Willamette Valley American Inn of Court

Presentation Materials:

Foreclosure Battle

Team Martinez

January 13, 2011

Table of Contents

1) *In re Fred Leroy Allman, Debtor. First American Title Company, et. al. v. CIT Group/Consumer Finance, Inc., et. al.*, 2010 WL 3366405 (Bankr. D. Or. 2010);

2) *Landmark National Bank v. Boyd A. Kesler, et. al.* 289 Kan. 528, 216 P.3d 158 (2009);

3) Example Affirmation and Affidavit required for filings in the Supreme Courts of the State of New York;

4) Federal Law: *Protecting Tenants at Foreclosure Act (PTFA); and*

5) State Law: *ORS 86.755: Obtaining possession of property after sale.*

priority of trust deed
ORS 93.640(1)
ORS 86.715
release of trust deed
ORS 87.920
ORS 86.720
MERS
ORS 93.740
attorney fees

First American Title v. CIT Group, Adversary No. 08-3245
In re Fred Allman, Case No. 08-31282-elp7

8/24/10 ELP Unpublished

Memorandum Opinion ruling on a stipulated facts trial regarding the validity and priority of liens on two parcels of real property. There were a number of deeds of trust recorded against the property, as well as judgments and a lis pendens.

CIT held a trust deed on the property pursuant to a home equity line of credit. Debtor refinanced, and the underlying debt was paid off. When CIT did not reconvey the deed of trust, First American released it pursuant to ORS 86.720. The court discusses each of CIT's arguments for why the release of the trust deed was invalid. First, it rejects CIT's argument that the obligation was not fully satisfied. The court reviewed the language of the note and deed of trust, and concluded that the debtor requested closure of her account in writing, as required by the line of credit instrument. It rejected the argument that negotiation of the payoff check was an accord and satisfaction governed by ORS 73.0311.

Second, the court rejected CIT's argument that the notice provided to it by First American was insufficient. The court discussed whether MERS was a beneficiary of the trust deed that had to be given notice of the intention to record the release of the deed of trust. The court concluded that MERS was not a beneficiary as defined in ORS 87.705(1), and was merely a nominee. The court also concluded that ORS 87.720, which provides for an objection period after notice is given, must contemplate that the lender object if it believes there is an error in the substance of the notice or the noticing procedure. The court concluded that the release of the trust deed was valid.

The opinion also discusses lis pendens under ORS 93.740 and rejected plaintiffs' request for attorney fees under ORS 86.720(9).

Below is an Opinion of the Court.

ELIZABETH PERRIS
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re: FRED LEROY ALLMAN, Debtor.	Bankruptcy Case No. 08-31282-elp7
FIRST AMERICAN TITLE COMPANY, SAXON MORTGAGE SERVICES, INC., and GREENPOINT MORTGAGE FUNDING, INC., Plaintiffs, v. CIT GROUP/CONSUMER FINANCE, INC., PETER McKITTRICK, as Trustee of the Bankruptcy Estate of Fred Leroy Allman and Kimberly Allman, KIMBERLY A. ALLMAN, MADALYN FALCON, FRERES BUILDING SUPPLY, an Oregon corporation, CROSLAND EARTHWORKS OF OREGON, INC., an Oregon corporation, TED MEEKER dba TED MEEKER ELECTRIC, TIMMERMAN & ASSOCIATES CONSTRUCTION, LLC, an Oregon limited liability company, DEERE & COMPANY, a Delaware corporation duly authorized to transact business in the State of Oregon, METROPOLITAN AGENGIES, INC.,	Adversary No. 08-3245-elp MEMORANDUM OPINION

an Oregon corporation, RONALD WAYNE BERKEY, SR., SHERMAN CLAY & CO. dba MUSIC ACCEPTANCE CORPORATION, an Indiana corporation duly authorized to transact business in the State of Oregon, BRETTHAUER OIL COMPANY, an Oregon corporation, BACKYARD EXCAVATION, INC., an Oregon corporation, EXCEL EXCAVATION, INC., an Oregon corporation, BUCKLEY LeCHEVALLIER, PC, an Oregon professional corporation, and FRED ALLMAN,

Defendants.

This complaint arises out of a dispute among a number of parties who each claim a security interest in real property titled in the name of Kimberly Allman ("Kimberly"), whose estate is substantively consolidated with the bankruptcy estate of debtor Fred Allman. The primary question is the order of priority of the liens. Default judgments have been entered against many of the defendants. The remaining parties stipulated to the facts pertinent to all of the remaining claims in the complaint and to the first counterclaim filed by defendant CIT Group/Consumer Finance, Inc. ("CIT"). CIT's second, third, and fourth counterclaims for negligence, breach of contract, and breach of fiduciary duty against First American Title Company ("First American") are reserved for later decision.

FACTS

Before Fred Allman filed bankruptcy, his wife Kimberly owned two adjoining parcels of property (collectively "the property"). Parcel 1 has a barn located on it; Parcel 2 has a house located on it. In January 2006, Kimberly entered into a home equity line of credit agreement with

CIT. CIT took a deed of trust on both parcels, which was in second position behind the first mortgage held by Lehman Brothers. CIT's trust deed was recorded in January 2006.[1]

In May 2006, Kimberly refinanced the loans on the property. Pursuant to the refinancing by Charter Capital Corporation ("Charter"),[2] the senior lien, held by Lehman Brothers, and the second lien, held by CIT, were to be paid off and released, and Charter was to be in first position. Charter's deed of trust covers Parcel 2 only.

The refinancing closed. First American acted as the escrow agent for the transaction. It used the funds from the refinance to pay off Lehman Brothers, which released its lien. First American also sent a payoff check to CIT for the amount CIT had reported would pay in full the obligation owing on its line of credit. On May 23, 2006, the Charter deed of trust encumbering Parcel 2 was recorded.

Shortly thereafter, on June 13, 2006, Madalyn Falcon filed a complaint in state court against Kimberly and, on that same date, recorded a lis pendens, listing both parcels as real property affected by the notice.

Also in June 2006, Kimberly took out a home equity line of credit

---

[1] The parties have stipulated that the trust deed was recorded on January 26, 2006. Stipulation for Trial on Stipulated Facts at ¶ 7. The recording date that appears on the trust deed is January 23, 2006. Line of Credit Trust Deed at p.1 (Exh. 3). In this Opinion, I will use the date of recording stipulated to by the parties, January 26, 2006.

[2] Charter has assigned its interest in the Charter note and trust deed to plaintiff Saxon Mortgage Services, Inc., which is now the owner and holder of that note and trust deed. Because it was Charter that refinanced the obligations on the property, I will refer throughout this decision to Charter.

with Greenpoint Mortgage Funding, Inc. ("Greenpoint"). On June 20, 2006, Greenpoint recorded a deed of trust encumbering Parcel 2.

On October 4, 2006, when CIT had not released its lien on Kimberly's property, First American recorded a release of the CIT deed of trust, based on its understanding that the CIT obligation had been satisfied by the refinance.

In March 2007, Timmerman and Associates Construction ("Timmerman") filed a lien claim on Parcel 1. It filed a foreclosure action in July 2007.

In September 2007, CIT executed and recorded an "Amendment of Erroneous Reconveyance and Reinstatement of Deed of Trust" and also re-recorded the original CIT deed of trust that had been the subject of the release filed by First American.

On April 11, 2008, Falcon obtained a limited judgment against Kimberly for attorney fees. On April 21, 2008, Ronald Wayne Berkey, Sr. obtained a judgment against Kimberly.

For ease of reference, below is a listing of the recordings in chronological order:

Date Recorded	Party Recording and Document Recorded	Covers Parcel 1	Covers Parcel 2
1/26/06	CIT Deed of Trust	X	X
5/23/06	Charter Deed of Trust		X
6/13/06	Falcon lis pendens	X	X
6/20/06	Greenpoint Deed of Trust		X
10/4/06	First American - Release of CIT Deed of Trust	X	X
3/16/07	Timmerman Judgment	X	

Date Recorded	Party Recording and Document Recorded	Covers Parcel 1	Covers Parcel 2
9/28/07	CIT Reinstatement of Deed of Trust	X	X
4/11/08	Falcon judgment entered	X	X
4/21/08	Berkey judgment entered	X	X

CIT seeks a declaratory judgment that it has a lien with priority over all other liens on both Parcel 1 and Parcel 2. Charter and Greenpoint seek a declaration that their security interests in Parcel 2 have priority over any lien CIT may have. In the alternative, Charter argues that it is first in position under the doctrine of equitable subrogation. First American seeks a declaratory judgment that it complied with ORS 86.720 in reconveying CIT's trust deed. First American, Charter, and Greenpoint all seek an award of attorney fees against CIT.

Falcon seeks a determination that her interest in the property has priority dating from the date she filed her lis pendens. Timmerman asks the court to find that it has priority over all other interests with regard to Parcel 1. Finally, Berkey claims that CIT is not entitled to priority.

DISCUSSION

Under Oregon law, a mortgage that is recorded first has priority over later-recorded mortgages. ORS 93.640(1). "A trust deed is deemed to be a mortgage on real property[.]" ORS 86.715. Thus, priority is ordinarily determined by the date of recording.

CIT asserts that it is entitled to a declaration that its interest in both Parcel 1 and Parcel 2 is in first position, based on its

recording of the deed of trust on January 26, 2006. That recorded deed of trust is first in time before all of the other interests that are the subject of the litigation and, therefore, CIT argues that it has priority.[3]

Charter and Greenpoint argue that their interests in Parcel 2 are ahead of CIT's interest, because CIT's deed of trust was released by First American's recording of the Release of Deed of Trust on October 4, 2006. CIT does not dispute that, if the release of its trust deed was valid, Charter and Greenpoint have interests in Parcel 2 that come ahead of CIT, because CIT did not re-record its deed of trust until September 2007, which was after Charter and Greenpoint had recorded their trust deeds. In the alternative, Charter argues that it should have priority over CIT based on equitable subrogation.

1. Effect of First American's release of CIT's deed of trust

CIT argues that First American's recording of the release of the CIT deed of trust was invalid and had no effect, because it did not comply with ORS 86.720, which allows a title insurance company to record a release of a trust deed under certain circumstances. CIT relies on ORS 87.920 to argue that, because First American did not comply with ORS 86.720, the recorded release was of no force and effect.

ORS 87.920 provides:

> Except where filing of the document is specifically required or authorized by statute, no document filed for recording or otherwise with any public officer in this state . . . shall create a lien or encumbrance upon or affect the title to the real or personal property of any person or constitute actual or constructive notice

---

[3] The deed of trust secured future advances under the line of credit agreement. ORS 86.155(2).

to any person of the information contained therein.

First American recorded the release of CIT's trust deed pursuant to ORS 86.720(2). That statute provides, as relevant here:

> If a full reconveyance of a trust deed has not been executed and recorded pursuant to the provisions of subsection (1) of this section [which requires reconveyance of a trust deed after performance of the obligation secured] within 60 calendar days of the date the obligation secured by the trust deed was fully satisfied, then:
>
> . . . .
>
> (b) Upon compliance with the notice requirements of subsection (3) of this section, any title insurance company or insurance producer may prepare, execute and record a release of trust deed.

