

8-24-2012

Edwards v. Mortgage Electronic Registration Appellant's Reply Brief 2 Dckt. 38604

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IN THE SUPREME COURT OF THE STATE OF IDAHO

LESLIE JENSEN-EDWARDS,

APPELLANT

Vs.

MERS, INC. a foreign corporation, QUALITY LOAN SERVICES CORP. Of WASHINGTON, a foreign corporation And PIONEER LENDER TRUSTEE SERVICES, LLC, an Idaho limited liability company

RESPONDENTS

Appellant's Reply Brief

Case Number 38604-2-11

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

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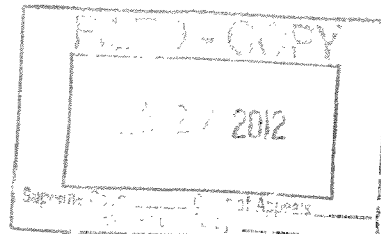
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#2

TRUE COPY

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IN THE SUPREME COURT STATE OF IDAHO

LESLIE JENSEN EDWARDS
Appellant

v.

MERS, INC. a foreign corporation,
QUALITY LOAN SERVICES CORP.
Of WASHINGTON, a foreign corporation
And PIONEER LENDER TRUSTEE
SERVICES, LLC, an Idaho limited liability
company
Appellees

CASE NO. 38604-2-11

APPELLANT'S REPLY BRIEF

IN THE SUPREME COURT OF THE STATE OF IDAHO

APPELLANT'S REPLY BRIEF

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

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Case Citations:

Bain v. Metropolitan Mortgage Group, Inc. et al. Number 86206-1 (WA Supreme Court August 16, 2012). (page)

Eccles v. People's Bank of Lakewood Village, 333 U.S. 426 (1948) (page)

Golay v. Loomis, 118 Idaho 387, 797 P.2d 95 (Idaho 1990) (Page)

In Re: Wilson, (Bankr.E.D.La., 2011) Case 07-11862 (Page)

Soria v. Sierra Pacific Airlines, Inc., 111 Idaho 594, 726 P.2d 706 (Idaho 1986) (Page)

Trotter v. Bank of New York Mellon, 275 P.3d 857 (Idaho 2012) (Page)

Phillips v. U.S. Bank, NA No. 11 CV-0054 (Ga. Superior Court, November 2, 2011) (Page)

Statement of Facts

1) On or about May 18, 2005, Appellant executed a Note and Deed of Trust (hereinafter DOT) in favor of Appellee Lehman Brothers Bank which listed Appellee MERS as nominee for Lehman Brothers Bank.

2) On or about December 3, 2009, Appellee Quality Loan Services mailed a "Notice of Default and Election to Sell under Deed of Trust" to Appellant (Record at 15-16). The Notice further alleged that MERS was the beneficiary and Nominee for Lehman Brothers Bank under the DOT and further purported to designate Pioneer Lender Trustee Services as Trustee and Pioneer Loan Services as Successor Trustee and Attorney in Fact.

3) In response, Appellant filed an action seeking Declaratory and Injunctive Relief with the First Judicial District Court, Kootenai County on April 1, 2010. (Record at 1-28).

4) The request for a Temporary Injunction was denied by the District Judge on April 7, 2010, however the parties submitted a stipulation for cancellation of the sale pending suit on May 6, 2010 which remained in full force and effect until the Court's decision on November 16, 2010.

5) In her Complaint, Appellant alleged that the actual owner of the note had not been established, and that MERS lacked standing to foreclose. Thereafter, Appellant was given leave to amend her Complaint. On June 10, 2010, she filed an amended Complaint adding allegation of fraud.

6) All defendants joined in the filing of a Motion to Dismiss filed on April 27, 2010. The motion was granted by the District Court pursuant to a Ruling on November 16, 2010, and a final judgment dated February 18, 2011. The granting of that motion is the subject of the instant appeal.

Issues Presented On Appeal

- 1) Whether the District Court erred in converting the Motion to Dismiss to a Motion for Summary Judgment before discovery enabled Appellant to acquire information to resist the Motion.
- 2) Whether the District Court erred in finding that Appellees had standing to foreclose.
- 3) Whether the District Court erred in concluding there were no genuine issues of disputed fact?
- 4) Whether Appellant is entitled to attorney fees and costs?

