IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

MATTHEW L. GRIFFIN and CYNTHIA L.GRIFFIN, a married couple,

Plaintiffs,

vs.

AMERICAN HOME MORTGAGE, a New York corporation, its successors and assigns or its nominee MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ["MERS"]; RESIDENTIAL CREDIT SOLUTIONS, INC., a Texas corporation; PIONEER TITLE OF ADA COUNTY, an Idaho corporation d/b/a PIONEER LENDER TRUSTEE SERVICES; and All Persons in Possession or Claiming any Right to Possession (DOES I-V),

Defendants.

Case No. CV-11-2388

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO LIFT STAY OF TRUSTEE SALE

On May 3, 2011, this Court granted Plaintiffs' *Motion to Stay Foreclosure and Trustee Sale.* Plaintiffs' motion was granted pursuant to I.R.C.P. 65, and the stay ordered to continue until further proceedings could be had in this matter. Thereafter, Residential Credit Solutions, Inc. (hereinafter, "RCS") and Pioneer Title of Ada County (hereinafter, "Pioneer Title") filed

Defendants Residential Credit Solutions, Inc. and Pioneer Title of Ada County d/b/a Pioneer Lender Trustee Services' Motion to Lift Stay of Trustee Sale and Alternatively to Require Plaintiffs to Pay Monthly Loan Amount into the Court Registry and Memorandum in Support Thereof. Defendants' motion came on for hearing on October 4, 2011. At the conclusion of the hearing, the Court took the matter under advisement. Now, having reviewed the files and records herein and having considered the oral argument of the parties, the Court hereby renders its Memorandum Decision and Order.

FACTUAL HISTORY

On July 9, 2007, Matthew and Cynthia Griffin (hereinafter, "the Griffins"), executed a promissory note (hereinafter, "Note") in the amount of Seven hundred eighty thousand dollars ($780,000.00), in favor of lender American Home Mortgage (hereinafter, "AHM"). The Note was secured by a deed of trust on the property commonly known as 2326 East Summit Drive, Coeur d'Alene, Idaho 83815. The deed of trust was recorded in Kootenai County on July 16, 2007, under Kootenai County recording number 2110753000. The deed of trust lists Mortgage Electronic Registration Systems, Inc. (hereinafter, "MERS") as beneficiary, Kootenai title as trustee, and AHM as lender. The deed of trust further provides that MERS "is acting solely as a nominee for Lender and Lender's successors and assigns."

The Griffins defaulted on the Note in December of 2010. On March 21, 2011, MERS, acting as nominee for AHM, assigned all beneficial interest under the deed of trust to RCS. The Assignment of Deed of Trust was recorded on March 28, 2011, under Kootenai County recording number 2307649000. Also on March 28, 2011, RCS, acting as successor beneficiary, recorded an Appointment of Successor Trustee under Kootenai County recording number 2307650000. RCS appointed Pioneer Title as successor trustee. On March 31, 2011, Pioneer

Title, acting in its capacity as successor trustee, recorded a Notice of Default under Kootenai County recording number 2308209000.

On March 18, 2011, the Griffins filed this lawsuit, and filed their *First Amended Complaint for Injunctive and Declaratory Relief and to Quiet Title* on April 20, 2011. After an uncontested hearing on the Griffins' *Motion to Stay Foreclosure and Trustee Sale*, the Court ordered the trustee sale and foreclosure enjoined and stayed until further proceedings could be held. Defendants' current motion followed.

DISCUSSION

At the October 4, 2011 hearing, the Griffins argued that the Court could either treat the stay as a preliminary injunction pursuant to I.R.C.P. 65, or a motion to stay another proceeding pursuant to I.R.C.P. 12(b)(8). This Court is not convinced that I.R.C.P. 12(b)(8) is applicable to the current matter. Further, the Griffins' initial motion was decided by this Court pursuant to I.R.C.P. 65. Therefore, Defendants' current motion will be scrutinized pursuant to the same procedural rule.

