6-14-2012

Edwards v. Mortgage Electronic Registration Respondent's Brief 1 Dckt. 38604

IN THE SUPREME COURT OF THE STATE OF IDAHO

Case No. 38604-2011

LESLIE JENSEN EDWARDS,
Plaintiff-Appellant,

v.

LEHMAN BROTHERS BANK, FSB, AS LENDER; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE and BENEFICIARY and QUALITY LOAN SERVICES, AS ATTORNEY IN FACT AND SUCCESSOR TRUSTEE; and PIONEER LENDER TRUSTEE SERVICES, LLC AS TRUSTEE; and AURORA LOAN SERVICES AS SERVICER,
Defendants-Respondents.

BRIEF OF RESPONDENTS QUALITY LOAN SERVICE CORPORATION AND PIONEER LENDER TRUSTEE SERVICES LLC

Appeal from the District Court of the First Judicial District for Kootenai County
Honorable Lansing L. Haynes, District Judge, presiding

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STATEMENT OF THE CASE

This appeal arises from a Memorandum Decision, Findings of Fact and Conclusions of Law and Order re: Defendants' Motion for Summary Judgment entered by the District Court on November 16, 2010. Appellant Leslie Jensen Edwards' First Amended Complaint asserted causes of action for injunctive and declaratory relief relating to the nonjudicial foreclosure of her home, contending the foreclosure was unlawful due to the involvement of Mortgage Electronic Registration Systems, Inc. ("MERS"). Defendants filed a Motion to Dismiss the First Amended Complaint for failure to state a cause of action under I.R.C.P. 12(b)(6), which the court treated as a Motion for Summary Judgment. After two continuances to give Plaintiff additional time to submit opposing evidence, the court granted summary judgment for Defendants. Plaintiff has appealed.

STATEMENT OF FACTS

I. The Loan And The Nonjudicial Foreclosure

In 2003, Plaintiff obtained a loan from American Gold Mortgage Corporation secured by a Deed of Trust to her real property located at 17287 West Summerfield Road, Post Falls, Idaho 83854 ("Subject Property"). (R. p. 157.) She refinanced the loan in 2005 by obtaining a new loan from Lehman Brothers Bank, FSB. (R. p. 103.) In connection with the refinance transaction, the American Gold Mortgage loan was paid off and the Deed of Trust was reconveyed. (R. pp. 104, 158.)

Plaintiff executed a new Deed of Trust to secure the Lehman Brothers loan. (R. p. 78.) The Deed of Trust identified Lehman Brothers Bank, FSB as the Lender, Alliance Title & Escrow as the Trustee, and MERS as the Beneficiary, in its capacity as nominee for the Lender and the Lender's successors and assigns. (R. pp. 78-79.) Specifically, the Deed of Trust stated the following:

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

(R. p. 80.)

Plaintiff stopped making payments on her loan in 2009 when she suffered a drop in income. (*See* R. p. 154 (quoting Affidavit of Leslie Edwards).) As a result, nonjudicial foreclosure was initiated under the provisions of I.C. § 14-1502 et seq. ("Idaho Trust Deed Act"). On November 30, 2009, MERS executed an Appointment of Successor Trustee, designating Pioneer Lender Trustee Services, LLC ("Pioneer") in place of the original trustee Alliance Title & Escrow. (R. pp. 115-116.) The Appointment of Successor Trustee was recorded in the Kootenai County Recorder's Office on December 3, 2009. (R. p. 115.) Pioneer, acting through Quality Loan Service as its attorney in fact, then issued a Notice of Default and Election to Sell under the Deed of Trust, (R. pp. 117-118), followed by a Notice of Trustee's Sale, (R. p. 120).

II. Proceedings Below

Edwards filed her Complaint on April 1, 2010, seeking declaratory and injunctive relief to stop and cancel the trustee's sale. (R. p. 1.) Defendants moved to dismiss the Complaint, and the parties stipulated to postpone the trustee's sale until the court ruled on Defendants' motion. (R. pp. 32, 34-35.) Shortly thereafter, Plaintiff filed a Motion to Amend the Complaint. (R. pp. 37-38.) The motion to amend was granted, and Plaintiff's Amended Complaint was filed on June 10, 2010. (R. p. 39.) The Amended Complaint again asserted causes of action for declaratory and injunctive relief, claiming that Defendants did not have standing to foreclose because they had not demonstrated an interest in the promissory note and Deed of Trust, and because "the purported changes to/substitutions of successor trustees are fraudulent." (R. pp. 109, 112.)