When a release of trust deed is recorded pursuant to this statute, it "shall be deemed to be the equivalent of a reconveyance of a trust deed." ORS 86.720(5).

CIT argues that First American's release of the trust deed did not comply with the statute for two reasons: the obligation underlying the deed of trust was not fully satisfied, and the notice given did not comply with ORS 86.720(3).

A. Was the obligation fully satisfied?

ORS 86.720 authorizes a title insurance company to release a trust deed when the beneficiary fails to do so, but only if the obligation was "fully satisfied." In this case, CIT argues, the obligation was not fully satisfied, so the release was not authorized by statute.

ORS 86.720(1) requires the beneficiary of a trust deed to request that the trustee reconvey the interest in the real property "[w]ithin 30 days after performance of the obligation secured by the trust deed." If the trust deed is not reconveyed "within 60 calendar days of the date the

obligation secured by the trust deed was fully satisfied," the title insurance company is required to give notice as provided in subsection (3) of the statute and then "prepare, execute and record a release of trust deed." ORS 86.720(2), (3).

CIT argues that the line of credit obligation was not fully satisfied by payment of the full amount of outstanding debt through the refinancing transaction, because Kimberly did not authorize in writing the closing of the line of credit account. Thus, according to CIT, the payment from the refinancing merely reduced the balance to zero. The account was still open, and CIT was still obligated to provide advances on request from Kimberly, which would be secured by the deed of trust.

CIT relies on the distinction in the Home Equity Line of Credit Agreement, Exh. 2, between a borrower suspending her right to obtain loan advances and the borrower terminating her right to obtain loan advances. It argues that Kimberly never authorized closure of her account, but merely "froze," or suspended, her right to obtain advances.

The Line of Credit Agreement provides:[4]

> I may terminate my right to obtain loan advances by sending you a written notice which will become effective upon receipt by you. I may suspend my right to obtain loan advances pursuant to paragraph 11.D. above.

Line of Credit Agreement ¶ 15.A. Paragraph 11.D. provides:

> If more than one Borrower signs this Agreement and any of us request in writing that you cease making loan advances, you may comply with such a request. If any of us sends you a written notice which

---

[4] "I," "me," and "my" refer to the borrower; "you" and "your" refer to the lender. If there is more than one borrower, "I," "me," "my," and "us" "refer to all who sign, separately and together." Line of Credit Agreement at p.1.

> indicates that any of us does not intend to be obligated for any further loan advances obtained by any of us, you may treat that notice as a request to stop making loan advances, and comply with the request. All of us who have signed this Agreement must join in any request to reinstate the right to obtain loan advances from the Account for such request to be effective. If all such persons subsequently request reinstatement of the loan advances, you must honor such a request unless a condition [of default] has occurred.

Id. at ¶ 11.D.[5]

When Kimberly obtained refinancing from Charter, First American as the escrow agent sent a request to CIT for a payoff amount. The request was signed by Kimberly, and said:

> IF AN EQUITY LOAN IS TO BE PAID IN FULL THROUGH ESCROW, the undersigned hereby instruct Equity Credit Line Lender to freeze the existing credit line upon receipt of this signed statement. **The undersigned agree that we will not take any further advances/draws from this account.**

Exh. 15 at p.2 (emphasis in original).

In response to the payoff request, CIT sent a letter addressed to Kimberly but sent via facsimile to First American, showing that $265,299.99 was the "TOTAL TO PAY ACCOUNT IN FULL" as of May 5, 2006.[6] Exh. 16. That amount included principal and accrued interest, plus a $100 reconveyance fee. CIT's letter also said:

> If your account is a Home Equity Line of Credit account: You must include a letter authorizing the closing of your account. Without signed authorization, your account will remain open and the mortgage

---

[5] This paragraph contemplates more than one borrower. Kimberly was the sole borrower on this line of credit.

[6] It is worth noting that the CIT letter did not state that $265,299.99 was the amount necessary to pay the account balance to $0, which is CIT's argument in this adversary proceeding. In other words, to the extent there is a distinction between paying the account to $0 and paying in full, CIT, by the terms of its demand, requested sums sufficient to pay the account in full.

will not be released.

Exh. 16. The last line of the letter said that "[a] lien release document will be processed once the loan has been paid in full."

First American sent a second request for an updated payoff amount, using the same authorization form signed by Kimberly, requesting that CIT provide the payoff amount as of June 2, 2006. Exh. 17. CIT responded with the same form letter as the earlier one, this time showing a payoff amount of $265,796.52 as of June 2, 2006. The letter again included the reconveyance charge and again included the statement that the borrower must provide a written authorization to close a home equity line of credit account. It again contained the language advising that, without the authorization, the account would remain open and the mortgage would not be released, but also stating that a lien release document would be processed once the loan was paid in full. Exh. 18.

The refinance was funded, and on May 23, 2006, First American sent a check to CIT for $265,796.52. The cover letter accompanying the check provides, as relevant:

> The closing of the above referenced transaction is now complete. For your records we enclose the following:
>
> > Our check in the amount of **$265,796.52** representing full payoff of the above referenced loan, negotiation of said check constitutes your agreement to issue a full Reconveyance of the Deed of Trust securing said loan
> >
> > . . . .
>
> Oregon Revised Statute 86.720 provides that we may release/reconvey the above trust deed, notwithstanding the fact that the beneficiary has to request us take such action if said request has not been received within 60 days of the date that the obligation has been satisfied in whole, and the Grantor or his successors so request us. The purpose of this notice is to inform you that <u>our records disclose that said obligation has been satisfied in full</u> and that

the grantor has so requested us to release/reconvey said trust deed.

Pursuant to ORS 86.720, you are hereby given notice that you have 30 days from receipt of this notice to give us written objection that you do not wish us to so release/reconvey. If we do not receive written objection from you within 30 days of the receipt of this notice, we intend to release/reconvey the trust deed pursuant to ORS 86.720 and it will cease to be a lien on the subject property. If you do not wish us to release/reconvey said trust deed, you must inform us of your objections in writing and forward these objections to the above address within this 30-day period.

Ex. 21 (underlined emphasis supplied; boldface emphasis in original).

After CIT did not reconvey the trust deed, and First American did not receive any objection to the notice contained in the May 23 letter, First American sent CIT a Notice of Intent to Release/Reconvey Deed of Trust, dated August 30, 2006. The Notice advised CIT, in the same language used in the May 23 letter, that it intended to release the trust deed as provided by ORS 86.720, unless CIT objected within 30 days of receipt of the notice. It further stated, as did the May 23 letter, that "[i]f you do not wish us to release/reconvey said trust deed, you must inform us of your objections in writing and forward these objections to the above address within this 30-day period." Exh. 24.

CIT received the notice and did not object. On October 4, 2006, First American recorded the release of the trust deed. Ex. 9.

CIT's primary argument that it is in first position is that the recording of the release of the trust deed was invalid, because its obligation had not been fully satisfied by the payment in full of the amount CIT was owed on the line of credit.

The question is whether Kimberly's instruction to CIT to freeze her line of credit account and her agreement not to take further advances from the account was a suspension of the right to obtain further

advances, or a termination of the account.

CIT argues that it was a freeze, or temporary suspension, and that Kimberly never requested closure of her account in writing. It explains that borrowers often freeze their accounts pending payoff, so the exact amount owing can be ascertained. This freeze is merely a suspension, CIT says, because the borrower will want to reinstate the line of credit if for some reason the planned financing does not come through.

Although I agree that, if the statement simply said that the account should be "frozen," it would be a suspension, the authorization says more than that. It says that Kimberly agrees not to take any further advances from the account. That language is indicative of a termination of the account, not merely a suspension of it.

This reading of the statement is supported not only by the language of the authorization, but also by CIT's actions. The authorization on which CIT relies for its suspension argument is prefaced by the statement, "If an equity line loan is to be paid in full through escrow," indicating that CIT understood that the payoff request was intended to pay off the home equity line of credit. The amount CIT demanded be paid included a $100 reconveyance fee, which was unnecessary if the payment was not a complete satisfaction of the debt.

Second, when First American sent the payoff check to CIT, its letter said that the payment represented "full payoff of the above referenced loan," and that negotiation of the check was an "agreement to issue a full Reconveyance of the Deed of Trust securing said loan." That letter also gave CIT notice that First American would release the deed of trust if CIT did not, and that CIT should object in writing if it did not want

the deed of trust released. The payoff amount included $100 for a reconveyance fee, which CIT accepted.

CIT argues that, under ORS 73.0311, its negotiation of the payoff check does not mean that it was accepting the check as full payment of the line of credit obligation. ORS 73.0311 provides:

> The negotiation of an instrument marked "paid in full," "payment in full," "full payment of a claim," or words of similar meaning, or the negotiation of an instrument accompanied by a statement containing such words or words of similar meaning, does not establish an accord and satisfaction that binds the payee or prevents the collection of any remaining amount owed upon the underlying obligation unless the payee personally, or by an officer or employee with actual authority to settle claims, agrees in writing to accept the amount stated in the instrument as full payment of the obligation.

This is an accord and satisfaction statute. "An 'accord and satisfaction' is a method of discharging a contract or a claim or cause of action whereby the parties agree to give and accept something other than that which is due in settlement of the claim and to perform the agreement." 1 Am. Jur. 2d, "Accord and Satisfaction" § 1 (2005) (footnote omitted). CIT's acceptance of the full amount due, along with Kimberly's signed authorization to close the account, was not acceptance of any substituted consideration or performance; it was acceptance of the full performance that was due. The statute does not assist CIT.

The line of credit agreement gave Kimberly the right to mark a payment "Payment in Full" if "the amount of the check is sufficient to pay" the account "in full as of the date" CIT received the payment. Home Equity Line of Credit Agreement at ¶ 17.L. (Exh. 2). Further, there would have been no basis for a reconveyance fee in the payoff amount if CIT did not intend to reconvey the deed of trust.

CIT did not respond in any way to the letter accompanying the payoff check, or object to the later Notice of Intent to Release/Reconvey Deed of Trust, which also gave notice that First American was going to release the trust deed because the obligation had been satisfied in full.

CIT's acceptance of the payoff check, which included the $100 reconveyance fee, as full satisfaction of the obligation and its failure to object to First American's notice of intent to release the deed of trust indicates that the authorization language was sufficient to terminate CIT's obligation to make further advances. This authorization, combined with the payment from First American of the amount needed to pay the account in full, was sufficient to satisfy Kimberly's obligation to CIT in full.

Kimberly's intent to close the account is further indicated by her closing instructions, which required the Charter loan to be recorded in first position after paying off and closing both the Lehman Brothers and the CIT liens. Exh. 19 at p.3. The closing instructions included a payoff schedule, which again indicated that the CIT lien would be paid through closing. Id. at p.7 These instructions support a reading of Kimberly's signed statement that she would not take any more advances from the CIT account (Exh. 15) as an authorization to terminate her right to further advances and close the account.

CIT relies on the statement in its response to the two payoff requests that, if the account was a home equity line of credit, the borrower "must include a letter authorizing the closure" of the account, and that, if there was no signed authorization, the account would remain open and the mortgage would not be released. There are three responses

to this argument. First, the letter is ambiguous. It provides that the payoff amount includes a $100 reconveyance fee, which would be applicable only if the deed of trust was to be reconveyed, and it also includes a statement at the end of the letter that "[a] lien release document will be processed once the loan has been paid in full." Nothing in that letter indicated to either First American or to Kimberly that her written authorization, agreeing to take no further advances from the account, was insufficient to constitute the written authorization to close her account.

