STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: February 5, 2013)

RENE D. PIGEON	:	
PATRICIA E. MANN	:	
	:	
v.	:	**C.A. No. PC 2011-2782**
	:	
MORTGAGE ELECTRONIC	:	
REGISTRATION SYSTEMS, INC.;	:	
DECISION ONE MORTGAGE	:	
COMPANY, LLC; HOMEEQ	:	
SERVICING; AND DEUTSCHE BANK	:	
NATIONAL TRUST COMPANY, AS	:	
TRUSTEE UNDER POOLING AND	:	
SERVICING AGREEMENT DATED AS	:	
OF JUNE 1, 2006 MORGAN STANLEY	:	
ABS CAPITAL I, INC. TRUST	:	
2006-HE5:MORTGAGE	:	
PASS-THROUGH CERTIFICATES,	:	
SERIES 2006-HE5	:	

DECISION

RUBINE, J. Before the Court is a Motion for Summary Judgment pursuant to Super. R. Civ. P. 56 filed by Defendants. Plaintiffs filed a declaratory judgment action petitioning this Court to declare the foreclosure sale of their property at 1272 Putnam Pike, Glocester, Rhode Island (the "Property") void, and to quiet their title to the Property. Plaintiffs challenge the validity of Deutsche Bank's foreclosure sale of the Property, which occurred May 11, 2011, on the basis that there was an invalid assignment of the mortgage and that notice of the foreclosure sale was defective.

I

FACTS & TRAVEL

The undisputed facts supported by the movant's affidavits and undisputed documents reflect that on April 21, 2006, Plaintiffs executed an adjustable rate note ("Note") in favor of lender Decision One Mortgage Company, LLC ("Decision One") for $228,189. (Defs.' Mot. Summ. J. Ex. C.) Decision One endorsed the Note in blank. Id. at 3. The Note provides that "the Lender may transfer this Note." Id. at 1. The Note further provides that, "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.'" Id. Thereafter, Decision One transferred the Note to Deutsche Bank. (Comstock Aff. ¶ 7.)

To secure the Note, Plaintiffs contemporaneously executed a mortgage ("Mortgage") on the Property. (Defs.' Mot. Summ. J. Ex. B.) The Mortgage designated MERS as "mortgagee" and as "nominee for lender and lender's successors and assigns." Id. at 1. The Mortgage further provided that "Borrowers do 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 the Mortgage Covenants upon the Statutory Condition and with the Statutory Power of Sale." Id. at 3. The Mortgage was subsequently recorded in the land evidence records of the Town of Glocester. (Defs.' Mot. Summ. J. Ex. B.)

On June 23, 2008, MERS, as mortgagee and as nominee for Decision One, assigned the Mortgage interest to Deutsche Bank. (Compl. Ex. 3.) Thus, upon assignment of the Mortgage interest by MERS, Deutsche Bank held both the Note and Mortgage entitling it to exercise the statutory power of sale.

Thereafter, on December 21, 2009, Plaintiffs executed a modification agreement modifying the terms of the Note, whereby Plaintiffs agreed to pay the new balance due under the Note, and they agreed that they had "no defenses, claims or offsets" with respect to the new balance. (Defs.' Mot. Summ. J. Ex. E at 2.) The modification agreement further provided that "all of the covenants, agreements, stipulations and conditions in the Note and [Mortgage] remain unmodified and in full force and effect without any defense, counterclaim, right or claim of set-off." Id. at 3. In addition, the modification agreement specifically provided that "[n]one of Borrower's obligations or liabilities under the [Mortgage] shall be diminished or released by any provisions herein." Id.

Subsequently, Plaintiffs defaulted, in that Plaintiffs failed to make timely payments under the terms of the Note. (Comstock Aff. ¶ 10.) On January 28, 2011, a written notice of default and mortgagee's right to foreclose was mailed to Plaintiffs by first class mail. (Comstock Aff. ¶ 11; Defs.' Mot. Summ. J. Ex. F.) The notice further provides that Ocwen Loan Servicing, LLC ("Ocwen") is the servicer for Deutsche Bank. (Defs.' Mot. Summ. J. Ex. F.) Plaintiffs failed to cure their default, and on March 18, 2011, Ocwen sent written notice to Plaintiffs by certified mail, return receipt requested, of the time and place of the foreclosure sale. (Comstock Aff. ¶ 12; Defs.' Mot. Summ. J. Ex. G.) Hence, on May 11, 2011, Ocwen, as servicer for Deutsche Bank, foreclosed on the Property. (Comstock Aff. ¶ 13.) At the foreclosure sale Deutsche Bank prevailed as the successful bidder, purchasing the Property for $267,581.59. Id. at ¶ 14.

