STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: April 5, 2013)

LAURIE M. SOUTHWICK	**:**	
STEPHEN E. SOUTHWICK	**:**	
	:	
v.	**:**	**C.A. No. KC 2010-0290**
	:	
MORTGAGE ELECTRONIC	**:**	
REGISTRATION SYSTEMS, INC.;	**:**	
HOMECOMINGS FINANCIAL	**:**	
SERVICES; AURORA LOAN	**:**	
SERVICES	**:**	

DECISION

RUBINE, J. Defendants Mortgage Electronic Registration Systems, Inc. (MERS) and Aurora Loan Services (Aurora) (collectively, "Defendants")[1] move for summary judgment pursuant to Super. R. Civ. P. 56. Plaintiffs Laurie M. Southwick and Stephen E. Southwick (collectively, "Plaintiffs") filed a verified complaint (Complaint) seeking declaratory relief and to quiet title to certain real property located at 245 Read School House Road, Coventry, Rhode Island (the "Property"). The gravamen of Plaintiffs' Complaint challenges the foreclosure sale of the Property, alleging that the foreclosing party, Aurora, failed to possess the statutory power of sale; thus, rendering the foreclosure sale a nullity.

I

FACTS & TRAVEL

The record, for summary judgment purposes, reflects that on May 18, 2006, Plaintiffs executed an adjustable rate note (Note) in favor of lender Homecomings

[1] Defendant Homecomings Financial Services is not a party to this Motion.

Financial Services (Homecomings) for $315,000, using the loan proceeds to finance the purchase of the Property. (Trompisz Aff. ¶¶ 6-7; Defs.' Mot. Summ. J. Ex. B.) Homecomings thereafter specially endorsed the Note to Residential Funding Corporation (Residential). (Trompisz Aff. ¶ 7; Defs.' Mot. Summ. J. Ex. B.) Residential subsequently endorsed the Note in blank via an allonge to the Note. (Trompisz Aff. ¶ 8; Defs.' Mot. Summ. J. Ex. C.)

Contemporaneously with the execution of the Note, Plaintiffs executed a mortgage (Mortgage) on the Property to secure the Note. (Trompisz Aff. ¶ 5; Defs.' Mot. Summ. J. Ex. A; Compl. Ex. 1.) The Mortgage designates Homecomings as the "Lender" and further designates MERS as the "mortgagee" as well as the "nominee for [Homecomings] and [Homecomings'] successors and assigns." (Compl. Ex. 1 at 1-2.) In addition, the Mortgage provides that, "Borrower does hereby mortgage, grant and convey to MERS, (solely as nominee for [Homecomings] and [Homecomings'] successors and assigns) and to the successors and assigns of MERS, with Mortgage Covenants upon the Statutory Condition and with the Statutory Power of Sale." Id. at 3. The Mortgage further provides that:

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for [Homecomings] and [Homecomings'] successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of [Homecomings]. Id.

The Mortgage was recorded in the land evidence records of the Town of Coventry. (Trompisz Aff. ¶ 5; Defs.' Mot. Summ. J. Ex. A.)

Aurora, as servicer for the holder of the Note, attempted to assist Plaintiffs with loan modification efforts and proposed a special forbearance agreement (Agreement). (Trompisz Aff. ¶¶ 9, 11.) Plaintiffs never executed the Agreement, claiming that it was never received. (Trompisz Aff. ¶ 9.) Plaintiffs failed to pay their October 1, 2008 Mortgage payment, thus constituting a default under the terms of the Note and Mortgage; therefore, MERS, as mortgagee, foreclosed on the Property on August 28, 2009. (Trompisz Aff. ¶¶ 10, 13-14.) Aurora prevailed as the successful bidder at the foreclosure sale, and MERS thereafter executed and recorded a foreclosure deed, thereby conveying title to the Property to Aurora. (Trompisz Aff. ¶¶ 10, 14.)

Following the foreclosure sale, Plaintiffs filed the instant Complaint seeking declaratory judgment and return of title to them. Defendants then filed this Motion for Summary Judgment averring that no genuine issues of material fact exist and that they are entitled to judgment as a matter of law. Plaintiffs objected to Defendants' Motion averring that there are genuine issues of material fact, and this Court took the matter under advisement.

II

STANDARD OF REVIEW

The Court will only grant a motion for summary judgment if "'after viewing the [admissible] evidence in the light most favorable to the nonmoving party,'" Jessup & Conroy, P.C. v. Seguin, 46 A.3d 835, 838 (R.I. 2012) (quoting Empire Acquisition Group, LLC v. Atlantic Mortgage Co., 35 A.3d 878, 882 (R.I. 2012)), "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 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. Ins. Co. v. Kaya, 947 A.2d 869, 872 (R.I. 2008) (quoting D'Allesandro v. Tarro, 842 A.2d 1063, 1065 (R.I. 2004)). 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.'" Jessup & Conroy, P.C., 46 A.3d at 839 (quoting Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998)) (alteration in original).

