

2017

Bank of America, n.a., Plaintiff-Appellant, v. Loraine Sundquist and John Doe/Jane Doe/Occupant Doug Kahler, an Individual, Defendants-Appellees.

Utah Supreme Court

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OCT 16 2017

IN THE UTAH SUPREME COURT

BANK OF AMERICA, N.A.,

Plaintiff-Appellant,

v.

LORAIN E SUNDQUIST and JOHN
DOE/JANE DOE/OCCUPANT DOUG
KAHLER, an individual,

Defendants-Appellees.

Case No. 20170014-SC

On Appeal from the Third District Court, Salt Lake County
Case No. 110408730 EV (Judge Bruce C. Lubeck)

SUPPLEMENTAL BRIEF FOR BANK OF AMERICA

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October 16, 2017

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ARGUMENT

In an interlocutory ruling earlier in this litigation, this Court held: (1) that 12 U.S.C. § 92a(a) is unambiguous regarding which state a national bank is “located” in when the bank conducts a non-judicial foreclosure; (2) that the Comptroller of the Currency’s regulation interpreting §92a(a) is unreasonable; and (3) that under Utah law, national banks do not compete with state title insurance companies.

Federal National Mortgage Association v. Sundquist, 2013 UT 45, ¶¶ 21-49. Bank of America’s opening and reply briefs in this appeal explain why those rulings are erroneous. *See* Opening Br. 20-42; Reply Br. 2-20. The opening brief, however (which was submitted to the Court of Appeals), acknowledged that the rulings required the Court of Appeals to affirm the trial court’s judgment. This Court, of course, is not similarly bound; it could overrule *Sundquist*. *See* Opening Br. 20-21. In light of this important difference, Bank of America submits this supplemental brief.

I. OVERRULING OF *SUNDQUIST* IS WARRANTED UNDER LAW-OF-THE-CASE DOCTRINE

As this Court has explained, “[t]he ‘law of the case’ is a legal doctrine under which a decision made on an issue during one stage of a case is binding in successive stages of the same litigation.” *Thurston v. Box Elder County*, 892 P.2d 1034, 1037 (Utah 1995). The degree to which a decision is binding, however, varies based on the posture of a case. More specifically, under the “branch of the

doctrine[] often called the mandate rule,” lower courts are rigidly bound by higher courts’ holdings in the same case. *Id.* By contrast, a request for a court to revisit its *own* ruling in the same case “involves a branch of the ... doctrine which is more flexible than the mandate rule.” *Id.* at 1038. This second branch “is not a limit on power but[] ... merely expresses the practice of courts generally to refuse to reopen what has been decided.” *Id.* at 1038-1039 (citing *Messenger v. Anderson*, 225 U.S. 436, 444 (1912), and *Arizona v. California*, 460 U.S. 605, 618-619 & n.8 (1983)). In other words, “[t]he second branch neither mandates blind adherence to earlier rulings nor does it ‘rise to the dignity of res judicata or stare decisis.’” *State v. O’Neil*, 848 P.2d 694, 697 (Utah 1993) (quoting *Richardson v. Grand Central Corp.*, 572 P.2d 395, 397 (Utah 1977)); accord, e.g., *State v. Menzies*, 889 P.2d 393, 399 (Utah 1994) (stare decisis “is neither mechanical nor rigid as it relates to courts of last resort”). In particular, a court can reopen an issue “when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice.” *Thurston*, 892 P.2d at 1039. For all the reasons given in Bank of America’s opening and reply briefs, that standard is met as to this Court’s interlocutory decision in this case.

II. OVERRULING OF *SUNDQUIST* IS WARRANTED IRRESPECTIVE OF LAW-OF-THE-CASE DOCTRINE

Even if this Court’s prior decision had been made in another case, such that the Court were considering that decision apart from law-of-the-case doctrine,

overturning the decision would be justified. In determining whether to overrule precedent notwithstanding principles of stare decisis, the Court evaluates “(1) the persuasiveness of the authority and reasoning on which the precedent was originally based, and (2) how firmly the precedent has become established in the law since it was handed down.” *Eldridge v. Johndrow*, 2015 UT 21, ¶ 22. The second factor, in turn, involves examining “the age of the precedent, how well it has worked in practice, its consistency with other legal principles, and the extent to which people’s reliance on the precedent would create injustice or hardship if it were overturned.” *Id.*

Both factors counsel strongly in favor of overruling *Sundquist*. First, as Bank of America’s briefs in this appeal explicate, *Sundquist*’s reasoning and authorities are not persuasive. *See* Opening Br. 20-42; Reply Br. 2-20. And second, *Sundquist* is not firmly established. To begin with, the decision issued just four years ago—a small fraction of the 32 years that this Court in *Eldridge* deemed insufficient to firmly establish a precedent that was not “regularly used and relied on.” 2015 UT 21, ¶ 34; *see also id.* ¶ 37. That description certainly applies to *Sundquist*: Not only has the decision been cited very few times, but also the only two cases that ever relied on the holdings challenged here have both been reversed or abrogated. Specifically, the trial court in *Distressed Asset Solutions Fund I, LLC v. Adamson*, Case No. 140500067 (Utah Dist. Ct. Sept. 2, 2014), relied on

Sundquist in ruling that a foreclosure sale conducted by ReconTrust was void, *see id.* at 18 (attached as Exhibit A). But on appeal this Court reversed. *See Bank of America v. Adamson*, 2017 UT 2, ¶¶ 18-37. That reversal likewise abrogated the trial court's decision in *U.S. Bank National Association v. Ring*, Case No. 140500502 (Utah Dist. Ct. Sept. 4, 2015), which "[r]el[ie]d to a large degree upon the rational[e] of [the trial court's determination] in *Adamson*," *id.* at 6 (attached as Exhibit B).

This Court, meanwhile, has cited *Sundquist* only twice: in *Adamson*, where the Court merely held that the issue of whether to overrule *Sundquist* had not been adequately briefed, *see* 2017 UT 2 at ¶¶ 9-13, and in another case (one involving different issues) for the proposition (which long predates *Sundquist*) that "the existence of ambiguity in a statute subject to implementation by a federal agency requires judicial deference to the agency's resolution of the ambiguity," *Hughes General Contractors, Inc. v. Utah Labor Commission*, 2014 UT 3, ¶ 24. Finally, the few other courts that have cited *Sundquist* have all either disagreed with it or deemed it distinguishable. *See Dutcher v. Matheson*, 840 F.3d 1183, 1200, 1201 (10th Cir. 2016) (disagreeing with *Sundquist*'s *Chevron* step-one holding); *Garrett v. ReconTrust Co., N.A.*, 546 F. App'x 736, 738 (10th Cir. 2013) (same); *see also Parker for Chandler v. Citimortgage, Inc.*, 2014 WL 12686741, at *1 (D. Utah Mar. 4, 2014) (holding *Sundquist* inapplicable). Given that *Eldridge* deemed a

much older decision not “firmly established” under similar circumstances, *Sundquist* assuredly is not.

In light of *Sundquist*’s youth and the lack of reliance on it, the remaining considerations—how well *Sundquist*’s holding has worked in practice and whether it has become inconsistent with other principles of law—are largely inapposite. That said, the decision would not work well in practice. Indeed, as the U.S. Solicitor General explained in his amicus brief in this case, *Sundquist*’s interpretation of § 92a(a) would, “throw into confusion the complex system of modern interstate banking.” U.S. Amicus Brief at 17, *Federal National Mortgage Association v. Sundquist*, No. 13-852 (U.S. Oct. 7, 2014). Moreover, the decision has undercut the established policy of the Comptroller to “simplify the determination of where a bank with multi-state operations is acting in a fiduciary capacity.” *Id.* (quoting *Fiduciary Activities of National Banks*, 66 Fed. Reg. 34,792, 34,795 (July 2, 2001)). That provides yet a further reason to discard it.

In short, even if the question were one of stare decisis rather than the more flexible law-of-the-case doctrine, overruling *Sundquist* would be warranted.


CONCLUSION

Sundquist should be overruled and the district court's judgment should be reversed.

