IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

CARLA M. SCHROEDER,

Plaintiff,

v.

BANK OF AMERICA NATIONAL ASSOCIATION, a North Carolina banking institution; KOZENY & MCCUBBIN, L.C., a Missouri Company; QUICKEN LOANS, INC., a Michigan Corporation; MORTGAGE ELECTRONIC SYSTEMS, INC. (MERS); and TITLE SOURCE, INC. a Michigan Corporation, Trustee,

Defendants.

NO.: CI 14-3845

ORDER & JUDGMENT

This matter comes before the Court on Defendants Bank of America National Association and Mortgage Electronic Registration System, Inc.'s Second Motion for Summary Judgment filed on November 14, 2016 (the "Motion") and called up for hearing on March 3, 2017. Plaintiff was represented at the hearing by Marc Odgaard and William Jeffrey Barnes. Bank of America National Association ("BOA") and Mortgage Electronic Registration System, Inc. ("MERS") were represented by Alison M. Gutierrez. MERS was separately represented by Clay M. Carlton. Title Source, Inc. was represented by Stephen Schutz.

At the hearing, Defendants offered Exhibits 17 through 23. Exhibits 17 through 20 were received at the hearing. Plaintiff objected to Exhibits 21 through 23, which were taken under advisement. Those objections are overruled and Exhibits 21 through 23 are received by the Court. Plaintiff offered Exhibits 14 through 16 and 24-25. Exhibits 24-25 were received at the hearing. Defendants objected to Exhibits 14 through 16. For the reasons stated more fully below, Defendants' objections are sustained.

Upon review of the pleadings, evidence, briefs of the parties and argument of counsel, the Court hereby SUSTAINS Defendants' Motion and enters summary judgment in their favor. The Court finds there is no genuine issue as to any material facts and Defendants are entitled to judgment as a matter of law. The Court's findings of facts and conclusions of law follow.

FINDINGS OF UNDISPUTED FACT

A. The Loan

Wallace Schroeder and Plaintiff Carla Schroeder (the "Schroeders") executed and delivered to Quicken Loans, Inc. ("Quicken Loans") a promissory note in the principal amount of $612,000.00 dated April 18, 2006 (the "Note"). The Note evidences a loan to the Schroeders in a like amount (the "Loan"). The Loan is secured by a Deed of Trust executed by the Schroeders on April 18, 2006 and recorded in the Lancaster County, Nebraska Register of Deeds Office as Instrument No. 2006019584 on April 27, 2006 (the "Deed of Trust"). The Deed of Trust designated MERS as the beneficiary of the security instrument, as the nominee for the Lender, Quicken Loans, and the Lender's successors and assigns. In the Deed of Trust, the Schroeders granted MERS, as the beneficiary of the Deed of Trust, a security interest in certain real property (the "Property") located in Lancaster County, Nebraska, commonly known as 6500 Princeton Road, Firth, Nebraska 68358. The Deed of Trust further states that MERS, and MERS' successors and assigns, is empowered "to exercise any or all of [the Lender's] interests, including, but not limited to, the right to foreclose and sell the Property."

B. Sale of the Loan to BOA, Transfer of the Note to BOA and Assignment of the Deed of Trust to BOA

Pursuant to a Trade Confirmation dated May 19, 2006 (the "Trade Confirmation") between BOA, as Purchaser, and Quicken Loans, as Seller, BOA confirmed its agreement to

purchase and Quicken Loans confirmed its agreement to sell "certain fixed rate first and second lien mortgage loans." The Loan was included among the loans BOA purchased from Quicken Loans in connection with the Trade Confirmation. BOA duly appointed Wells Fargo Bank, N.A. d/b/a America's Servicing Company ("Wells Fargo") as servicer for the Loan and granted it the power and authority to administer the Loan and to enforce the terms of the Loan on behalf of BOA. Pursuant to the Trade Confirmation, Quicken Loans was required to deliver the collateral file (the "Collateral File") for each purchased loan, including "the original mortgage notes properly endorsed [and] original mortgage . . . to U.S. Bank National Association (the 'Custodian')." The Trade Confirmation specifies "[t]he Custodian shall hold the Collateral Files for the benefit of the Purchaser, its assignees or designees." U.S. Bank National Association ("U.S. Bank"), as Custodian and agent of BOA, received the Collateral File from Quicken Loans on May 31, 2006. The Collateral File includes, among other documents, the original, wet ink Note, Exhibit A to Exhibit 21.

