

IN THE DISTRICT COURT OF FORD COUNTY, KANSAS

By _____)
 LANDMARK NATIONAL BANK,)
) Plaintiff,)
))
 vs.))
))
 BOYD A. KESLER,)
 MILLENIA MORTGAGE CORP.,)
) Defendants.)
 _____)

Case No. 06-CV-155

ORDER

Now, on this 12th day of January, 2007, the Court enters its orders following a hearing held on the 8th day of January, 2007 on various motions filed by the litigants. At this hearing, the Plaintiff, Landmark National Bank was present by counsel, Mr. David H. Snapp of Dodge City, Kansas. The Defendant, Boyd Kesler, was present in person and by Mr. Ted E. Knopp of Wichita, Kansas. Sovereign Bank appears through local counsel, Mr. Aaron Kite of Dodge City, Kansas. Mr. Robert E. Lastelic of Overland Park, Kansas does not appear but has filed various motions and other pleadings on behalf of Sovereign Bank. The purchasers of the property, Dennis Bristow and Tony Woydziak, were present in person and by counsel, Mr. Max Estes of Dodge City, Kansas.

FINDINGS OF FACT

- 1.) The Plaintiff, Landmark National Bank, filed a Petition to foreclose its mortgage on certain real estate located in Ford County, Kansas on July 27th, 2006.
- 2.) Pursuant to a title search conducted by a local title company, (Ford County Title) the Plaintiff caused notice to be served on the Defendant Boyd Kesler and Defendant Millenia Mortgage Corp., who claims a second mortgage on the real estate. (MERS was not disclosed on the title report and therefore they were not notified by the Plaintiff.)
- 3.) Adequate service of process was made on both Defendants, Boyd Kessler and Millenia Mortgage Corp. Neither of these defendants filed an answer in the present case and were in default when the court entered judgment.

- 4.) On September 6th, 2006, this Court issued a judgment to the Plaintiff against the Defendants and foreclosed their interests in the property. (See Journal Entry of Judgment filed 9-6-06)
- 5.) The Court issued its Order for Sale on September 29th, 2006. Notice of this sale was published in the Dodge City Daily Globe.
- 6.) On October 26, 2006 the Ford County Sheriff sold the real estate to Dennis Bristow and Tony Woydziak for \$87,000.00.
- 7.) On November 14, 2006, Sovereign Bank claiming to be "successor in interest" to Millennia Mortgage Corp. filed an answer without leave of the Court. This answer contained no attachments or documents evidencing Sovereign Bank's claims.
- 8.) Also on November 14, 2006, the Plaintiff filed its Motion to Confirm Sale.
- 9.) On or about March 16, 2005, Defendant, Boyd Kessler, took out a second mortgage on the real estate that is the subject of this lawsuit. (See Ex. A, attached to Sovereign Bank's "Supplemental Motion to Set Aside or Vacate Judgment and Sheriff's Sale and Objection to Confirmation of Sale" filed December 1, 2006.) The first paragraph of the mortgage states,

"THIS MORTGAGE is made this 15th day of March, 2005, between the Mortgagor, BOYD A. KESLER, (herein "Borrower"), and the Mortgagee, Mortgage Electronic Registration Systems, Inc. ("MERS"), (solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns). MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS. MILLENNIA MORTGAGE CORP., A CALIFORNIA CORPORATION is organized and existing under the laws of CALIFORNIA and has an address of 23046 AVENIDA DE LA CARLOTA #100, LAGUNA HILLS, CALIFORNIA 92653 (herein "Lender")."
- 10.) The language of this mortgage establishes that MERS is named as the mortgagee. However, this designation is then limited by the language that establishes that MERS is "solely as nominee for Lender". The Lender is clearly identified as Millennia Mortgage Corp., with an address in California.
- 11.) Paragraph 12 of the Mortgage sets out that all notices under this mortgage shall be provided to the Lender. There is no mention of MERS being allowed to receive notices for the Lender.

12) Page 7 of the mortgage states,

"Borrower and Lender request the holder of any mortgage, deed of trust or other encumbrance with a lien which has priority over this Mortgage to give Notice to Lender, at Lender's address set forth on page one of this Mortgage, of any default under the superior encumbrance and of any sale or other foreclosure action."

This is additional evidence that the Lender, Millenia Mortgage Corp. required notice sent to them and not MERS as their nominee.

13.) This Court could find nothing in the mortgage which set out the rights and duties for MERS as "nominee of Lender". Counsel for the litigants could not provide the Court with a definition. Some counsel suggested the Court consider it like a power of attorney. Another suggested it was more like a trustee.

14.) In Sovereign's Supplemental Memorandum to Motion of Sovereign Bank, filed December 4th, 2006, counsel for Sovereign sets out what MERS is. No documents were attached to Sovereign's memorandum nor have any been subsequently provided which establishes what MERS is or their purpose. However, since the description of MERS was not disputed by the other litigants, the Court will accept it at face value.