Defendants filed a Motion to Dismiss on July 6, 2010, which was set for hearing on July 29, 2010. (R. pp. 126, 129.) On July 20, 2010, Plaintiff filed an Ex Parte Motion to Continue Hearing on the Motion to Dismiss, claiming that because the Motion was supported by documents outside the pleadings it should be treated as a motion for summary judgment, and consequently Plaintiff needed additional time to complete discovery before opposing the motion. (R. pp. 128, 130.) At her request, Defendants stipulated to continue the Motion to Dismiss hearing from July 29 to August 20, 2010. (*See* R. p. 150.)

On August 13, 2010, Plaintiff filed a Second Motion to Continue Hearing and Extend Time to Respond to Motion for Summary Judgment, contending that Plaintiff was "entitled to complete discovery" before having to respond to a summary judgment motion. (R. at 141-142.) At the hearing, she contended that a sixty-day continuance should be granted so that she could serve discovery requests on Defendants. (Tr. p. 24, L. 4-7.) Plaintiff's counsel admitted that she could have served discovery requests sooner, but she had chosen to delay discovery in an attempt to limit attorneys' fees for her client. (Tr. p. 27, L. 22 through p. 28, L. 11.) She also argued that she needed two weeks to obtain a forensic loan report from an expert witness she had retained. (Tr. p. 24, L. 8-14.) After hearing counsel's submissions, the court agreed to continue the motion hearing for 30 to 35 days to allow Plaintiff to obtain and file the forensic loan report, but found Plaintiff had not shown a need for additional time to engage in discovery. (Tr. p. 32, L. 9-15, and p. 33, L. 8-15.)

Defendants' Motion to Dismiss was heard on September 30, 2010. Because Plaintiff had filed exhibits supporting and opposing the Motion that went beyond the pleadings, the court treated it as a Motion for Summary Judgment. (R. p. 150 n.2; Tr. p. 29, L. 20-22.) After hearing the arguments of counsel, the court took the motion under submission. The court's Memorandum Decision was issued on November 16, 2010. (R. p. 147.) First, the court ruled on the evidentiary matters, denying Plaintiff's Motion to Strike the Affidavit of Holger Uhl and

Defendants' Motion to Strike the Affidavits of Charles Horner, and also denying Plaintiff's objection to Defendants' Request for Judicial Notice. (R. pp. 151-153.)

Turning to the merits of Defendants' Motion, the court found the Amended Complaint "d[id] not provide a colorable claim that prevents [Defendants] from proceeding with a non-judicial foreclosure under Idaho law." (R. p. 154.) The court went on to find, based on existing Idaho law and the instrument itself, that MERS was the beneficiary under Plaintiff's Deed of Trust, and MERS was therefore authorized to appoint Pioneer as the successor trustee. (R. pp. 157, 161-162.) The court also found the evidence submitted by Defendants demonstrated full compliance with the statutory requirements for carrying out the nonjudicial foreclosure. (R. pp. 164-165.) Based on these findings, the court concluded there was no triable issue of material fact and granted Defendants' Motion for Summary Judgment. (R. p. 165.) The court also lifted the stay of the foreclosure. (R. p. 165.)

Plaintiff filed a Motion to Reconsider on December 1, 2010. (R. p. 167.) The Motion was denied because Plaintiff did not present any new evidence or arguments that would change the court's ruling. (R. pp. 192, 196.) A Judgment for Dismissal was entered on January 28, 2011. (R. p. 169.) Plaintiff filed her Notice of Appeal on March 4, 2011. (R. p. 198.)

ARGUMENT

I. Standard of Review

On appeal, the Court reviews an order granting summary judgment de novo, applying the same standard applied by the trial court when ruling on the motion. *Sun Valley Potatoes v. Rosholt*, 133 Idaho 1, 3 (1999). Summary judgment may be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c). The evidence is viewed in a light most favorable to the nonmoving party. *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 529 (1994). But a party opposing a motion

for summary judgment may not rest on the allegations of the pleadings; they must set forth facts showing there is a genuine and material issue that remains to be tried. I.R.C.P. 56(e).

The trial court's evidentiary rulings are reviewed for abuse of discretion. *Sprinkler Irrigation Co. v. John Deere Ins. Co.*, 139 Idaho 691, 696 (2004). To determine whether the court abused its discretion, this Court considers: "(1) whether it correctly perceived the issue as discretionary; (2) whether it acted without the boundaries of its discretion and consistently with applicable legal standards; and (3) whether it reached its decision by an exercise of reason." *Id.*

II. The Court Did Not Err in Hearing the Motion for Summary Judgment Before Discovery Was Completed.

Summary Judgment was not entered until Plaintiff exhausted her dilatory delay tactics. It was Plaintiff that requested conversion of the Motion to Dismiss to a Summary Judgment Motion, and it was Plaintiff that introduced evidence outside the pleadings. (R. pp. 128, 141; T. pp. 22, 24.) Yet, Plaintiff contends that the trial court erred in granting summary judgment for Defendants before Plaintiff completed "full fledged discovery." She does not appear to contest the court's ability to convert the Motion to Dismiss to a Motion for Summary Judgment,[1] but instead contends the Motion was premature because discovery had not been completed. This argument fails because there is no requirement that discovery be completed before a summary judgment motion can be heard. Further, the record confirms that Plaintiff is the party who requested that the motion be converted to a summary judgment motion and had ample opportunity to conduct discovery, and she does not point to any specific information that she could have obtained if given additional time. Thus, Plaintiff has not shown any possible abuse of discretion by the trial court in denying her requests to postpone the summary judgment motion.