I.R.C.P. 65(e) sets for the grounds pursuant to which a preliminary injunction may issue. Under this Rule, the Court finds only three potentially applicable scenarios under which the foreclosure and trustee sale may remain enjoined:

> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.
>
> (2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.
>
> (3) When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

1. Whether the Griffins are Likely Entitled to the Relief Demanded, I.R.C.P. 65(e)(1):

The Griffins have set forth a number of arguments in response to Defendants' current motion. Each of these arguments is addressed in turn.

a. Whether RCS must show that it is the Holder of the Note, and if so, whether this Showing Requires RCS to Actually Reveal the Original Promissory Note?

The Griffins first argue that RCS has failed to show that it is in possession of the original Note and that, without such possession, RCS has no right to demand payment or seek foreclosure upon the Griffins' real property securing the Note. In part, this argument is based upon the premise that the Uniform Commercial Code bears application here, that this Note is indorsed in blank, and that RCS must prove it is either a holder of the Note, or a nonholder in possession of the instrument who has the rights of a holder. *See* I.C. §§ 28-3-205, 28-3-301.

However, this Court need not decide whether the UCC is applicable in this regard, as RCS has proven that it does, in fact, hold the original Note. This Note was produced for the Griffins' inspection, and was also shown to the Court at the October 4, 2011 hearing. Therefore, the Court finds that RCS is the holder of the note, that the note is payable to bearer. Thus, even if the UCC did apply, RCS has met the requirements thereof, and thus may enforce the Note.

b. Whether RCS has Adequately Produced the Recorded Assignment of the Deed of Trust, and, if so, Whether the Recorded Assignment is Valid?

While a concern was initially raised regarding RCS's ability to produce the recorded assignment of the deed of trust, RCS has subsequently done so. Therefore, the Court's attention turns to whether the recorded assignment is valid.

i. Whether MERS is Properly Designated as a Beneficiary when the Deed of Trust Specifies that MERS Holds Only Legal Title?

The Griffins argue that the language of the deed of trust sets forth a legal nullity because MERS holds only legal title to the interests granted by borrower, which is in contradiction to the

role of the beneficiary and more akin to the role of a trustee. As such, Plaintiffs argue that MERS is, in essence, acting as both the trustee and the beneficiary, which results in a collapse of the trust.

The deed of trust specifies that MERS is the beneficiary under that security agreement. However, the deed of trust also states:

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

I.C. § 45-1502 defines "beneficiary" and "trustee". As stated therein:

> (1) "Beneficiary" means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest, and who shall not be the trustee.
>
> (4) "Trustee" means a person to whom legal title to real property is conveyed by trust deed, or his successor in interest.

In our case, the "beneficiary" is MERS; consistent with the language of the deed of trust enumerating the same. The trustee was Kootenai Title, a position which was later assigned to Pioneer Title.

Here, the language used in the deed of trust does not transform MERS into the trustee. The deed of trust specifically sets forth that Kootenai Title was trustee, and MERS the beneficiary. The Court can certainly agree, however, that MERS would be best served by employing a more artful and precise term to define their role in accordance with future security instruments.

In further support of this argument, the Griffins cite to a case rendered in the Fifth Judicial District of the State of Idaho, which is not binding upon this Court. That decision, *Ralph*

v. Met Life Home Loans, Minidoka County Case No. CV-2010-0200, was issued on August 10, 2011. The deed of trust at issue in *Ralph* contains language mirroring that set forth above in this opinion. There, MERS executed an assignment of the deed of trust to MetLife. MetLife appointed Transnation Title and Escrow as the successor trustee, and a Notice of Default and Notice of Trustee's Sale were thereafter prepared. In *Ralph*, the court held, in part:

> In order to comply with I.C. § 45-1505(1) then, MERS must have been the beneficiary of the trust deed and must have had a beneficial interest to transfer. The definition of beneficiary under I.C. § 45-1502(1) is "the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest, and who shall not be the trustee." While Idaho's statement allows a designated beneficiary, and MERS is given the title "beneficiary" under the deed of trust, in no way is it the party whose benefit the trust deed is given. This is because the lender is retaining all the hallmarks of the beneficiary and the language in the deed limits what MERS is. . . Under that concession, it is difficult to see any benefit that MERS received from the deed of trust. Pursuant to I.C. § 45-1502(1), the real beneficiary under this deed of trust is the lender . . . and any of its assigns.

