

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: July 29, 2013)

CLARA AKALARIAN

:

v.

:

C.A. No. PC 2010-4744

:

NATION ONE MORTGAGE
COMPANY, INC.; MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC.; INDYMAC BANK,
F.S.B.; ONEWEST BANK, F.S.B.;
BENDETT & MCHUGH, P.C.

:

:

:

:

:

:

:

:

DECISION

RUBINE, J. Before the Court is Super. R. Civ. P. 56 Motion for Summary Judgment filed by Defendants OneWest Bank, F.S.B. (OneWest) and Mortgage Electronic Registration Systems, Inc. (MERS).¹ Plaintiff Clara Akalarian filed a complaint (Complaint) seeking declaratory and injunctive relief and to quiet title to certain real property located at 793 Namquid Drive, Warwick, Rhode Island (the Property). Plaintiff also originally sought damages for fraud and slander of title.² The gravamen of Plaintiff’s Complaint challenges the foreclosure sale of the Property alleging that Defendant OneWest, the foreclosing party, failed to possess the statutory power of sale, thus rendering the foreclosure sale a nullity and rendering void any title acquired by reason of the allegedly defective foreclosure.

¹ The parties filed a stipulation with the Court dismissing all claims against Defendant Bendett & McHugh, P.C. with prejudice and without attorneys’ fees or costs.

² Plaintiff’s counsel concedes in his Memorandum in Objection to Defendants’ Motion for Summary Judgment that Count III of the Complaint alleging a claim for slander of title may be dismissed voluntarily. (Pl.’s Mem. in Obj. to Defs.’ Mot. Summ. J. 11.)

I

FACTS & TRAVEL

The record,³ for summary judgment purposes, reflects that on November 27, 2006, Plaintiff executed a note (Note) in favor of the original lender, Nation One Mortgage Company, Inc. (Nation One) for \$334,000. (Boyle Aff. ¶ 2; Ex. A; Req. Admis. ¶¶ 2-3.) On that same date, Plaintiff executed a mortgage (Mortgage) to secure the Note. (Boyle Aff. ¶ 3; Ex. B; Req. Admis. ¶¶ 6-9.) Both the Note and Mortgage define the Lender as Nation One, and the Mortgage defines MERS as “mortgagee” and “nominee for Lender and Lender’s successors and assigns.” (Boyle Aff. Exs. A, B.) Further, the Mortgage provides that, “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.” (Boyle Aff. Ex. B.) 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 [Nation One] and [Nation One’s] successors and assigns) has the right: to exercise any or all of those interests, including, but not

³ The key issues in this matter—specifically concerning Plaintiff’s default under the terms of the note and the mortgage, notice of the foreclosure sale, and the validity of the mortgage assignment and its execution—have been conclusively admitted given Plaintiff’s failure to respond to Defendant OneWest’s Requests for Admissions. See Super. R. Civ. P. 36; see also Cardi Corp. v. State, 524 A.2d 1092, 1095 (R.I. 1987). Defendants submitted Plaintiff’s admissions with their Motion, and Plaintiff did not object or move for withdrawal of those admissions. See Rhode Island Insurer’s Insolvency Fund v. Leviton Mfg. Co., Inc., 763 A.2d 590, 599 (R.I. 2000) (finding that “it is wholly improper for a party, without leave of court, to make admissions and then subsequently attempt to avoid the effects of those admissions, thus prejudicing the opposing party.”).

limited to, the right to foreclose and sell the Property; and to take any action required of [Nation One].” Id.

The Mortgage was recorded in the Land Evidence Records of the City of Warwick. Id.

The Note was specially endorsed by Nation One to IndyMac Bank, F.S.B. (IndyMac), and IndyMac thereafter endorsed the Note in blank and the Note was transferred to Defendant OneWest, which held the Note at the time of foreclosure. (Boyle Aff. ¶ 2; Ex. A.) In July 2008, IndyMac was placed in receivership by Federal Deposit Insurance Corporation (FDIC) with FDIC appointed Receiver. (Compl. ¶ 44; Defs.’ Mot. Summ. J. Ex. 10.) FDIC reorganized IndyMac into a new entity it named IndyMac Federal Bank, F.S.B. (IndyMac Federal), and transferred all of IndyMac’s assets to IndyMac Federal. (Defs.’ Mot. Summ. J. Ex. 10.) Subsequently, on March 19, 2009, OneWest purchased all of the assets of IndyMac Federal. Id. On May 12, 2009, MERS, as mortgagee and as nominee for Nation One and Nation One’s successors and assigns, assigned the Mortgage to OneWest and that assignment was recorded. (Boyle Aff. ¶ 4; Ex. C; Req. Admis. ¶¶ 16-19.) Therefore, as of May 12, 2009, OneWest held both the Note and Mortgage, and OneWest has not transferred or delivered the Note to any other entity. (Boyle Aff. ¶ 2.)

