STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: December 7, 2012)

DIEGO M. HERNANDEZ	**:**	
NADYUSKA M. HERNANDEZ	**:**	
	:	
v.	**:**	**C.A. No. PC 2010-1212**
	:	
MORTGAGE ELECTRONIC	**:**	
REGISTRATION SYSTEMS, INC.;	**:**	
HOMECOMINGS FINANCIAL	**:**	
NETWORK, INC.; FEDERAL	**:**	
NATIONAL MORTGAGE	**:**	
ASSOCIATION	**:**	

DECISION

RUBINE, J. Defendants Mortgage Electronic Registration Systems ("MERS"), Homecomings Financial, LLC f/k/a Homecomings Financial Network, Inc. ("Homecomings"), and Federal National Mortgage Association ("FNMA") (collectively, "Defendants") move for Summary Judgment pursuant to Rule 56 of the Rhode Island Superior Court Rules of Civil Procedure. Plaintiffs Diego M. Hernandez and Nadyuska M. Hernandez (collectively, "Plaintiffs") filed a verified complaint ("Verified Complaint") seeking to quiet title to certain real property located at 15 Capuano Avenue, Cranston, Rhode Island (the "Property"). The Verified Complaint alleges that due to alleged defects in the foreclosure process, the foreclosing party, FNMA, had no right to exercise the statutory power of sale under Rhode Island law; thus, rendering the foreclosure sale a nullity.

I

Facts & Travel

The facts as set forth below are established by the Verified Complaint, the undisputed copies of the note ("Note") and mortgage ("Mortgage") executed by the Plaintiffs, and the affidavit in support of summary judgment from Juan Antonio Aguirre ("Aguirre"), an employee of GMAC Mortgage, LLC ("GMAC"), which serviced the loan on behalf of FNMA. (Aguirre Aff. ¶ 6.) Although a verified complaint may be considered the "functional equivalent" of an affidavit for the purpose of deciding a motion for summary judgment, in this matter the Plaintiffs' Verified Complaint fails to raise any genuine issue of material fact. See Sheinkopf v. Stone, 927 F.2d 1259, 1262 (1st Cir. 1991). Thus, Aguirre's affidavit is unopposed by any affidavit or other discovery material sufficient under Rule 56 to establish a genuine issue of material fact for the purpose of defeating Defendants' Motion for Summary Judgment. The question remains, however, whether on the basis of the undisputed facts Defendants are entitled to judgment as a matter of law.

On December 15, 2006, Plaintiffs executed the Note in favor of lender Homecomings for $176,000, having borrowed that amount to purchase the Property. The Note provides that "I [borrower] understand that [Homecomings] may transfer this Note. [Homecomings] or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" (Defs.' Mot. Summ. J. Ex. 1 at 1.) Thereafter, Homecomings specially endorsed the Note to GMAC who held the Note at the time of foreclosure. (Defs.' Mot. Summ. J. Ex. 1; Aguirre Aff. ¶¶ 9, 11.)

Plaintiffs contemporaneously executed the Mortgage on the Property to secure the Note. The Mortgage designated Homecomings as the "Lender" and further designates MERS as the "nominee for [Homecomings] and [Homecomings'] successors and assigns," as well as "mortgagee." (Compl. Ex. 2 at 1-2.) The Mortgage further 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." (Compl. Ex. 2 at 3.) In addition, the Mortgage 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." (Compl. Ex. 2 at 3.)

The Mortgage was recorded in the land evidence records of the City of Cranston.

On May 18, 2009, MERS, as nominee for Homecomings and Homecomings' successors and assigns and as mortgagee, assigned its interest in the Mortgage to FNMA. The assignment was recorded in the land evidence records of the City of Cranston. See Compl. Ex. 3. Hence, by the clear, unambiguous language of the Mortgage instrument, as acknowledged and accepted by Plaintiffs as borrowers and mortgagors, MERS, as well as FNMA as an assignee of MERS, were explicitly and expressly granted the rights set forth in the statutory power of sale.

Plaintiffs failed to make timely payments as obligated under the Note and Mortgage. (Aguirre Aff. ¶ 13.) As a result, FNMA foreclosed on the Property on November 4, 2009, and FNMA prevailed as the successful bidder at the foreclosure

sale, purchasing the Property for $153,127.08. (Defs.' Mot. Summ. J. Ex. 4; Aguirre Aff. ¶ 12.) FNMA then executed and recorded a foreclosure deed, conveying title of the Property in its favor.[1] (Defs.' Mot. Summ. J. Ex. 4.)