Id. at 5-6. Thus, the Court held that the only interest that MERS could legally assign was its legal interest in the deed of trust, and because Idaho law requires the assignment of the beneficial interest, or equitable title, MetLife lacked authority to proceed with a non-judicial foreclosure absent a recorded assignment from the lender. *Id.* at 9-10.

In this same vein, the Griffins argue that if MERS did have the right to transfer the beneficial interest in the property, pursuant to *Ralph* and the Statute of Frauds, the authority of MERS (as an agent) must be in writing. As explained by *Ralph*:

> Essentially MERS wants to limit its status on one hand but gain all the rights of a beneficiary or the lender if something goes wrong on the other. There is no good reason to allow MERS to define itself in a conflicting manner to the detriment of the grantor of the deed of trust, or potentially to the lender, or in derogation of the Idaho statute.
>
> Additionally, neither party argued the Statute of Frauds. However, to be an agent for the purposes of a transfer of real property, the authority of the agent must be in writing. I.C. § 9-505(4). The ambiguous language as to MERS in the deed of trust poses a problem on this issue. Nothing in the deed of trust suggests MERS itself has the authority to sell or

> assign the beneficial interest. Thus, it is not clear how MERS could purport to transfer First Horizon's beneficial interest in the deed of trust to MetLife.
>
> There is nothing in the record showing how MERS's actions were necessary to comply with law or custom, as the language in the deed of trust describes. Commercial convenience does not equal necessity, and the law in Idaho can be followed. *In re Salazar*, 448 B.R. 814, 824 (Bank. S.D. Cal. 2011). A bit of work by First Horizon does not make the transaction impossible.

Id. at 9.

However, case law from the First District of Idaho has held that MERS may properly act as beneficiary under a deed of trust. *See, e.g., Trotter v. Bank of New York Mellon, et al*., Kootenai County Case No. CV-10-95; *Edwards v. Mortgage Electronic Registration Systems, Inc.*, *et al.*, Kootenai County Case No. CV-10-2745. In *Edwards*, the court was presented with the issue, in part, that MERS was and could not be a beneficiary. Determining that the authority cited by the parties was not binding on the court, the court in *Edwards* "relie[d] on Idaho law and the instruments themselves to conclude that MERS is the beneficiary under Edwards' Deed of Trust." *Id.* at 11. There, the court held, in part,

> A beneficiary is defined in I.C. § 45-1502 as "the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest, and who shall not be the trustee." Further, in that statute, a trustee is defined as "a person to whom the legal title to real property is conveyed by trust deed, or his successor in interest."
>
> I.C. § 45-1504(2) provides that: The trustee may . . . be replaced by the beneficiary . . .
>
> MERS was the beneficiary and also the nominee for Beneficiary Aurora, fka Lehman Brothers Bank, under the Deed of Trust, recorded as Instrument No. 1952437. The Deed of Trust provides "**MERS is the beneficiary under this Security Instrument."** Also, as the Beneficiary, MERS was entitled to appoint the successor trustee, in this case Pioneer. Pursuant to I.C. § 45-1504(2), upon recording the Appointment of Successor Trustee in the mortgage records of the county in which the trust deed is recorded, the successor trustee shall be vested with all of the powers of the original trustee. The Appointment of Successor Trustee was recorded in Kootenai County, wherein the Deed of Trust is recorded, on December 3, 2009, as Instrument No. 2243744000. Therefore, as a matter of law, this Court finds that Pioneer was vested with the powers of the original trustee, which includes the power of sale.

Id. at 15-16 (Emphasis in original). The *Ralph* decision relies upon no case law which can stand as binding authority upon this Court which was not available to the court in deciding *Trotter* or *Edwards*.

