STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: November 20, 2012)

CHARLES M. SMITH III	:	
MARIA CASIMIRO	:	
	:	
v.	:	**C.A. No. PC 2011-2549**
	:	
MORTGAGE ELECTRONIC	:	
REGISTRATION SYSTEMS, INC.;	:	
COUNTRYWIDE HOME LOANS,	:	
INC.; AND FEDERAL NATIONAL	:	
MORTGAGE ASSOCIATION	:	

DECISION

RUBINE, J. Before the Court is Defendants', Mortgage Electronic Registration Systems, Inc. ("MERS"), Countrywide Home Loans, Inc. ("Countrywide"), and Federal National Mortgage Association ("FNMA") (collectively, "Defendants"), Motion to Dismiss the Complaint of Plaintiffs' Charles M. Smith III and Maria Casimiro (collectively, "Plaintiffs") pursuant to Rule 12(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure. Through the Complaint, Plaintiffs challenge the validity of FNMA's foreclosure on certain real property located at 249-251 Rochambeau Avenue, Providence, Rhode Island (the "Property") alleging that the assignment of the mortgage interest vesting FNMA with the statutory power of sale is allegedly void rendering the foreclosure sale a nullity. Thus, Plaintiffs claim that title of the Property remains vested in them. Additionally, Plaintiffs allege that the mortgage note is current or has been satisfied.

I

FACTS & TRAVEL

The facts derived from the Complaint and the exhibits attached to and incorporated therein are as follows: On November 30, 2005, Plaintiffs executed a note ("Note") in favor of lender Countrywide. To secure the Note, Plaintiffs contemporaneously executed a mortgage ("Mortgage") on the Property. (Compl. ¶ 9.) The Mortgage designated Countrywide as the "Lender" and further designated MERS as "nominee for [Countrywide] and [Countrywide's] successors and assigns" as well as "mortgagee." (Compl. Ex. 2 at 1.) The Mortgage further provided that "Borrower does hereby mortgage, grant and convey to MERS, (solely as nominee for [Countrywide] and [Countrywide'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. In addition, 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 [Countrywide] and [Countrywide'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 [Countrywide]." (Defs.' Ex. A at 3.)[1]

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

[1] Defendants' Exhibit A is a full copy of the Mortgage instrument. Plaintiffs submitted only various pages of the Mortgage as an attachment to the Complaint. Since the Complaint expressly references and incorporates the Mortgage instrument, this Court may properly consider the entire document as submitted by Defendants without converting this Motion to a motion for summary judgment under Rule 56. See Super. R. Civ. P. 10(c); see also Robert B. Kent et al., Rhode Island Civil Procedure § 10:3 (West 2011); see also 5A Wright & Miller, Federal Practice & Procedure, 3d § 1327 (West 2012).

On August 14, 2009, MERS, as nominee for Countrywide and mortgagee, assigned the Mortgage interest to FNMA. The assignment was recorded in the land evidence records of the City of Providence on August 20, 2009. Thus, from the date of the recording of the assignment, FNMA controlled the statutory power of sale as explicitly granted by Plaintiffs through their execution of the Mortgage.

Thereafter, FNMA foreclosed on the Property; however, Plaintiffs allege that the note was not in default and therefore the foreclosure was not justified. On March 15, 2011, prior to initiating this instant action, Plaintiffs recorded a *lis pendens* on the Property in the land evidence records of the City of Providence, notifying all third parties of the dispute over title to the Property.[2] On May 3, 2011, Plaintiffs filed the instant Complaint seeking nullification of the foreclosure sale and return of title to them. Plaintiffs also allege in their Complaint that the Note is current or has been satisfied. (Compl. ¶ 54.) Defendants then filed this Motion to Dismiss under Rule 12(b)(6). Plaintiffs objected to Defendants' Motion averring that they clearly established a claim for relief. At the motion hearing, all parties waived oral argument, and thus, this Court took the matter under advisement.

II

STANDARD OF REVIEW

"The solitary purpose of a Rule 12(b)(6) motion to dismiss 'is to test the sufficiency of the complaint.'" Tarzia v. State, 44 A.3d 1245, 1251 (R.I. 2012) (quoting

[2]As a matter of law, one cannot legitimately record a *lis pendens* prior to filing a complaint challenging title to the property. Cafua v. Mortg. Elec. Registration Sys. Inc., No. PC 2009-7407, 2012 WL 2377404 (R.I. Super. June 20, 2012) (Rubine, J.). The primary purpose of notice of *lis pendens* is to give notice to all potential buyers of a pending lawsuit concerning real property. Id. (citing Darr v. Muratore, 143 B.R. 973 (D.R.I. 1992)); see also Montecalvo v. Mandarelli, 682 A.2d 918 (R.I. 1996).

Narragansett Elec. Co. v. Minardi, 21 A.3d 274, 277 (R.I. 2011)). For purposes of the motion, the Court assumes "the allegations contained in the complaint are true and examin[es] the facts in the light most favorable to the plaintiff." Id. The complaint must "provide the opposing party with 'fair and adequate notice of the type of claim being asserted.'" Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009) (quoting Gardner v. Baird, 871 A.2d 949, 953 (R.I. 2005) (quotation omitted)). Thereafter, "[t]he grant of a Rule 12(b)(6) 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 the plaintiff's claim.'" 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)).

III

ANALYSIS

Since the allegations set forth in the instant Complaint—specifically concerning the assignment of the Mortgage interest, the disconnect between the Note and Mortgage, and the authority of certain individuals to execute assignments on behalf of MERS—are nearly identical to the allegations of the complaint in Payette v. Mortg. Elec. Registration Sys., Inc., and the Mortgage executed by Plaintiffs contains the same operative language as the mortgage considered in Payette, this Court will incorporate and adopt the reasoning set forth in Payette. No. PC 2009-5875, 2011 WL 394701 (R.I. Super. Aug. 22, 2011) (Rubine, J.); see also Kriegel v. Mortg. Elec. Registration Sys., Inc., No. PC 2010-7099, 2011 WL 4947398 (R.I. Super. Oct. 13, 2011). Notwithstanding this similarity, there is an allegation in the instant Complaint that the Note is current or has been satisfied. If this

allegation is accepted as true for purposes of the Rule 12(b)(6) Motion to Dismiss, Plaintiffs' Complaint cannot be dismissed, and Plaintiffs must be given an opportunity to be heard with respect to the allegation concerning whether default under the Note was sufficient to trigger the right to foreclose.

Plaintiffs, in their memorandum, fail to distinguish this matter from the Court's earlier determination and dismissal of similar cases, except to the extent that Plaintiffs allege in their Complaint that the Note was current or satisfied. Rather, Plaintiffs have chosen primarily to criticize the precedent of the Rhode Island Superior Court as "legally and factually impossible" and "missing the point," attaching thereto and incorporating therein an exhibit to their memorandum entitled "Deconstruction of Payette."[3] Such criticism of prior precedent is not persuasive. See Rutter v. Mortg. Elec. Registration Sys., Inc., 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, 459 Fed. App. 770 (10th Cir. March 6, 2012) (affirming district court where appellant's counsel criticized, rather than distinguished, prior MERS cases).

Likewise, Plaintiffs' reliance on case law of other jurisdictions, which is not binding precedent upon this Court, to further criticize this Court's past decisions is unconvincing. This is especially true in light of the fact that this Court's prior precedent with respect to mortgagors' lack of standing to challenge the assignments of the mortgage

[3] Plaintiffs decided it was "necessary to dissect the Payette Decision for the Federal District Court for the District of Rhode Island to understand [the] abomination" which is that decision. (Pls.' Mem. in Supp. of Obj. to Mot. to Dismiss 57.) This Court will continue to follow the reasoning and result of the well-reasoned, thoughtful, and concise prior decisions of the Rhode Island Superior Court.

and debt appears to represent the holding of the majority of courts which have considered the issue. See Oum v. Wells Fargo, N.A., 842 F. Supp. 2d 407, 413 & n.12 (D. Mass. 2012) (citing cases from several jurisdictions and noting the "near uniformity of opinion" with respect to the issue of a mortgagor's standing to challenge the validity of an assignment); Bridge v. Aames Capital Corp., No. 1:09CV2947, 2010 WL 3834059, at *3 (N.D. Ohio Sept. 29, 2010) ("Courts have routinely found that a debtor may not challenge an assignment between an assignor and assignee."). The Court believes criticism of its earlier decisions should be saved for appellate review. In the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of the Superior Court decisions on this subject matter represents the prevailing view of the law in Rhode Island. Breggia v. Mortg. Elec. Registration Sys., Inc., No. PC 2009-4144, 2012 WL 1154738 (R.I. Super. April 3, 2012) (Rubine, J.); see also Rutter, 2012 WL 894012.

