

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
RENO, NEVADA

CARYN ERIKA PARKER, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
GREENPOINT MORTGAGE FUNDING )  
 )  
INC.; PINNACLE MORTGAGE GROUP; )  
 )  
MARIN CONVEYANCING CORP.; MORTGAGE )  
 )  
ELECTRONIC SYSTEMS, INC. [MERS]; )  
 )  
BAC HOME LOANS SERVICING, LP; )  
 )  
RECONTRUST COMPANY; FIRST AMERICAN )  
 )  
TITLE INSURANCE COMP.; and DOES )  
 )  
1-25 CORPORATIONS, DOES and ROES )  
 )  
1-25 Individuals, Partnerships, or )  
 )  
anyone claiming any interest to )  
 )  
the property described in the )  
 )  
action, )  
 )  
Defendants. )  
 )  
 )  
 )

3:11-cv-00039-ECR-RAM

Order

Plaintiff is a homeowner who alleges that she is the victim of a predatory lending scheme perpetrated by Defendants. Now pending before the Court are Plaintiff's Motion for Reconsideration (#26) and Defendants GreenPoint Mortgage Funding, Inc. ("GreenPoint") and Marin Conveyancing Corp.'s ("Marin") Motion for Clarification (#27) of Court's July 15, 2011 Order (#25).

1 **I. Factual Background**

2 Plaintiff alleges that on or about December 17, 2004, she  
3 executed a note in the amount of \$311,900 in favor of lender  
4 GreenPoint (the "Note") and a deed of trust (the "Deed of Trust")  
5 with respect to the real property located at 214, 216, 218 Moran  
6 Street, Reno, Nevada 89501. (Compl. ¶ 35 (#1 Ex. 1).) The Deed of  
7 Trust names GreenPoint the Lender, Marin the Trustee, and MERS both  
8 the beneficiary and the Lender's nominee. (#9 Ex. E.)<sup>1</sup> Stewart  
9 Title of Northern Nevada recorded the Deed of Trust on December 27,  
10 2004. (Id.) The Complaint (#1 Ex. 1) alleges that ReconTrust  
11 Company ("ReconTrust"), as agent for BAC Home Loans Servicing  
12 ("BAC"), executed a "Notice of Default/Election to Sell under Deed  
13 of Trust," which was recorded by First American National Default on  
14 September 16, 2010 (the "Notice of Default"). (Id. ¶ 36.) The  
15 Complaint (#1 Ex. 1) further alleges that the Notice of Default was  
16 signed by Charlotte Olmos as agent for First American Title  
17 Insurance Comp. ("First American"), as agent for ReconTrust, as  
18 agent for BAC. (Id.) However, the Notice of Default itself shows  
19 that ReconTrust executed the Notice of Default as agent for the  
20 Beneficiary under the Deed of Trust, and notified Plaintiff that she  
21 could contact BAC c/o ReconTrust to discuss possible reinstatement,  
22 cure, and loan modification. (Notice of Default at 1-2 (#9 Ex. F).)

23

24

---

25 <sup>1</sup> The Court takes judicial notice of the Note, the Deed of Trust,  
26 and the Notice of Default as incorporated by reference as though fully  
27 set out in the Complaint. FED. R. CIV. P. 10(c). Judicial notice of  
28 these documents is also proper under Federal Rule of Evidence 201  
because they are capable of accurate and ready determination by resort  
to sources whose accuracy cannot reasonably be questioned.

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**II. Procedural Background**

Plaintiff filed her Complaint (#1 Ex. 1) in state court on December 13, 2010. Defendant MERS filed a petition for removal (#1) on January 20, 2011. On February 7, 2011, Defendants BAC, MERS, and ReconTrust filed a Motion to Dismiss (#8) with a Request for Judicial Notice (#9) in support thereof. On March 31, 2011, Defendants GreenPoint and Marin joined (#18) the Motion to Dismiss (#8). On May 27, 2011, Plaintiff filed a Motion for Leave to File Amended Complaint (#21).

