STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

(Filed: August 9, 2012)

EQUIVEST, LLC	:	
	:	
v.	:	**C.A. No. NC 2009-0676**
	:	
SUSAN ALEXANDER AND JULIA PINHEIRO, A/K/A JULIE ALEXANDER A/K/A JULIA ALEXANDER AND JULIE PINHEIRO	:	
	:	
v.	:	
	:	
DEUTSCHE BANK NATIONAL TRUST COMPANY, BARCLAYS CAPITAL REAL ESTATE INC. D/B/A HOMEQ SERVICING, MERS, INC., AS NOMINEE AND AGENT FOR FREMONT INVESTMENT & LOAN, NICHOLAS BARRETT & ASSOCIATES	:	

DECISION

RUBINE, J. Before the Court is a Motion for Summary Judgment filed by Third Party Defendants' Deutsche Bank National Trust Company ("Deutsche Bank"), Barclays Capital Real Estate Inc. d/b/a Homeq Servicing ("Homeq"), and MERS, Inc., as nominee and agent for Fremont Investment & Loan ("MERS") (collectively, "Third Party Defendants")[1] Third Party Defendants seek the entry of judgment as a matter of law on all counts of the third party complaint ("Third Party Complaint") filed by Defendant, as Third Party Plaintiff, Julia Pinheiro, a/k/a Julie Alexander a/k/a Julia Alexander and Julie

[1] Defendant Nicholas Barrett & Associates is not a party to this Motion. Signature Group Holdings, Inc., successor in interest to Fremont Reorganizing Corporation f/k/a/ Fremont Investment & Loan filed a Motion for Summary Judgment as well; however, they are not a named party to this matter. MERS, Inc., as nominee and agent for Fremont Investment & Loan is a party to this matter.

Pinheiro's ("Julia").[2] Third Party Defendants aver in their Motion that the pleadings, depositions, admissions and affidavits of this matter all prove the absence of a genuine issue of material fact, and that Third Party Defendants are entitled to judgment as a matter of law.

I

Facts & Travel

The undisputed facts are as follows: In April of 2004, Defendants and Third Party Plaintiffs Susan Alexander ("Susan") and Julia inherited real property located at 114 Champlin Place North, Newport, Rhode Island ("the Property") as tenants in common. Two years later, on May 18, 2006, Susan executed an adjustable rate note ("Note") in favor of lender Fremont Investment & Loan ("Fremont") in the amount of $75,000. The Note was not co-signed by Julia. The Note provides, "I [borrower] understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" (Defs.' Ex. B at 1.)

Contemporaneously, Susan and Julia jointly executed a mortgage ("Mortgage") on the Property. The Mortgage designated MERS as "nominee for Lender and Lender's successors and assigns," as well as "mortgagee." (Defs.' Ex. A at 1.) The Mortgage further designated Susan and Julia as "Borrower[s]." Id. The Mortgage provided that "Borrower[s] do[] hereby mortgage, grant and convey to MERS, (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with Mortgage Covenants upon the Statutory Condition and with the Statutory Power of

[2] Due to the use of various aliases by the Third Party Plaintiff Julia Pinheiro, this Court will refer to the Third Party Plaintiffs by their first names only for the purposes of clarity. The Court certainly intends no disrespect.

Sale, the following described property . . . address of 114 Champlin Pl N, Newport." (Defs.' Ex. A at 3.) Thus, the Mortgage encumbered the entire Property owned by Susan and Julia as tenants in common. The Mortgage was recorded in the land evidence records of the City of Newport.

Two weeks preceding the execution of the Note and Mortgage, on May 1, 2006, Third Party Defendants provided Susan and Julia with all necessary disclosures, including the lender's pre-closing disclosures, federal and state required disclosures as well as the good faith estimate of settlement services and truth in lending disclosures. See Defs.' Ex. H. At no time, did Susan or Juila have a discussion with Fremont or any affiliate of Fremont.

