STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(Filed: June 25, 2012)

FRANK W. KOSIBA III	:	
	:	
v.	:	**C.A. No. KC 2011-0874**
	:	
MORTGAGE ELECTRONIC	:	
REGISTRATION SYSTEMS, INC.;	:	
WILMINGTON FINANCE, INC.;	:	
VERICREST FINANCIAL, INC.;	:	
THE BANK OF NEW YORK	:	
MELLON, AS TRUSTEE FOR CIT	:	
MORTGAGE LOAN TRUST 2007-1	:	

DECISION

RUBINE, J. Defendants Mortgage Electronic Registration Systems, Inc. ("MERS"), Vericrest Financial, Inc. ("Vericrest"), and the Bank of New York Mellon, as Trustee for CIT Mortgage Loan Trust 2007-1's ("Bank of New York") (collectively, "Defendants") jointly move to dismiss Plaintiff Frank W. Kosiba III's ("Plaintiff") complaint ("Complaint") for declaratory and injunctive relief. Through the Complaint, Plaintiff seeks a declaration from this Court quieting title and declaring that the foreclosure sale conducted by Bank of New York on certain real property located at 19 Niantic Trail, West Greenwich, Rhode Island ("the Property") is null and void as Bank of New York allegedly was lawfully unable to foreclose in that it failed to possess or control the statutory power of sale upon commencement of foreclosure proceedings.

I

Facts & Travel

The facts as alleged in the Complaint and facts gleaned from exhibits attached to the Complaint are as follows: On August 28, 2006, Plaintiff executed a note ("Note") in

favor of lender Wilmington Finance, Inc. ("Wilmington") for $180,000. To secure the Note, Plaintiff contemporaneously executed a mortgage ("Mortgage") on the Property. The Mortgage was recorded in the land evidence records of the Town of West Greenwich. The Mortgage identifies MERS as "nominee for Lender and Lender's successors and assigns" and as "mortgagee." (Compl. Ex. 2 at 1.) The Mortgage further provides "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." (Compl. Ex. 2 at 3.)

On December 15, 2010, MERS, as nominee for Wilmington and mortgagee, assigned the Mortgage interest to Bank of New York. See Compl. Ex. 3. The assignment was recorded in the land evidence records of the Town of West Greenwich. As a result of the assignment, Bank of New York succeeded to all the rights granted to MERS through Plaintiff's execution of the Mortgage instrument, including all "Mortgage Covenants upon the Statutory Condition and with the Statutory Power of Sale." (Compl. Ex. 2 at 3.)

Plaintiff failed to make timely payments pursuant to the terms of the Note and Mortgage, thereby resulting in a default. Accordingly, Bank of New York, as mortgagee and nominee for Wilmington, foreclosed on the Property.

Plaintiff thereafter filed this Complaint to quiet title, seeking nullification of the foreclosure sale and return of title to him. Defendants filed this Rule 12(b)(6) Motion to Dismiss averring that Plaintiff's Complaint fails to state a claim upon which relief may be

granted. After the submission of supplemental memoranda by both parties, this Court took the matter under advisement.

II

Standard of Review

"The 'sole function of a motion to dismiss' pursuant to Rule 12(b)(6) is 'to test the sufficiency of the complaint.'" McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005) (quoting Rhode Island Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)). For purposes of the motion, the Court "assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the plaintiffs." Giuliano v. Pastina, Jr., 793 A.2d 1035, 1036-37 (R.I. 2002) (quotation omitted).

The United States Supreme Court has adopted the view that a complaint must allege facts that "raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007) (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004)). Hence, a plaintiff has an obligation to provide "the 'grounds' of his 'entitlement to relief.'" Id. (citing Papasan v. Allain, 478 U.S. 265, 286, 106 S.Ct. 2932 (1986)). This "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. Accordingly, a plaintiff's factual allegations contained in a complaint must be specific enough to cross "the line from conceivable to plausible." Id. at 570.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 556); see also Peterson v. GMAC Mort., LLC, No. 11-

11115-RWZ, Slip Copy, 2011 WL 5075613 at * 2 (D. Mass. Oct. 25, 2011) (Zobel, J.). "Where a complaint pleads facts that are 'merely consistent with' defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" Id. at 678, (quoting Twombly, 550 U.S. at 557). "Only a complaint that states a plausible claim for relief survives a motion to dismiss." Id. at 679 (citing Twombly, 550 U.S. at 556). A complaint that states "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," will not suffice. Id. at 678 (citing Twombly, 550 U.S. at 555). However, "when there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id. at 679. "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. (citing Iqbal v. Hasty, 490 F.3d 143, 157-58 (C.A.2 2007)).

