

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

DATE: 09/09/11

DEPT. 32

HONORABLE Mary H. Strobel

JUDGE

D. Beltran

DEPUTY CLERK

HONORABLE  
12

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

C. Caterio/C.A.

Deputy Sheriff

R. Norberg (CSR 9265)

Reporter

8:30 am

BC435437

JOSE H DONIS ET AL

VS

SAXON MORTGAGE SERVICES

Plaintiff

Counsel

Pier Paolo Caputo (x)  
(telephonically appears)

Defendant

Counsel

Brian J. Wagner (x)

**NATURE OF PROCEEDINGS:**

MOTION OF DEFENDANTS OCWEN LOAN SERVICING, LLC AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, ADJUDICATION OF ISSUES;

Copy of the Court's Tentative Ruling is handed to counsel for Defendant, who is present in Court this date.

The Motion is called for hearing.

The Court announces and Counsel submit to the Court's Tentative Ruling.

For the reasons set-forth in the Court's Tentative Ruling, filed herein this date and adopted as the final order of the Court, the Court rules as follows:

Defendants Ocwen Loan servicing, LLC, and Mortgage Electronic Registration Systems, Inc.'s Motion for Summary Judgment or in the alternative Motion for Summary Adjudication GRANTED.

Counsel for Moving partes is directed to give notice including the Court's written ruling.

<p align="center">MINUTES ENTERED 09/09/11 COUNTY CLERK</p>
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09/09/11

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES**

JOSE H. DONIS, ET AL )  
)  
)  
Plaintiff )  
Vs. )  
)  
SAXON MORTGAGE SERVICES )  
)  
Defendant )  
\_\_\_\_\_ )

Case No. BC435437

**COURT'S  
[REDACTED] RULING**

**FILED**  
Superior Court of California  
County of Los Angeles

SEP 09 2011

John A. Clarke, Executive Officer/Clerk  
*[Signature]*, Deput  
DELSY BELTRAN

**HEARING DATE:** September 9, 2011  
**DEPARTMENT:** 32  
**JUDGE:** Mary H. Strobel

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**SUBJECT:** Motion for Summary Judgment, or in the alternative, Motion for Summary Adjudication  
**MOVING PARTY:** Defendants Ocwen Loan Servicing LLC, Mortgage Electronic Registration Systems, Inc.  
**RESP. PARTY:** Plaintiffs Jose H. Donis, Maria Donis

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**TENTATIVE RULING**

Motion for Summary Judgment GRANTED.

**STATEMENT OF THE CASE**

Plaintiffs allege that they received a loan in the amount of \$810,000 from Defendant WMC Mortgage Corp. in December 2006. Plaintiffs also allege that Defendants, including companies that serviced the loan, have improperly engaged in the practice of securitizing Plaintiffs' loan and transferring the rights to the loan without keeping proper records and that Defendants never had proper title to the note and deed of trust. Given these deficiencies, Plaintiffs seek declaratory and injunctive relief preventing Defendants from proceeding with a non-judicial foreclosure and other remedies.

Plaintiff filed a Second Amended Complaint on December 3, 2010. On June 23, 2011, Plaintiffs filed a Doe amendment naming Deutsche Bank National Trust Co., as Trustee for the Registered Holders of the Morgan Stanley ABS Capital Trust I Inc. Trust 2007-HE5 Mortgage Pass-Through Certificates, Series 2007-HE5 as Doe 2.

## ANALYSIS

*Declaratory Relief.* In order to obtain summary adjudication on the cause of action for declaratory relief, Defendants must show that Plaintiffs are not entitled to a declaration in their favor by establishing “(1) the sought-after declaration is legally incorrect; (2) undisputed facts do not support the premise for the sought-after declaration; or (3) the issue is otherwise not one that is appropriate for declaratory relief.” *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1402.