Second, nothing in the line of credit agreement requires that a written authorization to close an account be a separate letter authorizing that closure, as CIT seems to argue. The agreement allows termination of the right to obtain future loan advances by sending "a written notice which will become effective upon receipt" by the lender. Home Equity Line of Credit Agreement at ¶ 15.A. (Exh. 2). That is what Kimberly did when she signed the payoff authorization.

Third, there is no evidence that CIT ever read Kimberly's statement that she would not take further advances from the CIT account. Had CIT done so, it would have understood that her statement, along with the closing instructions and letter accompanying the payoff check, showed that Kimberly was terminating the agreement.

CIT also argues that the authorization was a request to suspend rather than terminate the agreement because Kimberly did not return the unused line of credit blank checks, as required by the line of credit agreement. The agreement provides that, on termination, the borrower "must return unused Home Equity Checks[.]" Home Equity Line of Credit

Agreement at ¶ 15.C. (Exh. 2). What CIT does not mention is that the agreement also provides that, when an account is suspended, the borrower may request reinstatement of the right to obtain loan advances. Id. at ¶ 11.D. There is no evidence that Kimberly requested reinstatement; she instead simply wrote checks on the account, which CIT chose to honor. I do not find Kimberly's failure to return the blank checks to CIT any indication that, when she signed the payoff authorization, she intended to merely suspend rather than terminate the account.

Because the payment to CIT was a full satisfaction of the obligation, First American was justified in beginning the release/reconveyance process pursuant to ORS 86.720.

B. Was the notice provided by First American sufficient?

CIT also argues that the release of its trust deed was ineffective because First American did not comply with the notice requirements of ORS 86.720(3). That statute requires that, before a title insurance company releases a trust deed, it must "give notice of the intention to record a release of trust deed to the beneficiary of record and, if different, the party to whom the full satisfaction payment was made." ORS 86.720(3).

First American gave notice of the intention to release the trust deed to CIT. It did not give notice of the intent to release to Mortgage Electronic Registration Systems, Inc. ("MERS"), which is listed as the beneficiary on the trust deed. According to CIT, this failure invalidates the release of the trust deed, because the filing of the release was not "specifically required or authorized by statute[.]" ORS 87.920.

The threshold question is whether notice to MERS was required by the

statute. ORS 86.720(3) requires notice of the intention to record a trust deed release be given "to the beneficiary of record," as well as to "the party to whom the full satisfaction payment was made." "Beneficiary" is defined by statute as "the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the person's successor in interest[.]" ORS 86.705(1).

The trust deed provides that it "secures to Lender," which is CIT, the borrower's obligations for repayment of the debt secured. Line of Credit Trust Deed at p.1 (Exh. 3). Paragraph 23 of the deed of trust says that "[t]his Deed of Trust is given to secure prompt payment to the Lender of all sums advanced pursuant to the Note" and also "secures each advance made pursuant to the Note" and "any extensions, renewals or modifications of the Note . . . ." Id. at ¶ 23.

The trust deed lists MERS as the beneficiary "solely as nominee for Lender and Lender's successors and assigns," and states that "MERS is a separate corporation that is acting as a nominee for Lender and Lender's successors and assigns." Id. at p.1. It further says that "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Deed of Trust, 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 Deed of Trust." Id.

Payments on the line of credit were to be made to CIT, not to MERS. Home Equity Line of Credit Agreement at ¶ 2 (Exh. 2). Despite the

language in the trust deed that purportedly authorizes MERS to exercise interests under the trust deed such as foreclosing or releasing and canceling the deed of trust, the trust deed also provides that it is CIT, as lender, that can elect to exercise rights on the borrower's default. Line of Credit Trust Deed at ¶ 17 (Exh. 3). "Upon payment of all sums secured by this Deed of Trust, Lender shall request the Trustee to reconvey the Property and shall surrender this Deed of Trust and all notes evidencing debt secured by this Deed of Trust to the Trustee." Id. at ¶ 19. Notices are to be sent to the lender, which is CIT, not to MERS. Id. at ¶ 12.

I conclude that the failure to give notice of the release to MERS does not make the release ineffective, for several reasons.

First, under the statutory definition, CIT is the beneficiary, as it is the "person for whose benefit" the deed of trust was given. The trust deed makes clear that MERS is merely a nominee for the lender, and that the trust deed is for the benefit of the lender.

> A nominee is "a person designated to act on behalf of another, usu. in a very limited way." Black's Law Dictionary 1076 (8th ed. 2004). A nominee is also a "person who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others." Id.

Mortg. Elec. Reg. Sys., Inc. v. Southwest Homes of Ark., Inc., 301 S.W.3d 1, 3 n.4 (Ark. 2009). As one court has explained,

> MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to

> record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.

Mortg. Elec. Reg. Sys., Inc. v. Neb. Dep't. of Banking, 270 Neb. 529, 530 (2005).

The relationship of MERS to CIT "is more akin to that of a straw man than to a party possessing all the rights given a buyer." See Landmark Nat'l Bank v. Kesler, 289 Kan. 528, 539 (2009) (court considered relationship of MERS to parties to a secured real estate transaction). As in Kesler, here the trust deed "consistently refers only to rights of the lender, including rights to receive notice of litigation, to collect payments, and to enforce the debt obligation." Id. at 539. The trust deed "consistently limits MERS to acting 'solely' as the nominee of the lender." Id. at 539-540. It is apparent that the listing of MERS as beneficiary in the deed of trust is merely to facilitate its ownership tracking function. It is not in any real sense of the word, particularly as defined in ORS 86.705(1), the beneficiary of the trust deed. Accord Southwest Homes of Ark., 301 S.W.3d at 4 (MERS was not the beneficiary, even though designated as beneficiary in the trust deed). Thus, notice to CIT met the statutory requirement that notice be given to the beneficiary.

Second, ORS 86.720 specifically provides for an objection period after notice is given, presumably to give the parties who received the notice the opportunity to point out any errors in the proposed action. Although MERS was not given notice of the proposed recording of the release, it is not MERS that is here objecting. Instead, CIT, which got the statutory notice and was in a position to object and point out any

reasons why the release should not have been recorded, failed to object or respond in any way to the notice.

Although non-compliance with a statutory notice provision cannot constitute substantial compliance, Parthenon Constr. & Design, Inc. v. Neuman, 166 Or. App. 172, 181 (2000), the doctrine of substantial compliance "has been used in certain instances 'to avoid the harsh results of insisting on literal compliance with statutory notice provisions.'" Villanueva v. Bd. of Psychologist Examiners, 175 Or. App. 345, 357 (2001), adh'd to on recons., 179 Or. App. 134 (2002) (quoting Brown v. Portland Sch. Dist. #1, 291 Or. 77, 81 (1981)). In determining the sufficiency of the notice given, the courts look to whether the purpose of the statute has been served. Brown, 291 Or. at 81. Substantial compliance "depends on the particular facts of each case." McComas v. Employment Dept., 133 Or. App. 577, 580 (1995).

ORS 86.720(2) requires that notice be given to the lender and the beneficiary, if they are different. ORS 86.720(3) requires that the notice provide an objection period during which the interested parties can challenge the release of the trust deed. The purpose of the notice must be to allow the interested parties to protect themselves. The 30-day objection period must have as its purpose to give those interested parties the time to raise any objection to the release, including any alleged error in the substance of the notice or who received notice. The legislature's provision of an objection period contemplates that, if there is no objection, the recording can go forward as noticed. Thus, the legislature apparently contemplated that a title insurance company would be authorized to record a release of a deed of trust despite

technical errors, if no objection is filed.

Here, CIT had notice. As I said above, I conclude that First American complied with the statute by giving notice to CIT, for whose benefit the deed of trust was given. Even if the statute required that notice be given to MERS, which I do not think it does, CIT has not provided any evidence that, had its nominee MERS been given notice as required by the statute, it would have acted differently. If the statute required that notice be given to MERS, I conclude that First American substantially complied with the notice statute when it sent the notice to the only party with any real interest in the trust deed, CIT. Failure to give notice to MERS is not shown to have caused any harm to any party.

Finally, First American gave CIT notice twice that it would file a release of the trust deed, based on the fact that the obligation had been fully satisfied: once in the May 23, 2006, letter that accompanied the payoff check, Exh. 21, and again in the August 30, 2006, Notice of Intent to Release/Reconvey Deed of Trust, Exh. 24. Both of those notices advised CIT that "our records disclose that said obligation has been satisfied in full", and that CIT needed to provide written objection within 30 days if it did not wish First American to release the trust deed. The notices further said:

> If we do not receive written objection from you within 30 days of the receipt of this notice, we intend to release/reconvey the trust deed pursuant to ORS 87.720 and it will cease to be a lien on the subject property. If you do not wish us to release/reconvey said trust deed, you must inform us of your objections in writing and forward these objections to the above address within this 30-day period.

Exh. 21, 24.

CIT does not dispute that it received these notices. It argues,

however, that it had no obligation to respond, because the information contained in the notices was wrong. The purpose of giving notice is to provide an opportunity for the party receiving notice to object to the proposed action. CIT's argument that it had no obligation to object is nonsensical; according to CIT, if the statutory requirements are met, there is an obligation to respond to the notice, but there would be no basis on which to object. But if there is a basis for objection, CIT argues that there is no obligation to respond. That cannot be what the legislature intended when it required the giving of notice and an opportunity to object.

There is no evidence at all about what happened to the August Notice of Intent to Release/Reconvey Deed of Trust or why CIT failed to object within the time allowed by statute. In light of the statutory objection period and CIT's failure to make any objection, CIT cannot complain that First American recorded the release of the deed of trust based on its records that showed the obligation had been paid in full.

I conclude that the release of the trust deed was effective. CIT's January 2006 trust deed was released, so CIT's priority dates only from its re-recording of the trust deed, which occurred on September 28, 2007.[7]

2. Equitable subrogation and breach of contract

Charter argues that, even if the release of the deed of trust was not effective to put it in first position, it should stand in first

---

[7] I need not address the effect of full satisfaction of the line of credit obligation on the rights of CIT and Kimberly with regard to Kimberly's use of the line of credit after CIT had been paid in full.

position under the doctrine of equitable subrogation. First American argues that CIT breached a contract with First American when it accepted the payoff check and did not close Kimberly's account.

I understand both of these arguments to be alternatives that the parties assert only if I conclude that the release of the trust deed was not effective. Because I have determined that the release was effective, I need not address either alternative argument.

3. Falcon's lis pendens

Falcon seeks a determination that, to the extent her state court litigation establishes an interest in both parcels of real property, her priority dates from the time she filed her lis pendens.

On June 13, 2006, Falcon gave notice of the pendency of her action (also known as lis pendens) against Kimberly, pursuant to ORS 93.740. The notice contained a description of both Parcels 1 and 2. At that time, Kimberly's obligation to CIT had been fully satisfied, but CIT's deed of trust had not yet been released. After CIT's trust deed was released, Timmerman filed a lien foreclosure lawsuit that relates to Parcel 1. CIT's trust deed was not re-recorded until after Timmerman's lien foreclosure was commenced. The question is what effect the lis pendens notice has on the priority of encumbrances on the property.

