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SUPERIOR COURT OF THE STATE OF ARIZONA
COUNTY OF PINAL

KONDAUR CAPITAL
CORPORATION

Plaintiff

v.

CLINTON WHITE AND
CATHERINE WHITE,
HUSBAND AND WIFE, AS
COMMUNITY PROPERTY,
WHO ACQUIRED TITLE AS
CLINTON WHITE AND CATHY
WHITE, HUSBAND AND WIFE;
PINAL COUNTY, a political
subdivision of the State of Arizona
and PAUL R BABEU, Sheriff of
Pinal County and DOES 1 through
X, inclusive

Defendants.

CIVIL ACTION: CV2010-02012

Honorable Judge Robert Olson

**PETITION FOR TEMPORATY
RETRAINING ORDER AND
PRELIMINARY INJUNCTION**

(Oral Argument Requested)

Re: Property At: 4006 S Valerian Street,
Casa Grande, AZ 85294

COME NOW the Defendants, Catherine Ann White and Clinton A White,
(hereinafter "Defendants"), and moves for a temporary restraining order and a
preliminary injunction enjoining Defendant, Kondaur Capital Corporation ("Kondaur")

1 from executing a Writ of Restitution and dispossessing the Whites of their home unless
2 and until such time that the Defendant can establish the truth, validity and authenticity of
3 their claim of right to possession.

4 **I. INTRODUCTION**

5 Defendants filed a voluntary petition for relief seeking relief in this matter under
6 Chapter 13 of the Bankruptcy Code on January 11, 2011. During the Chapter 13
7 proceedings, initiated by the Defendants to save their home, the Kondaur was awarded
8 relief from the automatic stay based upon fabricated documents. This matter is pending
9 appeal and there is a motion to stay further action pending the appeal. That should be
10 scheduled soon.

11 Defendant received a Judgment of Forcible Detainer and received a writ of
12 restitution on based upon a void trustee's deed upon sale without evidence of any
13 consideration paid at the sale, any foundation, authentication or actual authority to
14 convey the interest in the Whites' home. The Whites were denied a hearing and have
15 filed a motion to set aside the judgment and now Kondaur is demanding immediate
16 possession at 9:00 am July 20, 2010 despite actual notice of this Petition for Temporary
17 Restraining Order and request for Preliminary Injunction will be filed and the hearing
18 currently set for August 4, 2011.

19
20 **II. STATEMENT OF FACTS**

21 1. Plaintiffs are the lawful owners of real property within the jurisdiction of
22 this Court located at 4006 South Valerian Street, Casa Grande, AZ 85294.

23 2. The property was purchased on December 2, 2005 pursuant to a warranty
24 deed.

25 3. M&I Marshall & Isley Bank, (hereinafter "M&I"), was the original lender
26 on the loan. M&I sold and divested their interest in the loan to unknown investors in
27 unrecorded electronic transfers.
28

1 4. Defendants failed to strictly comply with the law, statutes and procedures,
2 as required by state and federal law, in transferring the interest and proceeded to
3 foreclose upon the Plaintiffs' residential real property without legal right to do so based
4 upon fabricated documents which were recorded;

5 5. Pursuant to A.R.S. § 33-809(c), "The trustee, within five business days
6 after the recordation of a notice of sale, shall mail by certified or registered mail, with
7 postage prepaid, a copy of the notice of sale to each of the persons who were parties to
8 the trust deed except the trustee." Whites never received a copy of the Notice of Trustee
9 Sale as required by statute. This was a willful and intentional failure by the Trustee
10 Michael A. Bosco, Jr.

11 6. Notice of Breach and right to cure did not comply with the Deed of Trust
12 paragraph 22 of the Deed of Trust.

13 7. Defendants failed to comply with the statutory notice requirements giving
14 notice to all the interested parties.

15 8. The beneficiaries were not properly identified in the Notice of Trustee
16 Sale.

