

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: OCTOBER 1, 2012)

ANNMARIE DILIBERO	:	
	:	
v.	:	C.A. No. PC 2011-4645
	:	
MORTGAGE ELECTRONIC	:	
REGISTRATION SYSTEMS, INC.,	:	
ALIAS, UBS REAL ESTATE	:	
SECURITIES, INC., ALIAS, USA	:	
RESIDENTIAL PROPERTIES, LLC,	:	
ALIAS, RUSHMORE LOAN	:	
MANAGEMENT SERVICES, LLC,	:	
ALIAS AND JOHN DOE	:	

DECISION

RUBINE, J. Before the Court is Defendants’ Mortgage Electronic Registration Systems, Inc., Alias (“MERS”), UBS Real Estate Securities, Inc., Alias (“UBS”), USA Residential Properties, LLC, Alias (“USA Residential”), and Rushmore Loan Management Services, LLC, Alias (“Rushmore”) (collectively, “Defendants”) Motion to Dismiss Annmarie Dilibero’s (“Plaintiff”) Complaint pursuant to Rule 12(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure. Plaintiff seeks declaratory and injunctive relief to quiet title to certain real property located at 9 Jencks Road, Foster, Rhode Island (“the Property”), thereby declaring that the foreclosure sale conducted by USA Residential is null and void as USA Residential allegedly was lawfully unable to foreclose in that it failed to possess or control the statutory power of sale upon commencement of foreclosure proceedings.

I

Facts & Travel

The facts as alleged in the Complaint and gleaned from exhibits attached to the Complaint and incorporated therein are as follows: On January 13, 2007, Plaintiff (as borrower) executed an adjustable rate balloon note (“Note”) in favor of lender New Century Mortgage Corporation (“New Century”) for \$255,000. (Compl. ¶ 19.)¹ The Note explicitly provides that “I [borrower] understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the ‘Note Holder.’” (Compl. Ex. B at 1.)

To secure the Note, Plaintiff contemporaneously executed a mortgage (“Mortgage”) on the Property. The Mortgage designates New Century as the “Lender” and further designates MERS as the “mortgagee” as well as the “nominee for [New Century] and [New Century’s] successors and assigns.” (Compl. Ex. A at 1-2.) In addition, the clear unambiguous language of the Mortgage provides that “Borrower does hereby mortgage, grant and convey to MERS, (solely as nominee for [New Century] and [New Century’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 or custom, MERS (as nominee for [New Century] and [New Century’s] successors and assigns) has the right: to

¹ In the Complaint, Plaintiff alleges that the Note was executed in favor of New Century for \$351,000. However, the Mortgage and Note clearly evidence that the Note was executed for the amount of \$255,000. See Compl. Ex. A; see also Compl. Ex. B. “In the case of conflict between the pleadings and the exhibit, the exhibit controls.” Kriegel v. Mortgage Electronic Registration Systems, No. PC 2010-7099, 2011 WL 4947398 at * 6 (R.I. Super. Oct. 13, 2011) (Rubine, J.) (quotations omitted).

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 [New Century].” Id.

The Mortgage was recorded in the land evidence records of the Town of Foster.

On July 20, 2009, MERS, as nominee for New Century (the lender) and as mortgagee, assigned the Mortgage interest to UBS. (Compl. ¶ 23.) See Compl. Ex. E. The assignment was recorded in the land evidence records of the Town of Foster. Thereafter, UBS, as assignee of MERS, assigned the Mortgage interest to USA Residential on December 28, 2010. (Compl. ¶ 24.)² See Compl. Ex. G. That assignment was also recorded in the land evidence records of the Town of Foster. Thus, as of December 28, 2010, USA Residential, as successor and subsequent assignee of MERS possessed “the right: to exercise any or all of [the interest granted in the Mortgage instrument by Plaintiff], including but not limited to, the right to foreclose and sell the Property” following Plaintiff’s default. (Compl. Ex. A at 3.)

Thereafter, Plaintiff failed to make timely payments under the terms of the Note and Mortgage, thus USA Residential commenced foreclosure proceedings. On August 2, 2011, USA Residential, as mortgagee possessing the statutory power of sale, foreclosed on the Property. USA Residential prevailed as the successful bidder at the foreclosure sale.