Thereafter, on July 28, 2006, Fremont transferred all beneficial rights of the loan to Barclays Bank PLC ("Barclays"). (Uribarre Aff. ¶ 5.) On October 1, 2006, Fremont also transferred the servicing rights to Homeq. (Uribarre Aff. ¶ 5.) Thus, as of October 1, 2006, Fremont no longer held any direct interest in the Note and Mortgage.

On May 8, 2008, the Mortgage interest was assigned to Deutsche Bank. Thus, Deutsche Bank acquired all the rights granted to MERS as mortgagee of the Mortgage instrument, including the statutory power of sale. This assignment was recorded in the land evidence records of the City of Newport. At the time of the MERS Mortgage assignment to Deutsche Bank, MERS was not only mortgagee but also the nominee of the lender Fremont and Fremont's successors and assigns, Barclays.

Susan failed to make timely payments as obligated under the Note and Mortgage. As a result, Deutsche Bank, as mortgagee, commenced foreclosure proceedings, thereby mailing foreclosure notices to Susan and Julia. On December 10, 2008, Deutsche Bank

foreclosed on the Property. Plaintiff Equivest, LLC ("Equivest") succeeded as the highest bidder at the foreclosure sale. Equivest thereafter on December 30, 2008, recorded a foreclosure deed in the land evidence records of the City of Newport.

Subsequently, Equivest brought a trespass and ejectment action in the Second Division District Court, Equivest, LLC v. Pinheiro, No. 2009-0306. The parties agreed to stay the District Court action in order to seek a declaratory judgment in the Superior Court. Hence, Equivest filed this instant action in Newport Superior Court on December 10, 2009, seeking a declaration that Equivest is the record owner of the Property by reason of the recordation of the foreclosure deed. On January 20, 2010, Julia filed the Third Party Complaint seeking a declaration from this Court that she is the lawful owner of the Property, alleging the invalidity of the foreclosure and hence the invalidity of the recorded foreclosure deed in favor of Equivest. Third Party Defendants then filed this Motion for Summary Judgment under Rule 56 averring that the material facts are not in dispute, and accordingly based upon such undisputed facts they are entitled to judgment as a matter of law.

II

Standard of Review

The Court will only grant a motion for summary judgment if "after reviewing the admissible evidence in the light most favorable to the nonmoving party[,]" Liberty Mut. Ins. Co. v. Kaya, 947 A.2d 869, 872 (R.I. 2008) (quoting Roe v. Gelineau, 794 A.2d 476, 481 (R.I. 2002)), "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Super.

R. Civ. P. 56(c). The nonmoving party "has the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions." Liberty Mut., 947 A.2d at 872 (quotation omitted). To meet this burden, "[a]lthough an opposing party is not required to disclose in its affidavit all its evidence, he [or she] must demonstrate that he [or she] has evidence of a substantial nature, as distinguished from legal conclusions, to dispute the moving party on material issues of fact." Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998) (quotation omitted).

III

Analysis

A

Julia's Claims of Fraud and Misrepresentation

Julia claims she is entitled to judgment as a matter of law because the foreclosure sale on the Property was improper, and therefore, Equivest does not hold valid legal title to the Property. Specifically Julia avers that the Mortgage deed granting the statutory power of sale, which was signed both by Julia and Susan, was "procured by negligence, misrepresentation, fraud and wrongful and bad faith misrepresentations." (Compl. ¶ 6.) Julia further avers that she was wrongfully and illegally induced to execute the Mortgage and therefore the Mortgage was "wrongfully procured" and "illegal in its execution," hence Julia avers that the Mortgage is "void an initio." Id. The opposition to Summary Judgment is long on conclusions but woefully short of facts. Julia has failed to produce any admissible evidence to support these conclusory allegations.

