

I

Facts & Travel

The facts as they appear in the pleadings are as follows: On February 23, 2007, Plaintiffs executed a promissory note (“Note”) in favor of American Mortgage Network Inc., dba Amnet Mortgage (“Amnet”) in the amount of \$300,000, having borrowed that amount to purchase the Property. See Ans. Ex. B. Contemporaneously Plaintiffs executed a mortgage on the Property to secure the Note (hereinafter, “Mortgage”). The following language appears in the Mortgage deed “Borrower does 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 Covenant upon the Statutory Condition and with the Statutory Power of Sale.” Compl. unmarked Ex. at 3; Ans. Ex. C at 3. The Mortgage was duly executed and recorded in the land evidence records for the Town of Johnston on February 28, 2007.

Thereafter, Amnet transferred the Note, through endorsement, to IndyMac Bank, FSB (“IndyMac”) without recourse. (Ans. ¶ 4.) Subsequently, IndyMac endorsed the Note in blank to FNMA. Id. IndyMac remained the servicing agent of the Mortgage on behalf of FNMA. Id.

On July 11, 2008, the Office of Thrift Supervision closed IndyMac and appointed the Federal Deposit Insurance Corporation (“FDIC”) as receiver for IndyMac. (Ans. ¶ 5.) See Ans. Ex. F. FDIC reorganized IndyMac into a new entity, known as IndyMac Federal, and transferred all of IndyMac’s assets to IndyMac Federal. Id. see Ans. Ex. G. Then, FDIC, still acting as receiver for IndyMac, assumed IndyMac’s responsibilities as servicer of the Note that IndyMac had previously transferred to FNMA. Thereafter,

FDIC transferred its responsibilities as servicer to OneWest, a transfer that was approved by the then current note-holder FNMA as evidenced by the contract executed between FNMA and OneWest whereby OneWest agreed to service the note then held by FNMA. (Ans. ¶ 4.) See Ans. Ex. E.

On May 15, 2009, MERS, as nominee for the original lender Amnet and Amnet's successors and assigns, assigned its interest in the Mortgage to OneWest. See Compl. unmarked Ex.; see also Ans. Ex. D. Thus, as of May 15, 2009, OneWest by agreement with FNMA, was authorized to service the Note for FNMA the note-holder. OneWest was also the mortgagee by assignment from MERS.

Plaintiffs failed to make timely payments pursuant to the terms of the Note. OneWest, as servicer for FNMA, sent notice of default to Plaintiffs and scheduled a foreclosure sale for July 28, 2009. This Court enjoined the sale for two weeks upon the initiation of litigation by the Plaintiffs. The foreclosure sale was thereafter held by OneWest, as mortgagee and servicer for the note-holder, on January 20, 2010. FNMA was the successful bidder at the foreclosure sale and recorded its foreclosure deed thereafter.

On January 18, 2011, this Court denied Plaintiffs' Motion to Strike Defendants' Answer. Meanwhile, Defendants filed this Motion for Entry of Judgment on the Pleadings under Rule 12(c). The parties submitted to the Court supplemental memoranda to discuss the impact of the decision of this Court in Porter v. First NLC Financial Services, No. PC-2010-2526, 2011 WL 1251246 (R.I. Super. March 31, 2011) (Rubine, J.) on the instant motion.

II

Standard of Review

A

Conversion

Based on its consideration of exhibits outside of the pleadings, this Court will consider this motion for Judgment on the Pleadings (Rule 12(c)) as a motion for Summary Judgment (Rule 56).

In this matter, Defendants' Motion does not append any new documents; it incorporates by reference the same exhibits as originally attached to Defendants' Verified Answer.² Pursuant to Rule 10(c), the Court may consider a copy of any written instrument which is an exhibit to a pleading under the Rule 12(c) standard. See Super. R. Civ. P. 10(c). Therefore, this Court may properly consider the written instruments attached to Defendants' Answer as exhibits. However, documents not attached to a pleading, but rather to a motion, have been submitted by Plaintiffs.³ Defendants'

² Defendants' Verified Answer contains the following exhibits:

- a. Foreclosure Deed (Ex. A-1); Affidavits of Sale (Ex. A-2) and Non-Military Service (Ex. A-3); and the foreclosure advertisements (Ex. A-4).
- b. The Note (Ex. B).
- c. The Mortgage in its entirety (Ex. C).
- d. The Assignment from MERS, as nominee for Amnet's successors and assigns, to OneWest of the mortgage (Ex. D).
- e. The servicing contract for the mortgage between FNMA and One West in its entirety (Ex. E).
- f. The Office of Thrift Supervision's Order placing IndyMac into conservatorship with FDIC (Ex. F).
- g. FDIC's Resolution reorganizing IndyMac into IndyMac Federal (Ex. G).
- h. The Notice of Mortgagee's Sale (Ex. H).

³ Plaintiffs' Objection contains the following new materials:

- a. FDIC's Power of Attorney transferring its assets to OneWest (unmarked ex.).
- b. A list of names entitled "Exhibit A Attorneys-in-Fact" (unmarked ex.).
- c. A flow chart entitled "Dan & Teri Securities Transaction Process Reverse Engineered Version 4.1" (Plaintiffs in this matter are named Patricia and Frank Breggia) (unmarked ex.).
- d. A flow chart purporting to describe the travel of Plaintiffs' Mortgage and Note (unmarked ex.).
- e. The certifications of verified answers for this matter as well as some of Plaintiffs' attorney's other cases (unmarked ex.).