Argument

At the outset, Appellant disputes the manner in which Respondent MERS has characterized the facts in its Opening Brief. The Court has the record and need not resort to counsel's derogatory representations of the facts of this case.

In addition starting on Page 4 of MERS Brief, there is a lengthy recitation of facts relating to MERS history, which was not presented to the District Court and is irrelevant to this appeal, and thus should be disregarded.

Similarly, MERS brief is replete with citations to cases from other jurisdictions which have no bearing on Idaho law; are not binding on this court, and should be ignored by this Court.

Appellant could cite numerous cases from around the country in which MERS has been found to lack standing to foreclose, or to be a beneficiary, however, the only one which might have any bearing upon this case was the recent decision in *Bain v. Metropolitan Mortgage Group, Inc. et al.* Number 86206-1 (WA Supreme Court August 16, 2012). There the court held

that MERS citation of *Trotter v. Bank of New York Mellon*, 275 P.3d 857 (Idaho 2012) was “not helpful” since it did not address the definition of the word “beneficiary.” (Courtesy Copy attached)

At the time of preparation of her Original Brief, the decision in *Trotter v. Bank of New York Mellon*, 275 P.3d 857 (Idaho 2012) had not yet been rendered. Many of the issues in her original brief were similar to those in *Trotter*, and to the extent that *Trotter* governs the issue of MERS standing, Appellant leaves it to the discretion of this Court to ascertain the extent to which that case applies here.

Without regard to the admissibility of the Horner Report, surely that report was adequate to have raised genuine issues of material fact to warrant the dismissal of a summary judgment motion, as Appellant noted in her Original Brief

Respondent’s mistake Appellants contention insofar as it relates to the Uhl Affidavit The issue is not whether it was hearsay, nor whether the court may take judicial notice of public records, the issue is that counsel submitted evidence to the court when he was precluded from being a witness in a matter where he represented a party. As noted in her Original Brief, the Idaho Rules of Professional Conduct prohibit counsel from testifying in a matter where he represents a party. How can it be said that an attorney should be permitted to affect the outcome of a case by providing evidence on behalf of a client, which significantly impairs the rights of other litigants. The Rules of Professional Conduct are designed to insure the basics of Due Process and to prohibit the rights of parties from being violated, *Soria v. Sierra Pacific Airlines, Inc.*, 111 Idaho 594, 726 P.2d 706 (Idaho 1986)

MERS further contends that Appellant did not submit an affidavit in conjunction with her request for a continuance. Under *Golay v. Loomis*, 118 Idaho 387, 797 P.2d 95 (Idaho 1990) the

Court has the broad authority to grant a continuance to permit the filing of additional affidavits, or for discovery, and the contention that an affidavit is required to obtain a continuance flies in the face of that decision.

MERS further objects to the citation of two cases from outside of Idaho, *In Re: Wilson*, (Bankr.E.D.La., 2011) Case 07-11862. and *Phillips v. U.S. Bank, NA* No. 11 CV-0054 (Ga. Superior Court, November 2, 2011) because they are not binding in Idaho. This mischaracterizes the reason for their citation. They demonstrate the difficulties homeowners face when trying to get meaningful data relating to their loan, a fact which is amply demonstrated by the level of resistance MERS Brief and the entire record in this case so forcefully demonstrates.

MERS further expended substantial time in arguing that it may be a proper beneficiary, and the issue of the applicability of *Trotter v. Bank of New York Mellon*, 275 P.3d 857 (Idaho 2012) has been addressed above. Yet MERS cites numerous lower court decisions from Idaho district courts which are not only irrelevant and not binding, they are improperly cited given that some may be on appeal, or soon to be and thus not even final judgments. As such they should be stricken or disregarded.

And in an amazing blaze of inconsistency, MERS concedes cases from other jurisdictions are not binding or applicable to this Appeal, yet then cites a litany of cases from other jurisdictions on Page 31-32 of its brief. Given the concession that these cases are not “meaningful” to resolution of this Appeal, the Court should disregard, or strike them.

