STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: June 19, 2012)

ANTONIO P. ROSANO	:	
	:	
v.	:	**C.A. No. PC 2010-0310**
	:	
MERS, EQUIFIRST CORPORATION; SUTTON FUNDING LLC C/O HOMEQ SERVICING	:	

DECISION

RUBINE, J. Before this Court is Defendant MERS' Motion to Dismiss Plaintiff Antonio P. Rosano's ("Plaintiff") verified complaint ("Complaint") pursuant to Rule 12(b)(6) and Rule 12(b)(7) of the Rhode Island Superior Court Rules of Civil Procedure. Plaintiff alleges in his Complaint that the assignment of the mortgage interest by MERS was unlawful and ineffective, and therefore, the successor and assignee of MERS', Defendant Sutton Funding LLC C/O Homeq Servicing ("Sutton"), obtained no rights in the mortgage and that Sutton's subsequent assignment to Bank of New York Mellon Trust Company, National Association as grantor trustee of the Protium Master Grantor Trust ("Bank of New York")[1] was a nullity. Bank of New York was the assignee of Sutton and conducted the foreclosure sale. Ultimately, Plaintiff alleges that none of the Defendants, as well as Bank of New York, possessed the requisite standing to foreclose, thus rendering the foreclosure sale a nullity. Plaintiff seeks to quiet title by way of a determination that he remains the exclusive title holder of real property located at 331 High Street, Bristol, Rhode Island ("the Property").

[1] Bank of New York acted as the grantor trustee of Protium Master Grantor Trust, yet the Complaint fails to join Bank of New York or the Trust as a party defendant.

I

Facts & Travel

The following facts are gleaned from the Complaint and exhibits attached thereto and incorporated therein: On June 25, 2007, Plaintiff executed an adjustable rate note ("Note") in favor of lender EquiFirst Corporation ("EquiFirst"), for $379,000. To secure the Note, Plaintiff contemporaneously executed a mortgage ("Mortgage") on the Property. See Compl. Ex. 1. The Mortgage was recorded in the land evidence records of the Town of Bristol on June 29, 2007. The Mortgage designates "MERS as mortgagee under this Security Instrument" (Compl. Ex. 1 at 1) and further provides "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 Covenants upon the Statutory Condition and with the Statutory Power of Sale." (Compl. Ex. 1 at 3.)

On September 4, 2009, MERS, as mortgagee and as nominee for EquiFirst, executed an assignment of the Mortgage interest to Sutton, recording the assignment in the land evidence records of the Town of Bristol on September 14, 2009. See Compl. Ex. 2. Thereafter, on November 5, 2009, Sutton, as assignee of MERS, and hence, nominee of EquiFirst, executed a second assignment of the Mortgage interest to Bank of New York. See Compl. Ex. 3. That assignment was recorded in the land evidence records of the Town of Bristol on November 12, 2009.

Plaintiff failed to make payments under the terms of the Note and Mortgage, as well as failed to pay taxes. As a result, Bank of New York sent a notice of default for

non-payment to Plaintiff. Plaintiff failed to cure the default and subsequently, Bank of New York published the notice of sale for four consecutive weeks in The Providence Journal. Shortly thereafter, on January 6, 2010, Bank of New York conducted a foreclosure sale on the Property, prevailing as the highest bidder. On February 9, 2010, Bank of New York recorded a foreclosure deed evidencing it as the current holder of fee simple title to the Property.

Prior to the recording of the foreclosure deed, Plaintiff filed the instant Complaint wherein he seeks declaratory and injunctive relief pursuant to G.L. 1956 § 9-30-1. MERS filed a Motion to Dismiss pursuant to Rule 12(b)(6) and 12(b)(7) to which Plaintiff objected. After the submission of supplemental memoranda by each party, this Court took the matter under advisement.

II

Standard of Review

A

Conversion

Ordinarily, the Court's review of a motion to dismiss is confined to the complaint, Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009), and if the Court goes outside the complaint, the Court must convert the motion into a motion for summary judgment. See Coia v. Stephano, 511 A.2d 980 (R.I. 1986). These rules provide, however, where the pleading refers to attachments, "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Super. R. Civ. P. 10(c). The motion justice may consider and refer to documents incorporated into a complaint by reference when ruling on a motion to dismiss, without converting the motion into one under Rule 56.

