

DIRT Periodic Development for Thursday, May 16, 2013
In re Gifford

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In re Gifford, 2013 WL 1897118 (Wyoming Supreme Court, May 8, 2013)

SYNOPSIS: Wyoming Supreme Court properly recognizes that a mortgage assignment to MERS is not invalid merely because it does not identify MERS as an agent or representative of the note holder and does not describe the nature of the assignee's agency or representative capacity.

FACTS: Betty Gifford borrowed \$438,400 from the Jackson State Bank & Trust (JSB) to finance the purchase of a home in Pinedale, WY, signing a note and mortgage. Shortly after closing, JSB assigned the note to Countrywide (now Bank of America) and the mortgage to MERS. The assignment to MERS (which was recorded) did not describe MERS as an agent or acting in a representative capacity.

In April 2009, Gifford defaulted on the note. In October 2009, MERS assigned the mortgage to BAC Home Loans Servicing (BAC), which was servicing the loan for Bank of America. BAC recorded the assignment, which also did not describe BAC as an agent or as acting in any representative capacity. In December 2009, Gifford filed a Chapter 7 bankruptcy petition. In November 2010, the Chapter 7 trustee brought an adversary proceeding against BAC to avoid the mortgage, arguing that the mortgage was invalid because it failed to comply with the requirements of Sections 34-2-122 and 34-2-123 of the Wyoming Statutes, which provide:

In all instruments conveying real estate, or interests therein, in which the grantee is described as trustee, agent, or as in any other representative capacity, the instruments of conveyance shall also define the trust or other agreement under which the grantee is acting.... [O]therwise the description of a grantee in any representative capacity in each instrument of conveyance shall be considered and held to be a description of the grantee, only, and shall not be notice of any trust, agency or other representative capacity of the grantee who shall be held as vested with the power to convey, transfer, encumber or release the affected title. Whenever the grantee shall execute and deliver a conveyance, transfer, encumbrance or release of the property in a representative capacity, it shall not thereafter be questioned by anyone claiming as a beneficiary under the trust or agency or by anyone claiming by, through or under any undisclosed beneficiary.... [Wyo. Stat. Ann. § 34-2-122]

Any instrument which complies with this act shall be effective regardless of when it was executed or recorded. All instruments of conveyance to, or transfer, encumbrance or release of, lands or any interest therein within the state of Wyoming, which name a grantee in a representative capacity, or name a trust as grantee, and which fail to provide the information required by W.S. 34-2-122, shall cease to be notice of any trust or representative capacity of the grantee and shall be considered and held to be a description of the grantee only, who shall be held to have individually, the full power to convey, transfer, encumber or release the affected title and no conveyance, transfer, encumbrance or release shall thereafter be questioned by anyone claiming with respect to the affected property, as a beneficiary or by anyone claiming by, through, or under an undisclosed beneficiary[.] ... [Wyo. Stat. Ann. § 34-2-123]

The trustee argued that because the recorded assignments of the mortgage did not identify with specificity the terms of the agency relationship between the holder of the note and the assignees, the recorded assignments did not comply with the statutes and thus rendered the mortgage unenforceable. The bankruptcy court certified the question of the mortgage's validity to the Wyoming Supreme Court, which unanimously agreed that the mortgage was valid despite the fact that the assignments did not identify MERS or BAC as acting in a representative capacity.

ANALYSIS: The Court, in an opinion by Justice Hill, held first that the Wyoming statutes, by their express terms, applied only to instruments in which the grantee was specifically described as a trustee, agent, or representative. Because the mortgage assignments did not specifically describe MERS or BAC as acting in an agency or representative capacity – even though they were in fact acting in such a capacity – the Court held that the statutes were inapplicable.

Furthermore, the Court held that the statutes were “notice statutes” that were not intended to apply to the situation presented in the case:

By their plain terms and stated legislative purpose, Sections 122 and 123 do not invalidate or render unenforceable a mortgage simply because the recorded assignment of that mortgage fails to include the statutorily mandated description of the principal/agent relationship. Rather, the statutes operate to protect a third party who deals with the agent. Thus, if the agent transfers the property to a third party, the third party is protected against a claim by the agent's principal challenging the agent's authority to make the transfer.

Because there was no transfer by MERS or BAC to a third party, and no challenge by an undisclosed principal to the actions of MERS or BAC, “this case presents no conflicting claims by a principal and an agent from which a third party needs protection, and the statutes therefore do not apply.”

REPORTER'S COMMENT: The decision is obviously correct and sensible, and it is refreshing to see the court properly articulate the idea that like any notice statute (like a recording statute), the statute has to be understood in the context of whether the plaintiff belongs to the class of persons intended to be protected by the statute.

This concept is not something that the Wyoming Supreme Court has always properly appreciated. For example, in *Countrywide Home Loans, Inc. v. First Nat'l Bank of Steamboat Springs*, 144 P.3d 1224 (Wyo. 2006), a refinancing lender attempted to claim the priority of the paid-off mortgage under equitable subrogation in order to claim priority over the claim of an intervening junior lienholder. The Court improperly rejected the equitable subrogation claim, suggesting that the integrity of the state's recording statute required a conclusion that the refinancing lender had constructive notice of the junior lien and thus took its refinancing mortgage subject to the rights of that lienholder. The court missed the boat in so concluding; the recording statute exists to protect the interests of subsequent purchasers and mortgagees without notice; the existing junior lienholder knew that it was in a subordinate position to the original mortgage and cannot be said to have been a reliance creditor without notice vis-à-vis the refinancing lender. Thus, the purpose of the statute was not served by using it to deprive the refinancing lender of its expected priority.