As required by the Trade Confirmation, prior to the transfer of the Collateral File to the Custodian, Quicken Loans endorsed the Note in blank. The endorsement states "WITHOUT RECOURSE Pay to the Order of _____" and is signed by Scott Johnson, Capture Manager, on behalf of and with authorization from Quicken Loans. During the course of this litigation, U.S. Bank released custody of the Note to Wells Fargo in its capacity as duly appointed servicer for the Loan. Wells Fargo maintained possession of the Collateral File after that date until on or about May 16, 2016, when it transferred it to its counsel, Kutak Rock LLP. Kutak Rock received the Collateral File on May 17, 2016.

The Schroeders received notice that Quicken Loans transferred its servicing rights to BOA when Quicken Loans sent a Notice of Assignment, Sale or Transfer of Servicing Rights dated May 25, 2006 to the Schroeders.

On July 14, 2011, MERS, as nominee for Quicken Loans and Quicken Loans' successors and assigns, executed an Assignment of Deed of Trust, which was recorded in the Lancaster County, Nebraska Register of Deeds Office as Instrument No. 2011030924 on July 19, 2011 (the "Assignment").

As a result of BOA's purchase of the Loan from Quicken Loans pursuant to the Trade Confirmation, Quicken Loans' transfer of the Note to BOA and MERS' assignment of the Deed of Trust to BOA, BOA is the current owner and holder of the Note and Deed of Trust.

C. Plaintiff's Default

Mr. Schroeder died in September 2007. Prior to Mr. Schroeder's death, the Schroeders, and later Plaintiff, made payments under the terms of the Note and Deed of Trust to Wells Fargo until May 2010. Thereafter, Plaintiff made no further payments. Plaintiff defaulted under the terms of the Note and Deed of Trust by failing to make payments since May 2010. By letter dated March 21, 2012 and addressed to the Property, Wells Fargo, in its capacity as servicer for the Loan, gave notice to Plaintiff that she was in default for failure to make payments due and that if Plaintiff failed to bring the Note and Deed of Trust current by April 24, 2012 it would become "necessary to require immediate payment in full (also called acceleration) of your Mortgage Note and pursue the remedies provided for in your . . . Deed of [T]rust, which include foreclosure." Plaintiff failed to bring the Note and Deed of Trust current. To date, Plaintiff has failed to tender the amounts due and owing under the Note and Deed of Trust.

EVIDENTIARY RULINGS

A. Ex. 14 – Plaintiff's Affidavit

In opposition to the Motion, Plaintiff offered her own affidavit. Under Neb. Rev. Stat. 25-1334, "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." "[S]tatements in affidavits as to opinion, belief, or conclusions of law are of no effect . . . and . . . mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment." *Boyle v. Welsh*, 256 Neb. 118, 127, 589 N.W. 2d 118, 125-26 (1999) (internal quotations omitted).

Exhibit 14 consists of immaterial and unsupported conclusions and beliefs and other inadmissible statements that are insufficient to establish a genuine issue of fact. Defendants' objection to Exhibit 14 is sustained.

B. Exhibits 15-16

Under Neb. Rev. Stat. § 25-1334, "the key inquiry . . . insofar as an expert's opinion and foundational evidence is concerned, is whether such evidence 'would be admissible' at trial." *Boyle v. Welsh*, 256 Neb. at 127, 589 N.W.2d at 126. Pursuant to *Schafersman v. Agland Coop*, 262 Neb. 215, 232, 631 N.W.2d 862, 876-77 (2001), the Court "must determine at the outset, pursuant to Neb. Evid. R. 702, whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." "This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue." *Schafersman*, 262 Neb. at 232, 631 N.W.2d at 877. The Court may consider a number of factors that might bear on its gatekeeping function,

including, but not limited to, whether a theory can be, and has been, tested; whether the theory has been subjected to peer review and publication; and whether the theory enjoys "general acceptance" within a relevant scientific community. *Id.*

1. **Exhibit 15 - Affidavit of Sylvia Kessler**

Plaintiff offered Exhibit 15, the affidavit of Sylvia Kessler ("Kessler Affidavit"). The Kessler Affidavit is not admissible under Rule 702 because Ms. Kessler's testimony is not relevant and she does not testify to scientific, technical, or other specialized knowledge that will assist the trier of fact.

