Mortgage Elec. Registration Sys., Inc. (MERS) v. Johnston, No. 420-6-09 Rdcv (Cohen, J., Oct. 28, 2009)

STATE OF VERMONT
RUTLAND COUNTY

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS), as Nominee for WMC MORTGAGE CORP.,	)	**Rutland Superior Court Docket No. 420-6-09 Rdcv**
Plaintiff,	)	
v.	)	
FRANK S. JOHNSTON and ELLEN L. JOHNSTON, UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE, and ANY OTHER OCCUPANTS OF [Redacted] (n/k/a [Redacted]) WALLINGFORD, VERMONT,	)	
Defendants	)	

ORDER RE PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT, FILED SEPTEMBER 1, 2009

This matter comes on before the Court on a Motion for Default Judgment against the United States of America Department of Treasury, Internal Revenue Service, filed on September 1, 2009, by plaintiff Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for WMC Mortgage Corp. Plaintiff had previously filed a Motion for Default Judgment on July 8, 2009, as to defendants Frank and Ellen Johnston. The Court granted that Motion on August 27, 2009.

Plaintiff MERS is represented by Grant C. Rees, Esq. Defendant United States of

America Department of Treasury, Internal Revenue Service ("IRS") has entered an appearance through Assistant United States Attorney Melissa A.D. Ranaldo. However, defendant IRS has not filed a Verified Answer. Defendants Frank and Ellen Johnston are not represented by counsel.

Background

On September 18, 1989, Frank and Ellen Johnston (the "Johnstons") purchased property located at [redacted] in the town of Wallingford, Vermont. On April 27, 2005, the Johnstons executed a promissory note (the "Note") in favor of WMC Mortgage Corp, in the original principal amount of $117,000.00 dollars. Said Note was secured by a Mortgage Deed dated April 27, 2005, from the Johnstons to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for WMC Mortgage Corp. ("WMC"). The Mortgage Deed also listed MERS as the mortgagee. The Mortgage Deed was recorded in the Town of Wallingford Land Records.

On June 10, 2009, plaintiff MERS, as nominee for WMC, brought a Complaint for Foreclosure against defendants Frank and Ellen Johnston, as well as the United States of America Department of Treasury, Internal Revenue Service. The Complaint alleges that the Johnstons failed to make payments on the Note.

On July 8, 2009, plaintiff MERS, as nominee for WMC, filed a Motion for Default Judgment against the Johnstons. Said Motion was granted by the Court on August 27, 2009.[1]

On September 1, 2009, plaintiff MERS, as nominee for WMC, filed a Motion for Default Judgment against defendant IRS. The Court now raises, *sua sponte*, the issue of

[1] The Court granted plaintiff's Motion for Default Judgment against the Johnstons before the issue of standing was brought to the Court's attention by the case of *Landmark Nat. Bank v. Kesler*, 216 P.3d 158 (Kan. 2009), issued August 28, 2009.

MERS's standing to bring the instant foreclosure action, either independently or in its role as "nominee" for the lender WMC.

Discussion

A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures. Restatement (Third) of Property, Mortgages § 5.4(c).

The relationship of MERS to the mortgage transaction is not subject to any easy description. *Landmark Nat. Bank v. Kesler*, 216 P.3d 158, 164 (Kan. 2009). The Supreme Court of Kansas and the Supreme Court of Nebraska have described MERS as follows:

> MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.

Id. (quoting *Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance*, 704 N.W.2d 784, 785 (Neb. 2005)).

Chief Judge Kaye of the Court of Appeals of New York described the role of MERS as follows:

> In 1993, members of the real estate mortgage industry created MERS, an electronic registration system for mortgages. Its purpose is to streamline the mortgage process by eliminating the need to prepare and record paper

> assignments of mortgage, as had been done for hundreds of years. To accomplish this goal, MERS acts as nominee and as mortgagee of record for its members nationwide and appoints itself nominee, as mortgagee, for its members' successors and assigns, thereby remaining nominal mortgagee of record no matter how many times loan servicing, or the mortgage itself, may be transferred. MERS hopes to register every residential and commercial home loan nationwide on its electronic system.

