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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ALICE ARENA CHILTON,

Plaintiff,

v.

FEDERAL NATIONAL MORTGAGE  
ASSOCIATION, AND DOES 1-20

Defendants.

1:09-CV-02187 OWW SMS

ORDER RE PROPOSED ORDER TO SHOW  
CAUSE AND MOTION FOR TEMPORARY  
RESTRAINING ORDER (DOC 3)

Plaintiff filed a complaint on December 16, 2009, alleging that Defendant, Federal National Mortgage Association, violated unspecified provisions of federal law within "Title 15 U.S.C. and/or Title 18 U.S.C." because Defendant initiated non-judicial foreclosure on her property, located in Clovis, California, without "possess[ing] the genuine original note." Doc. 1 at 2. She advances no other bases for relief. *See generally id.*

Plaintiff, who appears *pro se*, has applied for leave to proceed *in forma pauperis*. Doc. 2, filed Dec. 16, 2009. That application has not yet been acted upon, and summons has not yet been served on any Defendant.

Plaintiff has also filed an "order to show cause and motion

1 for temporary restraining order," in an attempt to block the  
2 foreclosure process. Doc. 3, filed Dec 16. 2009. Among other  
3 things, to obtain temporary or permanent injunctive relief, a  
4 plaintiff must demonstrate likelihood of success on the merits.  
5 See *Winter v. NRDC*, --- U.S. ---, 129 S. Ct. 365 (2008); *Taylor*  
6 *v. Westly*, 488 F.3d 1197, 1200 (9th Cir. 2007).  
7

8 Here, Plaintiff's only legal theory has been resoundingly  
9 rejected as a basis for relief. It is well-established that non-  
10 judicial foreclosures can be commenced without producing the  
11 original promissory note. Non-judicial foreclosure under a deed  
12 of trust is governed by California Civil Code § 2924, et seq.  
13 Section 2924(a)(1) provides that a "trustee, mortgagee or  
14 beneficiary or any of their authorized agents" may conduct the  
15 foreclosure process. California courts have held that the Civil  
16 Code provisions "cover every aspect" of the foreclosure process,  
17 *I.E. Assoc. v. Safeco Title Ins. Co.*, 39 Cal. 3d 281, 285 (1985),  
18 and are "intended to be exhaustive," *Moeller v. Lien*, 25 Cal.  
19 App. 4th 822, 834 (1994). There is no requirement that the party  
20 initiating foreclosure be in possession of the original note.  
21 See, e.g., *Nool v. HomeQ Servicing*, --- F.Supp.2d ----, 2009 WL  
22 2905745 (Sep. 4 2009) ("There is no requirement that the party  
23 initiating foreclosure be in possession of the original note.");  
24 *Candelo v. NDEX West, LLC*, 2008 WL 5382259, at \*4 (E.D. Cal. Dec.  
25 23, 2008) ("No requirement exists under statutory framework to  
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1 produce the original note to initiate non-judicial  
2 foreclosure."); *Puttkuri v. ReconTrust Co.*, 2009 WL 32567, \*2  
3 (S.D. Cal. Jan. 5, 2009) ("Production of the original note is not  
4 required to proceed with a non-judicial foreclosure."); see also  
5 *Phillips v. MERS Mortgage Electronic Registration Systems*, 2009  
6 WL 3233865, 9 (E.D. Cal. 2009); *Vargas v. Reconstruction Co.*,  
7 2008 U.S. Dist. LEXIS 100115, at \*8-9 (E.D. Cal. Dec. 1, 2008).

9 Plaintiff's reliance on *Landmark National Bank v. Kessler*,  
10 216 P.3d 158, 2009 Kan. LEXIS 834 (Kan. 2009), is misplaced.  
11 That case concerned a company, Mortgage Electronic Registration  
12 Systems, Inc. ("MERS"), that acted on behalf of a lender to  
13 finalize a second mortgage on Kessler's home. For procedural  
14 reasons not relevant to the present case, it became necessary for  
15 the Kansas court to determine whether MERS possessed an interest  
16 in the second mortgage, eventually concluding that under the  
17 specific facts of that case, MERS was more like an agent than a  
18 buyer/owner of the note. *Id.* at 168-69. In reaching this  
19 conclusion, the *Landmark* court noted:  
20

21 Indeed, in the event that a mortgage loan somehow  
22 separates interests of the note and the deed of trust,  
23 with the deed of trust lying with some independent  
entity, the mortgage may become unenforceable.

24 "The practical effect of splitting the deed of trust  
25 from the promissory note is to make it impossible for  
26 the holder of the note to foreclose, unless the holder  
27 of the deed of trust is the agent of the holder of the  
28 note. [Citation omitted.] Without the agency  
relationship, the person holding only the note lacks  
the power to foreclose in the event of default. The  
person holding only the deed of trust will never  
experience default because only the holder of the note

1 is entitled to payment of the underlying obligation.  
2 [Citation omitted.] The mortgage loan becomes  
3 ineffectual when the note holder did not also hold the  
4 deed of trust." *Bellistri v. Ocwen Loan Servicing,*  
5 *LLC*, 284 S.W.3d 619, 623 (Mo. App. 2009).

6 *Id.* at 166-67. This language merely stands for the proposition  
7 that one possessing the deed of trust cannot foreclose on a  
8 mortgage without (1) also possessing some interest in the  
9 promissory note, or (2) obtaining permission to act as agent of  
10 the note-holder. This has nothing whatsoever to do with  
11 possession of the "original" promissory note document, i.e., the  
12 original piece of paper with original signatures, etc., the  
13 possession of which is not required to initiate non-judicial  
14 foreclosure in California.

15 Because Plaintiff cannot possibly establish any likelihood  
16 of success on her current claim for relief, it is not necessary  
17 to set her motion for temporary injunctive relief for hearing.  
18 Her motion is DENIED.

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21 IT IS SO ORDERED:

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24 Dated: December 22, 2009

/s/ OLIVER W. WANGER

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26 United States District Court Judge