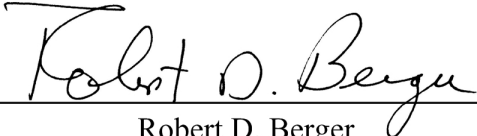




The relief described hereinbelow is SO ORDERED.

SIGNED this 30th day of April, 2012.


Robert D. Berger
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**COREY VAN NOSTRAND and
MISTY VAN NOSTRAND,
Debtors.**

**Case No. 09-24265
Chapter 13**

**COREY VAN NOSTRAND and
MISTY VAN NOSTRAND,
Plaintiffs,**

v.

Adv. No. 10-6146

**IBM LENDER BUSINESS PROCESS
SERVICES, INC., et al.,
Defendants.**

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs/Debtors Corey and Misty Van Nostrand seek a declaration invalidating a mortgage lien against their homestead because the note and mortgage are held by different

parties and the note's ownership is unclear to Debtors. Defendants Seterus, Inc., f/k/a IBM Lender Business Process Services, Inc., as servicer for Federal National Mortgage Association (Fannie Mae), and Mortgage Electronic Registration Systems, Inc. (MERS), move for summary judgment. The motion is granted because Defendants present uncontroverted evidence establishing Fannie Mae owns the note, Seterus holds and services the note, and MERS holds the mortgage as an agent of Seterus and Fannie Mae, thereby defeating Plaintiffs' claim the note is unsecured.

Findings of Fact

On March 1, 2007, Corey Van Nostrand borrowed \$136,000 to apply toward Debtors' homestead. He executed a promissory note to American Mortgage Network, Inc. To secure the note, Corey and Misty Van Nostrand signed a mortgage dated March 1, 2007. The mortgage states MERS is the mortgagee and "is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns." Lender is defined as American Mortgage Network, Inc. The mortgage states Van Nostrand "mortgages and warrants to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS" the property. The mortgage states the note "can be sold one or more times without prior notice" to Van Nostrand, and the covenants and agreements in the mortgage "shall bind . . . and benefit the successors and assigns of Lender." The mortgage was recorded on March 5, 2007.

American sold the note to Fannie Mae and endorsed it in blank. Seterus is the current servicer on the note for Fannie Mae. Seterus is also the holder of the note and, through its counsel, is in possession of the note. At all relevant times, American, Fannie Mae, and Seterus

were MERS members, subject to membership agreements with MERS. Pursuant to the agreements, at the time they owned or held the note, American, Fannie Mae, and Seterus all appointed MERS to act as their agent to serve as mortgagee on their behalf.

MERS's business is to hold record legal title to mortgages and deeds of trust on behalf of the beneficial owners. MERS is structured to allow its members, which include originators, lenders, servicers and investors, to track transfers of servicing rights and beneficial ownership interests in notes secured by the mortgages and deeds of trust held by MERS. MERS's membership agreements define the scope of its relationship with its members and require, among other things, (1) members to "cause MERS to appear in the appropriate public records as the mortgagee of record with respect to each mortgage loan that the Member registers on the MERS® System"; (2) MERS to serve as mortgagee of record with respect to all such mortgage loans solely as a nominee, in an administrative capacity, for the beneficial owner or owners; and (3) MERS to comply with the instructions of the holder and beneficial owner of the notes.

Debtors filed for bankruptcy on December 23, 2009. They are attempting to invalidate Defendants' security interest in their homestead.

Conclusions of Law

A. Summary Judgment Standard.

Summary judgment is appropriate if the moving party demonstrates there is no genuine issue as to any material fact, and he is entitled to judgment as a matter of law.¹ All inferences are

¹ FED. R. BANKR. P. 7056; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

to be construed in favor of the non-moving party.² Only when reasonable minds could not differ as to the import of the proffered evidence is summary judgment proper.³