Further, Ninth Circuit case law has stated that, even if MERS were a sham beneficiary, this in and of itself does not necessarily render the deed unenforceable. In *Cervantes v. Countrywide Home Loans, Inc. et al*., ___ F.3d ___, 2011 WL 3911031 (9th Cir., September 7, 2011) the court stated:

> Instead, the plaintiffs advance a novel theory of wrongful foreclosure. They contend that all transfers of the interests in the home loans within the MERS system are invalid because the designation of MERS as a beneficiary is a sham and the system splits the deed from the note, and, thus, no party is in a position to foreclose.
>
> Even if we were to accept the plaintiffs' premises that MERS is a sham beneficiary and the note is split from the deed, we would reject the plaintiffs' conclusion that, as a necessary consequence, no party has the power to foreclose. The legality of MERS's role as a beneficiary may be at issue where MERS initiates foreclosure in its own name, or where the plaintiffs allege a violation of state recording and foreclosure statutes based on the designation. . . .
>
> Here, MERS did not initiate foreclosure: the trustees initiated foreclosure in the name of the lenders. Even if MERS were a sham beneficiary, the lenders would still be entitled to repayment of the loans and would be the proper parties to initiate foreclosure after the plaintiffs defaulted on their loans. The plaintiffs' allegations do not call into question whether the trustees were agents of the lenders. . .the allegations do not raise any inference that the trustee . . . lacks the authority to act on behalf of the lender.
>
> Further, the notes and deeds are not irreparably split: the split only renders the mortgage unenforceable if MERS or the trustee, as nominal holders of the deeds, are not agents of the lenders. . . . Moreover, the plaintiffs have not alleged violations of Arizona recording and foreclosure statutes related to the purported splitting of the notes and deeds.

Id. at 7.[1]

This Court is similarly unmoved by the Griffins' Statute of Frauds argument. Assuming, without deciding, that the Statute of Frauds did require written authorization from AHM to

[1] Plaintiffs' "note-splitting" argument is more thoroughly addressed below.

MERS to act as its agent, the Statute of Frauds is meant to prevent just that—fraud. 73 Am. Jur. 2d Statute of Frauds § 313.[2] Here, clearly neither party to the agency agreement, that is, AHM and/or MERS, have argued that there is no enforceable agreement between them. Further, MERS has performed pursuant to its purported agency in acting in the role as beneficiary under this deed of trust. *See* I.C. § 9-504.

Recognizing that the Court is not faced with a motion for summary judgment, the Court need go no further in making a discretionary determination that the Griffins are unlikely to prevail on the merits of their claims for purposes of continued enjoinment. Here, the Court has considered the case law before it, and finds *Cervantes* and the First Judicial District precedent more appealing at this preliminary stage. The deed of trust herein specifically states that MERS is the beneficiary under that security instrument. The deed of trust further provides MERS with authority to exercise the right to foreclose, and take any action required of lender, should law or custom necessitate the same. The deed of trust also specifically lists Kootenai Title as Trustee. Thus, the Court in its discretion concludes that the Griffins are not likely to succeed on the merits of these arguments.

ii. Whether the Note and Deed of Trust were Impermissibly Split, Thereby Extinguishing the Right to Foreclose upon the Security:

The Griffins further argue that Griffins' Note and deed of trust were impermissibly split, that the Note does not follow the secured interest, and thus that there is no right to foreclose. Here, however, even if there was a split of the Note and the deed of trust, as in *Cervantes*, *supra*, there has been no showing that the two are irreparably split. At this time, there is no question that RCS holds the Note. As the holder of the Note, they are certainly entitled to repayment under the terms set forth therein. This Court can appreciate an argument exists that MERS had no authority

[2] This authority has been cited in other Idaho case law. *See, e.g., Ogden v. Griffith*, 149 Idaho 489, 236 P.3d 1249 (2010).

to transfer the Note, but here, RCS holds the Note, and that Note is indorsed in blank, rendering a determination of MERS's authority to transfer the Note inapposite.

Further, as in *Cervantes*, Plaintiffs "have not alleged violations of [Idaho] recording and foreclosure statutes related to the purported splitting of the notes and deeds." Instead, Plaintiffs' argument assumes that the reciprocal of the rule that the security follows the note is untrue, and forever disables a note holder's ability thereafter to claim a security interest. Additionally, while Plaintiffs cite *Ralph* as authority for the same, this Court is not convinced by the analysis in *Ralph* regarding the same. Plaintiffs also cite *Armacost v. HSBC Bank USA, et al*., United States District Court for the District of Idaho, Case No. 10-CV-274, Report and Recommendation. However, *Armacost* specifically stated:

> Idaho Code § 45-911 states that "[t]he assignment of a debt secured by mortgage carries with it the security." This provision appears to codify the common law rule regarding the result to the security of an assignment of the debt, but does not address the reverse. *There does not appear to be any Idaho state court case law on this point of assignment.*

Id. at 24.