> The term lis pendens means "a pending suit," and usually refers to a doctrine or rule that "the filing of a suit concerning real property is notice to people who obtain an interest in the property after commencement of the suit that they will be bound by the outcome of the suit."

Hoyt v. Am. Traders, Inc., 301 Or. 599, 603 (1986) (citation omitted). In Oregon, the doctrine is codified at ORS 93.740. That statute provides that, "[i]n all suits in which the title to or any interest in or lien

upon real property is involved, affected or brought in question," a party may record a notice with the county clerk "of the pendency of the action[.]" ORS 93.740(1). The notice must contain certain information, including the parties' names, "the object of the suit," and a description of the real property affected by the action. Id. "From the time of recording the notice, and from that time only, the pendency of the suit is notice, to purchasers and incumbrancers, of the rights and equities in the premises of the party filing the notice." Id.

"The effect of notice is to give the party filing the civil action priority over the lien of a subsequent judgment against the defendant." Hoyt, 301 Or. at 605.

CIT argues that its interest in the real property has priority over any interest Falcon may have, because CIT recorded its trust deed before Falcon filed her lis pendens. As I have already decided, however, CIT's trust deed was released, leaving CIT's priority to date from the re-recording of its trust deed. That did not occur until after the lis pendens was filed and Timmerman had commenced its lien foreclosure.

Timmerman acknowledges that Falcon filed her lis pendens before it filed and sought to foreclose its construction lien. It also acknowledges that, if the lis pendens is proper, "the Timmerman Lien would be subject to" Falcon's interest, so long as she prevails at trial on her claims. Timmerman & Associates Construction LLC's Opening Trial Memo at 2.

Timmerman and CIT argue that the lis pendens does not give Falcon priority, however, because there is no evidence in these stipulated facts that the Falcon lawsuit includes claims that would affect title to or any

interest in Kimberly's real property. They rely on the statutory language that allows for the filing of a lis pendens in "suits in which the title to or any interest in or lien upon real property is involved, affected or brought in question[.]" ORS 93.740(1).

It is true that the filing of a lis pendens is available only in an action that involves, affects, or questions "the title to or any interest in or lien upon real property[.]" Id.; Dougherty v. Birkholtz, 156 Or. App. 89, 94-95 (1998). "[T]he subject of the suit must be an actual interest in real property, not merely a speculative future one." Id. at 95. Thus, for example, a claim for breach of contract brought before the Construction Contractors Board, which could result in an award of damages that could then be recorded in the real property records, thereby becoming a lien on real property, was not a suit that involved, affected, or questioned an interest in real property. Id. at 96.

Falcon's Notice of Pendency of an Action indicates that Falcon has filed an action in state court against Kimberly and her husband, debtor Fred Allman. The object of the action is listed as "Civil Complaint-Breach of Contract." The notice contains a description of the property and the Yamhill County case number. Exh. 6.

According to Timmerman and CIT, this notice is inadequate to constitute lis pendens because the object of the action is a breach of contract claim, not a claim affecting an interest in real property.

If all that were in the record were the notice, I might agree. However, both Timmerman and CIT have admitted in their pleadings that Falcon's action relates to a claim to the real property. First American's Amended Complaint alleges, in paragraph 7, that "Defendant

Madalyn Falcon ('Falcon') claims or may claim some right, title, or interest in the real property based on an alleged contract claim as described in that certain lawsuit wherein Falcon appears as Plaintiff and Defendant Allman et al appear as Defendants, Yamhill County Court Case No. CV 060184." Amended Complaint ¶ 7. Both CIT and Timmerman admit that paragraph in their Answers. CIT Answer to Amended Complaint, Counterclaims and Cross Claims at ¶ 1 (admitting paragraphs 1 through 22); Timmerman Answer to Plaintiffs' Amended Complaint; Counterclaim at ¶ 1 (admitting paragraphs 1 through 19).

Although the notice filed by Falcon describes only a breach of contract claim, it clearly describes the real property at issue, and CIT and Timmerman admit that the underlying state court action involves Falcon's claim of "some right, title, or interest" in the property. The lis pendens is effective to give Falcon priority over interests that were of record after the date she filed the lis pendens to the extent Falcon establishes an interest through the state court litigation.[8]

4. Attorney fees

Finally, plaintiffs First American, Charter, and Greenpoint argue that they are entitled to an award of attorney fees. CIT opposes an award of fees.

Charter and Greenpoint claim a right under their trust deeds to attorney fees incurred in protecting and preserving their collateral and collecting the debts owed. CIT argues correctly that, whether or not

---

[8] Falcon does not seem to be claiming any priority for her attorney fee judgment, which was entered on April 11, 2008, based on the lis pendens.

Charter and Greenpoint have rights to attorney fees under provisions in their deeds of trust, CIT is not a party to either of those trust deeds. Charter and Greenpoint do not explain how a non-party could be subject to any attorney fee provisions in the deeds of trust.

First American claims that it is entitled to attorney fees pursuant to ORS 86.720(9), because the parties have sought interpretation and application of ORS 86.720 to this case. As prevailing party, First American argues, it is entitled to attorney fees under the statute.

ORS 86.720(9) provides:

> In addition to any other remedy provided by law, a title insurance company or insurance producer preparing, executing or recording a release of trust deed shall be liable to any party for damages that the party sustains by reason of the negligence or willful misconduct of the title insurance company or insurance producer in connection with the issuance, execution or recording of the release pursuant to this section. Except as provided in subsection (10) of this section, the court may award reasonable attorney fees to the prevailing party in an action under this section.

First American asserts that this provision authorizes an award of attorney fees in any action to declare rights after a reconveyance of a deed of trust under ORS 86.720. CIT argues that the attorney fee provision applies only in an action for negligence or willful misconduct by a title company in connection with a release of a trust deed under ORS 86.720.

The statute is not entirely clear as to what is meant by "an action under this section." CIT would have that phrase refer only to ORS 86.720(9) and the action for damages it authorizes. First American reads the statute more broadly, to authorize attorney fees to the prevailing party in any action in which ORS 86.720 is implicated.

I agree with First American that the reference to "an action under this section" refers to ORS 86.720 as a whole, not only to ORS 86.720(9). The statute refers to subsections when it means only a part of the section. The final sentence of subsection (9) begins with "[e]xcept as provided in subsection (10) of this section," indicating that "section" means the entire ORS 86.720, while "subsection" means the numbered sub-parts of the statute.[9]

This interpretation does not, however, mean that First American is entitled to its attorney fees in this action. The only "action under this section" is the action for damages for negligence or willful misconduct by a title company that is authorized by ORS 86.720(9). This declaratory judgment action is not an action for damages for negligence or willful misconduct.

Oregon follows the American rule with regard to attorney fees in litigation: A prevailing party is not entitled to attorney fees unless the award is authorized by a statute or a contract. Mattiza v. Foster, 311 Or. 1, 4 (1990). Because I conclude that the statute does not authorize an award of attorney fees for a declaratory judgment action based in part on application of ORS 86.720, I agree with CIT that First American is not entitled to attorney fees for prevailing on these claims.

---

[9] This reading is supported by the Oregon Legislature's "Form and Style Manual for Legislative Measures," which describes the numbering and citation form for Oregon statutes. It says:

> Sections may consist of more than one primary paragraph. These primary paragraphs are referred to as subsections.

Oregon Legislative Assembly, "Form and Style Manual for Legislative Measures" at p.8 (2010-2011 Online Edition).

CONCLUSION

First American's release of the CIT trust deed was valid, and the release effectively reconveyed the deed of trust. Therefore, Charter and Greenpoint's interest in Parcel 2 is superior to that of CIT.

Falcon's lis pendens relates to a dispute about interests in real property, and so has priority with regard to Parcels 1 and 2 from the date it was recorded.

Given these determinations, the order of priority of interests in the two parcels is as follows:

Parcel 1:

1. Falcon (to the extent she establishes an interest in the property)
2. Timmerman
3. CIT
4. Falcon attorney fee judgment
5. Berkey

Parcel 2:

1. Charter
2. Falcon (to the extent she establishes an interest in the property)
3. Greenpoint
4. CIT
5. Falcon attorney fee judgment
6. Berkey

No party is entitled to attorney fees for prevailing on these claims.

Within 14 days of the date of this Memorandum Opinion, Mr. Radmacher

shall prepare the declaratory judgment and the dismissal of First American's alternative claims. The parties shall advise the court within 21 days of the date of this Memorandum Opinion whether there is any dispute remaining on CIT's reserved second, third, and fourth counterclaims. If issues remain as to those counterclaims, the court will schedule a status conference to discuss the process for resolving those disputes. If the parties agree that the reserved counterclaims are effectively determined by this stipulated facts trial, they may submit a judgment within 21 days that disposes of all claims among the parties.

###

cc: Lee M. Hess
Jonathan M. Radmacher
Jeffrey C. Misley
Eric Bosse
Travis W. Hall
Truman A. Stone


Kansas Opinions | Finding Aids: Case Name » Supreme Court or Court of Appeals | Docket Number | Release Date |

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 98,489

LANDMARK NATIONAL BANK,

Plaintiff/Appellee,

v.

BOYD A. KESLER

Appellee/Cross-appellant

MILLENNIA MORTGAGE CORPORATION,

Defendant,

(MORTGAGE ELECTRONIC REGISTRATION

SYSTEMS, INC. AND SOVEREIGN BANK),

Appellants/Cross-appellees,

and

DENNIS BRISTOW AND TONY WOYDZIAK,

Intervenors/Appellees.

SYLLABUS BY THE COURT

1. Denial of a motion to set aside default judgment is subject to review under a standard of abuse of discretion. A district court decision that denies a motion to join a party as a necessary party under K.S.A. 60-219(a) is also subject to an abuse of discretion standard of review.

2. Whether the evidence demonstrates that the statutory requirements for joinder have been met is a mixed question of fact and law. When reviewing a mixed question of fact and law, an appellate court reviews the district court's factual findings for substantial competent evidence and reviews de novo the district court's legal conclusions.

3. Intervention as a matter of right is subject to the same mixed determination of law and fact as is joinder. Permissive intervention lies within the discretion of the district court.

4. Judicial discretion is abused when no reasonable person would take the view adopted by the trial court.

Review for abuse of discretion includes review to determine whether erroneous legal conclusions guided the exercise of discretion.

5. K.S.A. 60-255(b) does not require that the party moving for relief from default judgment be a party to the action.

6. It is appropriate for a trial court to consider evidence beyond the bare pleadings to determine whether it should set aside a default judgment. In a motion to set aside default, a trial court should consider a variety of factors to determine whether the defendant or would-be defendant had a meritorious defense, and the burden of establishing a meritorious defense rests with the moving party.

7. Relief under K.S.A. 60-255(b) is appropriate only upon a showing that if relief is granted the outcome of the suit may be different than if the entry of default or the default judgment is allowed to stand; the showing should underscore the potential injustice of allowing the case to be disposed of by default. In most cases the court will require the party in default to demonstrate a meritorious defense to the action as a prerequisite to vacating the default entry or judgment. The nature and extent of the showing that will be necessary lie within the trial court's discretion.

