

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

(Filed: May 1, 2012)

SUPERIOR COURT

DEUTSCHE BANK, ET AL :

v. :

JANICE FALCONER, JOANN
FALCONER, AND TRACEY BIAZ :

C.A. No. PD 2010-1588
(Consolidated)

DEUTSCHE BANK NATIONAL
TRUST COMPANY AS TRUSTEE
UNDER THE POOLING AND
SERVICING AGREEMENT DATED AS
OF SEPTEMBER 1, 2006, GSAMP
TRUST 2006-FM2 :

v. :

JANICE FALCONER, AND ALL
OTHER OCCUPANTS :

C.A. No. PD 2010-1591

JANICE A. FALCONER AND
MARIA FALCONER :

v. :

MORTGAGE ELECTRONIC
REGISTRATION SYSTEM, INC. ;
FREMONT INVESTMENT & LOAN ;
AND DEUTSCHE BANK NATIONAL
TRUST COMPANY :

C.A. No. PC 2010-1996

DECISION

RUBINE, J. Before the Court is a dispute referred to in consolidated cases that are before the Court for non-jury trial. The parties have stipulated to all material facts, obviating the need for the Court to consider evidence outside of the stipulated record. These cases concern the effect of the foreclosure sale conducted by Mortgage Electronic Registration System, Inc., (“MERS”), and the sale’s effect on title to certain real property

located at 56-58 Killingly Street, Providence, Rhode Island (“the Property”). The first two actions consist of petitions by Deutsche Bank National Trust Company as Trustee under the Pooling and Servicing Agreement dated as of September 1, 2006, GSAMP Trust 2006 FM2 (“Deutsche Bank”), as the assignee of the foreclosure bid, to obtain possession of the Property from the former owners Janice Falconer and Maria Falconer (collectively, “Falconers”), as well as other occupants of the Property, on appeal (trial de novo) from judgment of possession entered in Sixth Division District Court. The third action is Falconers’ petition in this Court to quiet title via a Complaint for Declaratory Judgment.¹ See G.L. 1956 § 34-16-5. The common issues in all of the consolidated cases stem from the alleged invalidity of the foreclosure sale held at the Property on July 28, 2009.

I

Facts & Travel

Because the parties have agreed to all material facts, and set forth those undisputed facts in a stipulation, no trial is necessary. Rather, the Court will render its post-trial decision based upon a determination of applicable law, and the application of that law to the stipulated facts.

This Court’s findings of facts will be based upon and incorporate the facts as stipulated by the parties. The material stipulated facts are as follows: On June 27, 2006, Falconers borrowed \$252,000 in connection with their purchase of the Property. On the same date, Falconers signed a promissory note (“Note”) for the borrowed funds of \$252,000. (Stipulated Facts ¶ 2.) Fremont Investment & Loan (“Fremont” or “Lender”)

¹ Defendants MERS and Fremont Investment & Loan were dismissed without prejudice in the matter of PC 2010-1996. (Stipulated Facts at 2 ¶ 4.)

was the original lender and the obligee of the Note. Id. To secure the Note, Falconers contemporaneously executed a mortgage (“Mortgage”). (Stipulated Facts ¶ 3.) The Mortgage designated MERS as mortgagee under the security instrument. (Stipulated Facts, Ex. 1 at 1.) The Mortgage further 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 Covenants upon the Statutory Condition and with the Statutory Power of Sale.” (Stipulated Facts, Ex. 1 at 3.)

On April 2, 2009, Litton Loan Servicing (“Litton”), acting as servicer for MERS, through their attorneys, caused notices of sale to be mailed by regular and certified mail, return receipt requested, to Falconers. (Stipulated Facts ¶ 4.) In addition, Litton published the notice of the foreclosure sale in The Providence Journal for twelve consecutive weeks. (Stipulated Facts ¶ 5.) On July 28, 2009, a foreclosure sale was conducted at the Property. MERS was the highest bidder at the foreclosure sale, purchasing the Property for a credit bid of \$83,190. (Stipulated Facts ¶ 6.)

On August 4, 2009, Janice Falconer filed for Chapter 7 bankruptcy. (Stipulated Facts ¶ 7.) Shortly thereafter, on August 19, 2009, MERS assigned its bid and all of its right, title, interest in, to and under the Terms and Conditions of Sale, to Deutsche Bank. (Stipulated Facts ¶ 8.) See Stipulated Facts Ex. 4. On October 19, 2009, after the foreclosure sale was conducted, MERS, as mortgagee and nominee for Lender, assigned the mortgage interest to Deutsche Bank. (Stipulated Facts ¶ 9.) See Stipulated Facts, Ex.

