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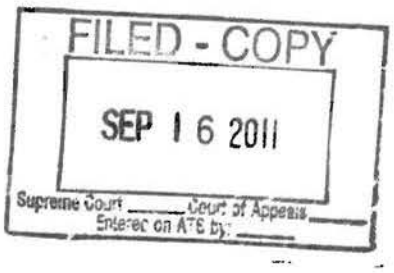
Federal Nat. Mortg. Ass'n v. Allen Respondent's Brief Dckt. 37972

Janaya L. Carter / ISB #8226
Derrick J. O'Neill / ISB #4021
Brian R. Langford / ISB #7747
ROUTH CRABTREE OLSEN, PS
300 Main Street, Suite 150
Boise, Idaho 83702
Telephone: 208-489-3035
Facsimile: 208-854-3998
brian@oneillpllc.com

Attorneys for Plaintiff/Respondent



IN THE SUPREME COURT OF THE STATE OF IDAHO

FEDERAL NATIONAL MORTGAGE ASSOCIATION, aka FANNIE MAE, a Corporation created by the Congress of the United States,

Plaintiff/Respondent,

vs.

DAVID B. ALLEN, an individual; and DOES 1 through 10, Unknown Occupants Of The Property Commonly Known as 1596 East Shingle Mill Road, Sandpoint, ID 83864,

Defendants/Appellants.

Sup. Ct. No. 37972-2010
Bonner Co. Case No. CV-2009-01865

PLAINTIFF/RESPONDENT'S RESPONSE BRIEF

Appeal from the District Court of the First Judicial District for Bonner County.
Honorable Steven Verby, District Judge, presiding.

Attorney for Appellant:	David Bruce Allen, pro se Residing in Sandpoint, Idaho
Attorney for Respondents:	Derrick J. O'Neill and Brian R. Langford, ROUTH CRABTREE OLSEN, P.S. Boise, Idaho

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I. Statement of the Case

The instant appeal stems from an action to evict the Defendant, David B. Allen, from real property and to restore possession to the Plaintiff, Federal National Mortgage Association, aka Fannie Mae, following the conclusion of a non-judicial foreclosure sale. The subject property is commonly known as 1596 E. Shingle Mill Road, Sandpoint, Bonner County, Idaho, (hereafter referred to as the "Property"). The trial court entered a default judgment against Defendant, and later denied Defendant's motions to vacate the default judgment. Defendant now appeals from the trial court's order denying his second motion to vacate the default judgment.

Plaintiff does not disagree with the chronology of events set forth in Defendant's statement of the case, though it does object to Defendant's characterization or spin on the facts listed therein. Moreover, several important facts were omitted from Defendant's statement. Plaintiff would offer the following additional facts to lend context to the matter.

Plaintiff's predecessor in interest, Suntrust Mortgage, purchased the Property at a trustee's sale conducted on August 27, 2009. R. 8-9. A trustee's deed was issued to Suntrust Mortgage, and duly recorded on August 31, 2009 in the official records of Bonner County. R. 9. Thereafter, Suntrust Mortgage conveyed its interest in the Property to Plaintiff via Special Warranty Deed, which deed was also duly recorded. R. 9. When Defendant failed and/or refused to vacate the Property, Plaintiff filed a Complaint in the First Judicial District Court on October 7, 2009. R. 10. The Complaint was signed by Mark Perison, as the attorney for Plaintiff. R. 12.

Defendant filed a "Pre-Answer Motion to Dismiss; Motion for Sanctions" on November 16, 2009. R. 13-15. Plaintiff, through Mr. Perison, filed an application for entry of default on December 4, 2009, and a default judgment was entered on December 11, 2009. R. 1, 23-24. On January 26, 2010, the default judgment was set aside pursuant to the parties' stipulation. R. 26-27. On February 11, 2010, Plaintiff filed a notice of substitution of counsel, wherein Mr. Perison withdrew, and Derrick J. O'Neill was substituted as counsel of record for Plaintiff. R. 175-176. The notice was signed by both Mr. Perison and Mr. O'Neill. *Id.* On February 17, 2010, a hearing on Defendant's motion to dismiss and motion for sanctions was rescheduled for March 17, 2010. R. 2.

