

**SEVENTH JUDICIAL DISTRICT
CIRCUIT COURTS
JUDGE PAUL G. CROWLEY
Presiding Judge**

HOOD RIVER COUNTY
GILLIAM COUNTY
SHERMAN COUNTY
WASCO COUNTY
WHEELER COUNTY

COUNTY COURTHOUSE
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September 8, 2011

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Re: Wells Fargo, et al v. Michelotti
Hood River County Circuit Court Case No. 11-0015FD

Dear Counsel:

The defense of this case boils down to a claim that Plaintiff "is not entitled to possession [of the property in question] because Plaintiff does not have legal title to the property. . . ." *Defendant's Trial Memorandum, page 1.*

Plaintiff contends that because the Court of Appeals in Option One Mortgage Corp. v. Wall, 159 Or App 354, 358 (1999) held "that *title* to the property may not be determined in a FED case defendant's answer in this post-foreclosure eviction wholly fails to state any justiciable defense. . . ." *Plaintiff's Trial Memorandum, page 7.* (Emphasis in the original).

Plaintiff's first point is correct. Title to property cannot be determined in an FED. Plaintiff's second point is wrong. Whether a plaintiff holds title to the property in question can be an issue in an FED.

That argument mischaracterizes the district court's jurisdiction as well as the disposition it rendered in this case. *Former* ORS 46.084(1) expressly allows title to real property to be "controverted or questioned" but not "*determined*" by the district court. (Emphasis added.) Indeed, an FED court has authority to consider issues regarding title "insofar as necessary for

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determination of possession,” but the judgment may not determine how those issues affect title.

Id., 159 Or App at 358, citing, Lawton v. Simpson, 133 Or App 489, 492 (1995). (Emphasis in original.)

Defendant is not seeking to determine who has title to the property. Defendant challenges Plaintiff's claim of title to the property. That is exactly the situation allowed by Option One Mortgage Corp.

While Defendant raised the issue of title, it is Plaintiff's burden to prove that it has a valid title. That is the case because standing to bring an FED action is based upon a possessory right to property, which in a foreclosure case is based upon title to the property.

Plaintiff failed to meet that burden in at least two respects. First, the initial trust deed named a nonexistent corporation, Option One Mortgage Corp., (OOM Corp.) as the beneficiary.

Defendant makes issue of the fact that an appointment of successor trustee, *Exhibit 11*, lists “American Home Mortgage Servicing, Inc. successor by merger to Option One Mortgage Corp. as Attorney-in-Fact.” That document was executed almost three years after the appointment of successor trustee, *Exhibit 7*, which claimed to create a beneficiary interest in OOM Corp. There is evidence that OOM Corp. does not exist and has not existed since before the conveyance. *Exhibit 106*. There is no evidence of when the purported merger took place or of why business continued to be conducted under the name of a no longer existing corporation.

Those issues give credence to Defendant's argument that this case is better brought as one to quiet title and then for ejectment. Plaintiff's counter argument to the effect that “if Plaintiff had paid the mortgage *we* wouldn't be here” does not prevail at this junction because the question remains: are the right *we* here?

Second, because of the lack of clarity in the passage of beneficial interest in the property, it appears that at least one subsequent assignment of the trust deed was not recorded.

For those reasons, Plaintiff failed to prove its claim. Defendant is therefore entitled to judgment.

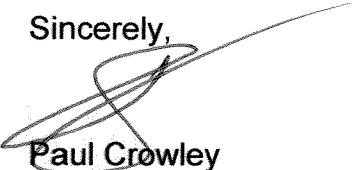
The next issue is whether Defendant is entitled to an award of attorney fees. Initially, Defendant conceded that since the defense raised is not found within the Oregon

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Revised Landlord Tenant Act that there is not a basis for an award of attorney fees. At the conclusion of the trial, Defendant attempted to point to creative statutory foundations for an award. Defendant's arguments are not well taken. Attorney fees will not be awarded.

Defendant should submit to the Court a General Judgment that includes this opinion letter by reference and attachment.

Sincerely,



Paul Crowley
Circuit Judge