2012 WL 9500853 (D.C.) (Appellate Brief)
District of Columbia Court of Appeals.

Hattie E. ROSE, Personal Representative of the Estate of James Rose, Appellant/Cross Appellee,
v.
WELLS FARGO BANK, N.A. as Trustee for Option One Mortage Loan Trust 1999-B Asset Backed Certificates, Series 1999-B, et al., Appellees/Cross Appellant.

Nos. 12-CV-451, 12-CV-538.
August 9, 2012.

On Appeal from the Superior Court of the District of Columbia CAR9058-10
(The Honorable Anita Josey-Herring, Anthony C. Epstein, Associate Judges)

Reply Brief of Appellant/Cross -Appellee

Kurt Berlin - 000836, Daniel S. Roth - 389850, Attorneys for Appellant/Cross-Appellee, Hattie E. Rose, Personal, Representative of the Esate of James Rose, Suite 700, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20004, (202) 347-3520.

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***1 I. WELLS FARGO'S CITATIONS OF LAW ARE INAPPLICABLE TO THE ISSUE OF THE DEFECTIVE FORECLOSURE NOTICE.**

In response to Ms. Rose' argument that the statutory Notice of Foreclosure Sale is defective for want of regulatory compliance, Wells Fargo "mixes apples with oranges." It confuses the informational content of the Notice under 9 DCMR 3100.1 (2004) that requires insertion of the noteholder's address in the Notice, with the identity of sender of the Notice.

9 DCMR 3100.1 does not say anything about the identity of the agent the noteholder employs to mail the Notice of Foreclosure Sale. Rather, it requires the Notice itself to contain the "name and address of the holder of the note" and the Notice form

contains a discrete block for that specific information (as distinguished from the sender's address). Ms. Rose' brief discussed extensively why the requirements of publicly revealing the identity and address of the noteholder is rational and consistent with the legislative purposes, including to facilitate the filing of injunctive, administrative, or other action in federal court or Superior Court to prevent the foreclosure. "A complaint by form must contain a caption including... the names and addresses of all parties [and] the name and address of a defendant's registered agent for acceptance of process...." 2 D.C. Prac. Manual at 1148, § IIIA (2011 ed.). Wells Fargo's designation of its trustees as its attorneys for the purpose of mailing out the Notice does not clearly authorize such attorneys to accept litigation service of process for Wells Fargo. *See McLaughlin v. Fidelity Security Life Ins.,* 667 A.2d 105, 106 (D.C. 1995). The foreclosure attorneys may not even represent the lender in such litigation. [1]

***2** Wells Fargo's reliance on *S & G Investment, Inc. v. Home Federal Savings and Loan Ass'n.* 164 U.S. App. 263, 505 F.2d 370 (1974) is misplaced. That case did not address 9 DCMR 3100.1 at all. The address under discussion in S&G that Wells Fargo recites in its brief was the address of the property owner in the lender's cover letter which accompanied the foreclosure notice. See 164 U.S. App. at 266, n. 6, 505 F.2d at 373, n. 6. S&G had nothing to do with the content of the foreclosure notice or the address of the lender, and therefore, is not applicable to the case at bar. Moreover, it was decided long before Independence *Fed. Sav. Bank v. Huntley,* 573 A.2d 787 (D.C. 1990), *Bank-Fund Staff FCU v. Cuellar,* 639 A.2d 561 (D.C. 1994), *Abdel-Kafi v. Citicorp Mortgage, Inc.,* 772 A.2d 802 (D.C. 2001) and other cases which applied the strict compliance standards of tax sale jurisprudence when adjudicating the validity of non-judicial foreclosures.