The parties dispute various legal propositions and arguments in the moving papers, including whether tender is required, whether the foreclosure documents are in substantial compliance with the code, whether Plaintiffs need to show that they will be prejudiced as the result of the defective foreclosure proceedings, and whether the parties who seek to foreclose are authorized to do so.

As an initial matter, plaintiffs are not entitled to bring actions for declaratory relief in order to determine whether a foreclosing party has authority to foreclose. As explained in *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154-1157:

California's nonjudicial foreclosure scheme is set forth in Civil Code sections 2924 through 2924k, which “provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust.” (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830, 30 Cal.Rptr.2d 777 (*Moeller* ).) “These provisions cover every aspect of exercise of the power of sale contained in a deed of trust.” (*I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285, 216 Cal. Rptr. 438, 702 P.2d 596.) “The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.” (*Moeller*, at p. 830, 30 Cal.Rptr.2d 777.)

...

By asserting a right to bring a court action to determine whether the owner of the Note has authorized its nominee to initiate the foreclosure process, Gomes is attempting to interject the courts into this comprehensive nonjudicial scheme. As Defendants correctly point out, Gomes has identified no legal authority for such a lawsuit. Nothing in the statutory provisions establishing the nonjudicial foreclosure process suggests that such a judicial proceeding is permitted or contemplated.

In his declaratory relief cause of action, Gomes sets forth the purported legal authority for his first cause of action, alleging that Civil Code section 2924, subdivision (a), by “necessary implication,” allows for an action to test whether the person initiating the foreclosure has the authority to do so. We reject this argument. Section 2924, subdivision (a)(1) states that a “trustee, mortgagee, or beneficiary, or any of their authorized agents” may initiate the foreclosure

process. However, nowhere does the statute provide for a judicial action to determine whether the person initiating the foreclosure process is indeed authorized, and we see no ground for implying such an action. [¶]

Gomes appears to acknowledge that California's nonjudicial foreclosure law does not provide for the filing of a lawsuit to determine whether MERS has been authorized by the holder of the Note to initiate a foreclosure. He argues, however, that we should nevertheless interpret the statute to provide for such a right because the "Legislature may not have contemplated or had time to fully respond to the present situation." That argument should be addressed in the first instance to the Legislature, not the courts. **Because California's nonjudicial foreclosure statute is unambiguously silent on any right to bring the type of action identified by Gomes, there is no basis for the courts to create such a right.**

(Emphasis added.) Thus, to the extent that Plaintiffs are seeking a judicial determination that Defendants do not have the right to foreclose on his property, such relief is not recognized by the non-judicial foreclosure statutory scheme or California courts. However, *Gomes* did point out that the homeowner "has not asserted *any* factual basis to suspect that MERS lacks authority to proceed with the foreclosure. He simply seeks the right to bring a lawsuit to find out *whether* MERS has such authority." *Id.* at p. 1156. Thus, Plaintiffs may argue that this case is distinguishable, as they have alleged numerous deficiencies in the transfers of interests and rights from the various Defendants.

Nevertheless, Plaintiffs still cannot prevail on their claim because even if they can prove that these transfers are deficient (which they have the burden of proving<sup>1</sup>), they have not shown that they will be prejudiced by foreclosure of their property. California Courts have held that defective foreclosure processes do not provide a basis for relief where there is no showing of prejudice. As explained in the recently decided case of *Fontenot v. Wells Fargo, N.A.* (Aug. 11, 2011) 2011 WL 3506177 at \*9:

We also note a plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests. (cites omitted) Prejudice is not presumed from "mere irregularities" in the process. (*Meux v. Trezevant* (1901) 132 Cal. 487, 490, 64 P. 848.)