[1] This Court has held that were materials outside the pleadings are submitted in support of a motion to dismiss, the trial court had a duty to treat the motion as a motion for summary judgment. *Boesiger v. De Modena*, 88 Idaho 337, 343 (1965).

A. Summary Judgment May Be Granted Before Discovery Is Complete.

Idaho Rule of Civil Procedure 56(f) gives the court discretion to continue the hearing on a summary judgment motion "to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." The court's ruling on a motion for continuance is reviewed for abuse of discretion. *Taylor v. AIA Servs. Corp.*, 261 P.3d 829, 849 (Idaho 2011).

Rule 56(f) does not necessitate "full fledged discovery" prior to Summary Judgment, as claimed by Plaintiff. *Bennett v. Bliss*, 103 Idaho 358, 360 (Ct. App. 1982); (*see* Opening Br. 11). Instead, it allows a continuance only where the party opposing summary judgment gives specific reasons why the party is unable to oppose the motion without additional discovery. *Golay v. Loomis*, 118 Idaho 387, 389 (1990). The party seeking a continuance has the dual burden of showing what further discovery is needed to support their opposition and how the information sought would preclude summary judgment. *Nicholas v. Wallenstein*, 266 F.3d 1083, 1088-89 (9th Cir. 2001) (discussing former Federal Rule of Civil Procedure 56(f)). Plaintiff failed to make such showing.

Plaintiff twice moved for continuance because of lack of discovery. The first time Defendants gave her the benefit of doubt and stipulated to continuance, but Plaintiff made no use of the opportunity. Plaintiff's Second Motion to Continue Hearing simply declared that she was "entitled to complete discovery prior to having to respond to a Motion for Summary Judgment." (R. p. 142.) She identified no needed discovery, and provided no affidavit in compliance with Rule 56(f). At the August 20, 2010 hearing, the trial court asked Plaintiff's counsel to explain what discovery she felt was necessary to respond to the Motion for Summary Judgment. (Tr. p. 30, L. 8-10.) She again stated only that she wanted discovery regarding "whether or not the assignment was properly recorded, [and] whether or not they actually are holders of the original Deed of Trust." (Tr. p. 30, L. 11-16.) No specifics were provided as to what actual facts she sought to uncover, or how those facts could have impacted the ruling on Defendants' Motion.

This presents sufficient grounds to deny a continuance. *See Golay*, 118 Idaho at 389, 391; *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 108 P.3d 380, 386 (2005)

Further, Plaintiff's only explanation for why this discovery had not been conducted sooner is that her attorney made a conscious decision not to conduct discovery, ostensibly to keep fees low until Defendants' Motion to Dismiss could be heard. (Tr. p. 28, L. 4-11.) Plaintiff's counsel fully recognized that she could have conducted discovery earlier – as Defendants did – but simply chose not to do so. (Tr. p. 26, L. 18-20, and p. 27, L. 22-23.) Having specifically elected *not* to pursue discovery, Plaintiff cannot be heard to challenge the court's ruling on the ground that she needs the very discovery she elected not to pursue. Plaintiff's failure to pursue discovery earlier in the case did not justify her request for further continuances of the summary judgment hearing. *See Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 524 (9th Cir. 1989) ("A movant cannot complain if it fails diligently to pursue discovery before summary judgment."); *Merrifield v. Arave*, 128 Idaho 306, 311 (Ct. App. 1996) ("One of the objectives of the summary judgment rules has been to insure that a *diligent* party is given a reasonable opportunity to prepare his case.") (emphasis added).

B. The Refusal To Grant A Third Extension Is Not An Abuse Of Discretion.

Plaintiff's argument centers on the erroneous supposition that the trial court refused to grant her request for a continuance so that she could conduct discovery. (Opening Br. 11-12.) Plaintiff fails to acknowledge that she was actually granted *two* continuances of the summary judgment hearing, but let the time pass. The Motion was originally set to be heard on July 29, 2010. The hearing was continued to August 20, 2010 by stipulation, at Plaintiff's request. (*See* R. p. 150.) At the August 20 hearing, the court granted Plaintiff's second request for a continuance and reset the hearing for September 30, 2010. (R. p. 150-151.) Although Plaintiff requested a continuance of sixty days from August 20, the court found thirty-five days would be sufficient time for her to file the affidavit of her expert witness. (Tr. p. 24, L. 4-5, and p. 32 L. 9-13.)