The crux of Plaintiffs' Complaint challenges the validity of the assignment of the Mortgage interest by MERS to FNMA, and thus, FNMA's standing to foreclose on the Property following mortgagors' default. Specifically, Plaintiffs allege in their Complaint that Francis J. Nolan ("Nolan") had no authority to assign the Mortgage interest on behalf of MERS as no power of attorney was recorded authorizing Nolan to execute the assignment on behalf of MERS. (Compl. ¶¶ 12, 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, 2011 WL 3794701; see also Rutter, 2012 WL 894012 at *17 (quoting Fryzel v. Mortg. Elec. Registration Sys., Inc., C.A. No. 10-325 M, 2011 U.S. Dist. LEXIS 95114, at *41-42 (D.R.I. June 10, 2011) (dismissed on other grounds))

(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 v. GMAC Mortg., LLC, No. 11-11115-RWZ, 2011 WL 5075613 at *4 (D. Mass. Oct. 25, 2011) (Zobel, J.) (court refused to read U.S. Bank Nat. Ass'n v. Ibanez, 941 N.E.2d 40 (Mass. 2011) as an independent basis for mortgagors to collaterally contest previously executed mortgage assignments to which they were not a party and that did not grant them any interests or rights; finding mortgagors had no legally protected interests in the assignment of the mortgage, and therefore lacked standing to challenge it); In re Correia, 452 B.R. 319 (B.A.P. 1st Cir. 2011) (the bankruptcy appellate panel affirming the bankruptcy judge's finding that mortgagors lacked standing to challenge the validity of the mortgage assignment). As this Court has proclaimed time and again, Plaintiffs' allegation with respect to the invalidity of the assignments of the Mortgage interest constitutes a legal conclusion not supported by the prevailing case law and is insufficient to survive a motion to dismiss.

Moreover, there is no requirement under Rhode Island law that MERS must record a power of attorney in order for Nolan to act on behalf of MERS. See Section 34-13-1. Thus, even assuming the veracity of Plaintiffs' allegation, this allegation does not entitle Plaintiffs to the relief they seek.

Plaintiffs further aver that MERS holds a mere legal title, and thus an assignment which is limited to its beneficial interest transfers nothing as a matter of law. To support this allegation, Plaintiffs rely upon Eisenberg v. Gallagher, 32 R.I. 389, 79 A. 941 (1911).

Plaintiffs erroneously assert 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 the proposition that the foreclosure sale was invalid where the foreclosing party sent notice prior to actually holding an interest in the mortgage. Id. Since the foreclosing party gave notice of the foreclosure sale prior to that party actually 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 FNMA the statutory power of sale. Accordingly, FNMA must be, and properly was, the mortgagee prior to its commencement of the foreclosure proceedings.

Moreover, Plaintiffs allege that, although the Mortgage was assigned to FNMA, the Note was never transferred to or negotiated by Countrywide, and therefore FNMA does not have standing to enforce the Mortgage without the Note. (Compl. ¶¶ 50-56.) Likewise, this allegation fails to state a fact entitling Plaintiffs to relief. The identity of the note holder is irrelevant as it is well established under current Rhode Island law that MERS and the assignees of MERS may 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 v. Lehman Brothers Bank, FSB, No. PC 2009-3888, 2009 WL 3328373 (R.I. Super. Aug. 25, 2009) (Silverstein, J.).

Plaintiffs attempt to invalidate the foreclosure sale by averring that the note holder and mortgagee must be one in the same. Specifically, Plaintiffs aver 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 as a matter of law. Justice Silverstein has interpreted § 34-11-21 as to "not require the Note and Mortgage be held by the same entity, at the time of foreclosure or at the time MERS assigns the mortgage to another entity." 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 mortgages,' and 'clearly, the General Assembly envisioned a role for mortgage servicers in the mortgage lending industry.'" Id. at *14 (quoting Bucci, 2009 WL 3328373 at *18-19). 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 WL 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 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 assigns the mortgage with "the note and debt thereby secured." Section 34-11-24. Therefore, the assignment of the Mortgage interest by MERS to FNMA transferred the Mortgage as well as "the [N]ote and debt thereby secured." Section 34-11-24. FNMA then became an assignee of MERS, thereby possessing all the rights as mortgagee, including the statutory power of sale. See Kriegel, 2011 WL 4947398 at *13-14 (quoting

Weybosset Hill Inv., 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). Thus, FNMA was the foreclosing party and properly commenced foreclosure proceedings, if a default occurred.