Ms. Kessler's testimony in this matter is inadmissible because it is not relevant to determining a fact in issue. The sole question in this matter on which it may be relevant for a forensic document examiner to opine is whether the Note offered as Exhibit 21 is an original. Ms. Kessler's opinion on the originality of Exhibit 21 premised on her review of a scanned and e-mailed copy of Exhibit 21, and not Exhibit 21 itself, is not helpful to assist the fact finder in determining whether Exhibit 21 is an original.

Ms. Kessler's methodology further does not meet the *Schafersman* test for validity. Ms. Kessler admits her methodology is "new" and is a "never before used . . . method." She further admits that "[i]n all of [her] Forensic Examination books [she] could find no reference to Hypothesis examination for the document examiner." She does not explain the genesis of her methodology or provide any foundation to establish the methodology she used is valid, has been or can be tested or has been accepted by anyone within the community of forensic document examiners. Ms. Kessler confirms in her affidavit that she herself does not fully grasp her own "methodology" by admitting "I think I finally understand how to go about the examination." It is this Court's determination that Ms. Kessler's admittedly new, untested and unreviewed

methodology is invalid and therefore is not useful to determining the facts in issue in this case. Defendants' objections to the Kessler Affidavit (Ex. 15) are therefore sustained.

2. **Exhibit 16 – Affidavit of Richard Kahn**

Plaintiff offered Exhibit 16, the affidavit of Richard Kahn ("Kahn Affidavit") in opposition to the Motion.

The Kahn Affidavit fails to set forth sufficient foundation to establish Mr. Kahn is qualified to testify as an expert to the subject matter of his affidavit. *See Edwards v. Mount Moriah Missionary Baptist Church*, 21 Neb. App. 896, 908-10, 845 N.W.2d 595, 605-06 (2014) (concluding expert affidavit was properly excluded from evidence because "it lacked foundation to qualify him as an expert and failed to demonstrate his competence"); Neb. Rev. Stat. § 27-702. Mr. Kahn's affidavit fails to include any references to his education, training or certifications he holds relevant to the issues in this case or otherwise. The Kahn Affidavit is also devoid of any explanation as to the nature of sworn testimony provided by Mr. Kahn in other matters, whether he has been qualified as an expert by any court and, if so, the subject matter of any testimony that has been accepted or allowed. Mr. Kahn's generalized experience analyzing, reviewing structuring and handling mortgage backed securities and syndicated real estate investments and his generalized experience originating and underwriting loan originations for sale into the secondary marketplace does not qualify him to testify as to the specifics of what happened in this case. *See United States v. Chaika*, 695 F.3d 741, 745–46 (8th Cir. 2012) (limiting expert testimony to explanation of structure of mortgage loan industry but refusing to "let that witness go over the line and say in the next question now here is what happened in this case."). Likewise, Mr. Kahn's generalized experience does not qualify him to testify as to MERS or the MERS® System. Mr. Kahn does not identify any experience or specialized knowledge that he

has concerning MERS or the MERS® System. Mr. Kahn's generalized experience in the mortgage industry further does not qualify him to testify as an expert regarding the authenticity of the Schroeders' signatures and initials and Mr. Johnson's endorsement on the Note. Mr. Kahn readily admits in his affidavit he is a "casual observer" of the signatures at issue and speaks to the need for a separate "handwriting expert to make their own examinations."

Mr. Kahn's methodology is also not valid and cannot properly be applied to the facts in issue under the *Schafersman* factors. His affidavit does not disclose what, if any, methodology he utilizes in reaching any of his conclusions and does not provide any foundation demonstrating that such methodology has been tested, subjected to peer review or is accepted in any relevant community. Mr. Kahn simply summarizes and interprets the contents of documents Defendants have offered into evidence and/or produced in discovery or documents Mr. Khan has himself procured from other sources. This summary testimony is not helpful to the trier of fact and is not based on a reliable methodology.

Mr. Kahn's opinions purporting to interpret documentation evidencing the sale and transfer of the Note from Quicken Loans to BOA and the assignment of the Deed of Trust from MERS to BOA also invades the province of the Court. Legal documents must be interpreted by the Court as a matter of law. *Terry D. Whitten, D.D.S., P.C. v. Malcolm*, 249 Neb. 48, 51, 541 N.W.2d 45, 47 (1995). Expert opinions on issues of law, including interpretation of legal documents, are not admissible. *State v. Merch.*, 285 Neb. 456, 464-66, 827 N.W.2d 473, 481-82 (2013); *Burroughs v. Mackie Moving Sys. Corp.*, No. 4:07CV1944MLM, 2010 WL 1254630, at *7 (E.D. Mo. Mar. 24, 2010).

