

I

FACTS & TRAVEL

The record reflects that on July 28, 2008, Plaintiffs executed a note (Note) in favor of lender Shamrock Financial Corp. (Shamrock) for \$179,212. (Gossett Aff. ¶ 6; Defs.' Mot. Summ. J. Ex. B.) Shamrock thereafter specially endorsed the Note to Flagstar. (Gossett Aff. ¶ 7; Defs.' Mot. Summ. J. Ex. B.)

Along with the execution of the Note, Plaintiffs executed a mortgage (Mortgage) on the Property to secure the Note. (Gossett Aff. ¶ 5; Compl. Ex. 2 at 1.) The Mortgage designates Shamrock as the "Lender" and MERS as "mortgagee" and "nominee for [Shamrock] . . . and [Shamrock's] successors and assigns." (Compl. Ex. 2 at 1.) In addition, the Mortgage 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. The Mortgage further 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 [Shamrock] and [Shamrock'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 [Shamrock]. Id. at 2.

The Mortgage was recorded in the land evidence records of the City of Providence. (Compl. Ex. 2.)

On February 24, 2011, MERS, as mortgagee and as nominee for Shamrock, assigned the Mortgage interest to Flagstar. (Compl. Ex. 3.) Thus, Flagstar became the assignee of MERS, thereby possessing the right to exercise the statutory power of sale

and to foreclose on the Property. (Compl. Ex. 2 at 1-2.) The assignment was recorded in the land evidence records of the City of Providence. (Compl. Ex. 3.)

Plaintiffs thereafter defaulted under the terms of the Note and Mortgage (Gossett Aff. ¶ 10-11), as Plaintiffs were delinquent on their Mortgage payments as of September 1, 2009. (Gossett Aff. ¶ 11.) As a result, Flagstar, as mortgagee and note holder, foreclosed on the Property on May 3, 2011, and prevailed as the successful bidder. (Gossett Aff. ¶ 9.)

Following the foreclosure sale, Plaintiffs filed the instant Complaint seeking nullification of the foreclosure sale and return of title to the Property to them. Defendants filed this Motion for Summary Judgment. Plaintiffs objected to Defendants' Motion averring that genuine issues of material fact exist and that Defendants are not entitled to judgment as a matter of law. At the Motion hearing, the parties stipulated to waive oral argument, thereby submitting this matter to the Court on the briefs. The Court then took this Motion under advisement for decision on the Motion.

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,”” 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 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. 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

Since the facts herein are nearly identical to the facts in Payette v. Mortg. Elec. Registration Sys., Inc., and the Mortgage executed by Plaintiffs contains the same operative language as that of the mortgage considered in Payette, this Court will incorporate and adopt the reasoning set forth in Payette. 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 chosen to primarily criticize the precedent of the Rhode Island Superior Court, thereby incorporating into their memorandum “The

Deconstruction of Payette” and “The Deconstruction of Kriegel.” Plaintiffs’ counsel fails to distinguish the earlier precedent, merely arguing that the previous cases were wrongly decided, and this Court is not persuaded by that argument. 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).

Plaintiffs challenge Defendants’ affidavit submitted in support of their Motion, which is the affidavit of Catherine Gossett (“Gossett”), an Assistant Manager of Foreclosure for Flagstar. Specifically, Plaintiffs aver that the affidavit is not based on Gossett’s personal knowledge and that Gossett is not competent to testify in this matter. In addition, Plaintiffs aver, based on hours of internet research, that Gossett is not who she purports to be—an Assistant Manager of Foreclosure—but rather that Gossett is an Investigator for Flagstar; thus, rendering her affidavit ineffective. (Seng Aff. ¶¶ 7-9.)

Pursuant to Rule 56(e), “[s]upporting 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). Moreover, this Court, and at least one other jurisdiction, have found that the testimony of an employee of a mortgagee who provides an affidavit with respect to documents in the mortgagee’s file is not hearsay, as the documents that form the basis of that employee’s testimony are admissible under the business records exception. See Rutter, 2012 WL 894012, at *23-24; see also Charter

One Mortg. Corp. v. Keselica, No. 04CA008426, 2004 WL 1837211, at *4 (Ohio Ct. App. Aug. 18, 2004). Further, a hearsay business record is admissible under Rule 803(6) of the Rhode Island Rules of Evidence if it is established that the business record meets the definition as contained therein.