Plaintiff filed the instant Complaint seeking nullification of the foreclosure sale and return of title of Property to her. Defendant thereafter filed this Motion to Dismiss under Rule 12(b)(6), in lieu of an answer, averring that Plaintiff has failed to set forth a

² Plaintiff alleges in the Complaint that the assignment of the Mortgage interest by UBS to USA Residential occurred on December 2, 2010. However, the assignment document proves that the date of the assignment of the Mortgage interest by UBS to USA Residential was on December 28, 2010. See Compl. Ex. G. As set forth supra, “[i]n the case of conflict between the pleadings and the exhibit, the exhibit controls.” Kriegel, 2011 WL 4947398 at * 6 (quotations omitted).

claim entitling her to the relief sought. Plaintiff objected to Defendants' Motion alleging that she has established a claim setting forth facts that if proven invalidate the foreclosure sale therefore entitling her to the relief sought, nullification of the foreclosure sale, and return of title of the Property to her.

II

Standard of Review

A

Conversion

In this matter, Defendants' Motion does not append any new documents; rather, it merely attaches a copy of the Note, a copy of which is also attached to the Complaint. See Compl. Ex. B. Pursuant to Rule 10(c), the Court may consider a copy of any written instrument which is an exhibit to a pleading under the Rule 12(b)(6) standard. See Super. R. Civ. P. 10(c). Therefore, this Court may properly consider the documents attached to Defendants' Motion as exhibits without converting the Motion to Dismiss under Rule 12(b)(6) to a motion for summary judgment pursuant to Rule 56. However, documents not attached to a pleading, but rather to a motion, have been submitted by Plaintiff.³

³ Plaintiff's Objection contains the following new materials:

- a. An order in the matter filed in the Rhode Island Superior Court, Cruz v. Mortgage Electronic Registration Systems, Inc., No. PC 2011-0890, along with the transcript of the Court hearing in that matter of November 16, 2011.
- b. A United States Department of Treasury Consent Order wherein MERS agrees to review its business operations and to take quality assurance measures.
- c. Various case law from other jurisdictions.
- d. An internet article entitled "MERS: Coming Soon to a Mortgage Near You."
- e. Mortgage Loan Transfer Disclosure Notice notifying Plaintiff that the Mortgage interest was transferred to Rushmore as servicer of The Bank of New York Mellon, N.A. on October 25, 2011, after the foreclosure sale was conducted by USA Residential resulting in the conveyance of title of the Property to USA Residential as the foreclosure buyer. Since the foreclosure sale extinguished the Mortgage, any subsequent transfer of the Mortgage interest is null and void, and therefore not material to the Court's adjudication of this matter.
- f. An order in the matter filed in the Rhode Island Superior Court, Bordas v. Mortgage Electronic Registration Systems, Inc., No. PC 2009-5596.

Thus, this Court must decide whether to limit its consideration of this matter to the pleadings and documents referenced therein and attached thereto; and thereby exclude these materials outside the pleadings and adjudicate using the 12(b)(6) Motion to Dismiss standard of review, or consider such documents and convert the Motion into a motion for summary judgment under Rule 56. The Court finds that all documents material to this matter were attached to the pleadings. Additional documents attached to Plaintiff's Objection to Defendants' Motion to Dismiss are not material to this Court's determination of this matter, and therefore, will not be considered by this Court. Accordingly, the Court will consider Defendants' Motion as a Motion to Dismiss pursuant to Rule 12(b)(6).

B

Standard of Review Under 12(b)(6) Motion to Dismiss

“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). In the case of Barrette v. Yakavonis, 996 A.2d 1231 (R.I. 2009), the Supreme Court interpreted the Rhode Island rules of pleading 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 plaintiff’s] claim is based.’” Id. at 1234 (quoting

g. Transcript of the Court hearing in the matter of Bordas v. Mortgage Electronic Registration Systems, Inc., No. PC 2009-5596, dated November 23, 2010.

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. Based upon the analysis of the law as set forth below, Plaintiff’s Complaint cannot survive Rule 12(b)(6) under the standard articulated in Barrette and Palazzo. The Court cannot consider facts or legal argument from Plaintiff (the mortgagor) to prove an alleged defect in an assignment since Plaintiff, the mortgagor, lacks standing, as a stranger to the assignment, and therefore cannot establish his claim by proving that the assignment document evidences flaws that might affect the enforcement of the assignment by the assignor or the assignee. Since Plaintiff is neither, she is without standing to seek relief on that basis. The Defendants are entitled to dismissal of a claim if Plaintiff cannot prevail upon under any set of facts dealing with defects in an assignment.