17 9. A Corporation Assignment of Deed of Trust ("Assignment"), was
18 recorded on September 9, 2009 signed by robosigners that had do actual authority or
19 legal right to convey and were in fact not Vice Presidents of M&I Bank. This document
20 purports to transfer all beneficial interest in the Deed of Trust from M&I (which they
21 had already sold) to Kondaur which is a nullity. This was recorded more than six (6)
22 months **after** the Notice of Trustee Sale was recorded, naming M&I as the beneficiary
23 which constitutes intentional notice failure.

24 10. As a result of failing to comply with the required statutes and procedure,
25 the foreclosure conducted by Tiffany & Bosco upon the Plaintiffs' Residential Real
26 Property is null and void. *See* Affidavit of William McCaffrey.

27 11. On February 13, 2009, the Whites entered into a Loan Modification
28 Agreement with M&I. The Modification called for six payments beginning July 1,

1 2009. All six payments were timely made. During this period of payments, M&I
2 assigned their interest to Kondaur. Whites were told by M&I that Kondaur would honor
3 the Modification. The remaining payments of the Modification were made to Kondaur,
4 who cashed and did not return the payments.

5 12. Upon the completion of the six payments, M&I had promised the
6 modification would become permanent with a fixed rate of 8%. However, Kondaur
7 refused to honor the agreement stating that a payment of \$55,000.00 must be made to
8 them to honor the Modification. As Whites were calling to get wiring instructions to
9 wire the additional funds, Kondaur informed them that they had changed their mind and
10 would not Modify the Loan at all.

11 13. Debtors received from Kondaur Capital Corporation a "Notification of
12 Assignment, Sale or Transfer of your Mortgage Loan" dated on August 4, 2009, reciting that the
13 mortgage loan had been transferred to Kondaur Venture X, LLC and contemporaneously to
14 Kondaur Capital Trust Series 2009-3. The Notice went on to say that the above-mentioned
15 transfers of ownership were not recorded, but that an Assignment was recorded in the name of
16 the *servicer* Kondaur Capital Corporation.

17 14. Kondaur continued the process of a non-judicial foreclosure with the substitute
18 Trustee Michael A Bosco, Jr. based upon an invalid substitution from Mark Bosco not the
19 lender with no legal power of sale conveyed.

20 15. On February 15, 2010 Tiffany & Bosco had the Trustee's Sale scheduled for
21 March 16, 2010.

22 16. On or before March 1, 2010 the Trustee's Sale date was moved forward to
23 March 2, 2010.

24 17. There was no opening bid the day before the sale and there was no opening bid
25 available on the day of the sale.

26 18. At the proposed "Trustee's Sale" the Whites property was not called for sale.

27 19. Mrs. White and her assistant Donna Sue Harrison were told that the sale had
28 been pulled.

1 20. On March 2, 2010, Kondaur and Michael A. Bosco, Jr. purportedly
2 conducted a non-judicial sale on Plaintiffs Whites's residential real Property and "sold"
3 it to Kondaur.

4 21. Realizing this was another exercise in futility, Plaintiffs Whites had no
5 other recourse and they were forced to file for a Chapter 11 Bankruptcy on January 11,
6 2011.

7 22. During the ongoing Chapter 11 bankruptcy process, Kondaur filed a
8 Motion for Relief from the Automatic Stay.

9 23. During the hearing on Kondaur's Motion, the Court granted the Motion,
10 but invited the pending appeal.

11 **III. LEGAL ARGUMENT**

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13 As is in the case of landlords and tenants, *Dowdy v. Calvi*, 14 Ariz. 148, 158, 125
14 P. 873, 877(1912), a right of ownership does not always establish a right of possession
15 superior to the right of possession of Appellant. *Pinkerton v. Pritchard*, 71 Ariz. 117,
16 123, 223 P.2d 933, 937 (1950). Moreover, the right of possession in the Appellant
17 remains superior to any contrary right of possession obtained fraudulently. *Merrill v.*
18 *Gordon*, 15 Ariz. 521, 527 140 P. 496, 499 (1914).

19
20 Except for the availability of the bad faith evidence, the court could have
21 presumed the adequacy of an independent right of damages associated with a wrongful
22 denial of the subject right of possession. Given the bad faith evidence, however, the
23 Appellant retains a right of possession superior to the contrary right asserted. *Queiroz v.*
24 *Harvey*, 220 Ariz. 273, 274-75, 205 P.3d 1120, 1121-22 (2009).

