

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.

SUPERIOR COURT

(Filed: February 13, 2013)

AURORA LOAN SERVICES, LLC	:	C.A. No. WD 2011-0491
	:	
v.	:	
	:	
PAMELA C. MOFFATT F/K/A	:	
PAMELA C. ICART	:	
	:	
PAMELA C. MOFFATT FKA	:	
PAMELA C. ICART	:	
	:	
v.	:	C.A. No. WC 2011-0307
	:	(Consolidated)
	:	
MORTGAGE ELECTRONIC	:	
REGISTRATION SYSTEMS, INC.;	:	
CENTRAL PACIFIC MORTGAGE	:	
COMPANY; AURORA LOAN	:	
SERVICES, LLC; AND JOHN DOE	:	
SECURITIZED TRUST	:	

DECISION

RUBINE, J. Before the Court is Defendants’, Mortgage Electronic Registration Systems, Inc. (“MERS”) and Aurora Loan Services, LLC (“Aurora”) (collectively, “Defendants”),¹ Motion to Dismiss Plaintiff’s complaint (“Complaint”) pursuant to Super. R. Civ. P. 12(b)(6). Plaintiff, through her Complaint, seeks declaratory and injunctive relief pursuant to G.L. 1956 § 9-30-1, *et seq.*, petitioning this Court to quiet title in favor of Plaintiff and to declare the foreclosure sale of her real property located at 28 Deacon Drive, North Kingstown, Rhode Island (the “Property”) void. With respect to the District Court appeal, Plaintiff raises a defense that Aurora cannot seek eviction in

¹ Defendants Central Pacific Mortgage Company and John Doe Securitized Trust are not parties to this Motion.

that its title was derived from a flawed foreclosure sale. Plaintiff alleges that the foreclosure sale was ineffective because the assignment of the mortgage interest was invalid and Defendants allegedly had no standing to exercise the statutory power of sale under § 34-11-22. Plaintiff further sets forth allegations in her Complaint that the mortgage note is current or has been satisfied and that the foreclosure sale was not noticed or published as required by statute and by the terms of the Mortgage. This dispute was consolidated with a related dispute from the Fourth Division District Court wherein this Court, on appeal, entered judgment for possession of the Property in favor of Aurora. In that judgment, Aurora was also granted back rent and use and occupancy to be paid by Plaintiff. This Court exercised its discretion and stayed execution of the judgment pending the resolution of this quiet title action.

I

FACTS & TRAVEL

The facts derived from the Complaint and the exhibits attached thereto and incorporated therein are as follows. On September 29, 2006, Plaintiff executed a note (“Note”) in favor of lender Central Pacific Mortgage Company (“Central”) for \$470,000, which loan proceeds were used to finance the purchase of the Property. (Compl. Ex. 2. at 1.) Contemporaneously, Plaintiff executed a mortgage (“Mortgage”) on the Property to secure the Note. (Compl. Ex. 2.) The Mortgage designates Central as the “Lender” and further designates MERS as “mortgagee” as well as “nominee for [Central] and [Central’s] successors and assigns.” *Id.* at 1. The plain, unambiguous language of the Mortgage expressly provides that “Borrower does hereby mortgage, grant and convey [the Property] to MERS (solely as nominee for [Central] and [Central’s] successors and

assigns) and to the successors and assigns of MERS.” Id. at 2-3. 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 [Central] and [Central’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 [Central].” Id. at 3.

The Mortgage was recorded in the land evidence records of the Town of North Kingstown. (Compl. Ex. 2.)

On November 22, 2010, MERS, as mortgagee and as nominee for Central, assigned the Mortgage interest to Aurora. (Compl. Ex. 3.) Thus, Aurora held “legal title to the interests granted by Borrower in th[e] Security Instrument,” and “if necessary to comply with law or custom,” as assignee of the mortgagee, Aurora had all of the rights of the assignor, including “the right to foreclose and sell the Property.” (Compl. Ex. 2 at 3.) Subsequently, on April 26, 2011, Aurora, as holder of the Mortgage, foreclosed on the Property. (Compl. ¶¶ 39-41, 76.)

Plaintiff filed the instant Complaint seeking nullification of the foreclosure sale and return of title to her. Plaintiff also alleges that the Note is current or has been satisfied and that the foreclosure sale was not properly noticed or published. (Compl. ¶¶ 45-47, 55.) Defendants then filed this Motion to Dismiss pursuant to Rule 12(b)(6) averring that Plaintiff’s Complaint fails to set forth a claim entitling Plaintiff to relief. Plaintiff has objected to Defendants’ Motion averring that she has set forth a claim for relief. At the Motion hearing, both parties stipulated to waive oral argument, and this Court took the matter under advisement.

II

ANALYSIS

For the purpose of a Rule 12(b)(6) motion to dismiss, the Court assumes the allegations set forth in the Complaint are true and views them in the light most favorable to plaintiff. Tarzia v. State, 44 A.3d 1245, 1251 (R.I. 2012) (quoting Narragansett Elec. Co. v. Minardi, 21 A.3d 274, 277 (R.I. 2011)). The motion will be granted only if it appears clear beyond a reasonable doubt that there is no set of facts which could entitle plaintiff to relief. Palazzo v. Alves, 944 A.2d 144, 149-50 (R.I. 2008) (quoting Ellis v. Rhode Island Pub. Transit Auth., 586 A.2d 1055, 1057 (R.I. 1991)).

Applying that standard here, Defendants' Motion to Dismiss must be denied. There are at least two allegations which, if taken as true, would be grounds to invalidate the foreclosure. Plaintiff has set forth an allegation that the Note is current. (Compl. ¶ 55.) If that is proven to be a truthful allegation, there would be no payment default which, under the mortgage, is a condition precedent to foreclosure. In addition, Plaintiff sets forth an allegation in the Complaint that notice and publication of the sale failed to adhere to statutory requirements. (Compl. ¶¶ 45-47.) Under prevailing law, failure to follow the notice procedures as provided in the statute may be grounds to render the foreclosure sale a nullity. See 55 Am. Jur. 2d Mortgages § 508, 511 & n.3 (2009) (citing persuasive authority therein) (a foreclosing mortgagee's failure to comply with certain notice requirements contained in the Mortgage and in the pertinent state statute will invalidate a foreclosure sale). Once again, if the Court views that allegation as true, Defendants' Motion to Dismiss must be denied.

For the above reasons, Defendants' Motion to Dismiss is denied. As to the other

grounds for invalidating the foreclosure alleged in the Complaint, based on earlier precedent, those allegations fail to state a claim as a matter of law. See Payette v. Mortg. Elec. Registration Sys., Inc., No. PC 2009-5875, 2011 WL 3794701 (R.I. Super. Aug. 22, 2011) (Rubine, J.); Porter v. First Fin. Serv., No. PC 2010-2526, 2011 WL 1251246 (R.I. Super. March 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.).

III

CONCLUSION

In sum, Plaintiff has set forth allegations in the Complaint that, if true, state a claim for relief. Accordingly, Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) is denied. Counsel for the prevailing party shall submit an Order in accordance with this Decision.