In addition, Julia fails to specify with particularity the circumstances which constitute her allegations of fraud. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Super. R. Civ. P. 9(b). The general purpose of Rule 9(b) is to give "fair and specific notice of the alleged fraud" to the adverse party. Women's Development Corporation v. City of Central Falls, 764 A.2d 151, 161 (R.I. 2001). Therefore, Rule 9(b) requires that circumstances constituting fraud or mistake shall be stated with particularity. Kent, Rhode Island Civil Procedure § 9.2 (2011). What constitutes sufficient particularity depends upon the nature of the case and should always be determined in the light of the purpose of the rule to give fair notice to the adverse party and to enable him to prepare his responsive pleading. Id. Further, "the requirement must be read in the light of the mandate contained in Rule 8(e)(1) that 'each averment in a pleading shall be simple, concise, and direct,' and that of Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice.'" Id. To comply with the basic standard of fair notice to the adversary, "fairness requires greater detail with respect to averments of fraud and mistake than is required" of facts pleaded generally. Id.

Accordingly, Julia has the burden of detailing in the Third Party Complaint, and/or in opposition to Summary Judgment, such facts as the time, the place, the identity of the parties involved, and the nature of the fraud or mistake. Wright & Miller, 5 Federal Practice & Procedure § 1241 (3d ed.). In the Third Party Complaint, Julia merely sets forth conclusory allegations that the Mortgage was "procured by negligence, misrepresentation, fraud and wrongful and bad faith misrepresentation" and as a result, Julia "was wrongfully and illegally induced to execute" the Mortgage. (Compl. ¶ 6.)

Julia fails to set forth any facts in support of that legal conclusion, let alone stating such facts with the particularity required by Rule 9. In Rhode Island, the elements of a common law claim of fraud are that "the defendant made a false representation intending thereby to induce plaintiff to rely thereon, and that the plaintiff justifiably relied thereon to his or her damage." Women's Development Corporation v. City of Central Falls, 764 A.2d 151, 160 (R.I. 2001) (quoting Travers v. Spidell, 682 A.2d 471, 472-73 (R.I. 1996)). In the absence of proof from Julia with respect to this rudimentary information, the Third Party Complaint falls measurably short of meeting Rule 9(b)'s specificity requirement and renders insufficient Julia's opposition to Summary Judgment. Feinstein v. Resolution Trust Corp., 942 F.2d 34, 42 (1991). At a minimum, Julia's fraud claims as set forth in the Third Party Complaint should be dismissed without prejudice, allowing leave for Julia to amend the Third Party Complaint to comply with the specificity requirement of Rule 9(b).

B

Julia's Claim of Negligence

Third Party Defendants aver that they are entitled to Summary Judgment on Julia's claim of negligence as Third Party Defendants had no duty to advise Julia or Susan regarding the legal effect of the Note and Mortgage. Specifically, Third Party Defendants aver that Julia has failed to present any facts to create a genuine issue of material fact that would trigger a duty of care beyond the obligations set forth in the Note and Mortgage.

In the instant matter, the Court is required to determine whether, under applicable law, Third Party Defendants owed Julia a duty. "If no such duty existed, then the trier of

fact has nothing to consider and a motion for summary judgment must be granted." Ferreira v. Strack, 636 A.2d 682, 685 (R.I. 1994) (quoting Barratt v. Burlingham, 492 A.2d 1219, 1220 (R.I. 1985)).

"A defendant cannot be liable under a negligence theory unless the defendant owes a duty to the plaintiff." Id. (quoting Rodrigues v. Miriam Hospital, 623 A.2d 456, 460 (R.I. 1993)). Whether a duty exists in a particular situation is a question of law to be decided by this Court. Id. (citing D'Ambra v. United States, 114 R.I. 643, 649, 338 A.2d 524, 527 (1975)). In determining whether a defendant owes a duty to the plaintiff, our Supreme Court has "adopted an ad hoc approach of considering all relevant factors." Id. (citing D'Ambra, 114 R.I. at 650-52, 338 A.2d at 528). The factors "utilized in a particular case should reflect considerations of public policy, as well as notions of fairness." Id.