Mr. Kahn's testimony regarding any documents extrinsic to the Trade Confirmation, the Note and the Assignment is irrelevant to the determination regarding whether the Note was

transferred and the Deed of Trust was assigned to BOA, as the issues must be determined by looking to the four corners of the instruments themselves. Mr. Kahn's opinions premised on other documents are irrelevant and are not helpful to assist the trier of fact in determining the issues in this case.

Mr. Kahn's opinion is premised on inadmissible, unauthenticated and hearsay documents. The Nebraska Rules of Evidence permit an expert to base an opinion or inference on facts or data that need not be admissible in evidence "[i]f of a type reasonably relied on by experts in the particular field." *See* Neb. Rev. Stat. § 27-703. The Nebraska Supreme Court, however, has made clear "a testifying expert may not merely act as a conduit for hearsay." *Koehler v. Farmers All. Mut. Ins. Co.*, 252 Neb. 712, 716-18, 566 N.W.2d 750, 753-54 (1997). The Kahn Affidavit does not provide foundation for the documents attached thereto that would establish any of the documents were of a type reasonably relied on by experts in a particular field. Mr. Kahn simply summarizes these sources and testifies to his interpretation of their meaning and significance. In so doing, Mr. Kahn acts as a "summary witness," not an expert and merely serves as a conduit for hearsay.

Mr. Kahn's opinions as to the credibility of witness affidavits offered by Defendants also are inadmissible. "The critical inquiry with respect to the admissibility of expert testimony under Rule 702 is whether such testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. . . . Truthfulness is generally not a fact in issue, except in limited circumstances such as perjury prosecutions." *State v. Catsam*, 148 Vt. 366, 371, 534 A.2d 184, 188 (1987). "There is no scientific foundation for th[e] evaluation of credibility, because an expert is no better qualified than a lay person to assess witness credibility." *State v. Doan*, 1 Neb. App. 484, 493, 498 N.W.2d 804, 810 (1993). Expert opinions regarding the reliability of

other witnesses "create a serious danger of confusing or misleading the [trier of fact] . . . causing it to substitute the expert's credibility assessment for its own common sense determination." *Nichols v. Am. Nat. Ins. Co.*, 154 F.3d 875, 883 (8th Cir. 1998).

For all of the reasons discussed above, Defendants' objection to Exhibit 16 is sustained.

CONCLUSIONS OF LAW

A. Summary Judgment Standard

"Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law." *Latzel v. Bartek*, 288 Neb. 1, 11, 846 N.W.2d 153, 162 (2014). "The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law." *Id.* at 12, 846 N.W.2d at 162. "After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion." *Id.* "In the summary judgment context, a fact is material only if it would affect the outcome of the case." *Id.*

B. Plaintiff Does Not Have Standing to Challenge the Assignment of the Deed of Trust to BOA

The general rule is that "only a party (actual or alleged) to a contract can challenge its validity." *Spanish Oaks, Inc. v. Hy-Vee, Inc.*, 265 Neb. 133, 138, 655 N.W.2d 390, 397 (2003). "[T]he fact that a third party would be better off if a contract were unenforceable does not give

him standing to sue to void the contract." *Id.* "In order for those not named as parties to recover under a contract as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interest of such unnamed parties were contemplated and that provision was being made for them." *Palmer v. Lakeside Wellness Ctr.*, 281 Neb. 780, 785, 798 N.W.2d 845, 850 (2011). The Nebraska Supreme Court held in *Marcuzzo v. Bank of the West*, 290 Neb. 809, 862 N.W.2d 281 (2015), that a "borrower who is not a party to a mortgage assignment, or a party intended to benefit from the assignment, lacks standing to challenge the assignment."

In this matter, Plaintiff alleged substantially similar claims to those asserted in *Marcuzzo* arising out of the trustee's sale of her property. Like *Marcuzzo*, Plaintiff's claims are premised on allegations that BOA is not the beneficiary of the Deed of Trust because the Assignment from MERS to BOA was purportedly defective. Also, as in *Marcuzzo*, the undisputed evidence demonstrates Plaintiff was not a party to, or a third-party beneficiary of, the Assignment. Plaintiff further failed to articulate any injury she suffered specifically arising out of the allegedly defective Assignment because the Assignment had no effect on her obligation to pay. Plaintiff made payments to Wells Fargo until she stopped making payments in May 2010, and no other party, except those acting on Wells Fargo's behalf, ever demanded payment on the Loan. Plaintiff cannot have suffered any injury as a result of an alleged defect in the Assignment absent any claim of right to payments by a party other than BOA, or parties, such as Wells Fargo and those acting on its behalf.