On May 16, 2011, Plaintiffs filed the Complaint, requesting declaratory and injunctive relief. See Compl. Defendants then filed this Motion for Summary Judgment

pursuant to Rule 56, based upon their belief that there are no genuine issues of fact, and that Defendants are entitled to judgment as a matter of law, with respect to the validity of the foreclosure sale and the validity of title in Deutsche Bank. Plaintiffs object to Defendants' Motion for Summary Judgment, averring that genuine issues of material fact exist, and therefore, that this Court must deny Defendants' Motion. In opposing summary judgment, Plaintiffs claim that the assignment of the Mortgage was invalid because the individual executing the assignment is a "robo-signer." (Pigeon Aff. ¶ 6-9.) Further, Plaintiffs claim that they did not receive notice of the foreclosure sale and that the modification agreement is invalid. Id. at ¶¶ 12, 14, 17, 23. Finally, Plaintiffs challenge the validity of the copies of the Note and Mortgage submitted by Defendant. Defendants, on the other hand, contend that there are no genuine issues of material fact in dispute because the assignment of the Mortgage was valid, Plaintiffs defaulted, and Defendants complied with all statutory notice requirements and the terms of the Mortgage during the foreclosure process. (Comstock Aff.) After the submission of supplemental memoranda in accordance with the Order entered by this Court on March 21, 2012, this Court took the matter under advisement.

II

STANDARD OF REVIEW

The Court will only grant a motion for summary judgment if "'after viewing the [admissible] evidence in the light most favorable to the nonmoving party,'" 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); Jessup & Conroy, P.C. v. Seguin, 46 A.3d 835, 838 (R.I. 2012) (quoting Empire Acquisition Group, LLC v. Atlantic Mortgage Co., 35 A.3d 878, 882 (R.I. 2012)).

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. Ins. Co. v. Kaya, 947 A.2d 869, 872 (R.I. 2008) (quoting D'Allesandro v. Tarro, 842 A.2d 1063, 1065 (R.I. 2004)). 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.'" Jessup & Conroy, P.C., 46 A.3d at 839 (quoting Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998)) (alteration in original).

III

ANALYSIS

Plaintiffs make numerous statements in their affidavits and arguments in opposition to summary judgment, none of which establish a genuine issue of material fact and many of which are simply conclusory allegations with respect to the validity or enforceability of the documents and procedures leading up to foreclosure. With respect to Plaintiffs' claim that the individual who executed the assignment of the Mortgage is a "robo-signer," Plaintiffs have failed to establish a genuine issue of material fact. Rule 56 requires that statements made in an affidavit be made based on personal knowledge. See Super. R. Civ. P. 56(e). Statements made on the basis of information or belief, or on the

basis of suspicion, are inadmissible pursuant to Rule 56. See 27A Federal Procedure L. Ed. § 62:654 (West 2012). Thus, Plaintiffs' unverified "extensive research" of the individual executing the Mortgage assignment is insufficient to establish that Plaintiffs have personal knowledge with respect to that individual's authority to execute the assignment.

The term "robo-signer" is nowhere defined in the Complaint or in Plaintiffs' objection to summary judgment. Nor is it defined in the affidavits submitted in opposition to the Motion for Summary Judgment. It appears that Plaintiffs believe such a characterization alone connotes that the individual so characterized did or failed to do some act which should result in a fatal defect in a mortgage or of an assignment thereof. Without describing in an affidavit what the alleged robo-signer did or did not do, the Court cannot consider the effect of such action or inaction. Similarly such a characterization devoid of stating the facts that underlie such a characterization cannot be useful in a determination of whether or not such an affidavit demonstrates the existence of a genuine issue of material fact which should preclude summary disposition. There is also a serious question as to whether such a characterization constitutes admissible evidence.

Moreover, Plaintiffs have not properly set forth factual allegations supporting their claim of fraud, nor have they alleged the essential elements of fraud—that an intentional misrepresentation was made by Defendant, which misrepresentation he relied on, causing him damage. See Women's Dev. Corp. v. City of Central Falls, 764 A.2d 151, 160 (R.I. 2001) (citing Travers v. Spidell, 682 A.2d 471, 472-73 (R.I. 1996)). Even if the Complaint contained a well pleaded claim of fraud, the Rules of Civil Procedure

require that the circumstances constituting the alleged fraud be stated with particularity. Super. R. Civ. P. 9(b).