8. The law relating to a contingently necessary party closely resembles the law relating to vacating default judgment, in that both require the party asserting the interest to demonstrate a meritorious defense or an interest that may be impaired.

9. The word "nominee" is subject to more than one interpretation. The legal significance of the word depends on the context in which it is used. The word encompasses a range of meanings from a straw man or limited agent to a representative enjoying the same legal rights as the party that acts as the nominator.

10. The law generally understands that a mortgagee is not distinct from a lender: a mortgagee is a party to whom property is mortgaged, which is to say, a mortgage creditor or lender. A mortgagee and a lender have intertwined rights that defy a clear separation of interests.

11. Parties are bound by the formal admissions of their counsel in an action.

12. The Due Process Clause does not protect entitlements where the identity of the alleged entitlement is vague. A protected property right must have some ascertainable monetary value. An entitlement to a procedure does not constitute a protected property interest.

Review of the judgment of the Court of Appeals in 40 Kan. App. 2d 325, 192 P.3d 177 (2008). Appeal from Ford District Court; E. LEIGH HOOD, judge. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed. Opinion filed August 28, 2009.

Tyson C. Langhofer and *Court T. Kennedy*, of Stinson Morrison Hecker, L.L.P., of Wichita, for appellants/cross-appellees.

Ted E. Knopp, of Ted E. Knopp, Chartered, of Wichita, for appellee Boyd A. Kesler.

David A. Schatz, of Husch Blackwell Sanders L.L.P., of Kansas City, Missouri, for *amicus curiae* American Land Title Association.

The opinion of the court was delivered by

ROSEN, J.: Mortgage Electronic Registration Systems, Inc. (MERS) and Sovereign Bank seek review of

an opinion by our Court of Appeals holding that a nonlender is not a contingently necessary party in a mortgage foreclosure action and that due process does not require that a nonlender be allowed to intervene in a mortgage foreclosure action.

The facts underlying this appeal are not in dispute. On March 19, 2004, Boyd Kesler secured a loan of $50,000 from Landmark National Bank (Landmark) with a mortgage registered in Ford County, Kansas. On March 15, 2005, he secured an additional loan of $93,100 from Millennia Mortgage Corp. (Millennia) through a second mortgage registered in Ford County. Both mortgages were secured by the same real property located in Ford County.

The second mortgage lies at the core of this appeal. That mortgage document stated that the mortgage was made between Kesler--the "Mortgagor" and "Borrower"--and MERS, which was acting "solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns." The document then identified Millennia as the "Lender." At some subsequent time, the mortgage may have been assigned to Sovereign and Sovereign may have taken physical possession of the note, but that assignment was not registered in Ford County.

On April 13, 2006, Kesler filed for bankruptcy in the United States Bankruptcy Court for the District of Kansas, Wichita Division. He named Sovereign as a creditor; although he claimed the secured property as exempt, he filed an intention to surrender the property. The bankruptcy court discharged his personal liability on November 16, 2006. The record contains little documentation or evidence explaining the interplay of the bankruptcy and the foreclosure action, except to suggest that the bankruptcy action may have given Sovereign constructive notice of a possible default on payments.

On July 27, 2006, Landmark filed a petition to foreclose on its mortgage, serving and naming as defendants Kesler and Millennia. It did not serve notice of the litigation on MERS or Sovereign. In the absence of answers from either defendant, the trial court entered default judgment against Kesler and Millennia on September 6, 2006. The trial court then filed an order of sale on September 29, 2006. Notice of the sale was initially published in the Dodge City Daily Globe on October 4, 2006. On October 26, 2006, Dennis Bristow and Tony Woydziak purchased the secured property at a sheriff's sale for $87,000, and on November 14, 2006, Landmark filed a motion to confirm sale of the secured property.

Also on November 14, 2006, Sovereign filed an answer to the foreclosure petition, asserting an interest in the real property as the successor in interest to Millennia's second mortgage. A week later, on November 21, 2006, Sovereign filed a motion to set aside or vacate the default judgment and an objection to confirmation of sale. The motion asserted that MERS was a K.S.A. 60-219(a) contingently necessary party and, because Landmark failed to name MERS as a defendant, Sovereign did not receive notice of the proceedings. The motion asked the court to vacate the default judgment under K.S.A. 60-260(b). The motion further asked the court to set aside the surplus from the sale, holding it to later to be paid to Sovereign if the court elected not to grant the motion to vacate.

On November 27, 2006, Kesler filed a motion seeking distribution of surplus funds from the sheriff's sale, and on January 3, 2007, Kesler filed a motion joining Landmark's earlier motion to confirm the sheriff's sale. The trial court conducted a hearing on the various motions on January 8, 2007, at which counsel for Landmark, Kesler, Sovereign, and Bristow appeared and presented their cases. The trial court deferred judgment pending review of the pleadings.

On January 16, 2007, MERS filed a motion joining Sovereign's motion to vacate the journal entry of default judgment and objecting to confirmation of the sheriff's sale, followed on January 18, 2007, by a motion to intervene under K.S.A. 60-224. MERS proffered an answer and a cross-claim to the original foreclosure petition.

On that same date, the trial court filed an order finding that MERS was not a real party in interest and Landmark was not required to name it as a party to the foreclosure action. The court found that MERS served only as an agent or representative for Millennia. The court also found that Sovereign's failure to register its interest with the Ford County Register of Deeds precluded it from asserting rights to the mortgage after judgment had been entered. The court denied the motions to set aside judgment and to intervene and granted the motions to confirm the sale and to distribute the surplus.

On February 1, 2007, MERS and Sovereign filed motions to reconsider. The trial court conducted a hearing on those motions, at which counsel for *Kesler*, Sovereign, and MERS appeared and argued. The trial court subsequently entered an order denying the motions to reconsider. MERS and Sovereign filed timely notices of appeal.

Prior to the appellants submitting their briefs, the purchasers Bristow and Woydziak filed a motion with the Court of Appeals seeking leave to intervene in the appeal. The Court of Appeals granted the motion. Bristow and Woydziak then filed a motion to compel the office of the Clerk of the Appellate Courts to docket their cross-appeal, which the Court of Appeals denied. The Court of Appeals affirmed the district court in *Landmark National Bank v. Kesler*, 40 Kan. App. 2d 325, 192 P.3d 177 (2008). This court granted the appellants' petition for review.

I. Did The District Court Abuse Its Discretion In Denying MERS's Motion To Set Aside Default Judgment And Motion To Intervene As A Contingently Necessary Party?

A. Standard of Review

Denial of a motion to set aside a default judgment is subject to review under a standard of abuse of discretion. See *Canaan v. Bartee*, 272 Kan. 720, Syl. ¶ 9, 35 P.3d 841 (2001). A district court decision that denies a motion to join a party as a necessary party under K.S.A. 60-219(a) is also subject to an abuse of discretion standard of review. *State ex rel. Graeber v. Marion County Landfill, Inc.*, 276 Kan. 328, 352, 76 P.3d 1000 (2003). Whether the evidence demonstrates that the statutory requirements for joinder have been met is a mixed question of fact and law. When reviewing a mixed question of fact and law, an appellate court reviews the district court's factual findings for substantial competent evidence and reviews de novo the district court's legal conclusions. *State v. Fisher*, 283 Kan. 272, 286, 154 P.3d 455 (2007).

Intervention as a matter of right is subject to the same mixed determination of law and fact as is joinder. K.S.A. 60-224(a). Permissive intervention lies within the discretion of the district court. K.S.A. 60-224 (b); see *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 382 n.1, 94 L. Ed. 2d 389, 107 S. Ct. 1177 (1987) (Brennan, J., concurring) (discussing the different standards applied to Federal Rule of Civil Procedure 24[a] and [b]).

Judicial discretion is abused when no reasonable person would take the view adopted by the trial court. *Harsch v. Miller*, 288 Kan. 280, 293, 200 P.3d 467 (2009). Review for abuse of discretion includes review to determine whether erroneous legal conclusions guided the exercise of discretion. *State v. Skolaut*, 286 Kan. 219, Syl. ¶ 3, 182 P.3d 1231 (2008).

To the extent that this appeal requires interpretation of statutory mandates, this court exercises unlimited review. See *Genesis Health Club, Inc. v. City of Wichita*, 285 Kan. 1021, 1031, 181 P.3d 549 (2008).

B. Analysis

While this is a matter of first impression in Kansas, other jurisdictions have issued opinions on similar

and related issues, and, while we do not consider those opinions binding in the current litigation, we find them to be useful guideposts in our analysis of the issues before us.

At the heart of this issue is whether the district court abused its discretion in refusing to set aside the default judgment and in refusing to join MERS as a contingently necessary party.

The statutory provision for setting aside a default judgment is K.S.A. 60-255(b), which refers to K.S.A. 60-260(b), relating to relief from judgment, in a manner similar to the correlation between the corresponding federal rules, Fed. R. Civ. Proc. 55(c) and 60(b). K.S.A. 60-260(b) allows relief from a judgment based on mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence that could not have been timely discovered with due diligence; fraud or misrepresentation; a void judgment; a judgment that has been satisfied, released, discharged, or is no longer equitable; or any other reason justifying relief from the operation of the judgment. K.S.A. 60-260(b) requires that the motion be made by a party or by a representative who is in privity with a party, thus precluding a nonparty of standing to file such a motion. K.S.A. 60-255(b) does not, however, require that the movant be a party to the action. See 11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 2865 (1995).

It is appropriate--and probably necessary--for a trial court to consider evidence beyond the bare pleadings to determine whether it should set aside a default judgment. In a motion to set aside default, a trial court should consider a variety of factors to determine whether the defendant (or would-be defendant) had a meritorious defense, and the burden of establishing a meritorious defense rests with the moving party. See *Canaan v. Bartee*, 272 Kan. 720, 731, 35 P.3d 841 (2001).

This conclusion is consistent with the construction of the parallel federal rules:

"Generally, a federal court will grant a motion under Rule 55(c) only after some showing is made that if relief is granted the outcome of the suit may be different than if the entry of default or the default judgment is allowed to stand; the showing should underscore the potential injustice of allowing the case to be disposed of by default. In most cases, therefore, *the court will require the party in default to demonstrate a meritorious defense to the action as a prerequisite to vacating the default entry or judgment.* . . .

"A majority of the courts . . . have insisted upon a presentation of some factual basis for the supposedly meritorious defense. . . .

"The demonstration of a meritorious defense is not expressly called for by the federal rules and, therefore, *the nature and extent of the showing that will be necessary is a matter that lies within the court's discretion. . . . The underlying concern is to determine whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default.*" (Emphasis added.) 10A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d § 2697 (1998).

We accordingly find that it was incumbent on the trial court, when ruling on the motion to set aside default judgment, to consider whether MERS would have had a meritorious defense if it had been named as a defendant and whether there was some reasonable possibility MERS would have enjoyed a different outcome from the trial if its participation had precluded default judgment.

In determining whether MERS was a contingently necessary party that was entitled to relief from judgment, the trial court was required to consider the factors of K.S.A. 60-219(a) in addition to those of K.S.A. 60-260(b).

