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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DANIEL MAJOR EDSTROM, and TERI ANNE EDSTROM,

CIV. NO. S-10-105 FCD/EFB

Plaintiffs,

v.

MEMORANDUM AND ORDER

NDEX WEST, LLC, AMERICA'S SERVICING COMPANY, MORTGAGE ELECTRONIC REGISTRATION SYSTEM, and DOES 1-10,000,

Defendants.

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This matter is before the court on defendant Mortgage Electronic Registration System's ("defendant" or "MERS") motion for award of attorneys' fees against plaintiffs Daniel Major Edstrom and Teri Anne Edstrom (collectively, "plaintiffs") pursuant to California Code of Civil Procedure ("CCP") Section 1033.5(a)(10)(A). Plaintiffs oppose the motion.¹ For the

¹ Because oral argument will not be of material assistance, the court orders these matters submitted on the briefs. E.D. Cal. L.R. 230(g).

1 reasons set forth below, defendant's motion for award of
2 attorneys' fees is DENIED.

3 In September 2005, plaintiffs financed and obtained a loan
4 from Mortgage Lenders Network USA, Inc. (Defs.' Notice of
5 Removal ["DNR"], filed Jan. 13, 2010, [Docket #1], Ex. A.) The
6 terms of the loan were included in the promissory note, secured
7 by a deed of trust to the property, which identified defendant
8 MERS as nominee and beneficiary. (Id., Ex. A, B.) After using
9 the loan proceeds to purchase a parcel of real property,
10 plaintiffs defaulted on their loan. (FAC, filed June 8, 2010
11 [Docket #15], ¶ 9.)

12 Plaintiffs brought causes of action for statutory violations
13 of the Real Estate Settlement Procedures Act, Truth in Lending
14 Act, and Fair Debt Collection Practices Act seeking damages
15 against defendant and rescission of the deed of trust. (Id. ¶¶
16 184-205, Prayer.) Defendants MERS and America's Servicing
17 Company ("ASC"), a division of Wells Fargo Bank, moved to dismiss
18 plaintiffs' claims as time barred. The court granted the motion
19 to dismiss without leave to amend, holding that plaintiffs were
20 barred from bringing the claims because they initiated suit more
21 than one year after the alleged statutory violations and they
22 were not entitled to equitable tolling. (Mem. and Order Grant.
23 Defs.' Mot. to Dismiss, filed Oct. 18, 2010 [Docket #40]
24 ["Order"], at 6-9.)

25 The Deed of Trust provides for the award of attorneys' fees
26 to the lender as follows:

27 If: (a) Borrower fails to perform the covenants and
28 agreements contained in this Security Instrument, (b)
there is a legal proceeding that might significantly

1 affect Lender's interest in the Property and/or rights
2 under this Security Instrument . . . , Lender's actions
3 can include, but are not limited to: (a) paying any
4 sums secured by a lien which has priority over this
5 Security Instrument; (b) appearing in court; and (c)
6 paying reasonable attorneys' fees to protect its
7 interest in the Property and/or rights under this
8 Security Instrument

9 . . .

10 Any amounts disbursed by Lender under this Section 9
11 Shall become additional debt of Borrower secured by
12 this Security Instrument.

13 (Req. for Judicial Notice in Supp. of Mot. for Award of Att'y
14 Fees ["RJN"], filed Nov. 13, 2010, [Docket #43], Exh. B at 7-8.)

15 Defendant MERS argues that the Deed of Trust entitles it to
16 an award of attorneys' fees. (Def.'s Mot. for Award of Att'y
17 Fees ["Def.'s Mot."], [Docket # 41], filed Nov. 12, 2010, at 4.)
18 However, plaintiffs argue, inter alia, that defendant MERS never
19 incurred attorneys' fees. (Opp'n at 1.)

20 California law permits recovery of attorney fees "when
21 authorized by . . . [c]ontract." Cal. Civ. Proc. Code §
22 1033.5(a)(10)(A). Specifically, California Civil Code section
23 1717(a) addresses recovery of attorney fees in contract actions.

24 [W]here the contract specifically provides that
25 attorney's fees and costs, which are incurred to
26 enforce that contract, shall be awarded either to one
27 of the parties or the prevailing party, then the party
28 who is determined to be the party prevailing on the
contract . . . shall be entitled to reasonable
attorney's fees in addition to other costs.

Id.

"To incur a fee . . . is to become liable for it, i.e., to
become obligated to pay it." Trope v. Katz, 11 Cal. 4th 274, 280
(1995) (emphasis original) (internal citations and quotations
omitted). Indeed, California courts have "uniformly held that

1 mortgages and other agreements providing for the allowance of
2 attorney fees to a party in litigation arising thereon d[o] not
3 extend to a case where the party has neither paid nor incurred a
4 liability to pay such fees.'" Id. at 281 (quoting City of Long
5 Beach v. O'Donnell, 91 Cal. App. 760, 761 (1928)). The party
6 seeking attorney fees must show that the total fees incurred were
7 reasonable and "'should submit evidence supporting the hours
8 worked and rates claimed.'" Mardirossian & Assocs., Inc. v.
9 Ersoff, 153 Cal. App. 4th 457, 472 (2d Dist. 2007) (quoting
10 Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)).

11 *Assuming arguendo* that the fee clause in the Deed of Trust
12 applies to it, defendant fails to demonstrate that any fees have
13 been incurred on behalf of or paid by defendant MERS. In support
14 of its motion, defendant's counsel submits the billing statements
15 of Anglin, Flewelling, Rasmussen, Campbell and Trytten LLP that
16 purportedly relate to this case. (Ex. A to Decl. of Christopher
17 A. Carr in Supp. of Def.'s Mot. for Award of Att'y Fees ["Carr
18 Decl.], filed [Docket # 41-1], Nov. 12, 2010, at 5.) However,
19 these billing statements reflect only that they were sent to
20 Wells Fargo, not to defendant MERS. (Id.) The only reference to
21 defendant MERS in the proffered billing statements is a
22 description reading: "E-mail to *MERS* and *client* re tender of
23 defense." (Id. at 23.) (emphasis added). There is neither
24 evidence nor argument to support an assumption that defendant
25 MERS is a representative, alter ego, or agent of ASC or Wells
26 Fargo. As such, defendant fails to meet its burden of showing

1 that it incurred attorneys' fees.² Accordingly, defendant MERS'
2 motion for award of attorneys' fees is DENIED.

3 IT IS SO ORDERED.

4 DATED: March 2, 2011



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6 FRANK C. DAMRELL, JR.
7 UNITED STATES DISTRICT JUDGE
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27 ² The court notes that defendant MERS failed to file a
28 response to plaintiffs' opposition, which raised, *inter alia*,
this argument.