13 that were "in writing, executed and acknowledged with the same formality as required in
14 deeds and mortgages of real property." We concluded in *Brandrup* that the legislature
15 likely had *former* ORS 86.070 (1959) in mind when it adopted similar wording in ORS
16 86.735(1), and that it intended to assign a similar, narrow meaning to the term
17 "assignment" in the latter statute. *Brandrup*, __ Or at __ (slip op at 33-34). We
18 concluded, in other words, that in providing that a trustee may nonjudicially foreclose
19 only if "any assignments of the trust deed by the trustee or beneficiary * * * are

⁶ *Former* ORS 86.070 was repealed in 1965. Or Laws 1965, ch 252, § 1.

1 recorded," ORS 86.735(1) refers to written assignments of a trust deed in recordable
2 form, and not to assignments of trust deeds that result by operation of law by transfer of
3 the note.

4 According to that understanding, although the Court of Appeals correctly
5 observed that there is evidence in the summary judgment record that the trust deed's
6 beneficiary, Greenpoint, sold the promissory note associated with the trust deed, that
7 transaction does not qualify as an "assignment[]" of the trust deed" for purposes of the
8 recording requirement of ORS 86.735(1). Neither is there evidence in the summary
9 judgment record of any "assignment" of the trust deed in the intended sense, that is, a
10 formal, written assignment of the trust deed, itself. Thus, on the question of whether
11 defendants violated ORS 86.735(1) by initiating foreclosure when Greenpoint sold the
12 promissory note but did not record an assignment of the trust deed, there is no issue of
13 material fact.

14 IV. DOES A GENUINE ISSUE OF FACT REMAIN?

15 That leaves us to consider whether a genuine issue of material fact exists
16 that is pertinent to plaintiff's original challenge to the scheduled foreclosure sale -- that
17 none of defendants possessed a qualifying legal interest in the trust deed or note that
18 would allow them to initiate foreclosure under the OTDA. That challenge is based on
19 plaintiff's allegations that she had received a "Trustee's Notice of Sale" that referred to
20 ETS as the trustee of the trust deed and MERS as its beneficiary, that, in spite of the trust
21 deed's designation of MERS, the original beneficiary was the lender, and that plaintiff
22 had no knowledge or information as to whether or how any of defendants had acquired

1 any legal rights in the note and trust deed that were sufficient to institute foreclosure
2 proceedings.

3 In support of their motion for summary judgment, defendants submitted (1)
4 copies of the promissory note and trust deed; (2) an affidavit by an employee of the loan
5 servicer (GMACM) describing what defendants believed were the relevant transactions;
6 (3) a report from the MERS database showing the same transactions; and (4) a copy of
7 MERS's appointment of ETS as a successor to the original trustee, showing that the
8 appointment had been recorded in the county land records.⁷ Defendants asserted that that
9 evidence established that

10 "GMACM, as the holder of the original note and servicer of plaintiff's loan,
11 properly initiated the foreclosure of the Deed of Trust on behalf of MERS,
12 the beneficiary of the Deed of Trust as the nominee of the original lender's
13 assignee, Aurora Bank. LSI [(ETS's principal)], the duly appointed
14 successor trustee, properly executed the non-judicial foreclosure."

15 Plaintiff responded that defendants' evidence relied on the legitimacy of MERS's status as
16 the trust deed's beneficiary. Plaintiff insisted that MERS was *not* the trust deed's
17 beneficiary, but a mere nominee of the beneficiary, and that it therefore lacked authority
18 not only to foreclose, but also to assign interests in the trust deed or underlying note to

⁷ In the hearing, defendants apparently produced the original promissory note. It is unclear from the record what, if anything, the note showed about the person entitled to enforce the note or, if different, the owner of the note. We know that GMACM claimed to be "holding" the note in its capacity as servicer of the loan, and that GMACM did not claim to own the note or to act on its own behalf in the foreclosure proceeding. There is no evidence in the record as to whether or how the note had been transferred to GMACM.

1 others. Plaintiff also pointed to defendants' failure to produce, in response to her
2 demands, any document showing that MERS or ETS had acquired interests in the note
3 and trust deed that would entitle them to nonjudicially foreclose.