K.S.A. 60-219(a) defines which parties are to be joined in an action as necessary for just adjudication:

"A person is contingently necessary if (1) complete relief cannot be accorded in his absence among those already parties, or (2) he claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action in his absence may (i) as a practical matter substantially impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

The law relating to a contingently necessary party closely resembles the law relating to vacating a default judgment, in that both require the party asserting the interest to demonstrate a meritorious defense or an interest that may be impaired. In order to prevail on appeal, MERS must demonstrate that the trial court abused its discretion when it found, based on the testimony, evidence, and pleadings before the court at the time when it considered the motion to set aside default judgment, that MERS lacked a meritorious defense to the foreclosure proceeding or had an interest that could be impaired. We will accordingly examine the nature of the interest in the mortgage that MERS has demonstrated.

Sovereign is a financial institution that putatively purchased the Kesler mortgage from Millennia but did not register the transaction in Ford County. The relationship of MERS to the transaction is not subject to an easy description. One court has described MERS as follows:

"MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members." *Mortgage Elec. Reg. Sys., Inc. v. Nebraska Depart. of Banking*, 270 Neb. 529, 530, 704 N.W.2d 784 (2005).

The second mortgage designated the relationships of Kesler, MERS, and Millennia and established payment and notice obligations. That document purported to define the role played by MERS in the transaction and the contractual rights of the parties.

The document began by identifying the parties:

"THIS MORTGAGE is made this 15th day of March 2005, between the Mortgagor, BOYD A. KESLER, (herein 'Borrower'), and the Mortgagee, Mortgage Electronic Registration Systems, Inc. ('MERS'), (solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns). MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS. MILLENNIA MORTGAGE CORP., A CALIFORNIA CORPORATION is organized and existing under the laws of CALIFORNIA and has an address of 23046 AVENIDA DE LA CARLOTA #100, LAGUNA HILLS, CALIFORNIA 92653 (herein 'Lender')."

The third paragraph of the first page of the mortgage document conveyed a security interest in real estate:

"TO SECURE to Lender the repayment of the indebtedness evidenced by the Note, with interest thereon; the payment of all other sums, with interest thereon, advanced in accordance herewith to protect the security of this Mortgage; and the performance of the covenants and agreements of Borrower herein contained, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS the following described property located in the County of FORD, State of Kansas."

The first paragraph of the second page of the mortgage document contains the following language that apparently both limits and expands MERS's rights:

"Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Mortgage; 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 and 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 or cancelling this Mortgage."

Paragraph 7 of the mortgage document provides the lender with the right to protect the security:

"If Borrower fails to perform the covenants and agreements contained in this Mortgage, or if any action or proceeding is commenced which materially affects Lender's interest in the Property, then Lender, at Lender's option, upon notice to Borrower, may make such appearances, disburse such sums, including reasonable attorneys' fees, and take such action as is necessary to protect Lender's interest."

Paragraph 9 of the mortgage document provides the lender with rights in the event of a condemnation:

"Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of the Property, or part thereof, or for conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender, subject to the terms of any mortgage, deed of trust or other security agreement with a lien which has priority over this mortgage."

Paragraph 12 of the mortgage document addresses notice:

"Notice. Except for any notice required under applicable law to be given in another manner, (a) any notice to Borrower provided for in this Mortgage shall be given by delivering it or by mailing such notice by certified mail addressed to Borrower at the Property Address or at such other address as Borrower may designate by notice to Lender as provided herein, and (b) *any notice to Lender* shall be given by certified mail *to Lender's address stated herein* or to such other address as Lender may designate by notice to Borrower as provided herein. Any notice provided for in this Mortgage shall be deemed to have been given to Borrower or Lender when given in the manner designated herein." (Emphasis added.)

The signature page of the mortgage document contains language relating to notice in the event of default:

"*Borrower and Lender request the holder of any mortgage*, deed of trust or other encumbrance with a lien which has priority over this Mortgage *to give Notice to Lender, at Lender's address* set forth on page one of this Mortgage, *of any default* under the superior encumbrance and of any sale or other foreclosure action." (Emphasis added.)

The mortgage instrument states that MERS functions "solely as nominee" for the lender and lender's successors and assigns. The word "nominee" is defined nowhere in the mortgage document, and the functional relationship between MERS and the lender is likewise not defined. In the absence of a contractual definition, the parties leave the definition to judicial interpretation.

What meaning is this court to attach to MERS's designation as nominee for Millennia? The parties appear to have defined the word in much the same way that the blind men of Indian legend described an elephant--their description depended on which part they were touching at any given time. Counsel for Sovereign stated to the trial court that MERS holds the mortgage "in street name, if you will, and our client the bank and other banks transfer these mortgages and rely on MERS to provide them with notice of foreclosures and what not." He later stated that the nominee "is the mortgagee and is holding that

mortgage for somebody else." At another time he declared on the record that the nominee

"is more like a trustee or more like a corporation, a trustee that has multiple beneficiaries. Now a nominee's relationship is not a trust but if you have multiple beneficiaries you don't serve one of the beneficiaries you serve the trustee of the trust. You serve the agent of the corporation."

Counsel for the auction property purchasers stated that a nominee is "one designated to act for another as his representative in a rather limited sense." He later deemed a nominee to be "like a power of attorney."

Black's Law Dictionary defines a nominee as "[a] person designated to act in place of another, usu. in a very limited way" and as "[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others." Black's Law Dictionary 1076 (8th ed. 2004). This definition suggests that a nominee possesses few or no legally enforceable rights beyond those of a principal whom the nominee serves.

In its opinion below, the Court of Appeals cited *Thompson v. Meyers*, 211 Kan. 26, 30, 505 P.2d 680 (1973), which provides the only discussion in Kansas of the legal significance of a nominee:

"In common parlance the word 'nominee' has more than one meaning. Much depends on the frame of reference in which it is used. In Webster's Third New International Dictionary, unabridged, one of the definitions given is 'a person named as the recipient in an annuity or grant.' We view a 'nominee', as the term was used by the parties here, not simply in the sense of a straw man or limited agent. . . , but in the larger sense of a person designated by them to purchase the real estate, who would possess all the rights given a buyer . . . ."

The legal status of a nominee, then, depends on the context of the relationship of the nominee to its principal. Various courts have interpreted the relationship of MERS and the lender as an agency relationship. See *In re Sheridan*, ___ B.R. ___, 2009 WL 631355, at *4 (Bankr. D. Idaho March 12, 2009) (MERS "acts not on its own account. Its capacity is representative."); *Mortgage Elec. Registration System, Inc. v. Southwest*, ___ Ark. ___, ___, ___ S.W.3d ___, 2009 WL 723182 (March 19, 2009) ("MERS, by the terms of the deed of trust, and its own stated purposes, was the lender's agent"); *LaSalle Bank Nat. Ass'n v. Lamy*, 2006 WL 2251721, at *2 (N.Y. Sup. 2006) (unpublished opinion) ("A nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee.")

The relationship that MERS has to Sovereign is more akin to that of a straw man than to a party possessing all the rights given a buyer. A mortgagee and a lender have intertwined rights that defy a clear separation of interests, especially when such a purported separation relies on ambiguous contractual language. The law generally understands that a mortgagee is not distinct from a lender: a mortgagee is "[o]ne to whom property is mortgaged: the mortgage creditor, or lender." Black's Law Dictionary 1034 (8th ed. 2004). By statute, assignment of the mortgage carries with it the assignment of the debt. K.S.A. 58-2323. Although MERS asserts that, under some situations, the mortgage document purports to give it the same rights as the lender, the document consistently refers only to rights of the lender, including rights to receive notice of litigation, to collect payments, and to enforce the debt obligation. The document consistently limits MERS to acting "solely" as the nominee of the lender.

Indeed, in the event that a mortgage loan somehow separates interests of the note and the deed of trust, with the deed of trust lying with some independent entity, the mortgage may become unenforceable.

"The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose, unless the holder of the deed of trust is the agent of the holder of the

note. [Citation omitted.] Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. [Citation omitted.] The mortgage loan becomes ineffectual when the note holder did not also hold the deed of trust." *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623 (Mo. App. 2009).

The Missouri court found that, because MERS was not the original holder of the promissory note and because the record contained no evidence that the original holder of the note authorized MERS to transfer the note, the language of the assignment purporting to transfer the promissory note was ineffective. "MERS never held the promissory note, thus its assignment of the deed of trust to Ocwen separate from the note had no force." 284 S.W.3d at 624; see also *In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009) (standard mortgage note language does not expressly or implicitly authorize MERS to transfer the note); *In re Vargas*, 396 B.R. 511, 517 (Bankr. C.D. Cal. 2008) ("[I]f FHM has transferred the note, MERS is no longer an authorized agent of the holder unless it has a separate agency contract with the new undisclosed principal. MERS presents no evidence as to who owns the note, or of any authorization to act on behalf of the present owner."); *Saxon Mortgage Services, Inc. v. Hillery*, 2008 WL 5170180 (N.D. Cal. 2008) (unpublished opinion) ("[F]or there to be a valid assignment, there must be more than just assignment of the deed alone; the note must also be assigned. . . . MERS purportedly assigned both the deed of trust and the promissory note. . . . However, there is no evidence of record that establishes that MERS either held the promissory note or was given the authority . . . to assign the note.").

What stake in the outcome of an independent action for foreclosure could MERS have? It did not lend the money to Kesler or to anyone else involved in this case. Neither Kesler nor anyone else involved in the case was required by statute or contract to pay money to MERS on the mortgage. See *Sheridan*, ___ B.R. at ___ ("MERS is not an economic 'beneficiary' under the Deed of Trust. It is owed and will collect no money from Debtors under the Note, nor will it realize the value of the Property through foreclosure of the Deed of Trust in the event the Note is not paid."). If MERS is only the mortgagee, without ownership of the mortgage instrument, it does not have an enforceable right. See *Vargas*, 396 B.R. 517 ("[w]hile the note is 'essential,' the mortgage is only 'an incident' to the note" [quoting *Carpenter v. Longan*, 16 Wall. 271, 83 U.S. 271, 275, 21 L. Ed 313 (1872)]).

When it found that MERS did not have an interest in the property that was impaired by the default judgment, the trial court properly considered four factors: (1) that the written pleadings and oral arguments by MERS and Sovereign identified MERS as acting only as a digital mortgage tracking service; (2) that counsel for MERS insisted that no evidence of a financial or property interest was necessary and its argument rested solely on its identity as the mortgagee on the mortgage document, when counsel was directly challenged to produce evidence of a financial or property interest; (3) that evidence showed that Sovereign was on notice that Landmark had leave of the bankruptcy court to proceed with foreclosure and that MERS did not attempt to intervene in the action until after its alleged principal, Sovereign, had already had its motion to intervene and to set aside judgment denied; and (4) that the case law submitted by the parties weighed more in favor of denying the motion. These factors were properly before the trial court and were consistent with the evidence and supported the court's legal reasoning.

Counsel for MERS explicitly declined to demonstrate to the trial court a tangible interest in the mortgage. Parties are bound by the formal admissions of their counsel in an action. *Dick v. Drainage District No. 2*, 187 Kan. 520, 525, 358 P.2d 744 (1961). Counsel for MERS made no attempt to show any injury to MERS resulting from the lack of service; in fact, counsel insisted that it did not have to show a financial or property interest.

