

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: April 9, 2013)

EVELIN GONZALEZ

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v.

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C.A. No. PC 2010-7010

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MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.;  
DOMESTIC BANK; FEDERAL  
NATIONAL MORTGAGE  
ASSOCIATION; INDYMAC  
MORTGAGE SERVICES

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DECISION

**RUBINE, J.** Defendants Mortgage Electronic Registration Systems, Inc. (MERS), Federal National Mortgage Association (FNMA), and IndyMac Mortgage Services (IMMS),<sup>1</sup> a division of OneWest Bank, FSB, (collectively, “Defendants”)<sup>2</sup> move for summary judgment pursuant to Super. R. Civ. P. 56. Plaintiff Evelin Gonzalez (Plaintiff) filed a verified complaint (Complaint) seeking declaratory and injunctive relief to quiet title to certain real property located at 150 Ford Street, Providence, Rhode Island (the “Property”). The gravamen of the Complaint challenges the foreclosure sale conducted by FNMA, alleging that FNMA had no right to exercise the statutory power of sale under Rhode Island law; thus, rendering the foreclosure sale and the title passing thereafter a nullity.

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<sup>1</sup> IMMS is a division of OneWest Bank, FSB, and therefore is not a separate entity. (Boyle Aff. ¶ 3.)

<sup>2</sup> Defendant Domestic Bank is not a party to this Motion.

## I

### FACTS & TRAVEL

The record with respect to summary judgment reflects that on January 10, 2006, Plaintiff executed a note (Note) in favor of Domestic Bank (Domestic) for \$228,000, which proceeds were used to finance the purchase of the Property. (Boyle Aff. ¶ 8-9; Defs.’ Mot. Summ. J. Ex. B at 1.) The Note provides that “I [borrower] understand that the Lender may transfer this Note. The Lender 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. B at 1.) Thereafter, the Note was specially endorsed by Domestic to Credit Northeast, Inc. (Credit Northeast). (Boyle Aff. ¶ 9; Defs.’ Mot. Summ. J. Ex. B at 3.) Subsequently, Credit Northeast specially endorsed and transferred the Note to IndyMac Bank, F.S.B. (IndyMac). (Boyle Aff. ¶ 10-11; Defs.’ Mot. Summ. J. Ex. B at 3.) IndyMac then endorsed the Note in blank. (Boyle Aff. ¶ 11; Defs.’ Mot. Summ. J. Ex. B at 3.) Notice was sent to Plaintiff on March 1, 2006, wherein Plaintiff was notified that the servicing of her mortgage loan was transferred to IndyMac. (Boyle Aff. ¶ 12; Defs.’ Mot. Summ. J. Ex. C.)

To secure the Note, Plaintiff contemporaneously executed a mortgage (Mortgage) on the Property. (Compl. Ex. 2; Boyle Aff. ¶ 7; Defs.’ Mot. Summ. J. Ex. A.) The Mortgage designates Domestic as the “Lender” and MERS as the “mortgagee” as well as the “nominee for Lender and Lender’s successors and assigns.” (Compl. Ex. 2 at 1.) In addition, 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.” Id. at 2. 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 Lender and Lender’s 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 Lender. Id. at 3.

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

(Boyle Aff. ¶ 7; Defs.’ Mot. Summ. J. Ex. A.)

On July 11, 2008, IndyMac went into receivership with the Federal Deposit Insurance Corporation (FDIC) appointed as receiver. (Boyle Aff. ¶ 13.) On that same date, a new institution, IndyMac Federal Bank, FSB (IndyMac Federal), was created and FDIC was appointed as the conservator. Id. On March 19, 2009, OneWest Bank, FSB, through its division IMMS, became the servicer of the Mortgage and Note by way of its acquisition of substantially all of the assets and mortgage servicing rights of IndyMac Federal from the FDIC. Id.

On September 10, 2009, MERS, as mortgagee and as nominee of Domestic’s successors and assigns, assigned the Mortgage interest to FNMA. (Compl. Ex. 3; Boyle Aff. ¶ 14; Defs.’ Mot. Summ. J. Ex. D.) The assignment was duly executed and recorded. (Boyle Aff. ¶ 14; Defs.’ Mot. Summ. J. Ex. D.) Thus, as of September 10, 2009, FNMA possessed the power to exercise the statutory power of sale and to foreclose and sell the Property. (Compl. Ex. 2 at 3.)

