

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: February 11, 2013)

FRANCISCO ROSARIO :
v. :
MORTGAGE ELECTRONIC :
REGISTRATION SYSTEMS, INC.; :
THE BANK OF NEW YORK MELLON :
AS TRUSTEE FOR THE HOLDERS :
OF THE CERTIFICATES, FIRST :
HORIZON MORTGAGE PASS- :
THROUGH CERTIFICATES SERIES :
FH06-AAL; FIRST HORIZON HOME :
LOAN CORPORATION :

C.A. No. PC 2011-2999

DECISION

RUBINE, J. Before the Court is a Motion to Dismiss Plaintiff’s Verified Complaint (“Complaint”) pursuant to Super. R. Civ. P. 12(b)(6) filed by Defendants Mortgage Electronic Registration Systems Inc. (“MERS”), The Bank of New York Mellon as Trustee for the Holders of the Certificates, First Horizon Mortgage Pass-Through Certificates Series FH06-AAL (“Bank of New York”), and First Horizon Home Loan Corporation (“First Horizon”)<sup>1</sup> (collectively, “Defendants”). According to the Complaint, the foreclosure sale conducted by First Horizon on certain real property located at 183-185 Laban Street, Providence, Rhode Island (the “Property”) is null and void as First Horizon allegedly failed to possess the statutory power of sale upon the commencement of foreclosure proceedings. Thus, Plaintiff seeks a declaration from this

<sup>1</sup> Defendants allege that First Horizon is incorrectly named “First Horizon Home Loan Corporation” and that its correct name is “First Horizon Home Loans,” a division of First Tennessee Bank National Association.

Court quieting title in favor of Plaintiff. Plaintiff further sets forth allegations in the Complaint that the foreclosure sale was not noticed or published as required by the terms of the Mortgage. Finally, Plaintiff alleges that there was a breach of the duty of good faith and reasonable diligence.

## I

### FACTS & TRAVEL

The following facts are derived from the Verified Complaint and the exhibits attached thereto and incorporated therein. On December 23, 2005, Plaintiff executed a note (“Note”) in favor of lender First Horizon for \$268,800.<sup>2</sup> (Compl. Ex. 2.) To secure the Note, Plaintiff contemporaneously executed a mortgage (“Mortgage”) on the Property. (Compl. Ex. 2.) The Mortgage designates First Horizon as the “Lender”<sup>3</sup> and further designates MERS as the “mortgagee” as well as “nominee for [First Horizon] and [First Horizon’s] successors and assigns.” Id. at 1-2. The language contained in the Mortgage provides that “Borrower does hereby mortgage, grant and convey to MERS, (solely as nominee for [First Horizon] and [First Horizon’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 3. 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

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<sup>2</sup> Plaintiff also executed a second note in favor of lender First Horizon for \$33,600 which is secured by a second mortgage on the Property. The second note and mortgage are not involved in the instant action.

<sup>3</sup> The Mortgage explicitly designates First Horizon as the lender; however, Defendants state in their memorandum that the lender is First Tennessee and that First Horizon is now known as First Tennessee.

or custom, MERS (as nominee for [First Horizon] and [First Horizon'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 [First Horizon]." Id.

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

On January 21, 2011, MERS, as mortgagee and as nominee for First Horizon and its successors and assigns, assigned the Mortgage interest to Bank of New York. (Compl. Ex. 3.) Thus, Bank of New York became an assignee of MERS possessing the right to exercise the statutory power of sale and to foreclose and sell the Property as set forth in the mortgage. (Compl. Ex. 2 at 3.) The assignment was duly executed and recorded in the land evidence records of the City of Providence on January 26, 2011. (Compl. Ex. 3.)

Thereafter, Plaintiff alleges that it was actually First Horizon which sold the Property at a foreclosure sale in April 2011. (Compl. ¶ 47.) On May 24, 2011, Plaintiff filed the instant Complaint seeking nullification of the foreclosure sale and return of title to him, as well as a claim for breach of the duty of good faith and reasonable diligence. Plaintiff also alleges that First Horizon, as well as MERS and Bank of New York, did not have standing to foreclose and that the foreclosure sale was not properly noticed or published according to the terms of the Mortgage. (Compl. ¶¶ 41-42.) Plaintiff thereafter filed a *lis pendens* on the Property in the land evidence records of the City of Providence, putting all on notice of the dispute over title to the Property. Defendants then filed this Motion to Dismiss pursuant to Rule 12(b)(6) averring that Plaintiff has failed to set forth a claim for relief. At the Motion hearing, both parties waived oral argument and stipulated to submit this matter to the Court on the pleadings following Plaintiff's

submission of his objection to Defendants' Motion. Plaintiff thereafter objected to Defendants' Motion to Dismiss contending that the Complaint contains enough facts to state a claim for relief. This Court then took the matter under advisement.

## II

### ANALYSIS

For the purpose of a Rule 12(b)(6) motion to dismiss, the Court assumes the allegations set forth in the Complaint are true and views them in the light most favorable to plaintiff. Tarzia v. State, 44 A.3d 1245, 1251 (R.I. 2012) (quoting Narragansett Elec. Co. v. Minardi, 21 A.3d 274, 277 (R.I. 2011)). The motion will be granted only if it appears clear beyond a reasonable doubt that there is no set of facts which could entitle plaintiff to relief. 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)).

Applying that standard here, Defendants' Motion to Dismiss must be denied. There are at least two allegations, which, if taken as true, could be grounds to invalidate the foreclosure. Plaintiff has alleged that First Horizon conducted the foreclosure sale of his Property despite the previous recorded assignment of his Mortgage from MERS to Bank of New York. (Compl. ¶ 47.) Plaintiff has also attached to the Complaint a Notice of Intent to Foreclose on his Property sent from First Horizon by its attorneys which was recorded in the land evidence records of the City of Providence and was dated after the assignment of the Mortgage from MERS to Bank of New York. (Compl. ¶ 47, Ex. 4.) Thus, Plaintiff has alleged facts that, if true, could set forth a claim for relief, namely that the foreclosing mortgagee, First Horizon, was not authorized to exercise the statutory power of sale at the time that it commenced and conducted the foreclosure auction given

the prior assignment of the Mortgage to Bank of New York.

In addition, Plaintiff sets forth an allegation in the Complaint that notice and publication of the sale failed to adhere to the requirements set forth in the Mortgage, which includes compliance with statutory notice and publication requirements. Under prevailing law, failure to follow the notice procedures as provided in the statute may be grounds to render the foreclosure sale a nullity. See 55 Am. Jur. 2d Mortgages § 508, 511 & n.3 (2009) (citing persuasive authority therein) (a foreclosing mortgagee's failure to comply with certain notice requirements contained in the Mortgage and in the pertinent state statute will invalidate a foreclosure sale). Once again, if the Court views that allegation as true, Defendants' Motion to Dismiss must be denied.

This Court has found that Plaintiff has set forth factual allegations that may entitle him to relief under the declaratory claims. Since the Motion to Dismiss will be denied, this Court need not rule on the viability of Plaintiff's claim for breach of the duty of good faith and reasonable diligence at this time.

### **III**

#### **CONCLUSION**

In sum, Plaintiff has set forth allegations in the Complaint that, if true, state a claim for relief. Accordingly, Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) is Denied. Counsel for the prevailing party shall submit an Order in accordance with this Decision.