4 Because the trial court did not include any explanation of its decision in its
5 written order, its reasons for granting summary judgment for defendants must be
6 discerned from its comments during the summary judgment hearing. Those comments
7 suggest, on the one hand, that the court accepted MERS's designation as beneficiary in
8 the trust deed as conclusive evidence of that status, and thus concluded that no triable
9 issue of fact existed with respect to MERS's authority to initiate (or, specifically, to direct
10 the trustee to initiate) a nonjudicial foreclosure proceeding. But the trial court also
11 suggested that the question of whether the trustee was acting on behalf of a lawful
12 beneficiary was a matter between the trustee and the beneficiary, not one that the
13 borrower could assert to derail a foreclosure under the statute. At any rate, the court
14 appeared to conclude that defendants' evidence established ETS's authority, as a validly
15 appointed successor to the original trustee, to direct or participate in a nonjudicial
16 foreclosure proceeding under ORS 86.735. The Court of Appeals' opinion did not
17 address either of those apparent conclusions or the broader question of whether
18 defendants had interests in the note and trust deed that would authorize them to proceed
19 with foreclosure under the statute. We now turn to those issues.

20 We begin with the trial court's apparent conclusion that the summary
21 judgment record conclusively established that MERS was the beneficiary of the trust
22 deed and, thus, was entitled to initiate a foreclosure proceeding. That determination

1 appears to rest entirely on the fact that the trust deed, which was recorded in the pertinent
2 real property records, identified MERS as its "beneficiary."

3 However, as discussed above, ___ Or at ___ (slip op at 11-14), and in
4 *Brandrup*, ___ Or at ___ (slip op at 13-27), the fact that MERS was identified in the trust
5 deed as the "beneficiary" does not make it so for purposes of the OTDA. Rather, the
6 "beneficiary" is the person to whom the obligation that the trust deed secures is owed,
7 *Brandrup*, ___ Or at ___ (slip op at 22), in this case, either the lender or its successor. As
8 noted above, ___ Or at ___ (slip op at 13-14), under that meaning, MERS is not the trust
9 deed's beneficiary. MERS therefore cannot claim any authority, *as the trust deed's*
10 *beneficiary*, to initiate or direct the nonjudicial foreclosure of a trust deed.

11 Still, as this court recognized in *Brandrup*, ___ Or at ___ (slip op at 41-46),
12 even if MERS lacks authority to act *as* the trust deed's beneficiary, it may have authority
13 to act *on behalf of* the beneficiary if it can demonstrate that it has an agency relationship
14 with the beneficiary and that the agency agreement is sufficiently expansive. Although in
15 *Brandrup* we discussed that possibility in connection with the issue of MERS' authority
16 to *assign* a trust deed, it would seem to apply equally to the present issue of MERS's
17 authority to *foreclose* the trust deed. In either case, MERS' authority to act as the
18 beneficiary's agent depends on who succeeded to the lender's rights, whether those
19 persons manifested consent that MERS act on their behalf and subject to their control,
20 and whether MERS has agreed to so act. *Brandrup*, ___ Or at ___ (slip op at 44) (citing
21 *Hampton Tree Farms, Inc. v. Jewett*, 320 Or 599, 617, 892 P2d 683, 694 (1995)).

22 Although *Brandrup* is not a summary judgment case, it nevertheless is

1 instructive with respect to how MERS' status as a trust deed beneficiary's agent, and the
2 nature and scope of its authority as an agent, might be established. In that case, this court
3 rejected the proposition that MERS's designation in a trust deed as "nominee for Lender
4 and Lender's successors and assigns" established an agency relationship between MERS
5 and the original lender or any successor to the original lender. We did so primarily
6 because the original lender and its successors were not signatories to the trust deed. ___
7 Or at ___ (slip op at 46). We acknowledged, however, that, depending on its terms, the
8 much-discussed agreement between MERS and members *might* establish MERS's
9 authority to act as a "common agent" for the original lender and any successors who are
10 members of MERS. *Brandrup*, ___ Or at ___ (slip op at 23 n 7, 46). And, *Brandrup* aside,
11 there is always the possibility of a separate agreement between MERS and a lender's
12 successors in interest, authorizing MERS to act as the successors' agent in a foreclosure
13 proceeding.

14 But, as far as we can tell, there is nothing in the summary judgment record
15 in this case that identifies the successors to the original lender's interests or shows that
16 MERS is authorized, as the agent of the successors to the original lender's interests, to
17 initiate or direct a nonjudicial foreclosure proceeding under the OTDA. There is *some*
18 evidence that the current owner of the note is Aurora Bank and that Aurora Bank is a
19 member of MERS. But there is no evidence as to whether Aurora Bank is a successor to
20 the original lender's interests. Nor is there evidence of an agency agreement between
21 Aurora Bank and MERS, or between MERS and its members as a whole, much less one
22 that authorizes MERS to initiate foreclosures on behalf of Aurora Bank. Further, there is