Dated: October 16, 2017

Respectfully submitted,

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EXHIBIT A

FILED
2014 SEP -2 PM 1:21
5TH DISTRICT COURT
ST. GEORGE

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR
WASHINGTON COUNTY, STATE OF UTAH

DISTRESSED ASSET SOLUTIONS FUND
I, LLC,

Plaintiff,

vs.

SAMUEL D. ADAMSON; COURTNEY D.
ADAMSON; et al.,

Defendants.

DECISION AND ORDER DISMISSING
ACTION FOR UNLAWFUL DETAINER

Case No. 140500067

Judge Jeffrey C. Wilcox

This is an action for unlawful detainer, which came on for trial on August 7, 2014, after which the court took the matter under advisement. The court now dismisses this action for the reasons given below.

Pursuant to Utah Code section 78B-6-802.5,

A previous owner, trustor, or mortgagor of a property is guilty of unlawful detainer if the person:

- (1) defaulted on his or her obligations resulting in disposition of the property by a trustee's sale or sheriff's sale; and
- (2) continues to occupy the property after the trustee's sale or sheriff's sale after being served with a notice to quit by the purchaser.

At trial, Plaintiff presented as exhibits certified copies of the notice of default, the trust

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A-1

deed, and its own quitclaim deed, thus making out a prima facie case under the statute.¹

In defense, however, Defendants raised the issue of whether subdivision (1)'s requirement of "disposition of the property by a trustee's sale" has been satisfied.² There appears to be no question that Defendants defaulted on their obligations under a note secured by a trust deed, and that ReconTrust, acting as trustee, gave notice of default and intention to sell the property, and ultimately conducted a trustee's sale in January 2010, purporting to sell the property to Plaintiff's predecessor in interest.

Defendants argue that because the 2010 trustee's sale was conducted by ReconTrust, who was not a qualified trustee with the power of sale under Utah Code sections 57-1-21 and 57-1-23, see Fed. Nat. Mortgage Ass'n v. Sundquist, 2013 UT 45, ¶ 13, 311 P.3d 1004 ("ReconTrust is neither a member of the Utah State Bar nor a title insurance company or agency with an office in the State of Utah. ReconTrust was therefore not a qualified trustee with the power of sale under Utah Code sections 57-1-21 and 57-1-23."); id., ¶ 49 ("As a national bank operating in Utah

¹ Plaintiff also agreed to file, after trial, a certified copy of the 2007 trust deed, but thus far has not done so.

² In addressing this defense, the court considers, in addition to the evidence and arguments presented at trial, the briefing submitted on Defendants' Motion for Declaratory Judgment. At trial, the court indicated that it would not grant such motion at that time because there was nothing in Defendants' pleadings suggesting that they were seeking declaratory relief. However, also as indicated at trial, the motion addresses the substance of Defendants' defense, so the court references such briefing as a matter of convenience. Plaintiff's opposition memorandum filed May 23, 2014, is referenced herein as "Mem. Opp."

under the [National Banking Act], ReconTrust is precluded from exercising the power of a trustee under Utah statute for purposes of conducting a nonjudicial foreclosure.”), the sale and resulting trust deed are null and void ab initio.

As Plaintiff correctly notes, the Sundquist court expressly declined to decide what effect, if any, its determination that ReconTrust did not qualify as a trustee with the power of sale would have on the validity of the sale and resulting trust deed. See id., ¶ 50 (“Our opinion in this matter is limited to the narrow issue of whether Utah law regarding the qualification of trustees is preempted by the [National Banking Act]. In briefing and oral argument, the parties have attempted to raise a variety of other issues relating to the validity of the nonjudicial foreclosure sale, the validity of the trustee’s deed, and the propriety of the order of restitution. Because these issues were not fully litigated below, we decline to reach them on interlocutory appeal.”).

However, as Plaintiff also points out, the Court of Appeals has been presented with arguments similar to those of Defendants, and has not even considered it necessary to reach them where the party attacking the validity of a trustee’s sale failed to allege or prove how its rights were affected by the defect complained of. For example, in RM Lifestyles, LLC v. Ellison, 2011 UT App 290, 263 P.3d 1152, the defendants in an unlawful detainer action “argued that the trust deed sale was void because [the trustee] recorded the notice of default before it had been substituted as trustee, that the statute did not allow [the beneficiary] to ratify [the trustee’s] action, and that the execution of the substitution of trustee violated the statute of frauds.” Id., ¶

15. On review, the Court of Appeals declined to “reach the merits of these issues because the [defendants], in attacking the trust deed sale’s validity after the sale, ha[d] not met their burden of proving that the alleged irregularity affected their rights,” id. (footnote omitted), and “[did] not claim that they were denied the right to cure the default or ever planned on or were capable of curing the default.” Id., ¶ 18 (citation omitted).

Similarly, in Reynolds v. Woodall, 2012 UT App 206, 285 P.3d 7, the plaintiff argued “that the trustee’s sale [was] void” because the individual who “recorded the notice of default and held the trustee’s sale” did so “before [the beneficiary] executed and recorded a written substitution of trustee.” Id., ¶ 13. The plaintiff also challenged the beneficiary’s later “attempt to ratify [this individual’s] actions after the trustee sale.” Id. In other words, like Defendants here, the plaintiff attacked the validity of the sale based on the questionable authority of the one who conducted it. Again, the Court of Appeals declined to decide these issues on their merits based on the fact that, “in attacking the validity of the trustee’s sale, [the plaintiff] ha[d] not alleged that the challenged substitution of trustee impacted her rights.” Id.

In contrast to RM Lifestyles and Reynolds are two cases cited by Defendants. First, in an early Utah Supreme Court case, the court held a trust sale void where it was not performed by the person authorized under the deed of trust:

The deed of trust authorized the sale to be made by the United States Marshal. This was not done. One of his deputies made the sale as auctioneer. It is not claimed that he acted as deputy, but simply that a person who was a deputy acted

as the auctioneer. Nor do we think that the marshal could have acted by deputy, unless the deed of trust had shown express authority to that effect, which it did not do. The fact that no injury or fraud in the sale has been shown, does not affect the question. Nor is it affected by the fact, that the purchaser was an innocent party. The sale was made by one not authorized to make it, and cannot be upheld. It is simply void, and no one gains any rights under it. A purchaser must know that the sale is made by the proper person. The deed of trust shows who could make the sale. A trustee can no doubt employ an auctioneer to act for him in crying off the property; but the trustee must be present and superintend the sale. The trustee in the present instance says that he does not think he was present at the sale.

Singer Mfg. Co. v. Chalmers, 2 Utah 542, 546-47 (Utah Terr. 1880) (emphasis added).

More recently, the Court of Appeals affirmed a trial court ruling that a nonjudicial foreclosure sale for delinquent assessments owed to a condominium association was void where the sale was conducted by the association's attorney because "[t]he record reveal[ed] that, though its attorney may have qualified as a trustee under the Trust Deed Act, the Association failed to appoint its attorney as such." McQueen v. Jordan Pines Townhomes Owners Ass'n, Inc., 2013 UT App 53, ¶¶ 19-21 & 28, 298 P.3d 666.

Notably, the McQueen court does not discuss the obstacles to setting aside a trustee sale that were mentioned, and indeed dispositive, in the RM Lifestyles and Reynolds cases, as summarized above. Rather, the court simply addressed the claimed defect – the absence of the statutorily required qualified appointed trustee – on its merits, and agreed that it rendered the sale void. Reconciliation of these cases is difficult.

Reconciliation of Singer with RM Lifestyles and Reynolds is also difficult. To say, as do

these later cases, that a party attacking the validity of a trustee sale must allege that the claimed defect resulted in an injury to “the interests of the debtor,” or “some attendant fraud or unfair dealing,” RM Lifestyles, 2011 UT App 290, ¶ 16, or a circumstance “reach[ing] unjust extremes,” id.; Reynolds, 2012 UT App 206, ¶ 15, is plainly at odds with Singer’s statement that, where an unauthorized person conducts the sale, “[t]he fact that no injury or fraud in the sale has been shown, does not affect the question.” 2 Utah at 547.