III

ANALYSIS

Plaintiffs make numerous arguments in opposition to summary judgment; however, the Plaintiffs have failed to offer competent evidence in support of their objection. Thus, Plaintiffs have failed in their effort to establish the existence of a genuine issue of material fact. Most of the statements offered in support of their objection to summary judgment are simply conclusory allegations, unsupported by competent evidence. Since the facts herein are nearly identical to the facts in Porter v. First NLC Fin. Servs., LLC, and the Mortgage executed by Plaintiffs contains the same operative language as that of the mortgage considered in Porter, this Court will incorporate and adopt the reasoning set forth in Porter. No. PC 2010-2526, 2011 WL 1251246 (R.I. Super. Mar. 31, 2011) (Rubine, J.). The Court will then address any

additional issues that are unique to this matter that were not addressed in the aforementioned decision.

Plaintiffs, in their memorandum, fail to offer any material distinctions between the undisputed facts in this matter and the facts relied upon in the Court's earlier determination of similar cases. Rather, Plaintiffs have chosen primarily to criticize the precedent of the Rhode Island Superior Court as "flawed," thereby incorporating into their memorandum "The Deconstruction of Payette" and "The Deconstruction of Kriegel." Plaintiffs' counsel fails to distinguish the earlier precedent, merely arguing that the previous cases were wrongly decided; this Court is not persuaded by that argument.[2] See Rutter v. Mortg. Elec. Registration Sys., Inc., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012, at *10 (R.I. Super. Mar. 12, 2012) (Silverstein, J.); see also Commonwealth Prop. Advocates v. U.S. Bank Nat'l Ass'n, No. 11-4168, 459 Fed. App. 770 (10th Cir. Mar. 6, 2012) (affirming district court where appellant's counsel criticized, rather than distinguished, prior MERS cases).

Plaintiffs challenge Defendants' affidavit executed by Kristen Trompisz (Trompisz), a Legal Liaison for Aurora, submitted in support of their Motion. Specifically, Plaintiffs aver that the affidavit is not based upon the affiant's personal knowledge, and therefore, that the affiant is not competent to make statements with respect to the documents which pertain to this matter.

[2] This Court expects counsel to be familiar with earlier rulings on the same issues, and therefore, to avoid raising redundant issues. A continued effort to revisit issues previously addressed by the Court creates a waste of judicial resources and the resources of the clients represented by counsel. It serves no useful purpose for the Court or the parties to address legal issues previously addressed in earlier rulings by the Court, and in the future may lead to the imposition of sanctions.

Pursuant to Rule 56(e), "[s]upporting 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." Super. R. Civ. P. 56(e). Moreover, this Court and at least one other jurisdiction have found that the testimony of an employee of a mortgagee who provides an affidavit with respect to documents in the mortgagee's file is not hearsay, as the documents that form the basis of that employee's testimony are admissible under the business records exception. See Rutter, 2012 WL 894012, at *23-24; see also Charter One Mortg. Corp. v. Keselica, No. 04CA008426, 2004 WL 1837211, at *4 (Ohio Ct. App. Aug. 18, 2004). Further, a hearsay business record is admissible under Rule 803(6) of the Rhode Island Rules of Evidence if it is established that the business record meets the definition as contained therein.

Here, Defendants submitted the affidavit of Trompisz, a Legal Liaison for Aurora, which was the mortgage servicer for the mortgagee at the time of the foreclosure sale and the current record owner of the Property. (Trompisz Aff. ¶¶ 10-12.) Trompisz attested in the affidavit that "[i]n performing [her] duties and responsibilities as a Legal Liaison [she] regularly review[s] Aurora's business records regarding loans and mortgages, both in paper and electronic form." (Trompisz Aff. ¶ 3.) She further states that, "[i]n preparation for this affidavit, [she has] reviewed Aurora's business records concerning the mortgage loan account for Stephen E Southwick and Laurie M Southwick." (Trompisz Aff. ¶ 4.) Trompisz then sets forth details in the subsequent paragraphs of the affidavit establishing her personal knowledge of the matter. Accordingly, Trompisz is

competent to testify in the form of an affidavit pursuant to Super. R. Civ. P. 56(e). See Rutter, 2012 WL 894012, at *23-24.

In her opposing affidavit, Plaintiff Laurie M. Southwick primarily makes conclusory statements aimed at attacking MERS' authority to act as mortgagee and nominee of Homecomings and Homecomings' successors and assigns. She further sets forth statements challenging the validity of the allonge to the Note. As stated above, these issues were addressed in Porter, and this Court will not re-address its discussion of those issues herein, but simply will incorporate and adopt the reasoning as set forth in that decision. Nevertheless, Plaintiff sets forth additional challenges in her affidavit to the validity of the acknowledgment and execution of the foreclosure deed.