The scheduling of court proceedings rests in the sound discretion of the trial court. *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 24 (2005). Plaintiff has not identified any abuse in granting a continuance of thirty-five days rather than sixty. The record shows that the court recognized the matter as discretionary, ruled within the bounds of its discretion, and based its decision on an exercise of reason. (*See* Tr. p. 31, L. 22 through p. 33, L. 15); *Gunter*, 141 Idaho at 24 (discussing standards for abuse of discretion). The only specific evidence that Plaintiff identified as necessary to oppose Defendants' summary judgment motion was the forensic audit report from her expert witness. The trial court gave Plaintiff all the time that she needed to submit it, and it was finally submitted and considered by the court. (Tr. p. 33, L. 10-15.) Additionally, Plaintiff claimed to need sixty days because her "guess" was that Defendants would not adequately respond to discovery requests, making a motion to compel necessary. (Tr. p. 28, L. 15-19.) But at that time, Plaintiff had not even made any discovery requests to which Defendants could respond. (*See* Tr. p. 28, L.1-2 (describing her "next step" to be a large set of discovery requests).) The speculation that Plaintiff may need time to bring a motion to compel on discovery requests not even served yet did not warrant a further continuance of the hearing. *See Nelson v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990) (opposition must be anchored in something more than speculation).

Finally, Plaintiff has not shown any prejudice from the court's refusal to continue the hearing for the requested sixty days. As a result, any error that may have been committed by the trial court is harmless. *See Taylor*, 261 P.3d at 850. The Court "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." I.R.C.P. 61. Without pointing to any specific information that could have been discovered if given another twenty-five day continuance, Plaintiff cannot demonstrate any prejudicial error that would undermine the court's ruling. *Taylor*, 261 P.3d at 850.

III. Summary Judgment Was Proper Because There Was No Genuine Dispute As To Any Material Fact.

The Amended Complaint presented two causes of action: (1) Injunctive Relief, and (2) Declaratory Relief. (*See* R. pp. 108, 110.) The majority of Plaintiff's arguments focus on whether MERS could act as beneficiary of Plaintiff's Deed of Trust under Idaho law. Defendants herein adopt and incorporate the arguments presented in MERS's Brief on these points, and will not repeat them here. In addition to the reasons discussed in MERS Brief, Plaintiff also failed to state a cause of action against either Pioneer or Quality Loan Service because there is no basis for filing a civil action to challenge the "standing" of parties to a nonjudicial foreclosure, and because the evidence demonstrated compliance with the requirements of Idaho's nonjudicial foreclosure statutes.

A. The Trustee Of Record Has The Power To Foreclose Nonjudicially.

An action for declaratory relief cannot be based on a hypothetical or abstract injury; instead it requires "some specific adversary question or contention based on existing state of facts." *Wood v. Class A. Sch. Dist.*, 78 Idaho 75, 79 (1956) (quoting *State ex rel. Miller v. State Bd. of Education*, 56 Idaho 210, 217 (1935)). Plaintiff's action, however, completely failed to present a meritorious legal or factual dispute regarding an actual injury.

1. *There Is No Standing Requirement in the Idaho Trust Deed Act.*

Plaintiff failed to demonstrate the existence of an actual controversy regarding the trustee's or beneficiary's standing to pursue nonjudicial foreclosure. The judicial concept of "standing "has no applicability to nonjudicial proceedings. Yet Plaintiff contends that an issue of fact remains to be tried because the Defendants did not produce documents proving their standing to foreclose, namely the original promissory note and deed of trust. (Opening Br. 13, 26, 29.) This argument is misplaced because there is no requirement under the comprehensive statutory framework for either the trustee or the beneficiary to prove their standing before advancing nonjudicial foreclosure. This argument is virtually identical to the argument raised

and decided in *Vt. Trotter v. Bank of N.Y. Mellon*, 275 P.3d 857 (Idaho 2012), which should therefore be dispositive on this issue.

Standing is a concept that applies to judicial proceedings; a party seeking affirmative relief from a court must first prove its standing to seek that relief. *Young v. City of Ketchum*, 137 Idaho 102, 104 (2002). But foreclosure under Idaho's Trust Deed Act is a *nonjudicial* proceeding. *Roos v. Belcher*, 79 Idaho 473, 477-78 (1958). By executing a deed of trust, Plaintiff expressly authorized the property to be sold *without* judicial proceedings in the event of a default. *Id.* at 477. "The procedures to foreclose on trust deeds outside of the judicial process provide the express-lane alternative to foreclosure in the judicial system and strip borrowers of protections embedded in a judicial foreclosure." *Fed. Home Loan Mortg. Corp. v. Appel*, 143 Idaho 42, 46 n.1 (2006). The applicable statutes make no mention of "standing" or any requirement that the trustee prove standing before advancing the nonjudicial sale.

