

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(Filed: August 24, 2012)

DARA POK; LIANG POK; :  
CHANDARAROTH POK; AND :  
LEANG TANG :

v. :  
:

C.A. No. PC 2011-2428

MORTGAGE ELECTRONIC :  
REGISTRATION SYSTEMS, INC.; :  
SOVEREIGN BANK, HARMON :  
LAW OFFICES, PC; AND WELLS :  
FARGO BANK, NA :

DECISION

**RUBINE, J.** Defendants’ Mortgage Electronic Registration Systems, Inc. (“MERS”) and Wells Fargo Bank, NA (“Wells Fargo”) (collectively, “Defendants”)<sup>1</sup> move this Court to dismiss the complaint (“Complaint”) filed by Plaintiffs Dara Pok, Liang Pok, Chandararoth Pok and Leang Tang (collectively, “Plaintiffs”) pursuant to Rule 12(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure. The Complaint seeks declaratory relief to quiet title to certain real property located at 31 Cadillac Avenue, Cranston, Rhode Island (“the Property”). The Complaint alleges that due to alleged defects in the foreclosure process, the foreclosing party, Wells Fargo, had no right to exercise the statutory power of sale under Rhode Island law, thus rendering the foreclosure sale a nullity.

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<sup>1</sup> Defendant Sovereign Bank is not a party to this Motion to Dismiss. Defendant Harmon Law Offices, PC was voluntarily dismissed by Plaintiffs.

# I

## Facts & Travel

The facts gleaned from the Complaint and exhibits referred to explicitly therein are as follows: On September 12, 2008, Michael A. Moppin, Jane Moppin, and Gennaro Madonna Jr. conveyed title to the Property to Plaintiffs Dara Pok and Liang Pok by way of warranty deed. See Defs.’ Ex. A.<sup>2</sup> That warranty deed was thereafter recorded in the land evidence records of the City of Cranston on September 18, 2008. (Compl. ¶ 10.) Thus, as of September 12, 2008, Dara Pok and Liang Pok held record title to the property.

On September 16, 2008, Plaintiffs Chandararoth Pok and Leang Tang executed a note (“Note”) in favor of lender Sovereign Bank (“Sovereign”) for \$183,007. To secure the Note, Plaintiffs Chandararoth Pok and Leang Tang contemporaneously executed a mortgage (“Mortgage”) on the Property.<sup>3</sup> At the time the mortgage was executed neither Chandaroth Pok nor Leang Tang owned title to the property purporting to secure the Note they executed. The Mortgage identified Sovereign as the “Lender.” The Mortgage provides that “[t]his Security Instrument is given to . . . MERS, (solely as nominee for Lender, as hereinafter defined, and Lender’s successors and assigns),” the Mortgage also

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<sup>2</sup> As discussed infra, the Complaint does not attach any exhibits, however it explicitly refers to the warranty deed granting title to Plaintiffs Dara Pok and Laing Pok. Accordingly, this Court may properly consider the deed as submitted by Defendants without converting this Motion to Dismiss under Rule 12(b)(6) to a motion for summary judgment under Rule 56. A motion justice may consider and refer to documents incorporated into a complaint by reference when ruling on a motion to dismiss. Bowen Court Assoc. v. Ernst & Young, LLP, 818 A.2d 721 (R.I. 2003) (citing Super. R. Civ. P. 10(c)). Such documents “must be referred to explicitly.” 1 Kent, R.I. Civ. Prac. § 10.3 at 100 (1969); see also 5B Wright & Miller, Fed. Prac. & Proc., 3d § 1357 at 377.

<sup>3</sup> In the Complaint, Plaintiffs allege that the Mortgage was executed on September 18, 2009. (Compl. ¶ 11.) However, the Mortgage explicitly provides that the date of the execution of the Mortgage instrument was September 16, 2008. The Court will not accept as true “facts which are legally impossible . . . or facts which by the record or a document attached to the [C]omplaint appear to be unfounded.” 27A Fed. Proc., L. Ed. § 62:509 (1996). “In the case of conflict between the pleading and the exhibit, the exhibit controls.” 1 Kent, R.I. Civ. Prac. § 10.3 at 100; see also 5B Wright & Miller, Federal Practice & Procedure, Civil 3d § 1357 at 555 (citations omitted).

provides that MERS is the mortgagee. (Defs.' Ex. B at 1.)<sup>4</sup> The Mortgage further 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 1-2. In addition, the clear and unambiguous language of the Mortgage 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 2.