By Order (#25) on July 15, 2011, the Court granted Defendants BAC, MERS, and ReconTrust's Motion to Dismiss (#8) and denied Plaintiff's Motion for Leave to File Amended Complaint (#21).

On August 3, 2011, Defendants GreenPoint and Marin filed a Motion for Clarification (#27) of the Court's July 15, 2011 Order, seeking an Order clarifying that the Court's July 15 Order (#25) includes dismissal of Plaintiff's claims against Defendants GreenPoint and Marin.

Also on August 3, 2011, Plaintiff filed a Motion for Reconsideration (#26). Defendants BAC, MERS, and ReconTrust filed a Response (#28) on August 22, 2011 that Defendants GreenPoint and Marin joined (#29). Plaintiff replied (#30) on September 2, 2011.

**III. Legal Standard**

A motion for reconsideration is appropriately brought under Federal Rule of Civil Procedure 59(e). "Amendment or alteration is appropriate under Rule 59(e) if (1) the district court is presented with newly discovered evidence, (2) the district court committed

1 clear error or made an initial decision that was manifestly unjust,  
2 or (3) there is an intervening change in controlling law.”  
3 Zimmerman v. City of Oakland, 255 F.3d 734, 740 (9th Cir. 2001)  
4 (citing Sch. Dist. No. 1J, Multnomah Cty. v. ACandS, Inc., 5 F.3d  
5 1255, 1263 (9th Cir. 1993)). A Rule 59(e) motion is properly denied  
6 where it presents no arguments that have not already been raised in  
7 opposition to the original motion. Backlund v. Barnhart, 778 F.3d  
8 1386, 1388 (9th Cir. 1985).

9 A motion for reconsideration may also be brought under Rule  
10 60(b) for reasons of (1) mistake, inadvertence, surprise, or  
11 excusable neglect; (2) newly discovered evidence; (3) fraud or other  
12 misconduct by an opposing party; (4) the judgment is void; (5) the  
13 judgment has been satisfied, released, or discharged; or (6) any  
14 other reason that justifies relief.” FED. R. CIV. P. 60(b).

#### 16 IV. Discussion

17 Plaintiff seeks reconsideration because “the Court surprised  
18 the Plaintiff[]” by dismissing the case before the parties could  
19 engage in discovery. The Court agrees with Defendants that this is  
20 not the type of “surprise” contemplated in Rule 60(b). “Judgment is  
21 taken by surprise if it is taken against a party contrary to the  
22 party’s understanding or agreement with the adversary or when the  
23 relief obtained with the judgment varies materially from what is  
24 asked for in the underlying pleading.” 47 AM. JUR. 2D JUDGMENTS § 688.  
25 Plaintiff does not claim that there was an understanding or  
26 agreement between the parties related to the motion to dismiss.  
27 Defendants confirm that there was no such agreement. Also, there

1 was no relief awarded that differed from what was asked for in the  
2 pleadings. Instead, it appears to the Court that Plaintiff was  
3 surprised by the Court's dismissal of the Complaint and denial of  
4 leave to amend due to futility. For these reasons, the Court finds  
5 that Plaintiff is not entitled to relief from the Court's Order  
6 (#25) under Rule 60(b).

7 Plaintiff seeks relief from the Court's Order (#25) pursuant to  
8 Rule 59(e) on the grounds of clear error and manifest injustice.<sup>2</sup>  
9 Specifically, Plaintiff alleges the Court erred in dismissing the  
10 original complaint and denying leave to amend due to futility in  
11 light of two cases that Plaintiff claims stand for the proposition  
12 that Defendants did not have standing to foreclose. The Court now  
13 addresses these cases in turn.