Plaintiff attempts to distinguish Singer on the ground that the deed of trust in that case specified who could conduct the sale, and that there is no such provision in the trust deed here. Plaintiff also notes that Singer was decided well before the current governing statutes, and criticizes Defendants for not providing any additional authority to support their argument that the sale here is void.

Plaintiff’s arguments are unpersuasive. First, the provisions in Utah Code sections 57-1-21 and 57-1-23 restricting who is authorized to conduct a trustee’s sale are clearly comparable to the trust deed provision identifying who was authorized to conduct the sale in Singer, particularly since “a contract,” such as the trust deed here, “implicitly contains the laws existing at the time it was entered.”³ Washington Nat. Ins. Co. v. Sherwood Associates, 795 P.2d 665, 669 (Utah Ct.

³ It is unnecessary to decide which law to apply here (i.e., the law in effect in August 2007, when the trust deed was executed, or the law in effect in January 2010, when the trust sale occurred) since the statutory provisions defining a qualified trustee did not change between these periods.

App. 1990) (citing, among other cases, Beehive Med. Elecs., Inc. v. Indus. Comm'n, 583 P.2d 53, 60 (Utah 1978) (citing Edwards v. Kearzey, 96 U.S. 595, 601, 24 L.Ed. 793 (1878) (holding that contracts embrace laws which affect their validity, construction, discharge, and enforcement))); 59 C.J.S. Mortgages § 739 (WestlawNext database updated June 2014) ("The power to sell under deed of trust is [a] matter of contract between [the] mortgagor and mortgagee under the terms and conditions expressed in [the] deed of trust instrument. It cannot be enlarged beyond the terms of the contract and the incorporated relevant statutes.") (emphasis added and footnotes omitted).

Thus, this attempted distinction fails.

Second, while Singer is an older case, it is consistent with prevailing law on the subject today, as well as with current Utah statutory law. As a leading treatise on real estate financing explains:

Generally, defects in the exercise of a power of sale can be categorized in at least three ways – void, voidable, or inconsequential.

Some defects are so substantial that they render the sale *void*. In this situation, neither legal nor equitable title transfers to the sale purchaser or subsequent grantees, except perhaps by adverse possession. . . . A sale . . . is void when someone other than the named trustee conducts the sale, including a successor who has not been validly appointed, or, conversely, if the original trustee conducts the sale after a successor-trustee has been appointed.

Most defects render the foreclosure *voidable* and not void. When a voidable error occurs, bare legal title passes to the sale purchaser, subject to the redemption rights of those injured by the defective foreclosure. Typically, a voidable error is "an irregularity in the execution of a foreclosure sale" and must be "substantial or result in a probable unfairness." . . . If the defect only renders the sale voidable,

the redemption rights can be cut off if a bona fide purchaser for value acquires the land. When this occurs, an action for damages against the foreclosing mortgagee or trustee may be the only remaining remedy.

Finally, some defects are so *inconsequential* that they render the sale neither void nor voidable. These defects commonly involve minor discrepancies in the notice of sale. . . .

Grant S. Nelson, Dale A. Whitman et al, Real Estate Finance Law § 7:21 at 953-957 (6th ed. 2014) (hereinafter Nelson & Whitman) (underscoring added and footnotes omitted; italics in original).

Viewed within this framework, Singer clearly takes its place in the first category, and the prerequisites to setting aside a sale identified in RM Lifestyles and Reynolds are seen to be applicable only to those defects properly categorized as rendering a sale voidable rather than void. This is consistent with Singer, which expressly disavows any such prerequisites as to a sale conducted by one not authorized to do so. It is also consistent with McQueen, which affirmed that a sale was void based only on the fact that the person who conducted it had not been appointed as a trustee as statutorily required.

The limited applicability of the prerequisites stated in RM Lifestyles and Reynolds is also shown by examination of the cases cited therein. For instance, both cases quote the statement made in Concepts, Inc. v. First Sec. Realty Servs., Inc., 743 P.2d 1158, 1160 (Utah 1987) (per curiam), that “[a] sale once made will not be set aside unless the interests of the debtor were sacrificed or there was some attendant fraud or unfair dealing.” 2011 UT App 290, ¶ 16; 2012

UT App 206, ¶ 14. Concepts involved the attempted invalidation of a sale based on the fact that the notice of sale, which was printed in 1983, incorrectly stated that the sale was to be conducted on a given date in 1982, see 743 P.2d at 1159 – a defect that the court ultimately characterized as a “minor typographical error.” Id. at 1161. Thus, the statement quoted is clearly taken from a case falling into the third category described above (one involving “minor discrepancies in the notice of sale”), not one involving what Singer held to be a fundamental error.⁴

Similarly, RM Lifestyles and Reynolds each state that a trustee’s sale should be set aside “only in cases which reach unjust extremes.” 2011 UT App 290, ¶ 16; 2012 UT App 206, ¶ 15. For this proposition, RM Lifestyles cites Thomas v. Johnson, 801 P.2d 186, 188 (Utah Ct. App. 1990), which in turn cited Concepts, see id., and which involved only a challenge to the manner in which the sale was conducted – namely, the trustee’s acceptance of a bid offering to pay “fair market value” (rather than a specific dollar amount) for the property. The court rejected this challenge, holding that the statute was satisfied by the bid and “find[ing] no evidence that [the

⁴ Significantly, Concepts actually reiterates the underlying principle from Singer (although with a different focus in mind—namely, the party intended to benefit from statutory notice requirements), that “[t]he maker of the deed of trust with power of sale may condition the exercise of the power upon such conditions as he may describe.” 743 P.2d at 1160 (citing Houston First American Savings v. Musick, 650 S.W.2d 764, 768 (Tex. 1983)) (emphasis omitted). The cited case elaborates, as noted in Concepts, saying that “[t]he grantor of the power [of sale] is entitled to have his directions obeyed; to have the proper notice of sale given; to have it to take place at the time and place, and by the person appointed by him.” 650 S.W.2d at 768 (emphasis added and citation omitted).

debtor's] interests were sacrificed by the trustee's action" Id. at 189.⁵ RM Lifestyles and Reynolds also cite Timm v. Dewsnap, 2003 UT 47, ¶¶ 36-37, 86 P.3d 699, which again merely reiterated the holding of Concepts, and which, like Concepts, involved – as pertinent here – only a challenge to the sufficiency of the notice of the sale given to the debtor. Id.

Thus, none of the cases cited to support the prerequisites identified in RM Lifestyles and Reynolds involved "a purported sale by an unauthorized person," which is to be distinguished from cases in which there is merely "a question of procedural irregularities in a trustee's sale." Citizens Bank of Edina v. W. Quincy Auto Auction, Inc., 742 S.W.2d 161, 165 (Mo. 1987) (en banc). Where, as here (and as in Singer), there is "a completely unauthorized sale conducted by an individual who was powerless to sell the property," it is irrelevant "[w]hether in point of fact, the sale of the property was conducted in all respects judiciously or not, or in a manner most conducive to the interests of those concerned," although "[t]his would be a legitimate inquiry in a proceeding to set aside a sale made under the power conferred by the instrument. . . ." Id. (citation omitted). This conclusion is inconsistent with Reynolds, but that case must yield to Singer based on the principle that "[t]he Court of Appeals simply cannot overrule the law as

⁵ Thomas also included a footnote summarily rejecting the debtor's additional challenge in that case to the trustee's acceptance of a credit bid rather than "requir[ing] the bid to be 'payable in lawful money of the United States at the time of sale,' as allegedly instructed in the trust deed"—a provision that, if it existed, the court held to be satisfied by the credit bid. See 801 P.2d at 188 n.1.

announced by the highest court in the state, even if the announcement was made decades ago.”

Sentry Investigations, Inc. v. Davis, 841 P.2d 732, 735 (Utah Ct. App. 1992).