Bowen Court Assoc. v. Ernst & Young, LLP, 818 A.2d 721, 725-26 (R.I. 2003) (citing Super. R. Civ. P. 10(c)); 27A Federal Procedure L. Ed. § 62:509 (2004). Such documents "must be referred to explicitly," and be "exhibit[s] annexed to the complaint." 1 Kent, R.I. Civ. Prac. § 10.3 at 100 (1969); see also 5B Wright & Miller, Federal Practice & Procedure, 3d § 1357 (2006).

Here, the Complaint expressly references and appends copies of the Mortgage and the two assignments. In addition, Defendant MERS submitted the Note and foreclosure deed with their Motion. Thus, this Court must decide whether to exclude these materials and adjudicate this matter using the motion to dismiss standard of review under Rule 12(b)(6), or consider them 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 Complaint. Additional documents, the Note and foreclosure deed, attached to Defendants' memorandum, 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 a Motion to Dismiss under Rule 12(b)(6).

B

12(b)(6) Motion to Dismiss Standard of Review

"The 'sole function of a motion to dismiss' pursuant to Rule 12(b)(6) is 'to test the sufficiency of the complaint.'" McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005) (quoting Rhode Island Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)). For purposes of the motion the Court "assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the plaintiffs." Giuliano v. Pastina, Jr., 793 A.2d 1035, 1036-37 (R.I. 2002) (quotation omitted).

The United States Supreme Court has adopted the view that a complaint must allege facts that "raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007) (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004)). Hence, a plaintiff has an obligation to provide "the 'grounds' of his 'entitlement to relief.'" Id. (citing Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932 (1986)). This "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. (citing Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932 (1986)). Accordingly, a plaintiff's factual allegations contained in a complaint must be specific enough to cross "the line from conceivable to plausible." Id. at 570.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" Id. at 678, (quoting Twombly, 550 U.S. at 557). "Only a complaint that states a plausible claim for relief survives a motion to dismiss." Id. at 679 (citing Twombly, 550 U.S. at 556). A complaint that states "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," will not suffice. Id. at 678 (citing Twombly, 550 U.S. at 555). However, "when there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id. at 679. "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that

requires the reviewing court to draw on its judicial experience and common sense." Id. (citing Iqbal v. Hasty, 490 F.3d 143, 157-58 (C.A.2 2007)).

C

Motion to Dismiss Under 12(b)(7)

Pursuant to Rule 19 of the Rhode Island Superior Court Rules of Civil Procedure, entitled "Joinder of person needed for just adjudication,"

> "one may be joined as a party to an action if . . . (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest." Super. R. Civ. P. Rule 19(a)(2).

In consideration of joinder of a party, our Supreme Court has subscribed to a position which has been referred to as "the pragmatic approach," whereby "there is no fixed formula for determining in every case whether a [party] is indispensable or merely necessary." Doreck v. Roderiques, 120 R.I. 175, 180, 385 A.2d 1062, 1065 (1978). A Court "'does not know whether a particular person is 'indispensable' until it has examined the situation to determine whether it can proceed without him.'" Id. (quoting Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119 (1968)). Our Supreme Court has further described an "indispensable party" as

> "only those whose interests could not be excluded from the terms or consequences of the judgment and leave anything, or appreciable anything, for the judgment effectively to operate upon, as where the interests of the absent party are inextricably tied in to the cause (citations omitted) or where the relief really is sought against the absent party alone (citations omitted). In other words, if there may be a viable judgment having separable affirmative consequences with

> respect to parties before the court, and the inquiry is concerned solely with the inequities, in the light of the total circumstances, resulting from the inability to affect absent interested parties, then such other parties should be defined as merely necessary, not indispensable." Id. at 1065 (quoting Stevens v. Loomis, 334 F.2d 775 (1st Cir. 1964)).

In taking this approach, this Court is mindful that "the single most significant factor is whether a judgment entered in the case may have 'separable affirmative consequences with respect to parties before the court." Id. (citations omitted).