The courts in Massachusetts have adopted the plausibility standard for whether a complaint can survive a motion to dismiss under the Federal Rules of Civil Procedure 12(b)(6) as articulated by the United States Supreme Court in Iqbal, 556 U.S. at 678-79 and Twombly, 550 U.S. at 550. See Iannacchino v. Ford Motor Car, 451 Mass. 623, 636 (2008); see also Peterson v. GMAC Mort., LLC, No. 11-11115-RWZ, Slip Copy, 2011 WL 5075613 at * 2 (D. Mass. Oct. 25, 2011) (Zobel, J.). Although Rhode Island has adopted the Federal Rules of Civil Procedure, the Rhode Island Supreme Court has yet to explicitly accept the Iqbal and Twombly standard as the operative standard with which to judge a Rule 12(b)(6) motion. In the case of Barrette v. Yakavonis, 996 A.2d 1231 (R.I. 2009), the Supreme Court interpreted the Rhode Island rules as follows: "a pleading

need not include 'the ultimate facts that must be proven in order to succeed on the complaint . . . or . . . set out the precise legal theory upon which [the plaintiff's] claim is based.'" Id. at 1234 (quoting Gardner v. Baird, 871 A.2d 949, 953 (R.I. 2005)). All that is required is that the "complaint 'provide the opposing party with fair and adequate notice of the type of claim being asserted.'" Id. Stated differently, the Court ruled: "th[e] Court examines the allegations contained in the plaintiff's complaint, assum[ing] them to be true, and views them in the light most favorable to the plaintiff." Id. (quoting Palazzo v. Alves, 944 A.2d 144, 149 (R.I. 2008)). Thereafter a motion to dismiss is "appropriate 'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of plaintiff's claim.'" Id. However, based upon the analysis of the law as set forth below, Plaintiff's Complaint cannot survive a Rule 12(b)(6) motion even under the more forgiving pleading standard articulated in Barrette and Palazzo. The Court cannot hear facts or legal argument from Plaintiff to prove an alleged defect in an assignment since Plaintiff lacks standing, as a stranger to the assignment, and therefore cannot prove his claim by proving that the assignment document evidences flaws that might effect the enforcement of the assignment by the assignor or the assignee. Since Plaintiff is neither, he is without standing to seek relief on that basis. The Defendants are entitled to dismissal of a claim that Plaintiff cannot prevail upon under any set of facts dealing with defects in an assignment.

III

Analysis

The Court finds the allegations as set forth in the Complaint of this matter are nearly identical to the allegations in the complaint in Kriegel v. Mortgage Electronic Registration Systems, and the Mortgage executed by Plaintiff contains the same operative language as the mortgage considered in Kriegel, therefore, this Court will incorporate and adopt the reasoning set forth in Kriegel, No. PC 2010-7099, 2011 WL 4947398 (R.I. Super. Oct. 13, 2011) (Rubine, J.). In that case, plaintiff failed to adequately allege in his complaint the grounds entitling him to the relief sought, merely alleging false conclusory statements. Thus, the Court dismissed plaintiff's complaint under Rule 12(b)(6) for failure to state a claim. The same outcome obtains in this case.

The Court notes that Plaintiff in his memoranda, although given a fair opportunity to distinguish earlier cases, fails to distinguish this matter from the Court's earlier determination of similar cases. Rather, Plaintiff has chosen to primarily criticize the precedent of the Rhode Island Superior Court[1] as "fatally flawed," attaching an exhibit to his memorandum entitled "Deconstruction of Payette." This argument fails to convince the Court that its earlier rulings were fatally flawed.[2] See Rutter v. Mortgage Electronic Registration Systems, Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012 at * 10 (R.I. Super. March 12, 2012) (Silverstein, J.).[3]

[1] In the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of the Superior Court cases on this subject 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.); see also Rutter v. Mortgage Electronic Registration Systems, Nos. PC-2010-4756, PD-2010-4418, 2012 WL 894012 (R.I. Super. March 12, 2012) (Silverstein, J.).

