

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: MAY 7, 2012)

ERIC NOURY

:

v.

:

C.A. NO. PC 2009-7014

:

DEUTSCHE BANK NATIONAL

:

TRUST COMPANY; MERS;

:

AMERICA'S MORTGAGE NETWORK;

:

INDYMAC FEDERAL BANK, FSB

:

:

DECISION

RUBINE, J. Before this Court is Defendants' Mortgage Electronic Registration Systems ("MERS") and Deutsche Bank National Trust Company ("Deutsche Bank"), (collectively, "Defendants")¹ Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Rhode Island Superior Court Rules of Civil Procedure. Plaintiff Eric Noury ("Plaintiff") filed a declaratory judgment action petitioning this Court to quiet title to certain real property located at 2450 Hartford Avenue, Johnston, Rhode Island ("Property"). Plaintiff is challenging Defendant IndyMac Federal Bank, FSB's ("IndyMac Federal") foreclosure on the Property, on behalf of Defendant Deutsche Bank, on December 17, 2008, and the title the foreclosure buyer, Deutsche Bank, acquired through the allegedly invalid foreclosure sale.

¹ Defendants IndyMac Federal Bank, FSB and American Mortgage Networks are not parties to this Motion for Judgment on the Pleadings pursuant to Rule 12(c).

I

Facts & Travel

On February 13, 2006, Plaintiff executed a promissory note (“Note”) in favor of American Mortgage Networks Inc., d/b/a Amnet Mortgage (“Amnet”) in the amount of \$432,000, having borrowed that amount to purchase the Property. See Defs.’ Am. Ans. Ex. B. Contemporaneously, Plaintiff executed a mortgage (“Mortgage”) on the Property to secure the Note. The Mortgage states “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. Ex. 1 at 3; Defs.’ Am. Ans. Ex. A at 3. The Mortgage was recorded in the land evidence records for the Town of Johnston on February 17, 2006.

Thereafter, Amnet transferred the Note, through blank endorsement, to IndyMac Bank, FSB (“IndyMac”) without recourse. (Defs.’ Am. Ans. ¶ 2.) Subsequently, on May 1, 2006, IndyMac endorsed the Note in blank to Deutsche Bank. Id. IndyMac remained the servicing agent of the Note on behalf of Deutsche Bank. Id.

On July 11, 2008, the Office of Thrift Supervision closed IndyMac and appointed the Federal Deposit Insurance Corporation (“FDIC”) as receiver for IndyMac. (Defs. Am. Ans. ¶ 4.) See Defs.’ Am. Ans. Ex. C. FDIC reorganized IndyMac into a new entity named IndyMac Federal, and transferred all of IndyMac’s assets to IndyMac Federal. Id. Then, FDIC, still acting as receiver for IndyMac Federal, assumed IndyMac’s responsibilities as servicer of the Note that IndyMac had previously transferred to Deutsche Bank. Id. See Defs.’ Am. Ans. Ex. C.

On October 15, 2008, MERS, as nominee for Amnet and Amnet's successors and assigns, assigned its interest in the Mortgage to IndyMac Federal. See Compl. Ex. 2; see also Defs.' Am. Ans. Ex. D. Thus, as of October 15, 2008, IndyMac Federal was servicer of the Note held by Deutsche Bank. Deutsche Bank was both mortgagee by assignment and note-holder by endorsement.

Plaintiff failed to make timely payments pursuant to the terms of the Note. On December 17, 2008, IndyMac Federal, assignee of MERS conducted a foreclosure sale. Deutsche Bank was the successful bidder at the foreclosure sale and subsequently recorded its foreclosure deed. See Defs.' Am. Ans. Ex. E.