The facts in *Muldrow v. EMC Mortgage Corp.,* 766 F. Supp. 2d 230 (D.D.C. 2011), also cited by Wells Fargo, are even further adrift from the instant case than those in *S & G Investment.* While *Muldrow* discusses the sufficiency of a "notice," the document at issue was not a statutory District of Columbia Notice of Foreclosure Sale of Real Property, but rather, a communication under the Fair Debt Collection Practices Act (FDCPA), 15 U S.C §§ 1692, et. seq. This is obvious from the text of the *Muldrow* notice and the court's opinion.
On June 23, 2008, Rosenberg sent the plaintiff a notice informing her that the loan had been referred to it "for legal action based upon a default under the terms of the loan agreement" and that a foreclosure sale was scheduled for July 29, 2008 Notice at 1. The notice stated the total amount owed by the plaintiff and advised her that she could either take no action and assume the validity of ***3** the debt or notify Rosenberg within thirty days that she disputed all or part of the debt. Id. If the plaintiff contested the debt within thirty days, the notice stated, Rosenberg would suspend collection activities until it obtained verification of the debt and mailed the verification to the plaintiff. *Id.*

The notice indicated that if the plaintiff did not dispute the debt, she was to send a check to Rosenberg which it would not deposit until after informing the plaintiff of any adjustments in the amount owed. *Id.* The notice informed the plaintiff that she might be eligible "to enter into a workout to pay [her] delinquency over a period of time" and instructed the plaintiff to contact Rosenberg to determine if she met the program's qualifications. *Id.* at 2

Muldrow, at 232, also see id., n. 3. Such language does not appear anywhere in the D.C. Notice of Foreclosure Sale form. See Appendix (A) 54. Rather, it belongs to the FDCPA which was the asserted cause of action in *Muldrow. Muldrow* never mentioned any D.C. foreclosure statutes, regulations, or the strict compliance standard because no Notice of Foreclosure Sale was before that court.

Accordingly, the case law cited by Wells Fargo does not rebut Ms. Rose' arguments. In fact, a Superior Court judge recently agreed that the absence of the noteholders address in a Notice of Foreclosure Sale renders the Notice fatally deficient. See *Grodsky v. Diffell,* 2010 CA 2240, (D.C. Super. Ct. September 28, 2011 at 3 - 5), reproduced in the Addendum hereto.

II. WELLS FARGO RELIES ON AN OUT OF OATE VERSION OF THE CONSUMER PROTECTION PROCEDURES ACT

As Ms. Rose pointed out in her Brief, a violation ot the Consumer Protection Procedures Act (CPPA) may occur "whether or not any consumer is, in fact misled, deceived or damaged... *See* D.C. Code § 28-3904 (2001)

***4** In opposition, Wells Fargo asserts one must suffer actual damage to maintain a CPPA claim, relying on *Osboume v. Capital City Mortg. Corp.,* 667 A.2d 1321, 1330 (D.C 1995), as cited in *Muldrow, supra.,* 766 F. Supp. 2d at 234, and *Jackson v. ASA Holdings, LLC,* 2010 U.S. Dist. LEXIS 118320 § III(B)(a) (D.D.C. Nov. 8, 2010). [2]

However, the City Council changed the pertinent portions of the CPPA after the events in Osboume, which occurred in 1989 - 1990. See Osboume at 1323 - 1324. Back then, D.C. Code § 28-3905(k)(1) provided that a consumer must have "suffered... damage as a result of the use or employment... of an unlawful trade practice" in order to bring an action. *See Osboume,* 667 A.2d at 1330. [3] Thereafter, § 28-3905(k)(1) was amended to ease a claimant's burden and to make it more consistent with § 28-3904. It now states as follows:

(k) (1) A person, whether acting for the interests of itself, its members, or the general public, may bring an action under this chapter in the Superior Court of the District of Columbia seeking relief from the use by any person of a trade practice in violation of a law of the District of Columbia and may recover or obtain the following remedies:
(A) treble damages, or $1,500 per violation, whichever is greater, payable to the consumer;

(B) reasonable attorney's fees;

***5** (C) punitive damages;

(D) an injunction against the use of the unlawful trade practice;

(E) in representative actions, additional relief as may be necessary to restore to the consumer money or property, real or personal, which may have been acquired by means of the unlawful trade practice; or

(F) any other relief which the court deems proper.