Supplemental Memorandum also contains an additional item.⁴ Thus, this Court must decide whether to exclude these materials because they are outside the pleadings and adjudicate using the judgment on the pleadings standard of review, or include them and convert the Motion into a motion for summary judgment under Rule 56. The Court is satisfied that the party opposing the 12(c) motion had adequate notice of conversion to a motion for Summary Judgment and a “reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.” Payette v. Mortgage Elec. Reg. Sys., No. PC-2009-5875, 2011 WL 3794701 at * 6 (quoting Super. R. Civ. P. 12(c)). The Court therefore will consider Defendants’ 12(c) motion as a motion for Summary Judgment.

B

Summary Judgment Standard of Review

This 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 matter of law.” Super. R. Civ. P. 56(c).

The nonmoving party, in this case the Plaintiffs, “has the burden of proving by

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- f. Deposition of Erica Johnson-Seck in IndyMac v. Machado, No. 20 2008 CA 037322XXXX MB A W (Fla. Cir. Ct. Palm Beach County) (Ex. 1).
 - g. An assignment of mortgage for a Woonsocket, Rhode Island property (not the subject property in dispute) from MERS to IndyMac Federal (Ex. 2).
 - h. Flow Charts purporting to describe the travel of the mortgage and other homeowners Plaintiffs’ attorney represents in other cases (Ex. 3).
 - i. A United States Department of Treasury Consent Order wherein MERS agrees to review its business operations and to take quality assurance measures (Ex. 4).

⁴ Defendants’ Supplemental Memorandum includes a flow chart purporting to trace the travel of Plaintiffs’ obligations.

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

Since the facts herein are nearly identical to the facts in Payette and the Mortgage executed by the Plaintiffs contains the same operative language as the mortgage considered in Payette; and the parties in their memoranda fail to offer any material distinctions between the undisputed facts and the facts relied upon in the Court’s earlier determination of similar cases, this Court will incorporate and adopt the reasoning set forth in Payette, 2011 WL 3794701. In that case, this Court determined that according to undisputed material facts the defendants were entitled to judgment as a matter of law. The same outcome obtains in this case.

The undisputed facts, as evidenced by the provisions of the undisputed documents and affidavits, are as follows: Plaintiffs executed the Note in favor of Amnet. To secure the Note, Plaintiffs executed a Mortgage on the Property. The Mortgage designated MERS as nominee of Amnet, as well as mortgagee. Further, as mortgagee, MERS, as well as the successors and assignees of MERS, were expressly granted the Statutory Power of Sale by the clear unambiguous language of the Mortgage in the Mortgage

instrument as signed by the Plaintiffs as borrowers and mortgagors. See Compl. unmarked Ex. at 3. Thereafter, on May 15, 2009, MERS assigned its interest in the Mortgage to One West. One West then by assignment became the party having authority under the Statutory Power of Sale as granted in the Mortgage. Plaintiffs defaulted under the terms of the Note. Upon Plaintiffs' default, OneWest, as servicer for FNMA the current note-holder by way of blank endorsement by IndyMac, had the right and ability to exercise the Statutory Power of Sale and properly commenced foreclosure proceedings against the Plaintiffs. FNMA was the successful bidder at the foreclosure sale. The foreclosure deed in favor of FNMA was thereafter recorded. FNMA, as the buyer at the lawfully conveyed foreclosure sale, holds the record title to the Property. Plaintiffs are not entitled to clear the title leaving them as the owners of record, because the foreclosure sale, which has led to the recording of a deed in favor of FNMA, was lawfully noticed and conveyed.

Plaintiffs have not demonstrated by affidavit, or otherwise, that there exists a genuine issue of material fact which would vary this result.⁵ Furthermore, the issues presented in this matter have previously been decided by this Court. See Kriegel v. Mortgage Elec. Reg. Sys., No. PC-2010-7099, 2011 WL 4947398 (R.I. Super. October 13, 2011) (Rubine, J.); see also Payette, 2011 WL 3794701; Porter, 2011 WL 1252146; Bucci v. Lehman Brothers Bank, FSB, No. PC-2009-3888, 2009 WL 3328373 (R.I.

⁵ Although Plaintiffs allege that MERS assignment of the Mortgage interest was not signed by an authorized representative, Plaintiffs have presented no evidence to demonstrate that the signature is unauthorized. See Payette, 2011 WL 3794701 at * 11 (finding the contention that MERS' assignments were executed by an unauthorized signatory to be a mere conclusion or legal opinion that was 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 (quotation omitted). The parties opposing the Motion for Summary Judgment have not met their burden to show that there exists a genuine issue of material fact as to whether the assignment was executed by a person not authorized by the assignee to execute that document.

Super. August 25, 2009) (Silverstein, J.); Rutter v. Mortgage Electronic Registration System, Nos. PC-2010-4756, PD-2010-4418, 2012 WL 894012 (R.I. Super. March 12, 2012) (Silverstein, J.). Accordingly, Defendants' are entitled to judgment as a matter of law based on the authority of the above cited cases. In the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of Superior Court cases on this subject represent the prevailing view of the law in Rhode Island on these subjects. The decisions of the Superior Court unanimously support this result. The Court hereby incorporates by reference the reasoning and authorities relied upon in those previous decisions.

CONCLUSION

Defendants' Motion for Judgment as a Matter of Law, decided as a Motion for Summary Judgment, is GRANTED. Counsel for the prevailing party shall submit an Order in accordance with this decision.