STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: June 26, 2012)

WILLIAM CHHUN	:	
JOLI CHHIM	:	
	:	
v.	:	**C.A. No. PC 2011-4547**
	:	
MORTGAGE ELECTRONIC	:	
REGISTRATION SYSTEMS, INC.;	:	
DOMESTIC BANK; AURORA	:	
LOAN SERVICES, LLC; AND	:	
DEUTSCHE BANK NATIONAL	:	
TRUST COMPANY	:	

DECISION

RUBINE, J. Before the Court is Defendants' Mortgage Electronic Registration Systems, Inc. ("MERS"), Aurora Loan Services, LLC ("Aurora") and Deutsche Bank National Trust Company ("Deutsche Bank") (collectively, "Defendants")[1] Motion to Dismiss Plaintiffs' William Chhun and Joli Chhim (collectively, "Plaintiffs") complaint ("Complaint") pursuant to Rule 12(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure. Through the Complaint, Plaintiffs seek a declaration from this Court, quieting title and declaring that the foreclosure sale conducted by Aurora on certain real property located at 11 Wakefield Avenue, Cranston, Rhode Island ("the Property") is null and void as Aurora allegedly failed to possess the statutory power of sale upon the commencement of foreclosure proceedings.

[1] Defendant Domestic Bank is not a party to this Motion.

I

Facts & Travel

The facts gleaned from the Complaint and the exhibits attached to the Complaint and incorporated therein are as follows: On April 24, 2006, Plaintiffs executed an adjustable rate note (the "Note") in favor of lender Domestic Bank ("Domestic") for $224,000. To secure the Note, Plaintiffs contemporaneously executed a mortgage ("Mortgage") on the Property. See Compl. Ex. 2. The Mortgage designates Domestic as the "Lender" and further designates MERS as the "mortgagee" and as "nominee for [Domestic] and [Domestic's] successors and assigns." (Compl. Ex. 2 at 1.) The clear unambiguous language of 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. (Defs.' Ex. 1 at 2.)[2] 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 [Domestic] and [Domestic'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 [Domestic]." (Compl. Ex. 2 at 2.)

The Mortgage was thereafter recorded in the land evidence records for the City of Cranston on April 28, 2006.

[2] Defendants' Exhibit 1 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 1 Kent, R.I. Civ. Prac. § 10.3 at 100 (1969); 5B Wright & Miller, Fed. Prac. & Proc., 3d § 1357 at 377.

On September 10, 2010, MERS, as nominee for Domestic and mortgagee of the Mortgage, assigned the Mortgage interest to Aurora Loan Services, LLC ("Aurora"). See Compl. Ex. 3. That assignment was recorded in the land evidence records for the City of Cranston on September 17, 2010.

Thereafter, Plaintiffs failed to make timely payments under the terms of the Note. Subsequently, on August 3, 2011, Aurora, as holder of the Mortgage, foreclosed on the Property. Aurora was the successful bidder at the foreclosure sale.

On August 9, 2011, Plaintiffs filed the instant Complaint seeking nullification of the foreclosure sale and return of title to them, as well as claims for punitive damages. See Compl. Defendants then filed this Motion to Dismiss pursuant to Rule 12(b)(6). Plaintiffs filed an objection to Defendants' Motion averring that their Complaint contains short plain statements which establish their claim for relief. At the hearing, both parties agreed to waive oral argument, and hence, this Court took the matter under advisement.

II

Standard of Review

"The 'sole function of a motion to dismiss' pursuant to Rule 12(b)(6) is 'to test the sufficiency of the complaint.'" McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005) (quoting Rhode Island Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)). For purposes of the motion the Court "assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the plaintiffs." Giuliano v. Pastina, Jr., 793 A.2d 1035, 1036-37 (R.I. 2002) (quotation omitted).

The United States Supreme Court has adopted the view that a complaint must allege facts that "raise a right to relief above the speculative level." Bell Atlantic Corp. v.

Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007) (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004)). Hence, a plaintiff has an obligation to provide "the 'grounds' of his 'entitlement to relief.'" Id. (citing Papasan v. Allain, 478 U.S. 265, 286, 106 S.Ct. 2932 (1986)). This "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. (citing Papasan v. Allain, 478 U.S. 265, 286, 106 S.Ct. 2932 (1986)). Accordingly, a plaintiff's factual allegations contained in a complaint must be specific enough to cross "the line from conceivable to plausible." Id. at 570.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" Id. at 678, (quoting Twombly, 550 U.S. at 557). "Only a complaint that states a plausible claim for relief survives a motion to dismiss." Id. at 679 (citing Twombly, 550 U.S. at 556). A complaint that states "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," will not suffice. Id. at 678 (citing Twombly, 550 U.S. at 555). However, "when there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id. at 679. "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. (citing Iqbal v. Hasty, 490 F.3d 143, 157-58 (C.A.2 2007)).

The courts in Massachusetts have adopted the plausibility standard for whether a complaint can survive a motion to dismiss under the Federal Rules of Civil Procedure 12(b)(6) as articulated by the United States Supreme Court in Iqbal, 556 U.S. at 678-79 and Twombly, 550 U.S. at 550. See Iannacchino v. Ford Motor Car, 451 Mass. 623, 636 (2008); see also Peterson v. GMAC Mort., LLC, No. 11-11115-RWZ, Slip Copy, 2011 WL 5075613 at * 2 (D. Mass. Oct. 25, 2011) (Zobel, J.). Although Rhode Island has adopted the Federal Rules of Civil Procedure, the Rhode Island Supreme Court has yet to explicitly accept the Iqbal and Twombly standard as the operative standard with which to judge a Rule 12(b)(6) motion. In the case of Barrette v. Yakavonis, 996 A.2d 1231 (R.I. 2009), the Supreme Court interpreted the Rhode Island rules as follows: "a pleading need not include 'the ultimate facts that must be proven in order to succeed on the complaint . . . or . . . set out the precise legal theory upon which [the plaintiffs'] claim is based.'" Id. at 1234 (quoting Gardner v. Baird, 871 A.2d 949, 953 (R.I. 2005)). All that is required is that the "complaint 'provide the opposing party with fair and adequate notice of the type of claim being asserted.'" Id. Stated differently, the Court ruled: "th[e] Court examines the allegations contained in the plaintiff's complaint, assum[ing] them to be true, and views them in the light most favorable to the plaintiff." Id. (quoting Palazzo v. Alves, 944 A.2d 144, 149 (R.I. 2008)). Thereafter a 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 plaintiff's claim.'" Id. However, based upon the analysis of the law as set forth below, Plaintiffs' Complaint cannot survive a Rule 12(b)(6) motion even under the more forgiving pleading standard articulated in Barrette and Palazzo. The Court cannot hear

facts or legal argument from Plaintiffs to prove an alleged defect in an assignment since Plaintiffs lack standing, as strangers to the assignment, and therefore cannot prove their claim by proving that the assignment document evidences flaws that might effect the enforcement of the assignment by the assignor or the assignee. Since Plaintiffs are neither, they are without standing to seek relief on that basis. The Defendants are entitled to dismissal of a claim that Plaintiffs cannot prevail upon under any set of facts dealing with defects in an assignment.

III

Analysis

Since the allegations set forth in the instant Complaint are nearly identical to the allegations of the complaint in Kriegel v. Mortgage Electronic Registration Systems, and the Mortgage executed by Plaintiffs contains the same operative language as the mortgage considered in Kriegel, this Court will incorporate and adopt the reasoning set forth in Kriegel, No. PC 2010-7099, 2011 WL 4947398 (R.I. Super. Oct. 13, 2011) (Rubine, J.). In that case, the plaintiff failed to adequately allege in his complaint the grounds entitling him to the relief sought, merely alleging false conclusory statements; thus, this Court dismissed plaintiff's complaint for failure to state a claim for relief. The same outcome obtains in this case.