Plaintiffs argue that such a showing of prejudice is not required because they claim substantive defects with the foreclosure proceedings, not mere procedural defects. However, Plaintiffs' characterization of their arguments is inapposite. Courts have clarified in the context of tender requirements that substantive defects include challenges to the validity of the underlying debt itself or where the sale itself is void. See, e.g. *Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 424; *Ferguson v. Avelo Mortgage, LLC* (2011) 195 Cal.App.4th 1618, 1623-1624. Where the homeowner challenges procedural, notice, or even the issue of authority to foreclose, a showing of prejudice is still required. For example, in *Fontenot*, the homeowner challenged MERS authority to assign its interests and the note, MERS' status of both nominee

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<sup>1</sup> *Fontenot v. Wells Fargo, N.A.* (Aug. 11, 2011) 2011 WL 3506177 at \*8.

of the lender and beneficiary, the fact that trustee substitutions and assignments were recorded out of order, and the oft-repeated argument that an assignment which separates the note from the security interest is void, yet the Court still required the homeowner to show that it was prejudiced by these defects. See *Fontenot, supra*, 2011 WL 3506177, \*3-\*9.

Like the homeowner in *Fontenot*, Plaintiffs' allegations are not substantive, but procedural and require a showing of prejudice. Plaintiffs' Second Amended Complaint ("SAC") alleges that MERS did not have authority to transfer the Note or the beneficial interest, (SAC ¶ 15), that the substitution of Defendant Old Republic was void as a matter of law because MERS did not have the authority to make such a substitution, (SAC ¶ 17), and that Alfonzo Greene did not have authority to sign a Substitution of Trustee, (SAC ¶ 19-21). Plaintiffs do not dispute that they refinanced their home and obtained a \$810,000 mortgage. (UF 1 (Weissinger Decl., Exh. 14 [Donis Depo. at 52:18-53:25]).) Plaintiffs also do not dispute that they defaulted on their loan payments. (UF 2 (Weissinger Decl., Exh. 14 [Donis Depo. at 62:23-63:25]).) Thus, Plaintiffs do not dispute the validity of the underlying debt or the fact that they defaulted on their payments. Plaintiffs do not allege substantive defects and they must show that they will be prejudiced by a foreclosure sale.

Plaintiffs argue that they "will be greatly harmed if the foreclosure proceedings against their home are permitted to continue to a conclusion because they will lose their home to legal persons who are strangers and interlopers." (Oppo. at p. 9:19-21.) However, this precise argument was rejected in *Fontenot*:

Even if MERS lacked authority to transfer the note, it is difficult to conceive how plaintiff was prejudiced by MERS's purported assignment, and there is no allegation to this effect. Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely substituted one creditor for another, without changing her obligations under the note. Plaintiff effectively concedes she was in default, and she does not allege that the transfer to HSBC interfered in any manner with her payment of the note (see, e.g., *Munger v. Moore* (1970) 11 Cal.App.3d 1, 7-8, 89 Cal.Rptr. 323 [failure by lender to accept timely tender]), nor that the original lender would have refrained from foreclosure under the circumstances presented. If MERS indeed lacked authority to make the assignment, the true victim was not plaintiff but the original lender, which would have suffered the unauthorized loss of a \$1 million promissory note.

*Fontenot, supra*, 2011 WL 3506177 at \*9. Plaintiffs have not submitted any evidence which would make this language inapplicable. Plaintiffs' entire case is based upon their theory that the foreclosing entity does not have authority from the original lenders. Plaintiffs do not dispute the underlying debt or their default and by implication, that some entity has the right to foreclose on the property. Thus, there is no prejudice to *Plaintiffs* if Defendants foreclose upon the property. Accordingly, Defendants have met their burden of showing that Plaintiffs are not entitled to declaratory relief, and Plaintiffs have not raised any triable issues of material fact on this point. Thus, summary adjudication of the first cause of action should be

GRANTED.

*Injunctive Relief.* As noted above, Plaintiffs cannot prevail on their cause of action for declaratory relief. The cause of action for injunctive relief, which is based upon the same allegations, likewise cannot stand. Defendants' request for summary adjudication of the second cause of action for injunctive relief should therefore be GRANTED.