Merscorp, Inc. v. Romaine, 861 N.E.2d 81, 86 (N.Y. 2006) (Kaye, C.J., dissenting in part).

The mortgage deed designated the relationships of the Johnstons, the lender WMC, and the nominee and mortgagee MERS, and established payment and notice obligations. That document purported to define the role played by MERS in the transaction and the contractual rights of the parties.

The document began by identifying the parties:

> (A) "Security Instrument" means this document which is dated April 27, 2005 together with all Riders to this document. (B) "Borrower" is FRANK S JOHNSTON and ELLEN L JOHNSTON, HUSBAND AND WIFE, AS TENANTS BY THE ENTIRETY, THEIR HEIRS AND ASSIGNS FOREVER. Borrower is the mortgagor under this Security Instrument. (C) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting *solely as a nominee* for Lender and Lender's successors and assigns. *MERS is the mortgagee* under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS. (D) "Lender" is WMC MORTGAGE CORP. Lender is a Corporation organized and existing under the laws of CALIFORNIA. Lender's address is P.O. BOX 54089, LOS ANGELES, CA 90054-0089. *Lender is the mortgagee under this Security Instrument*. (emphasis added).

The first full paragraph of the second page of the mortgage document conveyed a security

interest in real estate:

> This Security Instrument secures to *Lender*: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose and in consideration of the debt, Borrower does hereby mortgage, grant and convey to MERS (*solely as nominee* for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with power of sale, the following described property located in the COUNTY of RUTLAND. (emphasis added).

The first paragraph of the third page of the mortgage document contained the following language that apparently limited and expanded MERS's rights:

> Borrower understands and agrees that *MERS holds only legal title to the interests granted* by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (*as nominee* for Lender and Lenders' successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to *foreclose and sell the property*; and to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument. (emphasis added).

Paragraph 9 of the mortgage document provided the lender with the right to protect the security:

> If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect *Lender's interest in the Property* and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulation), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate *to protect Lender's interest in the Property and rights under this Security Instrument*, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. (emphasis added).

Paragraph 22 of the mortgage document addressed power of sale:

> If *Lender* or Borrower invokes the power of sale, and the Property is judicially ordered to be sold pursuant to such power, Lender shall mail a copy of a notice of sale by registered mail to Borrower at the Property Address or at any other address Borrower delivers to Lender in writing for that purpose. (emphasis added).

Paragraph 23 of the mortgage document addressed release of the mortgage:

> Upon payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. *Lender shall discharge* this Security Instrument. (emphasis added).

The Mortgage Deed further stated that all payments would be made to lender WMC, and the notice provisions of the document refer solely to the lender WMC.

The mortgage deed stated that MERS functions "solely as nominee" for the lender and lender's successors and assigns. The word "nominee" is defined nowhere in the mortgage deed, and the functional relationship between MERS and the lender, WMC, is likewise not defined. See *Kesler*, 216 P.3d at 165 (analyzing similar language in mortgage deed). The Vermont Supreme Court has not yet defined the term "nominee," nor has it addressed whether a "nominee" has standing to bring a foreclosure action. In the absence of a contractual definition of the term "nominee," or a definition under Vermont law, the contractual term is to be interpreted based on its plain meaning. *In re Cole*, 2008 VT 58, ¶ 9, 184 Vt. 64; see also *Kesler*, 216 P.3d at 165 (stating "[i]n the absence of a contractual definition of the term "nominee," the parties leave the definition to judicial interpretation.").

Black's Law Dictionary defines nominee as "[a] person designated to act in place of another, usu. in a very limited way" and as "[a] party who holds bare legal title for the

benefit of others or who receives and distributes funds for the benefit of others." Black's Law Dictionary 1076 (8th ed. 2004).

Legal title is defined as "[a] title that evidences apparent ownership but does not necessarily signify full and complete title or a beneficial interest." *Id*. at 1523. This is in contrast to equitable title, which is "[a] title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title." *Id*.