Plaintiffs, in their memoranda, fail to distinguish this matter from the Court's earlier determination and dismissal of similar cases. Rather, Plaintiffs have chosen to primarily criticize the precedent of the Rhode Island Superior Court[3] as "fatally flawed,"

[3] In the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of the Superior Court cases on this subject matter represents the prevailing view of the law in Rhode Island. Breggia v. Mortgage Electronic Registration Systems, No. PC-2009-4144, 2012 WL 1154738 (R.I. Super.

attaching thereto and incorporating therein exhibits to their memorandum entitled "Deconstruction of Payette" and "Deconstruction of Kriegel." "To say the least, this Court is not persuaded [nor impressed] by that argument." Rutter v. Mortgage Electronic Registration Systems, 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, slip op. at 1-2 (10th Cir. March 6, 2012) (affirming district court where appellant's counsel criticized rather than distinguished prior MERS cases). In addition, Plaintiffs' reliance on case law of other jurisdictions, which are not binding precedent upon this Court, to further criticize the past decisions of this Court is also unconvincing. Likewise, Plaintiffs' argument that Bucci v. Lehman Brothers Bank, FSB, is no longer good law based on the mortgagors' allegations in Bucci that the affidavit of Cheryl Marchant is fraud, wherein the mortgagors rely on discovery in an unrelated matter as proof that there is no written agreement between MERS and Lehman Brothers in the Bucci matter is unavailing. No. PC 2009-3888, 2009 WL 3328373 (R.I. Super. Aug. 25, 2009) (Silverstein, J.).[4]

The crux of Plaintiffs' Complaint challenges the validity of the assignment of the Mortgage interest by MERS to Aurora, and thus, Aurora's standing to foreclose on the Property following Plaintiffs' default. Specifically, Plaintiffs' allege in their Complaint that Theodore Schultz ("Schultz") had no authority to assign the Mortgage interest on behalf of MERS as Schultz was an employee of Aurora, not MERS. (Compl. ¶¶ 12, 13.) According to Plaintiffs, this proves that Schultz was attempting to assign the Mortgage on

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April 3, 2012) (Rubine, J.); see also Rutter v. Mortgage Electronic Registration Systems, Nos. PC-2010-4756, PD-2010-4418, 2012 WL 894012 (R.I. Super. March 12, 2012) (Silverstein, J.).

[4] Through the clear unambiguous language contained in the mortgage instrument considered in Bucci, MERS was designated as nominee of the lender Lehman Brothers and Lehman Brothers' successors and assigns. See Bucci, 2009 WL 3328373.

behalf of Aurora not MERS. (Compl. ¶¶ 17, 18.) If this were accepted as fact, Aurora would be the assignor and assignee of the Mortgage, a proposition that is inherently flawed. Plaintiffs further state that there is concrete evidence to prove "robo-signers" exist, however, fail to allege facts which explain this allegation.

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 Mortgage Electronic Registration Systems, No. PC 2009-5875, 2011 WL 3794700 (R.I. Super. Aug. 22, 2011) (Rubine, J.); see also Rutter, 2012 WL 894012 at * 17 (quoting Fryzel v. Mortgage Electronic Registration Systems, C.A. No. 10-325 M, 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); 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, Slip Copy, 2011 WL 5075613 at * 4 (D. Mass. Oct. 25, 2011) (Zobel, J.) (court refused to read U.S. Bank Nat. Ass'n v. Ibanez, 458 Mass. 637, 941 N.E.2d 40 (2011) as an independent basis for mortgagors to collaterally contest previously executed mortgage assignments to which they are not a party and that do not grant them any interests or rights; finding mortgagors have no legally protected interests in the assignment of the mortgage and therefore lack 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).

Even if this Court were to find that Plaintiffs have standing to challenge the assignment of the Mortgage interest, Plaintiffs must allege facts entitling them to relief. Twombly, 550 U.S. at 555. Plaintiffs' allegations with respect to the invalidity of the assignment of the Mortgage interest are merely "conclusory statements" which are insufficient to survive a motion to dismiss. Iqbal, 556 U.S. at 678. Plaintiffs have failed to allege facts in their Complaint which "raise a right to relief above the speculative level." Twombly, 550 U.S. at 555. Accordingly, Plaintiffs' Complaint must be dismissed.

In addition, Plaintiffs aver that the assignment is invalid as there is no recorded power of attorney authorizing Schultz to act on behalf of MERS. (Compl. ¶ 19.) Under Rhode Island law there is no requirement that MERS record a power of attorney in order for Schultz to act on its behalf. 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 allege 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. (Compl. ¶¶ 21, 22, 28.) 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 as 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 it possessing the mortgage it followed that the complainant in Eisenberg was entitled to the relief she sought, quieting title to her property. Id. The Mortgage instrument is the instrument granting Aurora the statutory power of sale.

Accordingly, Aurora must be, and properly was, the mortgagee prior to commencing foreclosure proceedings.