Plaintiff also relies on the holding in Reynolds that, “[a]bsent such exceptional circumstances [i.e., harm to the interests of the debtor, fraud, unfair dealing, or unjust extremes], the proper remedy is to seek an injunction prior to a sale, which allows a debtor to challenge irregularities and protect her rights before the sale is completed and a trustee’s deed is executed and delivered to the purchaser.” 2012 UT App 206, ¶ 15 (citing RM Lifestyles, 2011 UT App 290, ¶ 15 n.4 (internal citation omitted)) (emphasis added). Because, as just discussed, Reynolds’s requirement of harm, etc. as a prerequisite to setting aside a trustee’s sale must be limited (under Singer) to those cases involving defects rendering a sale voidable rather than void, the companion requirement that challenges to irregularities be raised via a pre-sale injunction proceeding, except where harm, etc., is shown, must likewise be so limited. To hold otherwise would be to say that a debtor need not attempt to obtain a pre-sale injunction in a case in which the sale is only voidable (because it may be set aside thereafter by a showing of harm, etc.), but that such an attempt must be made where the sale is utterly void.

Additionally, Plaintiff argues that “the doctrines of waiver and estoppel bar Defendants’ claim that the Foreclosure Sale is void and should be set aside.” Mem. Opp. at 9. To support this argument, Plaintiff observes that

Defendants did not challenge the Foreclosure Sale before it occurred. It is

undisputed that the Foreclosure Sale took place in January 2010. It is also undisputed that although the Defendants in this case filed a class-action suit in federal court in November 2010, they have not prosecuted their claims in the Federal Action since the ruling in *Garrett* in September 2013, which ruled that a foreclosure sale done in Utah by ReconTrust was valid. It is undisputed that Defendants filed a Motion to Set Aside the Foreclosure Sale in the Prior State Case in July 2010, but failed to prosecute this claim, and allowed the case to be dismissed on June 21, 2012. Importantly, although the Defendants in this case were, or are, parties in the Prior State Action and Federal Action respectively, they failed to ever record a lis pendens on the Property. It is also undisputed that Defendants have failed to pay any value, and have failed to pay property taxes, for the Property since June 2009. Like the mortgagor in *American Falls Canal Securities Co.*, the Defendants in this case have failed to properly and timely assert their rights to defeat the rights of Plaintiff, an innocent bona fide purchaser. Defendants have knowingly and silently sat on any alleged rights they have to the Property, and most importantly, have allowed Plaintiff to expend money purchasing the Property. Defendants do not claim they had the ability to cure the default and stop the Foreclosure Sale. Defendants did not challenge the sale before it occurred, and therefore, the Trustee's Deed from ReconTrust must remain valid.[FN]1

[FN]1 Even if the court considered a trustee's deed voidable, "[a] voidable deed . . . 'is unassailable in the hands of a [bona fide purchaser].'" See *SEC v. Madison Real Estate Group, LLC*, 647 F. Supp. 2d 1271, 1279 (D. Utah 2009) (citation omitted).

Mem. Opp. at 9-10.

In the American Falls case cited, the Supreme Court recognized that "a party otherwise in position to object to a mortgage foreclosure sale may well be precluded from doing so based upon conduct sufficient to bring into operation the doctrines of waiver and estoppel." Am. Falls Canal Sec. Co. v. Am. Sav. & Loan Ass'n, 775 P.2d 412, 414 (Utah 1989) (footnotes omitted). The court indicated; however, that a party may not waive the right to challenge, or be estopped

from challenging, a sale wholly void, see id. (“[E]xcept where non-compliance results in a complete legal nullity, one otherwise entitled to object to a judicial sale in mortgage foreclosure proceedings as involving a defect or irregularity based upon a lack of or insufficient process, notice, advertisement or other designation with respect to the sale, designed for his benefit and protection, may waive, or be estopped from asserting, such defect or irregularity.”) (emphasis added and citation omitted); see also Ockey v. Lehmer, 2008 UT 37, ¶ 22, 189 P.3d 51, 57 (distinguishing “. . . between an illegal or void contract and one merely ultra vires,” which could become enforceable by ratification or estoppel”) (quoting Millard Cnty. Sch. Dist. v. State Bank of Millard Cnty., 80 Utah 170, 14 P.2d 967, 971-72 (1932)), which, under Singer, is what results from a trustee’s sale conducted by one not having authority.⁶

Moreover, even where it has been said that “[a] want of authority in the trustee making the sale may be waived by the parties in interest, or they may estop themselves by their conduct to object to such want of authority, at least as against the purchaser at the sale,” 59 C.J.S. Mortgages § 764 (WestlawNext database updated June 2014) (citing Reynolds v. Kroff, 144 Mo. 433, 46 S.W. 424 (1898); Spencer v. Hawkins, 39 N.C. 288, 4 Ired. Eq. 288, 1846 WL 1113

⁶ Plaintiff relies on Ockey, which held that a conveyance effected by trustees after the termination of the trust “was merely voidable” rather than void, see 2008 UT 37, ¶ 24, and on Millard County, which held that securities issued by a bank in excess of its statutory authority were likewise only voidable, see id., ¶ 22, but these cases did not involve a trustee’s foreclosure sale, in which context the clear rule is shown by Singer and the other authorities discussed above.

(1846); Schwarz v. Kellogg, 243 S.W. 179 (Mo. 1922)), the conduct giving rise to the waiver or estoppel in the cited cases was considerably more affirmative than anything Defendants are alleged to have done here.

Certainly, Defendants' failure to pay taxes or any other value for the property since June 2009,⁷ while remaining in possession, is understandably frustrating for the foreclosure sale purchaser (or its successor in interest), but it is not inconsistent with their claim that the sale is void,⁸ nor can their failure to affirmatively pursue judicial vindication of their position during this period properly be so characterized.⁹ Cf. Hammon v. Hatfield, 192 Minn. 259, 261, 256

⁷ At trial, Mr. Adamson actually acknowledged not having made payments since December 2008, explaining that, since April 2010, their lender refused to accept any payments.

⁸ Indeed, under the circumstances, it would be the making of payments to the purchaser at the sale, or to its successor in interest, that would be inconsistent with Defendants' claim.

⁹ Defendants' federal class-action lawsuit (initiated in November 2010), was stayed pending the outcome of Garrett v. ReconTrust Co., N.A., 546 F. App'x 736 (10th Cir. 2013) (which, contrary to Plaintiff's suggestion, did not unqualifiedly hold "that ReconTrust had the authority to act as a trustee in Utah, and therefore, the foreclosure sale that took place in the Garrett case was valid," Mem. Opp. at 3), and appears to remain pending. Resolution of the "Prior State Case" (case number 100501437 in this court) is difficult to follow. This was an unlawful detainer action filed against Defendants by Plaintiff's predecessor in interest, and appears to have been dismissed due to the failure of both sides to appear at a hearing on or about June 19, 2012. (The Order of Dismissal is a minute entry for a hearing that appears to have been held on June 19, 2012 (the date of the caption), but the signature line on the order is dated June 20, 2012, which is also the file stamp date, and the order was filed in CORIS on June 21, 2012.) However, the parties in the case had previously stipulated to continue the scheduled trial "without date," an order to that effect was entered on November 17, 2011, and no prior notice of any hearing scheduled thereafter appears in CORIS.

N.W. 94, 95 (1934) (property occupants claiming under mortgagor one year after void foreclosure sale were "rightfully in possession" and could not be barred from challenging the validity of such sale by statute requiring any challenge to be brought "with reasonable diligence," the principle being that "one who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another, for failure to bring suit against that other within a time specified to test the validity of a claim which the latter asserts, but takes no steps to enforce. It has consequently been held that a statute which, after a lapse of five years, makes a recorded deed purporting to be executed under a statutory power conclusive evidence of a good title, could not be valid as a limitation law against the original owner in possession of the land. Limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims.") (citation and internal quotation marks omitted). The same is true of Defendants' failure to file a lis pendens, as they have explained, since a void sale transfers no title under Singer, and there was no need to bring their challenge prior to the sale, as discussed above.

Plaintiff argues that some of the same conduct just discussed also constituted a ratification of the foreclosure sale, but the court disagrees for the same reasons such conduct is not an estoppel or waiver, not least of which is the fact that, as Plaintiff itself recognizes, "[a] contract or a deed that is void cannot be ratified or accepted" Ockey, 2008 UT 37, ¶ 18 (footnote omitted).