The mortgage deed consistently referred to MERS "solely as a nominee" and that it holds "only legal title," but it then purported to expand the authority of MERS as a "nominee" to act as in essence as an agent or as a power-of-attorney to carry out the rights of the Lender, including foreclosure and the sale of property. However, this purported expansion of authority was restricted to that "necessary to comply with law or custom." Importantly, the MERS and the lender WMC purposely chose to use the specific legal term "nominee," and *not* "agent" or "power-of-attorney." MERS also chose not to define the term "nominee." Furthermore, the mortgage deed consistently referred to the *Lender's* rights in the property, and not MERS's. This is consistent with MERS's authority to act in a very limited way "solely as nominee" - by holding bare legal title (not equitable title) for the lender.

I. MERS's Standing to Bring Independent Foreclosure

The Court will first address whether MERS has standing, independently, not in its role as "nominee," to bring the foreclosure action. Again, a mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures. Restatement (Third) of Property, Mortgages § 5.4(c). In general, a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation. *Id*.

cmt. e.

If the mortgage obligation is a negotiable note, Uniform Commercial Code § 3-203 is generally understood to make the right of enforcement of the promissory note transferrable only by delivery of the instrument itself to the transferee. Restatement (Third) of Property, Mortgages § 5.4 cmt. c. Vermont has adopted the Uniform Commercial Code in regards to negotiable instruments. Addressing the enforceability of a negotiable instrument, 9A V.S.A. § 3-301 sets forth:

> "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 3-309 or 3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

To be a "holder" of an instrument, 9A V.S.A. § 3-301(i), one must posses the note *and* the note must be payable to the person in possession of the note, or to bearer. 9A V.S.A. § 1-201(b)(21)(A) (emphasis added). Here, the "holder" option is not available to MERS because the note is not payable to MERS, nor has it been indorsed, either specifically to MERS or in blank. See *Id.*; 9A V.S.A. § 3-205(b) (blank indorsement becomes payable to bearer). Also, 9A V.S.A. § 3-301(iii) is not applicable, as it does not appear that plaintiff is entitled to enforce the instrument pursuant to either section 3-309 or 3-418(d).

A "nonholder in possession of the instrument who has the rights of a holder," 9A V.S.A. § 3-301(ii), includes persons who acquire physical possession of an unindorsed note. See 9A V.S.A. 3-203(a),(b). As the statutory comments explain, however, such

nonholders must "prove the transaction" by which they acquired the note:

> If the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled to enforce the instrument under Section 3-301 if the transferor was a holder at the time of transfer. Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the transferor as holder. *Because the transferee's rights are derivative of the transferor's rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 3-308 that the transferee, by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.*

Id. cmt. 2 (emphasis added).

In its Complaint, MERS does not assert to "hold" the Note, nor does it assert that it can otherwise enforce the Note. Therefore, MERS cannot enforce the underlying obligation, and may not enforce the mortgage deed it holds in its name. See Restatement (Third) of Property, Mortgages § 5.4(c); see also cmt. e. This is consistent with MERS's role "solely as nominee" in that it "holds only legal title to the interests granted by Borrower in this Security Instrument."

In regards to MERS's standing to bring an action for foreclosure independently, in its own name, the Court also notes that this inability to enforce the underlying obligation is consistent with the representations made by MERS to the Supreme Court of Nebraska in *Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance*, 704 N.W.2d 784 (Neb. 2005). There, the Nebraska Court faced the issue of whether MERS could be regulated as a "mortgage banker." *Id*. at 785. State law defined "mortgage banker" as:

> [A]ny person not exempt under section 45-703 who, for compensation or gain or in the expectation of compensation or gain, directly or indirectly makes, originates, services, negotiates, acquires, sells, arranges for, or offers to make, originate, service, negotiate, acquire, sell, or arrange for ten or more mortgage loans in a calendar year.

Id. at 786 (citing Neb. Rev. Stat. § 45-702). The Court noted the following representation made by MERS:

> MERS argues that it *does not acquire mortgage loans* and is therefore not a mortgage banker under § 45-702(6) because *it only holds legal title* to members' mortgages in a nominee capacity and is contractually prohibited from exercising any rights with respect to the mortgages (i.e., foreclosure) without the authorization of the members. Further, MERS argues that it *does not own the promissory notes* secured by the mortgages and has no right to payments made on the notes. MERS explains that it merely "immobilizes the mortgage lien while transfers of the promissory notes and servicing rights continue to occur."

