STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: July 18, 2012)

BRYAN J. LIZOTTE and EVELYN LIZOTTE	:	
v.	:	**C.A. No. PC 2011-1109**
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; AEGIS LENDING CORPORATION; BANK OF AMERICA, N.A.; OCWEN LOAN SERVICING, LLC; and LASALLE BANK, N.A., AS TRUSTEE FOR THE REGISTERED HOLDERS OF BEAR STEARNS ASSET BACKED SECURITIES I TRUST 2007-HE4 ASSET-BACKED CERTIFICATES, SERIES 2007-HE4	:	

DECISION

RUBINE, J. Before the Court is Defendants' Mortgage Electronic Registration Systems, Inc. ("MERS"), Bank of America, N.A. ("BOA"), Ocwen Loan Servicing, LLC ("Ocwen"), and Lasalle Bank, N.A., as Trustee for the Registered Holders of Bear Stearns Asset Backed Securities I Trust 2007-HE4 Asset-Backed Certificates Series 2007-HE4 ("Lasalle") (collectively, "Defendants") Motion for Summary Judgment pursuant to Rule 56 of the Rhode Island Superior Court Rules of Civil Procedure.[1] Plaintiffs Bryan J. Lizotte and Evelyn Lizotte's (collectively, "Plaintiffs") filed a verified complaint ("Complaint") for declaratory and injunctive relief challenging Ocwen's foreclosure on the certain real property located at 116-118 Arnold Avenue, Lincoln, Rhode Island ("the Property"), and the title obtained thereafter by foreclosure buyer BOA.

[1] Defendant Aegis Lending Corporation is not a party to this Motion.

I

Facts & Travel

The undisputed facts as evidenced by the pleadings, undisputed exhibits and affidavits, are as follows: On November 30, 2006, Plaintiffs executed a note ("Note") in favor of lender Aegis Lending Corporation ("Aegis") in the amount of $319,500, having borrowed that amount to purchase the Property. The Note designated Aegis as the "Lender" and provided 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.' Ex. C at 1.)

Contemporaneously with the execution of the Note, Plaintiffs executed a mortgage ("Mortgage") on the Property. The Mortgage designated MERS as "mortgagee" and "nominee for Lender and Lender's successors and assigns." (Compl. Ex. 2 at 1.) The Mortgage further designated Aegis as the "Lender." Id. The plain unambiguous language of the Mortgage deed provided "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 2.) Shortly thereafter the Mortgage was recorded in the land evidence records of the Town of Lincoln.

Following Plaintiffs' execution of the Note, Aegis endorsed the Note in blank and subsequently transferred the Note to BOA, as successor by merger to Lasalle. (Blanchard Aff. ¶ 7.) Ocwen was servicer of the loan on behalf of BOA. (Blanchard Aff. ¶ 8.) On August 13, 2007, Aegis filed bankruptcy. (Ver. Compl. ¶ 22.)

On August 7, 2009, MERS, acting as mortgagee and nominee for BOA, Aegis' successor and assignee, assigned its interest in the Mortgage to BOA. See Compl. Ex. 3. Thus, as of August 7, 2009, BOA held both the Note, through endorsement and negotiation of the Note, and was the Mortgagee by way of assignment from MERS. It is undisputed, as evidenced by the assignment document, that the assignment was recorded in the land evidence records of the Town of Lincoln. In addition, the signature of the signatory executing the assignment on behalf of MERS, Kevin M. Jackson, is witnessed and notarized. See Compl. Ex. 3.

Plaintiffs defaulted on their obligations under the Note and Mortgage for failure to make payments as and when due. (Blanchard Aff. ¶ 9.) As a result, Ocwen sent notice of default to Plaintiffs and scheduled a foreclosure sale for January 18, 2011. (Blanchard Aff. ¶¶ 10-12.) The foreclosure sale was conducted as scheduled. (Blanchard Aff. ¶ 12.) BOA prevailed as the highest bidder at the foreclosure sale with a credit bid in the amount of $187,500. (Blanchard Aff. ¶ 13.)

Plaintiffs filed the Complaint seeking declaratory and injunctive relief, setting forth conclusory allegations that the foreclosure was a nullity and therefore, record title remained with Plaintiffs. Defendants then filed this Motion for Summary Judgment pursuant to Rule 56. Plaintiffs have objected to Defendants' Motion averring that there are genuine issues of material fact, thus precluding the entry of judgment as a matter of law in favor of Defendants.

II

Standard of Review

The Court will only grant a motion for summary judgment if "after reviewing the

admissible evidence in the light most favorable to the nonmoving party[,]" Liberty Mut. Ins. Co. v. Kaya, 947 A.2d 869, 872 (R.I. 2008) (quoting Roe v. Gelineau, 794 A.2d 476, 481 (R.I. 2002)), "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 Plaintiffs, "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., 947 A.2d at 872 (quotation omitted). 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." Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998) (quotation omitted).