III

Analysis

A

Assignments of the Mortgage Interest Are Valid

Plaintiff contends that the assignment by MERS to Sutton is void as MERS never held the Note and thus never possessed a beneficial interest in the Mortgage to assign. Thus, according to Plaintiff, the subsequent assignment from Sutton to Bank of New York is void and of no effect as well. Plaintiff further avers that MERS lacked the capacity to act on behalf of EquiFirst as nominee, as there is no recorded power of attorney authorizing MERS to act on EquiFirst's behalf.

Plaintiff's averments overlook the clear and unambiguous language of the Mortgage instrument which provides that "MERS acts not only as mortgagee, but also as nominee for the original lender, and in that capacity it has the standing to enforce the obligations contained in the Note, and as mortgagee, also has, and may assign, the statutory power of sale contained therein." Deutsche Bank, et al v. Falconer, Nos. PD-2010-1588, PD-2010-1591, PC-2010-1996, slip op., (R.I. Super. May 1, 2012) (Rubine, J.). Plaintiff's averments further overlook the previous holdings of this Court that MERS

may assign the Mortgage interest as "permitted by the unambiguous language" contained in the Mortgage instrument. Payette, 2011 WL 3794700; see also Rutter, 2012 WL 894012. Accordingly, MERS has authority under Rhode Island law to assign the Mortgage interest as mortgagee.

Furthermore, § 34-11-24 provides that an assignment of the mortgage shall also be deemed an assignment of the debt secured thereby. Rutter, 2012 WL 894012; see also Kriegel, 2011 WL 4947398. Once the lender designates MERS as its nominee, MERS, and thus any assignee of MERS, also acts as holder of the debt secured by the mortgage and has the authority to assign the Mortgage interest. Kriegel, 2011 WL 4947389 at * 15. By the clear and unambiguous language of § 34-11-24, an assignment of the mortgage deed is assigned with "the note and debt thereby secured." Section 34-11-24. Therefore, the assignment of the Mortgage interest by MERS to Sutton, and subsequently from Sutton to Bank of New York, transferred not only the Mortgage to Bank of New York, but as a matter of law assigned "the [N]ote and debt thereby secured" under the plain, unambiguous language of § 34-11-24. See Section 34-11-24. As assignee of MERS, Sutton, and thus Bank of New York, became the mortgagee possessing the right to exercise the statutory power of sale, as well as nominee for the current note holder.

In addition, there is no requirement that EquiFirst record a power of attorney in order for MERS to act on its behalf. See § 34-13-1. By the plain, unambiguous language contained within the Mortgage instrument, which was recorded in the land evidence records of the Town of Bristol and in accordance with Rhode Island General Laws, MERS was designated as the mortgagee and nominee of EquiFirst and EquiFirst's

"successors and assigns," (MERS' Ex. B at 1), thus obviating the need for a recorded power of attorney.

Plaintiff further contends that the assignment from MERS to Sutton was unauthorized as the signatory, Bethany Hood, lacked the requisite authority to sign on behalf of MERS. Thus, Plaintiff contends that the unauthorized signature of the assignor renders the assignment void under § 34-11-1.

"It is well established that [Plaintiff] does not have standing to challenge the validity of the assignment or transfer of the Mortgage interest, to which []he [is] a stranger." The Bank of New York Mellon v. Cuevas, Nos. PD-2010-0988, PC-2010-0553, 2012 WL 1388716 at * 12 (R.I. Super. April 19, 2012) (Rubine, J.); see also Payette, 2011 3794701; Kriegel, 2011 WL 4947398 (plaintiff was a stranger to that assignment and consequently lacks standing to contest the legal rights of an assignee under these documents); Bucci v. Lehman Brothers Bank, FSB, No. PC 2009-3888, 2009 WL 3328373 (R.I. Super. Aug. 25, 2009) (Silverstein, J.); Brough v. Foley, 525 A.2d 919 (R.I. 1987) (holding that the plaintiff, whose property purchase was thwarted by an assignee's exercise of the assigned right of first refusal, had no standing to challenge the validity of the assignment).[2] Even if this Court were to consider Plaintiff's allegation that the assignment by MERS to Sutton was unauthorized as the signatory lacked the requisite authority to act on behalf of MERS, MERS avers that this argument must be disregarded by the Court under Rule 12(f) as Plaintiff failed to plead the allegation in his Complaint. However, while Rule 12(f) provides that "the court may order stricken from any pleading