Plaintiff argues there is "an exception to the general rule" enunciated in *Marcuzzo* pursuant to which borrowers have standing to challenge the "impossibility of an assignment."

The Court does not find Plaintiff's argument persuasive to deviate from the Nebraska Supreme Court's decision in *Marcuzzo*.

Defendants are entitled to summary judgment on the issue of standing alone. They are also entitled to summary judgment on the merits of Plaintiff's claims.

C. Defendants Are Entitled to Summary Judgment on the Merits of Plaintiff's Claims.

1. The Note was properly negotiated and transferred to BOA.

If an endorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the endorsement identifies a person to whom it makes the instrument payable, it is a "special endorsement." Neb. Rev. Stat. U.C.C. § 3-205(a). An endorsement made by the holder of the instrument which is not a "special endorsement" is a "blank endorsement." Neb. Rev. Stat. U.C.C. § 3-205(b). A signature (including an endorsement) on an instrument is presumed to be authentic until evidence is introduced to support a finding that a signature is forged or unauthorized. Neb. Rev. Stat. U.C.C. §§ 3-308; 1-206. "When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." *Id.* A party in possession of a negotiable instrument payable to bearer is the "holder" of the instrument. Neb. Rev. Stat. U.C.C. § 1-201(b)(21).[1] A holder may possess an instrument "either directly or through an agent." Neb. Rev. Stat. U.C.C. 3-201, cmt. 1. A "holder" of an instrument has the right to enforce it. Neb. Rev. Stat. U.C.C. § 3-301.

Here, the undisputed evidence shows Quicken Loans, the originator of the Loan and the original holder of the Note, sold the Loan to BOA, pursuant to a Trade Confirmation. Prior to

[1] "'Holder' means: (A) the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession . . . . " Neb. Rev. Stat. U.C.C. § 1-201(b)(21).

transferring the Collateral File, which contained the original Note, to U.S. Bank, as Custodian and agent for BOA, Quicken Loans endorsed the Note, as it was required to do pursuant to the Trade Confirmation. The endorsement states "WITHOUT RECOURSE Pay to the Order of _____" and is signed by Scott Johnson, Capture Manager, on behalf of Quicken Loans. Scott Johnson's attestation that his endorsement on the Note is authentic and that he had authority to execute it confirms the legal presumption of the authenticity of the endorsement. Given the endorsement does not identify a specific person to whom it is payable, it qualifies as a blank endorsement payable to bearer under the Nebraska UCC and enables the Note to be negotiated by transfer of possession alone. As the party in possession of the Note payable to bearer, BOA is the holder of the Note and is entitled to enforce it.

2. The Assignment of the Deed of Trust from MERS to BOA is Proper and Valid.

Plaintiff asserts BOA "never acquired any interest in the [Deed of Trust] and has no authority to seek the remedy of foreclosure" due to purported deficiencies in the Assignment. Plaintiff's argument is not persuasive or supported by the undisputed facts or law. The Assignment is proper and valid.

Under Nebraska law, a deed of trust, as distinguished from a promissory note, is a contract whereby the borrower pledges the property as collateral to secure the repayment of the promissory note. *See Gilroy v. Ryberg*, 266 Neb. 617, 623, 667 N.W.2d 544, 552 (2003). Here, Plaintiff and the Lender, Quicken Loans, contractually agreed to designate MERS (as the Lender's nominee) to serve as the beneficiary of the Deed of Trust, such that legal title to the Lender's secured interest in the property was held by MERS. *See Mort. Elec. Reg. Sys., Inc. v. Neb. Dep't of Banking & Fin.*, 704 N.W.2d 784, 788 (Neb. 2005); *Marcuzzo*, 862 N.W.2d at

285. For its part, MERS then served as the beneficiary on the Deed of Trust, on behalf of, or as the nominee for, the Lender and for any of the Lender's successors and assigns. *See Mort. Elec. Reg. Sys., Inc.*, 704 N.W.2d at 788. After Plaintiff signed the Deed of Trust agreeing to designate MERS as the beneficiary, the Deed of Trust was recorded in the public land records.