[2] It seems to the Court that Counsel should save his criticism of the Court's earlier cases as "fatally flawed" for the appellate court.

[3] Justice Silverstein quoted at length from Commonwealth Prop. Advocates v. U.S. Bank Nat'l Ass'n, wherein the Court held that "the issues presented in this appeal have been previously decided. Counsel

The crux of Plaintiff's Complaint challenges the validity of the assignment of the Mortgage interest by MERS to Bank of New York, and thus, Bank of New York's ultimate standing to commence foreclosure proceedings. Specifically, Plaintiff alleges in the Complaint that Paul Laird ("Laird") had no authority to execute the assignment on behalf of MERS as Laird is an employee of Accredited not a Vice-President or Assistant Secretary of MERS. (Compl. ¶¶ 12, 13.) Hence, Plaintiff asks the Court to draw the conclusion that Laird was attempting to assign the Mortgage on behalf of Accredited, not MERS. (Compl. ¶ 19.)

It is well-established that "homeowners lack standing to challenge the propriety of mortgage assignments and the effect those assignments, if any, could have on the underlying obligation." Payette v. Mortgage Electronic Registration Systems, No. PC 2009-5875, 2011 WL 3794700 (R.I. Super. Aug. 22, 2011) (Rubine, J.); see also Rutter, 2012 WL 894012 at * 17 (quoting Fryzel v. Mortgage Electronic Registration Systems, C.A. No. 10-325 M, 2011 U.S. Dist. LEXIS 95114, at * 41-42 (D.R.I. June 10, 2011)) (the principle that a non-party to the contract does not have standing to challenge the contract's subsequent assignment is well established); Brough v. Foley, 525 A.2d 919, 922 (R.I. 1987) (holding that the plaintiff, whose property purchase was thwarted by an assignee's exercise of the assigned right of first refusal, had no standing to challenge the validity of the assignment); Peterson, 2011 WL 5075613 at * 4 (court refused to read U.S. Bank Nat. Ass'n v. Ibanez, 458 Mass. 637, 941 N.E.2d 40 (2011) as an independent basis for mortgagors to collaterally contest previously executed mortgage assignments to which they are not a party and that do not grant them any interests or rights; finding

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were given an opportunity to distinguish our prior cases but Appellant's counsel used that opportunity to criticize, rather than distinguish them. There is nothing more to say." No. 11-4168, slip op. at 1-2 (10th Cir. March 6, 2012)

mortgagors have no legally protected interests in the assignment of the mortgage and therefore lack standing to challenge it); In re Correia, 452 B.R. 319 (1st Cir. BAP (Mass.) 2011) (affirming the bankruptcy appellate panel's finding that mortgagors lacked standing to challenge the validity of the mortgage assignment to which they were not a party). Even if this Court were to find Plaintiff had standing to challenge the assignment of the Mortgage interest, Plaintiff must allege facts entitling him to relief. Twombly, 550 U.S. at 555. Plaintiff's allegations with respect to the invalidity of the assignment of the Mortgage interest are merely "conclusory statements" which are insufficient to survive a motion to dismiss. Iqbal, 556 U.S. at 678. Plaintiff has failed to allege facts in the Complaint which "raise a right to relief above the speculative level." Twombly, 550 U.S. at 555. Accordingly, Plaintiff's Complaint must be dismissed.

In addition, Plaintiff avers that the assignment is invalid as there is no recorded power of attorney authorizing MERS to act on behalf of Wilmington. Under Rhode Island law, there is no requirement that Wilmington record a power of attorney in order for MERS to act on its behalf. See G.L. 1956 Section 34-13-1. By the plain, unambiguous language contained within the Mortgage instrument, which was recorded in the land evidence records in the Town of West Greenwich in accordance with Rhode Island General Laws, MERS was designated as the mortgagee and nominee of Wilmington and Wilmington's "successors and assigns," (Compl. Ex. 2 at 1.), thus obviating the need for a recorded power of attorney. Thus, even assuming the veracity of Plaintiff's allegations, these allegations do not entitle Plaintiff to the relief he seeks.