[2] In the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of the Superior Court cases on this subject represents the prevailing view of the law in Rhode Island. Breggia v. Mortgage Electronic Registration Systems, No. PC-2009-4144, 2012 WL 1154738 (R.I. Super. April 3, 2012) (Rubine, J.).

any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter," this Rule applies only to pleadings and therefore is not applicable to allegations raised by Plaintiff through argument within his memorandum.[3] Super. R. Civ. P. 12(f).

Nevertheless, Plaintiff has made no allegation in the Complaint sufficient to comply with Rule 9(b). Accordingly, Plaintiff must allege facts entitling him to relief. Twombly, 550 U.S. at 555. Plaintiff's allegations with respect to the invalidity of the assignment of the Mortgage interest are merely "conclusory statements" which are insufficient to survive a motion to dismiss. Iqbal, 556 U.S. at 678. Plaintiff has failed to allege facts in the Complaint which "raise a right to relief above the speculative level." Twombly, 550 U.S. at 555. Therefore, the assignment is presumptively valid. See Dolan v. Hughes, 20 R.I. 513, 40 A. 344 (1898) (citing Johnson v. Thayer, 17 Me. 403 (1840)) (the presumption of law is in favor of the validity of the assignment and of the good faith of the transactions thereunder, and they must be proved to have been fraudulently made before the court can decide against them). Plaintiff's Complaint must be dismissed.

B

The Foreclosure Was Proper

Plaintiff alleges that no party in the chain of title possesses the requisite standing to foreclose due to the defects in the assignments of the Mortgage interest, an argument all too familiar to this Court. According to Plaintiff, all Defendants lack standing to foreclose because they did not have the right to enforce the obligations under the Note. Thus, Plaintiff argues that in order to enforce the statutory power of sale under § 34-11-22, the foreclosing entity, Bank of New York, must be a note holder and possess legal

[3] The Court pauses to note that Plaintiff's Complaint fails to state with particularity the circumstances which constitute any allegations of fraud with respect to the execution of the assignment of the Mortgage interest. See Super. R. Civ. P. 9(b).

title through the Mortgage. Since the Note and Mortgage were "severed" at the closing, Plaintiff alleges that the foreclose sale was a nullity.

The Rhode Island Superior Court[4] has "enforced foreclosures conducted by an assignee of MERS." Rutter v. Mortgage Electronic Registration Systems, Nos. PC-2010-4756, PD-2010-4418, 2012 WL 894012 (R.I. Super. March 12, 2012) (Silverstein, J.); see also Payette, 2011 WL 3794701. As discussed supra, the assignment of the Mortgage interest by MERS to Sutton and the assignment from Sutton to Bank of New York are both valid. Accordingly, as assignee of Sutton, Bank of New York stepped into the shoes of the assignor and possessed the right to exercise the statutory power of sale after default by Plaintiff. See Kriegel, 2011 WL 4947398 (quoting Weybosset Hill Investments, LLC v. Rossi, 857 A.2d 231, 240 (R.I. 2004)) (assignee steps into the shoes of the assignor and can avail itself of the assignor's rights). Hence, Bank of New York possessed the right and ability to exercise the statutory power of sale and properly commence foreclosure proceedings against the Plaintiff. Bank of New York was the successful bidder at the foreclosure sale. The foreclosure deed in favor of Bank of New York was thereafter recorded. Bank of New York, as the buyer at the lawfully convened foreclosure sale, holds the record title to the Property. Therefore, Bank of New York is the owner of record, and holds title to the Property pursuant to the recorded foreclosure deed, which recorded deed is presumptively valid. See Deutsche Bank, et al. v. Falconer, Nos. PD-2010-1588, PD-2010-1591, PC-2010-1996, slip op. (R.I. Super. May 1, 2012) (Rubine, J.); see also Noury v. Deutsche Bank National Trust Co., No. PC-2009-7014, 2012 WL 1670546 (R.I. Super. May 7, 2012) (Rubine, J.); Restatement of the Law Third Property

[4] As set forth supra, in the absence of controlling authority from the Rhode Island Supreme Court, the consistent holdings of the judges of the Superior Court constitute the existing status of the law of this State. See Breggia, 2012 WL 1154738; see also Rutter, 2012 WL 894012.

