IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR JACKSON COUNTY

FEDERAL NATIONAL MORTGAGE ASSOCIATION, ITS SUCCESSORS AND/OR ASSIGNS Plaintiffs, v. KEVIN D. GOODRICH AND ALL UNKNOWN OCCUPANTS, Defendants.	Case No: 110016389E GENERAL JUDGMENT

This matter came before the court for trial on October 11, 2011. Additional time was given to the parties by the court to submit supplemental memoranda on the MERS issue raised by defendant. Additional memoranda were received by the court on October 18, 2011. The court, having heard the arguments, reviewed the pleadings and filings of the parties, and otherwise being fully advised on the issues presented, awards judgment to the defendants.

Discussion and Analysis

This litigation involves a forcible entry and detainer action to evict the defendants from the premises located at 644 Shadow Way, Central Point, Oregon. The Plaintiff asserted at trial that it had a right to possess the premises based upon statutory notice to the defendants after a successful trustee's sale resulting from a non-judicial foreclosure. Defendant Goodrich asserts in his defense that Plaintiff is not entitled to possession due to "its wrongful foreclosure action taken in early November 2010." Defendant specifically asserts that the Plaintiff's trustee's deed and warranty deed are invalid because no valid assignment occurred between First Horizon Home Mortgage and MERS.

Plaintiff's right to possess the premises is based on a Warranty Deed recorded in Jackson County. This action is not governed by ORS Chapter 90. Plaintiff asserts that the defendants' interest in the subject premises was terminated when the trustee sold the property at a trustee's sale. The court addresses the one issue raised by defendant Goodrich which may have merit – that being whether MERS is a proper beneficiary under Oregon law.

Whether Mortgage Electronic Registration Systems, Inc. (MERS) is a legitimate beneficiary under Oregon law and whether assignments of the deed of trust comply with ORS 86.735 are questions that have not been addressed by the Oregon Supreme Court or Oregon Court of Appeals. Reported cases in Oregon U.S. District Courts have come to opposing conclusions on these questions. As discussed below, this court concludes that the MERS deed of trust assignment process does not comply with Oregon law.

The relevant statute states:

> The trustee may foreclose a trust deed by advertisement and sale in the manner provided in ORS 86.740 to 86.755 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 the mortgage records in the counties in which the property described in the deed is situated;

ORS 86.735(1) (2011).

<u>Argument for MERS' Legitimacy</u>

The position of the courts finding that the MERS process is legitimate is summarized most fully in *James v. ReconTrust Company,* 2011 U.S. Dist. LEXIS 101139 (August 26, 2011). In that case, a magistrate judge recommended that the court find that because (1) MERS is named the beneficiary by mutual agreement of the parties in the trust deed and (2) the trust deed grants MERS the right to exercise all the rights of the lender, therefore, MERS is a full and legitimate beneficiary. *Id.* at *20-22. In addition, the judge found that ORS 86.735(1) was complied with because the assignment from MERS was properly recorded. *Id.* at 26. The deed of trust did not have to be recorded each time the note was assigned because it is the deed of trust that carries the property interest and the statute makes no mention of promissory notes. *Id.* at 30.

The insistence of the grantor, that assignments of the deed had to be recorded whenever the note was transferred, was impeding the right of the note holder to foreclose. *Id.* at 29.

Argument for MERS' Illegitimacy

The leading case finding that the MERS process is illegitimate is *Hooker v. NW Tr. Servs., Inc.*, 2011 U.S. Dist. LEXIS 57005 (May 25, 2011). In that case, the court found that MERS acting as an agent for the note holder did not, by itself, make the non-judicial foreclosure invalid. *Id.* at *8. However, MERS was not the real beneficiary of the trust deed and could only act on the real beneficiary's behalf, the lender or lender's successor in interest. *Id.* at *7-8. Because the lender and its successors did not record their transfers of interest, the beneficiaries had not complied with the recording requirement in ORS 86.735(1) and were prevented from foreclosing via non-judicial foreclosure. *Id.* at *10, 19. The court noted that the MERS process is an evasion of the intentions of the Oregon Trust Deed Act, "a well-coordinated statutory scheme to protect grantors from the unauthorized foreclosure and wrongful sale of property, while at the same time providing creditors with a quick and efficient remedy against a defaulting grantor." *Id.* at 12 (quoting *Staffordshire Investments, Inc. v. Cal-Western Reconveyance Corp.*, 209 Or App 528, 542 (2006)). To take advantage of this efficient remedy, creditors have to demonstrate strict compliance with the Act. *Id.* The MERS process creates confusion about who has authority to act on the trust deed, encourages improper lending, and leaves borrowers unable to negotiate a resolution that would benefit both borrower and beneficiary. *Id.* at *17-18.

The Identity of the Beneficiary is Confused

This court finds that the arguments presented in *Hooker* are persuasive. A beneficiary is defined 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(2) (2011). On its face, this statute would permit MERS to be a beneficiary because it is so designated in the trust deed. However, the person for whose benefit the trust deed is given, the lender or ultimate note holder is also the beneficiary. With securitization of the mortgage, multiple investors, and the involvement of other entities like mortgage insurers, the number of beneficiaries can be multiplied endlessly. The MERS process makes unclear whether any or all of these beneficiaries hold the right to foreclose on the borrower. Any number of breakdowns in the convoluted relationships between the beneficiaries could lead one to think they have the authority to foreclose even if the borrower has not defaulted. The law, as written, envisioned there being only one clear beneficiary of a deed of trust. The decisions finding MERS a valid beneficiary simplistically take the language of the deed of trust at face value heedless that the underlying reality is more complex than that envisioned by the law. MERS is either not a beneficiary, as found by *Hooker*, or is instead one among several beneficiaries with unclear and overlapping rights.

