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Attorney for Defendant, *MICHELLE CABESAS*

SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF SOLANO
SOLANO COURT/ LIMITED JURISDICTION

FANNIE MAE et al,

Plaintiff,

v.

MICHELLE CABESAS

Defendant.

) **Case No.: VCM 106610**

)
)
) **DEFENDANT'S *IN LIMINE* MOTION**
) **TO EXCLUDE TRUSTEES DEED**
) **UPON SALE (RE:FACIALLY**
) **INVALID NOTICE OF DEFAULT)**

) **TRIAL DATE: Tues., June 15, 2010**

To the Court, to Plaintiff FANNIE MAE, and its attorney of record:

PLEASE TAKE NOTICE that, on Tuesday, June 15, 2010, at 8:30 AM, or as soon thereafter as the matter may be heard, Defendant, MICHELLE CABESAS, will *in limine judicii* move the court, and hereby does move, for an order excluding from trial all evidence proffered by Plaintiff FANNIE MAE.



1 The motion will be heard in Department 26, at 1:30 p.m. in front of the
2 Honorable Judge Davis of the Solano Court of the above-captioned court.

3 The motion will be brought pursuant to Evidence Code sections 353 and 400
4 et seq., Code of Civil Procedure section 430.10(b), and related decisional law.


5 The ground of the motion will be that the Unlawful Detainer Complaint,
6 together with the publicly-filed "Deed of Trust" that is necessarily incorporated
7 into it, is facially invalid because the Beneficiary did not have the power of sale.
8 Such irregularities should constitute sufficient grounds to set aside the entire non-
9 judicial foreclosure process. Therefore, the Trustee's Deed After Sale should not
10 be admitted as no lawful basis exists for its execution. Additionally, the Notice of
11 Default, and Notice of Default Declaration should be excluded.
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15 The failure of Plaintiff and/or Plaintiff's agent to perform a condition
16 precedent pursuant to Civil Code Section 2923.5 is fatal. The Notice of Default
17 Declaration fails in several regards, (1) the language of the Notice does not comply
18 with the statute because it does not set forth facts of how the statute was
19 performed; (2) the Declaration is not sworn under penalty of perjury; (3) the only
20 date of the Declaration is the date of execution which is one day prior to the Notice
21 of Default which was recorded only five days later, thus, thirty days did not pass
22 from the date of execution of the Declaration and the date of recordation. As such,
23 under Section 2923.5, the Notice of Default Declaration is void and could not
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1 support the recordation of the Notice of Default. Because the non-judicial
2 foreclosure process is subject to strict scrutiny, and given the material failure of a
3 condition precedent by Plaintiff and/or Plaintiff's agent, the entire non-judicial
4 foreclosure process is invalid. Therefore, the Trustee's Deed After Sale cannot be
5 admitted into evidence, as no lawful foundation can be laid.
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7 //

8 DATED: June 14, 2010.

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10 LAW OFFICES OF TIMOTHY L. MCCANDLESS
11 By: Timothy P. McCandless, Esq.
12 Attorney for Defendant, MICHELLE CABESAS
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MEMORANDUM OF POINTS AND AUTHORITIES

I.
FACTUAL BACKGROUND

The court's records for this case will show that Plaintiff FANNIE MAE filed its Complaint on or about August 4, 2009. The apparent foreclosing beneficiary was plaintiff, FANNIE MAE. [See attachment to Unlawful Detainer Complaint entitled "Trustee's Deed Upon Sale."]

This motion ensued in its present form, because sufficient time did not remain before trial, in order to permit Defendant CABESAS to bring a regularly-noticed general demurrer or "motion for judgment on the pleadings".

II.
THE COURT HAS POWER TO EXCLUDE ALL EVIDENCE FROM TRIAL, ON
GROUNDS ANALOGOUS TO A GENERAL DEMURRER.

The court has power to consider and grant an objection to all evidence under Evidence Code sections 353 and 400 et seq. If no cause of action or defense is stated by the respective pleading, then no "factual issue" any longer exists, and therefore no evidence may be admitted on grounds of "relevance" under Evidence Code sections 400 et seq.

It is well established that a party may bring an *in limine* objection in order to exclude all evidence, as a sort of general demurrer or "motion for judgment on the pleadings". "Although not in form a motion, this method of attacking the pleading is identical in purpose to a general demurrer and motion for judgment on the pleadings and is governed by the same rules.