25
26 The trustee of the Deed of Trust was the agent of both Appellant and beneficiary
27 alike, *Bisbee v. Security National Bank & Trust Co.*, 157 Ariz. 31, 34, 754 P.2d 1135,
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1 1138 (1988); *Patton v. First Federal Savings and Loan Ass'n*, 118 Ariz. 473, 476, 578
2 P.2d 152, 156 (1978), and owed both a duty of good faith and fair dealing. *Mallamo v.*
3 *Hartman*, 70 Ariz. 294, 298, 219 P.2d 1039, 1041 (1950). To the extent of the
4 involvement of the holder of the trustee deed in the subject bad faith, it remains subject
5 to the same duty of good faith and fair dealing owed to the Appellant. *Merchants &*
6 *Manufacturers' Assn. v. First National Bank*, 40 Ariz. 531, 537, 14 P.2d 717, 719
7 (1932).
8

9 Despite the inapplicability of constitutional rights otherwise, *Kelly v. Nations*
10 *Bank Mortg. Corp.*, 199 Ariz. 284, 289, 17 P.3d 790, 795 (App. 2000), the instant
11 forcible detainer action upholds the applicability of the subject constitutional rights. *See*
12 *Trujillo v. Superior Court*, 134 Ariz. 355, 357, 656 P.2d 644, 646 (App. 1992) (denying
13 an equal protection challenge); *Blair v. Stump*, 127 Ariz. 7, 10-11, 617 P.2d 791, 794-94
14 (App. 1980) (upholding an equal protection challenge). The meaninglessness of RPEA
15 15 (a) under any other interpretation establishes their availability, *Alejandro v. Harrison*,
16 223 Ariz. 21, 24, 219 P.3d 231, 234 (App. 2009), and the wrongful denial of the
17 admissibility of the bad faith evidence establishes the constitutional rights of Appellant
18 to present his bad faith evidence. *Kenyon v. Hammer*, 142 Ariz. 69, 79, 688 P.2d 961,
19 971 (1984).
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23 Until the bad faith evidence is fully explored, the lower court may not presume
24 the superiority of the contrary right of possession. *Johansen v. Arizona Hotel*, 37 Ariz.
25 166, 173-74, 291 P. 1005, 1008 (1930). As the bad faith evidence implicates only the
26 merits of possession and not title, any consideration of title remains purely incidental
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28

1 and appropriate for subject consideration. *Curtis v. Morris*, 186 Ariz. 534, 535, 925
2 P.2d 259, 260 (1996).

3
4 For the reasons stated, the court should declare the constitutional rights of the
5 Appellants violated, set aside the judgment, and dismiss the action or remand the case
6 for further proceedings consistent with its ruling

7 *Krohn v. Sweatheart*, 203 Ariz. 205, 52 P.3d 774 (2002) applies to non-judicial
8 foreclosures in Arizona. The deed of trust statutes strip borrowers of many of the
9 protections available under a mortgage. Therefore, strict compliance with the procedural
10 rules of A.R.S. §33-801 et.seq. is required. Also, inadequacy of consideration is another
11 well understood basis for upsetting such sales. Judicial foreclosure sales have been set
12 aside even in the absence of gross inadequacy, when there has been some irregularity.
13 “[W]here there is an inadequacy of price which in itself might not be grounds for setting
14 aside the sale, slight additional circumstances or matters of equity may so justify.”
15 *Mason v. Wilson*, 116 Ariz. 255, 257, 568 P.2d 1153, 1155 (App.1977) (citing *Johnson*
16 *v. Jefferson Standard Life Ins.*, 5 Ariz.App. 587, 429 P.2d 474 (1967))(emphasis added).
17 In the present case, the inadequacy of consideration is clearly present as well as invalid
18 transfers of interest.

19 Moreover, there is a lack of any substantive evidence there were valid transfers or
20 assignments. Thus, there was no chain of title, standing or authority to conduct a lawful
21 non-judicial foreclosure which is *highly irregular*.