The MERS Recording Process is not Valid

Whether or not MERS is a valid beneficiary, the process of mortgage assignment and recording under MERS does not comply with ORS 86.735(1). On its face, ORS 86.735 requires only the assignments of the deed of trust to be recorded and indeed deeds of trust are the only instrument that can be recorded. As with the beneficiary, however, the MERS system complicates a relationship that was once more simple. Under Oregon law, the deed of trust follows the note. *James* at *27; *Hooker* at *9. In fact, the deed of trust is meaningless without the note describing the obligation the deed is securing and the note is difficult and expensive to collect without the security of the deed of trust. Yet the MERS system attempts to separate the deed and note, and let them go their separate ways, while still attempting to allow all the beneficiaries an opportunity to exercise the attendant rights.

Decisions finding that the recording law has been followed engage in an incomprehensible and illogical attempt to explain how the deed of trust follows the note. One of the common arguments presented is this: because ORS 86.735 only mentions the recording of trust deeds, the promissory note may be freely assigned without recording. However, the reason the Trust Deed Act does not mention promissory notes is because it does not contemplate that the deed of trust would matter to anyone other than the holder of the note. The court in *James*, in fact, complains that the demand for recording is preventing the note holder from exercising its right to foreclose. The requirement for recording is there for exactly the purpose of making sure the note holder has the right to foreclose. The problem with the MERS system is that it bypasses this safety check in the law. Under MERS, no one can be sure who holds the rights, and the courts and public are expected to simply trust that arrangements made in secret are fair.

Courts have repeatedly noted that Oregon law does not require foreclosing beneficiaries to produce the note. *See, E.g., Beyer v. Bank of Am.*, 2011 U.S. Dist. LEXIS 85704 *5 (Aug. 1, 2011). This rule exists because the law assumes that only the note holder would have an interest in the deed of trust. *United States Nat'l Bank v. Holton,* 99 Or 419 (1921), has been cited for the proposition that the deed of trust may be separated from the note and rejoined, but this case proves more than MERS defenders intend. In *Holton*, the court in equity found that the plaintiff was entitled to foreclose even though the trust deed and note had been separated and later rejoined because several of the defendants had engaged in a complex web of fraudulent assignments of the note and trust deed. *Id.* at 432-35. The court made its decision as a concession to sort out the mess the multiple, unrecorded assignments had made of the parties' interests in the property.

Other Problems of the MERS System

MERS has done more than just create confusion. Real damage has been caused to all participants in mortgage lending because of the complexity and poor design of the MERS system. Many borrowers before Oregon courts complain that they were encouraged to default by servicers or lenders as a condition of considering a loan modification and, instead of receiving help, face eviction from their homes. No doubt this is because the loan relationships have too many participants to work out a better solution. Lenders and borrowers made poor bets on the future of home values, but cannot come to a fair resolution because so many participants (borrowers, note holders, investors, mortgage insurers) have to be a part of the agreement. The lending industry's only response seems to be to place the cost of default as far as possible on borrowers.

The judges upholding the MERS process are no doubt bothered by the prospect of defaulting home owners living rent free for months or years. However, the problem has been created by the lending industry with an unaccountable system that is unable or unwilling to work out an equitable resolution to the fall in home values. Instead the industry now seeks to make mostly low net worth individuals bear the bulk of the cost of their economic escapades.

The court finds that MERS has created a system that, in effect, bypasses the balanced protections of the Oregon Trust Deed Act. MERS has attempted to preserve the right of lenders to efficient foreclosure while removing from grantors the protection from wrongful seizure of their property. The MERS system amounts to private lawmaking which bypasses the protections of state law and creates a new scheme of governance solely for the benefit of investors. In a case now pending before the Michigan Supreme Court, the Court of Appeals of Michigan has made similar observations about the effect of MERS on Michigan's non-judicial foreclosure process. *See Residential Funding Co., LLC v. Saurman,* 2011 Mich. App. LEXIS 719 (Apr. 21, 2011). In that case, the court found that MERS was created in order to avoid operation of the law; that it distorts the legal concept of ownership interest, creates the risk to borrowers of double exposure on their debt, and seeks to have the rights of a lender without the responsibilities. *Id.* at 6, 15, 22, 26.

Judgment

The court finds that non-judicial foreclosure is not available in this case because the MERS system confuses the identity of the beneficiary and violates the Trust Deed Act's recording requirement. For the reasons stated above, the defect in the chain of title precludes Plaintiff from bringing this action based upon Plaintiff's assertion that it conducted a valid non-judicial foreclosure and subsequent trustee's sale.

Judgment of possession is awarded to Defendant Goodrich, together with costs. Costs will be determined under ORCP 68.

Dated this 7th day of December, 2011.

Daniel L. Harris
Circuit Court Judge

cc: Parties