14 **A. Leyva v. Nat'l Default Servicing Corp., 255 P.3d 1275**  
15 **(Nev. 2011)**

16 In Leyva, the Nevada Supreme Court addressed the issue of who  
17 has standing to foreclose on a property pursuant to a deed of trust  
18 or a mortgage note. At the outset, the Court disagrees with  
19 Defendants that Leyva is of no precedential value in this suit  
20 merely because it was primarily focused on compliance with Nevada's  
21 foreclosure mediation statutes. On the contrary, the Leyva court  
22 found it necessary to determine a party's standing to foreclose on

---

23  
24 <sup>2</sup> In her reply, Plaintiff purports to also seek relief under Rule  
25 59(e) due to an intervening change in the law. However, the cases  
26 Plaintiff cites in support thereof, Leyva v. Nat'l Default Servicing  
27 Corp., 255 P.3d 1275 (Nev. 2011) and In re Veal, 450 B.R. 897 (B.A.P.  
28 9th Cir. 2011), were each handed down in June 2011 - before the  
Court's Order (#25) of July 15, 2011. Accordingly, the Court  
addresses these cases under the clear error prong of Rule 59(e)  
relief.

1 the property at issue in that case and to clarify Nevada foreclosure  
2 law in light of the "increase in the number of foreclosure appeals  
3 in this state." 255 P.3d at 1281. Accordingly, the Court will  
4 address the application of Leyva to the instant case, keeping in  
5 mind that only clear error and/or manifest injustice justifies  
6 granting Plaintiff relief from our previous Order (#25) pursuant to  
7 Rule 59(e).

8       Specifically, Plaintiff claims that Leyva stands for the  
9 proposition that a party cannot initiate a non-judicial foreclosure  
10 until it establishes who the "true holder" of the note is and the  
11 true holder's relationship with the entities foreclosing on the  
12 property as a matter of standing. Plaintiff claims that Defendants  
13 in this case have failed to establish their standing to foreclose.  
14 Plaintiff finds support in the Leyva Court's assertion that "[t]he  
15 obligor on the note has the right to know the identity of the entity  
16 that is 'entitled to enforce' the mortgage note under Article 3 [of  
17 the Uniform Commercial Code ("U.C.C.")], see NRS 104.3301,  
18 '[o]therwise, the [homeowner] may pay funds to a stranger in the  
19 case.'" 255 P.3d at 1279-80 (quoting In re Veal, 450 B.R. 897, 920  
20 (B.A.P. 9th Cir. 2011)). While at first glance this proposition  
21 appears to support Plaintiff's claim, the Leyva Court was addressing  
22 enforcement of a note "by a party other than to whom the note is  
23 originally payable." 255 P.3d at 1280. The Leyva Court went on to  
24 hold that for such a note to be enforceable by someone other than  
25 the original party named on the note, it must be assigned either by  
26 negotiation or transfer in accord with Article 3 of the U.C.C., as

27

28

1 codified in Nevada Revised Statutes ("NRS") § 104.3201. 255 P.3d at  
2 1280-81.

3 In this case, the judicially noticed documents confirm that the  
4 original party named on the Note, Defendant GreenPoint, is the party  
5 seeking to enforce the Note. The Note was originally made payable  
6 to the order of the Lender, GreenPoint Mortgage Funding, Inc. (Note  
7 at 1 (#9 Ex. D).) The Deed of Trust names GreenPoint the Lender,  
8 Marin the Trustee, MERS the beneficiary and nominee for Lender, and  
9 refers to the Note and property at issue. (Deed of Trust at 2 (#9  
10 Ex. E).) The Deed of Trust further provides that "MERS (as nominee  
11 for Lender and Lender's successors and assigns) has the right: to  
12 exercise any or all of those interests, including, but not limited  
13 to, the right to foreclose and sell the Property; and to take any  
14 action required of Lender..." (Id. at 3.) Courts in this district  
15 have recently clarified that MERS, where it is nominated on a deed  
16 of trust by the holder of a promissory note, is the lender's agent  
17 with the limited role of administering the deed of trust on the  
18 holder's behalf. See, e.g., Weingartner v. Chase Home Fin., LLC,  
19 702 F. Supp. 2d 1276, 1279 (D. Nev. 2010). The Notice of Default  
20 was executed by ReconTrust, acting as an agent of MERS. (Notice of  
21 Default at 1 (#9 Ex. F).) Therefore, in this case, Defendant  
22 GreenPoint is the party enforcing the Note through its agent MERS,  
23 through MERS' agent ReconTrust. Leyva's holding with regard to the  
24 assignment of mortgage notes is therefore inapplicable to this case  
25 where the original note holder is the party enforcing the note.