In its original brief, MERS lists what it considers other forms of relief, relying on the concepts of equity to contend that Appellants claims are barred by her failure to cure the alleged default, citing *Eccles v. People’s Bank of Lakewood Village*, 333 U.S. 426 (1948) Respondent fails to understand the real issue at hand in contending there is no reason to stop a wrongful

foreclosure if an (alleged) defaulting borrower cannot cure the default (Brief at p 34) This argument ignores Appellant's contentions entirely. Appellant raised the issue of set offs at the district level, particularly in relation to the issue of discovery. Her contention then and now is that if she had been allowed to conduct proper discovery, that she could have ascertained if any genuine default existed.

Finally, MERS urges this court to consider the policy considerations relating to following the long standing law relating to negotiable instruments and the mortgages which secure them. It suggests to this court that financial chaos will result if MERS and lenders are required to adhere to long standing principles of property law, and the law relating to secured instruments. In truth and fact, it was MERS that destroyed the nationwide system of proper recordation of transfers affecting real property, and enabled the financial services industry to improperly transfer notes and deeds of trust by hiding their actions using MERS. In effect, MERS essentially seeks a "get out of jail free" card to avoid accepting the legal consequences of its improper and illegal practices. In effect, its would ask this Court to turn a blind eye to its wrongdoing because it has created a chaotic monster which will take years to correct. It is MERS which has made it all but impossible to know the identity of the true creditors with whom homeowners could negotiate.

MERS also suggests that a ruling in Appellant's favor would wreak financial havoc at a level which would inundate the courts. In fact, it is a ruling in favor of MERS which will have that result. MERS brags that it "holds" 70 million mortgages in the United States, and no doubt several hundred thousand of them are probably in Idaho alone. Each and every MERS infected mortgage has created clouds on title without regard to foreclosure or alleged defaults. Not all MERS infected mortgages go into default, but every person who is current and sells their home is in fact buying a lawsuit if the defects in title are not cleared. It was MERS and its member

banks which created the downturn in the economy from a keening desire to harvest huge profits out of mortgage backed securities. The process was flawed, illegal and the system ultimately came crashing down on the heads of the American middle class. Idaho has been severely affected by this lending based destruction.

Idaho has had the greatest drop in property values with over 30% of all homeowners upside down or close to a negative equity status, according to CBS News.

http://www.cbsnews.com/8301-505145_162-37144224/top-5-states-for-depreciating-home-values/

BankRate reports the Boise/Nampa region had the largest drop in property values for all demographics in the whole United States for the 4th Quarter of 2011.

<http://www.bankrate.com/finance/real-estate/q4-2011-home-values-5-worst-markets-2.aspx>

Similarly, CNBC has reported that Idaho has the 8th highest foreclosure rate in the nation.

http://www.cnbc.com/id/29655038/States_With_the_Highest_Foreclosure_Rates?slide=4

For so long as the Courts continue to turn a blind eye to the illegal practices which Appellant sought to bring to light through discovery, the carnage will continue.

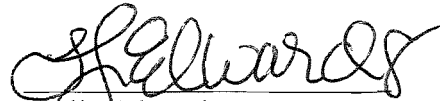
CONCLUSION

In summary, Appellant asks the Court to adopt her arguments and grant the requested relief below.

RELIEF SOUGHT

- 1) Appellant prays the court overrule the District Court and grant her a declaratory judgment on the issue of lack of standing.
- 2) In the alternative, Appellant prays that this court overrule the District Court's decision and remand with an order that the matter proceed to trial.

- 3) Further in the alternative, Appellant prays this Court for an order remanding this case back to District Court with an order requiring Appellees comply with all present and future discovery requests so the case may move forward to trial and proper resolution.
- 4) For all other general and equitable relief to which Appellant may be entitled.



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Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 21st day of August, 2012, caused a true and correct copy of the attached MOTION TO SET BRIEFING DEADLINE postage prepaid, to the following parties: MERS, Inc.; Quality Loan Service Corporation of Washington; Pioneer Lender Trustee Services, LLC by and through counsel of record.

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