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CLERK OF DISTRICT COURT

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Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**BRIAN D. BENSEN,** )  
 )  
 ) *Plaintiffs,* )  
 )  
 )  
 ) vs. )  
 )  
 ) **MORTGAGE ELECTRONIC** )  
 ) **REGISTRATION SYSTEMS (MERS), et al.** )  
 )  
 ) *Defendants.* )  
 )

Case No. **CV 2009 2538**

**MEMORANDUM DECISION AND  
ORDER DENYING PLAINTIFF'S  
MOTION FOR JUDGMENT OF  
DEFAULT OF DEFENDANT  
PIONEER TITLE COMPANY**

**I. PROCEDURAL HISTORY AND BACKGROUND.**

Defendant First American Title (First American) was the trustee under the original Deed of Trust granted by plaintiff Brian D. Bensen (Bensen) in favor of GMAC Mortgage, LLC dba Ditech.com (Ditech). Bensen made payments directly to Ditech. Although it is not clear from Bensen's Complaint, at some point in early 2009, Bensen began receiving telephone calls from GMAC regarding his not having made payments as required. On March 14, 2009, Bensen was served with Notice of Trustee's Sale. Bensen then learned that the title had been transferred on February 24, 2009, but Bensen states he did not receive proper notice of this fact.

On March 30, 2009, Bensen filed this lawsuit. Bensen alleged in his objection to First American Title's motion to dismiss, the Defendants (he does not state whether he is referring to MERS, GMAC dba Ditech, First American Title, or Pioneer Title specifically) have failed to comply with I.C. § 45-1602 (Contract Notice under the

Consumer Foreclosure Protection Act), I.C. § 45-1505 (Foreclosure of Trust Deeds), and 15 U.S.C. §§ 1601, *et seq.* (Truth in Lending Act). On June 8, 2009, this Court entered its Order Dismissing First American Title pursuant to I.R.C.P. 12(c)(motion for judgment on the pleadings). On September 19, 2009, this Court denied Bensen's motion for default (presumably brought against all named defendants, although Bensen's motion is unclear) and granted GMAC dba Ditech and MERS' motion to dismiss.

Bensen purported to serve defendant Pioneer Title Company (Pioneer) on May 15, 2009. On September 15, 2009, Bensen filed his Motion for Default against Pioneer. On September 30, 2009, Bensen filed his Amended Motion for Judgment of Default against Pioneer. On May 4, 2010, Bensen filed another Motion for Default on Pioneer. Bensen noticed his motion for oral argument on May 20, 2010. This matter is not yet set for trial.

## **II. STANDARD OF REVIEW.**

The Idaho Supreme Court and Idaho Court of Appeals agree that the decision as to whether to enter default judgment is a matter of discretion for the trial court.

*Mastrangelo v. Sandstrom, Inc.*, 137 Idaho 844, 849-850, 55 P.3d 298, 303-304 (2002); *Johnson v. State*, 112 Idaho 1112, 1114, 739 P.2d 411, 413 (Ct.App. 1987) (comparing I.R.C.P. 55 to Fed.R.Civ.P. 55); *see also Clear Springs Trout Co. v. Anthony*, 123 Idaho 141, 143, 845 P.2d 559, 561 (1992).

## **III. ANALYSIS.**

Fatal to Bensen's Motion for Default against Pioneer is the fact that he has failed to properly serve Pioneer. Pioneer is an Idaho Corporation.

Idaho Rule of Civil Procedure 4(d)(4) sets forth the proper procedure for effecting

service upon a domestic or foreign corporation. That rule states service upon a corporation shall be:

Upon a domestic or foreign corporation by delivering a copy of the summons and complaint to an officer, managing or general agent, or to any other agent authorized by appointment or by statute of this state to receive service of process, and upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and the complaint to an officer or the managing or general agent of the partnership or association, or to any other agent authorized by appointment or by statute of this state to receive service of process. If service is upon a statutory agent, any statutory requirement as to the number of copies of summons and complaint to be served shall be followed, and if such agent is a state official such service may be made by registered or certified mail, and also, if the statute so requires, by mailing a copy to the defendant.

I.R.C.P. 4(d)(4)(A). Service upon a domestic corporation occurs by personal service of the Complaint and summons upon: (1) an officer of the corporation; (2) a managing or general agent; or (3) any other agent authorized by appointment or by statute of this state to receive service of process. *Id.* The Idaho Secretary of State website lists for Pioneer Tile Company of Kootenai County, Inc., Cindy Munson as its secretary and Tim Bungard as its President, and both have an address at 8151 W. Rifleman in Boise, ID listed as their address in the annual report filed with the Secretary of State. The registered agent for Pioneer is Tim Bungard, also at that same Boise address. Here, Bensen filed an Affidavit of Service on May 15, 2009, signed by Bensen's process served Phillip Thompson, stating Peggy Canus, "who identified herself... as an officer of Pioneer Title Company", was served on March 31, 2009, at 100 Wallace Avenue in Coeur d'Alene, Idaho. Affidavit of Service, pp. 1-2. Pioneer has its local place of business at 100 Wallace Avenue in Coeur d'Alene.

Despite Bensen's serving an individual who identified herself as an officer of Pioneer, service was not upon the named secretary or president of the corporation, nor

was service upon the registered agent for service of process (also the president of Pioneer). As such, service was improper and any judgment of default entered would be void. “Failure to comply with the rules for service of process may cause a subsequent judgment to be void as to a particular defendant for lack of personal jurisdiction...”

*Fisher v. Crest Corp.*, 112 Idaho 741, 743, 735 P.2d 1052, 1054 (Ct.App. 1052).

“Jurisdiction to enter a default is based upon the fact of service and, ordinarily, it will not be defeated by a showing of mere ministerial defects in the service or return of service.”

*Fisher*, 112 Idaho 741, 744, 735 P.2d 1052, 1055, citing *Mason v. Pelkes*, 57 Idaho 10, 59 P.2d 1087, *cert. denied* 299 U.S. 615, 57 S.Ct. 319 (1936). Ministerial defects render a judgment voidable, not void. *Workman v. Brown*, 103 Idaho 945, 946-47, 655 P.2d 462, 463-64 (Ct.App. 1982) (finding substantial compliance with the requirement for an affidavit of service and refusing to set aside default judgment where moving party does not deny service and can show no substantial prejudice).

Here, service upon an individual in the Coeur d’Alene office of Pioneer, despite any statements she may have made to the effect that she was an officer, goes beyond a mere ministerial defect. An analogy to the instant matter would be a plaintiff suing the McDonald’s corporation and attempting to effect service on McDonald’s corporation via delivery of the summons and complaint to the local McDonald’s on Appleway Avenue in Coeur d’Alene, rather than service upon an officer or agent listed with the Secretary of State for McDonald’s Corporation.

### **III. CONCLUSION AND ORDER.**

For the reasons set forth above, Bensen’s motion for default must be denied.

IT IS HEREBY ORDERED Bensen’s Motion for Default is DENIED.

Entered this 20<sup>th</sup> day of May, 2010.

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John T. Mitchell, District Judge

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**Certificate of Service**

I certify that on the \_\_\_\_\_ day of May, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Brian D. Bensen *pro se*  
1895 E. 12<sup>th</sup> Ave.  
Post Falls, ID 83854

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Jeanne Clausen, Deputy Clerk