The Mortgage was recorded in the land evidence records for the City of Cranston on September 18, 2008. At the time of execution of the Mortgage, Plaintiffs Chandararoth Pok and Leang Tang did not have title to the Property referred to in the Mortgage. (Compl. ¶ 12.) Thus, as a matter of law, the Mortgage was ineffective to secure the obligations under the Note.<sup>5</sup>

On December 1, 2009, MERS, as nominee for Sovereign and mortgagee, assigned the Mortgage interest to Wells Fargo. (Compl. ¶ 14.) On October 27, 2010, MERS, in its

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<sup>4</sup> As set forth supra, the Complaint does not contain any exhibits, however it explicitly refers to the Mortgage executed by Plaintiffs. Accordingly, this Court may properly consider the Mortgage as submitted by Defendants without converting this Motion to Dismiss under Rule 12(b)(6) to a motion for summary judgment under Rule 56. A motion justice may consider and refer to documents incorporated into a complaint by reference when ruling on a motion to dismiss. Bowen Court Assoc. v. Ernst & Young, LLP, 818 A.2d 721 (R.I. 2003) (citing Super. R. Civ. P. 10(c)). Such documents "must be referred to explicitly." 1 Kent, R.I. Civ. Prac. § 10.3 at 100 (1969); see also 5B Wright & Miller, Fed. Prac. & Proc., 3d § 1357 at 377.

<sup>5</sup> This court has previously addressed the issue of whether an assignee of the mortgage can foreclose if it is not simultaneously the holder of the Note. This case, however raises a different and novel issue, that is whether persons who are strangers to the title may pledge property owned by others to secure debt owed by the them. The response to this issue is obviously no.

capacity as nominee of the lender executed a second assignment as nominee for Sovereign and mortgagee under the Mortgage to Wells Fargo. (Compl. ¶ 15.). This raises another issue as to whether MERS which already assigned its interest in the mortgage has any interest to assign by way of a subsequent assignment.

Thereafter, Plaintiffs Chandararoth Pok and Leang Tang failed to make timely payments under the Note, thereby committing a payment default under the terms of the Note and Mortgage. Following the default, Wells Fargo exercised the statutory power of sale which it had acquired by way of accepting an assignment of the Mortgage and commenced foreclosure proceedings, ultimately foreclosing upon the Property owned by Dara Pok and Liang Pok.

Plaintiffs then filed the instant Complaint seeking a declaration from this Court that Plaintiffs Dara Pok and Liang Pok are the record title owners of the Property. Defendants have filed this Motion to Dismiss pursuant to Rule 12(b)(6) averring that Plaintiffs have failed to state a claim entitling them to the relief they seek. At the hearing, all parties waived oral argument, thereby submitting the matter to this Court on the written memoranda of law. After the submission of all memoranda by the parties, the Court then took this matter under consideration.

## **II**

### **Standard of Review**

#### **A**

#### **Conversion**

Ordinarily, the court's review of a motion to dismiss is confined to the complaint, Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009), and if the court considers

matters outside of the complaint, the court must convert the motion into a motion for summary judgment. See Coia v. Stephano, 511 A.2d 980 (R.I. 1986). These rules provide, however, where the pleading refers to attachments, “[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.” Super. R. Civ. P. 10(c). The motion justice may consider and refer to documents incorporated into a complaint by reference when ruling on a motion to dismiss, without converting the motion into one under Rule 56. Bowen Court Assoc. v. Ernst & Young, LLP, 818 A.2d 721, 725-26 (R.I. 2003) (citing Super. R. Civ. P. 10(c)); 27A Federal Procedure L. Ed. § 62:509 (2004). Such documents “must be referred to explicitly,” and be “exhibit[s] annexed to the complaint.” 1 Kent, R.I. Civ. Prac. § 10.3 at 100 (1969); see also 5B Wright & Miller, Federal Practice & Procedure, 3d § 1357 (2006).