In consideration of all relevant factors, the Court finds that no further duty was owed by Third Party Defendants to Julia. It is undisputed that Julia has not identified any facts sufficient to trigger a claim of negligence. Third Party Defendants provided Susan and Julia with all the necessary disclosures more than two weeks prior to the closing date. These documents included the lender's pre-closing disclosures, federal and state required disclosures, as well as the good faith estimate of settlement services and truth in lending disclosures. See Defs.' Ex. H. In addition, Third Party Defendants complied with all contractual duties owed to Julia and Susan under the Mortgage. Susan received the loan proceeds of $75,000, and in consideration thereof executed the Note and Mortgage. Thereafter Susan defaulted on her re-payment obligations under the Note and Mortgage. Following default by Susan, Third Party Defendants commenced foreclosure

proceedings, thereby invoking the statutory power of sale, as granted to them by Julia and Susan through the execution of the Mortgage. Julia has failed to prove to this Court that Defendants violated any contractual duty to Julia, under the specific facts of this case. There has been adduced no evidence sufficient to create a genuine issue of material fact with respect to Third Party Defendants' alleged negligence or duty. Since Third Party Defendants did not owe an identifiable duty to Julia under the undisputed material facts of this matter, Third Party Defendants are entitled to judgment as a matter of law with respect to Julia's claim of negligence.

C

Good Faith and Fair Dealing

Julia further avers that Third Party Defendants breached the covenant of good faith and fair dealing as implied in the Mortgage contract, yet no facts have been presented in opposition to Summary Judgment to support such a claim.

It is well settled that "virtually every contract contains an implied covenant of good faith and fair dealing between the parties." Dovenmuehle Mortgage, Inc. v. Antonelli, 790 A.2d 1113, 1115 (R.I. 2002) (quoting Centerville Builders, Inc. v. Wynne, 683 A.2d 1340, 1342 (R.I. 1996)). The purpose of this covenant is so that the contractual objective may be achieved. Ide Farm & Stable, Inc. v. Cardi, 297 A.2d 643, 644-45 (R.I. 1972). In determining whether a party breached the covenant of good faith and fair dealing, "a party's actions must be viewed against the backdrop of contractual objectives in order to determine whether those actions were done in good faith." Hord Corp. v. Polymer Research Corp. of Am., 275 F. Supp. 2d 229, 238 (D.R.I. 2003) (quoting Thompson Trading Ltd. v. Allied Breweries Overseas Trading Ltd., 748 F. Supp. 936,

942-43 (D.R.I. 1990)). "[C]lear and unambiguous language set out in a contract is controlling in regard to the intent of the parties to such contract and governs the legal consequences of its provisions." Antonelli, 790 A.2d at 1115 (quoting Burke v. Potter, 771 A.2d 895 (R.I. 2011)).

By the clear, unambiguous language of the Mortgage instrument in this case, Julia and Susan denominated "MERS, . . . and [] the successors and assigns of MERS," as mortgagee thereby having the benefit of all "Mortgage Covenants upon the Statutory Condition and with the Statutory Power of Sale." (Defs.' Ex. A at 3.) The Mortgage further granted MERS the right "to exercise any or all of those interests, including, but not limited to the right to foreclosure and sell the Property; and to take any action required of Lender." Id. MERS was also designated by clear unambiguous language to be nominee of the lender, its successors and assigns. Thus, after Susan's default, Third Party Defendants did not breach the covenant of good faith and fair dealing by foreclosing upon the Property, a known consequence of default which Julia and Susan accepted and agreed to when the loan proceeds were accepted by Susan.

D

Validity of the Mortgage

Third Party Defendants insist, and the Court agrees, that Julia is bound by the express language of the Mortgage which she acknowledged and executed. Further, Third Party Defendants argue that Julia's mistaken belief that only Susan's "portion of" the Property was encumbered by the Mortgage is a unilateral mistake of law, thus, preventing the voiding of the Mortgage. Under common law, as tenants in common, Susan and Julia had common ownership of the entire undivided parcel and there could be no separate and