(2) The remedies or penalties provided by this chapter are cumulative and in addition to other remedies or penalties provided by law. Nothing in this chapter shall prevent any person who is injured by a trade practice in violation of a law of the District of Columbia within the jurisdiction of the Department from exercising any right or seeking any remedy to which the person might be entitled or from filing any complaint with any other agency.

D.C.Code § 28-3905 (k)(1) (2001, as amended). Under the current version, Ms. Rose need only prove a violation of the CPPA and not actual resulting damage. Although she did suffer actual damage in the loss of the house under a defective notice of foreclosure, her rights are no less limited. She did, after articulating the unlawful trade practices, pray for the treble damages or $1,500 per trade violation and other damages as provided by the current statute and applicable law. A 12 -13.

Wells Fargo, while conceding the CPPA term "trade practice" is expansively construed in light of the CPPA's liberal and remedial purposes, argues on appeal that Ms. Rose did not adequately plead a CPPA count because she did not plead misrepresentation. As it has been shown in above and in Ms. Rose' initial brief, the CPPA is not limited to common law deceit, and, she did so plead misrepresentation of a material fact and the failure to state a material fact which had a tendency to mislead. A 12. Wells Fargo then asserts Ms. Rose did not plead that Wells Fargo is a merchant for purposes of the CPPA. However, she did plead a list of factual allegations in this ***6** regard, and attached to her complaint exhibits which provide further factual bases to her averment of a consumer-merchant relationship. These included the Notice of Foreclosure Sale indicating Wells Fargo was a merchant in a creditor-debtor posture with respect to the late Mr. Rose and his successor, and to which funds were to be paid to avoid the foreclosure sale of the home, such as "Balance owed on the Note: $130,965.95"....Minimum balance

required to cure default obligation pursuant to D.C. Law 5-82 "Right to Cure a Residential Mortgage Foreclosure Default Act of 1984 $32,682.39." A 15.

Under Super. Ct. Civ. R. 10(c) [4], an exhibit to a complaint is regarded as incorporated for all purposes into the pleading itself. *See Industrial Bank v. Allied Consulting Services*, 571 A.2d 1166, 1167 (D.C. 1990). The Complaint itself had alleged facts in support of the CPPA cause of action, delineating the consumer-merchant relationship between Mr. Rose and Option One Mortgage Corp. to which interest Wells Fargo allegedly succeeded. *E.g. Complaint*, nos. 4 - 7, 10, 11, **A 9, 10 and 11.** In the other exhibits to the Complaint, i.e., the Substitute Trustee's Deed, A 17, and Deed of Appointment of Substitute Trustee, **A 21,** Wells Fargo is repeatedly described as the secure creditor. The description of original mortgagee as a "mortgage corporation" in its very name, and the title of the portfolio for which Wells Fargo is trustee ("Option One Mortgage Loan Trust"), both recited in the Complaint and its ***7** 7 exhibits, evince that the original mortgagee and Wells Fargo are merchants in the mortgage business.

Regarding the recording requirements of D.C. Code § 47-1431, Wells Fargo focuses on a series of statements by the Office of the Attorney General (AG). A 37 - 48. The AG appeared to be concerned that "homeowners who receive foreclosure notices have immediate access to public records that will allow them and their advocates to review and, if warranted, challenge foreclosing entities' authority to foreclose... A 43 (emphasis added). The AG's assorted statements are not consistent, and he did not cite any controlling case law with respect to the validity of foreclosure sales in the absence of compliance with § 47-1431(a). However, his statements do reflect the belief that as much information about the current noteholder be available on the public record, as Ms. Rose has argued.

Further, careful reading of the AG's statements show that even he would not disparage challenges to trustee sales where the § 47-1431(a) violations were accompanied by other violations, viz., "assuming there are no other grounds for invalidating the foreclosures," A 40, or "that he "does not intend that his Office seek rescission of completed foreclosure sales .olely on noteholders' non-compliance with D.C. Code § 47-1431(a). A 43 (emphasis added).