Upon Plaintiff’s payment default under the terms of the Mortgage and the Note, Defendant OneWest, through its attorney, sent Plaintiff notice of default and of her right to cure the default prior to acceleration of the debt. (Boyle Aff. ¶¶ 5-6; Ex. D; Req. Admis. ¶¶ 1, 10-12; Ex. C.) However, Plaintiff failed to cure her default. (Boyle Aff. ¶ 7; Req. Admis. ¶¶ 10, 13.) OneWest, through its attorney, subsequently sent Plaintiff notice of the foreclosure sale. (Req. Admis. ¶¶ 14-15; Ex. D; Defs.’ Mot. Summ. J. Exs. 5, 8.)

On August 13, 2010, Plaintiff filed the instant Complaint as well as a “Motion for Stay Pending Lite,” which this Court denied. Thereafter, OneWest proceeded with a foreclosure sale of the Property on September 22, 2010.⁴ (Defs.’ Mot. Summ. J. Ex. 8.) Federal National Mortgage Association (FNMA)⁵ prevailed as the successful bidder at the foreclosure sale; however, as a result of the filing of this case, Plaintiff recorded a Notice of Lis Pendens concerning the Property. (Defs.’ Mot. Summ. J. Ex. 9.)

After the foreclosure sale, Defendants filed this Motion for Summary Judgment averring that no genuine issues of material fact exist with respect to the validity of the foreclosure sale and that Defendants are entitled to judgment as a matter of law.⁶ Plaintiff filed an objection to Defendants’ Motion—consisting of a memorandum of law, a deposition unrelated to Plaintiff or Plaintiff’s Note and Mortgage, and a copy of a California bankruptcy court decision—averring that genuine issues of material fact exist, 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 &

⁴ Plaintiff also had previously filed a Chapter 7 Voluntary Petition for Bankruptcy in the United States Bankruptcy Court for the District of Rhode Island. See In re: Clara Akalarian, No. 1:09-BK-12681 (Bankr. D.R.I. Apr. 28, 2011) (closed). Prior to closure of the case, the Bankruptcy Court entered an order granting OneWest’s Motion for Relief from the Automatic Stay pursuant to 11 U.S.C. § 362(a) allowing OneWest to proceed with its foreclosure action against the subject property. See Order Granting Motion for Relief, In re: Clara Akalarian, No. 1:09-BK-12681.

⁵ FNMA has not been joined as a party.

⁶ Defendants OneWest and Bendett & McHugh, P.C. originally filed a joint Motion for Summary Judgment before Bendett & McHugh, P.C. was dismissed from this action. Shortly thereafter, MERS filed a Motion for Summary Judgment joining Defendants OneWest and Bendett & McHugh, P.C. in their Motion.

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 Plaintiff, “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

The gravamen of Plaintiff’s Complaint challenges the authority of MERS to act as mortgagee and nominee of the original lender, Nation One, and to assign the Mortgage, thus allegedly invalidating the foreclosure sale conducted by OneWest, MERS’s assignee. This issue has been conclusively resolved by the recent Rhode Island Supreme Court decision in Bucci v. Lehman Bros. Bank, FSB, wherein the Court affirmed MERS’s authority to act as a mortgagee and as nominee of the lender pursuant to a

mortgage contract and to exercise the statutory power of sale granted to MERS under that contract. See No. 2010-146-A., 2013 WL 1498655, *17-18, 22, 24 (R.I. Apr. 12, 2013). Here, Plaintiff explicitly acknowledged that MERS, and MERS' successors and assigns, had the right to exercise the statutory power of sale and to foreclose and sell the Property. See Boyle Aff. Ex. B. While the Bucci decision did not address the specific issue of MERS's authority to assign a mortgage, it follows from the reasoning in Bucci that MERS—as the lawful and contractually designated mortgagee and nominee for the lender/noteholder—may also lawfully assign its interest in a mortgage. Plaintiff's claims to the contrary merit no further discussion.