As stated by this Court on several earlier occasions (see, e.g., Van Hoecke v. First Franklin Fin. Corp., No. KC 2009-0743, 2013 WL 1088825, at *8-9 (R.I. Super. Mar. 7, 2013) (Rubine, J.); Deutsche Bank Nat. Trust Co. v. Monegro, No. KD 2011-1345, 2013 WL 372646, at *7 (R.I. Super. Jan. 24, 2013) (Rubine, J.)), an acknowledgement by a notary public carries a strong presumption of validity, and acknowledged deeds and mortgages of real estate will not be set aside absent clear and convincing evidence that the certificate of acknowledgment is false.[3] See Butler v. Encyclopedia Brittanica, Inc., 41 F.3d 285, 294-95 (7th Cir. 1994) (citing 1 Am. Jur. 2d Acknowledgments § 83 (1994)); see also 91 Am. Jur. Proof of Facts 3d 345 Acknowledgment of Real Property Instruments and Other Acknowledgments § 8 (2012). This Court agrees with the Seventh Circuit's analysis that "[i]f a notary's certificate were vulnerable to attack every time an interested witness contradicted the certificate and the notary did not have a personal

[3] A party who falsely swears before a notary public in Rhode Island is subject to criminal penalties. See G.L. 1956 § 11-33-4.

recollection of the event, 'it would shock the moral sense of the community, deny justice, and create chaos in land titles[]' and every other type of document requiring notarization."[4] Butler, 41 F.3d at 295. Moreover, statements made on the basis of information or belief, or on the basis of suspicion, are inadmissible pursuant to Rule 56. See 27A Federal Procedure L. Ed. § 62:654 (West 2012).

Plaintiffs' unverified, conclusory statements concerning the authority of the individual who executed the foreclosure deed, and the manner in which the foreclosure deed allegedly was acknowledged, are insufficient to rebut the strong presumption of validity carried by the acknowledged and recorded foreclosure deed. See Butler, 41 F.3d at 294-95. Moreover, Plaintiffs have not properly set forth clear and convincing evidence that the acknowledgment was false, nor have they adequately set forth an allegation of fraud which includes the essential elements of such a claim—that an intentional misrepresentation was made by Defendants, which misrepresentation they relied on, causing them damage. See 91 Am. Jur. Proof of Facts 3d 345 Acknowledgment of Real Property Instruments and Other Acknowledgments § 8; see also Women's Dev. Corp. v. City of Central Falls, 764 A.2d 151, 160 (R.I. 2001) (citing Travers v. Spidell, 682 A.2d 471, 472-73 (R.I. 1996)). Therefore, through Plaintiff Laurie M. Southwick's affidavit,

[4] To the extent that Plaintiffs challenge the authority of particular individuals to execute and acknowledge the foreclosure deed, Rhode Island Title Standard No. 5.3 provides that it may be assumed that the individuals executing those instruments were the officers they purported to be where the instrument is executed and acknowledged in proper form. Furthermore, Rhode Island Title Standard No. 5.2 provides that the signature of an individual signing on behalf of a corporation on a corporate instrument is sufficient despite the omission of the corporate name over the signature of the signer, as long as the corporation appears as the party to the instrument and the instrument is properly executed and acknowledged. Although the Rhode Island Title Standards are not binding authority on this Court, they are persuasive.

Plaintiffs have failed to establish a genuine issue of material fact sufficient to avoid summary judgment.

Plaintiffs have failed to demonstrate by affidavit, or otherwise, that a genuine issue of material fact exists which would result in the nullification of the foreclosure sale conducted by MERS, through which Aurora became the current record owner of the Property. Furthermore, the issues presented in this matter have been previously decided by this Court. See Kriegel v. Mortg. Elec. Registration Sys., Inc., No. PC 2010-7099, 2011 WL 4947398 (R.I. Super. Oct. 13, 2011) (Rubine, J.); see also Rutter, 2012 WL 894012; Payette v. Mortg. Elec. Registration Sys., Inc., No. PC 2009-5875, 2011 WL 3794701 (R.I. Super. Aug. 22, 2011) (Rubine, J.); Porter, 2011 WL 1251246; Bucci v. Lehman Bros. Bank, FSB, No. PC 2009-3888, 2009 WL 3328373 (R.I. Super. Aug. 25, 2009) (Silverstein, J.). Accordingly, Defendants are entitled to judgment as a matter of law based on the authority of the above-cited cases.

IV

CONCLUSION

Based upon the foregoing, Defendants' Motion for Summary Judgment is granted. Counsel for the prevailing party shall submit an order and form of judgment in accordance with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	Laurie M. Southwick, et al. v. Mortgage Electronic Registration Systems, Inc., et al.
CASE NO:	KC 2010-0290
COURT:	Kent County Superior Court
DATE DECISION FILED:	April 5, 2013
JUSTICE/MAGISTRATE:	Rubine, J.
ATTORNEYS:	
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