In support of her argument that proof of standing is required, Plaintiff cites to no specific section of the Idaho Trust Deed Act or binding case law, and instead cites two decisions from the U.S. Bankruptcy Court for the District of Idaho, *In re Wilhelm* and *In re Sheridan*. (Opening Br. 13-16.) Both *Wilhelm* and *Sheridan* involved *judicial* proceedings in which the moving party sought affirmative relief from the automatic bankruptcy stay. *See In re Wilhelm*, 407 B.R. 392, 397 (Bankr. D. Idaho 2009); *In re Sheridan*, 2009 Bankr. LEXIS 552, at *3-4 (Bankr. D. Idaho Mar. 12, 2009). In both cases the bankruptcy court merely held that a creditor filing a motion for relief from the stay under 11 U.S.C. § 362 must provide some evidence that it is entitled to seek that relief, since it has to be requested by a "party in interest" under § 362(a). *Wilhelm*, 407 B.R. at 401; *Sheridan*, 2009 Bankr. LEXIS 552 at *11. While Plaintiff urges the Court to give broad application to these opinions, *Wilhelm* and *Sheridan* held only that a moving party in a bankruptcy proceeding must establish its standing to seek affirmative relief in that venue. Neither opinion discussed the requirements necessary to commence a nonjudicial foreclosure under Idaho's statutory framework. Those requirements are set forth in I.C. § 45-1505, which

lists four requirements for a trustee to foreclose by advertisement and sale. None of those requirements expressly provide for a "standing" or "real party in interest" inquest. This Court specifically rejected the applicability of these bankruptcy court opinions in *Trotter*, and should likewise reject them here.

Nevertheless, Plaintiff asks this Court to require proof of standing in order to test the accuracy of the county title records. (Opening Br. 33.) But Plaintiff's stated desire to ensure that county records are accurate does not provide a basis for the declaratory relief sought in the Amended Complaint. There never was any genuine question as to the accuracy of the county records. Further, as addressed below, the undisputed evidence demonstrated that the Trustee complied fully with the statutory foreclosure requirements. Accordingly, the trial court properly granted summary judgment for Defendants without requiring proof of standing to foreclose.

2. *Neither The Court Nor The Trustee Are Required To Look Past The Public Record In Determining Compliance With I.C. § 45-1505(1).*

I.C. § 45-1505(1) provides as follows:

> The trustee may foreclose a trust deed by advertisement and sale under this act if:
>
> (1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in mortgage records in the counties in which the property described in the deed is situated . . . .

Defendants produced evidence to establish that these statutory requirements to advance a nonjudicial foreclosure were met. The evidence showed that the Deed of Trust and Appointment of Successor Trustee were recorded in the Kootenai County Records. (R. pp. 78, 115.) The public record also showed that MERS was named as the beneficiary in the Deed of Trust, there were no other recorded assignments of the Deed of Trust, and that appointment of Pioneer as successor trustee was recorded. The trial court properly reviewed this evidence and found that Defendants had complied with the statutory foreclosure requirements. (R. pp. 159-162, 164-

165.) Neither the Trustee nor the court needed to look beyond those public records to determine compliance with the statute. The remaining requirements of I.C. 45-1505 were also met, namely that Plaintiff was in default, (R. p. 154), and that a Notice of Default was recorded on December 3, 2009 containing all of the information required by I.C. § 45-1505, (R. pp. 117-118).

Plaintiffs cites to no specific requirement under I.C. § 45-1505 or any other section of the Trust Deed Act to show that the court committed an error of law. Instead she seems to argue that the court was required to go beyond the public record and consider additional unspecified evidence to determine compliance with I.C. § 45-1505(1), or at a minimum to provide Plaintiff with additional time to rummage for evidence not in the public record. Such evidence would purportedly show that the note and deed of trust may have been split, that MERS is not the economic beneficiary of the note, or that there were potential unrecorded assignments of the note.

In effect she argues that I.C. § 45-1505(1) is not simply a requirement to show that the notice of default is signed by a trustee or beneficiary of record, but that it requires that record notice be given of the "true" owner of the promissory note and that such owner establish his or her rights through a chain of *mesne* assignments. This would turn the recorder's office into a de facto registry of negotiable promissory notes, and destroy the free negotiability of such notes. If Plaintiff were correct, a trustee appointed by a beneficiary of record could no longer rely on the validity of that appointment, nor could a potential third party purchaser or title insurer ever rely on the public record to determine if a foreclosure is valid, and thus whether a bidder at a sale can obtain good title. Even a *good faith* purchaser would be on inquiry notice that there may be unrecorded assignments which could invalidate the foreclosure.