MERS argued in another forum that it is *not* authorized to engage in the practices that would make it a

party to either the enforcement of mortgages or the transfer of mortgages. In *Mortgage Elec. Reg. Sys. v. Nebraska Dept. of Banking*, 270 Neb. 529, 704 N.W.2d 784 (2005), MERS challenged an administrative finding that it was a mortgage banker subject to license and registration requirements.

The Nebraska Supreme Court found in favor of MERS, noting that "MERS has no independent right to collect on any debt because MERS itself has not extended credit, and none of the mortgage debtors owe MERS any money." 270 Neb. at 535. The Nebraska court reached this conclusion based on the submissions by counsel for MERS that

"MERS does not take applications, underwrite loans, make decisions on whether to extend credit, collect mortgage payments, hold escrows for taxes and insurance, or provide any loan servicing functions whatsoever. MERS merely tracks the ownership of the lien and is paid for its services through membership fees charged to its members. MERS does not receive compensation from consumers." 270 Neb. at 534.

Even if MERS was technically entitled to notice and service in the initial foreclosure action--an issue that we do not decide at this time--we are not compelled to conclude that the trial court abused its discretion in denying the motions to vacate default judgment and require joinder of MERS and Sovereign. The record lacks evidence supporting a claim that MERS suffered prejudice and would have had a meritorious defense had it been joined as a defendant to the foreclosure action. We find that the trial court did not abuse its discretion and did not commit reversible error in ruling on the postdefault motions.

We note that various arguments were presented suggesting that economic policy provides independent grounds for reversing the trial court. MERS and the *amicus curiae* American Land Title Association argue that MERS provides a cost-efficient method of tracking mortgage transactions without the complications of county-by-county registration and title searches. The *amicus* suggests the statutory recording system is grounded in seventeenth-century property law that is entirely unsuited to twentieth-century financial transactions. While this may be true, the MERS system introduces its own problems and complications.

One such problem is that having a single front man, or nominee, for various financial institutions makes it difficult for mortgagors and other institutions to determine the identity of the current note holder.

"[I]t is not uncommon for notes and mortgages to be assigned, often more than once. When the role of a servicing agent acting on behalf of a mortgagee is thrown into the mix, it is no wonder that it is often difficult for unsophisticated borrowers to be certain of the identity of their lenders and mortgagees." *In re Schwartz*, 366 B.R. 265, 266 (Bankr. D. Mass. 2007).

"[T]he practices of the various MERS members, including both [the original lender] and [the mortgage purchaser], in obscuring from the public the actual ownership of a mortgage, thereby creating the opportunity for substantial abuses and prejudice to mortgagors . . . , should not be permitted to insulate [the mortgage purchaser] from the consequences of its actions in accepting a mortgage from [the original lender] that was already the subject of litigation in which [the original lender] erroneously represented that it had authority to act as mortgagee." *Johnson*, 2008 WL 4182397, at *4.

The *amicus* argues that "[a] critical function performed by MERS as the mortgagee is the receipt of service of all legal process related to the property." The *amicus* makes this argument despite the mortgage clause that specifically calls for notice to be given to the *lender*, not the putative mortgagee. In attempting to circumvent the statutory registration requirement for notice, MERS creates a system in which the public has no notice of who holds the obligation on a mortgage.

The Arkansas Supreme Court has noted:

"The only recorded document provides notice that [the original lender] is the lender and, therefore, MERS's principal. MERS asserts [the original lender] is not its principal. Yet no other lender recorded its interest as an assignee of [the original lender]. Permitting an agent such as MERS purports to be to step in and act without a recorded lender directing its action would wreak havoc on notice in this state." *Southwest Homes*, ___ Ark. at ___.

In any event, the legislature has established a registration requirement for parties that desire service of notice of litigation involving real property interests. It is not the duty of this court to criticize the legislature or to substitute its view on economic or social policy. *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 348, 789 P.2d 541 (1990).

II. Did The Trial Court's Refusal To Join MERS As A Party Violate MERS's Right To Due Process?

MERS contends that the Fourteenth Amendment and §18 of the Kansas Constitution Bill of Rights guarantees of due process were violated when the foreclosure action was consummated without MERS receiving notice of the proceeding and without MERS having the opportunity to intervene in the action.

Although joinder is evaluated under an abuse of discretion standard, if a constitutional right is involved the trial judge's exercise of discretion is limited. Discretion must be exercised not in opposition to, but in accordance with, established principles of law. It is not an arbitrary power. *In re Adoption of B.G.J.*, 281 Kan. 552, 563, 133 P.3d 1 (2006).

The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

Section 18 of the Kansas Constitution Bill of Rights provides: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

Due process provides any interested party with the elementary and fundamental right to notice of the pendency of an action and the opportunity to present its objections in any proceeding that is to be accorded finality. *Alliance Mortgage Co. v. Pastine*, 281 Kan. 1266, 1275, 136 P.3d 457 (2006) (citing *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 [1950]). In the absence of a protected property or liberty interest, there can be no due process violation. *State ex rel. Tomasic v. Unified Gov't of Wyandotte County/Kansas City*, 265 Kan. 779, 809, 962 P.2d 543 (1998).

The Due Process Clause does not protect entitlements where the identity of the alleged entitlement is vague. *Castle Rock v. Gonzales*, 545 U.S. 748, 763, 162 L. Ed. 2d 658, 125 S. Ct. 2796 (2005). A protected property right must have some ascertainable monetary value. 545 U.S. at 766. Indirect monetary benefits do not establish protection under the Fourteenth Amendment. 545 U.S. at 767. An entitlement to a procedure does not constitute a protected property interest. 545 U.S. at 764.

MERS's contention that it was deprived of due process in violation of constitutional protections runs aground in the shallows of its property interest. As noted in the discussion of the first issue above, MERS did not demonstrate, in fact, did not attempt to demonstrate, that it possessed any tangible interest in the mortgage beyond a nominal designation as the mortgagor. It lent no money and received no payments from the borrower. It suffered no direct, ascertainable monetary loss as a consequence of the litigation. Having suffered no injury, it does not qualify for protection under the Due Process Clause of either the

United States or the Kansas Constitutions.

Furthermore, MERS received the full opportunity to present arguments and evidence to the trial court. Only after Sovereign clearly had notice of the litigation, had filed a motion to intervene, and had participated in a hearing on the motion did MERS--Sovereign's nominee--elect to file for joinder. Despite its late decision to enter an appearance in the case, the trial court allowed MERS the opportunity to present arguments and evidence. It cannot be said that MERS was prejudicially denied notice and the opportunity to be heard.

We find that the district court did not abuse its discretion in denying the motions to vacate and for joinder and in holding that MERS was not denied due process. We accordingly affirm the district court and the Court of Appeals.

END

 Kansas Opinions | Finding Aids: Case Name » Supreme Court or Court of Appeals | Docket Number | Release Date |

Comments to: WebMaster, kscases@kscourts.org.
Updated: August 28, 2009; updated August 31, 2009.
URL: http://www.kscourts.org/Cases-and-Opinions/opinions/supct/2009/20090828/98489.htm.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

Plaintiff,

v.

Defendant(s)

AFFIRMATION

Index No.: _____

Mortgaged Premises:

_____

N.B.: During and after August 2010, numerous and widespread insufficiencies in foreclosure filings in various courts around the nation were reported by major mortgage lenders and other authorities, including failure to review documents and files to establish standing and other foreclosure requisites; filing of notarized affidavits which falsely attest to such review and to other critical facts in the foreclosure process; and "robosignature" of documents.

* * *

[_____], Esq., pursuant to CPLR §2106 and under the penalties of perjury, affirms as follows:

1. I am an attorney at law duly licensed to practice in the state of New York and am affiliated with the Law Firm of _____, the attorneys of record for Plaintiff in the above-captioned mortgage foreclosure action. As such, I am fully aware of the underlying action, as well as the proceedings had herein.

2. On [date], I communicated with the following representative or representatives of of Plaintiff, who informed me that he/she/they (a) personally reviewed plaintiff's documents and records relating to this case for factual accuracy; and (b) confirmed the factual accuracy of the allegations set forth in the Complaint and any supporting affidavits or affirmations filed with the Court, as well as the accuracy of the notarizations contained in the supporting documents filed therewith.

Name	Title
_____	_____
_____	_____
_____	_____

3. Based upon my communication with [person/s specified in ¶2], as well as upon my own inspection and other reasonable inquiry under the circumstances, I affirm that, to the best of my knowledge, information, and belief, the Summons, Complaint, and other papers filed or submitted to the Court in this matter contain no false statements of fact or law. I understand my continuing obligation to amend this Affirmation in light of newly discovered material facts following its filing.

4. I am aware of my obligations under New York Rules of Professional Conduct (22 NYCRR Part 1200) and 22 NYCRR Part 130.

_____

DATED:

N.B.: Counsel may augment this affirmation to provide explanatory details, and may file supplemental affirmations or affidavits for the same purpose.

[Revised 11/18/10]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

_____

Plaintiff,

v.

Defendant(s)

AFFIDAVIT

Index No.: _____

Mortgaged Premises:

_____

_____

STATE OF NEW YORK)
) ss:
COUNTY OF_____)

_____, being duly sworn, deposes and says:

1. I am a _____, a representative of plaintiff in the above-captioned mortgage foreclosure action. I am authorized to execute this affidavit and am fully aware of the underlying action, as well as the papers and proceedings heretofore had herein.

2. This Affidavit is made in further support of plaintiff's counsel's affirmation pursuant to the October 2010 Administrative Order of the Chief Administrative Judge of the Courts of New York, as supplemented.

3. I have performed the following actions in order to confirm the truth and veracity of the statements made herein. This review is based upon my access to the books and records relating to this loan which are kept in the ordinary course of business.

Initial all that are applicable:

A____ Confirmed the notice of default, if required, was properly mailed prior to commencement of foreclosure.

B____ Reviewed the summons and complaint in this action to confirm the factual accuracy of the identity of the proper plaintiff, the defaults and the amounts claimed to be due to plaintiff as set forth therein.

C____ Confirmed the affidavit(s) executed and submitted by plaintiff together with this

application have been personally reviewed by the signatory; that the notary acknowledging the affiant's signature followed applicable law in notarizing the affiant's signature.

D____ I am unable to confirm or deny that the underlying documents previously filed with the Court have been properly reviewed or notarized.

E____ Inasmuch as the underlying mortgage loan has been transferred prior to commencement or during the pendency of this action, I am unable to confirm or deny that the underlying documents filed with the Court have been properly reviewed or notarized by the prior servicer.

F_____(other)_____

_____

_____

_____

N.B.: Affiants may augment this affidavit to provide explanatory details, and may file supplemental affirmations or affidavits for the same purpose.

WHEREFORE, it is respectfully requested that the Court grant the proposed relief requested herein together with such other relief as the Court deems just and proper

_____

(Affiant)

STATE OF _____) SS:
COUNTY OF _____)

On the _____ day of _____ in the year _____ before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is(are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), that by his/her/their signature(s) on the instrument, the individual(s), or the personal upon behalf of which the individual(s) acted, executed the instrument, and that such individual made such appearance before the undersigned in the .