Here, Defendants submitted the affidavit of Gossett, in which she states that she is Assistant Manager of Foreclosure for Flagstar, the foreclosing mortgagee and the current record owner of the Property. (Gossett Aff. ¶¶ 8-9.) Gossett attested in the affidavit that “[i]n the regular performance of my job functions, I am familiar with business records maintained by Flagstar.” (Gossett Aff. ¶ 3.) She further states that “[i]n connection with making this affidavit, I have personally examined these business records” and that “I have reviewed Flagstar’s business records concerning the mortgage loan account for Meng Seng and Sopha Sin.” (Gossett Aff. ¶¶ 3-4.) Gossett then set forth details in the subsequent paragraphs of the affidavit establishing her personal knowledge of the matter. See Super. R. Civ. P. 56(e). Accordingly, Gossett is competent to testify in the form of an affidavit pursuant to Super. R. Civ. P. 56(e). See Rutter, 2012 WL 894012, at *23-24. Plaintiffs’ research in reaching the conclusion that Gossett is not who she purports to be does not create a genuine issue of material fact necessary to successfully oppose summary judgment. At most, the questions raised by Plaintiffs as to the position held by Gossett at Flagstar may affect her credibility, but they do not run counter to her claim of personal knowledge and her review and reliance on Flagstar’s business records. With respect to a motion for summary judgment, the Court does not consider the credibility of affiants, (Palmisciano v. Burrillville Racing Ass’n, 603 A.2d 317, 320 (R.I. 1992)); if

summary judgment is denied, credibility of witnesses becomes the exclusive domain of the finder of fact at trial.

In his affidavit, Plaintiff Meng Seng (Seng) fails to establish a genuine issue of material fact sufficient to defeat Defendants' Motion. Seng primarily sets forth challenges to the authority of those individuals that executed the endorsement of the Note and the assignment and acknowledgement of the Mortgage.

Under prevailing law in this jurisdiction, a plaintiff/mortgagor in these circumstances lacks standing to challenge the validity of the mortgage assignment. See Payette, 2011 WL 3794701 (citing persuasive authority from several jurisdictions to support the holding that a plaintiff/mortgagor does not have standing to challenge a mortgage assignment); Rutter, 2012 WL 894012; see also Brough v. Foley, 525 A.2d 919, 921-22 (R.I. 1987) (plaintiffs/buyers lacked standing to challenge the assignment of a right of first refusal and the exercise of that right of first refusal by nominee). Although a recent decision from the First Circuit holds that mortgagors have standing to challenge a mortgage assignment under Massachusetts law, this Court is obligated to apply the common law of Rhode Island. See Culhane v. Aurora Loan Servs. of Nebraska, 708 F.3d 282, 290-91 (1st Cir. 2013). Furthermore, it is this Court's interpretation of the Culhane decision that the First Circuit holds that, according to Massachusetts law, a mortgagor has standing to challenge a mortgage assignment on the basis that the assignor had no interest to assign, rather than holding that a mortgagor has standing to assert defects in the execution of a particular mortgage assignment. See id.

Furthermore, the allegation that an assignment was not duly acknowledged will not, in most cases, invalidate a notarized and recorded assignment. "A notary public's

certificate of acknowledgement, regular on its face, carries a strong presumption of validity,” and acknowledged deeds and mortgages of real estate will not be set aside absent clear and convincing evidence that the certificate of acknowledgment is false. Butler v. Encyclopedia Britannica, Inc., 41 F.3d 285, 294-95 (7th Cir. 1994) (citing 1 Am. Jur. 2d Acknowledgments § 83 (1994)); see also 91 Am. Jur. Proof of Facts 3d 345 Acknowledgment of Real Property Instruments and Other Acknowledgments § 8 (2012). This Court agrees with the Seventh Circuit’s analysis that “[i]f a notary’s certificate were vulnerable to attack every time an interested witness contradicted the certificate and the notary did not have a personal recollection of the event, ‘it would shock the moral sense of the community, deny justice, and create chaos in land titles[]’ and every other type of document requiring notarization.”² Butler, 41 F.3d at 295. Moreover, 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).