III

Analysis

Since the facts herein are nearly identical to the facts in Kriegel v. Mortgage Electronic Registration Systems, and the Mortgage executed by Plaintiffs contains the same operative language as the mortgage considered in Kriegel, 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.); see also Payette v. Mortgage Electronic Registration Systems, No. PC 2009-5875, 2011 WL 3794701 (R.I. Super. Aug. 22, 2011)

(Rubine, J.). The Court will then address any additional issues that are unique to this matter that were not addressed in the aforementioned decision.

Plaintiffs, in their memorandum, fail to offer any material distinctions between the undisputed facts and the facts relied upon in the Court's earlier determination of similar cases. Rather, Plaintiffs have used their memorandum as an opportunity to criticize the precedent of the Rhode Island Superior Court, characterizing those previous decisions as "errors." "This Court is not persuaded by [Plaintiffs'] argument." Rutter v. Mortgage Elec. Reg. Sys., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012 at * 10 (R.I. Super. March 12, 2012) (Silverstein, J.); see also Commonwealth Prop. Advocates v. U.S. Bank Nat'l Ass'n, No. 11-4168, slip op. at 1-2 (10th Cir. March 6, 2012) (affirming district court where appellant's counsel criticized rather than distinguished prior MERS cases). In addition, Plaintiff's reliance on case law of other jurisdictions, which are not binding precedent upon this Court, to further criticize the past decisions of this Court is also unconvincing. Plaintiffs should have used this opportunity to distinguish this matter from all other "MERS" cases previously decided by this Court, rather than disapprove of and refuse to accept, the precedential value of such case law.[2]

The undisputed facts, as evidenced by the provisions of the undisputed documents and affidavits, are as follows: Plaintiffs executed the Note in favor of the original lender Aegis. To secure the Note, Plaintiffs contemporaneously executed a Mortgage on the Property. The Mortgage designated MERS as "mortgagee" and "nominee for [Aegis] and [Aegis'] successors and assigns." (Compl. Ex. 2 at 1.) Further, as mortgagee, MERS, as well as the successors and assigns of MERS, were unequivocally granted the

[2] The Rhode Island Supreme Court has not yet reviewed the earlier precedent relied on herein. Accordingly, the prevailing legal interpretation of the law of Rhode Island is that established by the Superior Court.

"Statutory Power of Sale" by the Plaintiffs. (Compl. Ex. 2 at 2.) Hence, by the clear unambiguous language of the Mortgage deed, as acknowledged and executed by Plaintiffs as borrowers and mortgagors, MERS, as well as BOA as successor and assignee of MERS, were explicitly granted the statutory power of sale.

Thereafter, on August 7, 2009, MERS assigned its interest in the Mortgage to BOA. Plaintiffs defaulted on their repayment obligation, thereby causing Ocwen, as servicer for BOA the mortgagee and the current note-holder, to exercise the statutory power of sale and properly commence foreclosure proceedings against Plaintiffs. Ocwen, as servicer for BOA, had the right and ability to exercise the statutory power of sale upon Plaintiffs' default.

Attempting to establish a genuine issue of material fact, Plaintiffs challenge the affidavit of Rashad Blanchard ("Blanchard"), Loan Analyst for Ocwen. Specifically, Plaintiffs aver that the affidavit is not based upon the affiant's knowledge as an employee of Ocwen, and therefore the affiant is not competent to make statements with respect to the documents which pertain to this matter.

Under Rule 56(e), "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Super. R. Civ. P. 56(e). Here, Defendants submitted the affidavit of Blanchard, a Loan Analyst for Ocwen, the mortgage servicer. (Blanchard Aff. ¶¶ 1, 2.) Blanchard attested in the affidavit that he was "familiar with the facts and circumstances" of this matter "[b]ased upon [his] personal knowledge and review of the referenced documents and proceedings." (Blanchard Aff. ¶ 1.) Blanchard further set forth the details with reference

to his personal knowledge of the matter. Thus, Blanchard has properly laid a foundation for his personal knowledge of the matter as set forth in his affidavit. See Turano v. Artigas, 518 A.2d 13 (R.I. 1986) (finding the affidavit to be sufficiently adequate for defendant to have met her burden of proof). Accordingly, Blanchard is competent to testify as to the statements made in his affidavit.

The sole affidavit submitted by Plaintiff in opposition to Defendants' Motion for Summary Judgment is that of Plaintiff Brian J. Lizotte. Although Defendants have failed to challenge the affidavit of Plaintiff Bryan J. Lizotte's, this Court finds that affidavit to be inadequate under Rule 56. Lizotte makes bald conclusory statements in his affidavit which are not supported by the plain unambiguous language contained in the documents of this matter, specifically the Note and Mortgage. Lizotte further attests that Kevin M. Jackson ("Jackson") is "not an employee of any party to this loan, to assign the mortgage to any other party." (Lizotte Aff. ¶ 24.) Lizotte claims to have personal knowledge based on an internet search that Jackson is an employee of Ocwen and not an officer of MERS. (Lizotte Aff. ¶¶ 25, 26.)[3] In addition, Lizotte attests that the allonge of the Note is fraudulent and that Robin Dove is not an employee of Aegis, without establishing the basis for his personal knowledge of that alleged fact. (Lizzotte Aff. ¶¶ 62-65.)