5.²

² Although the fact stipulation agrees to the occurrence of the post-foreclosure assignment of the mortgage, neither party addressed any issue or any legal consequence as a result of the post-foreclosure assignment. Accordingly, the Court does not believe this fact is material to the determination of these consolidated cases.

On November 4, 2009, the Bankruptcy Court granted Deutsche Bank's motion for relief from the automatic stay and an order was entered. (Stipulated Facts ¶ 10.) See 11 U.S.C. § 362(d). Thereafter, on December 16, 2009, Janice Falconer's bankruptcy petition was dismissed without discharge. (Stipulated Facts ¶ 11.)

After obtaining relief from the automatic stay, Deutsche Bank recorded the foreclosure deed on January 7, 2010, (Stipulated Facts ¶ 12, Stipulated Facts Ex. 6), thus establishing its presumptive title to the Property. After recording the foreclosure deed, Deutsche Bank then filed suit for trespass and ejectment against Falconers and all other occupants in two separate actions in the Sixth Division District Court on February 2, 2010. (Stipulated Facts ¶ 14.) On March 8, 2010, Deutsche Bank and Falconers stipulated to judgment for possession in favor of Deutsche Bank in both District Court actions. Id. Falconers then appealed the judgments to this Court on March 10, 2010 seeking trial de novo. (Stipulated Facts ¶ 15.)

Thereafter, Falconers filed a Complaint for Declaratory Judgment to quiet title in Superior Court on April 5, 2010. The following day, Deutsche Bank and Falconers agreed to consolidate the three actions for adjudication. (Stipulated Facts ¶ 16.) Upon submission of the stipulated facts and supplemental memoranda by both parties, this Court took the consolidated matters under advisement. This decision will constitute the Court's findings of fact and conclusions of law with respect to the complaint for declaratory relief, as well as final judgments on de novo trials as to the two District Court appeals.

II

Standard of Review

In a case tried to the Court upon stipulated facts, “the trial court does not play a fact-finding role, but is limited to applying the law to the agreed-upon facts.” Delbonis Sand & Gravel Co. v. Town of Richmond, 909 A.2d 922, 925 (R.I. 2006). Stipulated facts, upon which a case is submitted for decision, may be taken with all the admitted facts and the inferences legitimately to be drawn from them. 73 Am. Jur. 2d Stipulations § 17. Where . . . [there are] evidentiary facts stipulated, the court may, if more than one inference can be drawn from the facts, permissibly find the ultimate determinative facts from the evidence stipulated. Id. Valid fact stipulations are controlling and conclusive, and courts are bound to enforce such stipulations. Burstern v. U.S., 232 F.2d 19, 22 (C.A. 8 1956) (citing H. Hackfeld & Co. v. United States, 197 U.S. 447 (1905)).

III

Discussion

In the action for Declaratory Judgment to quiet title, the parties raise two issues for determination by this Court: (1) whether MERS, as mortgagee, may foreclose on a Mortgage pursuant to the statutory power of sale (“Statutory Power of Sale”) when it is not the holder of the Note secured thereby; and (2) whether MERS, as the original mortgagee and nominee of the original lender Fremont, may assign the Mortgage together with the debt secured thereby when it was not a holder of the Note at the time of the mortgage assignment. The resolutions of these issues are material to all of these consolidated cases. In its determination of these issues, this Court will continue to follow the rationale and holdings of its previously decided cases. In Kriegel v. Mortgage

Electronic Registration Systems, No. PC-2010-7099, 2011 WL 4947398 (R.I. Super. October 13, 2011) (Rubine, J.), this Court ruled as a matter of law that the foreclosure sale conducted by one of MERS' assignees was valid. See also Bucci v. Lehman Bros. Bank, No. PC-2009-3888, 2009 WL 3328373 (R.I. Super. August 25, 2009) (Silverstein, J.); Porter v. First Financial Services, No. PC-2010-2526, 2011 WL 1252146 (R.I. Super. March 31, 2011) (Rubine, J.); Payette v. Mortgage Electronic Registration Systems, No. PC-2009-5875, 2011 WL 3794701 (R.I. Super. August 21, 2011) (Rubine, J.). In Bucci, 2009 WL 3328373, and Porter, 2011 WL 1251246, this Court held that the foreclosure sale conducted on behalf of MERS with respect to a mortgage deed containing identical operative language as the mortgage deed at issue herein was lawful. Applying the law to the agreed upon facts, this Court will follow the results and reasoning in the Kriegel, 2011 WL 4947398; Payette, 2011 WL 3794701; Porter, 2011 WL 1251246; and Bucci, 2009 WL 3328373, cases.