The AG's statements are largely directed as to what his office might do. Nevertheless, they highlight the need for the lender's address to appear in the foreclosure notice and elsewhere on the public record to facilitate both the AG's efforts to assist homeowners and the homeowners' efforts on their own behalves, which is ***8** consistent with the legislative history of the foreclosure notice statute. Further, even under the AG's non-binding opinions, a § 47-1431(a) violation could underpin a foreclosure rescission and/or a CPPA action where, as in the case at bar, other reasons are presented in support of such counts. The non-binding decision in Leake v. Prensky, 798 F. Supp. 2d 254 (D.C.C. 2011), cited by Wells Fargo, did not analyze § 47-1431 in relation to other rounds for challenges to foreclosures. [5]

Next, Wells Fargo contends that § 47-1431(a)'s placement in the taxation section of the Code means a private party cannot rely upon it. This contention is not only contrary to the Attorney General statements upon which Wells Fargo relies, but also to comparable legislation. The real property foreclosure regulations, 9 DCMR 3100, et seq., are situated in the "Taxation and Assessments" article of the D.C. Municipal Regulations. This Court quoted them *verbatim in Bank-Fund Staff FCU, supra,* 639 A.2d at 570, notes 19 and 20 when it sustained a homeowner's challenge to a foreclosure that was grounded, in part, in the secured party's lack of regulatory compliance.

Wells Fargo argues that § 47-1431 does not state that a private individual may rely upon non-compliance with the statute in a private cause of action. The regulations in 9 DCMR 3100 do not contain any such enabling provisions either, but clearly, an aggrieved individual may cite regulatory non-compliance in a suit to overturn a foreclosure, as in Bank-Fund, supra. Wells-Fargo further avers that the $250 penalty in ***9** 9 § 47-1433 which the Recorder of Deeds collects when an instrument is recorded late, bars Ms. Rose' suit. However, the municipal foreclosure regulations also contain provisions for a fine or imprisonment to those who knowingly make false statements on foreclosure notices. *See* 9 DCMR 3100.9 and 10 [6] Wells-Fargo's argument would prevent a homeowner victimized by a foreclosure notice riddled with falsehoods from questioning the sale due to the existence of criminal penalties for such conduct! Neither the case law nor the statutes and regulations support such a bizarre outcome.

The recording requirements in § 47-1431 are complemented in D.C. Code § 42-405(a) & (b), which requires security interest transferees to give notice to the Recorder of Deeds of their names, addresses, and the corresponding subject real property, which information the Recorder enters into the public records. Had the sole purpose of § 47-1431 been revenue collection, there would be no need to mandate recording and indexing in a public forum. There simply could have been a law, comparable to income, estate, or realty deed transfer and recordation tax legislation, mandating submission of a tax return unseen by anyone but the taxing authorities. A requirement to publicly record a document with the Recorder of Deeds, must have intended that the required recording there serve a public notice function in addition to whatever other purposes (such as revenue enhancement) the legislature intended. See ***10** Frassetto v. Barry, 497 A.2d 109, 113 (D.C. 1985). Indeed, the title of Subchapter III of Title 47 is *"Compulsory Recordation* of Transfers of Real Property" and § 47-1432 characterizes the subchapter as imposing a *"recordation requirement." See* § 47-1432 (emphasis added).

It would seem that Well Fargo seeks to substitute its own collection practices for law. As one federal judge, while dismissing foreclosure actions for want of recorded mortgage assignments to the plaintiffs, observed: "The [**financial**] institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance." *See Opinion and Order*, n. 3, (October 31, 2007) *in re Foreclosure Cases* (1:07CV2282, et seq., N.D. Ohio), 2007 WL 3232420

III. OPPOSITION TO CROSS - APPEAL: LACK OF A PROPER POWER OF ATTORNEY AND INVALID APPOINTMENT OF SUBSTITUTE TRUSTEES

A. Wells Farqo's cross-appeal should be denied because its notice of cross-appeal did not specify any aspect of the final order for appeal.