Plaintiff failed to make timely payments as obligated under the Note and Mortgage and, at the time of the foreclosure sale, Plaintiff owed her September 2009

monthly Mortgage payment. (Boyle Aff. ¶¶ 18, 19.) Thus, FNMA foreclosed on the Property on December 1, 2010, and prevailed as the successful bidder at the foreclosure sale. (Boyle Aff. ¶ 16.) IMMS, as servicer for FNMA, held the Note on behalf of FNMA at the time of the foreclosure sale. (Boyle Aff. ¶ 17; Defs.’ Mot. Summ. J. Ex. B at 3.)

Defendants aver that no genuine issues of material fact exist, and therefore, that they are entitled to judgment as a matter of law. Plaintiff filed a one-page objection in response to Defendants’ Motion in which she fails to establish that a genuine issue of material fact exists. Furthermore, Plaintiff and her counsel failed to appear at the Motion hearing. Accordingly, the Court took the matter under advisement, thereby considering Defendants’ Motion unopposed.

## 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 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

Since the facts herein are nearly identical to the facts in Payette v. Mortg. Elec. Registration Sys., and the Mortgage executed by Plaintiff contains the same operative language as that of the mortgage considered in Payette, this Court will incorporate and adopt the reasoning set forth in Payette. No. PC 2009-5875, 2011 WL 3794701 (R.I. Super. Aug. 22, 2011) (Rubine, J.). In that case, this Court determined that, according to the undisputed material facts, defendants were entitled to judgment as a matter of law. The same outcome obtains in this case.

Although given a fair opportunity, Plaintiff has failed to adequately oppose Defendants’ Motion for Summary Judgment. In her one-page objection, Plaintiff did not offer any evidence to contest any material facts as established by the affidavits and uncontested documents, many of which Plaintiff attached and incorporated into her Complaint. In addition, Plaintiff does not distinguish the undisputed facts and the facts relied upon in the Court’s earlier determination and dismissal of similar cases. “[O]nce a party files and serves a properly supported summary-judgment motion, an alarm bell

begins to toll and it is time for the opposing parties either to put up their evidence or shut up their case.” Wright v. Zielinski, 824 A.2d 494, 499 (R.I. 2003). Accordingly, Plaintiff has failed to meet her affirmative burden under Rule 56 and to demonstrate that a genuine issue of material fact exists. See Liberty Mut. Ins. Co., 947 A.2d at 872.

Moreover, the legal issues raised by the Complaint have been previously decided by this Court in a manner inconsistent with the position that Plaintiff takes herein. See Kriegel v. Mortg. Elec. Registration Sys., No. PC 2010-7099, 2011 WL 4947398 (R.I. Super. Oct. 13, 2011) (Rubine, J.); see also Rutter v. Mortg. Elec. Registration Sys., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012 (R.I. Super. Mar. 12, 2012) (Silverstein, J.); Payette, 2011 WL 3794701; Porter v. First NLC Fin. Servs., No. PC 2010-2526, 2011 WL 1251246 (R.I. Super. Mar. 31, 2011) (Rubine, J.); 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. In the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of Superior Court cases on this subject represents the prevailing view of the law in Rhode Island. The decisions of the Superior Court unanimously support this result. The Court hereby incorporates by reference the reasoning and authorities relied upon in those previous decisions.

#### IV

#### CONCLUSION

In sum, a review of the record in this case reveals no genuine issue of material fact for trial. Accordingly, Defendants’ Motion for Summary Judgment is granted. Counsel for the prevailing party shall submit an appropriate order for entry.



**RHODE ISLAND SUPERIOR COURT**  
*Decision Addendum Sheet*

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**COURT:** Providence County Superior Court

**DATE DECISION FILED:** April 9, 2013

**JUSTICE/MAGISTRATE:** Rubine, J.

**ATTORNEYS:**

For Plaintiff: Todd S. Dion, Esq.

For Defendant: Jennifer J. Normand, Esq.