In terms of the exact timing, the Court does not know whether RCS obtained beneficiary status prior to obtaining the Note, such that a question may arise regarding whether the Note should follow the secured interest. The Court does not decide this issue today. The Court is also not concerned with a "split" of the Note and deed if MERS acts as a nominee or otherwise as an agent for RCS. There are no facts in the record with which the Court can make this determination.

Rather, based on the record, RCS holds the Note, and for the reasons set forth above, also appears to hold the beneficial interest pursuant to the deed of trust. The record does not reflect any timeline which may affect this determination and, ultimately, "[o]ne who seeks an

injunction has the burden of proving a right thereto." *Harris v. Cassia County*, 106 Idaho 513, 518, 681 P.2d 988, 993 (1984) (citation omitted).

2. Whether the Griffins would Suffer Great or Irreparable Injury, I.R.C.P. 65(e)(2):

The Court is not convinced that the Griffins will suffer irreparable injury should the Court lift the stay. The requirements of the Idaho Deed of Trust Act, I.C. § 45-1502 *et seq.* set forth the guidelines and procedures for carrying out a non-judicial foreclosure proceeding.

I.C. § 45-1504(2) provides that:

> The trustee may resign at its own election or be replaced by the beneficiary. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, the beneficiary shall appoint a trustee or a successor trustee. Upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.

As explained above, it is most likely that MERS was a proper beneficiary. As a proper beneficiary, MERS was the proper party to record an Assignment of Deed of Trust and thus transfer beneficial interest to another entity, as nominee for AHM—here, to RCS. Thereafter, as beneficiary, RCS was permitted to record an Appointment of Successor Trustee, thereby appointing Pioneer Title as successor to Kootenai Title.

Pursuant to the Act, in order to initiate non-judicial foreclosure proceedings, in brief, three conditions must be met: (1) the trust deed, all assignments, and the appointment of successor trustee must be recorded in the mortgage records of the county where the property is located; (2) there must be default; and, (3) the trustee or beneficiary must record a notice of

default and mail a copy of such notice by registered or certified mail to any person requesting such notice of record as provided in I.C. § 45-1511. I.C. § 45-1505(1)-(3).

Here, it is clear that the trust deed, assignments, and appointment of successor trustee were properly recorded in Kootenai County, where the property is located. The Griffins do not dispute that they are in default. A notice of default is also recorded in Kootenai County. Here, there is a clear chain of title set forth tending to show that non-judicial foreclosure is most likely proper. This, alone, is sufficient for the Court to find a lack or irreparable injury.

However, in addition to the foregoing, the Court finds irreparable harm very unlikely as the Griffins were clearly aware of the agency relationship between AHM and MERS, as the nature of this relationship was expressly set forth in the deed of trust. Further, the Griffins were clearly aware of the potential consequences which could arise upon default, as these consequences are similarly set forth in the trust deed. The Griffins cannot be irreparably harmed by seeing acts unfold, the nature of which the Griffins were put on notice would occur in the event of default.

iii. **Whether it Appears that Defendants will do an Act in Violation of the Plaintiffs' Rights Tending to Render the Judgment Ineffectual, I.R.C.P. 65(e)(3):**

For the foregoing reasons, the Court is not convinced that Defendants will do an act in violation of the Griffins' rights in foreclosing upon the property and engaging in a trustee sale. As explained above, Defendants appear to have a right to initiate non-judicial foreclosure, and to do so, when done under the terms of the Act, do not violate a borrower's rights.

ORDER

The Court being fully advised in the premises and good cause appearing, therefore, IT IS HEREBY ORDERED, as follows:

1. Defendants' Motion to Lift the Order Staying the Trustee Sale is GRANTED.

DATED: This ____ day of October, 2011

_____
Benjamin R. Simpson
District Judge # 1001

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of October, 2011, I caused, to be served, a true and correct copy of the foregoing document as addressed to:

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_____
Deputy Clerk