1 some suggestion that GMACM is the "holder" of the note. If the note is negotiable, it is
2 possible that GMACM is a successor to the original lender's interests or that both Aurora
3 Bank and GMACM share that role; however, neither the record nor the parties' arguments
4 establish those matters beyond genuine dispute.⁸

5 The trial court nevertheless appeared to reason⁹ that the beneficiary's
6 authority in a decision to proceed with nonjudicial foreclosure is immaterial. To the
7 extent that the court so reasoned, we disagree. On the one hand, it is true that the trustee,
8 and only the trustee, is authorized to foreclose a trust deed by advertisement and sale.
9 ORS 86.710, ORS 86.735. However, the OTDA contemplates that the beneficiary of the
10 trust deed -- the original lender or its successor -- is entitled to determine whether and
11 how to foreclose a trust deed after default. For example, ORS 86.710 expressly provides
12 that the beneficiary can reject the nonjudicial foreclosure procedure in favor of an

⁸ The parties have not addressed the identity of the beneficiary if, as we conclude, it is not MERS. That issue is by no means academic. If a note is negotiable, the "party entitled to enforce the note" (the "PETE") under ORS 73.0301 may not be the same person as the owner of the note, that is, the party entitled to the economic benefits of the note. Because a mortgage or trust deed follows the note that it secures, *United States Nat. Bank v. Holton*, 99 Or 419, 428-29, 195 P 823 (1921), the potential separation of ownership and PETE status raises the question of whether a lender's successor -- that is, the beneficiary -- must be the owner, the PETE, or both? Most courts that have thus far addressed the issue have concluded that PETE status, not ownership, confers the right to foreclose. *See, e.g., Edelstein v. NY Mellon*, 286 P3d 249, 257 (Nev 2012). Because the parties have not addressed the issue, we do not discuss it further here.

⁹ The court opined that the foreclosure of the trust deed at issue could proceed, without regard to whether MERS was authorized to act as the trust deed's beneficiary, because "we have a trustee and the trustee is foreclosing."

1 ordinary judicial foreclosure. More importantly, the beneficiary has absolute authority to
2 appoint a successor trustee at any time after a trust deed is executed under ORS
3 86.790(3), an authority that all but guarantees the beneficiary's control over any
4 foreclosure decision.

5 However, even if the beneficiary's authority were immaterial, summary
6 judgment still would be improper in the present case. That is so because, on the present
7 record, MERS' involvement in the appointment of the current trustee casts doubt on the
8 trustee's status. The trial court concluded that ETS was the lawfully appointed trustee
9 ("of record, we have * * * the chain, if you will, back to the original trustee First
10 American Title"). The trial court apparently relied on a document in the summary
11 judgment record showing that MERS had appointed ETS as successor to the original
12 trustee, and also showing that the appointment had been recorded in the Clackamas
13 County real property records. But, appointments of a successor trustee may only be made
14 by the trust deed beneficiary, ORS 86.790(3), and, as discussed, MERS is not, and never
15 has been, the beneficiary of the trust deed for purposes of the OTDA. In the absence of
16 evidence in the record showing the identity of the lender's successors in interest and that
17 MERS had authority to act for those successors in interest,¹⁰ an issue of fact remains as to
18 the validity of ETS's appointment as successor trustee, and, in consequence, its authority

¹⁰ As discussed above, ___ Or at ___ (slip op at 20-21), there is nothing in the summary judgment record that establishes MERS's authority to act as the agent for anyone.

1 to initiate and pursue a nonjudicial foreclosure proceeding under the OTDA.¹¹ It follows
2 that the trial court erred in granting summary judgment to defendants.

3 The decision of the Court of Appeals is affirmed. The judgment of the
4 circuit court is reversed, and the case is remanded to that court for further proceedings.

¹¹ This same logic would apply to any contention that GMACM had authority to direct nonjudicial foreclosure as the servicer of the loan with the lender's or note owner's/holder's permission to proceed, ORS 86A.175(1), (3)(e)(C). Even if there were undisputed evidence in the record showing that GMACM had the required status or authority to direct a nonjudicial foreclosure (and there is not), the uncertain state of the record with respect to ETS's status as the trustee still would preclude summary judgment.

1 KISTLER, J., concurring in part and specially concurring.

2 For the reasons stated in the opinion concurring in part and dissenting in
3 part in Brandrup v. Recontrust Company, N.A., ___ Or ___, ___ P3d ___ (decided this
4 date), I concur in part in the majority's reasoning and in its judgment.

5 Balmer, C.J., joins in this opinion concurring in part and specially
6 concurring.