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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PENSCO TRUST COMPANY)	CASE NO. C16-1926 RSM
CUSTODIAN FBO JEFFREY D.)	
HERMANN, IRA ACCOUNT NUMBER)	
20005343,)	ORDER GRANTING PLAINTIFF'S
)	MOTION FOR SUMMARY JUDGMENT
Plaintiff,)	AND DENYING DEFENDANT'S
)	MOTION FOR SUMMARY JUDGMENT
v.)	
)	
LORINA DELFIERRO, <i>et al.</i> ,)	
)	
Defendants.)	

I. INTRODUCTION

This matter comes before the Court on the parties' cross Motions for Summary Judgment.¹ Dkts. #44 and #45. Plaintiff argues that it is entitled to judgment as a matter of law because there are no genuine disputes as to any material fact, and the record definitively demonstrates that it is entitled to foreclose on Defendant Delfierro's property. Dkt. #44. Defendant Delfierro asserts that Plaintiff lacks standing to bring this action, and therefore the claims should be dismissed in their entirety. Dkt. #45. For the reasons set forth below, the Court now GRANTS Plaintiff's motion and DENIES Defendant's motion.

¹ Although Defendant also seems to conflate her Motion for Summary Judgment with a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), *see* Dkt. #45 at 2, the Court treats the motion as one for summary judgment and will review the full record before it.

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II. BACKGROUND

Plaintiff filed the instant action in King County Superior Court on November 14, 2016, seeking a judicial foreclosure on Ms. Delfierro’s residential property. Dkt. #4. On December 16, 2016, Defendant Delfierro removed the action to this Court on the basis of diversity jurisdiction. Dkt. #1. Defendant subsequently filed an Amended Answer in this matter and alleged four Counterclaims against Plaintiff for: 1) Wire Fraud under 18 U.S.C. § 1343; 2) violations of 18 U.S.C. § 152; 3) violations of Washington’s Consumer Protection Act; and 4) False Claims. Dkt. #31 at Counterclaims ¶¶ 4.1-4.23. Although difficult to discern from the Amended Answer, Defendant alleges as the bases for her Counterclaims that there is no effective chain of title with respect to her property, that certain sums of money have not been accounted for and have been taken fraudulently, and that certain title documents have been improperly re-sequenced. *Id.* Plaintiff moved to dismiss the Counterclaims as barred by the doctrine of *res judicata*, which this Court granted. Dkt. #48. The instant motions are now ripe for review.

III. DISCUSSION

A. Legal Standard

Summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (*citing Federal Deposit Ins. Corp. v. O’Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992)). Material facts are those which might affect the outcome of the suit under governing law. *Anderson*, 477 U.S. at 248.

1 The Court must draw all reasonable inferences in favor of the non-moving party. *See*
2 *O'Melveny & Meyers*, 969 F.2d at 747, *rev'd on other grounds*, 512 U.S. 79 (1994). However,
3 the nonmoving party must make a "sufficient showing on an essential element of her case with
4 respect to which she has the burden of proof" to survive summary judgment. *Celotex Corp. v.*
5 *Catrett*, 477 U.S. 317, 323 (1986). Further, "[t]he mere existence of a scintilla of evidence in
6 support of the plaintiff's position will be insufficient; there must be evidence on which the jury
7 could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 251.

9 The parties have both moved for summary judgment. However, cross motions for
10 summary judgment do not warrant the conclusion that one of the motions must be granted. The
11 Court must still determine whether summary judgment for either party is appropriate. *See Fair*
12 *Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136-1137 (9th Cir.
13 2001).

15 **B. Plaintiff's Motion**

16 Plaintiff moves for judgment as a matter of law on the bases that: 1) it has standing to
17 foreclose on the subject property; 2) Defendant is in default on the mortgage loan; and 3) all
18 preconditions to foreclosure have been met. Dkt. #44. The Court agrees that Plaintiff has
19 provided sufficient evidence to satisfy these assertions.
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21 First, in its prior Order dismissing Defendant's Counterclaims, the Court affirmed what
22 the Washington state court had already determined – Plaintiff is the beneficial owner of the
23 mortgage note, "with power and authority to enforce the same." Dkt. #48 at 5 (emphasis added).
24 Further, the record is clear that shortly after loan origination, Defendant Delfierro defaulted on
25 her obligation to make her mortgage payments, and Ms. Delfierro does not dispute that in her
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1 response to summary judgment. Dkt. #34. Ex. E. As a result, Plaintiff is entitled to bring an
2 action to foreclose on the subject property under the terms of the Note and the Deed of Trust.