Id. at 787 (citing brief for MERS) (emphasis added). According to the Court, counsel for MERS further explained:

> [T]hat MERS does not take applications, underwrite loans, make decisions on whether to extend credit, collect mortgage payments, hold escrows for taxes and insurance, or *provide any loan servicing functions whatsoever. MERS merely tracks the ownership of the lien* and is paid for its services through membership fees charged to its members.

Id. (emphasis added). In finding that MERS was not a "mortgage banker," the Court stated:

> In other words, through its services to its members as characterized by the district court, MERS does not acquire "any loan or extension of credit secured by a lien on real property." MERS does not itself extend credit or acquire rights to receive payments on mortgage loans. Rather, the *lenders retain the promissory notes* and servicing rights to the mortgage, while *MERS acquires legal title to the mortgage for recordation purposes.*

> MERS *serves as legal title holder in a nominee capacity*, permitting lenders to sell their interests in the notes and servicing rights to investors without recording each transaction. But, simply stated, *MERS has no independent right to collect on any debt* because MERS itself has not extended credit, and none of the mortgage debtors owe MERS any money.

Id. at 788. (emphasis added).

Likewise, as noted by the Supreme Court of Kansas in *Landmark Nat. Bank v. Kesler*, "[c]ounsel for MERS explicitly declined to demonstrate to the trial court a tangible interest in the mortgage." 216 P.3d at 167. In *Kesler*, the Kansas Court found that MERS was not a contingently necessary party in a mortgage foreclosure action. *Id*. at 168. The Court found that MERS had no stake in the outcome of an independent action for foreclosure, as it did not lend money, nor was anyone involved in the case required to pay MERS money. *Id*. at 167 (citing *In re Sheridan*, No. 08-20381-TLM, 2009 WL 631355 (Bankr. D. Idaho March 12, 2009)). The Court stated, "[i]f MERS is only the mortgagee, without ownership of the mortgage instrument, it does not have an enforceable right." *Id*. (citing *In re Vargas*, 396 B.R. 511, 517 (Bankr. C.D. Cal. 2008) (stating "[w]hile the note is 'essential,' the mortgage is only 'an incident' to the note." (quoting *Carpenter v. Longan*, 83 U.S. (16 Wall.) 271, 275 (1872)).

As two commentators from the Mortgage Banker's Association of America noted, "it is a legal maxim that the mortgage depends on the note for enforceability." Phyllis K. Slesinger & Daniel Mclaughlin, *Mortgage Electronic Registration System*, 31 IDAHO L. REV. 805, 808 (1995).[2] This Court finds that MERS has no standing to bring an

[2] The Court notes that co-author Phyllis K. Slesinger was Senior Director, Secondary Market & Investor Relations, Mortgage Banker's Association of America ("MBA"), Washington, D.C. 31 IDAHO L. REV. 805, 818 fn.a. Co-author Daniel Mclaughlin was Director of Technology Initiatives, Mortgage Banker's

independent foreclosure action.

II. MERS's Standing to Bring Foreclosure Action as "nominee" for Lender

MERS has brought the instant foreclosure action as "nominee" for lender WMC. As noted *supra*, the word "nominee" is defined nowhere in the mortgage deed, and the functional relationship between MERS and the lender, WMC, is likewise not defined. MERS and the lender WMC purposely chose to use the specific legal term "nominee," and not "agent" or "power-of-attorney," without defining it.

As stated above, the term "nominee" has not yet been defined by the Vermont Supreme Court. Black's Law Dictionary defines nominee as "[a] person designated to act in place of another, usu. in a very limited way" and as "[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others." Black's Law Dictionary 1076 (8th ed. 2004). Other courts have had the occasion to analyze the role of MERS as a "nominee."