Defendants aver that no genuine issue of material fact exists and that movants are entitled to judgment as a matter of law. Plaintiffs objected to Defendants' Motion alleging the existence of the following issues of fact: 1) that MERS is not the mortgagee and nominee of the "Lender" under the Mortgage; 2) Defendant did not submit specific evidence of Plaintiffs' default and the Aguirre Affidavit does not meet the standard for discovery material sufficient to satisfy Rule 56; 3) the Note was not collateralized by a valid mortgage and MERS unlawfully assigned the Mortgage; and 4) there was a fatal disconnect between the Note and Mortgage. At the Motion hearing, both parties agreed to submit this matter to the Court on the briefs, thereby waiving oral argument. After submission of supplemental memoranda by both parties, this Court took the matter under advisement.

1. The court will initially address seriatim the above alleged genuine issues of material fact: A copy of the fully executed Mortgage is attached to the Complaint, and it provides specifically that MERS is both the mortgagee and nominee of the lender. Plaintiffs do not contest that they signed the Mortgage, nor do they contest the explicit recitals contained therein. It appears that Plaintiffs

[1] As a matter of law, recording is presumptive evidence of FNMA's title after foreclosure. See The Bank of New York Mellon v. Cuevas, Nos. PD 2010-0988, PC 2010-0553, 2012 WL 1388716 at *4 (R.I. Super. April 19, 2012) (Rubine, J.); see also 65 Am. Jur. 2d Quieting Title § 73 (West 2012) ("In a quiet title action, there is a presumption in favor of the record titleholder, and the evidence to overcome that presumption must be clear and convincing."); Breliant v. Preferred Equities Corp., 918 P.2d 314 (Nev. 1996).

dispute only the legal effect of the Mortgage, not the fact of its authenticity and execution. A contest as to the legal effect of an admitted document does not raise a genuine issue of material fact sufficient to defeat a motion for summary judgment.

4. Although movant did not attach documentary evidence of default, Mr. Aguirre states in his affidavit under oath that on the basis of his review of business records Plaintiffs defaulted under the Note. Plaintiffs have not submitted an affidavit or other proof to dispute Mr. Aguirre's statement of fact. Accordingly, this Court finds that the Plaintiffs' default is not a genuine issue of material fact. Our Supreme Court has clearly held that a legal conclusion in a complaint cannot form the basis of a genuine issue of material fact. See Jessup & Conroy, P.C. v. Seguin, 46 A.3d 835, 839 (R.I. 2012) (citing Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998)) (evidence in opposition to a motion for summary judgment must be of a substantial nature and not merely conclusory). The invalidity of the Mortgage and the "unlawfulness" of the assignment are clearly legal conclusions and do not create a genuine fact issue as required by Rule 56. Likewise, the allegation of a "fatal" disconnect of the Note and Mortgage is an allegation of a legal conclusion, not a statement of disputed fact. In fact, the legal conclusion with respect to a fatal disconnect between the Note and Mortgage is a conclusion of law with which this court has disagreed on numerous occasions.[2]

[2] The submission of nearly identical Complaints in numerous cases containing nearly identical factual allegations based on nearly identical mortgage documents will result in this Court's application of the same law to those facts. For this Court to do otherwise in the absence of authority from the Rhode Island Supreme Court would result in the exercise of inconsistent and arbitrary decision-making.

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, "'ha[ve] 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

The material facts, as set forth in the Verified Complaint, exhibits, and affidavits reviewed and considered by the Court herein are undisputed and nearly identical to the

material facts in Payette v. Mortg. Elec. Registration Sys., Inc.; also, the Mortgage as executed and acknowledged by Plaintiffs contains the same operative language as the Mortgage under review in Payette. No. PC 2009-5875, 2011 WL 3794701 (R.I. Super. Aug. 22, 2011) (Rubine, J.). In addition, Plaintiffs, in their memoranda, fail to offer any material distinctions between the undisputed facts relied upon in the Court's earlier determination and dismissal of similar cases. Therefore, this Court will incorporate and adopt the reasoning set forth in Payette. See 2011 WL 3794701. The Court will then address any additional issues that are unique to this matter that were not addressed in the aforementioned decision. See, supra, n.2.

While Plaintiffs attempt to raise a genuine issue of material fact by averring that there is a fatal disconnect between the Note and the Mortgage, it is well established that the identity of the note holder is not a genuine issue of material fact sufficient to defeat Defendants' Motion for Summary Judgment because MERS and MERS' assignee, in this case FNMA, act as nominee for the current note holder. See Porter v. First NLC Fin. Serv., No. PC 2010-2526, 2011 WL 1251246 at *8 (R.I. Super. March 31, 2011) (Rubine, J.) ("[W]hatever financial entity currently holds the beneficial interest of the Note, MERS is designated the nominee for the current beneficial owner of the Note based upon the broad language contained in the Mortgage Agreement."). Thus, the proper note holder at the time of the foreclosure sale is not a genuine issue that is material to the Court's determination of the instant matter.