3 In her own motion, and in response to Plaintiff's Motion for Summary Judgment,
4 Defendant does not discuss her default on the mortgage loan, nor does she point to any evidence
5 that would raise a genuine dispute as to the fact that she has defaulted on her payments. *See*
6 Dkts. #45 and #51. Instead, Defendant asserts that Plaintiff, as a mere "account," does not have
7 standing to bring this action. *Id.* She seems to argue that Jeffrey Hermann, as the beneficiary of
8 the account, is the real party in interest, but that the account itself has no ability to bring the
9 foreclosure claim. Dkt. #45 at 3-9. Federal Rule of Civil Procedure 17(a) states that "An action
10 must be prosecuted in the name of the real party in interest." Thus, the question before this court
11 is who the real party in interest is. To resolve this question, the Court must look at the structure
12 of Plaintiff.
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15 In recognizing Plaintiff as the beneficial owner of the mortgage note, the state court noted
16 that PENSCO is the custodian of an IRA account. *See* Dkt. #34, Ex. A at ¶ 21. As such,
17 Defendant asserts that it has no capacity to sue. Plaintiff provides little assistance to the Court
18 in response. Rather than address the legal authority cited by Defendant, Plaintiff summarily
19 points to the state court finding that Plaintiff is the beneficial owner of the note with power and
20 authority to enforce the same. Dkt. #50 at 4. Plaintiff then states in conclusory manner that
21 "[m]ortgages are continually held in a variety of accounts and trusts, and to assert that this is not
22 the correctly named party is unsupported by any authority." *Id.*
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25 Contrary to Plaintiff's assertion, there is some authority, albeit limited, to support
26 Defendant's assertion. Indeed, the District of Utah has addressed this issue, relying in part on
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1 the same authority cited by Defendant. In *Deem v. Baron*, the United States District Court for
2 the District of Utah explained:

3 . . . At least two federal cases have found that an owner of a self-directed
4 IRA has standing to sue on behalf of his or her own IRA. In the New York
5 case of *Vannest v. Sage, Ruddy & Co., Inc.*, a plaintiff sued his securities
6 broker for fraud and related activities. The broker argued that Plaintiff could
7 not recover because it was not he who had purchased the securities, but his
8 self-directed IRA. The court held that Plaintiff was the true purchaser and so
9 he had standing: "Because Vannest controlled the investment decisions, he
10 certainly was a purchaser/seller for all practical purposes. Investors in self-
11 directed IRAs have standing as "purchasers/sellers" to assert claims under the
12 securities laws."

13 The second federal case dealing with this issue, *FBO David Sweet IRA v.*
14 *Taylor*, has a similar fact situation to this case. Plaintiff Sweet was the sole
15 decision maker on all investments and actions on behalf of his IRA. Equity
16 Trust Company (ETC), an independent company which was the holding
17 company/administrator for the IRA, did not provide investment advice or
18 related services. The court in *FBO David Sweet IRA* determined that "a Self-
19 Directed IRA, like the one at issue here, is unique in that the owner or
20 beneficiary of the IRA acts as a trustee for all intent and purposes. While the
21 IRS and SEC require that all IRA's be placed with a holding company that
22 serves as a trustee or custodian of the account, it is the owner of the Self-
23 Directed IRA who manages, directs, and controls the investments." The
24 court then found that for purposes of the case, "ETC served as merely a
25 holding company while Sweet acted as trustee of his Self-Directed IRA.
26 Accordingly, Sweet's suit on behalf of David Sweet IRA is proper."

27 In the case before the court, the actual agreement between Plaintiff David
28 Law, and the custodian, American Pension Services, clearly states that the
owner, David Law, not the custodian, has sole responsibility for decisions.
The custodian was to have "no responsibility." Following the logic of the
Vannest case and the *FBO David Sweet IRA* case, which this court finds
compelling, the Plaintiffs, not the holder or custodian of the IRA are the true
parties in interest. Since the custodian/holder has not been involved in the
decision-making process, it lacks the knowledge of the facts which would
allow it to bring this action.

Since the Plaintiffs named in this action are the true and real parties in interest
on every contract which form the basis of this action and since they are the
ones most knowledgeable of all of the facts and circumstances surrounding
those contracts, and since they are also the ones for whose benefit all of the
transactions were performed, they are the appropriate parties to prosecute the
case. . . .

