

Sarina Nelson Tel: (530) 354-6212
4081 County Rd., #203
Hamilton City, CA 95951

Plaintiffs In Propria Persona

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF GLENN

DEUTSCHE BANK NATIONAL TRUST
COMPANY, as Trustee of the IndyMac
IMSC Mortgage

Plaintiff,

V.

SARINA NELSON

Defendant.

CASE NO: 10NUD00320

EX PARTE APPLICATION FOR STAY OF
ENFORCEMENT OF JUDGMENT,
MEMORANDUM OF POINTS AND
AUTHORITIES, DECLARATION OF
SARINA NELSON

Date:
Time:
Dept:

NOTICE IS HEREBY GIVEN that on _____, 2011, at _____ in Department
____ of the Superior Court of California, County of Glenn located at 526 W Sycamore St,
Willows, CA 95988, Defendant Sarina Nelson will move the above-entitled court for an Order
staying enforcement of the Judgment.

Good cause exists for making the application for two reasons, (1) Defendant intends to
file a meritorious appeal of the judgment for possession, if deemed necessary and (2)
Defendant has filed a civil action against Plaintiff, Deutsche Bank National Trust Company, as
Trustee of the IndyMac IMSC Mortgage, a corporation, and, Regional Trustees Service

1 Corporation a corporation as Trustee, AND DOES 1 - 25, in Glenn County Superior Court
2 challenging the legality of the non-judicial foreclosure by said Plaintiffs. Additionally,
3 Defendant, Sarina Nelson is prepared to pay a monthly fair rental value pending resolution
4 should it be this court's recommendation.
5

6 The Ex Parte Application will be based upon this Application, the Memorandum of
7 Points and Authorities, the Declaration of Sarina Nelson and other and further oral and
8 documentary evidence to be adduced at the hearing of this Application.
9

10 Dated:

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13 By _____
14 **Sarina Nelson**
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 Defendant Sarina Nelson seeks a stay of enforcement of judgment pending appeal of the
5 judgment entered following Motion for Summary Judgment. Normally, unlawful detainer actions
6 are quickly resolved, with little consideration given to whether the Plaintiff is actually the lawful
7 owner of a given property.

8 This however is a different day ... and these are different times. In California alone,
9 approximately 20,000 homes have been foreclosed each month in the last six months and owners
10 have been evicted, again, with little or no consideration of whether the title claimed by the
11 Plaintiff has any legal validity.

12 Defendant Sarina Nelson has filed a civil action to set aside the foreclosure of her home
13 based on fraud in the execution of her loan and in the unlawful foreclosure and sale.
14 Additionally, other defenses exist having to do with and not limited to, the multiple chain of
15 assignments of the trust deed, negligence, unclean hands and non-judicial foreclosure procedure.
16 Traditionally, there is a tension following a non-judicial foreclosure which exists between the
17 needs of Plaintiffs to perfect their possession of the property and the Defendant owners who are
18 denied due process in a summary proceeding in which evidence is not taken on the issue of the
19 validity of title.

20 Defendant believes that Plaintiff, Deutsche Bank National Trust Company, will not be
21 prejudiced by the delay in possession of yet another property in its ever growing non-performing
22 portfolio. More particularly, in as much as record of the Court has witnessed Defendant has been
23 prepared to make reasonable monthly rental payments and post any required undertaking
24 pending resolution of the appeal and civil action, however these offers have been rejected by the
25 Plaintiff's legal representative.

26 **II.**

27 **A STRONG FACTUAL SHOWING SUPPORTS THE CONCLUSION**
28 **THAT DEFENDANT WILL PREVAIL AS THE PLAINTIFF IN HER**

1 **CIVIL ACTION AND SET THE FORECLOSURE ASIDE.**

2 A strong factual showing supports the conclusion that Defendant will prevail as the
3 Plaintiff in her civil action to set aside the foreclosure, either/and/or based upon fraud in the
4 execution of the loan, fraud in the transfer of deed of trust, negligence or that there was a lack of
5 consideration due to a failure to have a meeting of the minds. In any and all events, the court
6 may rest its discretion on the sworn Declaration of Sarina Nelson (attached) in granting a stay.