Plaintiff claims that MERS may not be designated as beneficiary in Nebraska deeds of trust. Plaintiff's argument is not persuasive or supported by Nebraska law. A deed of trust is a contract and Plaintiff agreed to the designation of MERS as beneficiary in her deed of trust contract. The freedom to contract allows parties to contract for MERS to serve as beneficiary, as nominee for the lender and the lender's successors and assigns. Plaintiff's contention that MERS (or an agent of the lender) may not be named as the beneficiary or mortgagee has been repeatedly rejected by courts across the country; those courts have consistently held that MERS may be designated as the beneficiary or mortgagee of the security instrument, as nominee for the lender and the lender's successors and assigns. *See, e.g., Vanderhoof v. Deutsche Bank Nat'l Trust*, 554 F. App'x 355, 358 (6th Cir. 2014); *McFadden v. Fed. Nat'l Mortg. Ass'n*, 525 F. App'x 223, 230-31 (4th Cir. 2013); *Culhane v. Aurora Loan Servs. of Neb.*, 708 F.3d 282, 291 (1st Cir. 2013); *Epstein v. US Bank, N.A.*, 540 F. App'x 354, 357 (5th Cir. 2013); *Zadronsky v. Bank of New York Mellon*, 720 F.3d 1163, 1169 (9th Cir. 2013); *Edwards v. Mortg. Elec. Regis. Sys., Inc.*, 300 P.3d 43, 49 (Idaho 2013); *Bucci v. Mortg. Elec. Regis. Sys., Inc.*, 68 A.3d 1069, 1085 (R.I. 2013); *Edelstein v. Bank of N.Y. Mellon*, 286 P.3d 249, 260 (Nev. 2012); *RMS Residential Props. LLC v. Miller*, 32 A.3d 307, 317 (Conn. 2011); *Jackson v. Mortg. Elec. Regis. Sys., Inc.*, 770 N.W.2d 487, 500-01 (Minn. 2009); *MERSCORP, Inc. v. Romaine*, 861 N.E.2d 81, 97 (N.Y. 2006); *see also Stein v. Chase Home Finance, LLC*, 662 F.3d 976, 980 (8th Cir. 2011).

Plaintiff also claims that, because MERS may not be the beneficiary, any assignment of the Deed of Trust by MERS is null and void. Again, Plaintiff's argument is not persuasive or supported by Nebraska law. Given that deeds of trust are contracts, the rights set forth in the contractual deed of trust are, as matter of law, freely assignable unless the deed of trust contract prohibits assignment. *See Burnison v. Johnston*, 277 Neb. 622, 626, 764 N.W.2d 96, 99 (2009). Here, the Deed of Trust does not prohibit its assignment; to the contrary, the Deed of Trust provides that it may be assigned. Based on this basic legal notion that contracts may be assigned, courts across the country have repeatedly held that MERS may assign its interests in the deed of trust, as the beneficiary. *See, e.g.*, *Lial v. Bank of Am. Corp.*, 633 F. App'x 406, 406 (9th Cir. 2016); *Vanderhoof*, 554 F. App'x at 358; *Smith v. BAC Home Loans Servicing*, LP, 552 F. App'x 473, 479 (6th Cir. 2014); *Johnson v. Bank of New York Mellon*, 576 F. App'x 650, 652 (8th Cir. 2014); *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 253 (5th Cir. 2013); *Serra v. Quantum Servicing Corp.*, 747 F.3d 37, 40 (1st Cir. 2014); *Espeland v. OneWest Bank, FSB*, 323 P.3d 2, 12 (Alaska 2014); *Rudder v. Mortg. Elec. Regis. Sys., Inc.*, 86 A.3d 381, 382-83 (R.I. 2014); *Edelstein*, 286 P.3d at 260.

3. Defendants are entitled to summary judgment as to Plaintiff's first and second claims for Quiet Title and Declaratory Judgment, and BOA is entitled to summary judgment as to Plaintiff's sixth claim for wrongful foreclosure.