A "notice of appeal must... designate the judgment, order, or part thereof being appealed...." D.C. App. R. 3(c). If "an appellant... chooses to designate specific determinations in his notice of appeal - rather than simply appealing from the entire judgment - only the specified issues may be raised on appeal." *See Flax v. Schertler*, 935 A.2d 1091, 1099 (D.C. 2007)(citation omitted). An appeal may be taken of an entire final judgment. *Id.* at 1095.

Wells Fargo's Notice of Cross-Appeal designated the whole of the February 29, 2012 Order that granted its summary judgment motion for appeal. A 290. Wells Fargo was not aggrieved by that victory. See D.C. Code § 11-721(b) (2001). Its Notice of ***11** Cross-Appeal did not specify any part of that final order which it intended for cross-appeal.[7] *See Shannon v. Koeher*, 616 F.3d 855, 865, n. 7 (8th Cir. 2010). Ms. Rose respectfully suggests that Wells Fargo's cross-appeal is deficient and should be dismissed.

B. Wells Fargo's affiant was not sufficiently competent for his affidavit to be considered for summary judgment purposes

Wells Fargo submitted a Supplemental Appendix containing the affidavit of one Jose D. Colon. This affidavit constituted the evidentiary support for Wells Fargo's Motion for Summary Judgment and its opposition to Ms. Rose' summary judgment motion. Mr. Colon's affidavit identified him as an employee of American Home Mortgage Servicing, Inc. (AHMS) and not of Wells Fargo. Mr. Colon's knowledge is based on his "review of Plaintiffs loan account." **Supp. Appendix at 1.**

No exception to the hearsay rule would make Mr. Colon's testimony admissible at trial or for summary judgment purposes. He only started working with AHMS in March ***12** of 2009. A 135. His involvement with an account begins only when there is litigation. A 135. He wasn't there for the creation of the loan account documents, had no personal knowledge of the requisite business regularity with respect to the records about which he testified, and otherwise cannot comply with the business records exception to the hearsay rule. *See Allstate Ins. Co. v. Curtis*, 781 A.2d 725, 727 (D.C. 2001). He simply looked at what he was

handed in this litigation. Such testimony would be inadmissible at trial, and is inadmissible for summary judgment purposes. See Richardson v. D.C., 522 A.2d 1295, 1298 (D.C. 1987); Super Ct. Civ. R. 56(e).

C. Wells Fargo was fully on notice of the issues that were before the trial court regarding the validity of the power of attorney and the Deed of Appointment of Substitute Trustee

Alternatively, and in support of her appeal and in opposition to the cross-appeal, Ms. Rose states as follows: The Complaint expressly disputed the validity of the Deed of Appointment of Substitute Trustee and/or the authority of the person who signed it. When that Deed of Appointment was signed there was no recorded assignment of interest in the Deed of Trust, and therefore, nothing in the public record to suggest Wells Fargo would cldim in hold the secured promissory note indorsed in blank or otherwise. The Deed of Appointment of Substitute Trustee, exhibited and incorporated into the Complaint, A 21-22, on its face, did not comply with D.C. Code § 42-101 (a) in that it did not contain the "recording date and instrument number reference of where the original recorded power of attorney is located in the Office of the Recorder of Deeds for the District of Columbia." *See id.* This would be mandatory for a power-of-attorney ***13** recorded before the Deed of Appointment being executed thereunder. See id. Nor was a power-of-attorney of any kind attached to or incorporated into the Deed of Appointment.

This is not one of the technical flaws listed in curative legislation of D.C. Code § 42-404 which addresses defective acknowledgments. In light of the facial defectiveness of the Deed of Appointment, the trial court construed the Complaint's allegations too narrowly, and did not draw all inferences in the light most favorable to Ms. Rose as the opponent of Wells Fargo's summary judgment motion. See Flax, supra, 935 A.2d at 1100 -1101 (D.C. 2007). The Deed of Appointment was not signed by anyone claiming to be a noteholder or its president or vice president, but rather by Kathy Smith as Vice President of American Home Mortgage Servicing, Inc. (AHMS), and therefore, a recorded power of attorney had to accompany the Deed of Appointment or be referenced therein as required by statute. This exhibit to the Complaint is a part of the pleading for all purposes. See Super. Ct. Civ. R. 10(c).