B. Defendants' Objection to Claim Alleged for the First Time in Summary Judgment Pleadings.

A complaint can not be amended to raise a new claim for relief by summary judgment pleadings. The Tenth Circuit requires a formal motion to amend under Rule 15(b).⁴ In their complaint, Plaintiffs allege Defendants split the promissory note and mortgage between two separate and independent parties, rendering the note unsecured. Plaintiffs cite K.S.A. § 58-2323. Defendants' motion addresses these allegations. In opposing summary judgment, Plaintiffs raise a factual allegation that Misty Van Nostrand's signature on the mortgage is not notarized. Defendants object to the additional factual allegation. To the extent the fact is offered to defeat summary judgment on the claim the note is unsecured as between the Plaintiffs and Defendants, the lack of a notarized signature is immaterial. The mortgage is valid between the parties thereto despite the lack of an acknowledgment.⁵ This fact would be material in an 11 U.S.C. § 544 avoidance action, but such an action is not alleged, and the trustee is not a party to this lawsuit.

C. The Evidence of an Agency Relationship between MERS and Its Members Demonstrates the Note and Mortgage Were Not Severed and Remain Valid and Enforceable.

Under Kansas law, a promissory note and the mortgage securing it are, as a general rule,

² *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000).

³ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

⁴ *Green Country Food Market, Inc., v. Bottling Group, LLC*, 371 F.3d 1275, 1280-81 (10th Cir. 2004).

⁵ K.S.A. § 58-2223.

inseparable.⁶ Even so, a note holder may appoint another to hold and enforce the mortgage on its behalf.⁷ A note and mortgage are not split when the note is held by the principal and the mortgage is held by its agent.⁸ Kansas statutory law is the complement to the general, common law rule.⁹ The MERS system has been scrutinized and analyzed by other courts, and, provided MERS can produce a complete evidentiary record, its system has been upheld as a valid way to hold and enforce promissory notes secured by mortgages and deeds of trust. Debtors' counsel was involved in the most recent challenge to MERS in a case similar to this case.¹⁰ *Williams* and its predecessor, *Martinez*, are well-reasoned, well-supported, and directly on point. This Court adopts the reasoning of these opinions and so holds in this case.

Defendants present uncontroverted testimony stating Fannie Mae owns the note, Seterus services the note, and MERS holds the mortgage as an agent of Seterus and Fannie Mae. Plaintiffs/Debtors offer no evidence to raise a triable issue of fact over the agency relationship between MERS, Fannie Mae, and Seterus. Debtors make no effort to address the case law cited by Defendants which holds the note and mortgage may be held by separate entities, provided an agency relationship exists between the two. Debtor does not distinguish, discuss, or even

⁶ *Hamilton v. CitiMortgage, Inc. (In re Lieurance)*, 458 B.R. 757, 761-62 (Bankr. D. Kan. 2011); *Bank Western v. Henderson*, 255 Kan. 343 (1994), citing *Middlekauff v. Bell*, 111 Kan. 206, 207 (1922); *Kurtz v. Sponable*, 6 Kan. 395, 396 (1870).

⁷ *Martinez v. Mortgage Electronic Registration Systems, Inc. (In re Martinez)*, 444 B.R. 192, 203-04 (Bankr. D. Kan. 2011).

⁸ *Williams v. BAC Home Loans Servicing, LP (In re Williams)*, slip copy, 2012 WL 695832, at *3 (Bankr. D. Kan. 2012); *In re Tucker*, 441 B.R. 638, 643-44 (Bankr. W.D. Mo. 2010).

⁹ *Williams*, slip copy, 2012 WL 695832, at *3, citing *Bank Western v. Henderson*, 255 Kan. 343, 354 (1994); *Army Nat'l Bank v. Equity Developers, Inc.*, 245 Kan. 3, 17 (1989) (holding that "[o]ur view is that the mortgage follows the note"); *Kurtz v. Sponable*, 6 Kan. 395, 396 (1870) ("Under our laws, the mortgage is but appurtenant to the debt,--a mere security; and, under ordinary circumstances, whoever owns the debt owns the mortgage."); and K.S.A. § 58-2323.

¹⁰ *Williams*, slip copy, 2012 WL 695832.

mention *Martinez* and *Williams*. Accordingly, Defendants have sustained their burden of establishing they are entitled to judgment as a matter of law.

Conclusion

IT IS THEREFORE ORDERED Defendants' Motion for Summary Judgment is GRANTED.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE
DISTRICT OF KANSAS