Likewise, Plaintiffs' argument that a genuine issue of material fact exists as to MERS' role in the foreclosure proceedings is flawed. The Rhode Island Superior Court has previously determined that MERS acts as mortgagee and nominee of the Lender by

the plain, unambiguous language of the Mortgage deed. See Bucci v. Lehman Brothers Bank, FSB, No. PC 2009-3888, 2009 WL 3328373 (R.I. Super. Aug. 25, 2009) (Silverstein, J.); see also Rutter v. Mortg. Elec. Registration Sys., Inc., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012 (R.I. Super. March 12, 2012) (Silverstein, J.); Kriegel v. Mortg. Elec. Registration Sys., Inc., No. PC 2010-7099, 2011 WL 4947398 (R.I. Super. Oct. 13, 2011) (Rubine, J.); Payette, 2011 WL 3794701; Porter, 2011 WL 1251246. In the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of Superior Court decisions represents the prevailing view of the law in Rhode Island on this subject. Breggia v. Mortg. Elec. Registration Sys., Inc., No. PC 2009-4144, 2012 WL 1154738 (R.I. Super. April 3, 2012) (Rubine, J.). Accordingly, there is no genuine issue of material fact with respect to MERS' role in this transaction. MERS may act both as mortgagee and nominee of Homecomings and Homecomings' successors and assigns as acknowledged by Plaintiffs through their execution of the Mortgage.

Similarly, Plaintiffs' argument that the assignment is void as MERS failed to possess the Note at the time it executed the assignment of the Mortgage interest fails to establish a genuine issue of material fact. It is well established that Plaintiffs do not have standing to challenge the validity of the assignment or the transfer of the Mortgage interest to which they are strangers. Cuevas, 2012 WL 1388716 at *12; see also Payette, 2011 WL 3794701; Brough v. Foley, 525 A.2d 919 (R.I. 1987). Moreover, the assignment of the Mortgage carries with it an assignment of the debt secured by the Mortgage. See G.L. 1956 § 34-11-24. Furthermore, as discussed supra, MERS acts as nominee of the note holder, as well as mortgagee, when assigning the Mortgage interest,

and thus there is no requirement that MERS must possess the Note in order to assign the Mortgage interest.[3] As explicitly set forth in the Mortgage instrument, MERS is the "mortgagee," and therefore, may properly assign the Mortgage. Since there is no genuine issue of material fact with respect to the validity of the assignment, Plaintiffs' argument that the foreclosure deed is void because it references a fraudulent assignment likewise fails.

Plaintiffs further aver that the signature of Andrew S. Harmon ("Harmon") is not authentic. As proof of this contention, Plaintiffs submitted numerous photocopies of mortgage documents signed by Harmon. To authenticate the photocopies of the signatures, Plaintiffs submitted affidavits attesting to the authenticity of these photocopies, as well as purported certified copies of various assignments, mortgages, and deeds executed by Harmon, including the mortgage of Harmon's own real property. See Allard Aff. ¶¶ 15-16; see also Nota Aff. ¶¶ 15-16; Pls.' Exs. 6, 7. Nevertheless, the affidavits submitted by Plaintiffs attempting to establish a genuine issue of material fact aver that both affiants "do not know" if any of the signatures, including the signature of Harmon on the assignment, is actually Harmon's signature. Allard Aff. ¶ 22; Nota Aff. ¶ 18. These averments are insufficient to establish a genuine issue of material fact to defeat Defendants' Motion for Summary Judgment.

[3] Plaintiffs misstate the holding of Eisenberg v. Gallagher when making their argument concerning possession of the Note. 32 R.I. 389, 79 A. 941 (1911). Eisenberg stands for the proposition that the foreclosing party must possess an interest in the mortgage prior to the commencement of foreclosure proceedings. Id. It is not necessary for the foreclosing party to also possess the note. Id. Section 34-11-24 provides that an assignment of the mortgage shall likewise be deemed an assignment of the debt secured thereby. Rutter, 2012 WL 894012; see also Kriegel, 2011 WL 4947398.

"[N]aked conclusory assertions of law in an affidavit filed in opposition to a motion for summary judgment are inadequate to establish the existence of a genuine issue of material fact." Roitman & Son v. Crausman, 121 R.I. 958, 959, 401 A.2d 58, 59 (1979). Further, a litigant opposing a motion for summary judgment, in meeting its burden of proving the existence of a disputed issue of material fact, cannot rest upon mere allegations or denials in the pleadings, mere conclusions, or mere legal opinions. See Liberty Mut. Ins. Co., 947 A.2d at 872. As set forth supra, to meet this burden, the opposing party "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. When the party opposing the motion for summary judgment, in this case the Plaintiffs, fails to satisfy its burden to set forth specific facts, as opposed to legal conclusions, to demonstrate that there is a genuine issue of material fact to be resolved at trial, summary judgment is properly granted, if on those undisputed facts the movant is entitled to judgment as a mater of law. See id. Thus, the allegation that the signature on the assignment of the Mortgage interest may or may not be Harmon's signature, fails to raise a genuine issue of material fact sufficient to defeat Defendants' Motion for Summary Judgment. Even if the authenticity of Harmon's signature is a contested issue of fact, this Court, on numerous occasions, has held that a plaintiff/mortgagor lacks standing to challenge the validity of a mortgage assignment. See Rutter, 2012 WL 894012; Payette, 2011 WL 3794701.