Plaintiff also argues that the statutory remedy set forth in Utah Code section 57-1-23.5 is exclusive, but this section was not added until 2011, the year after the sale at issue here, and Plaintiff has made no argument to show its retroactive applicability.

Finally, Plaintiff stresses that it is a bona fide purchaser for value. Assuming that to be true,¹⁰ however, Singer clearly holds that such status cannot validate a void sale. This determination is not altered by Utah Code section 57-1-28's provision stating that trust deed "recitals of compliance with the requirements of Sections 57-1-19 through 57-1-36 relating to the exercise of the power of sale and sale of the property described in the trustee's deed" "are conclusive evidence in favor of bona fide purchasers and encumbrancers for value and without notice." Utah Code Ann. § 57-1-28(2)(c)(ii).

For obvious reasons, such provisions cannot be taken completely at face value. See Nelson & Whitman § 7.22 at 982 (describing "[t]he literal language of this . . . type of statute" as "breathtakingly broad in its impact on BFPs" as it "arguably applies even when the mortgagee had no substantive right to foreclose," such as where "a lender forecloses though the secured obligation is not in default or if the mortgage is forged" – a result that would be "fundamentally unfair and is probably legislatively unintended"). In an earlier treatment of the subject, Nelson

¹⁰ Such an assumption may be unduly generous, given that Defendants have remained in possession of the property challenging the validity of the sale at all times since the sale, thereby giving notice to Plaintiff, prior to Plaintiff's purchase, of the claimed defect in the exercise of the power of sale.

and Whitman went as far as to assert that “the conclusive impact” of such statutes should be limited “to procedural defects in the foreclosure process,” consistent with the likely legislative intent. See Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 Duke L.J. 1399, 1506-1507 (2004).

Although this suggested bright-line limitation did not find its way into the most recent version of Nelson and Whitman’s treatise, it appears to accurately reflect how these “conclusive” statutory presumptions should be understood. See *Main I Ltd. P’ship v. Venture Capital Const. & Dev. Corp.*, 154 Ariz. 256, 260, 741 P.2d 1234, 1238 (Ariz. Ct. App. 1987) (observing, with reference to an Arizona conclusive presumption statute similar to that of Utah, and without apparent disagreement, that “[w]hen the California cases hold that recitals in a deed of trust are conclusive, they qualify that they are conclusive ‘in the absence of grounds for equitable relief,’” but finding equitable relief inappropriate in a case where there was no “fraud, misrepresentation, . . . concealment,” bad faith, or breach of fiduciary duty) (emphasis added and citation omitted). Among the traditional grounds for equitable relief not specifically mentioned in *Main I* is, as previously indicated, the absence of a power of sale in the party conducting such sale. See 5 *Tiffany Real Prop.* § 1550 (3d ed.) (WestlawNext database updated September 2013) (“It appears that the sale will ordinarily be set aside in equity on grounds on which it would have been previously enjoined, as for instance where the debt never existed, or has been extinguished, or was conducted by a party without authority to do so, or where the notice of sale was substantially

defective.”) (emphasis added and footnotes omitted). Thus, the court concludes that the protection afforded to BFPs by Utah Code section 57-1-28 is not intended to extend, and does not extend, to protect against defects traditionally viewed as fundamental, such as the one at issue here.

For these reasons, the court holds that Plaintiff has not overcome Defendants’ defense that there has been no “disposition of the property by a trustee’s sale,” as required under Utah Code section 78B-6-802.5, and accordingly dismisses this unlawful detainer action.

ORDER

For the foregoing reasons, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Plaintiffs’ unlawful detainer action is dismissed.

Dated this 2nd day of September, 2014.

BY THE COURT:


Jeffrey C. Wilcox
District Court Judge



EXHIBIT B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
2015 SEP 4 PM 4: 28

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

FILED BY DA

**U.S. BANK NATIONAL ASSOCIATION,
AS TRUSTEE FOR GSR 2006-1F, its
successors and/or assigns,**

Plaintiff(s),

vs.

**JIM RING, and/or JOHN DOES 1-10,
JANE DOES 1-10,**

Defendant(s),

vs.

**RECONTRUST COMPANY, N.A. as a
Subsidiary of Bank of America, its
Successors and Assigns,**

Third Party Defendant(s).

MEMORANDUM DECISION

Case No. 140500502

Judge Kara Pettit

INTRODUCTION

The following four motions are before the Court, have been fully briefed, and the parties appeared and presented oral argument on them on July 9, 2015:

- 1) Plaintiff U.S. Bank National Association as Trustee for GSR 2006-1F's ("U.S. Bank")
Motion for Summary Judgment as to its unlawful detainer claim and Ring's
counterclaim, filed October 10, 2014;
- 2) Defendant Ring's Motion for Summary Judgment as to U.S. Bank's unlawful detainer
claim, filed March 12, 2015;

- 3) Plaintiff U.S. Bank's Motion to Dismiss Ring's Second Amended Counterclaim, filed March 20, 2015;
- 4) Third-Party Defendant ReconTrust Company's ("ReconTrust") Motion for Judgment on the Pleadings, filed May 4, 2015.

All four motions share one common issue that is a threshold determination for the Court: whether the sale by the substitute trustee, ReconTrust, is void as a matter of law because, at the time of the sale, ReconTrust was not a qualified trustee with the power of sale pursuant to Utah Code §§ 57-1-21 and 57-1-23.

The Court holds that the sale is void because ReconTrust never possessed the power of sale. The Court addresses below the other issues presented by the motions as well.

STANDARDS OF REVIEW

Three similar standards of review are applicable to the pending motions. First, with respect to U.S. Bank's and Ring's summary judgment motions, summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). The Court must construe all facts and the reasonable inferences to be made therefrom in a light most favorable to the non-moving party. See *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258, 1261 (Utah 1984). Similarly, for U.S. Bank's Motion to Dismiss, a Rule 12(b)(6) motion "admits the facts alleged in the [pleading] but challenges the [party's] right to relief based on those facts." *State v. Apotex Corp.*, 2012 UT 36, ¶42, 282 P.3d 66. In the Rule 12(b)(6) context, a court "assume[s] that the factual allegations in the [pleading] are true and ... draw[s] all reasonable inferences in the light most favorable to the [non-moving party]." *Berneau v. Martino*, 2009 UT 87, ¶3, 223 P.3d 1128. "A motion to dismiss is properly granted ... in cases

in which, even if the factual assertions in the [pleading] were correct, they provided no legal basis for recovery.” *Mackey v. Cannon*, 2000 UT App 36, ¶13, 996 P.2d 1081.

Third-Party Defendant ReconTrust has moved for judgment on the pleadings on Ring’s Third-Party Complaint. “A court may enter judgment on the pleadings when the moving party is entitled to judgment on the face of the pleadings themselves.” *Mountain Am. Credit Union v. McClellan*, 854 P.2d 590, 591 (Utah Ct. App. 1993). A judgment on the pleadings is to be affirmed “only if, as a matter of law, the nonmoving party...could not prevail under the facts alleged.” *Id.* at 591.

UNDISPUTED FACTS AND PROCEDURAL HISTORY

1. On November 30, 2005, Defendant Jim Ring purchased the property at 1102 Park Avenue Park City, UT 84060. The lot is described as Lot 1, Pinnell Replat Subdivision in Summit County Utah and all improvements located thereon (“the Property”). Joint Memo. in Opposition to Defendant Ring’s Motion for Summary Judgment, Response to Ring’s Statement of Facts (“Response to Ring Facts”), ¶1.
2. When Ring purchased the subject property, he executed a Trust Deed as Trustor, which was delivered to the Trustee, Stewart T. Matheson, an active member of the Utah State Bar, for the benefit of Mortgage Electronic Registration Systems, Inc. (“MERS”), as beneficiary. On November 30, 2005, the Trust Deed was recorded as Entry No. 00760223 in Book 01755 at Page 0030 in the Summit County Recorder’s Office. *Id.*, ¶2.
3. The Trust Deed provides that the lender may appoint a successor trustee, who “shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.” Trust Deed, ¶ 24 (Ex. A to Ring’s Memo. in support of Summary Judgment).