Equity will only grant relief to set aside a trustee's sale where there are defects in the sale which render it either void or voidable. *Gilroy*, 266 Neb. at 624-25, 667 N.W.2d at 554. "Defects that render a sale void are rare and generally occur when the trustee conducted the sale, but no right to exercise the power of sale existed." *Id.* at 625, 667 N.W.2d at 554. "Typical examples of defects in a sale which would render it void include situations when (1) no default on the underlying obligation has occurred, (2) the trust deed is a forgery, and (3) the trust deed

requires the beneficiary to request that the trustee commence foreclosure proceedings and no request has been made." *Id.* An egregious failure to comply with the fundamental procedural requirements while exercising the power of sale also will render the sale void. *Id.* at 626, 667 N.W.2d at 554. In this matter, there is no evidence of any defects in the foreclosure sale process that would render the sale void or voidable, if the sale were to move forward.

As to MERS, the undisputed evidence demonstrates that MERS assigned all interest it had in the Deed of Trust (and gave public notice that it had assigned all interest it had in the Deed of Trust) in July 2011—almost a year before the foreclosure took place. The evidence further shows MERS is not and has never been the Trustee under the Deed of Trust and MERS does not have any interest in the Note. The evidence also establishes MERS did not and will not have any role in the foreclosure process because MERS assigned the Deed of Trust to BOA in July 2011. MERS is therefore entitled to summary judgment on Plaintiff's quiet title and declaratory judgment claims.

As to BOA, there is no evidence of any defect in the trustee's sale process that would render the sale either void or voidable were it to go forward. The Plaintiff alleges there was an improper transfer of the Note and Assignment of the Deed of Trust to BOA. The Court rejected that argument above. In light of Plaintiff's failure to cure her existing default, BOA is entitled to enforce the power of sale in accordance with the Deed of Trust and the Trust Deeds Act. Accordingly, BOA is entitled to summary judgment as to Plaintiff's claims for wrongful foreclosure, declaratory judgment and to quiet title to the Property in her name.

4. BOA is entitled to summary judgment on Plaintiff's third claim for conversion and accounting.

Plaintiff argues BOA "has received payments when it had not obtained a proper Assignment of the Deed of Trust and Promissory Note." Conversion is "any unauthorized or wrongful act of dominion exerted over another's property which deprives the owner of his property permanently or for an indefinite period of time." *Brook Valley Ltd. Partnership v. Mutual of Omaha Bank*, 285 Neb. 157, 164, 825 N.W.2d 779, 787 (2013). Under the UCC, an issuer of a note (such as Plaintiff here) "is obliged to pay" the "person entitled to enforce the instrument." Neb. Rev. Stat. U.C.C. § 3-412.

As discussed above, Plaintiff entered into the Note and Deed of Trust which obligated her to make payments in accordance with their terms to the owner and holder thereof. As further discussed above, BOA is entitled to enforce the Note as the holder. Therefore, Plaintiff, as the maker, is obliged to pay BOA on the Note. Any act of dominion or control by BOA over Plaintiff's payments was thus rightful and authorized. Plaintiff has failed to raise any genuine issue of material fact as to BOA's right to receive loan payments. Accordingly, BOA is entitled to summary judgment as to Plaintiff's claim for conversion.

Plaintiff also seeks an accounting. Plaintiff's causes of action seeking to prevent the trustee's sale from occurring and to quiet title to the Property in her name are equitable in nature. *See Gilroy*, 266 Neb. at 622, 667 N.W.2d at 552. "Generally, in order to be entitled to the equitable remedy of accounting, it is necessary to allege a fiduciary, trust, or confidential relationship; a complicated series of accounts; or the inadequacy of a remedy at law, the latter being the basic reason for asserting equitable jurisdiction." *Lone Cedar Ranches*, 246 Neb. 769, 772, 523 N.W.2d 364, 368 (1994).

Here, there is no evidence Plaintiff had a fiduciary, trust, or confidential relationship with BOA, or of the existence of a complicated series of accounts or the inadequacy of a remedy at

law. There exists a "presumption under Nebraska law" that "the relationship between a bank and a customer . . . imposes no fiduciary duty upon the bank." *McCormack v. Citibank N.A.*, 100 F.3d 532, 540 (8th Cir. 1996) (quoting *Chase v. Denau*, No. A-91-1015, 1993 WL 70947, at *2 (Neb. Ct. App. Mar. 16, 1993)); *see also Bloomfield v. Neb. State Bank*, 237 Neb. 89, 465 N.W.2d 144 (1991). "The relations between the trustor and trustee under a deed of trust would seem to be the same as those between a mortgagor and mortgagee, that is, to be of a business character and not of a fiduciary nature." *Ariz. Motor Speedway, Inc. v. Hoppe*, 244 Neb. 316, 325, 506 N.W.2d 699, 704 (1993). It is further clear there is a single loan at issue in this matter, and not a complicated series of accounts. Plaintiff has failed to demonstrate the right to an equitable accounting.