Plaintiff further avers that the Note was never transferred or negotiated to Bank of New York or MERS. (Compl. ¶ 54.) Likewise, this allegation fails to state a fact which

entitles Plaintiff to relief. Twombly, 550 U.S. at 555. The identity of the note-holder is irrelevant as it is well-established under this Court's interpretation of current Rhode Island law that MERS and the assignees of MERS act as nominee of the current note-holder. See The Bank of New York Mellon v. Cuevas, Nos. PD 2010-0988, PC 2010-0553, 2012 WL 1388716 (R.I. Super. April 19, 2012) (Rubine, J.); see also Payette, 2011 WL 3794701; Bucci, 2009 WL 3328373. Nevertheless, the Note and the Mortgage were both in the hands of Bank of New York by way of assignment from MERS at the time of foreclosure.

Plaintiff further attempts to invalidate the foreclosure sale by averring that the note-holder and mortgagee must be one of the same. Specifically, Plaintiff avers that under §§ 34-11-21, 22 and 24, the note-holder and mortgagee must be the same party.

The assertion by Plaintiffs, that §§ 34-11-21, 22, and 24 require the note-holder and mortgagee to be the same party is erroneous under Rhode Island law Section 34-11-21 does not stands for the proposition that the note and mortgage be held by the same party. See Rutter, 2012 WL 894012 at * 15. "Interpreting § 34-11-21 to require the mortgagee and lender always be the same entity would reach an absurd result because named mortgagees and lenders would be precluded from employing servicers to service and collect obligations secured by real estate mortgagees," and "clearly, the General Assembly envisioned a role for mortgage servicers in the lending industry." Id. at * 14 (quoting Bucci v. Lehman Brothers Bank, FSB, No. PC-2009-3888, 2009 WL 3328373 (R.I. Super. August 25, 2009) (Silverstein, J.)). Moreover, "the designation of MERS as mortgagee and lender's nominee, does not as a matter of law, cause a fatal defect in the foreclosure." Kriegel, 2011 WL 4947398 at * 9.

Furthermore, § 34-11-24 provides that an assignment of the mortgage shall also be deemed an assignment of the debt secured thereby. Rutter, 2012 894012; see also Kriegel, 2011 WL 4947398. Once the lender designates MERS as its nominee, MERS, and thus any assignee of MERS, also acts as holder of the debt secured by the mortgage and has the authority to assign or enforce the mortgage interest. Kriegel, 2011 WL 4947398 at * 15. By the clear and unambiguous language of § 34-11-24, an assignment of the mortgage deed is assigned with "the note and debt thereby secured." Section 34-11-24. Therefore, the assignment of the Mortgage interest by MERS to Bank of New York transferred the Mortgage as well as "the [N]ote and debt thereby secured." Section 34-11-24. Bank of New York then became an assignee of MERS thereby possessing all the rights as mortgagee, including the statutory power of sale. See Kriegel, 2011 4947398 at * 13-14 (quoting Weybosset Hill Investments, LLC v. Rossi, 857 A.2d 231, 240 (R.I. 2004)) (an assignee steps into the shoes of the assignor and can avail itself of the assignor's rights). In addition, as set forth supra, in this case the Mortgage and Note were held by Bank of New York at the time of foreclosure.

Plaintiff further relies on a United States Supreme Court case, Carpenter v. Longan, 83 U.S. 271 (1872), wherein the Court found the note and mortgage to be inseparable, holding that under Colorado law, the assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. 83 U.S. at 274 (emphasis added). This holding is in direct conflict with § 34-11-24.[4] Under Rhode Island General Laws, § 34-11-24, unlike the law of Colorado, an assignment of the mortgage carries with it "the note and debt thereby secured." Section 34-11-24. Section

[4] The holding of the U.S. Supreme Court interpreting Colorado law is not dispositive of the same issue under Rhode Island law.