26 Moreover, a foreclosure is not improper under Nevada's  
27 foreclosure statute, NRS 107.080, where, as here, the entity that  
28

1 filed the notice of default is the agent of the lender's agent.  
2 Karl v. Quality Loan Serv. Corp., 759 F. Supp. 2d 1240, 1246 (D.  
3 Nev. 2010); see also Vega v. CTX Mortg. Co, LLC, 761 F. Supp. 2d  
4 1095, 1099 (D. Nev. 2011) ("This Court agrees with the state trial  
5 court's view that only the beneficiary of the debt secured by a  
6 mortgage, the trustee, or an agent of one of these, may foreclose.")  
7 (citing NRS § 107.080(2)(c)) (emphasis added); Kartman v. Ocwen Loan  
8 Servicing, LLC, No. 2:09-cv-02404, 2010 WL 3522268, at \*1 (D. Nev.  
9 Sept. 1, 2010) ("In Nevada, the power of sale cannot be exercised  
10 until one of two particular entities - the beneficiary or the  
11 trustee - or an agent thereof, records the [notice of default].")  
12 (emphasis added).

13 For the foregoing reasons, Leyva provides no grounds for  
14 relieving Plaintiff from the Court's previous Order (#25) dismissing  
15 Plaintiff's claims and denying leave to amend the complaint due to  
16 futility.

17 **B. In re Veal, 450 B.R. 897 (B.A.P. 9th Cir. 2011)**

18 Plaintiff contends that In re Veal supports her split note  
19 theory, namely that securitization of the note, or splitting a note  
20 from the deed of trust, renders the transfer a nullity and the  
21 assigned deed of trust a worthless piece of paper. "The key to this  
22 argument is that, under the common law generally, the transfer of a  
23 mortgage without the transfer of the obligation it secures renders  
24 the mortgage ineffective and unenforceable in the hands of the  
25 transferee." In re Veal, 450 B.R. at 915-16 (citing RESTATEMENT  
26 (THIRD) OF PROPERTY (MORTGAGES) § 5.4 cmt. e (1997)). The Veal Court  
27 went on to validate the split-note theory pursuant to Illinois law,  
28



1 which follows the common law rule. In re Veal, 450 B.R. at 916-17.  
2 This Court, however, must decide the issue according to Nevada law.

3 Unlike the case in Illinois, however, the Nevada Supreme Court  
4 has yet to address the split note issue. See Leyva, 255 P.3d at 1280  
5 n.7 (“[W]e express no opinion on the issue addressed in the  
6 Restatement (Third) of Property section 5.4 concerning the effect on  
7 the mortgage of the note having been transferred or the reverse.”).  
8 Section 5.4(b) of the Restatement, however, sets up a general  
9 presumption that the transfer of a mortgage normally includes an  
10 assignment of the obligation it secured. Moreover, the theory does  
11 not apply in this case where the mortgage or the note has not been  
12 transferred. As explained above, the original holder of the Note,  
13 Defendant GreenPoint, is the party enforcing the Deed of Trust  
14 through its agent MERS through its agent ReconTrust.