A

Foreclosure by MERS Was Proper

Falconers argue that MERS did not have standing to foreclose as mortgagee because it did not have the right to enforce the obligations under the Note. (Falconers' Mem. in Support of Ownership at 6.) Specifically, Falconers allege that in order to enforce the Statutory Power of Sale, under § 34-11-22, the foreclosing entity must be a note-holder and possess legal title through the Mortgage. Since the Note and Mortgage were "severed" (that is, held by different entities), Falconers assert that MERS is merely a mortgagee without standing to foreclose. Id. at 7. In addition, Falconers overlook the language of the mortgage 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. Furthermore, § 34-11-24 provides that assignment of the mortgage shall also be deemed an assignment of the debt secured thereby. Falconers' argument also overlooks this statutory authority as well as the previous decisions of this Court.³

In Bucci, the Court held that MERS had the contractual authority and statutory authority to foreclose. 2009 WL 3328373. Such language explicitly designated MERS as mortgagee and as nominee for Lender and Lender's successors and assigns, with the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the property. Id. The operative language in the Mortgage at issue here is identical to the operative language contained in the mortgage at issue in Bucci. As in Bucci, the Falconers, in the Mortgage at issue herein, expressly granted MERS the right to invoke the statutory power of sale as acknowledged, accepted and approved by Falconers who signed the Mortgage Deed. Therefore, as this Court held in previous cases, the mortgagee and nominee of Fremont (the original lender) and Fremont's successors and assigns has the right and authority to exercise the Statutory Power of Sale and foreclose on the Property, as mortgagee and nominee of the current note-holder, according to the plain, unambiguous language contained in the Mortgage instrument; MERS therefore possessed the contractual and statutory authority to foreclose after borrowers' default under the Note. See Porter, 2011 WL 1252146.

The Court in Bucci further concluded that nothing within the Rhode Island

³ In the absence of controlling authority of 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.

statutes prohibits MERS, as mortgagee in a nominee capacity, from foreclosing under the statutory power of sale or to assign such right to a successor party. 2009 WL 3328373 at * 6; see also Krigel, 2011 WL 4947398. Furthermore, MERS, while not the original lender, may invoke the statutory power of sale as the mortgagee and nominee of the original lender by exercising its right to foreclose following a homeowner's default under the Note. Id. at * 7.

As in Bucci, 2009 WL 3328373, this Court in Porter found that MERS had the contractual and statutory authority to foreclose. 2011 WL 1252146. The Court found the plain language of the mortgage, as acknowledged by the mortgagor, authorized MERS to exercise the statutory power of sale, thus overcoming the contention that MERS did not have the right to initiate foreclosure proceedings. Porter, 2011 WL 1252146 at * 6-8. In finding the reasoning of Bucci to be persuasive, the Court in Porter determined that MERS, while not the lender or note-holder, may nonetheless invoke the statutory power of sale as the mortgagee and nominee for the lender, finding the foreclosure to be valid in all respects. 2011 WL 1252146. For these reasons, the Court rejects Falconers' argument that MERS lacks standing to foreclose.

B

Assignment of the Mortgage Interest

Deutsche Bank contends that the assignment of the Mortgage interest from MERS to Deutsche Bank after the foreclosure sale is valid and binding. In the alternative, Deutsche Bank relies upon the "gavel rule"⁴ and asserts that the Mortgage was

⁴ Under the "gavel rule," a debtor's right to cure is cut off at the foreclosure sale. In re Medaglia, 402 B.R. 530, 532 (D.R.I. 2009); see also In re Connors, 497 F.3d 314 (3rd Cir. 2007); In re Cain, 497 F.3d 617 (6th Cir. 2005); in fact, under its statutory power of sale, Rhode Island law does not provide for any post-foreclosure right of redemption. Id. at 533. Section 34-11-22 provides ". . . which sale or sales . . . shall

extinguished at the time the terms of the foreclosure sale were executed by the highest bidder; thus, an assignment thereafter has no effect upon Deutsche Bank's title of the Property.

According to Falconers, MERS' assignment of its bid at foreclosure to Deutsche Bank is void as MERS is not the note-holder and the Mortgage cannot be transferred by a party that is not holder of the Note. Furthermore, Falconers assert that MERS possessed no beneficial interest in the Mortgage to transfer it and failed to comply with § 34-11-24 when assigning the Mortgage interest to Deutsche Bank. Id. at 8.