unidentifiable portion of the real estate owned independently by either party. That alleged belief that as tenants in common Julia held one-half interest in some identifiable portion of the real estate, is a belief not supported by the common law of real property. See Black's Law Dictionary (9th ed. 2009), tenancy in common (a tenancy by two or more persons, in equal or unequal undivided shares, each person having an equal right to possess the whole) (quoting Thomas F. Bergin & Paul G. Haskell, Preface to Estates in Land and Future Interests 54 (2d ed. 1984)) (the central characteristic of a tenancy in common is simply that each tenant is deemed to own by himself, with most of the attributes of independent ownership, a physically undivided part of the entire parcel); see also 20 Am. Jur. 2d Cotenancy and Joint Ownership § 32 (2006) (a tenancy in common is a form of ownership in which each cotenant owns a separate fractional share of undivided property); 86 C.J.S. Tenancy in Common § 1 (each tenant owns a separate fractional share of undivided property); In re Dahlgreen, 418 B.R. 852, 860 (D.N.J. 2009) (a tenancy in common is the ownership by two or more people of undivided interests in the same land . . . each tenant owns his or her proportionate share of the undivided whole); Fagnani v. Fisher, 418 Md. 371, 382, 15 A.3d 282, 289 (2011) (quoting Downing v. Downing, 326 Md. 468, 474, 606 A.2d 208, 211 (1992) (a tenant in common holds an undivided share in the whole estate, and an equal right to possess, use and enjoy the property).

It is well settled that "if there is not fraud, duress or mutual mistake, one who has the capacity to understand a written document who reads and signs it, or, without reading it or having it read to him, signs it, is bound by his [or her] signature as to all of its terms." Westerly Hospital v. Higgins, 106 R.I. 155, 160, 256 A.2d 506, 509 (1969)

(quoting Binder v. Benson, 225 Md. 456, 171 A.2d 24). "[A] party who signs an instrument manifests his [or her] assent to it and cannot later complain that he [or she] did not read the instrument or that he [or she] did not understand its contents." Rivera, 847 A.2d at 285 (quoting Kottis v. Cerili, 612 A.2d 661, 668 (R.I. 1992)). Furthermore, "one . . . who manifests acceptance of the terms of a writing which he [or she] should reasonably understand to be an offer or proposed contract, is bound by the contract, though ignorant of the terms of the writing or of its proper interpretation." Higgins, 106 R.I. at 160, 256 A.2d at 509 (citing 1 Restatement, Contracts, § 70). "[I]gnorance of the contents of a writing is not a defense to an action." Id. In addition, "a party who has received the benefit of the performance of a contract will not be permitted to deny his or her obligations unless paramount public interest requires it." City of Warwick v. Boeng Corp., 472 A.2d 1214, 1218 (R.I. 1984) (citing Steele v. Drummond, 275 U.S. 199, 205 (1927)).

Julia's assertion that she believed the Mortgage encumbered only Susan's portion of the Property is a frivolous claim which fails as a matter of law. Tenants in common cannot claim to own some identifiable, separate portion of the parcel so held. The Mortgage clearly and unambiguously describes the Property as "114 Champlin Pl N, Newport." (Defs.' Ex. A at 3.) In addition, Julia conceded to signing all the documents without reading them, thereby relying upon Susan's interpretation of the material terms of the documents. See Julia Dep. at 21:21-21:22. Therefore, it is the entirety of that Property that is encumbered by the Mortgage. Thus, Julia is bound by the terms of the Mortgage, regardless of her mistaken belief. See Higgins, 106 R.I. at 160, 256 A.2d at 509. The Court will not consider the Mortgage void based on Julia's unilateral mistake

or alleged misunderstanding. See Merrimack Mutual Fire Ins. Co. v. Dufault, 958 A.2d 620, 625-26 (R.I. 2008) (citing McEntee v. Davis, 861 A.2d 459, 463 (R.I. 2004)) (a party to a contract who labors under a mistake uncommon to the other side will not be afforded relief). Susan borrowed $75,000 from Fremont, securing the loan by a Mortgage on the Property owned as tenants in common. The Mortgage deed was executed by both Julia and Susan. Susan obligated herself to repay such sums under the terms of the Note. Julia cannot escape Susan's re-payment obligation by attempting to show she misunderstood the concept of joint tenancy.