There is no basis in Idaho law to draft such a requirement into the statute. The question is not who owns the note or the trust deed, but who can enforce the trust deed. That question can and should be answered by mere reference to the public record. MERS was named as the beneficiary in the Deed of Trust. It is well established that a party named in a contract can

enforce that contract, even if made for the benefit of another. *See* I.R.C.P. 17(a); 3 Am.Jur. 2d, Agency § 332 (1986). Equally well recognized is the principle that the ultimate purpose of the recording statutes is to protect potential purchasers by enabling them "to rely upon the record title." *Kalange v. Rencher*, 136 Idaho 192, 196 (2001). That purpose does not necessitate the recording of instruments assigning mortgages. *Millick v. O'Malley*, 47 Idaho 106 (1928). Plaintiff cannot impose extra duties not appearing in the Trust Deed Act to search for *mesne* assignments which are not of record. A contrary rule would defeat the carefully balanced statutory process under the Idaho Trust Deed Act, undermine the negotiability of instruments under the UCC, and repurpose the recorder's office.

B. The Idaho Legislature Did Not Provide A Private Remedy For Alleged Violations Of I.C. 45-1505(1).

"Idaho Code § 45-1502, et seq. provides a comprehensive regulatory scheme for non-judicial foreclosure of deeds of trust, which includes the exclusive remedies for a given statutory violation." *Spencer v. Jameson*, 147 Idaho 497, 506, 211 P.3d 106 (2009). In "the absence of strong indicia of a contrary legislative intent, courts must conclude that the legislature provided precisely the remedies it considered appropriate." *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 176 (1996). The alleged violations asserted by Plaintiff do not affect her rights under the statute or her remedies. She had the right and opportunity at all times to tender funds to reinstate her loan, and thereby stop the foreclosure. *See* I.C. § 45-1506(12). The alleged defects that she claims in the foreclosure process did not interfere with that right. She never alleged that she attempted to tender reinstatement funds, or that Defendants interfered with any attempt to tender. *See Diamond v. Sandpoint Title Ins.*, 968 P.2d 240, 246 (Idaho 1998). Hence, even if there had been a technical violation of I.C. 45-1505(1), the statute does not provide avoidance of her contractual obligations as a remedy.

C. Plaintiff's Conjectures Regarding Authorized Signatories Did Not Create A Genuine Issue Of Fact.

Plaintiff also contends there were specific deficiencies in the execution of the Appointment of Successor Trustee, Notice of Default, and Notice of Trustee's Sale. (Opening Br. 26-27.) The trial court reviewed the evidence and correctly concluded there was no apparent deficiency in these documents. (R. pp. 164-165.)

First, Plaintiff contends the Notice of Default was invalid because there is no evidence that the person who signed the document, Tara Donzella, "had the knowledge or skill to evaluate the propriety of any assignments, nor that she made any effort to do so." (Opening Br. 26.) But Plaintiff does not identify any legal authority that would require the trustee or agent who issues the notice of default to conduct any analysis of the chain of title before signing the notice. This is not one of the four requirements of Idaho Code § 45-1505, which provides that "the trustee may foreclose a trust deed by advertisement and sale" if the following four requirements are met:

(1) The deed of trust, any assignments, and the appointment of successor trustee are recorded in the county land title records;

(2) The borrower is in default under the obligation secured by the deed of trust, which deed of trust authorized sale in the event of default;

(3) The trustee or beneficiary records a notice of default containing certain specified information; and

(4) No other action has been instituted to recover the debt.

Once those four requirements are satisfied, the trustee must give notice of trustee's sale to the interested parties, after which the sale may be held without any judicial intervention. *See* I.C. § 45-1506. The Idaho Code contains a "comprehensive regulatory scheme for nonjudicial foreclosure of deeds of trust." *Spencer*, 211 P.3d at 115. Idaho Courts have refused to change or expand the express requirements dictated by Idaho Code section 45-1502 et seq. *See id.* (refusing to change the statutory requirements for distributing surplus funds from a trustee's sale). Because there is no statutory requirement that the trustee analyze the validity of any

assignments before acting, Plaintiff's contentions do not raise a genuine issue as to the validity of the Notice of Default.