7 Here, there are several considerations for the court to resolve. Civil action has been filed
8 in the court. Notice of related case has been filed in the court. Case management conference has
9 been scheduled. Defendant will file Notice of Appeal and requests a stay of execution of
10 judgment pending the appeal, if necessary. Defendant has offered and was prepared to pay-over
11 the reasonable fair market rental value to the Plaintiff, and post any required undertaking as the
12 court may recommend however this offer was declined on record by Plaintiff's counsel on April
13 4, 2011. Defendant believes that she has a meritorious defense to the summary judgment.
14 Defendant alleges that representatives of Mortgage Sense, who will become one of the DOES 1 –
15 25 in the civil case committed a fraud in the execution of her loan, whereby, she had an existing
16 first deed of trust which was a fixed loan at (____) percent amortized over thirty years with
17 Wells Fargo Bank.

18 Defendant was approached by Tracilee Piliero, a representative of Mortgage Sense, and
19 induced to execute a new first deed of trust with the underlying obligation being a loan that
20 Defendant was told would have a monthly payment of \$1,025. The loan documents and trust
21 deed were brought to her place of business and she was told to sign wherever there were x
22 marks. She did as she was told and signed a number of documents. She never received a copy of
23 the documents. Defendant continued to make payments

24 Defendant was surprised when her first mortgage payment notice arrived and the amount
25 of the monthly payment was closer to \$1,500. Defendant was at the time a pre-school teacher and
26 earned only \$2,200 per month. Not being sophisticated in financial arrangements, she discussed
27 the problem with her then live-in domestic partner. He told her not to worry, he would help her
28 make the payments. Defendant was making payments to IndyMac on loan

1 # 3002723249 although it has been found that the actual deed of trust was for a loan
2 # 226-379051. This is a complication and question that can only be addressed and resolved with
3 the presentment of the original Promissory Note.

4 Defendant made the monthly mortgage payments for two years to IndyMac. Defendant
5 then contacted IndyMac, whom she believed to be the holder of the note, for a refinance loan to
6 reduce monthly payments. Before the refinance loan was initiated, her partner suffered a heart
7 attack and could no longer assist her with the payments. Defendant found that through the
8 Barack Obama nationwide modification loan offer through IndyMac that she could apply for a
9 loan modification. She was told repeated that they were working on it and not to make any
10 payments until the modification was complete.

11 Defendant's fiance' passed away on May 3rd. Within 2 weeks Defendant was
12 contacting IndyMac to deal with the late payments, the process of the modification and was told
13 that now she would qualify for a "hardship" modification and not to worry. She was in constant
14 contact with IndyMac in providing all the necessary verifications of income, proof of
15 employment and the like.

16 Defendant then found a Notice of Default and Election to Sell Under Deed of Trust from
17 someone purporting to be Marghong representing a company called Regional Trustee Services
18 Corp. taped to her front door. The document was not notarized but did state in fact:

19 NOTICE IS HEREBY GIVEN that REGIONAL SERVICE CORPORATION, is either
20 the duly appointed Trustee, the substitute Trustee or acting as agent for the Beneficiary under a
21 Deed of Trust dated 03/01/2007, executed by SARINA ANN NELSON, A SINGLE WOMAN,
22 as Trustor, **to secure obligations in favor of MORTGAGE ELECTRONIC**
23 **REGISTRATION SYSTEMS, INC. as Beneficiary** (emphasis added), recorded 3/8/2007, as
24 Instrument No. 2007-1472, of Official Records in the office of the Recorder of GLENN County,
25 CALIFORNIA, as more fully described on said deed of trust **including one note(s)** (emphasis
26 added) for the sum of \$272,800.00.....