In *Kesler*, the district court found that MERS was not a real party in interest to the foreclosure action and there was no requirement to name it as a party. 216 P.3d at 162. The court of appeals affirmed that ruling and held that a non-lender was not a contingently necessary party in a mortgage foreclosure action. *Id*. at 161. MERS sought

---

Association of America, Washington, D.C. *Id*. fn.aa. Their analysis of the planned structure and role of MERS relied extensively on two sources: Mortgage Banker's Association Interagency Technology Task Force, Whole Loan Book Entry Concept for the Mortgage Finance Industry (Oct. 1993) (hereinafter White Paper), and Ernst & Young, LLP, MERS Cost Benefit Analysis (Dec. 1994). *Id*. fn.6-fn.15.

The White Paper was published by a MBA task force comprised of representatives from the MBA, Fannie Mae, Freddie Mac and Ginnie Mae. *Id*. at 810. The White Paper was published at the MBA's Annual Convention and was thereafter used as the primary vehicle for soliciting comments from the real estate finance industry on the MERS concept. *Id*. at 810-11. Ernst & Young, LLP (Ernst & Young) was subsequently engaged to validate the White Paper's findings by conducting a feasibility study and performing other analyses. *Id*. at 811. The result was the MERS Cost Benefit Analysis.

Because the information cited in this law review article was taken directly from the documents which formed the basis for MERS, the Court finds the article to be particularly informative as to the planned structure and role of MERS.

review before the Kansas Supreme Court as to that issue. *Id.*

In trying to attach a meaning to MERS's description as "nominee," the Court found that the parties "defined the word in much the same way that the blind men of Indian legend described an elephant – their description depended on which part they were touching at any given time." *Id.* at 165-66. One party described MERS's role as "nominee" in three different ways. First, that MERS held the mortgage in street name so that banks could transfer the mortgages. *Kesler*, 216 P.3d at 166. The description later changed to MERS as a mortgagee, holding the mortgage for somebody else. *Id.* Finally, the party described MERS as a trustee with multiple beneficiaries. *Id.* Another party stated that MERS was a representative designated to act for another in a limited sense. *Id.* That party later deemed a nominee to be like a power-of-attorney. *Id.*

The Kansas Supreme Court found the legal status of a nominee depended on the context of the relationship of the nominee to its principal. *Id.* The Court found the relationship of MERS to a subsequent purchaser of the mortgage was "akin to that of a straw man." *Id.* The mortgage document purported to give MERS the same rights as the lender, but consistently referred to only the rights of the lender, including the rights to receive notice of litigation, to collect payments, and to enforce the debt obligation. *Id.* As in the instant foreclosure action, the document constantly limited MERS to act "solely" as the nominee of the lender. See *Id.*

Counsel for MERS insisted that it did not have to show a financial or property interest in order to be a necessary party. *Id.* at 168. In holding that MERS was not a contingently necessary party to the foreclosure action, the Kansas Supreme Court noted that MERS argued before the Nebraska Supreme Court that it was *not* authorized to

engage in the practices that would make it a party to either the enforcement of mortgages or the transfer of mortgages. *Id*. (citing *Mortgage Electronic Registration Systems v. Nebraska Dept. of Banking and Finance*, 704 N.W.2d 784). The Court finds this argument made by MERS before the Nebraska Supreme Court to be particularly interesting.

In *In re Huggins*, 357 B.R. 180, 182 (Bankr. D. Mass. 2006), the debtor argued that MERS, acting as "nominee" for the lender, lacked standing to seek stay relief to foreclose on a mortgage on the debtor's residence. The court found that MERS had authority to conduct a foreclosure by power of sale under Massachusetts law. *Id*. at 183.

In so holding, the court relied upon the Black's Law Dictionary for "nominee" – "[a] nominee is generally understood as a person designated to act in place of another." *Id*. (citing Black's Law Dictionary (8th Ed. 2004)). Conspicuously missing from the *Huggins* court's opinion was the fact that the Black's Law definition limits a "nominee" to act usually in a "very limited way" and as "[a] party who holds bare legal title for the benefit of others." See, generally, *In re Huggins*, 357 B.R. 180; see also Black's Law Dictionary 1076 (8th ed. 2004).