In her opposition to summary judgment, Plaintiff argues that MERS was not the duly authorized agent of the noteholder at the time it assigned the Mortgage to Defendant OneWest, rendering that Mortgage assignment invalid. However, this Court has held on numerous occasions that a plaintiff/mortgagor in these circumstances lacks standing to challenge the validity of a mortgage assignment.⁷ See, e.g., Payette, No. PC 2009-5875, 2011 WL 3794701, at *15; see also Rutter v. Mortg. Elec. Registration Sys., Inc., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012, at *16-17 (R.I. Super. Mar. 12, 2012) (Silverstein, J.). Further, the Rhode Island Supreme Court recently reaffirmed its holding in Brough v. Foley, 525 A.2d 919, 922 (R.I. 1987) that one not a party to an agreement has no standing to challenge the validity of the agreement. See DePetrillo v. Belo

⁷ Plaintiff's counsel also sets forth in his memorandum an argument concerning the receivership of IndyMac, averring that somehow IndyMac's reorganization invalidated the Mortgage assignments in this matter. This Court has held on several occasions that IndyMac's receivership does not operate to invalidate MERS's authority, and that of MERS' successors and assigns, to act as nominee for the original lender, and the successors and assigns of that lender, and therefore to assign the mortgage. See, e.g., Payette, No. PC 2009-5875, 2011 WL 3794701, at *12-13.

Holdings, Inc., 45 A.3d 485, 492 (R.I. 2012). Nevertheless, assuming arguendo that Plaintiff has standing to challenge the assignment of her Mortgage on the basis of lack of agency between the assignor and the noteholder, this Court finds the challenge unavailing.

In Bucci, our Supreme Court addressed the issue of agency with respect to MERS's authority to foreclose as mortgagee and as agent of the noteholder; however, the Supreme Court has yet to rule on any issues concerning the validity of mortgage assignments in the context of a MERS form mortgage. See Bucci, No. 2010-146-A., 2013 WL 1498655, *25-27. While a foreclosing mortgagee must hold the mortgage and the note or be acting as an agent of the noteholder (see id.), a mortgagee executing a mortgage assignment need not be explicitly acting as an agent of the noteholder in order to transfer its bare legal interest in the mortgage as “the mortgagee is an equitable trustee who holds bare legal title to the mortgaged premises in trust [implied by law] for the noteholder.” Culhane v. Aurora Loan Servs. of Neb., 708 F.3d 282, 292 (1st Cir. 2013) (discussing common law principles concerning mortgages pursuant to Massachusetts law); see also Bucci, No. 2010-146-A., 2013 WL 1498655, *28-29 (citing Culhane, 708 F.3d at 293) (finding that “‘MERS’s role as mortgagee of record and custodian of the bare legal interest as nominee for the [noteholder], and the [noteholder’s] role as owner of the beneficial interest in the loan’ . . . reside comfortably within [Rhode Island law].”). “Absent a provision in the mortgage instrument restricting transfer . . . a mortgagee may assign its mortgage to another party,” and “[t]he noteholder possesses an equitable right to demand and obtain an assignment of mortgage” as the owner of the beneficial interest in the loan. Culhane, 708 F.3d at 293. Here, that is exactly what

occurred. The Note and Mortgage were eventually reunited in the same entity such that the foreclosing mortgagee and holder of the Mortgage—in this case, OneWest—also held the Note, rendering the issue of agency moot.⁸ Also, under Rhode Island statutory law, an assignment of a mortgage effectively results in an assignment of the note and debt secured thereby. See § 34-11-24. Accordingly, Plaintiff has failed to establish a genuine issue of material fact with respect to the assignment of the mortgage.

Furthermore, Plaintiff avers in her opposition to summary judgment that the individual who executed the Mortgage assignment was not authorized by MERS to do so and that the individual is a “robo-signer.”⁹ This argument fails because Plaintiff has not demonstrated by affidavit, or otherwise, that the assignment was executed by a person not authorized by the assignor to execute that document.¹⁰ Moreover, Plaintiff, by her

⁸ Plaintiff also sets forth a convoluted argument that proof of agency requires the recording of a power of attorney and that, here, Defendants OneWest and MERS failed to record powers of attorney to act on behalf of any of the other banks involved, including IndyMac and FDIC. In Rhode Island, an agency agreement relating to a mortgage need not be in writing, much less recorded. See Bucci, No. 2010-146-A., 2013 WL 1498655, *18 n.10; see also UXB Sand & Gravel, Inc. v. Rosenfeld Concrete Corp., 641 A.2d 75, 79 n.1 (R.I. 1994). Further, none of the facts in this matter demonstrate that any entity executed a conveyance on behalf of another entity as attorney in fact such that recording of a power of attorney was required pursuant to G.L. 1956 § 34-11-34.