4. On September 26, 2008, MERS executed a Substitution of Trustee appointing ReconTrust as trustee under the Deed of Trust. This document was recorded on September 30, 2008 as Entry No. 00855927 in the Summit County Recorder's Office. Response to Ring Facts, ¶3.
5. ReconTrust published a Notice of Trustee's Sale in the *Park Record* newspaper on Wednesday, December 31, 2008, January 7, 2009, and January 14, 2009 stating that ReconTrust would be conducting a trustee's sale on the subject property on January 27, 2009. *Id.*, ¶4.
6. The sale did not proceed as noticed on January 27, 2009, but was postponed until February 26, 2009. U.S. Bank/ReconTrust's Statement of Additional Facts, ¶ 7.
7. On or about March 3, 2009, ReconTrust Company executed a Trustee's Deed which recites that ReconTrust conducted a trustee's sale on the subject property and sold the subject property to the Plaintiff, U.S. Bank, on February 26, 2009. *Id.*, ¶5.
8. ReconTrust was neither an active member of the Utah State Bar nor a Utah title insurance company at the time of the foreclosure sale. *Id.*, ¶7.
9. On September 11, 2014, U.S. Bank served Ring with a 5-Day Notice to Vacate. Ring did not vacate, and continues to reside at the property located at 1102 Park Avenue Park City, UT 84060. *See* Second Am. Countercl. ¶3.
10. On September 18, 2014, U.S. Bank filed an unlawful detainer action against Ring. *See* Original Compl.¹
11. Ring filed an answer and counterclaim that the Court dismissed without prejudice.

¹ U.S. Bank filed, but voluntarily dismissed, two prior unlawful detainer actions against Mr. Ring. *See* Silver Summit Cases 090500313 and 1105000651. Mr. Ring's counterclaims in those prior actions were also dismissed without prejudice.

12. Ring filed an amended counterclaim. On February 18, 2015, the Court granted Ring leave to file a second amended counterclaim to address issues related to ReconTrust as trustee, including adding ReconTrust as a Third-Party Defendant.

13. On February 27, 2015, Ring filed a second amended answer and counterclaim, including a claim against ReconTrust as a Third Party Defendant. *See* Second Am. Countercl.

ANALYSIS

I. This Court Is Bound by the Utah Supreme Court's Holding in *Federal Nat'l Mortgage Ass'n v. Sundquist* that Section 92a of the National Banking Act ("NBA") Does Not Preempt Utah Code §§ 57-1-21 and 57-1-23.

In their opposition to Ring's summary judgment motion, U.S. Bank and ReconTrust argue that ReconTrust's power of sale resulted from federal law that preempts state law. *See* U.S. Bank/ReconTrust Opp. to Ring MSJ at 2. While U.S. Bank and ReconTrust acknowledge that Utah Code §§ 57-1-23 and 57-1-21 limit the power of sale to active members of the Utah State Bar and title insurance companies--and they admit ReconTrust was neither at the time of sale—they argue that 12 U.S.C. § 92a and its implementing regulation, preempt Utah law.

As U.S. Bank/ReconTrust further acknowledge, however, this Court is bound by the Utah Supreme Court's holding in *Federal Nat'l Mortgage Ass'n v. Sundquist*, which addressed this precise question of preemption (and also involved ReconTrust), holding:

As a national bank operating in Utah under the NBA, ReconTrust is precluded from exercising the power of a trustee under Utah statute for purposes of conducting a nonjudicial foreclosure. It would be irrational to interpret § 92a(b) or § 9.7 as giving a national bank such as ReconTrust authority to exercise a power that Utah law specifically prohibits even Utah banks from exercising. We therefore hold that sections 57-1-21 and 57-1-23 of the Utah Code are not preempted by the NBA. A national bank seeking to foreclose on real property in Utah must comply with Utah law.

Federal Nat'l Mortgage Ass'n v. Sundquist, 2013 UT 45, ¶49, 311 P.3d 1004.

Therefore, the Court summarily rejects U.S. Bank/ReconTrust's preemption argument.

II. The Purported Sale to U.S. Bank is Void Because ReconTrust Did Not Possess the Power of Sale.

Relying to a large degree upon the rationale of a decision rendered in the Fifth District Court by Judge Wilcox in *Distressed Asset Solutions Fund v. Adamson*,² Ring asserts U.S. Bank's unlawful detainer claim fails as a matter of law because the sale to U.S. Bank is void. This Court agrees.

In 2001, Utah Code § 57-1-23 was amended to read: "The trustee who is qualified under Subsection 57-1-21(1)(a)(i) or (iv) is given the power of sale," thus prohibiting the former practice of allowing "any depository institution" to have the power of sale. Utah Code § 57-1-23.³ Utah law confers the power of sale only to

- (i) any active member of the Utah State Bar who maintains a place within the state where the trustor or other interested parties may meet with the trustee
- and
- (iv) any title insurance company or agency that:
 - (A) holds a certificate of authority or license under Title 31A, Insurance Code, to conduct insurance business in the state;
 - (B) is actually doing business in the state; and
 - (C) maintains a bona fide office in the state;

Utah Code § 57-1-21(i) and (iv).

Notably, Section 57-1-21(4) mandates that "[a] trust deed with an unqualified trustee or without a trustee shall be effective to create a lien on the trust property, but the power of sale and other trustee powers under the trust deed may be exercised only if the beneficiary has appointed a qualified successor trustee under Section 57-1-22." Utah Code § 57-1-21(4).

² This Fifth District Court decision is currently on appeal before the Utah Court of Appeals. *See Bank of America v. Adamson*, Appellate Case No. 20140861.

³ The 2001 version of the statute required active members of the Bar to reside in Utah. Due to legal challenges to this requirement, the legislature amended the statute two additional times, in 2002 and 2004, ultimately enacting the language in effect today and at the time of the sale of the Ring property in 2009. *See Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1036-37 (10th Cir. 2009).

The Utah Court of Appeals relied upon this statutory language in *McQueen v. Jordan Pines Townhomes Owners Ass'n, Inc.* to affirm a trial court's determination that a "nonjudicial foreclosure proceeding conducted by the Association was ineffective and void because the Association failed to appoint a qualified trustee to conduct the nonjudicial foreclosure sale." *McQueen v. Jordan Pines Townhomes Owners Ass'n, Inc.*, 2013 UT App 53, ¶ 7, 298 P.3d 666.

In *McQueen*, a homeowners' association allowed its attorney to conduct a nonjudicial foreclosure sale but did not appoint the attorney as a trustee to conduct the sale, instead relying upon language in the Condominium Ownership Act that allows the manager or management committee to enforce foreclosure. The Court of Appeals affirmed the trial court's conclusion that the sale was ineffective and void because the Trust Deed Act required a qualified trustee be appointed in order for a nonjudicial foreclosure sale to occur. *Id.*, at ¶¶ 19-21 and 28.

Similar to the homeowners' association in *McQueen*, here, MERS failed to appoint a qualified trustee to conduct the nonjudicial foreclosure sale. It is undisputed that ReconTrust was not a qualified successor trustee with a power of sale. MERS failed to appoint a licensed Utah attorney or title company with an office in the state as successor trustee. As the appointed successor trustee, ReconTrust had no ability to convey title at the nonjudicial foreclosure sale because it did not have the power of sale. Therefore, as in *McQueen*, the sale by ReconTrust was ineffective and void ab initio.

Because the sale is void and a nullity, instead of voidable, any requirement to prove injury and violation of rights due to the alleged defect of sale, as specified in *Reynolds v. Woodall*, 2012 UT App 206, 285 P.3d 7 and *RM Lifestyles, LLC v. Ellison*, 2011 UT App 290, 263 P.3d 1152, is not applicable. Both *Reynolds* and *RM Lifestyles* involved the recordation of a substitution of trustee after a nonjudicial foreclosure sale, and neither involved a challenge to the

sale because the trustees were not qualified trustees with the power of sale. Thus, the sales in *Reynolds* and *RM Lifestyles* were voidable due to purported procedural defects, as opposed to void because the trustee lacked the authority or power of sale.