22 A Non-Judicial Trustee’s Sale is a statutory remedy provided to beneficiaries
23 pursuant to a Deed of Trust. A.R.S. § 33-801 et seq., a “beneficiary” of a Deed of Trust
24 is defined by A.R.S. § 33-801(1):

25 “Beneficiary” means the person named or otherwise designated in a Trust Deed
26 as the person for whose benefit a Trust Deed is given, or the person’s successor in
27 interest. There is no valid Assignment of Deed of Trust recorded in Maricopa County
28 identifying the current purported lender and owner of the Plaintiff’s mortgage as the

1 beneficiary of the Plaintiff's mortgage. The Plaintiff has filed a Complaint to determine
2 the extent, validity or priority of the purported Vertical lien and this Petition for
3 Temporary Restraining Order and Preliminary Injunction to establish that there was a
4 wrongful foreclosure and there is no valid debt remaining that is secured by the
5 Plaintiffs' residence.

6 The false recording statute A.R.S. § 33-420(A) provides that

7 "a person purporting to claim an interest in, or a lien or encumbrance
8 against, real property, who causes a document asserting such claim
9 to be recorded in the office of the county recorder, knowing or
10 having reason to know that the document is forged, groundless,
11 contains a material misstatement or false claim or is otherwise
invalid is liable to the owner . . . of the real property for the sum of
not less than five thousand dollars, or for treble the actual damages
caused by the recording, whichever is greater, and reasonable
attorney fees and costs of the action."

12 A.R.S. § 33-420(D) provides that "[a] document purporting to create an interest
13 in, or a lien or encumbrance against, real property not authorized by statute, judgment or
14 other specific legal authority is presumed to be groundless and invalid."

15 Arizona courts strictly construe deeds of trust in favor of the borrower because
16 the statutory deed of trust procedures "strip borrowers of many of the protections
17 available under a mortgage," such as the right of redemption after sale guaranteed under
18 a mortgage foreclosure. *Patton v. First Fed. Sav. & Loan Ass'n*, 118 Ariz. 473, 477, 578
19 P.2d 152,156 (1978). "Therefore, lenders must strictly comply with the Deed of Trust
20 statutes, and the statutes and Deeds of Trust must be strictly construed in favor of the
21 borrower." *Id.* Further, "contracts will be strictly construed to avoid forfeitures."
22 *Schaeffer v. Chapman*, 176 Ariz. 326, 329, 861 P.2d 611, 614 (1993).

23 Preliminary injunctions are appropriate where there is (1) a strong likelihood of
24 success on the merits; (2) a possibility of irreparable injury not remediable by damages;
25 (3) a balance of hardships in the Movant's favor; and (4) a public policy in favor of
26 granting the relief. *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176
27 Ariz. 275, 280, 860 P.2d 1328, 1333 (Ct App. 1993).

1 **A. A Strong Likelihood of Success on the Merits.**

2 As demonstrated in the attached Affidavits, Kondaur has been granted favorable
3 verdicts from this Court with fraudulent or inaccurate documents. Despite Kondaur's
4 avowal, the Note presented to this Court in the Proof of Claim and Motion for Relief
5 from the Automatic Stay are not true copies of the original Note.

6 The Trustee's Sale was brought under a different beneficiary than is purported to
7 be the beneficiary to this Court. The Notice of Trustee's Sale lists M&I as the
8 beneficiary, but Kondaur claims an interest in these proceedings. Therefore either the
9 Trustee's Sale, the Motion to Lift the Automatic Stay, or both, were brought by the
10 wrong party. The failure of consideration at the sale is fatal.

11 Clearly this Court cannot condone the Defendant's willful misrepresentations to
12 the Court in violation of ER 3.3. Therefore, there is a strong likelihood of success on the
13 merits.

14
15 **B. Irreparable Injury Not Remediable by Monetary Damages.**

16 The Plaintiffs seek to retain their family residence. When dealing with real
17 property, a "...Court may assume the inadequacy of damages as a remedy without the
18 necessity of a showing to that effect." *Sabin v. Rauch*, 75 Ariz. 275, 280 (Ariz. 1953)
19 (When discussing specific performance of a contract). Each plot of land is unique and
20 there is no assurance that the property could be obtained from a bona fide purchaser at a
21 Trustee's Sale.

