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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:
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> (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

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

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[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.

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[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.
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> 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

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[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. Dewsnup, 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

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[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
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> [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

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[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

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[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 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

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[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.

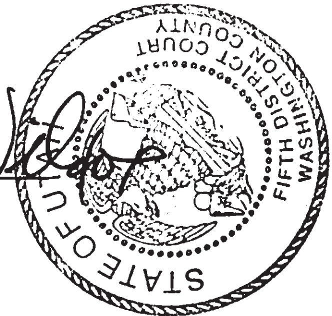
For these reasons, the court holds that Plaintiff has not overcome Defendants' defense that there has been no "disposition of the property by a trustee's sale," as required under Utah Code section 78B-6-802.5, and accordingly dismisses this unlawful detainer action.

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

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 140500067 by the method and on the date specified.

EMAIL: JOHN C BARLOW
EMAIL: BRAD G DEHAAN

Date: 09/02/2014

/s/ TIPPY LASTOWSKI

Deputy Court Clerk