27 She immediately contacted IndyMac and was told not to worry that the modification
28 would take care of all the back payments and they would simply be tacked on to the end of the

1 new loan. Defendant called Regional Service Corporation and requested they stop the
2 foreclosure as there was a modification pending. Regional told defendant that the modification
3 would stop the foreclosure but Defendant was advised to contact IndyMac which she continued
4 to do for over 5 months until she received the NOTICE OF TRUSTEE'S SALE. She then
5 received notice from IndyMac that the "hardship modification" was denied.

6 Plaintiff claims to have bought the property at a "duly conducted foreclosure sale" on
7 March 26, 2010. Defendant asserts that the foreclosure sale was invalid and that numerous
8 assignments of the trust deed were made by parties that had no beneficial interest in the original
9 promissory note.

10 Defendant has filed a civil action in which she seeks to have the foreclosure set aside for
11 several legal reasons including but, not limited to: (1) fraud in the execution, misrepresentation
12 of the terms of the agreement, fraudulent appraisal of the property, and fraudulently
13 misrepresenting her income for the underwriting of the loan, negligence, and (2) violation of
14 Civil Code section 2932.5, by a failure to record the assignment of the original promissory note.
15 The failure to record the assignment strips the power of sale from the promissory note. Lacking
16 power of sale, the foreclosure could not have proceeded under any viable legal theory.
17 Additionally, Defendant believes that the claimed endorsement of the promissory note was
18 defective and legally rendered the promissory note "non-negotiable" pursuant to the holding of
19 *Pribus v. Bush*, (1981) 118 Cal.App.3d 1003. Further, Defendant believes that the trustee was
20 not even in possession of the original note and that such note was lost, as such any non-judicial
21 foreclosure would be unfounded. Also, Defendant believes that the alleged beneficiary under the
22 note during the non-judicial foreclosure, was not a holder in due course and had no actual
23 secured interest in the Defendant's property.

24 25 **III.**

26 **A PROCEDURAL MECHANISM EXISTS TO STAY EXECUTION** 27 **OF JUDGMENT PENDING AN APPEAL.** 28

1 A procedural mechanism exists to stay execution of a judgment pending appeal pursuant
2 to California Code of Civil Procedure section 918.5 which provides as follows:

3
4 § 918.5.

5 (a) The trial court may, in its discretion, stay the enforcement of a judgment or
6 order if the judgment debtor has another action pending on a disputed claim against the
7 judgment creditor.

8 (b) In exercising its discretion under this section, the court shall consider all of the
9 following:

10 (1) The likelihood of the judgment debtor prevailing in the other action.

11 (2) The amount of the judgment of the judgment creditor as compared to the
12 amount of the probable recovery of the judgment debtor in the action on the
13 disputed claim.

14 (3) The financial ability of the judgment creditor to satisfy the judgment if a
15 judgment is rendered against the judgment creditor in the action on the disputed
16 claim.

17
18 Thus, the court may exercise its learned discretion whether to stay this action, order the
19 posting of an adequate undertaking and payment of a reasonably monthly rental value. In the
20 matter of *Asuncion vs. Superior Court*, (1981) 108 Cal.App.3d 141, 146, 166 Cal.Rptr. 306,
21 the Fourth District Court of Appeal held in pertinent part, “A possibility, which we understand is
22 frequently utilized in other counties, is for the superior court to stay the eviction proceedings
23 until trial of the fraud action, based on the authority of Code of Civil Procedure section 526
24 which permits a preliminary injunction to preserve the status quo on such grounds as irreparable
25 injury, multiplicity of legal actions, or unconscionable relative hardship. (See, e. g., *Continental*
26 *Baking Co. v. Katz*, 68 Cal.2d 512, 528, 67 Cal.Rptr. 761 and see gen. discussion of subject in 2
27 *Witkin, Cal. Procedure* (2d ed. 1970) *Provisional Remedies*, § 47, p. 1496; § 73, pp. 1511-
28 1512.) Bond would be required to obtain such an injunction (Code Civ.Proc., § 529), which

could be waived for an indigent litigant. *Conover v. Hall*, 11 Cal.3d 842, 851, 853, 114 Cal.Rptr. 642. It has been held where foreclosure of a trust deed would moot a claim of right under a deed, and the deed is attacked as a fraudulent conveyance, a preliminary injunction is permitted to prevent foreclosure pending trial. *Weingand v. Atlantic Savings & Loan Assn.*, (1970) 1 Cal.3d 806, 83 Cal.Rptr. 650. Staying the eviction here is analogous.”