1 2016 U.S. Dist. LEXIS 50681, *2-6 (D. Utah Apr. 14, 2016); *see also FBO David Sweet IRA v.*
2 *Taylor*, 4 F. Supp.3d 1282, 1284-85 (M.D. Ala. 2014) (“While the Court can find no cases
3 specifically addressing whether the beneficiary of a Self-Directed IRA, the IRA itself, or the IRA
4 holding company is the proper party to bring suit, . . . under Alabama law, a beneficiary may not
5 typically bring an action against a third-party, even when adversely affected. . . . However, a
6 Self-Directed IRA, like the one at issue here, is unique in that the owner or beneficiary of the
7 IRA acts as a trustee for all intensive purposes. Moreover, sole management and control of the
8 IRA rests with Sweet. It is Sweet alone who is “responsible for the selection, due diligence,
9 management, review and retention of all investments in [his] account,” (Doc. #23), likening
10 Sweet’s position with that of a trustee rather than a beneficiary. Thus, under the limited facts
11 and circumstances surrounding this unique situation, the Court finds that for the purposes of this
12 case, ETC served as merely a holding company while Sweet acted as trustee of his Self-Directed
13 IRA. Accordingly, Sweet's suit on behalf of David Sweet IRA is proper.”).

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16 However, those cases are distinguishable from the instant matter. First, they can be
17 factually distinguished. Indeed, those cases (which are not binding on this Court in any event)
18 do not stand for the proposition that a custodian can never be a real party in interest. Rather,
19 those cases focus on the relationships between the asserted parties in interest based on the specific
20 facts of those cases. Here, Defendant makes no showing that the current Plaintiff does not have
21 the capacity to sue. Indeed, she makes no effort to demonstrate the relationship between Mr.
22 Hermann and PENSCO as the custodian of his IRA account, and provides no evidence of the
23 type of account held by PENSCO for the benefit of Mr. Hermann. Moreover, as noted above,
24 the state court found, and this Court has affirmed, that PENSCO is the beneficial owner of the
25 mortgage note and has the authority to enforce the note. Defendant cites no Washington cases
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1 or other legal authority that would preclude Plaintiff from pursuing this action to enforce its
2 interests.

3 Ms. Delfierro also argues that summary judgment is not appropriate because PENSCO
4 has improperly re-recorded certain documents to correct errors with the chain of title. Dkt. #51
5 at 10. The Court has already ruled that claims regarding Plaintiff's ownership have been litigated
6 and resolved in Plaintiff's favor. Dkts #48 at 5 (citing Dkt. #34, Exhibit E at sub-exhibit H). As
7 the Court previously explained:
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9 After hearing evidence and argument in a bench trial, state court Judge Carol
10 A. Schapira concluded that "PENSCO is the beneficial owner of the Note and
11 Deed of Trust with power and authority to enforce the same." *Id.* While the
12 record reflects that multiple Assignments of Deeds of Trust were rerecorded
13 in 2015 to "correct recording sequence," dkt. #34, Ex. E at sub-exhibits D, E
14 and G, Judge Schapira noted that the documents had not been recorded at the
15 time of her decision, but reached the same conclusion with respect to
16 PENSCO's interest in the Note. *Id.* ("Although this particular Assignment of
Deed of Trust has not yet been recorded, it remains valid between the
signatories," "The Court finds Plaintiff has not proven there is any other
claimant other than PENSCO to the beneficial interest in her Note and Deed
of Trust.").

17 Dkt. #48 at 5. This Court concluded that Defendant Delfierro's claim that recording errors
18 preclude foreclosure of her property is barred by the doctrine of *res judicata*. For the same
19 reasons, Defendant is barred from raising the claim as a defense to foreclosure on summary
20 judgment.
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22 For all of these reasons, the Court agrees with Plaintiff that summary judgment in its favor
23 is appropriate.

24 **C. Defendant Delfierro's Motion**

25 In her motion for summary judgment, Ms. Delfierro raises only the standing issue
26 addressed above. Dkt. #45. Because the Court has rejected that argument, Defendant's Motion
27 for Summary Judgment must be denied.
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IV. CONCLUSION

Having reviewed the parties' cross Motions for Summary Judgment, the documents in support thereof and in opposition thereto, and the remainder of the record, the Court hereby

ORDERS:

1. Plaintiff's Motion for Summary Judgment (Dkt. #44) is GRANTED.
2. Defendant's Motion for Summary Judgment (Dkt. #45) is DENIED.
3. This matter is now CLOSED.

DATED this 11th day of August 2017.



RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE