

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(Filed: January 15, 2013)

JUSTA MACHADO

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v.

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C.A. No. PC 2011-4092

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MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.;;
FEDERAL NATIONAL
MORTGAGE ASSOCIATION

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DECISION

RUBINE, J. Defendants Mortgage Electronic Registration Systems, Inc. (“MERS”) and Federal National Mortgage Association (“FNMA”) (collectively, “Defendants”) jointly move to dismiss Plaintiff’s verified complaint (“Complaint”). Through the Complaint, Plaintiff seeks declaratory and injunctive relief pursuant to G.L. 1956 § 9-30-1, et seq., petitioning this Court to quiet title in favor of Plaintiff and to declare the foreclosure sale of Plaintiff’s real property located at 30 Ophelia Street, Providence, Rhode Island (the “Property”) null and void. Plaintiff alleges that FNMA unlawfully foreclosed because at the time of the foreclosure sale it allegedly did not have authority under the statutory power of sale to commence foreclosure proceedings. 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 the actions of one or more of the Defendants constituted a breach of the duty of good faith and reasonable diligence as implied in every contract.

I

FACTS & TRAVEL

The following facts are derived from the Complaint and the exhibits attached thereto and incorporated therein. On October 1, 2007, Plaintiff executed a note (“Note”) in favor of lender Countrywide Home Loans, Inc. (“Countrywide”) for \$205,200, using the loan proceeds to finance the purchase of the Property. (Compl. Ex. 2 at 1.) To secure the Note, Plaintiff contemporaneously executed a mortgage (“Mortgage”) on the Property. (Compl. Ex. 2.) The Mortgage designated MERS as “mortgagee” and “nominee for Lender and Lender’s successors and assigns.” Id. at 1. 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 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 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.

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

On April 15, 2008, MERS, as mortgagee and nominee for Countrywide, assigned the Mortgage to FNMA. (Compl. Ex. 3.) Thereafter, FNMA, as an assignee of MERS, was entitled to enforce all “Mortgage Covenants upon the Statutory Condition and with

the Statutory Power of Sale.” (Compl. Ex. 2. at 2.) The assignment was recorded in the land evidence records of the City of Providence. (Compl. Ex. 3.)

Subsequently, FNMA foreclosed on the Property. (Compl. ¶¶ 1-3, 58.) Plaintiff thereafter filed the instant Complaint to quiet title, seeking nullification of the foreclosure sale and return of title to Plaintiff. Plaintiff also alleges that the foreclosure sale was not properly noticed or published according to the terms of the Mortgage. (Compl. ¶ 51.) Defendants filed this Super. R. Civ. P. 12(b)(6) Motion to Dismiss averring that Plaintiff’s Complaint fails to state a claim upon which relief may be granted. Plaintiff objected to Defendants’ Motion arguing that the Complaint alleges sufficient facts to state a claim for relief. At the Motion hearing, both parties waived oral argument, and thus, this Court took the matter under advisement based upon written memoranda from the parties.

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 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) (internal quotation marks 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

The allegations set forth in the instant Complaint—specifically concerning the assignment of the Mortgage, 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 in the complaint in Chhun v. Mortg. Elec. Registration Sys., Inc., and the Mortgage as executed by Plaintiff contains the same operative language as the Mortgage considered in Chhun. No. PC 2011-4547, 2012 WL 2648200 (R.I. Super. June 26, 2012) (Rubine, J.). Further, Plaintiff's arguments are nearly identical to the arguments raised in Chhun, and are based on substantially identical facts. Therefore, this Court will incorporate and adopt the reasoning set forth in Chhun in ruling on Defendants' Motion. In Chhun, the plaintiffs failed to adequately allege in their complaint the grounds entitling them to relief, merely incorporating conclusory legal statements; thus, this Court dismissed plaintiffs' complaint for failure to state a claim for relief. The same outcome obtains in this case with respect to the aforementioned legal issues.

Notwithstanding the substantial similarity between this matter and Chhun, there is an allegation of fact in the instant Complaint that the foreclosure sale was not noticed or published as required by the terms of the Mortgage. If this allegation is accepted as true

for purposes of the Defendants' Motion, Plaintiff's Complaint cannot be dismissed, and Plaintiff must be given an opportunity to be heard with respect to the allegation concerning whether the notice and publication requirements were properly performed with respect to the foreclosure sale. See 55 Am. Jur. 2d Mortgages § 508, 511 (2009) (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).