In *Gonzales v. Gem Properties, Inc.*, (1974) 37 Cal.App.3d 1029, 1036, 112 Cal.Rptr. 884, 889, the Second Appellate District pointed out, "The summary nature of unlawful detainer proceedings suggests that, as a practical matter, the likelihood of the defendant's being prepared to litigate the factual issues involved in a fraudulent scheme to deprive him of his property, no matter how diligent defendant is, is not great."

A qualified exception to the rule that title cannot be tried in an unlawful detainer proceeding [see Evid Code § 624; 5.45[1][c]] is contained in CCP § 1161a. By extending the summary eviction remedy beyond the conventional landlord-tenant relationship to include purchasers of the occupied property, the statute provides for a narrow and sharply **focused** (emphasis added) examination of title. A purchaser of the property as described in the statute, who starts an unlawful detainer proceeding to evict an occupant in possession, must show that he or she **acquired** (emphasis added) the property at a **regularly conducted sale** (emphasis added) and thereafter “duly perfected” the title [CCP § 1161a; *Vella v. Hudgins* (1977) 20 C3d 251, 255, 142 CR 414, 572 P2d 28]. To this limited extent, as provided by the statute, title may be litigated in the unlawful detainer proceeding [*Cheney v. Trauzettel* (1937) 9 C2d 158, 159, 69 P2d 832].

1. In General; Words and Phrases

Term “duly” implies that all of those elements necessary to valid sale exist. *Kessler v. Bridge* (1958, Cal App Dep’t Super Ct) 161 Cal App 2d Supp 837, 327 P2d 241, 1958 Cal App LEXIS 1814.

Title that is “duly perfected” includes good record title, but is not limited to good record title. *Kessler v. Bridge* (1958, Cal App Dep’t Super Ct) 161 Cal App 2d Supp 837, 327 P2d 241, 1958 Cal App LEXIS 1814.

1 Title is “duly perfected” when all steps have been taken to make it perfect, that is, to
2 convey to purchaser that which he has purchased, valid and good beyond all
3 reasonable doubt. Kessler v. Bridge (1958, Cal App Dep’t Super Ct) 161 Cal App 2d
4 Supp 837, 327 P2d 241, 1958 Cal App LEXIS 1814.

5 The purpose of CCP 1161a, providing for the removal of a person holding over after a
6 notice to quit, is to make clear that one acquiring ownership of real property through
7 foreclosure can evict by a summary procedure. The policy behind the statute is to
8 provide a summary method of ouster where an occupant holds over possession after
9 sale of the property. Gross v. Superior Court (1985, Cal App 1st Dist) 171 Cal App 3d
10 265, 217 Cal Rptr 284, 1985 Cal App LEXIS 2408.

11 Here, Plaintiff, Deutsche Bank National Trust Company is not a bonified purchaser and
12 had notice of the claims of Defendant. As such, there is no presumption that the trustee’s deed
13 after alleged sale is valid nor in fact was the trustee’s deed valid before alleged sale.

14 On July 17, 2007, a non-notarized Notice of Default and Election to Sell Under Deed of
15 Trust was filed, signed on July 14, 2007 by Marghong. This Notice of Default clearly states on
16 page 2 that Notice Is Hereby Given “to secure obligations in favor of **MORTGAGE**
17 **ELECTRONIC REGISTRATION SYSTEMS, INC, as Beneficiary** (emphasis added)”.
18 **However** (emphasis added), a different Beneficiary is claimed during this same time, at this
19 same date, as being OneWest Bank FSB as recorded on 10/23/2009 Assignment of Deed Of
20 Trust, signed by Dennis Kirkpatrick, vp of MERS on 06/23/2009. As the record states: “FOR
21 VALUE RECEIVED, the undersigned, MORTGAGE ELECTRONIC REGISTRATION
22 SYSTEMS, INC, by these presents, grants, bargains, sells, assigns, transfers and **sets over unto**
23 **OneWest Bank FSB, all beneficial interest under that certain Deed of Trust** (emphasis
24 added) dated 3/1/2007...”