Here, the Complaint expressly references the warranty deed to Plaintiffs Dara Pok and Liang Pok, the Mortgage deed and the two assignments of the Mortgage interest. Defendants have submitted the Mortgage and the deed with their Motion. The Plaintiffs have not contested the authenticity of these documents as true and accurate copies of the documents referred to in the Complaint. Thus, this Court must decide whether to exclude these materials and adjudicate this matter using the motion to dismiss standard of review under Rule 12(b)(6), or consider them and convert the Motion into a motion for summary judgment under Rule 56. The Court finds that all documents submitted by Defendants were explicitly referred to by Plaintiffs in the Complaint, but not annexed to the Complaint. The Court will consider “documents expressly relied upon or integral to the complaint and matters of public record, if the claims of the Plaintiffs are based upon such documents.” Rowe v. Morgan Stanley, 191 F.R.D. 398, 405 (D. N.J. 1999); see also

Kriegel v. Mortgage Electronic Registration Systems, No. PC 2010-7099, 2011 WL 4947398 at \* 4 (R.I. Super. Oct. 13, 2011) (Rubine, J.); In re Burlington Coat Factory, 114 F.3d 1410, 1426 (3rd Cir. 1997). Plaintiffs' Complaint to void the foreclosure sale expressly references and certainly finds its basis in the Mortgage and warranty deed, both of which are public record. Accordingly, this Court will consider Defendants' Motion as a Motion to Dismiss under Rule 12(b)(6).

## **B**

### **12(b)(6) Motion to Dismiss 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 motion “should be granted only when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief under any set of facts that could be proven in support of the claim.” Siena M.D. v. Microsoft Corp., 796 A.2d 461, 463 (R.I. 2002) (citation omitted).

## **III**

### **Analysis**

Plaintiffs have properly set forth allegations in the Complaint averring that Chandararith Pok and Leang Tang did not have title to the Property at the time they executed the Note and Mortgage. (Compl. ¶ 12.) Accepting these allegations as true, as

this Court must, and viewing them in the light most favorable to Plaintiffs, Plaintiffs have properly set forth a claim for relief, in that a mortgage is a conveyance or retention of an interest in real property as security for performance of an obligation. Restatement (Third) of Property Mortgages § 1.1 (1997); see also Black's Law Dictionary (9th ed. 2009) (defining a mortgage as a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty). In the instant matter, Sovereign lent money to Chandararoth Pok and Leang Tang, accepting a Mortgage on the Property to secure the borrowers obligations under the Note. As borrowers under the Note, Chanadararoth Pok and Leang Tang executed the Mortgage to secure the Note without holding any interest in the Property described in the Mortgage. The Mortgage was designed to serve as a security for the Note, and thus to convey to Sovereign as security for their obligations under the Note. As a result, the Mortgage is a nullity, thus leaving borrowers liable to Sovereign, or the current note holder, under an unsecured Note. Chandararoth Pok and Leang Tang knew, or should have known, that they did not own the Property at the time they pledged the Property as security for the Note. Likewise, through due diligence, Sovereign should have realized its mistake. At a minimum, the Defendants should have realized that the Property described in the Mortgage was titled to persons other than the borrowers.

Accepting the allegation in the complaint as true that Chandararoth Pok and Leang Tang did not have any interest or title to the Property at the time they executed the Note and Mortgage, then the Mortgage is void and of no force or effect, as discussed supra. The invalidity of the Mortgage renders borrowers' obligations under the Note unsecured. One cannot execute a mortgage, thereby conveying title to the Property, if

they do not have an interest in the Property. Stated differently, a party cannot effectively convey by mortgage deed, that refers to Property which it does not own. See Restatement (Third) of Property Mortgages, § 1.1 (1997). It is axiomatic that if the Mortgage is ineffective, and therefore void, MERS was never properly granted the authority to exercise the statutory power of sale following Chandararoth Pok and Leang Tang's default under the Note. Likewise, any subsequent assignments of the void Mortgage are ineffective to convey the statutory power of sale. Therefore, Wells Fargo lacked the authority to enforce the statutory power of sale following default. Accordingly, Plaintiffs have set forth allegations in the Complaint which clearly state a claim for relief, thereby the motion to dismiss must be denied.<sup>6</sup>

#### **IV**

#### **Conclusion**

Defendants' Motion to Dismiss is denied. Counsel for the prevailing party shall prepare an Order in accordance with this Decision.

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<sup>6</sup> Although Plaintiffs have suggested a number of other reasons the foreclosure was ineffective, the Plaintiffs' memoranda failed to discuss the most obvious defect in the Mortgage, the fact that the borrowers, although signing the Mortgage deed, did not own the Property described in the Mortgage.