Seng’s unverified, conclusory statements concerning the authority of the individuals who executed the assignment of the Mortgage and the acknowledgment of the Mortgage assignment are insufficient to rebut the strong presumption of validity carried by certificates of acknowledgement and recorded documents. See Butler, 41 F.3d at 294-95. Moreover, Plaintiffs have not properly set forth clear and convincing evidence that

² To the extent that Seng challenges the authority of particular individuals to execute the Mortgage assignment and acknowledgment of the Mortgage assignment, Rhode Island Title Standard No. 5.3 provides that it may be assumed that the individuals executing those instruments were the officers they purported to be where the instrument is executed and acknowledged in proper form. Furthermore, Rhode Island Title Standard No. 5.2 provides that the signature of an individual signing on behalf of a corporation on a corporate instrument is sufficient despite the omission of the corporate name over the signature of the signer, as long as the corporation appears as the party to the instrument and the instrument is properly executed and acknowledged. Although the Rhode Island Title Standards are not binding authority on this Court, they are persuasive.

the acknowledgment of the Mortgage assignment was false, nor have they adequately set forth an allegation of fraud that includes the essential elements of such a claim—that an intentional misrepresentation was made by Defendants, which misrepresentation they relied on, causing them damage.³ See 91 Am. Jur. Proof of Facts 3d 345 Acknowledgment of Real Property Instruments and Other Acknowledgments § 8; see also 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)). Therefore, through Seng’s affidavit, Plaintiffs have failed to establish a genuine issue of material fact.

In his affidavit, Seng also makes the conclusory assertion that he did not default on his Mortgage and that he did not receive adequate notice of default or of the foreclosure sale as required by the terms of his Mortgage. (Seng Aff. ¶¶ 51, 58-59.) Such conclusory averments are insufficient to establish a factual issue concerning default and adequate notice. See Jessup & Conroy, P.C., 46 A.3d at 839 (evidence in opposition to a motion for summary judgment must be of a substantial nature rather than merely consisting of legal conclusions). Furthermore, the issues presented in this matter have been previously decided by this Court. See Kriegel v. Mortg. Elec. Registration Sys., Inc., No. PC 2010-7099, 2011 WL 4947398 (R.I. Super. Oct. 13, 2011) (Rubine, J.); see also Rutter, 2012 WL 894012; Payette, 2011 WL 3794701; Porter v. First NLC Fin. Serv., LLC, No. PC 2010-2526, 2011 WL 1251246 (R.I. Super. March 31, 2011) (Rubine, J.); Bucci v. Lehman Bros. Bank, FSB, No. PC 2009-3888, 2009 WL 3328373 (R.I. Super. Aug. 25, 2009) (Silverstein, J.). Plaintiffs have failed to demonstrate by affidavit, or otherwise, that a genuine issue of material fact exists which would result in

³ This Court notes that falsely swearing before a notary public carries criminal implications pursuant to G.L. 1956 § 11-33-4.

the nullification of the foreclosure sale conducted by Flagstar. Accordingly, Defendants are entitled to judgment as a matter of law based on the authority of the above-cited cases.

Likewise, the affidavit of Gregory P. Titus (Titus), president of a “business consulting firm specializing in business intelligence,” fails to establish a genuine issue of material fact. (Titus ¶ 1.) Titus bases his affidavit solely on his internet research on the website LinkedIn, and thus, Titus lacks personal knowledge with respect to the endorsement of the Note and the employment of the individuals executing and acknowledging the assignment of the Mortgage. Belief, no matter how sincere, is insufficient to establish personal knowledge, and in the instant matter, Titus’ affidavit must be stricken for lack of personal knowledge. See Super. R. Civ. P. 56(e); 27A Federal Procedure L. Ed. § 62:654.

Finally, some of the assertions in Seng’s affidavit raise questions as to whether they are made in bad faith solely for the purpose of delay. Seng claims that “[t]here is nothing in the mortgage that states that Shamrock ever had an interest in the mortgage that is the subject of this case.” (Seng Aff. ¶ 11.) This statement is frivolous, as it is blatantly contradicted by a cursory review of the Mortgage which, on the first page, names Shamrock as the Lender. This baseless allegation, and others like it in the affidavit, fails to establish a genuine issue of material fact.

IV

CONCLUSION

Based upon the foregoing, Defendants' Motion for Summary Judgment is granted. Counsel for the prevailing party shall submit an order and form of judgment in accordance with this Decision.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Meng Seng, et al. v. Mortgage Electronic Registration Systems, Inc., et al.

CASE NO: PC 2011-2784

COURT: Kent County Superior Court

DATE DECISION FILED: April 3, 2013

JUSTICE/MAGISTRATE: Rubine, J.

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