As set forth supra, Rule 56(e) requires that "supporting and opposing affidavits . . . be made on personal knowledge, [and] set forth such facts as would be admissible in

[3] It should be noted that a person could be authorized to execute an assignment or other legal documents, for instance via a power of attorney, even if that person is neither an officer nor employee of the assignor. The person purporting to assign the mortgage has affirmed to a notary that he or she was authorized to do so. Under Rhode Island law, the authority of the person executing a recorded document is not required to establish by extrinsic evidence the basis for such authority. The authority is presumptively valid by reason of the attestation on the document. See GSM Industrial, Inc. v. Grinnell Fire Protection Systems Company, Inc., --- A.3d ---, 2012 WL 2619129 at * 4 (R.I. Sup. July 5, 2012) (an acknowledgment is the method of authenticating an instrument by showing it was the act of the person executing it); see also Rhode Island Rules of Evidence 902.

evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Super. R. Civ. P. 56(e). Accordingly, Lizotte's conclusory opinion and interpretation in light of the clear unambiguous language of the Mortgage and Note are insufficient to defeat Defendants' Motion for Summary Judgment. See Gordon v. Ide, Inc., 107 R.I. 9, 264 A.2d 332 (R.I. 1970) (finding affidavit to be insufficient to entitle defendant to summary judgment as assertions made in affidavit lacked testimonial competence and was conclusionary impression on critical issue). In addition, Lizotte lacks personal knowledge with respect to the endorsement of the Note in blank and its subsequent transfer to BOA, thus rendering Lizotte's affidavit, at least certain sections of it, invalid. If a party's "affidavit fails to comply with the[] requirements [of Rule 56(e)], it is useless in establishing . . . a genuine issue of material fact." Nichola v. Fiat Motor Co., Inc., 463 A.2d 511, 513 (R.I. 1983). Moreover, belief, no matter how sincere, is not equivalent to knowledge, and affidavits are insufficient to establish a genuine issue of material fact where they are based on information and belief of that affiant. 27A Fed. Proc., L. Ed. § 62:654. Likewise, an affidavit is insufficient where it is based on mere suspicion. Id. Allegations not made from an affiant's own knowledge are subject to being stricken. 2A C.J.S. Affidavits § 45. Lizotte has failed to prove to this Court that he has personal knowledge with respect to the endorsement and subsequent transfer of the Note. Accordingly, this Court will disregard the incompetent portions of Lizotte's affidavit. See DiCristoforo v. Beaudry, 110 R.I. 324, 293 A.2d 301 (1972) (failure of portion of an affidavit under Rule 56 to conform to the prescribed limitations does not require the court to expunge the entire affidavit, but courts should

disregard the incompetent portions and consider only that which has been properly included).

Assuming arguendo that this Court considered the incompetent portions of Lizotte's affidavit, Plaintiffs still fail to raise a genuine issue of material fact sufficient to defeat Defendants' Motion for Summary Judgment. The nonmoving party "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., 947 A.2d at 872 (quotation omitted). Plaintiffs' averments concerning the endorsement of the Note in blank, the fraudulent execution of the allonge of the Note, and the lack of authorization by Jackson to execute the assignment of the Mortgage interest on behalf of MERS, are merely unsupported allegations and mere conclusions. Plaintiffs have presented no evidence to prove these allegations. Accordingly, Plaintiffs have not met their burden to show that there exists a genuine issue of material fact.

Plaintiffs are not entitled to clear title to the Property thereby leaving them as the owners of record, because the foreclosure sale was lawfully noticed and the Property properly conveyed to BOA as a result of the sale. Further, Plaintiffs have not demonstrated by affidavit, or otherwise, that there exists a genuine issue of material fact which would vary this result. The issues presented in this matter have previously been decided by this Court. See Kriegel v. Mortgage Elec. Reg. Sys., No. PC 2010-7099, 2011 WL 4947398 (R.I. Super. Oct. 13, 2011) (Rubine, J.); see also Payette, 2011 WL 3794701; Porter v. First NLC Financial Services, No. PC 2010-2526, 2011 WL 1251246 (R.I. Super. March 31, 2011) (Rubine, J.); Bucci v. Lehman Brothers Bank, FSB, No. PC

2009-3888, 2009 WL 3328373 (R.I. Super. Aug. 25, 2011) (Silverstein, J.); Rutter, 2012 WL 894012. 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 the Superior Court cases on this subject matter represents 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, and the documents and affidavit in support thereof, demonstrate that there is no genuine issue of material fact. Accordingly, this Court grants Defendants' Motion for Summary Judgment. There being no just reason for delay, Final Judgment shall enter in favor of Defendants under Rule 54(b).