Lastly, Plaintiffs object to the affidavit of Aguirre. Specifically, Plaintiffs aver that the affidavit is not based on personal knowledge. Under Rule 803(6) of the Rhode Island Rules of Evidence "a hearsay business record is admissible if the information was

regularly maintained in the course of regular business activity, the source of the information is a person with knowledge, and the information was recorded contemporaneously with the event or occurrence." Rutter, 2012 WL 894012 at *23. "This 'rule is interpreted expansively in favor of admitting hearsay records into evidence.'" Id. (quoting R.I. Managed Eye Care, Inc. v. Blue Cross & Blue Shield of R.I., 996 A.2d 684 (R.I. 2010)).

In the instant matter, Defendants submitted the Affidavit of Juan Antonio Aguirre, an employee of GMAC, servicer of the loan on behalf of FNMA. (Aguirre Aff. ¶¶ 2, 6.) Aguirre attested in the affidavit that "in performing [his] duties and responsibilities as Manager-Litigation Support, [he] regularly reviewed GMAC's business records regarding loans and mortgages." (Aguirre Aff. ¶ 4.) Aguirre further set forth that the "entries in these records and the records themselves were created and maintained in good faith, in the regular course of GMAC's business, and that it is the usual course of GMAC's business to make the entries at the time of the event recorded, or within a reasonable time thereafter." Id. In addition, the affidavit sets forth facts derived from Aguirre's personal review of the Mortgage, the details concerning the endorsement and negotiation of the Note, the assignment of the Mortgage, and the foreclosure. See Aguirre Aff. ¶¶ 5-13. Accordingly, this meets the standard of competent evidence under Rule 56 and is admissible under the Rhode Island Rules of Evidence 803(6). See Rutter, 2012 WL 894012.

Plaintiffs have failed to demonstrate, by affidavit or otherwise,[4] that there exists a genuine issue of material fact which would justify the nullification of the foreclosure sale conducted by FNMA, where FNMA holds record title. Furthermore, the issues presented in this matter have previously been decided by this Court. See Rutter, 2012 WL 894012; see also Kriegel, 2011 WL 4947398; Payette, 2011 WL 3794701; Porter, 2011 WL 1251246; Bucci, 2009 WL 3328373. Accordingly, based on the undisputed facts, Defendants are entitled to judgment as a matter of law based on the authority of the aforementioned cases. As set forth supra, in the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of Superior Court decisions on this subject represent the prevailing view of the law in Rhode Island with respect to this issue. The decisions of the Superior Court unanimously support this result. It also appears from a review of decisions from courts throughout the nation that this Court's determination of the validity of the foreclosure process is consistent with the majority of courts considering such issues. See Oum v. Wells Fargo, N.A., 842 F. Supp. 2d 407, 413 & n.12 (D. Mass. 2012) (citing cases from several jurisdictions and noting the "near uniformity of opinion" with respect to the issue of a mortgagor's standing to challenge

[4] Plaintiffs have not filed an affidavit or other discovery materials sufficient to oppose summary judgment pursuant to Rule 56. As mentioned above, Plaintiffs' affidavits concerning Harmon's signature do not create a genuine issue of fact when they are unable to conclude that the signatures are not those of the person they purport to be. Additionally, the Verified Complaint, which may be considered the "functional equivalent" of an affidavit for the purpose of summary judgment, is insufficient to oppose summary judgment in this matter for two reasons. See Sheinkopf, 927 F.2d at 1262. First, the verification does not set forth that the facts (as opposed to legal conclusions) are based on the Plaintiffs' personal knowledge. Secondly, the Verified Complaint does not dispute any of the facts relied on by Defendants in support of their Motion. In fact, to the extent the Verified Complaint alleges facts, they seem to be facts upon which Defendants rely. Accordingly, the Court finds nothing in the Verified Complaint that establishes a dispute as to material facts.

the validity of an assignment); Bridge v. Aames Capital Corp., No. 1:09CV2947, 2010 WL 3834059, at *3 (N.D. Ohio Sept. 29, 2010) ("Courts have routinely found that a debtor may not challenge an assignment between an assignor and assignee."). The Court hereby incorporates by reference the reasoning and authorities relied upon in those previous decisions.

IV

Conclusion

For the reasons cited herein, Defendants' Motion for Summary Judgment is granted. Counsel for the prevailing party shall submit an Order in accordance with this Decision.