5. BOA is entitled to summary judgment on Plaintiff's fourth claim for slander of title.

The Nebraska statute governing slander of title claims provides:

> No person shall use the privilege of filing notices hereunder for the purpose of slandering the title to real estate . . . . If the court shall find that any person has filed a claim for the purpose only of slandering title to such real estate, the court shall award the plaintiff all of the costs of such action, including attorney fees to be fixed and allowed to the plaintiff by the court, and all damages that plaintiff may have sustained as a result of such notice of claim having been filed for record.

Neb. Rev. Stat. § 76-296. "An action for slander of title is based upon a false and malicious statement, oral or written, which disparages a person's title to real or personal property and results in special damage." *Wilson v. Fieldgrove*, 280 Neb. 548, 552, 787 N.W.2d 707, 711 (2010). The "malice" necessary to establish a slander of title claim requires (1) knowledge that the statement is false or (2) reckless disregard for its truth or falsity. *Id.* "[A] valid interest

would obviously defeat the slander of title claim because filing notice of a valid claim could not be considered either false or malicious." *Id.*

As discussed above, the evidence demonstrates BOA is the owner and holder of the Note and Deed of Trust and Plaintiff defaulted under the terms of the Note and Deed of Trust. Plaintiff's default entitles BOA to exercise the power of sale as set forth in the Deed of Trust and the Trust Deeds Act. Plaintiff has failed to present any evidence BOA caused the filing of any false or malicious statements for any purpose other than to exercise the express rights accorded under the Note and Deed of Trust. BOA is entitled to summary judgment as to Plaintiff's fourth claim for slander of title.

6. Defendants are entitled to summary judgment on Plaintiff's fifth claim for injunctive relief.

An injunction should not be granted "unless the right is clear, the damage irreparable, and the remedy at law is inadequate to prevent a failure of justice." *Hogelin v. City of Columbus*, 274 Neb. 453, 463, 741 N.W.2d 617, 625 (2007).

As to Plaintiff's claim for injunctive relief against MERS, MERS assigned all of its interest in the Deed of Trust to BOA in July 2011. Further, MERS is not, and has never been, the Trustee under the Deed of Trust. Therefore, MERS will not have any role in the foreclosure sale process whatsoever. Given MERS has no interest in the Deed of Trust or the Note and will not have any role whatsoever in the foreclosure sale of the Property, MERS is entitled to summary judgment as to Plaintiff's claim for injunctive relief seeking to enjoin foreclosure.

As to BOA, Plaintiff has failed to demonstrate a clear right to relief. Plaintiff defaulted under the Note and Deed of Trust and failed to cure after notice and opportunity to do so. Accordingly, BOA is entitled to summary judgment as to Plaintiff's fifth claim for injunctive relief.

7. **MERS is separately entitled to summary judgment because MERS cannot provide any of the remedies Plaintiff seeks in this Lawsuit.**

Plaintiff asserts three claims against MERS in this Lawsuit: (1) quiet title; (2) declaratory relief; and (3) injunctive relief. Through these three claims, Plaintiff seeks a declaration of who has interests in her Property and an injunction prohibiting the foreclosure of her Property.

However, MERS assigned all interest it had in the Deed of Trust to BOA in July 2011. Further, MERS is not and has never been the Trustee under the Deed of Trust. And, MERS will not have any role in the foreclosure process because MERS assigned the Deed of Trust to BOA in July 2011. Thus, MERS does not have any interest in the Deed of Trust, MERS does not have any interest in the Note and MERS will have no involvement in the foreclosure of Plaintiff's Property.

Thus, MERS is entitled to summary judgment as to Plaintiff's claims for quiet title, declaratory relief seeking an adjudication of the interests in her Property and injunctive relief seeking to enjoin foreclosure because MERS cannot provide any of the remedies Plaintiff seeks from it in this lawsuit.

Accordingly,

IT IS HEREBY ORDERED that Defendants Bank of America, National Association and Mortgage Electronic Registration Systems, Inc.'s Second Motion for Summary Judgment is granted and Judgment is entered in their favor.

Dated this 8 day of May, 2017.

BY THE COURT:

Lancaster County District Court Judge

Kevin R. McManaman