The analyses in both Porter, 2011 WL 1251246, and Bucci, 2009 WL 3328373, presuppose that the designation in the mortgage of MERS as mortgagee and nominee of the original lender results in MERS' assignee having the full power to enforce the note obligations, and upon default by the borrower, to exercise the statutory power of sale. Payette, 2011 WL 3794701 at * 14. Furthermore, based on the consistent line of decisions of this Court,⁵ Falconers do not have standing to challenge assignments or transfers of the Mortgage interest to which they are not parties. See Payette, 2011 WL 3794701; see also Kriegel, 2011 WL 4947398 (plaintiff was a stranger to the assignment and consequently lacks standing to contest the legal rights of an assignee); Fryzel v.

forever be a perpetual bar against the mortgagor.” Id. (quoting Section 34-11-22); 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); 140 Reservoir Avenue Associates v. Sepe Investments, LLC, 941 A.2d 805, 811-812 (R.I. 2007) (concluding that any interest of mortgagor's successor in real estate was forever barred by the foreclosure sale, where no party challenged the validity of the sale); 4 Richard R. Powell, Powell on Real Property, § 37.46 at 37-317 (2007) (“[T]he mortgagor has an opportunity to redeem down to the time of the [mortgage foreclosure] sale . . . , but this opportunity comes to an end with such sale From that point on, the equity court ceases to be concerned with the mortgagor in relation to the land.”).

⁵ As set forth supra, in the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of the Superior Court cases on this subject matter 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.).

Mortgage Elec. Registration Sys., 2011 U.S. Dist. LEXIS 95114 at * 47 (D.R.I. June 10, 2011) (Section 34-16-4 (the quiet title statute) does not provide plaintiff with standing to sue but only serves as the legal basis for a plaintiff who already has standing to obtain declaratory relief); Brough v. Foley, 525 A.2d 919 (R.I. 1987) (holding that the plaintiff, whose property purchase was thwarted by another's exercise of the right of first refusal, had no standing to challenge the validity of the assignee's rights to exercise a right of first refusal).

Assuming arguendo that this Court considered Falconers' contentions that the assignment from MERS to Deutsche Bank is void, Falconers' allegations that MERS failed to comply with § 34-11-24 is erroneous. The statute merely requires that the assignment is in the form entitled "Assignment of Mortgage" and duly executed. See Section 34-11-24. Here, the assignment is in the statutory form entitled, "Assignment of Mortgage." See Stipulated Facts, Ex. 5; see also Sec. 34-11-12. It bears the signature of the assignor, MERS, as nominee of Fremont, and the assignment was duly executed, notarized, and witnessed. It is therefore 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 transaction thereunder; and they must be proved to have been fraudulently made before the court can decide against them). Even if the Court were to find the assignment was invalid, as Falconers allege, this does not give Falconers a private right of action to rescind the foreclosure sale and extinguish the borrower's repayment obligations. See Payette, 2011 WL 3794701; see also 140 Reservoir Avenue Associates, 941 A.2d at 811-12 (Section 34-11-22 provides that a foreclosure conducted by statutory power of sale

“shall forever be a perpetual bar against the mortgagor . . .”); Holden, 964 A.2d at 516; In re Medaglia, 402 B.R. at 533; 4 Richard R. Powell, Powell on Real Property, § 37.46 at 37-317 (2007) (supra); Section 34-11-22.

Furthermore, the assignment was of the MERS bid which occurred after the foreclosure sale, wherein MERS was the successful bidder at the foreclosure sale. Accordingly, the assignment of the Mortgage interest does not affect title to the Property. MERS however then assigned its bid to Deutsche Bank. Deutsche Bank therefore stands in the same post-foreclosure status as the assignor, MERS, would have as a result of its successful bid at the sale. Deutsche Bank then held all the rights of the successful bidder at the foreclosure sale and recorded the foreclosure deed on January 7, 2010, thus establishing its presumptive title to the Property. 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). Falconers do not have a post-foreclosure right of redemption. See 140 Reservoir Avenue Associates, 941 A.2d at 811-12 (Section 34-11-22 provides that a foreclosure conducted by statutory power of sale “shall forever be a perpetual bar against the mortgagor . . .”).

IV

Conclusion

In the declaratory, quiet title action, judgment shall enter in favor of the Defendants, and denying and dismissing the Complaint of the Falconers. Based upon this Court’s rationale and reasoning in the Declaratory Judgment action, this Court likewise grants the motion to dismiss of both Falconers’ District Court Appeals. Since the only defense asserted to the eviction relates to the alleged lack of title in Deutsche Bank, and therefore the alleged lack of standing to pursue a judgment of possession, the Court finds the foreclosure sale to have been proper, title passed to Deutsche Bank by its recorded foreclosure deed, and at the time of the eviction action was the recorded title holder in accordance with the land evidence records of the City of Providence. No facts are set forth in the stipulated record to rebut the presumption of the validity of title in Deutsche Bank. The dismissal of the District Court appeals will be coupled with remand to the District Court for execution of the Judgment entered therein. The Court will enter judgment consistent with this decision.