1 [Citations.]” 5 WITKIN, Cal.Proc.3rd page 386, “Pleading” at §953. See also 6
2 WITKIN, Cal.Proc.3rd pages 571-573, “Proceedings Without Trial” at §§272-
3 273.

4 According to 5 WITKIN, Cal.Proc.3rd page 340, “Pleading” at §899, a
5 “general” demurrer concerns only the defense that the pleading does not state
6 facts sufficient to constitute a cause of action or defense. That is precisely
7 what defendant contends here: the Unlawful Detainer Complaint fails to state
8 a claim for which relief may be granted.

9
10 III.

11 THE COURT MUST STRICTLY ENFORCE
12 THE TECHNICAL REQUIREMENTS FOR A FORECLOSURE.

13 The harshness of non-judicial foreclosure has been recognized. “The
14 exercise of the power of sale is a harsh method of foreclosing the rights of the
15 grantor.” *Anderson v. Heart Federal Savings* (1989) 208 Cal.App.3d 202, 6 215,
16 citing to *System Inv. Corporation v. Union Bank* (1971) 21 Cal.App.3d 137, 153.
17 The statutory requirements are intended to protect the trustor from a
18 wrongful or unfair loss of his property *Moeller v. Lien* (1994) 25 Cal.App.4th
19 822, 830; accord, *Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496,
20 503; *Lo Nguyen v. Calhoun* (6th District 2003) 105 Cal.App.4th 428, 440, and a
21 valid foreclosure by the private power of sale requires **strict compliance** with
22 the requirements of the statute. Miller & Starr, California Real Estate (3d ed.),
23 Deeds of Trust and Mortgages, Chapter 10 §10.179; *Anderson v. Heart Federal*
24 *Sav. & Loan Assn.*, 208 Cal. App. 3d 202, 211 (3d Dist. 1989), reh'g denied and
25 opinion modified, (Mar. 28, 1989); *Miller v. Cote* (4th Dist. 1982) 127 Cal. App.
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1 3d 888, 894; *System Inv. Corp. v. Union Bank* (2d Dist. 1971) 21 Cal. App. 3d
2 137, 152-153; *Bisno v. Sax* (2d Dist. 1959) 175 Cal. App. 2d 714, 720.

3 **It has been a cornerstone of foreclosure law that the statutory**
4 **requirements, intending to protect the trustor from a wrongful or unfair**
5 **loss of the property, must be complied with strictly.** Miller & Starr,
6 California Real Estate (3d ed.), Deeds of Trust and Mortgages, Chapter 10
7 §10.182. "Close" compliance does not count. **As a result, any trustee's sale**
8 **based on a statutorily deficient Notice of Default is invalid (emphasis**
9 **added).** Miller & Starr, California Real Estate (3d ed.), Deeds of Trust and
10 Mortgages, Chapter 10 §10.182; *Anderson v. Heart Federal Sav. & Loan Assn.*
11 (3dDist. 1989) 208 Cal. App. 3d 202, 211, reh'g denied and opinion modified,
12 (Mar. 28, 1989); *Miller v. Cote* (4th Dist. 1982) 127 Cal. App. 3d 888, 894;
13 *System Inv. Corp. v. Union Bank* (2d Dist. 1971) 21 Cal. App. 3d 137, 152-153;
14 *Saterstrom v. Glick Bros. Sash, Door & Mill Co.*(3d Dist. 1931) 118 Cal. App. 379.

15
16 Additionally, any trustee's sale based on a statutorily deficient Notice of
17 Trustee Sale is invalid. *Anderson v. Heart Federal Sav. & Loan Assn.* (3d Dist.
18 1989) 11 208 Cal.App. 3d 202, 211, reh'g denied and opinion modified, (Mar.
19 28, 1989). The California Sixth District Court of Appeal observed, "Pursuing
20 that policy [of judicial interpretation], the courts have fashioned rules to
21 protect the debtor, one of them being that the notice of default will be strictly
22 construed and must correctly set forth the amounts required to cure the
23 default." *Sweatt v. The Foreclosure Co., Inc.* (1985 - 6th District) 166 Cal.App.3d
24 273 at 278, citing to *Miller v. Cote* (1982) 127 Cal.App.3d 888, 894 and
25 *SystemInv. Corp. v. Union Bank* (1971) 21 Cal.App.3d 137, 152-153.
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1 The same reasoning applies even to a *notice* of a trustee's sale. Courts
2 will set aside a foreclosure sale when there has been fraud, when the sale has
3 been improperly, unfairly, or unlawfully conducted, or when there has been
4 such a mistake that it would be inequitable to let it stand. *Bank of America Nat.*
5 *Trust & Savings Ass'n v. Reidy* (1940) 15 Cal. 2d 243, 248; *Whitman v. Transtate*
6 *Title Co.*(4th Dist. 1985) 165 Cal. App. 3d 312, 322-323; *In re Worcester* (9th
7 Cir. 1987) 811 F.2d 1224, 1228. See also *Smith v. Williams* (1961) 55 Cal. 2d
8 617, 621; *Stirton v. Pastor* (4th Dist. 1960) 177 Cal. App. 2d 232, 234; *Brown v.*
9 *Busch* (3d Dist. 1957) 152 Cal.App. 2d 200, 203-204.