In *Bangerter v. Petty*, the Utah Court of Appeals applied this reasoning as a basis for finding a sheriff's sale voidable, and not void: "[A] void act results where the public officer has no authority to act at all, whereas a voidable act results from the officer's imperfect execution of an otherwise lawful act." *Bangerter v. Petty*, 2010 UT App 49, ¶ 12, 228 P.3d 1250 (quotations omitted). Thus, because the sheriff had the appropriate authority to conduct the sale even if it was imperfectly executed, the *Bangerter* Court concluded that the sale was voidable, not void.

In contrast, in *Singer Mfg. Co. v. Chalmers*, 2 Utah 542 (1880), the Utah Supreme Court held that a trust sale was void where it was not performed by the person authorized with the power of sale under the deed of trust, regardless of whether there was "injury or fraud in the sale" and regardless of whether "the purchaser was an innocent party:"

The deed of trust authorized the sale to be made by the United States Marshal. This was not done. One of his deputies made the sale as auctioneer...The fact that no injury or fraud in the sale has been shown, does not affect the question. Nor is it affected by the fact, that the purchaser was an innocent party. The sale was made by one not authorized to make it, and cannot be upheld. It is simply void, and no one gains any rights under it.

Singer Mfg. Co. v. Chalmers, 2 Utah 542, 546-47 (Utah Terr. 1880).

U.S. Bank/ReconTrust attempt to distinguish *Singer* on the basis that "the auctioneer who conducted the sale was not the appointed trustee and was not authorized to act as trustee under the deed of trust." (See Joint Memorandum in Opposition to Defendant Jim Ring's Motion for Summary Judgment at 6). However, as in *Singer*, ReconTrust was not authorized to act as trustee for a sale by the language of the trust deed itself. The Ring Trust Deed provides that the lender may appoint a successor trustee, who "shall succeed to all the title, power and duties

conferred upon Trustee herein and by Applicable Law.” Trust Deed, ¶ 24 (emphasis added). Thus, the Trust Deed itself limited the powers conferred to ReconTrust as those conferred by applicable law. As an unqualified trustee, ReconTrust could not succeed to the power of sale. Moreover, regardless of the language of the Trust Deed, ReconTrust could not, and did not, possess the power of sale and was not authorized to conduct a nonjudicial foreclosure sale of this property. *See Washington Nat. Ins. Co. v. Sherwood Associates*, 795 P. 2d 665, 669 (Utah Ct. App. 1990) (a contract “implicitly contains the laws existing at the time it was entered”).

U.S. Bank/ReconTrust also attempt to distinguish *McQueen* because the person “who conducted the sale...was not appointed trustee” and never held title, whereas in this case, ReconTrust was appointed trustee, but simply did not have the power of sale. This Court finds this factual distinction to be unpersuasive. The crucial fact present in *Singer* and *McQueen*, that is also present in this case, is the sales were conducted by someone who did not have the authority to conduct them. Thus, the Court finds it irrelevant whether ReconTrust “held title,” because ReconTrust indisputably did not have the power to convey that title through a nonjudicial foreclosure sale.

A. The Sale is Void and Not a Voidable Ultra Vires Act.

U.S. Bank/ReconTrust argue that as successor trustee, ReconTrust held legal title to the property, and “if it exceeded its statutory authority by conveying that title, that ultra vires act would not be void unless it violated public policy.” *See Joint Memorandum in Opposition to Defendant Jim Ring’s Motion for Summary Judgment*, p.7. In support of this argument, U.S. Bank/ReconTrust rely primarily upon two cases: *Millard Cnty. Sch. Dist. v. State Bank of Millard Cnty*, 14 P.2d 967 (Utah 1932) and *Ockey v. Lehmer*, 2008 UT 37, 189 P.3d 51. In *Millard* a bank provided notes and mortgages as collateral security to a school district as security

for public funds deposited by the district with the bank. Approximately four years later, the bank sought the return of the securities, alleging they violated certain statutes. The Utah Supreme Court held that the bank could not repudiate its pledge of the securities after it had benefitted from and used the school district funds. *Id.* at 973. In so holding, the Utah Supreme Court relied on case law that held “a national bank cannot repudiate its contract as ultra vires and at the same time retain the benefits thereof.” *Id.*

Similarly, in *Ockey*, the Utah Supreme Court rejected the attempt by a former beneficiary of irrevocable trusts to invalidate a conveyance, that he expressly (and in writing) had directed the trustees of the irrevocable trusts to make, after he had accepted substantial benefits from the conveyance for several years. *Ockey v. Lehmer*, 2008 UT 37, ¶¶ 26-32. According to the terms of the irrevocable trusts, title to the property would pass to the beneficiary on his 21st birthday, or when he turned 28 if he elected to extend the trust. *Id.* at ¶ 5. He directed the trustees to make the conveyance at issue approximately eight years after he turned 28. *Id.* at ¶ 11. The *Ockey* Court held that the conveyance was voidable, and not void, because, at best, it only harmed the former trust beneficiary, and did not violate public policy. *Id.* at ¶¶ 17-24.

Unlike the circumstances in *Millard* and *Ockey*, Ring is not an actor who seeks to repudiate his own conduct after having accepted substantial benefits resulting from such conduct. There is no allegation that Ring received any benefits by ReconTrust’s illegal performance of the nonjudicial sale. To the contrary, Ring asserts he was deprived of the benefits intended by the legislature’s restriction on who can conduct nonjudicial foreclosure sales.

As recognized by the *Ockey* Court, “In general, the difference between void and voidable contracts is whether they offend public policy. Contracts that offend an individual, such as those arising from fraud, misrepresentation, or mistake, are voidable. Only contracts that offend public

policy or harm the public are void ab initio.” *Ockey v. Lehmer*, 2008 UT 37, ¶ 19, 189 P.3d 51, 56. The *Ockey* Court pointed to language from *Millard* explaining: “only ‘contracts and corporate acts and transactions which are malum in se or malum prohibitum, which contravene some rule of public policy, [or] violate some public duty...are illegal and void.’” *Id.* at ¶ 22 (quoting *Millard*, 14 P.2d at 971-72).

Strong public policy supports the requirement that a qualified trustee conduct a nonjudicial foreclosure sale. In 2001, the legislature substantially narrowed who could conduct nonjudicial foreclosure sales under Utah law. Under the former version of the statute, the power of sale was conferred upon any depository institution. By amendments enacted between 2001-2004, the legislature required that, in order to exercise a power of sale, the trustee must be either a licensed Utah attorney who maintains a place within the state where a trustor could meet with the trustee, or a title company with an office in the state. The obvious intention of the legislature’s revisions was to ensure trustees conducting nonjudicial sales were accessible and present in the state. As the Tenth Circuit recognized in upholding the constitutionality of these limitations imposed by the Utah legislature: “Making it easier for Utahns to meet with trustees, who play a pivotal role in nonjudicial foreclosures, is a legitimate state interest.” *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1048 (10th Cir. 2009); *see also McQueen*, 2013 UT App 53, at ¶21 (“[t]he purpose of requiring the appointment of a qualified trustee is to provide an independent third party who can objectively execute a foreclosure or sale in the absence of judicial oversight. . . . [Thus,] a party must appoint a qualified trustee in order to enforce a [] lien without judicial intervention.”

Neither *Millard* nor *Ockey* involved a nonjudicial foreclosure sale by a person or entity who did not possess authority to conduct such a sale. Unlike the situation presented by this case,

the transactions at issue in *Millard* and *Ockey* were entered into voluntarily and knowingly by the party who later sought to avoid the transaction, but only after having received substantial benefits. This is a dispositive distinction. As the *Ockey* Court stated, it started with the presumption that the contract at issue was voidable, and not void, due to the general rule that "the law favors the right of men of full age and competent understanding to contract freely." *Id.* at ¶ 21. No such presumption applies here, because Ring did not ask ReconTrust to conduct the sale, and Ring did not receive any purported benefits from ReconTrust's conduct.