E

Alleged Genuine Issues of Material Fact

1

Notary Public

In a futile attempt to create a genuine issue of material fact, Julia avers that certain signatures on the Mortgage are not her signature. (Julia Aff. ¶ 1(a).) Julia further avers that the notary was not present at the execution of the Mortgage and therefore Lee Nunes ("Nunes") never witnessed or acknowledged her signature. (Julia Aff. ¶ 1(b), (c).) In addition, Julia avers that the Mortgage was executed in Portsmouth, Rhode Island, but notarized in Fall River, Massachusetts and therefore that notarization is not valid. (Pinheiro Aff. ¶ 1(d).)

Third Party Defendants aver that Julia's allegations with respect to the notarization of her signature fail to raise an issue of material fact that would preclude the entry of summary judgment. The Mortgage is valid and binding against Julia as a matter of law, even if it is not notarized, in accordance with the provisions of § 34-11-1.

Section 34-11-1 provides that a conveyance "shall be void unless made in writing duly signed, acknowledged as hereinafter provided, delivered, and recorded in the records of land evidence in the town or city where the lands . . . are situated . . . ." Sec. 34-11-1. However, this provision provides for an exception to the acknowledgement requirement. Carrozza v. Carrozza, 944 A.2d 161, 165 (R.I. 2008). "Section 34-11-1 dictates that 'the conveyance, if delivered, as between the parties and their heirs, and as against those taking by gift or devise, or those having notice thereof, shall be valid and binding though not acknowledged or recorded.'" (emphasis added.) Id. (quoting Sec. 34-11-1). Thus, the Mortgage is "valid and binding" upon the parties "even [though] not acknowledged or recorded." Rhode Island Hospital Trust National Bank v. Boiteau, 119 R.I. 64, 69, 376 A.2d 323, 326 (1977) (finding a deed valid and binding against those who have knowledge of it even if not acknowledged and recorded). Julia's assertion that the Mortgage is invalid as not properly notarized fails to create a genuine issue of material fact sufficient to defeat Third Party Defendants' Motion for Summary Judgment.

In addition, Julia's assertion that certain signatures on the Mortgage are not her signature fails to create a genuine issue of material fact sufficient to defeat Third Party Defendants' Motion for Summary Judgment. Julia admitted in her deposition that it was indeed her signature and initials on the Mortgage. See Julia Dep. at 24:14-24:19; see also Julia Dep. at 24:22-24:23; Julia Dep. at 25:10-25:14; Julia Dep. at 38:4-38:6. In addition, Julia only disputes the validity of the signatures of Julia Alexander and Julie Alexander, not the validity of the signature of Juila Pinheiro. The signatures with respect to Julia's aliases are immaterial to the validity of the Mortgage instrument. Accordingly, Julia concedes that she executed the Mortgage instrument with the signature as Julia Pinheiro.

Julia further stated in the deposition that she was uncertain if one particular signature was hers. Julia Dep. at 28:20-28:24; see also Julia Dep. at 29:1. Uncertainty is not enough to establish a genuine issue of material fact. "Rule 56(e) requires that 'supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.'" Nichola v. Fiat Motor Co., Inc., 463 A.2d 511, 513 (R.I. 1983) (quoting Rule 56(e)). If a party's "affidavit fails to comply with these requirements, it is useless in establishing . . . a genuine issue of material fact." Id. Moreover, belief, no matter how sincere, is not equivalent to knowledge, and affidavits are insufficient to establish a genuine issue of material fact where they are based on information and belief of that affiant. 27A Fed. Proc., L. Ed. § 62:654. Likewise, an affidavit is insufficient where it is based on mere suspicion. Id. Allegations not made from an affiant's own knowledge are subject to being stricken. 2A C.J.S. Affidavits § 45. Julia's belief that the signatures on the Mortgage may not be her signature is insufficient to create a genuine issue of material fact. The nonmoving party "has the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions." Liberty Mut., 947 A.2d at 872 (quotations omitted).