Plaintiffs further aver that the Note was never transferred or negotiated by Domestic. (Compl. ¶ 57.) Likewise, this allegation fails to state a fact which entitled Plaintiffs to relief. Twombly, 550 U.S. at 555. 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 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, 2009 WL 3328373.

Plaintiffs further attempt to invalidate the foreclosure sale by averring that the note holder and mortgagee must be one of 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. Justice Silverstein has interpreted § 34-11-21 as not requiring "the note and mortgage to 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 mortgagees," and "clearly, the General Assembly envisioned a role for mortgage servicers in the lending industry." Id. at * 14 (quoting Bucci, 2009 WL 3328373). 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 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 is assigned with "the note and debt thereby secured." Section 34-11-24. Therefore, the assignment of the Mortgage interest by MERS to Aurora transferred the Mortgage as well as "the [N]ote and debt thereby secured." Section 34-11-24. Aurora then became an assignee of MERS thereby possessing all the rights as mortgagee, including the statutory power of sale. See Kriegel, 2011 4947398 at * 13-14 (quoting Weybosset Hill Investments, 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). In addition, Plaintiffs allegations that Deutsche Bank was the foreclosing entity and Aurora was only the servicer fails to state a claim as Aurora was the party authorized to exercise the statutory power of sale by way of assignment of the Mortgage interest by MERS. Thus, Aurora was the foreclosing party, and properly commenced foreclosure proceedings following Plaintiffs' default.

Plaintiffs further rely on a United States Supreme Court case, Carpenter v. Longan, 83 U.S. 271 (1872), 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. at 274. This holding is in direct conflict with § 34-11-24 of the Rhode Island General Laws. Unlike the law of Colorado, under § 34-11-24, as discussed supra, 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 an assignment of a mortgage interest a nullity by the plain, unambiguous language of the statute itself. "It is well settled that when the language of a statute is clear and unambiguous, this Court must interpret that 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 Plaintiff's 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 carries with it the note and debt thereby secured and will not be rendered a nullity. Since these allegations are merely conclusory legal statements, they fail to state a claim. See Iqbal, 556 U.S. at 678.

In addition, Plaintiffs erroneously rely on Eaton v. Fed. Nat'l Mortg. Ass'n, No. 1-1382, 2011 WL 3322892 (Mass. Super. June 17, 2011). While Eaton stands for the proposition that under Massachusetts law one must hold the note and mortgage in order to properly foreclose, it is not 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 past 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 disconnect between the note and the mortgage. Furthermore, no Rhode Island case law or statutory law requires that the foreclosing party hold the note and mortgage in order to foreclose. In effect, Rhode Island case law states that the foreclosing party may act as nominee for the note holder. See Porter v. First NLC Financial Services, 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, Eaton "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 in to doubt by subsequent decisions." Id. The same applies to Culhane v. Aurora Loan Services of Nebraska, 826 F. Supp.2d 352 (D. Mass. 2011).

Accepting the allegations set forth in the Complaint as true, and viewing them in the light most favorable to the Plaintiffs, Plaintiffs have failed to establish a plausible claim for relief. Plaintiffs have merely alleged conclusory statements which are insufficient to "raise a right to relief above the speculative level." Twombly, 550 U.S. at 555. Furthermore, the issues presented in this matter have been previously decided by this Court. See Kriegel, 2011 WL 4947398; see also Payette, 2011 WL 3794701; Porter, 2011 WL 1252146; Bucci, 2009 WL 3328373; Rutter, 2012 WL 894012. Accordingly, Plaintiffs' Complaint is dismissed for failure to state a plausible claim for relief. As set forth supra, in the absence of controlling authority from the Rhode Island Supreme Court,

the reasoning and result of the Superior Court cases on this subject matter represents the prevailing view of the law in Rhode Island. Breggia, 2012 WL 1154738. The decisions of the Superior Court unanimously support this result. The Court hereby incorporates by reference the reasoning and authorities relied upon in those previous decisions.

Lastly, Plaintiffs have failed to state a claim for punitive damages as the foreclosure sale was properly conducted and convened by Aurora.

IV

Conclusion

Defendants' Motion to Dismiss under Rule 12(b)(6) is granted. Counsel for the prevailing party shall submit an Order in accordance with this Decision.