15.) Sovereign Bank filed no documents in the public record with the Ford County Register of Deeds setting out their interest in the real estate.

16.) At no time during this litigation has Sovereign Bank provided written documentation setting forth this interest in the real estate to the Court or the other litigants.

17.) Sovereign Bank knew that Landmark National Bank had obtained relief from the bankruptcy stay in order to proceed with foreclosure. (Paragraph 10 of Sovereign Bank's "Motion to Set Aside or Vacate Judgment and Sheriff's Sale and Objections to Confirmation of Sale filed 11-21-06) The Court has no knowledge as to when Sovereign Bank obtained this knowledge in relation to the present litigation.

18.) Counsel for Landmark National Bank and for Boyd Kessler made the court aware of a case in Florida dealing with MERS. On January __, 2007, Mr. Knopp provided this court with a synopsis of that case. This court did not consider this Florida case in making its ruling. This court felt this case had no precedential value as it appears to be a decision entered at the trial level.

CONCLUSIONS OF LAW

The central issue is, who was required by law to receive notice of the foreclosure action filed by Landmark National Bank. In a nutshell, the Court is required to determine whether MERS was entitled to be named as a Defendant and thus receive notice of the lawsuit.

Sovereign Bank argues that MERS as nominee for the Lender, Millenia Mortgage Corp., was entitled to notice because they are the mortgage holder. If MERS had been notified, Sovereign argues that they would have then received notice from MERS of the lawsuit and thus they could have properly joined the litigation. As noted above, other than Sovereign's description of what MERS is and how it operates, this Court has no evidence to support Sovereign's claims that they would have actually received notice from MERS.

The other litigants argue that MERS is not a real party in interest pursuant to K.S.A. 6-217, and therefore not entitled to notice. Further, they argue that Sovereign Bank was required to file evidence of their interest in the property with the Register of Deeds or they are merely in "privity" with Millenia Mortgage Corp. Thus Sovereign Bank's interest in the real estate was foreclosed upon when judgment was taken against Millenia Mortgage Corp., and the purchasers at the Sheriff's sale take the real estate free and clear of any claim by Sovereign Bank.

ORDERS

This Court has reviewed the statutes cited by the various litigants along with the case law cited. The Court notes that there is apparently no Kansas cases that help the Court determine the central issues in this case. After reviewing the arguments of counsel for the litigants and the law provided, it is this Court's opinion that pursuant to K.S.A. 60-217, MERS is not a real party in interest and thus it is not required that they be named as a party in a foreclosure lawsuit. As nominee for Lender, MERS is serving as an agent or representative for Millenia Mortgage Corp., Millenia Mortgage Corp. was clearly identified as the Lender in the mortgage in this case. Millenia Mortgage Corp. is the real party in interest. They are the entity subject to being named as a party defendant, not MERS in a lawsuit. Thus they are the entity entitled to Notice, not MERS. This is supported by the Court's findings of fact as set out in paragraphs 9, 10, 11 and 12.

As the Court has found that Millenia Mortgage Corp. is the proper party in interest and was properly served, and further that Sovereign failed to file with the local Register of Deeds evidence of their interest in the real estate, this Court finds that Sovereign is in privity with Millenia Mortgage Corp. Therefore, Sovereign Bank's interest in the property has been foreclosed. Had Sovereign Bank wished to protect their interest, they could have easily filed their interest with the Ford County Register of Deeds. Instead they relied on a "nominee" of Millenia Mortgage Corp., to protect them.

Therefore, this Court denies Sovereign Bank's vague request to intervene; denies Sovereign Bank's Motion to Set Aside or Vacate the Judgment entered on September 6, 2006, on the ground that MERS was not named as a Defendant; denies Sovereign Bank's Motion to Set Aside the Judgment pursuant to K.S.A. 60-260 as Sovereign Bank presented no evidence to support any of the statutory reasons justifying relief; and enters an order confirming the sale held on October, 26, 2006.

ADDITIONAL ORDERS


On Defendant Boyd Kesler's motion to distribute surplus, based on the Court's ruling as set out above, this motion is granted. Even though this Defendant did not answer and is in default, this Court cannot find that he is prohibited from being eligible for any surplus that resulted from the sale of the real estate.

Defendant, Boyd Kesler, filed a motion to extend the redemption period. K.S.A. 60-2414 establishes redemption periods as beginning "from the day of sale". Pursuant to the authority presented by Defendant Kesler, it appears this Court has wide discretion on equitable grounds to extend the period of redemption. The Court finds that there are sufficient equitable grounds to grant the Defendant Kesler's request. The Court extends the redemption period for three (3) months from the filing of this order.

CONCLUSION

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the above findings and orders be made the final orders of the Court.

IT IS SO ORDERED.



E. LEIGH HOOD
District Judge

pc: Mr. David Snapp
Mr. Ted E. Knopp
Mr. Aaron Kite
Mr. Max Estes
Mr. Robert E. Lastelic
Mr. Tyson C. Langhofer