2

Foreclosure

Julia further avers that no public foreclosure auction took place on December 10, 2008. (Julia Aff. ¶ 8.) Julia suggests that further discovery is necessary to determine whether foreclosure proceedings and notice requirements were followed. At no time did

Julia or her counsel request a continuance under Rule 56(f) to explore those alleged facts by way of discovery in order to establish a genuine issue of material fact to raise in opposition to a motion for summary judgment. At this point Julia speculates that further discovery may result in the determination of facts that could be used in opposition to summary judgment. Such speculation as to what facts might be uncovered if further discovery is allowed is an insufficient basis by which to oppose a motion for summary judgment. Once a party files and serves a properly supported summary judgment motion, an alarm bell begins to toll and it is time for the opposing parties either to put up their evidence or shut up their case. Wright v. Zielinski, 824 A.2d 494 (R.I. 2003).

Rule 56(f) permits the continuance of a matter, at the Court's discretion, to "permit affidavits to be obtained or depositions to be taken or discovery to be had" in order for the party opposing a motion for summary judgment to "present by affidavit facts essential to justify the party's opposition." Super. R. Civ. P. 56(f). Our Supreme Court "has held that a decision to grant a continuance pursuant to Rule 56(f) is discretionary." Holley v. Argonaut Holdings, Inc., 968 A.2d 271, 275-76 (R.I. 2009) (citing Chevy Chase, F.S.B. v. Faria, 733 A.2d 725, 727 (R.I. 1999)). In addition, "Rule 56(f) 'clearly mandates that the party opposing the motion for summary judgment file affidavits stating why he or she cannot present facts in opposition to the motion.'" Id. at 276 (quoting Rhode Island Depositors' Economic Protection Corp. v. Insurance Premium Financing, Inc., 705 A.2d 990 (R.I. 1997)). Julia has failed to request a continuance under Rule 56(f) and has not filed an affidavit stating "why . . . she cannot present facts in opposition to" the pending Motion for Summary Judgment or that her failure to conduct such discovery prior to the filing of the Motion for Summary Judgment was

justified. Id. In fact, the Motion for Summary Judgment was filed May 20, 2011 and Julia had from that time to the present to conduct any necessary discovery to raise an objection to Defendants' Motion for Summary Judgment. Accordingly, this Court refuses to continue the Motion for Summary Judgment in order for Julia to conduct further discovery. Third Party Defendants' Motion for Summary Judgment was mailed to Julia's counsel on May 20, 2011. Julia had ample opportunity to conduct discovery prior to the hearing date of September 27, 2011. See Id.

Julia has failed to prove to this Court that there exist genuine issues of material fact with respect to Third Party Defendants conducting of a foreclosure auction on December 10, 2008. The nonmoving party "has the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions." Liberty Mut., 947 A.2d at 872 (quotation omitted). Julia has not met her burden of proving that there exists a genuine issue of material fact as to whether Third Party Defendants actually conducted a foreclosure auction at the Property on December 10, 2008.

3

Relationship with Nicholas Barrett & Associates

Julia further avers that there are genuine issues of material fact with respect to the principal agent relationship between Fremont and the Law Offices of Nicholas Barrett & Associates ("NBA"). Specifically, Julia asserts that there exist genuine issues of material fact as to the attorney-client relationship of Julia and Susan with NBA.

Since NBA is not a party to this Motion, Julia's assertion that there exists genuine issues of material fact with respect to a possible attorney-client relationship of Julia and

Susan with NBA fails to create a genuine issue of material fact sufficient to defeat Third Party Defendants' Motion for Summary Judgment.

IV

Conclusion

For the above cited reasons, Third Party Defendants' Motion for Summary Judgment is granted. The claims asserted in the Third Party Complaint are denied and dismissed, however the claim of fraud asserted in the Third Party Complaint is dismissed without prejudice, allowing an opportunity for the Third Party Plaintiffs to file an amended Third Party Complaint that complies with the specificity requirements of Rule 9(b). There being no just reason for delay, Final Judgment shall enter as to all counts of the Third Party Complaint except for the claim of fraud, as indicated in accordance with Rule 54(b) in favor of Third Party Defendants Deutsche Bank, Homeq, and MERS.