_____

Notary Public

Public Law 111-22, (May 20, 2009)
TITLE VII--PROTECTING TENANTS AT FORECLOSURE ACT (PTFA)[4]

SEC. 701. SHORT TITLE.

This title may be cited as the `Protecting Tenants at Foreclosure Act of 2009'.

SEC. 702. EFFECT OF FORECLOSURE ON PREEXISTING TENANCY.

(a) In General- In the case of any foreclosure on a federally-related mortgage loan or on any dwelling or residential real property after the date of enactment of this title, any immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to--

(1) the provision, by such successor in interest of a notice to vacate to any bona fide tenant at least 90 days before the effective date of such notice; and

(2) the rights of any bona fide tenant,

(A) under any bona fide lease entered into before the notice of foreclosure to occupy the premises until the end of the remaining term of the lease, except that a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of the 90 day notice under paragraph (1); or

(B) without a lease or with a lease terminable at will under State law, subject to the receipt by the tenant of the 90 day notice under subsection (1),

except that nothing under this section shall affect the requirements for termination of any Federal- or State-subsidized tenancy or of any State or local law that provides longer time periods or other additional protections for tenants.

(b) Bona Fide Lease or Tenancy- For purposes of this section, a lease or tenancy shall be considered bona fide only if--

(1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant;

(2) the lease or tenancy was the result of an arms-length transaction; and

(3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy.

(c) Definition- For purposes of this section, the term `federally-related mortgage loan' has the same meaning as in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602). For purposes of this section, the date of a notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed.

SEC. 703. EFFECT OF FORECLOSURE ON SECTION 8 TENANCIES.

Section 8(o)(7) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)(7)) is amended--

(1) by inserting before the semicolon in subparagraph (C) the following: `and in the case of an owner who is an immediate successor in interest pursuant to foreclosure during the term of the lease vacating the property prior to sale shall not constitute other good cause, except that the owner may terminate the tenancy effective on the date of transfer of the unit to the owner if the owner--

(i) will occupy the unit as a primary residence; and

(ii) has provided the tenant a notice to vacate at least 90 days before the effective date of such notice.'; and

(2) by inserting at the end of subparagraph (F) the following: `In the case of any foreclosure on any federally-related mortgage loan (as that term is defined in section 3 of the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2602)) or on any residential real property in which a recipient of assistance under this subsection resides, the immediate successor in interest in such property pursuant to the foreclosure shall assume such interest subject to the lease between the prior owner and the tenant and to the housing assistance payments contract between the prior owner and the public housing agency for the occupied unit, except that this provision and the provisions related to foreclosure in subparagraph (C) shall not shall not affect any State or local law that provides longer time periods or other additional protections for tenants.

SEC. 704. SUNSET.

This title, and any amendments made by this title are repealed, and the requirements under this title shall terminate, on December 31, 2014.

123 STAT. 1632, 1660

---

[4] The PTFA was amended in section 1484 of P.L. 111-203 (July 21, 2010).

Applicable Oregon Statutes on Landlord/Tenant issues in foreclosure

86.755 Sale of property; obtaining possession after sale; procedures; notices required. (1) The trustee shall hold the trustee's sale on the date and at the time and place designated in the notice of sale, which must be at a designated time after 9 a.m. and before 4 p.m., based on the standard of time set forth in ORS 187.110 and at a designated place in the county or one of the counties where the property is situated. The trustee may sell the property in one parcel or in separate parcels and shall sell the parcel or parcels at auction to the highest bidder for cash. Any person, including the beneficiary under the trust deed, but excluding the trustee, may bid at the trustee's sale. The attorney for the trustee, or an agent that the trustee or the attorney designates, may conduct the sale and act in the sale as the trustee's auctioneer.

(2) The trustee or the attorney for the trustee, or an agent that the trustee or the attorney conducting the sale designates, may postpone the sale for one or more periods totaling not more than 180 days from the original sale date, giving notice of each adjournment by public proclamation made at the time and place set for sale. The trustee, the attorney or an agent that the trustee or the attorney designates may make the proclamation.

(3) The purchaser shall pay at the time of sale the price bid, and, within 10 days following payment, the trustee shall execute and deliver the trustee's deed to the purchaser.

(4) The trustee's deed shall convey to the purchaser the interest in the property that the grantor had, or had the power to convey, at the time the grantor executed the trust deed, together with any interest the grantor or the grantor's successors in interest acquire after the execution of the trust deed.

(5)(a) The purchaser at the trustee's sale is entitled to possession of the property on the 10th day after the sale. A person that remains in possession after the 10th day under any interest, except an interest prior to the trust deed or an interest the grantor or a successor of the grantor created voluntarily is a tenant at sufferance. The purchaser may obtain possession of the property from a tenant at sufferance by following the procedures set forth in ORS 105.105 to 105.168 or other applicable judicial procedure.

(b) Except as provided in paragraph (c) of this subsection, at any time after the trustee's sale the purchaser may follow the procedures set forth in ORS 105.105 to 105.168 or other applicable judicial procedure to obtain possession of the property from a person that holds possession under an interest that the grantor or a successor of the grantor created voluntarily if, not earlier than 30 days before the date first set for the sale, the person was served with not less than 30 days' written notice of the requirement to surrender or deliver possession of the property.

(c) If the property purchased at the trustee's sale is a dwelling unit, as defined in ORS 90.100 (9), that the person holds under a tenancy that the grantor or a successor of the grantor created voluntarily and in good faith, the purchaser may follow the procedures set forth in ORS 105.105 to 105.168 or other applicable judicial procedure to obtain possession if after the sale the purchaser terminates the tenancy in a written notice given to the person:

(A) At least 60 days before the termination date specified in the notice, if the tenancy is a fixed term tenancy, as defined in ORS 90.100, and at least 30 days before the date first set for the trustee's sale the person provided the trustee with a copy of the rental agreement that established the fixed term tenancy. The provisions of this subparagraph do not apply to a purchaser that does not intend to terminate a fixed term tenancy before the date on which the fixed term tenancy ends.

(B) At least 30 days before the termination date specified in the notice, if:

(i) The tenancy is a month-to-month tenancy or week-to-week tenancy, as those terms are defined in ORS 90.100, and at least 30 days before the date first set for the trustee's sale the person provided the trustee with a copy of the rental agreement that established the tenancy or with other written evidence of the existence of a rental agreement, if the person cannot provide the rental agreement; or

(ii) The tenancy is a fixed term tenancy for which the person has provided notice to the trustee as provided in subparagraph (A) of this paragraph and the purchaser intends to occupy the property that is subject to the fixed term tenancy as the purchaser's primary residence.

(d) A purchaser may not commence a proceeding under ORS 105.105 to 105.168 that is authorized under this subsection before the later of:

(A) The 10th day after the trustee's sale;

(B) The date specified in a written notice of the requirement to surrender or deliver possession of the property if the notice is required by and is given to the person in accordance with paragraph (b) of this subsection;

(C) The date specified in a written notice of the purchaser's intent to terminate a tenancy if the notice is required by and is given to the person in accordance with paragraph (c) of this subsection; or

(D) The date on which the term of a fixed term tenancy ends, if the property is a dwelling unit and the purchaser has not terminated the tenancy in accordance with paragraph (c) of this subsection.

(e) For the purposes of this subsection:

(A) A month-to-month tenancy or a week-to-week tenancy that a grantor or a successor of the grantor first created after a notice of sale was served under ORS 86.750 is presumed not to be a tenancy created in good faith.

(B) A fixed term tenancy that a grantor or a successor of the grantor created after a notice of sale was served under ORS 86.750 is not a tenancy created in good faith.

(6) A purchaser shall serve a notice under subsection (5) of this section by first class mail and not by certified or registered mail or a form of mail that may delay or hinder actual delivery of mail to the addressee. The notice is effective three days after the notice is mailed.

(7)(a) Notwithstanding the provisions of subsection (5)(c) of this section and except as provided in paragraph (b) of this subsection, the purchaser is not a landlord subject to the provisions of ORS chapter 90 unless the purchaser:

(A) Accepts rent from the person who possesses the property under a tenancy described in subsection (5)(c) of this section;

(B) Enters into a new rental agreement with the person who possesses the property under a tenancy described in subsection (5)(c) of this section; or

(C) Fails to terminate the tenancy as provided in subsection (5)(c) of this section within 30 days after the date of the sale.

(b) The purchaser may act as a landlord for purposes of terminating a tenancy in accordance with the provisions of ORS 90.396.

(8)(a) Except as provided in paragraph (b) of this subsection, the purchaser is not liable to the person who possesses the property under a tenancy described in subsection (5)(c) of this section for:

(A) Damage to the property or diminution in rental value; or

(B) Returning a security deposit.

(b) A purchaser that is a landlord under the provisions of subsection (7)(a) of this section is liable to the person who possesses the property under a tenancy described in subsection (5)(c) of this section for:

(A) Damage to the property or diminution in rental value that occurs after the date of the trustee's sale; or

(B) Returning a security deposit the person pays after the date of the trustee's sale.

(9)(a) Notwithstanding subsection (2) of this section, except when a beneficiary has participated in obtaining a stay, foreclosure proceedings that are stayed by order of the court, by proceedings in bankruptcy or for any other lawful reason shall, after release from the stay, continue as if uninterrupted, if within 30 days after release the trustee sends amended notice of sale by registered or certified mail to the last-known address of the persons listed in ORS 86.740 and 86.750 (1).

(b) In addition to the notice required under paragraph (a) of this subsection, the trustee shall send amended notice of sale:

(A) By registered or certified mail to:

(i) The address provided by each person who was present at the time and place set for the sale that was stayed; and

(ii) The address provided by each member of the Oregon State Bar who by registered or certified mail requests the amended notice of sale and includes with the request the notice of default or an identification number for the trustee's sale that would assist the trustee in identifying the property subject to the trustee's sale and a self-addressed, stamped envelope measuring at least 8.5 by 11 inches in size; or

(B) By posting a true copy or a link to a true copy of the amended notice of sale on the trustee's Internet website.

(10) The amended notice of sale must:

(a) Be given at least 20 days prior to the amended date of sale;

(b) Set an amended date of sale that may be the same as the original sale date, or date to which the sale was postponed, provided the requirements of this subsection and ORS 86.740 and 86.750 are satisfied;

(c) Specify the time and place for sale;

(d) Conform to the requirements of ORS 86.745; and

(e) State that the original sale proceedings were stayed and the date the stay terminated.

(11) If the publication of the notice of sale was not completed before the date the foreclosure proceedings were stayed by order of the court, by proceedings in bankruptcy or for any other lawful reason, after release from the stay, in addition to complying with the provisions of subsections (9) and (10) of this section, the trustee shall complete the publication by publishing an amended notice of sale that states that the notice has been amended following release from the stay and that contains the amended date of sale. The amended notice must be published in a newspaper of general circulation in each of the counties in which the property is situated once a week for four successive weeks, except that the required number of publications must be reduced by the number of publications that were completed before the effective date of the stay. The last publication must be made more than 20 days before the date the trustee conducts the sale. [1959 c.625 §9; 1965 c.457 §6; 1983 c.719 §7; 1985 c.817 §6; 1989 c.190 §5; 1989 c.506 §1; 2009 c.883 §§1,1a]