Next, Plaintiff contends there is a "possibility" that the notary who acknowledged the signature on the Notice of Default, Michelle Nguyen, is the same Michelle Nguyen that is under a cease and desist order from the Securities and Exchange Commission. (Opening Br. 26.) No evidence on this point was ever submitted to the trial court, and nothing more than speculation appears in the Opening Brief. (*See generally* Affidavits of Charles J. Horner attached to Plaintiff's Mot. to Augment Record.) Furthermore, there is no basis for Plaintiff's belief that the notary Michelle Nguyen is the same person as the Certified Public Accountant (CPA) Michelle V. Nguyen – an officer of a company called Meridean Holdings, Inc. – who is the subject of the cease and desist order. *See* http://www.sec.gov/ litigation/admin/2009/34-59317.pdf. The SEC's suspension of a CPA sharing the same name as the notary does not create any defect in the instant foreclosure.

Finally, Plaintiff complains that the Appointment of Successor Trustee was executed by Tara Donzella as Assistant Vice President of MERS, while the Notice of Default was also signed by Tara Donzella as Assistant Vice President of Quality Loan Service Corporation. (Opening Br. 27; *see* R. at 115-116, 117-118.) Both documents were notarized by Michelle Nguyen. (*Id.*) Because Tara Donzella purported to "wear two hats" as a signing officer for both MERS and Quality Loan Service, Plaintiff contends both documents were deficient and possibly "robo-signed." (Opening Br. 27; Tr. p. 63, L. 10-12.) Plaintiff provides no explanation as to why alleged "robo-signing" would be legally significant, nor does she cite any legal authority that would preclude one person from simultaneously having authority to act on behalf of two different companies. *See Chua v. IB Prop. Holdings, LLC*, 2011 U.S. Dist. LEXIS 84683, at *6-7 (C.D. Cal. Aug. 1, 2011). Any person or entity can authorize another to sign documents on its behalf. *See* I.C. § 28-3-402. This general rule is no different where a single person has been authorized by two separate entities to sign documents for the respective companies. Here, Tara

Donzella was duly authorized by both MERS and Quality Loan Service to sign documents on behalf of the respective companies. (R. pp. 116, 118.) Plaintiff has not demonstrated any way that either the Appointment of Successor Trustee or the Notice of Default would be rendered deficient by her dual role. Further, even if Tara Donzella had not been authorized to sign one of the documents, her lack of authority would not create a claim for Plaintiff. When a document is signed by one who is not authorized to act for the principal, the principal may nonetheless ratify the unauthorized signature. I.C. § 28-3-403(1). Both MERS and Quality Loan Service have ratified the signatures of Tara Donzella by defending the validity of the Appointment of Successor Trustee and the Notice of Default. *See Carpenter v. Payette Valley Coop.*, 99 Idaho 143, 147 (1978). Thus these issues raised by Plaintiff did not create any genuine issues of material fact.

D. Plaintiff Did Not Provide Any Evidence To Contradict Defendants' Assertions.

A party opposing a summary judgment motion must come forward with evidence to contradict the assertions of the moving party. *State ex rel. Dept. of Labor & Indus. Servs. v. Hill*, 118 Idaho 278, 284, 796 P.2d 155 (Ct. App. 1990); *Verbilles v. Dependable Appliance Co.*, 107 Idaho 335, 337, 689 P.2d 227 (Idaho Ct. App. 1984); *McCoy v. Lyons*, 120 Idaho 765, 769-770, 820 P.2d 360 (1991). In order to defeat Defendants' Motion, Plaintiff was required to produce opposing evidence "through depositions, discovery responses and affidavits sufficient to create a genuine issue for trial." I.R.C.P. 56(e). Merely denying the validity or persuasiveness of the Defendants' evidence does not create a genuine issue for trial. *Northwest Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 838-839 (2002). Plaintiff submitted two affidavits from her expert witness, Charles Horner, but the conclusory statements by Mr. Horner did not identify any particular noncompliance with the applicable foreclosure statutes. (*See* Affidavits of Charles J. Horner attached to Plaintiff's Mot. to Augment Record.) As discussed above, Mr. Horner's observation that Tara Donzella executed both the Appointment of Successor Trustee and the Notice of Default does not run afoul of Idaho law. Further, as discussed in the Brief of

Defendant MERS, the involvement of MERS as beneficiary of the Deed of Trust does not invalidate either the Deed or the foreclosure. Plaintiff's evidence did not identify any particular way in which the foreclosure was supposedly invalid. Her conclusory affidavits were not enough to create a genuine issue of fact. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005 (1986); *Casey v. Highlands Ins. Co.*, 100 Idaho 505, 508, 600 P.2d 1387 (1979). As a result, Plaintiff failed to show that any genuine issue of fact remained for trial, and this Court should affirm the lower court's order granting summary judgment for Defendants.

