

# One Minute Memo<sup>®</sup>



## California Court Holds That Omission Of Trustee Does Not Preclude Nonjudicial Foreclosure

Deciding an issue of first impression in California, the Second District Court of Appeal has held that a lender properly may foreclose when the Deed of Trust fails to name a Trustee, provided that a Trustee is named prior to foreclosure. *Shuster v. BAC Home Loans Servicing LP*, No. B235890 (Nov. 29, 2012). In doing so, the court followed the weight of authority from other jurisdictions on this issue.

In *Shuster*, a wrongful foreclosure case, the Deed of Trust did not name a trustee, but designated Mortgage Electronic Registration Systems, Inc. (MERS) as beneficiary. After the borrowers defaulted, MERS substituted ReconTrust Company, N.A. as Trustee and assigned its beneficial interest in the Deed of Trust to the mortgage servicer. ReconTrust then recorded a Notice of Default and completed a Trustee's Sale. The borrowers sued to set aside the foreclosure sale, alleging that there was no authority to foreclose under the power of sale given by the Deed of Trust because no Trustee had been named. After taking judicial notice of the relevant loan documents, the trial court sustained defendants' demurrers without leave to amend, and the borrowers appealed.

The Court of Appeal rejected the borrowers' argument that the Deed of Trust's failure to designate a Trustee transformed the instrument into a mortgage which may be foreclosed only through judicial foreclosure. In reaching this conclusion, the court relied on authorities from other jurisdictions as well as California authorities holding that equity will not allow a trust to fail for lack of a trustee.

The court also rejected the borrowers' challenges to various alleged irregularities in the foreclosure process, reiterating that a debtor must allege tender of the amounts due under the loan in order to invalidate a foreclosure sale. In a welcome conclusion to the opinion, the court wrote: "We are mindful that foreclosures are a far too frequent occurrence in today's difficult financial times. But the hardship must not become a haven for those who, as here, do not appear to make any good faith effort to resolve the issue but, instead, seek shelter in minor ministerial omissions or speculative acts that neither misled nor prejudiced them."

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