(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); 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 is not entitled to rescind the foreclosure sale, thereby clearing title and rendering himself as the record title holder post-foreclosure. See 140 Reservoir Avenue Associates v. Sepe Investments, LLC, 941 A.2d 805, 811-12 (R.I. 2007) (Section 34-11-22 provides that a foreclosure conducted by statutory power of sale "shall forever be a perpetual bar against the mortgagor . . . ."); see also Holden v. Salvadore, 964 A.2d 508, 516 (R.I. 2009) (noting that it was not within the power of the defendant to prevent or postpone the foreclosure sale, because the sale and foreclosure had already taken place, the plaintiff herself was the highest bidder, and plaintiff and auctioneer had executed all the appropriate documents); In re Medalgia, 402 B.R. 530, 532 (D.R.I. 2009) (under the "gavel rule," a debtor's right to cure is cut off at the foreclosure sale).

C

Bank of New York as an Indispensable Party

Defendant MERS has petitioned this Court to dismiss Plaintiff's Complaint for failure to join an indispensable party, Bank of New York. Pursuant to Rule 19 of the Rhode Island Superior Court Rules of Civil Procedure, entitled "Joinder of person needed for just adjudication,"

> "one may be joined as a party to an action if . . . (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest." Super. R. Civ. P. 19(a)(2).

Truly indispensable parties are only those whose interest could not be excluded from the terms or consequences of the judgment and leave anything, or appreciably anything, for the judgment effectively to operate upon, as where the interests of the absent party are inextricably tied in to the cause . . . or where the relief really is sought against the absent party alone . . . . Anderson v. Anderson, 109 R.I. 204, 215, 283 A.2d 265, 271 (1971) (quoting Stevens v. Loomis, 334 F.2d 775 (1st Cir. 1964)). While this Court is mindful that it must refrain from finding a party "indispensable" because it has a duty to seek "to avoid a dismissal whenever possible," Anderson, 109 R.I. at 215, 283 A.2d at 271, after examination of this matter, this Court holds that this matter cannot proceed without the joinder of Bank of New York. Accordingly, this Court finds Bank of New York to be an indispensable party to this action wherein Plaintiff is seeking nullification of the foreclosure sale and return of title to him; the same Property Bank of New York now

holds title to as the successful bidder at the foreclosure sale and holder of the recorded foreclosure deed. Therefore, this Court finds that the interests of Bank of New York in regards to the title of the Property are inextricably tied in to the adjudication of the issues in this action. Failure to join Bank of New York as a party to this action will impede Bank of New York's ability to protect their interests in title to the Property. Thus, Plaintiff's Complaint must be dismissed for failure to join Bank of New York, the record title holder.[5]

IV

Conclusion

Based upon the Court's review of the allegations in the Complaint, and the exhibits attached thereto and incorporated therein, Defendant MERS' Motion to Dismiss under Rule 12(b)(6) is granted. In addition, this Court grants MERS' Motion to Dismiss under Rule 12(b)(7) for failure to join Bank of New York, a truly indispensable party to this action. There being no just reason for delay, Final Judgment shall enter in favor of Defendant MERS under Rule 54(b).

[5] The Court further notes that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration and no declaration shall prejudice the rights of person not parties to the proceeding." Section 9-30-11. A court is prohibited from assuming subject-matter jurisdiction over a declaratory judgment action when a plaintiff fails to join all those necessary and indispensable parties who have an actual and essential interest that would be affected by the declaration. Meyer v. City of Newport, 844 A.2d 148 (R.I. 2004); see also Sullivan v. Chafee, 703 A.2d 748 (R.I. 1997). All parties who have an interest that would be affected by a declaration are indispensable and must be joined. Id.