15 Furthermore, courts in this District and others have repeatedly  
16 rejected the idea that securitization somehow splits a note from a  
17 deed of trust and renders either a nullity. See, e.g., Manderville  
18 v. Litton Loan Servicing, No. 2:10-cv-1696, 2011 WL 2149105, at \*2  
19 (D. Nev. May 31, 2011) (“As plaintiff is basing her quiet title  
20 claim on the ‘split the note’ theory, which has been rejected by  
21 many courts with regards to nonjudicial foreclosures such as this,  
22 it cannot survive.”); Vega, 761 F. Supp. 2d at 1098 (“The new rule  
23 proposed in the Restatement thus binds the note and the mortgage as  
24 a matter of law, as if the two agreements (the promissory note and  
25 the mortgage) simply appeared on consecutive pages of the same  
26 document.”); Birkland v. Silver State Fin. Servs., Inc, No. 2:10-cv-  
27 00035, 2010 WL 3419372, at \*2 (D. Nev. Aug. 25, 2010) (Plaintiff is

28

1 "incorrect" in "claiming that the securitization - or placement of  
2 her note/loan on the secondary market - makes it impossible to  
3 identify which parties have purchased an interest in the note, and  
4 thus, that the deed of trust 'is split from the note and is  
5 unenforceable.'"); see also Horvath v. Bank of N.Y., N.A., 641 F.3d  
6 617, 624 (4th Cir. 2011) ("If . . . the transfer of a note splits it  
7 from the deed of trust, . . . there would be little reason for notes  
8 to exist in the first place. One of the defining features of notes  
9 is their transferability, . . . but on Horvath's view, transferring  
10 a note would strip it from the security that gives it value and  
11 render the note largely worthless. This cannot be - and is not -  
12 the law."); Commonwealth Prop. Advocates v. Mortg. Elec.  
13 Registration Sys., Inc., No. 2:11-CV-214 TS, 2011 WL 1897826, at \*2  
14 (D. Utah May 18, 2011) ("[A]s any assignment of the note necessarily  
15 carries with it the deed of trust securing the property, the Court  
16 has found that such a 'split-note' scenario is untenable.")  
17 (footnote omitted); In re Mortg. Elec. Registration Sys. Lit., MDL  
18 Docket No. 09-2119-JAT, 2011 WL 251452, at \*5 (D. Ariz. Jan. 25,  
19 2011) ("Plaintiffs have not cited any legal authority where the  
20 namings of MERS - and the consequents 'splitting of the note' - was  
21 cause to enjoin a non-judicial foreclosure as wrongful. Indeed  
22 Nevada case law universally holds that these deeds are  
23 enforceable.") (citations and footnote omitted).

24 The Court therefore did not commit clear error in rejecting  
25 Plaintiff's splitting of the note theory - In re Veal provides no  
26 grounds for relief from the Court's previous Order (#25).

27

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**V. Conclusion**

Plaintiff has failed to show that the Court committed clear error or manifest injustice by our previous Order (#25) dismissing Plaintiff's claims and denying leave to amend for reason of futility. The two cases Plaintiff cites provide no reason for departing from our previous Order (#25), as neither are applicable to the facts of this case where no transfer of the Note has taken place.

Further, pursuant to Federal Rule of Civil Procedure 60(a), the Court now clarifies that Plaintiff's claims against Defendants GreenPoint and Marin should have also been dismissed in the Court's previous Order (#25) granting Defendants BAC, MERS, and ReconTrust's Motion to Dismiss (#8). Defendants GreenPoint and Marin timely filed a Joinder and Supplement (#18) to the other Defendants' Motion (#8) and should have been included in the Order (#25).

**IT IS, THEREFORE, HEREBY ORDERED** that Plaintiff's Motion for Reconsideration (#26) is **DENIED**.

**IT IS FURTHER ORDERED** that Defendants GreenPoint Mortgage Funding, Inc. and Marin Conveyancing Corp.'s Motion for Clarification (#27) is **GRANTED**. Plaintiff's claim against Defendants GreenPoint and Marin are **DISMISSED**.

DATED: November 1, 2011.

  
UNITED STATES DISTRICT JUDGE