On December 8, 2009, Plaintiff filed the Complaint seeking nullification of the foreclosure sale and return of title to him. Count I of Plaintiff's Complaint is a claim for "Injunctive Relief and Declaratory Judgment" (Compl. p. 5.) and Count II is a claim for "Quieting Title." (Compl. p. 6.) Subsequent to the filing of the Complaint, Defendants filed a Verified Answer. Thereafter, Plaintiff filed a Motion to Strike Defendants' Answer which was denied by this Court. Meanwhile, Defendants filed this Motion for Entry of Judgment on the Pleadings under Rule 12(c). At the motion hearing the parties agreed to submit supplemental memoranda to discuss the impact of the decision 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. The Court then took the matter under advisement.

II

Standard of Review

A

Conversion to Summary Judgment

In this matter, Defendants' Motion does not append any new documents; it incorporates by reference the same exhibits referenced in and attached to Defendants' Verified Amended 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 without converting the Motion for Judgment on the Pleadings (Rule 12(c)) to a Motion for Summary Judgment (Rule 56). However, documents not attached to a pleading, but rather to a motion, have been submitted by Plaintiff.³ Defendants' Supplemental Memorandum also contains an additional item,⁴ as does Plaintiff's Supplemental Memorandum.⁵ Thus, this Court must

² Defendants' Verified Amended Answer contains the following exhibits:

- a. The Mortgage in its entirety (Ex. A).
- b. The Note (Ex. B).
- c. The Office of Thrift Supervision's Order placing IndyMac into conservatorship with FDIC (Ex. C).
- d. The Assignment of the mortgage interest from MERS, as nominee for Amnet's successors and assigns, to IndyMac Federal (Ex. D).
- e. Foreclosure Deed (Ex. E-1); Affidavits of Sale (Ex. E-2) and Non-Military Service (Ex. E-3); and the foreclosure advertisements (Ex. E-4).

³ Plaintiff's Objection contains the following new materials:

- a. FDIC's Power of Attorney transferring its assets to Deutsche Bank (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" (Plaintiff in this matter is named Eric Noury) (unmarked ex.).
- d. A flow chart purporting to describe the travel of Plaintiff's Mortgage and Note (unmarked ex.).
- e. The certifications of verified answers for this matter as well as other cases (unmarked ex.).

⁴ Defendants' Supplemental Memorandum includes a flow chart purporting to trace the travel of Plaintiff's obligations.

⁵ Plaintiff's Supplemental Memorandum includes the following:

decide whether to limit its consideration of this matter to the pleadings and documents referenced therein and attached thereto; and thereby exclude these materials outside the pleadings and adjudicate using the judgment on the pleadings standard of review, or consider such documents and convert the Motion into a motion for summary judgment under Rule 56. The Court finds that all documents material to this matter were attached to the pleadings. Additional documents attached to the parties' memoranda are not material to the Court's determination of this matter, and therefore, will not be considered by this Court. Accordingly, the Court will consider Defendants' Motion as one for Judgment on the Pleadings.

B

Judgment on the Pleadings Standard of Review

A Rule 12(c) Motion for Judgment on the Pleadings provides a trial court with the means of disposing of a case early in the litigation process when the material facts are not in dispute, after the pleadings have been closed, and only questions of law remain to be decided. Haley v. Town of Lincoln, 611 A.2d 845, 847 (R.I. 1992). "The standard to be applied by the court in determining whether to grant a Rule 12(c) motion is a restrictive one. The court is to view the alleged facts presented in the pleadings in the manner most favorable to the nonmoving party." Id. at 847-48. Thus, the factual allegations contained in the non-movant's pleadings are admitted as true for purposes of the motion and all proper inferences to be derived from the pleadings are to be drawn in favor of the non-

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- a. 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).
 - b. An assignment of mortgage for a Woonsocket, Rhode Island property (not the subject property in dispute) from MERS to IndyMac Federal (Ex. 2).
 - c. Flow Charts purporting to describe the travel of the Mortgage and other homeowners which Plaintiff's attorney represents in other cases (Ex. 3).
 - d. A United States Department of Treasury Consent Order wherein MERS agrees to review its business operations and to take quality assurance measures (Ex. 4).

movant. Id. at 847-48. “In this fashion the court considering a Rule 12(c) motion ensures that the rights of the nonmovant are adjudicated as fully as if there had been a trial.” Id. at 847-48.

