

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9

Vladimir Brunat, Dagmar Brunat

No. CV-09-1796-PHX-FJM

10

Plaintiffs,

**ORDER**

11

vs.

12

13

IndyMac Federal Bank; Deutsche Bank  
National Trust Company; Quality Loan  
Service Corporation, One West Bank,

14

Defendants.

15

16

17

18

Before the court is plaintiffs' motion to consolidate and reassign case (doc. 59),

19

defendants' response (filed in Deutsche Bank v. Vladimir Brunat, et al., CV-11-0944-PHX-

20

GMS (D. Ariz. May 11, 2011) at doc. 6), and plaintiffs' reply (doc. 67). Also before us is

21

plaintiffs' motion for extension of time to file a notice of appeal (doc. 60), defendants'

22

response and motion to dismiss/strike plaintiffs' notice of appeal (doc. 66), and plaintiffs'

23

reply (doc. 68).

24

In order to prevent the trustee's sale of their property, plaintiffs filed the instant action

25

challenging defendants' security interest in the property under the Truth in Lending Act and

26

Arizona state law governing notice of trustee's sales. On April 6, 2011, we granted

27

defendants' motion for summary judgment on all claims (doc. 55) and on the same day

28

judgment was entered in favor of defendants (doc. 56). On May 9, 2011, plaintiffs filed a

1 notice of appeal (doc. 57).

2 Following the entry of judgment, defendants filed a forcible entry and detainer action  
3 in state court, seeking to recover possession of the property. Plaintiffs then removed the  
4 action on the basis of diversity jurisdiction. See Deutsche Bank v. Vladimir Brunat, et al.,  
5 CV-11-0944-PHX-GMS (D. Ariz. May 11, 2011). Plaintiffs now seek to consolidate that  
6 case with the one currently before us.

7 Rule 42(a), Fed. R. Civ. P., allows us to consolidate cases that contain a “common  
8 question of law or fact.” Notwithstanding that the two cases at issue involve similar parties  
9 and the same real property, the relevant law and facts underlying the two lawsuits are entirely  
10 distinct. In the instant case we considered plaintiffs’ challenges to defendants’ interests  
11 under the Truth in Lending Act and state statutory notice requirements related to trustee’s  
12 sales. The only issue in a forcible entry and detainer action is the right of actual  
13 possession—the merits of title are not litigated. A.R.S. § 12-1177(a); Curtis v. Morris, 186  
14 Ariz. 534, 925 P.2d 259 (1996). Because the two cases do not share a common question of  
15 law or fact, we deny plaintiffs’ motion to consolidate and/or reassign case (doc. 59). If it is  
16 plaintiffs’ intention to forestall eviction pending their appeal, their efforts are better directed  
17 through a motion to the Ninth Circuit Court of Appeals.

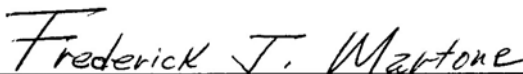
18 Rule 4(a)(1)(A), Fed. R. App. P., requires a party to file a notice of appeal with the  
19 clerk of the district court within 30 days after the judgment or order appealed from is entered.  
20 Plaintiffs acknowledge that they filed their notice of appeal 3 days after this deadline and  
21 now move for an extension of time to file the notice of appeal (doc. 60). Under Rule  
22 4(a)(5)(A), a district court can extend the time to file a notice of appeal if the motion to  
23 extend is filed no later than 30 days after the time prescribed by Rule 4(a), Fed. R. App. P.  
24 expires, and the party shows excusable neglect or good cause. In deciding excusable neglect,  
25 we consider (1) the danger of prejudice to the non-moving party, (2) the length of the delay  
26 and its potential impact on judicial proceedings, (3) the reason for the delay, and (4) whether  
27 the moving party’s conduct was in good faith. Pioneer Inv. Servs. Co. v. Brunswick Assocs.  
28 Ltd. P’ship, 507 U.S. 380, 395, 113 S. Ct. 1489, 1498 (1993).

1 Plaintiffs' counsel asserts that due to a calendaring error, he incorrectly filed the  
2 notice of appeal 3 days late. He argues that he nevertheless acted in good faith and that there  
3 is no prejudice to defendants given the brief delay.

4 Defendants contend that they are prejudiced by the fact that plaintiffs have been living  
5 in the residence for over two years without making any payments, notwithstanding that title  
6 to the property was transferred to defendant Deutsche Bank in November 2009. This obvious  
7 prejudice, however, does not arise from the 3-day delay in filing the notice of appeal. Again,  
8 the decision to stay the eviction properly lies with the Circuit Court of Appeals. We  
9 conclude that the Pioneer Inv. Servs. factors weigh in favor of granting the 3-day extension.

10 Therefore, **IT IS ORDERED DENYING** plaintiffs' motion to consolidate and/or  
11 reassign cases (doc. 59). **IT IS FURTHER ORDERED GRANTING** plaintiffs' motion  
12 to extend the time to file the notice of appeal (doc. 60), and **DENYING** defendants' motion  
13 to dismiss/strike the notice of appeal (doc. 66).

14 DATED this 13<sup>th</sup> day of July, 2011.

15  
16   
17 \_\_\_\_\_  
18 Frederick J. Martone  
19 United States District Judge  
20  
21  
22  
23  
24  
25  
26  
27  
28