Furthermore, the weight of authority among courts presented with the issue and the previous decisions of this Court establish that a plaintiff/mortgagor in these circumstances lacks standing to challenge the validity of the mortgage assignment. See Payette v. Mortg. Elec. Registration Sys., Inc., No. PC 2009-5875, 2011 WL 3794701 (R.I. Super. Aug. 22, 2011) (Rubine, J.) (citing persuasive authority from several jurisdictions to support the holding that a plaintiff/mortgagor does not have standing to challenge a mortgage assignment); see also Rutter v. Mortg. Elec. Registration Sys., Inc., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012 (R.I. Super. March 12, 2012) (Silverstein, J.); 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 holding that a mortgagor does not have standing to challenge the validity of an assignment).

Moreover, Plaintiffs' averment by way of affidavit that they did not receive notice of default or of the mortgagee's right to foreclose does not establish a genuine issue of material fact. Defendants state in their affidavit that notice of default and of the mortgagee's right to foreclose was sent to Plaintiffs on January 28, 2011, and on March 18, 2011. (Comstock Aff. ¶¶ 11-12.) Additionally, Defendants submitted copies of the notices that were sent to both borrowers at each of their known addresses as set forth in the mortgage along with proof that each notice was sent by certified or first class mail. (Defs.' Mot. Summ. J. Ex. F.) Plaintiffs' affidavits stating that they did not receive notice of the foreclosure sale fail to state a genuine issue of fact. The mortgage itself

provides that, although the copies of certified mail receipts reveal that the notices were returned to sender as "unclaimed" and "unable to forward," Defendants were not required to guaranty Plaintiffs' receipt of notice. According to the terms of the Mortgage, "notice to [Plaintiffs] in connection with this [Mortgage] shall be deemed to have been given to [Plaintiffs] when mailed by first class mail." (Defs.' Mot. Summ. J. Ex. B at 8.) Therefore, when Defendants sent each notice, Plaintiffs were deemed to have been served with notice according to the terms of the Mortgage.

Defendants' affidavit sets forth facts that notice was sent by certified mail, and that the notice was returned as undeliverable. Since certified mail is a form of first class mail, the notice would be deemed to have been made through constructive notice, even if the Plaintiffs state in their affidavits that they did not receive actual notice. The failure to receive actual notice because they possibly refused to accept and sign for the certified delivery is not a dispute of a material fact in the face of supporting affidavits establishing notice was given as required under the Mortgage. Plaintiffs' statements in their affidavits that they did not receive actual notice of default and of the mortgagee's right to foreclose fail to establish a genuine issue of material fact. The mere conclusory allegation in the Pigeon affidavit that Plaintiffs did not receive notice, when viewed in the light most favorable to the Plaintiffs does not create a genuine issue of material fact in that it refutes the statements and documents filed in support of summary judgment. As a matter of law, actual receipt of the notice is not relevant or material, and therefore fails to establish a genuine issue of material fact precluding summary judgment. Actual notice is not a material fact to be considered, when the parties agreed to language in the mortgage instrument that notice is deemed to have been given, when the mortgagee places notice

for first class mail delivery. In other words the parties agreed to a constructive notice provision, which renders the fact of actual receipt a fact not material to the resolution of this case.

Finally, some of the assertions in Plaintiffs' affidavit raise questions as to whether they are made in bad faith solely for the purpose of delay. Plaintiffs claim in each of their respective affidavits that "I never granted a mortgage to Decision One Mortgage as alleged by Defendants." (Pigeon Aff. ¶ 1.) This statement is not material in light of the uncontradicted language in the mortgage that although Decision One was the lender from whom Plaintiffs borrowed $228,189, MERS is identified as the mortgagee and nominee of the lender. Furthermore, Plaintiffs state that the copy of the Note submitted by Defendants is not the Note that Plaintiffs signed because "[t]he note that I signed at closing did not have holes on it" and "[t]he copy provided to the Court has black marks caused by holes." (Pigeon Aff. ¶¶ 5, 34.) Plaintiffs do not by way of affidavit refute that the signatures appearing on a copy of the Note identified by Defendants as the operative note. The existence of "black marks" on the copy of the Note provided by Defendants does not establish a genuine issue of material fact if the Plaintiffs do not refute that they borrowed money from Decision One or that they signed a note which in substance was identical to the copy produced by Defendants. These statements of fact by Plaintiffs in their opposing affidavits fail to establish a genuine issue of material fact.

IV

CONCLUSION

In sum, a review of the record in this case reveals that Plaintiffs have not met their burden in opposing the Motion for Summary Judgment as they have not presented evidence of a substantial nature that would lead to a conclusion that there are genuine issues of material fact justifying the denial of the Motion. Accordingly, Defendants' Motion for Summary Judgment is granted. Counsel for the prevailing party shall submit an Order in accordance with this Decision.