III

Discussion

Since the facts set forth in the pleadings are nearly identical to the facts in Payette, and the Mortgage as executed by Plaintiff contains the same operative language as the mortgage considered in Payette, this Court will incorporate and adopt the reasoning set forth in Payette, 2011 WL 3794701.⁶ 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 allegations of the pleadings and the undisputed documents referenced therein and attached to the pleadings, are as follows: Plaintiff executed the Note in favor of Amnet. To secure the Note, Plaintiff executed a Mortgage on the Property. The Mortgage designates MERS as nominee of Amnet, as well as mortgagee. Further, as mortgagee, MERS, as well as the successors and assigns of MERS, were expressly granted the Statutory Power of Sale by the clear unambiguous language of the Mortgage instrument as acknowledged and signed by Plaintiff as borrower and mortgagor. Compl. Ex. 1 at 3. Thereafter, on October 15, 2008, MERS assigned its interest in the Mortgage to IndyMac Federal. IndyMac Federal by assignment then became an assignee of MERS, possessing the Statutory Power of Sale as granted in the Mortgage. Upon Plaintiff’s default, IndyMac Federal, as servicer for

⁶ The Court further notes that 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.

Deutsche Bank the current note-holder through blank endorsement by IndyMac and as assignee of the Mortgage by assignment from MERS, had the right and ability to exercise the Statutory Power of Sale and properly commence foreclosure proceedings against the Plaintiff. Deutsche Bank was the successful bidder at the foreclosure sale. The foreclosure deed in favor of Deutsche Bank was thereafter recorded. Deutsche Bank, as the buyer at the lawfully convened foreclosure sale, holds the record title to the Property. Accordingly, Plaintiff is not entitled to clear the title thereby leaving him as the owner of record because the foreclosure sale, which has led to the recording of a deed in favor of Deutsche Bank, was lawfully noticed and conducted. Therefore, Deutsche Bank is the owner of record, and holds title to the Property pursuant to the recorded foreclosure deed, which recorded deed is presumptively valid. See Restatement of the Law Third Property (Mortgages) (1997) § 4.9 (a purchaser at a foreclosure sale not only acquires the prior owner's equity of redemption, but a title free and clear of all interests that were junior to the lien that was foreclosed); see also 74 C.J.S. Quieting Title § 75 (2012) (every presumption will be made in favor of the holder of the legal title . . . title once established remains until the contrary appears); Sherbonday v. Surring, 194 Iowa 203, 188 N.W. 831 (1922) (the presumptions are in favor of the legal title); Babcock v. Dangerfield, 98 Utah 10, 94 P.2d 862 (1939) (citing Eltzroth v. Ryan, 89 Cal. 135, 26 P. 647 (1891)) (it having been proved that title was vested in plaintiff, such condition would be presumed to exist until the contrary be shown); 65 Am. Jur. 2d Quieting Title § 73 (in a quiet title action, there is a presumption in favor of the record title holder); Breliant v. Preferred Equities Corp., 112 Nev. 663, 918 P.2d 314 (1996); Franklin v. Laughlin, No. SA-10-CV-1027 XR, 2011 WL 598489 * 26 (W.D. Tex. Jan. 13, 2011) (in a quiet title action, . . . the

burden of proof rests with the plaintiff to prove good title in himself).

Plaintiff has failed to demonstrated by affidavit, or otherwise, that there exists a genuine issue of material fact which would vary this result. Furthermore, the issues presented in this matter have been previously 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. Super. August 25, 2009) (Silverstein, J.); Rutter v. Mortgage Electronic Registration Systems, 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 above cited authority. In the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of Superior Court cases on this subject represents the prevailing view of the law in Rhode Island. 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.

IV

Conclusion

Defendants' Motion for Judgment as a Matter of Law is granted. There being no just reason for delay, Final Judgment shall enter in favor of Defendants MERS and Deutsche Bank under Rule 54(b).