22
23 **C. A Balance of Hardships in the Defendant's Favor.**

24 The hardship to the Debtors/Plaintiffs are extreme and the hardship to the
25 Defendant is slight at best. The Debtors/Plaintiffs have sustained a loss of
26 approximately \$295,000.00 in equity as a result of the house being illegally sold at
27 Trustee's Sale value of \$295,000.00 based upon fabricated documents in violation of
28 ARS 33-420.

1 The Defendant allegedly holds this property as one of many assets. They
2 purportedly hold thousands of similar Deeds of Trust. Granting the Temporary
3 Restraining Order will only slightly delay a process that has already been a long process.
4 If anything, the delay may help the Defendant. Property values appear to be rising
5 slightly from the recent plummet and the Plaintiff's will continue to care for and
6 maintain the property as they have done for approximately twenty years.

7
8 **D. Public Policy.**

9 The legislature created a very specific Deed of Trust statute. It represents a
10 compromise between the rights of a creditor and the rights of a homeowner. The
11 creditor was given an expedited remedy in exchange for strict procedural safeguards.
12 The Defendant must be held to these procedures. The very least of these procedures is
13 to put the true beneficiary on the notice of Trustee's Sale and collect the consideration
14 within 24 hours of the sale. According to the documents filed with this Court, the
15 Defendant has not done so.

16 Furthermore, property rights and truthfulness in representations to the court are
17 crucial to our system. A full exploration of the all infringements and misrepresentations
18 should be conducted before someone is stripped of their home and private property.
19 Public Policy also favors equitable behavior and truth in recorded documents. In the
20 current case, the Defendant has acted in a highly inequitable manner:

21 First, the Defendants were tricked into a modification that would reshape their
22 loan. After they complied with the modification, it was dishonored and Defendants
23 demanded additional funds in bad faith. After they acquired the additional funds and
24 were about to wire it, they again had the modification dishonored and Kondaur refused
25 to accept payment.

26 Second, the Defendant obfuscated to whom the Plaintiffs were to communicate
27 with by listing M&I as the beneficiary, executing a modification agreement by Bosco,
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1 fabricating an assignment without legal basis or actual authority. Thereafter, Kondaur
2 claimed they were the servicer and that they would comply with the modification and
3 then refused after all payments had been tendered and accepted.

4 **IV. Conclusion**

5 The Defendants have engaged in inequitable conduct. They have obtained
6 favorable decisions from this Court based on proof that is, at best, a misrepresentation
7 and, at worst, outright fraud. A Temporary Restraining Order is critical to maintaining
8 the status quo and preventing a Writ of Possession being enforced and acted upon until
9 the hearing scheduled currently scheduled for August 4, 2011 to evaluate the nature and
10 extent of the infractions committed by the Defendants and the truth and validity of their
11 claims.

12 WHEREFORE, it is respectfully requested that:

13 Kondaur be enjoined from taking any adverse actions against the property without
14 further Order of the Court; and Pinal County Sherriff's Office be instructed to take no
15 action without further Order of the Court; and

16 Such other relief the Court deems just and proper.

17 RESPECTFULLY SUBMITTED this 20th day of July, 2011

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19 Rhoads & Associates, PLC

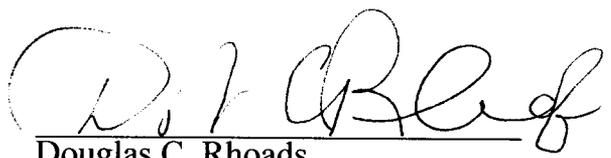
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VERIFICATION

That I, Douglas C. Rhoads, counsel in the above-entitled and numbered action and have read the contents of the Plaintiffs' Complaint, and believe that the allegations contained therein are true and correct, except as to matters alleged on information and belief.

DATED: July 20, 2011.



Douglas C. Rhoads