10 If somehow these foreclosing predecessor-in-interest can establish this
11 standing, or right, to extrajudicially foreclose, still it should be prevented from
12 pursuing this eviction action, because such an action, if successful, would
13 result in a wrongful foreclosure, due to the predecessor-in-interest's exercise
14 of a non-existent extrajudicial power.
15

16 IV.

17 PLAINTIFF, OR PLAINTIFF'S PREDECESSOR-IN-INTEREST,
18 DID NOT HAVE THE RIGHT TO EXTRAJUDICIALLY FORECLOSE

19 The foreclosing predecessor-in-interest simply did not have the right to
20 foreclose under the subject trust deed, because the notice of default facially
21 invalid.
22

23 The reason why the security instrument is not valid, is because it is
24 *facially* void! A copy of the subject trust deed – a public record!! -- is attached
25 hereto. Further, the trueness of the copy is readily verifiable, since it is a
26 publicly-recorded document. Clear as daylight, contact with the trustor 30
27 days prior to the notice was impossible. The was no lender MERS is not a
28

1 lender Plaintiff did not get the assignment till 7/8/2009 . The notice of
2 default was recorded 7/31/2009 only 23 days after the assignment.
3 A trust deed adds a third party, of sorts, namely the beneficiary. It has been
4 observed that a trust deed naming a purely fictitious person as beneficiary
5 may be void. *Woodward v. McAdam* (1894), 101 Cal. 438. It has been held
6 that a trust deed might be void for uncertainty, where the deed of trust does
7 not name or describe any of the beneficiaries, but only classified them by
8 reference to a common attribute. *Watkins v. Bryant* (1891), 91 Cal. 492.
9 There seems to be no common-sense reason why the same principle should
10 not apply to the designation of the grantee/ trustee, even were the law of
11 deeds not generally applicable to trust deeds.
12

13 Beneficiary did not have the power of sale. Such irregularities should
14 constitute sufficient grounds to set aside the entire non-judicial foreclosure process.
15 Therefore, the Trustee's Deed After Sale should not be admitted as no lawful basis
16 exists for its execution. Additionally, the Notice of Default, and Notice of Default
17 Declaration should be excluded.
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19 The failure of Plaintiff and/or Plaintiff's agent to perform a condition
20 precedent pursuant to Civil Code Section 2923.5 is fatal. The Notice of Default
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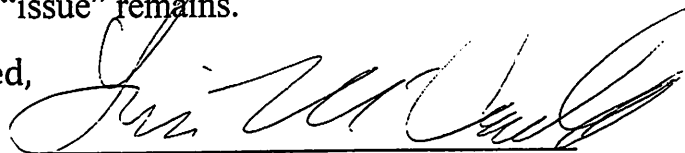
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6 foreclosure process is subject to strict scrutiny, and given the material failure of a
7 condition precedent by Plaintiff and/or Plaintiff's agent, the entire non-judicial
8 foreclosure process is invalid. Therefore, the Trustee's Deed After Sale cannot be
9 admitted into evidence, as no lawful foundation can be laid.
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15 CONCLUSION

16 The Plaintiff's entire case rests upon the "facial" or "on the public record"
17 legitimacy of the extrajudicial foreclosure by its predecessor-in-interest. The
18 foreclosure was facially void. The case should be dismissed, upon the court's
19 determination that no factual "issue" remains.

20 Respectfully submitted,

21 DATED: June 14, 2010



22 LAW OFFICES OF TIMOTHY L. MCCANDLESS

23 By: Timothy P. McCandless

24 ATTORNEY FOR DEFENDANT

25 MICHELLE CABESAS