In holding that MERS had standing to bring the foreclosure action, the court set forth four conclusions, each of which this Court finds unpersuasive or distinguishable from the instant facts.

First, the court concluded that MERS acted as nominee for lender, which held the note, and therefore there was no disconnection between note and mortgage. *Id*. at 184. However, this conclusion overlooks both the definitions of "nominee" and "legal title." In its "limited" role as nominee, MERS held "legal title." Legal title "does not

necessarily signify full and complete title or a beneficial interest." Black's Law Dictionary 1523 (8th ed. 2004). This is in contrast to equitable title, which is "[a] title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title." *Id.* In *Huggins*, there *did* appear to be a disconnection, as the lender held the Note while MERS held bare legal title. The Court fails to see how MERS's very limited role as a "nominee" can somehow connect the severed note and mortgage.

Second, MERS was the record mortgagee with powers expressly set forth in the mortgage document, including power of sale. *In re Huggins*, 357 B.R. 184. Once again, this conclusion does not take into account that MERS held only "legal title" and not the note. Therefore, MERS could not enforce the mortgage as record mortgagee.

Third, Massachusetts law expressly authorized the exercise of sale powers by a mortgagee or person authorized to sell, precisely the position held by MERS. *Id.* The opinion again ignored the fact that MERS held only "legal title" and not equitable title as the mortgagee of record. Furthermore, by cutting off the definition of "nominee," the court apparently accepted "nominee" to mean the equivalent of "agent," which this Court does not.

It is not known whether the mortgage document in *Huggins* was similar in every aspect to the instant document, but here the mortgage deed limited MERS's right to foreclose and sell the property with the preceding qualification - "if necessary to comply with law or custom." This Court does not find that it is "necessary to comply with law or custom" that MERS have the right to foreclose and sell the property. The parties intentionally chose not to use the term "agent," the mortgage document contains no definition of "nominee," the role of MERS is consistently limited to acting "solely as

nominee," holding bare legal title, and all rights as to notice, payment, and interest in the property are seemingly kept with the lender. There is no indication that MERS was an agent or power-of-attorney for the lender WMC.

Finally, the *Huggins* court stated:

> The logic of a denial of MERS's foreclosure right as mortgagee would lead to anomalous and perhaps inequitable results, to wit, if MERS cannot foreclose though named as mortgagee, then either Spectrum [lender] can foreclose though not named as mortgagee or no one can foreclose, outcomes not reasonably or demonstrably intended by the parties.

In re Huggins, 357 B.R. at 184.

The Court declines to accept this logic, as it ignores black letter mortgage law. In general, a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation. Restatement (Third) of Property, Mortgages § 5.4 cmt. e. Furthermore, separation of the obligation from the mortgage results in a practical loss of efficacy of the mortgage. *Id*. cmt. a. MERS and the lender intentionally split the obligation and the mortgage deed. This split was necessary to create the MERS system and facilitate the growth of the secondary mortgage market. See Phyllis K. Slesinger & Daniel Mclaughlin, *Mortgage Electronic Registration System*, 31 IDAHO L. REV. 805, 818 fn.2 (stating "[f]or mortgages sold into the secondary market, legal title and equitable ownership are commonly severed. Mortgage servicers retain bare legal title to facilitate mortgage servicing; equitable interests are transferred to the investor.").

However, the result need not be inequitable if the rules of mortgage law are properly followed. The two commentators from the Mortgage Bankers' Association of America noted that while a loan is current there would be no need to execute or record

assignments in the public land records to reflect sale of the mortgage to an investor; however, if a loan is to be foreclosed MERS could assign the mortgage in order to allow for a foreclosure action. Slesinger & Mclaughlin, supra, at 814.

The outcome that MERS does not have standing to foreclose is consistent with MERS's role simply as a "clearinghouse" which holds bare legal title and tracks mortgage ownership interests. See *Id*. at 811. This outcome is also consistent with the representations made by MERS before the Nebraska Supreme Court, in which it argued that it did not service, negotiate, or acquire mortgage loans, and, therefore, was not a "mortgage banker" under state law. *Mortgage Electronic Registration Systems v. Nebraska Dept. of Banking and Finance*, 704 N.W.2d at 786-88. MERS argued that it only held legal title to member bank's mortgages in a nominee capacity and "explained that it merely immobilizes the mortgage lien while transfers of the promissory note and servicing right continue to occur." *Id*. at 787.

The commentators from the Mortgage Bankers' Association of America stated the following: "*Mortgage bankers* originate or acquire mortgages to obtain fee income for "servicing" the mortgages. *Servicing involves*: i) collecting borrowers' payments of principal, interest, taxes and insurance; ii) remitting them to the proper payee; and iii) handling mortgage defaults, *foreclosures* and payoffs." Phyllis K. Slesinger & Daniel Mclaughlin, *Mortgage Electronic Registration System*, 31 IDAHO L. REV. 805, 818 fn.1 (1995) (emphasis added).

By bringing this foreclosure action, MERS seemingly contradicts its past representations that it is a passive entity (a type of clearinghouse) in the mortgage finance industry. While MERS argued before the Nebraska Supreme Court that in its role as

"nominee" it is not a servicer of mortgage loans, it now purports to be just that in bringing the instant foreclosure action.[3]

The Kansas Supreme Court noted the problems and complications introduced by the MERS system, in that "having a single front man, or nominee, for various financial institutions makes it difficult for mortgagors and other institutions to determine the identity of the current note holder." *Kesler*, 216 P.3d at 168. The Court further stated:

> It is not uncommon for notes and mortgages to be assigned, often more than once. When the role of a servicing agent acting on behalf of a mortgagee is thrown into the mix, it is no wonder that it is often difficult for unsophisticated borrowers to be certain of the identity of their lenders and mortgagees.

Id. (quoting *In re Schwartz,* 366 B.R. 265, 266 (Bankr. D. Mass. 2007)). Chief Judge Kaye of the Court of Appeals of New York Court noted similar concerns:

> Public records will no longer contain this information [mortgagee's identity] as, if it achieves the success it envisions, the MERS system will render the public record useless by masking beneficial ownership of mortgages and eliminating records of assignments altogether. Not only will this information deficit detract from the amount of public data accessible for research and monitoring of industry trends, but it may also function, perhaps unintentionally, to insulate a noteholder from liability, mask lender error and hide predatory lending practices.

Romaine, 861 N.E.2d at 88 (Kaye, C.J., dissenting in part). This problem would be further compounded if MERS, an entity which is neither a beneficial mortgagee nor a servicer, had standing to bring a foreclosure action as a "nominee."

If MERS were able to bring the instant foreclosure action, the result would be incongruous in two ways. First, that a clearinghouse or exchange for mortgages would

[3] The Court notes that the Fair Debt Collection Practices Act may apply to a mortgage servicer attempting to collect debts owed or due or asserted to be owed or due another, if such debt was in default at the time it was obtained by such person. 15 U.S.C. § 1692(a)(6)(F)(iii).

become an active entity in the transactions it oversees. Second, that MERS, an entity that by its own terms in the mortgage deed holds only bare legal title, and as it argued to the Nebraska Supreme Court does not acquire or service mortgage loans, would, upon foreclosing in its own name as "nominee," be able hold title to the property.

The Court finds that MERS's role as "nominee" is limited to holding bare legal title for the benefit of the lender and its successors and assigns. Thus, MERS lacks standing to bring the instant foreclosure action in its own name, as "nominee," on behalf lender WMC.

ORDER

Plaintiff Mortgage Electronic Registration Systems, Inc.'s foreclosure action is DISMISSED for lack of standing. Accordingly, the Court's Order, issued August 27, 2009, granting plaintiff's Motion for Default Judgment against the defendants Frank and Ellen Johnston is VACATED. The dismissal of the foreclosure action is without prejudice as to allow the proper plaintiff to come forward.

Furthermore, because this is a case of first impression under Vermont law and because it involves important issues concerning mortgage law and real estate title law, the Court will certify the issue of standing to the Vermont Supreme Court pursuant to V.R.C.P. 80.1(m).

Dated at Rutland, Vermont this _____ day of _____, 2009.

_____
Hon. William Cohen
Superior Court Judge