

2010

# RM Lifestyles and Woodbridge Realty v. Bryan K. Ellison and Jamie Ellison, Commonwealth Properties : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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RM LIFESTYLES LLC &  
WOODBIDGE REALTY LC,

Plaintiffs and Appellees,

vs.

BRYAN K. ELLISON & JAMIE  
ELLISON, COMMONWEALTH  
PROPERTIES LC,

Defendants and Appellants.

Case No. 20100510 CA

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**REPLY BRIEF OF THE APPELLANTS**

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Nature of the Proceedings: Appeal

Trial Court and Judge: Appeal from the Third District Court, Salt Lake County, Judge  
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**FILED**  
**UTAH APPELLATE COURTS**

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**RULES**

U. R. Ev. Rule 702 . . . . . 1

Defendants reply herewith to the Brief of Appellees herein.

As a preliminary matter the Court should note that appellees do not contest any of the following:

1. There is no evidence in the record below of an oral substitution of trustee relied upon by appellees and the district court, or of any term thereof.
2. The only evidence of service in the record is a pair of sealed envelopes of unknown content, sent to an address at which appellees knew no party or counsel was located, and returned undelivered by the post office.
3. The testimony upon which the district court relied was not expert testimony submitted to “assist the trier of fact to understand the evidence or to determine a fact in issue” pursuant to Rule 702, U.R. Ev., and no other basis for its admission is shown.

Appellees’ denial of the further facts asserted in Appellants’ Brief on the ground of failure of citation of the record is unavailing. The supporting testimony, from an earlier hearing, is proffered and accepted at pages 23-26 of the Transcript.

THERE IS NO SUCH THING AS AN ORAL SUBSTITUTION OF TRUSTEE

A trust deed conveys an interest in land. *Capital Assets Financial Services v. Maxwell*, 994 P.2d 201, 203-204 (Utah 2000). As such, it is subject to the Statute of Frauds. As assignment of the power of sale therein from one to another - a substitution of trustee - is subject to the Statute of Frauds.

Further, absent a proper substitution of trustee, the trustee's duties may not be delegated (§ 57-1-21.5(1), UCA (1953)), and "The grantor of the power is entitled to have his directions obeyed; to have the proper notice of sale given; to have it take place at the time and place, *and by the person appointed by him.*" *Concepts, Inc. v. First Sec. Realty Services*, 743 P.2d 1158, 1160-61 (Utah 1987) (emphasis added). Prior to the proper recording of a substitution of trustee, the directions of the trustor regarding who is the trustee prevail.

Finally, § 57-1-22, UCA (1953), presumes that substitutions of trustee must be in writing, because it requires them to be recorded. § 57-1-22(3)(a), UCA (1953).

There had been no substitution of trustee at the time foreclosure herein was initiated. The proper trustee initiated no foreclosure. The foreclosure in issue was void.

#### APPELLEE'S RATIFICATION ARGUMENT BEGS THE QUESTION

Conceding that § 57-1-22(1)(c) permits a beneficiary of a trust deed to "ratify and confirm action taken on the beneficiary's behalf by the new trustee prior to the recording of the substitution of trustee," it merely begs the question to assert that actions may be ratified before there exists a substitution of trustee.

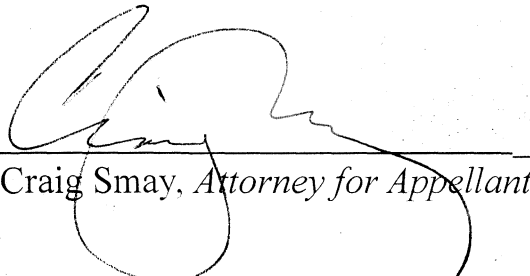
The subsection presumes that a substitution of trustee is a thing that will bear "recording"; that is, a writing. The Statute of Frauds renders void any substitution not in writing.

Section 57-1-22, UCA (1953) merely provides that between the execution of a written substitution and its recording - a time which may not extend beyond recording of a Notice of Default - acts may be ratified. A list of such acts is set out in § 57-1-24.5, UCA (1953), which includes those denominated subsections (1)(b), (c) and (d).

### CONCLUSIONS

Appellees cannot show proper service, admissible evidence, or compliance with the applicable statutes. The judgment of the district court should be reversed in entirety.

DATED this 12th day of January, 2011.


  
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E. Craig Smay, *Attorney for Appellant*



CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Reply Brief of Appellants, postage prepaid, this 12th day of January, 2011 to the following:

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