Apart from the allegation that there was a defect in the notice and publication of the foreclosure sale, Plaintiff sets forth allegations in the Complaint relative to MERS' authority to act as nominee of the lender and its authority to execute mortgage assignments. Contrary to Plaintiff's assertion, an assignment by MERS authorizes the assignee, in this case FNMA, to exercise the statutory power of sale, and thus to foreclose following a mortgagor's default. An assignment of the Mortgage does not cause a disconnect between the note and mortgage rendering the assignment a nullity. Rather, under § 34-11-24, an assignment of the mortgage carries with it "the note and debt thereby secured." Section 34-11-24. Therefore, in this case, the assignment of the Mortgage interest from MERS to FNMA transferred the Mortgage as well as "the [N]ote and debt thereby secured." Id. FNMA then became an assignee of MERS thereby possessing all of the rights as mortgagee, including the statutory power of sale. See Kriegel v. Mortg. Elec. Registration Sys., Inc., No. PC 2010-7099, 2011 WL 4947398 at *13-14 (R.I. Super. Oct. 13, 2011) (Rubine, J.) (quoting Weybosset Hill Inv., LLC v. Rossi, 857 A.2d 231, 240 (R.I. 2004)) (affirming the argument that an assignee steps into the shoes of the assignor and can avail itself of the assignor's rights).

Moreover, Plaintiff alleges that the assignment was not duly executed as the individual who signed the Mortgage assignment was not an employee of MERS, the assignor, and therefore, did not have the authority to execute the assignment on behalf of MERS. (Compl. ¶¶ 34-37.) 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 v. Mortg. Elec. Registration Sys., Inc., No. PC 2009-5875, 2011 WL 3794701 (R.I. Super. Aug. 22, 2011) (Rubine, J.); see also Rutter v. Mortg. Elec. Registration Sys., Inc., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012, at *17 (R.I. Super. March 12, 2012) (Silverstein, J.) (quoting Fryzel v. Mortg. Elec. Registration Sys., Inc., C.A. No. 10-325M, 2011 U.S. Dist. LEXIS 95114, at *41-42 (D.R.I. June 10, 2011)) (the principle that a non-party to the contract does not have standing to challenge the contract’s subsequent assignment is well established); 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 a mortgage assignment). As this Court has proclaimed time and again, Plaintiff’s allegation with respect to the invalidity of the Mortgage assignment on the basis of lack of authority or otherwise is not supported by the prevailing case law and is insufficient to survive a motion to dismiss.

Furthermore, Plaintiff sets forth allegations pertaining to the breach of duty of good faith and reasonable diligence. Specifically, Plaintiff alleges that Countrywide, a non-party to this action, owed Plaintiff a duty of good faith and fair dealing in the conduct leading up to the foreclosure sale. (Compl. ¶ 83.) According to Plaintiff, FNMA

violated that duty by conducting the foreclosure without a valid assignment of the Mortgage interest. (Compl. ¶ 84.) These allegations are conclusory and unclear. Plaintiff alleges that Countrywide, a non-party to this action, is the entity that owed a duty of good faith and reasonable diligence and that somehow FNMA violated that duty. Accordingly, Plaintiff has failed to allege facts in the Complaint which coherently state a claim for relief concerning breach of the duty of good faith and reasonable diligence.

Nevertheless, Plaintiff alleges that the foreclosure sale notice and publication requirements were not properly followed. Considering these allegations as true and in the light most favorable to Plaintiff, Defendants' Motion to Dismiss must be denied because defect in notice and publication of the foreclosure sale raises an issue of fact relative to the validity of the foreclosure sale. See 55 Am. Jur. 2d Mortgages § 508, 511. For that reason alone, Plaintiff's Complaint cannot be dismissed, and Plaintiff must be given an opportunity to have these issues considered at trial.¹ However, the remaining legal conclusions alleged in the 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—have previously been 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.

¹ The Defendants may not be required to proceed to trial in order to test the veracity of the allegation with respect to notice and publication of the foreclosure sale. If the Defendants can establish the default and notice as an undisputed fact, they may move for summary judgment prior to trial.

IV

CONCLUSION

In sum, Plaintiff has set forth an allegation in the Complaint that, if true, may support 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.