25 Additionally find online data records which also state the Dennis Kirkpatrick, at the same
26 time as acting as Vice President for MERS in the signing of documents you will find him also
27 listed as Vice President (VP) for JP Morgan Chase, VP of OneWest Bank, and Director at
28 Wachovia Mortgage, FSB. Dennis Kirkpatrick is also listed as a known RoboSigner on

documents to be submitted in discovery during the process of Hearing of the Complaint that is now filed with the Glenn County Court.

Good title cannot be based on Fraud. In the case of a fraudulent transaction California law is settled. The Court in Trout v. Trout, (1934), 220 Cal. 652 at 656 made as much plain:

“Numerous authorities have established the rule that an instrument wholly void, such as an undelivered deed, a forged instrument, or a deed in blank, cannot be made the foundation of a good title, even under the equitable doctrine of bona fide purchase. Consequently, the fact that although Plaintiff may even have acted in good faith in dealing with persons who apparently held legal title, is NOT in itself sufficient basis for relief.”

This sentiment was clearly echoed in 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc. (2001) 85 Cal. App.4th 1279 at 1286 where the Court stated:

“It is the general rule that courts have power to vacate a foreclosure sale where there has been fraud in the procurement of the foreclosure decree or where the sale has been improperly, unfairly or unlawfully conducted, or is tainted by fraud, or where there has been such a mistake that to allow it to stand would be inequitable to purchaser and parties.”

Thus, it would appear that sufficient facts exist of the fraud committed in the execution of Defendant’s loan, unlawful practices, unlawful foreclosure, unlawful trustee’s sale, which would support a stay pending the appeal and/or conclusion of the civil action.

IV.

PLAINTIFF WILL SUFFER NO PREJUDICE BY THE ISSUANCE OF A STAY PENDING RESOLUTION OF THE CIVIL ACTION.

Plaintiff will suffer no prejudice by the issuance of a stay pending resolution of the civil action and/or appeal, because Defendant has offered on record as also the previous counsel on this case Helen Duree who telephoned Plaintiff’s counsel and offered that Defendant make monthly payments based upon the reasonable fair rental value and post an adequate undertaking

1 as required while the case was pending and the offer was declined. As well, on April 4, 2011,
2 the Judge of the Glenn county court questioned the option for Defendant to make monthly
3 payments but this offer was also declined on record.

4 In the event that the stay is not issued, the property will be lost forever, and cannot be
5 easily replaced. On the other hand, the subject property will only sit in the non-performing
6 portfolio waiting to be sold in a market in which homes are not selling at any price, even if, the
7 lenders were able to make loans on the property. Thus, in a practical sense, if the stay is granted,
8 Plaintiff will at least have the benefit of caretakers on the property to maintain the property
9 pending the appeal and/or civil action.

10 "Prejudice is never presumed; rather it must be affirmatively demonstrated by the
11 defendant in order to sustain his burdens of proof and the production of evidence on the issue."
12 *Miller v. Eisenhower Medical Center*, (1980) 27 Cal.3d 614, 624, 166 Cal.Rptr. 826.

13 In fact, if the stay is not granted, Plaintiff stands to lose a large percentage of the value of
14 the property as it has an orchard that without maintenance will die and seriously reduce the value
15 of the property.

16 In the absence of prejudice on the part of Plaintiff, the court would properly exercise its
17 power to stay the execution of this judgment.

18 CONCLUSION

19 For all pleading filed in this matter, the Declaration of Sarina Nelson, the Memorandum
20 of Points and Authorities, Defendant Sarina Nelson respectfully requests that the court grant a
21 stay pending appeal and/or resolution of the impending civil action by Sarina Nelson against the
22 numerous Defendants in that action.
23

24 Dated: 4/8/2011

25
26
27 By _____

28 Sarina Nelson