IV. The Court Did Not Err In Admitting Defendants' Evidence In Support Of The Motion For Summary Judgment.

Plaintiff's fourth assignment of error contends the trial court should not have considered the Affidavit of Holger Uhl, which Plaintiff asserts is hearsay. (Opening Br. 34.) The trial court denied Plaintiff's hearsay objection because it found Mr. Uhl's affidavit was based on his personal knowledge and fell within several exceptions to the hearsay rule. (R. p. 152.) The Clerk's Record on Appeal does not include Mr. Uhl's affidavit. Because it is the Appellant's burden to produce a record that is sufficient to demonstrate error, this Court may presume that the omitted affidavit supports the trial court's findings. *State v. Willoughby*, 147 Idaho 482, 488 (2009). Further, the trial court's evidentiary ruling is reviewed only for abuse of discretion. *Sprinkler Irrigation Co. v. John Deere Ins. Co.*, 139 Idaho 691, 696 (2004). The record before this Court does not show any abuse of discretion in admitting the Affidavit.

Mr. Uhl's Affidavit stated that a number of attached documents were true and accurate copies of the documents in the public record, namely the Kootenai County Recorder, the Idaho Secretary of State, the Federal Reserve Board, and the United States Bankruptcy Court for the Southern District of New York. (R. p. 151.) As he confirmed during the September 30, 2010 hearing, Mr. Uhl obtained certifications of each of the publicly-recorded documents, and he thus had personal knowledge to testify that the documents were accurate copies of those contained in

the public record. (Tr. p. 42, L. 17-21.) Further, the documents themselves are public records, and are therefore excluded from the hearsay rule. I.R.E. 803(8), (14), (15).

Plaintiff has not identified any error in the trial court's decision to consider Mr. Uhl's Affidavit and supporting exhibits. Instead, she contends that "the documents filed of record are most probably false, inaccurate or grossly negligent." (Opening Br. 35.) This was an argument regarding the contents of the public records, not the accuracy of the copies. It was alleged without any support evidence. Notably, Plaintiff specifically relied upon many of the same documents in Plaintiff's Amended Complaint, such as the Deed of Trust, Notice of Default, and Appointment of Successor Trustee. (*See* R. pp. 158-160.) Plaintiff has not identified any documents that were not properly considered by the trial court, and has therefore failed to demonstrate any abuse of the court's discretion.

V. Appellant Is Not Entitled to Attorney Fees or Costs.

Attorney's fees may be awarded to the prevailing party on appeal *only* where the Court "is left with the abiding belief that the appeal has been brought, or defended frivolously, unreasonably, or without foundation." *Rendon v. Paskett*, 126 Idaho 944, 945 (Ct. App. 1995). Plaintiff asks the Court to award her attorney's fees incurred to prosecute this appeal. (Opening Br. 35-36.) This claim fails at the outset because Plaintiff is not represented by an attorney on appeal, and therefore she has not incurred any attorney fees. A party representing herself is not entitled to an award of attorney fees. *Chavez v. Canyon County*, 271 P.3d 695, 703 (Idaho 2012).

Second, the Court cannot conclude that Defendants defended the appeal frivolously. The lower court granted summary judgment for Defendants after finding there was no merit and no evidence to support Plaintiff's claims. While Plaintiff contends the Defendants improperly failed to produce evidence of their "standing" to foreclose, (Opening Br. 36), no such proof of "standing" is required before a beneficiary conducts nonjudicial foreclosure under Idaho law.

Because Respondents have not defended this appeal frivolously, attorney fees should be denied. I.R.C.P. 54(e)(1).

CONCLUSION

Plaintiff has not demonstrated any abuse of discretion by the court in considering the evidence, or in granting Plaintiff a shorter continuance of the hearing date than she had requested. Further, the record does not reveal any error in the lower court's judgment. Plaintiff's complaints about MERS's involvement in the foreclosure do not create a genuine issue of noncompliance with the statutory foreclosure framework, as nothing in the relevant portions of the Idaho Code would prohibit MERS from acting as beneficiary of the Deed of Trust. The Idaho Trust Deed Act was enacted to provide a simple remedy upon default by a mortgagor, not a roadblock to enforcement of the mortgage. Accordingly, the Court should affirm the trial court's Memorandum Decision and Judgment of Dismissal.

Dated: June 13, 2012

Respectfully Submitted,
McCarthy & Holthus, LLP

By: _____
Holger Uhl, Esq.
Attorneys for Respondents
Quality Loan Service Corporation and
Pioneer Lender Trustee Services LLC

CERTIFICATE OF SERVICE

I certify that on June 13, 2012, I served two (2) copies of the foregoing document, described as **BRIEF OF RESPONDENTS QUALITY LOAN SERVICE CORPORATION AND PIONEER LENDER TRUSTEE SERVICES, LLC**, on the following persons by U.S. First Class Mail:

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