Under the circumstances, it was fair for Ms. Rose to contend that the Deed of Appointment was legally insufficient, that it was not executed by someone with authority to do so, that the substitute trustees were not duly appointed and lacked authority to sell the property under the terms of the Deed of Trust, and/or that there was no power of attorney appointing AHMS or Ms. Smith to sign the Deed of Appointment.

Ms. Rose initiated discovery on April 20, 2011 (A 72) to find out, among other things, the chain of authority underpinning the execution of the Deed of Appointment. ***14** *E.g.* **A 76,** no. 10; **A 140, A 157.** [8] Wells Fargo did not easily provide discovery responses, [9] as indicated by Ms. Rose' Motion to Compel and for Sanctions, A 72, also A 3 (entry of Nov. 21, 2011), *granted in part*, **A 2** (entry of 12/16/11). At this point in time, discovery under the Scheduling Order, A 4 (entry of 8/5/2011) was closed. The Court allowed Wells Fargo until December 30, 2011 to supplement the discovery responses, and instructed the parties to file their summary judgment motions 11 days later, on January 10, 2012. A 2 (entry of 12/16/11).

Several rounds of discovery over ten months had confirmed that the Limited Power of Attorney, A 141, with acknowledgment date of June 8, 2009, was the only power of attorney underlying the execution of the Deed of Appointment of Substitute Trustee. A 157. That instrument neither complied with § 42-101 in form, nor was referenced by instrument number and recording date in the Deed of Appointment itself. As the trial court noted, the June 8, 2009 Limited Power of Attorney was not recorded at ***15** all. Wells Fargo attached a copy of the June 8, 2009 instrument to its January 10, 2012 Motion for Summary Judgment. A 102. This left no doubt that this was the operative power of attorney document.

Wells Fargo did not assert there were other powers-of-attorney until its Feb. 3, 2012 Reply Memorandum in support of its summary judgment motion. This came long after the close of discovery, after the motions deadline, and just a few weeks before the final order in this matter. Those instruments did not comply with § 42-101 either, and did not mentioned the subject property or Mr. Rose. The authority under a power of attorney is narrowly construed. *Smith v. Wells Fargo*, 991 A.2d 20, 27, n. 12 (D.C.

2010). Furthermore, these instruments were not referenced by instrument number or recording date in the Deed of Appointment of Substitute Trustee. They appear to have nothing to do with the case at bar. Had they been produced much earlier in the litigation, Ms. Rose could have considered the appropriateness of an amendment to her pleading to address them.

Given the allegations of the Complaint, its exhibit, and the repeated discovery requests on the subject, Wells Fargo cannot reasonably claim surprise. It delayed the production of informaition until the motions period to impede amendments to pleadings, if, in fact, such an amendment were necessary. The trial court correctly exercised its discretion to address the issue at the motions stage rather than instruct Ms. Rose to file a motion to amend. The parties fully briefed the issue, and there was no prejudice to Wells Fargo. *See Yun v. Southeast Academy*, 32 A.3d 413, 416 (D.C. 2011). Amendments to pleadings can be considered even in the pretrial conference stage of ***16** 16 civil litigation. See Super. Ct. Civ. R. 16(c)(3). There was not, on the part of Ms. Rose, any undue delay, bad faith or dilatory motive, or repeated failure to cure deficiencies by previous amendments which might have provided grounds for refusing an amendment. *See Flax, supra*, 935 A.2d at 1105. If this Court deems it proper, it can direct that upon remand the issue of amendment to the pleadings be considered by the trial court. *See Washkoviak v. Student Loan Marketing Ass'n*, 849 A.2d 37, 39 (D.C. 2004).

