

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

MICHAEL P. O'BANION and
PATRICIA R. BRADLEY,

Plaintiffs,

v.

SELECT PORTFOLIO SERVICES,
INC., LITTON LOAN SERVICING LP;
JUST LAW, INC.; MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC.; DISCOVER
LENDING GROUP; OWNIT
MORTGAGE SOLUTIONS, INC.,

Defendants.

Case No. 1:09-CV-00249-EJL

**ORDER ADOPTING REPORT
AND RECOMMENDATION**

On August 22, 2012, Chief United States Magistrate Judge Candy W. Dale issued a Report and Recommendation (“the Report”), recommending that Plaintiffs’ Motion for Summary Judgment, Amended Motion for Summary Judgment, and Motion in Limine be denied. (Dkt. 202.) The Report also recommended that Defendants’ Motion for Summary Judgment be granted and their Motion for Preliminary Injunction be denied as moot. Any party may challenge a Magistrate Judge’s proposed recommendation regarding by filing written objections within ten days after being served with a copy of the magistrate’s Report and Recommendation. 28 U.S.C. § 636(b)(1). The district court must then “make a

ORDER ADOPTING REPORT AND RECOMMENDATION - 1

de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” *Id.* The district court may accept, reject, or modify in whole or in part, the findings and recommendations made by the magistrate. *Id.*; *see also* Fed. R. Civ. P. 72(b). Plaintiffs filed objections to the Report and Recommendation to which the Defendants have responded. (Dkt. 207, 210.) The Court has considered the Plaintiffs’ contentions and conducted a *de novo* review of the record and finds as follows.

Discussion

Plaintiffs object to the Report arguing 1) it failed to properly consider the material facts and legal arguments brought out in the record and/or erred in finding no genuine issue of material facts in the record, 2) the facts in the record confirm there was an additional party/entity that had beneficial interests in Plaintiffs’ mortgage loan, 3) two of the loan documents fail to accurately reflect the appropriate beneficial parties in interest, and 4) the loan note is without the endorsement of the beneficial interest and, therefore, is null and void as a negotiable instrument. (Dkt. 207.) Defendants respond arguing the Report properly resolved the Motions and should be adopted. (Dkt. 210.) In particular, Defendants assert the facts and record in this matter were properly consider and there is no legal authority to support the Plaintiffs’ position.

The Court has reviewed the objections and conducted a *de novo* review of the Report in this matter as well as the record. Having done so, this Court is in agreement

ORDER ADOPTING REPORT AND RECOMMENDATION - 2

with the Magistrate Judge's analysis of the issues presented and will adopt the same. The bulk of Plaintiffs' objections point to portions of their filings to support their argument that a genuine issue of material fact exists in this case; in particular as to the question of whether or not there is an intermediate beneficial party in interest who was not properly listed and/or recorded on the loan documents.

In their objections, Plaintiffs take issue with the Report's comment in footnote 2 regarding their Statement of Disputed Facts and Statement of Facts. (Dkt. 202 at 2, n. 2.) In that footnote, the Magistrate Judge concluded that the statements contained in those two filings do not set forth admissible facts other than what is set forth within the Report. (Dkt. 202 at 2, n. 2.) Plaintiffs object, arguing the facts they presented should not be summarily disposed of in the footnote as doing so is bias, prejudicial, and an abuse of discretion. (Dkt. 207 at 4.) This Court has reviewed *de novo* the Plaintiffs' Statement of Disputed Facts and Statement of Facts (Dkt. 175-1 and 168-10) and agrees with the Magistrate Judge that those documents do not set forth facts admissible in this case other than what is already included in the Report. (Dkt. 202 at 2-7.) As noted in the Report, '[o]nly admissible evidence may be considered in ruling on a motion for summary judgment. Statements in a brief, unsupported by the record, cannot be used to create an issue of fact.' (Dkt. 202 at 11.) The Plaintiffs' two filings are more akin to argument than to stating facts or presenting evidence. This Court finds the Report properly considered and addressed these materials and finds no error in the Report's handling of the facts in this case and will adopt the same.

ORDER ADOPTING REPORT AND RECOMMENDATION - 3

As to Plaintiffs' arguments and objections regarding the improperly omitted beneficiary interest and the resulting unlawful transfer of the loan note, the Court has reviewed *de novo* the record in light of the parties arguments and again concludes the Magistrate Judge properly addressed these matters. (Dkt. 202 at 18-31.) The non-recording of intermediate beneficial interests in a deed of trust is legally immaterial and irrelevant in Idaho to the validity and enforceability of the instrument. Plaintiffs' objections are a recitation of the arguments previously made, considered, and appropriately decided in the Report. For the reasons stated in the Report, this Court finds that, as a matter of law, Plaintiffs' claim for unlawful default and unlawful foreclosure and fraudulent misrepresentation, is without factual and legal support and must be dismissed as a matter of law. There is no genuine issue of material fact that exists as to relevant facts on Plaintiffs' claim nor is there any basis in law to support the same. (Dkt. 202 at 18-31.) Accordingly, the Defendants' Motion for Summary Judgment will be granted and judgment will be entered in favor of Defendants on all claims.¹

ORDER

Having conducted a *de novo* review of the Report and Recommendation, this Court finds that Chief Magistrate Judge Dale's Report and Recommendation is well

¹ As stated in the Report, the claim in Count IV against Select and MERS is the sole remaining claim for relief. All other parties and claims have either been dismissed or are no longer being pursued by Plaintiffs. As a result and in light of the Court's ruling herein, judgment will be entered in favor of Defendants on all claims in this matter.

founded in law and consistent with this Court's own view of the evidence in the record.

Acting on the recommendation of Magistrate Judge Dale, and this Court being fully advised in the premises, **IT IS HEREBY ORDERED** that the Report and Recommendation entered on August 22, 2012, (Dkt. 202), should be, and is hereby, **INCORPORATED** by reference and **ADOPTED** in its entirety.

THEREFORE, IT IS HEREBY ORDERED as follows:

- 1) Defendant's Motion for Preliminary Injunction (Dkt. 127) is **DENIED AS MOOT**.
- 2) Defendants' Motion to for Summary Judgment (Dkt. 159) is **GRANTED**.
- 3) Defendants' Motion in Limine (Dkt. 164) is **DENIED**.
- 4) Plaintiffs' Motion for Summary Judgment and Amended Motion for Summary Judgment (Dkt. 168, 176) are **DENIED**.

DATED: October 9, 2012



Honorable Edward J. Lodge
U. S. District Judge