On March 9, 2010, prior to the scheduled hearing, Plaintiff filed a notice of intent to take default. R. 177-178. On March 17, 2010, the Court conducted a hearing on Defendant's motion to dismiss, in which it determined that the motion to dismiss would be denied, which rendered the motion for sanctions moot. TR. March 17, 2010, p. 20, l. 5 through p. 30, l. 17. At that time, the Court also advised Defendant that he needed to follow the Idaho Rules of Civil Procedure and file an answer. TR. March 17, 2010, p. 31, ll. 7-13. An order denying the motion to dismiss was entered on March 24, 2010. R. 30-31. On April 5, 2010, with Defendant yet to file an answer to the Complaint, Plaintiff filed an application for entry of a default judgment for failure to plead or otherwise defend, together with affidavits in support of the application. R. 184-193. A default judgment was entered on April 7, 2010, and the case was closed. R. 34-35.

Thereafter, on April 14, 2010, Defendant filed an Emergency Motion for Stay, an Emergency Motion to Quash the Writ of Ejectment, a Motion to Vacate Judgment, as well as an

Answer and Counterclaim. R. 36-81. The Court conducted a hearing on these motions on April 21, 2010, at the conclusion of which it took the matters under advisement. On May 27, 2010, the Court entered a written decision and order denying the Defendant's motion to vacate the judgment. R. 87-94. After that order was entered, Defendant filed a reply brief in support of the previously filed motion to dismiss, R. 95 – 98, together with an affidavit in support of the motion to vacate. R. 101 – 117. In response to those filings, Plaintiff filed a written objection to the motion to vacate the default judgment. R. 118 – 120.

On July 2, 2010, Defendant filed another motion to vacate the judgment with another brief in support of that motion. R. 121 – 159. Defendant scheduled that motion for hearing on July 21, 2010. *Id.* Although Plaintiff had not filed a written response, Defendant filed a reply brief on July 15, 2010. R. 160 – 164. Following a hearing on July 21, 2010, the Court denied the Defendant's motion to vacate the judgment, *see* TR. July 21, 2010, p. 14, l. 22, and the order was entered on July 23, 2010. R. 165-166. Defendant filed his notice of appeal on August 2, 2010. R. 167-170.

II. Issues on Appeal

The primary issues on appeal raised by Defendant all relate to standing. Defendant suggests that the Court was without standing to rule on his motion to dismiss the case, that Mr. O'Neill did not have standing to appear on behalf of Plaintiff; and that Fannie Mae was without standing to bring the original complaint. Ancillary to these concerns, Defendant suggests that the Idaho statutes concerning non-judicial foreclosure are unconstitutional and that the Court abused its discretion in failing to rule in Defendant's favor.

Defendant's actions have caused plaintiff to seek to assistance of attorneys to prosecute the underlying district court complaint and represent its interests through this appeal. Plaintiff should be entitled to its reasonable costs and attorneys' fees pursuant to Idaho Code § 12-120 and 12-121. In as much as Defendant is representing his own interests in this appeal, his request for an award of attorney's fees should be denied.

III. Argument

Defendant's concerns regarding standing are without merit and result from a fundamental misunderstanding of the concept of jurisdiction and standing. For the reasons set forth herein, the decisions of the trial court should be affirmed.

A. The trial court did not err in denying Defendant's motion to dismiss.

Defendant argues that because Judge Verby was the judge assigned to his case, Judge Hosack was without "standing" to rule on his motion to dismiss, and the resulting order was therefore void ab initio. This contention is incorrect.

Defendant seems to suggest that a retired district judge may only serve in a district court position upon the request and order of the chief justice. *See State v. Pratt*, 912 P.2d 94, 98 (Idaho 1996) ("A retired district judge may hold a district court position upon the request and order of the chief justice."). In *Pratt*, Judge Prather, a retired district judge, was appointed to hold court for the purpose of disposing of all matters and proceedings concerning that particular case. Plaintiff does not dispute that the Idaho Constitution allows for a retired judge to be appointed for extended periods of time and for multiple matters and that one mechanism to make such an appointment is via request and order of the chief justice. However, the plain language of

the Idaho Constitution also provides for more limited appearances by retired judges or other district judges. "A judge of any district court, or any retired justice of the Supreme Court or any retired district judge, may hold a district court in any county at the request of the judge of the district court thereof[.]" Idaho Constitution, Article V, Section 12.

Thus, all that is required under this latter circumstance is a simple invitation by the assigned district judge. *See, e.g., Kettenbach v. Walker*, 186 P. 912, 913 (Idaho 1919) (there can be no question that a district judge from one district may preside in another district under certain circumstances, and an invitation from either the judge of the district or from the Governor would have conferred the requisite authority); *Ferguson v. McGuire*, 104 P.1028 (Idaho 1909) (a judge invited to assist in trying of cases of another judge has full authority to try the matter). That is precisely what happened in this case. Judge Verby clearly indicated on the record that he had invited Judge Hosack to hold court in his stead during the time in which Judge Verby was out of the county. TR. July 21, 2010, p. 13, ll. 8-14. The reason Judge Verby was absent at the hearing is irrelevant, and his request that Judge Hosack cover the hearing shows no disrespect to this honorable Court or the parties.

Thus, being properly invited by Judge Verby, Judge Hosack was clothed with all the authority necessary to rule on Defendant's motion to dismiss. Judge Hosack articulated the reasons why the motion to dismiss should be denied, and Defendant has not shown that reasoning to be clearly erroneous. *See* Tr. March 17, 2010, p. 28, l. 5 through p. 30, l. 22. Accordingly, the decision of the trial court should be affirmed.

B. The trial court did not err in determining that Mr. O'Neill could appear on behalf of Plaintiff.

Defendant also alleges that Mr. Perison and Mr. O'Neill failed to comply with Idaho Rule of Civil Procedure 11(b)(1), and that these purported failings prohibited Mr. O'Neill from representing Plaintiff's interests in this case. Throughout these proceedings, Defendant frequently referred to Mr. O'Neill as lacking "standing" to represent Plaintiff.

In his brief, Defendant argues that the notice of substitution that he received from Mr. Perison was not signed by both attorneys. *See* R. 110 – 111. A review of one of his filed affidavits indicates that this notice was attached to a letter drafted and mailed by Mr. Perison's office on March 2, 2010. *See* R. 103. Plaintiff concedes that this notice only appears to contain the signature of Mr. Perison. Defendant then suggests that it is irrelevant if the court records show something otherwise. *See* Defendant's First Brief, p. 14. He suggests that the notice, signed by both the withdrawing and the substituting attorney, must be provided to all parties. *Id.* Plaintiff disagrees with Defendant's contention that the court records are irrelevant. In fact, the court record does contain a notice of substitution that was signed by both Mr. Perison and Mr. O'Neill. *See,* R. 175 – 176. Moreover, that notice contains a certificate of service that confirms that it was mailed to Defendant on February 11, 2010 at the same address used by Mr. Perison's office in the later correspondence. *Id.* Defendant has not suggested that he did not receive the notice sent by Mr. O'Neill on February 11, 2010, rather, he has only implied that the later notice sent by Mr. Perison's office did not contain Mr. O'Neill's signature. This anomaly can easily be explained by careful investigation of the court record, and the three separate facsimile signatures

at the top of the document. *See* R. 175-176. The notice of substitution was drafted by Mr. O'Neill, and then faxed to Mr. Perison for his review and signature. After Mr. Perison signed the document, it was faxed back to Mr. O'Neill, who then added his signature. The notice, with both signatures, was then faxed to the Court for filing.

Despite being an apparent stumbling block for Defendant, the court determined that the substitution of counsel was proper. Judge Hosack explained,

> I appreciate your arguments but this is a change of attorneys pursuant to Rule 11(b)(1) Notice of Substitution. We see this over and over in cases. It's just routine. And the Notice of Substitution is proper pursuant to the Idaho Rules of Civil Procedure. So we need to address – get past your problem with having a different attorney representing [Plaintiff] and address the substantive issues that you want the Court to be thinking about[.]

TR. March 17, 2010, p. 24, ll. 4 – 12. Even after the court had decided the issue, Defendant continued to suggest the substitution was improper, and the Court once again addressed the issue. Drawing upon persuasive authority from other jurisdictions, Judge Verby noted that even if there were an irregularity in the notice of substitution, Defendant had failed to show that he was prejudiced in any way by the substitution of Mr. O'Neill. TR. July 21, 2010, p. 11, l. 1 through p. 12, l. 22. Indeed, Defendant was not prejudiced by the substitution of attorneys. On multiple occasions, the court outlined the reasons for its decision and Defendant has not shown these decisions to be an abuse of discretion or clearly erroneous.

C. The trial court did not err when it denied Defendant's motions to vacate the default judgment.

The district court generally has discretion whether to vacate a default judgment. *Meyers v. Hansen*, 221 P.3d 81, 86 (Idaho 2009). As this Court has explained,

> When faced with an appeal from a discretionary determination, the appellate court must decide: (1) whether the trial court correctly perceived the issue as discretionary; (2) whether the trial court acted within the boundaries of its discretion and consistent with the applicable legal standards; and (3) whether the trial court reached its determination through an exercise of reason.

State v. Pratt, 912 P.2d 94, 98 (Idaho 1996) (citing *State v. Hedger*, 768 P.2d 1331, 1333 (Idaho 1989) (quoting *Associates Northwest, Inc. v. Beets*, 733 P.2d 824, 826 (Idaho Ct. App. 1987))).

1. The district court did not abuse its discretion in denying Defendant's motion to vacate the default judgment.

After taking Defendant's motion to vacate under advisement, the Court issued a reasoned decision outlining why the motion should be denied. There can be no doubt that Defendant was well aware of his responsibility to file an answer to Plaintiff's complaint. As the district court mentioned in its decision, Defendant was given notice of Plaintiff's intent to take a default by Plaintiff's counsel on March 9, 2010, and subsequently admonished by the court on March 17, 2010 to file an answer. R. 88. Yet, even after these warnings, Defendant's answer was not forthcoming. It was not until after the default judgment had been entered that Defendant finally filed an answer. Not only was Defendant's responsive pleading tardy, but his request to vacate the default judgment failed to articulate any grounds to justify it being granted.

Defendant sought to avoid the consequences of his tardiness on the grounds of excusable neglect and fraud pursuant to Idaho Rule of Civil Procedure 60(b)(1) and (3). To each of these points, the district court properly and adequately explained why the facts in this case did not warrant the relief sought. *See* R. 89-91. Moreover, as the court further explained, Defendant had

failed to set forth any proof of a meritorious defense to Plaintiff's complaint. R. 91-92. This requirement is well-settled:

> When moving to set aside a default judgment, the moving party must not only meet the requirements of I.R.C.P. 60(b) but must also plead facts which, if established, would constitute a defense to the action. It would be an idle exercise for the court to set aside a default if there is in fact no real justiciable controversy. The defense matters must be detailed.

Meyers, 912 P. 3d at 87 (citing *Idaho State Police v. Real Property*, 156 P.3d 561, 563-64 (Idaho 2007)).

Defendant attempted to remedy his shortcomings by filing a subsequent motion to vacate the judgment. At the hearing on this second motion to vacate, Defendant once again raised the same concerns that he had previously argued before the court. Defendant's motion was, in effect, a motion for reconsideration of the court's earlier decision. Such a motion is not permitted by the Idaho Rules of Civil Procedure. *See* I.R.C.P. 11(a)(2)(B) ("there shall be no motion for reconsideration of an order of the trial court entered on any motion filed under Rules 50(a), 52(b), 55(c), 59(a), 59(e), 59.1, 60(a), or 60(b)."). Given that the court had previously articulated its reasoning as to why the first motion to vacate the judgment would be denied, and that the procedural rules do not permit for a request for reconsideration in this context, the court did not abuse its discretion in ruling that the second motion to vacate would be denied.

2. Idaho Courts have consistently held that Idaho's non-judicial foreclosure statutes are constitutional.

The Idaho non-judicial foreclosure statutes provide debtors with significant notice of pending foreclosure proceedings. The constitutionality of those statutes has been repeatedly

reaffirmed by the Idaho Appellate Courts. *See, e.g., Security Pacific Finance Corp. v. Bishop*, 704 P.2d 357 (Idaho Ct. App. 1985), *Roos v. Belcher*, 321 P.2d 210 (Idaho 1958).

Having been thus upheld, Plaintiff is entitled to rely upon these statutory provisions. Idaho Code § 45-1510 provides:

> When a trustee's deed is recorded in the deed records of the county where the property described in the deed is located, the recitals contained in the deed and the affidavits required under § 45-1505(7), shall be *prima facie* evidence in any court of the truth of the recitals and the affidavits. However, the recitals and affidavits are conclusive in favor of a purchaser in good faith for value or any successor in interest thereof.

Idaho Code § 45-1510.

In addition, Idaho Code § 45-1506(11) provides:

> The purchaser at the trustee's sale shall be entitled to possession of the property on the tenth day following sale, and any persons remaining in possession thereafter under any interest except one prior to the deed of trust shall be deemed to be tenants at sufferance.

Idaho Code § 45-1506(11).

Moreover, the effect of the trustee's sale is set forth in Idaho Code § 45-1508, which provides:

> A sale made by a trustee under this act shall foreclose and terminate all interest in the property covered by the deed of trust if all persons to whom notice is given under § 45-1506, Idaho Code, and any other persons claiming by, through or under such persons and such persons shall have no right to redeem the property from the purchaser at the trustee's sale. The failure to give notice to any such persons by mailing, personal service, posting or publication in accordance with § 45-1506, Idaho Code, shall not affect the validity of the sale as to persons so notified nor as to any persons having actual knowledge of the sale.

Idaho Code § 45-1508.

Defendant had actual knowledge of the foreclosure proceedings, and as a result, cannot attack the validity of the sale. Whatever interest Defendant formerly had in the Property was terminated and foreclosed upon the completion of the sale. In this case, the issuance and recording of the trustee's deed is a *prima facie* showing of compliance with Idaho's non-judicial foreclosure statutes. As the successor in interest to the purchaser at the trustee's sale, and pursuant to the statutory presumptions set forth in these statutes, Plaintiff is entitled to the relief sought in its Complaint as a matter of law.

3. Plaintiff was the real party in interest and had standing to bring the original complaint.

Idaho Rules of Civil Procedure require every action to be prosecuted in the name of the real party in interest. I.R.C.P. 17(a). "A real party in interest is 'one who has a real, actual, material, or substantial interest in the subject matter of the action.'" *Citibank (South Dakota), N.A. v. Carroll*, 220 P.3d 1073, 1076-77 (Idaho 2009) (quoting *Caughey v. George Jensen & Sons*, 258 P.2d 357, 359 (Idaho 1953)). "Generally, the holder of legal title to the subject matter of a cause of action is a real party in interest." *Id.* at 1077. As previously set forth, Suntrust Mortgage acquired title to the Property via trustee's sale on August 27, 2009. Suntrust Mortgage was issued a trustee's deed, which was duly recorded in the official records of Bonner County. Suntrust Mortgage thereafter transferred its interest in the Property to Plaintiff via Special Warranty Deed which was recorded in the official records of Bonner County. R. 9. Accordingly, Plaintiff held legal title to the Property and was entitled to possession pursuant to

Idaho law. As such, Plaintiff was the real party in interest, and had the authority to bring this suit.

IV. Conclusion

Pursuant to the Idaho non-judicial foreclosure statutes, Plaintiff acquired title to the Property and had a right to possession. When Defendant refused to vacate the Property, Plaintiff properly brought suit to remove Defendant from the Property and restore possession in Plaintiff. The district court has jurisdiction over the action, and the authority to decide all matters before it. Defendant failed to comply with the Idaho Rules of Civil Procedure, and a judgment was issued against Defendant. The district court did not err in denying Defendant's repeated attempts to set aside the judgment. For the reasons set forth herein, the decision of the district court should be AFFIRMED.

DATED, this 16th day of September, 2011

By: 

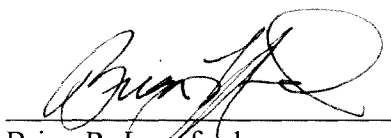
Brian R. Langford, of the firm
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September, 2011, I lodged the original bound brief, six (6) true and correct bound copies, and one true and correct unbound, unstapled copy of the foregoing appellate brief with the clerk of the Idaho Supreme Court.

I FURTHER CERTIFY that on the same date, I caused two (2) true and correct bound copies of the foregoing appellate brief to be served as follows:

David B. Allen 222 Kootenai 4th Ave. Sandpoint, ID 83864	__X__ U.S. Mail, Postage prepaid _____ Facsimile _____ Hand delivery



Brian R. Langford