Plaintiffs further rely on a United States Supreme Court case, Carpenter v. Longan, 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. 271, 274 (1872). This holding is in direct conflict with § 34-11-24 of the Rhode Island General Laws. Unlike the law of Colorado, § 34-11-24, as discussed supra, provides that an assignment of the mortgage carries with it "the note and debt thereby secured." Section 34-11-24. Accordingly, when drafting § 34-11-24, the legislature did not intend to render a nullity an assignment of a mortgage interest without the simultaneous assignment of the Note. "It is well settled that when the language of a statute is clear and unambiguous, this Court must interpret the 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 Plaintiffs' 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 alone carries with it the note and debt thereby secured and will not be rendered a nullity. Since these allegations of legal invalidity are merely conclusory statements of law, they fail to state a

claim.

In addition, Plaintiffs erroneously rely on Eaton v. Fed. Nat'l Mortg. Ass'n, No. SUCV201101382, 29 Mass. L. Rptr. 115 (Mass. Super. June 17, 2011) (Eaton I). However, since the submission of Plaintiffs' memorandum, Eaton was overruled by the Supreme Judicial Court of Massachusetts. See Eaton v. Fed. Nat'l Mortg. Ass'n, 969 N.E.2d 1118 (Mass. 2012) (Eaton II). While Eaton I stands for the proposition that under Massachusetts law one must hold the note and mortgage in order to properly foreclose, in Eaton II the court held that the mortgagee must either hold the note or act on behalf of the note holder. See id. at 1121. Regardless, neither decision is 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 precedent of the Rhode Island Superior Court, that the assignment of the mortgage of the nature and with the language of the mortgage considered herein does not create a fatal disconnect between the note and the mortgage. Furthermore, 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 states that the mortgagee may also act as nominee for the note holder. See Porter v. First NLC Fin. Serv., 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 Justice Silverstein stated in Rutter, the Eaton case "has already been questioned and distinguished by" other cases [in Massachusetts], 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 into doubt by subsequent decisions." Id.

Lastly, Plaintiffs aver that under Rhode Island law mortgage servicers cannot act as mortgagees. According to Plaintiffs, mortgage servicers are not authorized to foreclose following a mortgagor's default.[4]

In Kriegel, this Court dismissed plaintiff's claim that the foreclosure sale conducted by the mortgage servicer on behalf of MERS' assignee was contractually invalid, thereby finding that the mortgage servicer had the ability to, and properly did, foreclose on behalf of the mortgagee following plaintiff's default. 2011 WL 4947398 at *16. Therefore, plaintiff's claim was dismissed as "factually and legally unfounded." Kriegel, 2011 WL 4947398 at *16 (citing 27A Federal Procedure L. Ed. § 62:509 (1996)); see also Bucci 2009 WL 3328373 at *7 (noting that the General Assembly envisioned a role for mortgage servicers in the mortgage lending industry); G.L. 1956 § 34-26-8(a)(4), as amended by P.L. 1995, ch. 131, § 1 (including mortgage servicers within the definition of "mortgagee" for purposes of § 34-26-8). The same outcome obtains here.

Finally, Plaintiffs allege that the Note is current or has been satisfied. Considering this allegation as true and in the light most favorable to Plaintiffs, Defendants' Motion to Dismiss must be denied because the absence of default, if established as true by the finder of fact, would be a defense to a foreclosure allegedly triggered by borrower's default under the Note. For that reason alone, Plaintiffs' Complaint cannot be dismissed, and Plaintiffs must be given an opportunity to have the

[4] The instant matter did not involve a mortgage servicer—FNMA was the mortgagee and FNMA foreclosed on the Property. Nevertheless, the Court will address this argument.

issue of default considered at trial. Accordingly, Defendants' Motion to Dismiss must be denied. Accepting the allegations set forth in the Complaint as true, and viewing them in the light most favorable to the Plaintiffs, Plaintiffs have set forth an allegation in the Complaint which, if true, establishes a claim for relief. However, the legal issues presented in this matter—specifically concerning the assignment of the Mortgage interest, the disconnect between the Note and Mortgage, and the authority of certain individuals to execute assignments on behalf of MERS—have been previously decided by this Court in a manner contrary to the alleged interest of the mortgagor/homeowner. See Kriegel, 2011 WL 4947398; see also Rutter, 2012 WL 894012; Payette, 2011 WL 3794701; Porter, 2011 WL 1251246; Bucci, 2009 WL 3328373.

IV

CONCLUSION

Plaintiffs' have alleged facts in their Complaint concerning the absence of default which, if true, would entitle them to the relief sought. Accordingly, Defendants' Motion to Dismiss under Rule 12(b)(6) is denied. Counsel for the prevailing party shall submit an Order in accordance with this Decision.