34-11-24 supports the proposition that in Rhode Island the legislature did not intend to render an assignment of a mortgage interest a nullity when the mortgage interest alone is assigned to the foreclosing bank. The plain, unambiguous language of the statute itself is clear. "It is well settled that when the language of a statute is clear and unambiguous, this Court must interpret that statute literally and must give the words of the statute their plain and ordinary meanings." Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996); see also Bucci, 2009 WL 3328373 at * 10. To accept Plaintiff's interpretation of § 34-11-24, thereby rendering the assignment of the Mortgage interest a nullity, would lead to an absurd result. "Statutes should not be construed to reach an absurd result." Bucci, 2009 WL 3328373 at * 12; see also Brennan v. Kirby, 529 A.2d 633, 637 (R.I. 1987). Accordingly, an assignment of the mortgage interest carries with it the note and debt thereby secured and will not be rendered a nullity. Since these allegations are merely conclusory legal statements, they fail to state a claim. See Iqbal, 556 U.S. at 678.

In addition, Plaintiff erroneously relies on Eaton v. Fed. Nat'l Mortg. Ass'n, No. 1-1382, 2011 WL 3322892 (Mass. Super. June 17, 2011). While Eaton, a decision of a lower court in Massachusetts, stands for the proposition that under Massachusetts law one must hold the note and mortgage in order to properly foreclose, it is not binding precedent upon the Rhode Island Superior Court. There is a wide array of case law throughout this country, evidencing a split of authority. This Court follows the past precedent of the Rhode Island Superior Court, that the assignment of the mortgage does not create a fatal disconnect between the note and the mortgage. No Rhode Island case law or statutory law requires that the foreclosing party hold both the note and mortgage in

order to foreclose. In effect, Rhode Island case law permits the foreclosing party to act as nominee for the note holder. See Porter v. First NLC Financial Services, No. PC 2010-2526, 2011 WL 1251246 (R.I. Super. March 31, 2011) (Rubine, J.); see also Bucci, 2009 WL 3328373; Kriegel, 2011 WL 4947398. As stated in Rutter, the relevance of the Eaton case "has already been questioned and distinguished by" other cases, and directly "contradict[s] this Court's prior holding in Bucci" as well as other Superior Court cases. 2012 WL 894012 at * 15. Accordingly, this Court "will not overturn its own prior ruling[s] in favor of another state's lower court opinion that has already been called in to doubt by subsequent decisions." Id. The same applies to Culhane v. Aurora Loan Services of Nebraska, 826 F. Supp.2d 352 (D. Mass. 2011), which is not binding precedent for this Court.

Lastly, Plaintiff relies upon Eisenberg v. Gallagher, 32 R.I. 389, 79 A. 941 (1911). Plaintiff erroneously asserts that Eisenberg stands for the proposition that the foreclosing party must own the note and mortgage at the time it commences foreclosure proceedings. Rather, Eisenberg stands for a different proposition, that the foreclosure sale was invalid as the foreclosing party sent notice prior to actually holding an interest in the mortgage. Id. at 389, 79 A. at 941. Since the foreclosing party gave notice of the foreclosure sale prior to it possessing the mortgage, it followed that the plaintiff in Eisenberg was entitled to the relief she sought, quieting title to her property. Id. The Mortgage instrument is the instrument granting Bank of New York the statutory power of sale. Accordingly, Bank of New York must be, and properly was in this case, the mortgagee prior to commencing foreclosure proceedings. Whether Bank of New York was the note-holder is irrelevant. See Cuevas, 2012 WL 1388716.

Plaintiff's Complaint merely alleges false conclusory statements of Rhode Island law as Plaintiff would like it to be, thereby failing to adequately allege the grounds which entitle Plaintiff to the relief sought. Furthermore, the issues presented in this matter have been previously decided by this Court. See Kriegel, 2011 WL 4947398; see also Payette, 2011 WL 3794701; Porter, 2011 WL 1252146; Bucci, 2009 WL 3328373; Rutter, 2012 WL 894012. Accordingly, Plaintiff's Complaint must be dismissed for failure to state a claim for relief. In the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of Superior Court cases on this subject represent the prevailing view of the law in Rhode Island on these subjects. 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

Defendants Motion to Dismiss is granted. Counsel for the prevailing party shall submit an Order in accordance with this Decision.