Allowing unqualified trustees to conduct nonjudicial foreclosure sales contravenes the public policy advanced by the Trust Deed Act's requirements and violates the duty the trustees owe to Utahns. Consequently, this Court finds that the sale conducted by ReconTrust who was unqualified trustee, violates public policy, is illegal and void ab initio.^{4 5}

Because the Court holds the sale by ReconTrust was illegal and void ab initio based upon the undisputed facts, it follows that U.S. Bank's unlawful detainer claim fails as a matter of law because it is not the owner of the Property. Accordingly, U.S. Bank's motion for summary judgment on its unlawful detainer claim against Ring pursuant to Utah Code § 78B-6-802 and/or 802.5 is DENIED, and Ring's motion for summary judgment as to Plaintiff's unlawful detainer claim is GRANTED. Accordingly, U.S. Bank's unlawful detainer claim is DISMISSED.

U.S. Bank also moved for summary judgment and dismissal as to Ring's counterclaims. Several of the grounds argued as support for U.S. Bank's motions relied upon the validity of the

⁴ Because the sale is void, the presumptions afforded to a bona fide purchaser do not apply: "The protections afforded to bona fide purchasers do not apply to deeds that are void. Consequently a void deed cannot convey a legal interest, even against an innocent purchaser or a bona fide encumbrancer for value." *See S.E.C. v. Madison Real Estate Grp., LLC*, 647 F. Supp. 2d 1271, 1279 (D. Utah 2009). Thus, the Court denies U.S. Bank's Motion to Dismiss on this ground. *See* U.S. Bank Memo. in support of Motion to Dismiss at 12-14.

⁵ U.S. Bank and ReconTrust argue that Ring would receive a windfall if the sale is held to be void. *See* Joint Opp. Memo. at 5-6. The Court fails to see how Ring would receive a windfall. If the sale is void, it simply needs to be redone in a legal manner by a qualified trustee. If the purported windfall is the fact that Ring has remained in possession of the property since 2009, that is a windfall U.S. Bank voluntarily chose to bestow upon him by allowing him to remain, and not pursuing unlawful detainer until late 2014.

Trustee's Deed executed by ReconTrust. Because the Court holds the Trustee's Deed is void, it also DENIES U.S. Bank's summary judgment and dismissal motions that rely upon the Trustee's Deed as a basis for relief. Last, to the extent ReconTrust's seeks judgment on the pleadings on the basis that the sale is not void, the motion is DENIED.

III. Ring's First Cause of Action for Quiet Title Is Not Barred by the Statute of Limitations, and His Second and Third Causes of Action Are Moot Because the Sale Is Void.⁶

U.S. Bank moved the Court to grant it summary judgment on Ring's counterclaims because they are barred by the statute of limitations. See U.S. Bank's Memo. in support of Summary Judgment at 5-9. U.S. Bank's motion asks for judgment because Ring was required to assert claims that the sale did not comply with the Trust Deed Act requirements within three or at most four years. *Id.* Ring's Second Cause of Action is based upon defective notice of the sale and his Third Cause of Action is based upon inadequate purchase price. Because the Court has ruled the sale is void, these two causes of action are moot. As to the First Cause of Action for Quiet Title, the Court of Appeals of Utah has held that "the statute of limitations does not apply to true quiet title actions." *Powder Run at Deer Valley Owner Ass'n v. Black Diamond Lodge at Deer Valley Ass'n of Unit Owners*, 2014 UT App 43, 320 P.3d 1076. The Utah Supreme Court has established the general rule that where "the action is purely one to remove a cloud or to quiet title [to real property], the statute of limitations has not application." *Id.* at 1081 (quoting *Branting v. Salt Lake City*, 47 Utah 296, 153 P. 995, 1001 (1915)). The Utah Supreme Court has further stated:

If the action is a true quiet title action, meaning an action merely to "quiet an *existing* title against an adverse or hostile claim of another," then the statute of limitations will not bar the claim. However, "[i]f the party's claim for quiet title relief can be granted only if the

⁶ U.S. Bank also moved to dismiss Ring's Second and Third Causes of Action under Rule 12(b)(6); because the claims are rendered moot by the Court's determination that the sale is void, the Court does not reach these issues.

party succeeds on another claim, then the statute of limitations applicable to the other claim will also apply to the quiet title claim.”

Id. (quoting *In re Hoopiaina Trust*, 2006 UT 53, ¶¶26-27, 144 P. 3d 1129). Given that Ring’s first cause of action for quiet title is an action for “true quiet title” and does not rely upon the success of another claim, this action is not barred by any statute of limitations. Thus, U.S. Bank’s motion for summary judgment as to the First Cause of Action based upon statute of limitations is DENIED.

IV. Ring’s Fourth Cause of Action Against ReconTrust for Violation of the Implied Covenant of Good Faith And Fair Dealing Is Barred by the Six Year Statute of Limitations Pursuant to Utah Code §78B-2-307(3).

ReconTrust moves for judgment on the pleadings, arguing in part that Ring’s Fourth Cause of Action is untimely. Ring’s Fourth Cause of Action is for breach of the implied covenant of good faith and fair dealing and is subject to a six-year statute of limitation under Utah Code §78B-2-309 (“an action may be brought within six years upon...any liability founded [upon the contract]”). Utah Code §78B-2-309(2). Ring claims that ReconTrust breached the implied covenant on the date of the trustee’s sale, and admits that the third-party claim against ReconTrust was filed six years and one day after the date of the trustee sale; however, Ring claims that the relation-back doctrine under Utah Rule of Civil Procedure 15(c) saves the claim by relating it back to the date of the original pleading because “the claim arises [out] of the transaction set forth in the original pleading.” *See* Ring’s Opposition to Judgment on the Pleadings. ReconTrust refutes the application of the relation-back doctrine by citing *Penrose v. Ross* which states, “generally...rule 15(c) will not apply to an amendment which substitutes or adds new parties for those brought before the court by the original pleadings.” *Penrose v. Ross*, 2003 UT App 157, ¶ 9, 71 P.3d 631, 634. Because the relation-back doctrine does not apply when new parties are added to the amended pleadings, the fourth cause of action is barred by the

statute of limitations; therefore, the claims against ReconTrust are untimely and hereby DISMISSED.

V. Ring's First Cause of Action for Quiet Title Does Not Fail to State a Claim.

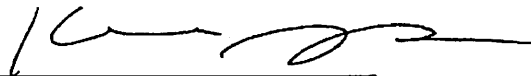
U.S. Bank argues that Ring has failed to set forth a quiet title claim as a matter of law. In making this assertion, U.S. Bank correctly observes that "[t]o succeed in an action to quiet title to real estate, a [party] must prevail on the strength of his own claim to title and not on the weakness of a[n] [opposing party's] title or even its total lack of title." *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44, ¶19, 87 P.3d 734. Nevertheless, "[a]ll a party need do is prove prima facie that he has title which, if not overcome by the opposing party, is sufficient." *Gillmor v. Blue Ledge Corp.*, 2009 UT App 230, ¶14, 217 P.3d 723. In the 12(b)(6) context, Ring has sufficiently set forth a quiet title claim—Ring has alleged that he has title to the Property based on his November 30, 2005 purchase thereof. And because the Court has determined that the Trustee's Deed is void as a matter of law, dismissal is not warranted based upon the deed to U.S. Bank.

U.S. Bank also argues that Ring's quiet title claim is barred by the doctrine of laches. "To successfully assert laches, one must establish that (1) [a party] *unreasonably* delayed in bringing an action, and (2) [the opposing party] w[as] prejudiced by that delay." *Nilson-Newey & Co. v. Utah Res. Int'l*, 905 P.2d 312, 314 (Utah Ct. App. 1995) (emphasis added). "The length of time that constitutes [unreasonable delay] depends on the circumstances of each case, because the propriety of refusing a claim is equally predicated upon the gravity of the prejudice suffered and the length of delay." *Veysey v. Veysey*, 2014 UT App 264, ¶16, 339 P.3d 131. Under a 12(b)(6) standard, the Court cannot make the leap proposed by U.S. Bank to dismiss Ring's quiet title claim. Consequently, U.S. Bank's Motion to Dismiss is DENIED.

No further order is necessary to effectuate this ruling.

DATED this 4th day of September, 2015.

DISTRICT COURT JUDGE



Judge Kara Pettit