⁹ The term “robo-signer” is nowhere defined under Rhode Island law. Apparently, this colloquial term has been used to describe a person without authority signing a recorded document.

¹⁰ Plaintiff’s counsel has submitted the deposition of Erica Johnson-Seck taken during the discovery process of a different case in a different jurisdiction not involving Plaintiff or the subject Property. It should be noted that Plaintiff’s counsel, and other counsel who frequently represent mortgagors challenging foreclosure in this Court, have submitted this same deposition in a plethora of other cases. Each and every time this deposition has been submitted, this Court has found that a deposition from a different case involving different parties and different facts fails to raise a genuine issue of material fact concerning the record before the Court. See, e.g., Payette, No. PC 2009-5875, 2011 WL 3794701, at *18-19; Breggia v. Mortg. Elec. Registration Sys., Inc., No. PC 2009-4144, 2012 WL 1154738, at *5, 7 (R.I. Super. Apr. 3, 2012) (Rubine, J.); Ingram v. Mortg. Elec. Registration Sys., Inc., No. PC 2010-1940, 2012 WL 1889238, at *5, 8 (R.I. Super.

failure to respond to Defendant OneWest's Requests for Admissions, conclusively admitted that the individual who executed the Mortgage assignment for MERS was authorized to do so. See Req. Admis. ¶ 19; see also Super. R. Civ. P. 36; see also Cardi, 524 A.2d at 1095. Plaintiff may not now attempt to avoid the effect of that conclusive admission. See Rhode Island Insurer's Insolvency Fund, 763 A.2d at 599. Even if this fact were not conclusively admitted, Plaintiff's averment still fails for lack of standing to challenge the validity of the mortgage assignment. See, e.g., Payette, No. PC 2009-5875, 2011 WL 3794701, at *15; see also DePetrillo, 45 A.3d at 492; Brough, 525 A.2d at 922; Rutter, Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012, at *16-17.

In addition, citing §§ 34-11-1 and 34-13-1, Plaintiff avers that Rhode Island statutes require the recording of all assignments of notes and mortgages and that the failure to record each transfer of the Note in this matter constituted a failure to comply with Rhode Island law. However, neither of these statutes, nor any other Rhode Island conveyance statute, requires the recording of assignments of a promissory note.¹¹ Thus, Plaintiff has failed to establish a genuine issue of material fact with respect to the transfer and recording of the Note.

Finally, in her Complaint, Plaintiff attempts to allege a claim for fraud. This claim is not viable for two reasons. Plaintiff failed to properly allege the essential elements of fraud—that an intentional misrepresentation was made by Defendants, which misrepresentation she relied on, causing her damage. See Women's Dev. Corp. v. City of

May 17, 2012) (Rubine, J.); Noury v. Deutsche Bank National Trust Company, No. PC 2009-7014, 2012 WL 1670546, at *5, 8 (R.I. Super. May 7, 2012) (Rubine, J.).

¹¹ The transfer of any negotiable instrument is governed exclusively by Title 3 of the Uniform Commercial Code (UCC). See § 6A-3-101 et seq. This is true in Rhode Island and in any state which has adopted the UCC. Nothing in the UCC requires the recordation of the transfer of a negotiable instrument, such as a promissory note.

Central Falls, 764 A.2d 151, 160 (R.I. 2001) (citing Travers v. Spidell, 682 A.2d 471, 472-73 (R.I. 1996)). Also, Plaintiff's Complaint fails to allege fraud with the particularity required by R.I. R. Civ. P. 9(b).

IV

CONCLUSION

Accordingly, Plaintiff has failed to establish a genuine issue of material fact with respect to the claims asserted in the Complaint. Accordingly, Defendants' Motion for Summary Judgment is granted and the notice of lis pendens concerning the subject property shall be vacated. 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: Akalarian v. Nation One Mortgage Company, Inc., et al.

CASE NO: PC 2010-4744

COURT: Providence County Superior Court

DATE DECISION FILED: July 29, 2012

JUSTICE/MAGISTRATE: Rubine, J.

ATTORNEYS:

For Plaintiff: Keven A. McKenna, Esq.

For Defendant: Nicole M. Labonte, Esq.
Nicholas R. Mancini, Esq.