The trial court, however, erred in determining that Ms. Rose lacked any interest in the process appointing substitute trustees to the trust instrument that granted the property as security and gave a power of sale. Contrary to Wells Fargo's contention, this is not a matter of being a "stranger to a contract" but rather, the appointment of a fiduciary for the Rose trust res to which Ms. Rose, as personal representative of Mr. Rose's estate, was a party. A deed of trust grantor would have statutory authority to petition the court for a new fiduciary under D.C. Code § 42-814(a) [10], even where there is a trust provision authorizing the note holder to substitute trustees. *See Wright v. Pitts*, 62 U.S. App. D.C. 217, 218 - 219, 66 F.2d 197, 198-199 (1933).

***17** 17 Wells Fargo is incorrect when it argues that *Holden v. Stickney*, 2 MacArthur (9 D.C.) 141 (1875) pre-dated non-judicial foreclosure. The statutory history to the 1968 foreclosure notice act (see *Addendum to Appellant's Brief*) reveals that non-judicial foreclosure already existed. "For as long as anyone can remember... foreclosure practice in the District of Columbia has been accomplished extra-judicially...." *District of Columbia Survey: A Practitioner's Guide to Foreclosure on a Deed of Trust in the District of Columbia*, 33 Cath. U. L. Rev. 1187 (Summer 1984). A reading of Holden reveals that Mr. Holden filed a suit to enjoin a non-judicial sale by a substitute trustee, id. at 142, in which he pled defects in the judicial process wherein that trustee was appointed. It is difficult to conceive that deed of trust grantors today have less standing to inquire into the appointment of their own fiduciaries than in the 19th century.

Frassetto v. Barry, 497 A.2d 109 (D.C. 1985) centered around the District'ss inability to show it timely filed a tax sale report with the Recorder of Deeds. The taxpayer was not a party to the report, nor an intended receipt thereof, yet had standing to refer to this procedural defect to challenge the tax sale of his own property. *See generally id.* In *Scheve v. Short*, 114 W.L.R. 2601, 2607 - 2608 (Super. Ct. 1986) the court entertained a challenge to a tax deed on the grounds that the purchaser had not submitted a sufficient deposit with the District, even though the taxpayer was not a party to the District's sale and tax deed to the purchaser. Id. at 2607 - 2608 In *Big Builders v. Israel*, 709 A.2d 74 (D.C. 1998), the maker of a promissory note could dispute the technicalities of the note's assignment to a third party even though the maker was not a party to that assignment. *Id.* at 76 - 78. Wells Fargo's contention, taken to its absurd ***18** 18 extreme, would mean no homeowner would have standing to challenge any trustee sale or trustee deed because the homeowner was not a party to the sale or deed!

Arguably, if Wells Fargo did not intend to invoke the collection powers of the Deed of Trust, its disregard for the technical niceties of powers of attorney, recording assignments, and substituting trustees might have limited legal significance. Activating the mechanics of a trust deed foreclosure requires the creditor to carefully adhere to the legal requirements of the instruments employed in the process. Against an **elderly** widow Wells Fargo violated at least one municipal regulation and about (depending on how counted) half a dozen statutory directives, each with the word "shall" as the expression of required compliance. Where statutory words are plain, speculation should not be employed to find a different meaning. *DeRuiz v. DeRuiz*, 66 U.S. App. D.C. 370, 372, 88 F.2d 752, 754 (1936). Further, as noted in Holden, the range of defects in instruments of public record, or the dearth of instruments which should be there, would so muddy the chain of title so as to disparage the fairness of the sale.

"No prudent purchaser would be willing to invest in a title so questionable.... a fair purchaser would probably decline to bid for it at all; and; if purchased by any one except the bank, it would be for an inadequate consideration." *Id.* at 145.

CONCLUSION

WHEREFORE, the decisions of the trial court should be reversed, and the cross-appeal should be dismissed or denied.

Footnotes

1 As may be demonstrated by Wells Fargo's representation in this case by a law firm different from the one listed on its Notice of Foreclosure Sale.

2 The federal court in *Jackson* (first paragraph) noted there was no timely opposition and treated the motion to dismiss as conceded. Given the one-sided presentation, the persuasiveness of *Jackson* may be limited.

3 The statutory version in Osboume appears to have been the following: "Any consumer who suffers any damage as a result of the use or employment by any person of a trade practice in violation of a law of the District of Columbia within the jurisdiction of the Department may bring an action in the Superior Court of the District of Columbia to recover or obtain any of the following: (A) treble damages; (B) reasonable attorney's fees; (C) punitive damages; (D) any other relief which the court deems proper." D.C. Code § 28-3905 (k)(1)(1991 Repl. Vol.).

4 **"Adoption by Reference; Exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Super. Ct. Civ. R. 10(c).

5 The Bar's suspension of plaintiffs counsel in *Leake, Keith J.* Smith (see Bar Dockets Nos. 339-03, 250-04, 357-04 & 415-06) on February 9, 2011, and also by the federal district court, may explain why there was no action in terms of reconsideration, appeal, or other review of the July 25, 2011 decision in Leake.

6 "No person shall knowingly include any false information in a notice of a foreclosure sale of real property, nor shall any person falsely certify that the original of any such notice was sent to the owner of the real property affected by the notice." 9 DCMR 3100.9. "Any person violating § 3100.9 upon conviction shall be punished by a fine of not more than three hundred dollars ($300), or imprisonment of not more that ten (10) days or both." 9 DCMR 3100.10

7 For example, Wells Fargo, in a footnote, expressed disagreement with the trial court's finding that D.C. Code § 42-101 applied to the Deed of Appointment of Substitute Trustee. Wells Fargo's Brief at 16, note 6. This issue was not specified in the Notice of Cross-Appeal. To the trial court Ms. Rost. argued that a deed substituting trustees pursuant to the power of substitution in the Deed of Trust entailed releasing the fee simple interest of the existing trustees and granting the substitutes "a qualified fee simple " under D.C. Code § 42-803 that is inherited by their heirs. *See D.C. v. Mayhew*, 601 A.2d 37, 42 (D.C. 1991)." "No power [e.g., the Deed of Trust's power to substitute trustees] can be executed except by some instrument in writing, which would be sufficient in law to pass the estate or interest intended to pass under the power if the person executing the power were the actual owner." D.C. Code § 42-1017. The trial court agreed that D.C. Code § 42-101 applied to the Deed of Appointment. *A 273 - 274.*

8 As additional examples, several requests for production of documents not reproduced in the Appendix, but found in the Record, asked for the following. "7. Any and all documents evidencing or supporting the authority of "Kathy Smith" to execute a Deed of Appointment of Substitute Trustee (copy attached as Exhibit "C" to the Complaint") with respect to the Deed of Trust (see definition, above). 8. Any and all documents evidencing the authority of "American Mortgage Servicing, Inc." to execute a Deed of Appointment of Substitute Trustee (copy attached as Exhibit "C" to the Complaint") with respect to the Deed of Trust (see definition, above), or to take any other action on your behalf." *Record, Motion to Compel and for Sanctions* (Nov. 21, 2011), Ex 2 at 6.

9 Typical of Wells Fargo's refusals to answer discovery requests were that "Plaintiffs allegations were false" and that it was a "farce of a lawsuit." **A 81 A -82 A.**

10 "(a) In case of the refusal of any trustee named in a deed of trust to secure a debt to accept the trusts thereby created, or of his resignation of said trust after accepting the same, which is hereby allowed, or of his removal from the District of Columbia, or of his inability to act, or for any other good cause shown, it shall be lawful for **any party interested** in the execution of such trusts to apply to said court by petition, setting forth the appropriate facts and asking for the appointment of a new trustee in his place, and a like proceeding shall be had for the appointment of such trustee as in the case of the death of a trustee, as directed in Sec. 42-811 and 42-819; provided, that any rule to show cause issued in such case shall be served upon the existing trustee, as provided in said sections. D.C. Code § 42-814(a)(2001)(emphasis added).

End of Document