III

Analysis

Despite the fact that Defendants’ filed a Motion to Dismiss, and Plaintiff objected to Defendants’ Motion to Dismiss, Plaintiff insinuates throughout her Objection that there exist genuine issues of material fact which preclude this Court from dismissing Plaintiff’s Complaint. However, this is not a motion for summary judgment under Rule 56, but

rather a Motion to Dismiss pursuant to Rule 12(b)(6), and therefore, Plaintiff has the burden of setting forth facts which establish a claim entitling her to the relief sought. In meeting this burden, Plaintiff must allege more than mere conclusory statements. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009). Plaintiff has failed to meet this burden.

The Court finds the allegations as set forth in the instant Complaint and the documents relating thereto are similar to the allegations in the complaint in Payette v. Mortgage Electronic Registration Systems, No. PC 2009-5875, 2011 WL 3794700 (R.I. Super. Aug. 22, 2011) (Rubine, J.) and the Mortgage executed by Plaintiff contains the same operative language as the mortgage considered in Payette. Therefore, this Court will incorporate and adopt the reasoning set forth in Payette. See also Kriegel v. Mortgage Electronic Registration Systems, No. PC 2010-7099, 2011 WL 4947398 (R.I. Super. Oct. 13, 2011) (Rubine, J.).⁴ The Court will then address any additional issues which were not addressed in the aforementioned decisions.

The gravamen of Plaintiff's Complaint challenges the validity of the assignments of the Mortgage interest by MERS to UBS, and UBS to USA Residential, and thus the authority of USA Residential to foreclose on the Property following Plaintiff's default. Specifically, Plaintiff alleges in the Complaint that UBS and MERS executed a fraudulent and void assignment of the Mortgage interest to create a false illusion that UBS owned the Note and Mortgage. (Compl. ¶ 16.) Plaintiff bases this allegation on the fact that the assignment of the Mortgage interest from MERS to UBS purports to transfer the Note as well, an instrument which MERS never possessed and therefore allegedly

⁴ In Kriegel, the plaintiff failed to adequately allege in his complaint the grounds entitling him to the relief sought, merely alleging conclusory statements. 2011 WL 4947398. Thus, the Court dismissed plaintiff's complaint under Rule 12(b)(6) for failure to state a claim. Id. The same outcome obtains in this case.

cannot assign or transfer. Id. In addition, Plaintiff alleges that Laura Hadley lacked the authority to execute the assignment of the Mortgage interest to UBS as she is not an employee or officer of MERS. (Compl. ¶¶ 16, 23.) Plaintiff further alleges that Rose C. Lara (“Lara”) lacked the authority to execute the assignment of the Mortgage interest on behalf of UBS to USA Residential as Lara is not an employee or officer of UBS. (Compl. ¶ 24.) Thus, according to Plaintiff, the assignments are void under G.L. 1956 § 34-11-24.

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, 2011 WL 3794700; see also Rutter v. Mortgage Electronic Registration Systems, Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012 at * 17 (R.I. Super. March 12, 2012) (Silverstein, J.) (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, 2011 WL 5075613 at * 4 (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 finding of the bankruptcy judge that mortgagors lacked standing to challenge the validity of the mortgage assignment to which they were not a party). Plaintiff's allegation with respect to the invalidity of the assignments of the Mortgage interest is a legal conclusion not supported by the prevailing case law and is insufficient to survive a motion to dismiss. Accordingly, Plaintiff's Complaint must be dismissed. Even if the facts with respect to alleged defects in the assignments are accepted as true for purposes of this motion, the Plaintiff lacks standing to assert these alleged defects to invalidate the foreclosure.

Furthermore, § 34-11-24 provides that an assignment of the mortgage shall also be deemed an assignment of the debt secured thereby. Rutter, 2012 WL 894012; see also Kriegel, 2011 WL 4947398. Once the lender designates MERS as its nominee, under Rhode Island law MERS, and thus any assignee of MERS, also acts as holder of the debt secured by the mortgage and has the authority to assign or enforce 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, under Rhode Island law, the assignment of the Mortgage interest by MERS to UBS, and subsequently by UBS to USA Residential, transferred the Mortgage as well as "the [N]ote and debt thereby secured." Section 34-11-24. USA Residential ultimately became an assignee of MERS thereby possessing all of the rights as mortgagee, including the statutory power of sale. See Kriegel, 2011 WL 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). Therefore the assignments are not void under § 34-11-24, nor are

the assignments fraudulent. This court does not accept the legal conclusion that plaintiff was defrauded by alleged defects in the instrument of assignment, such as to excuse the borrower's (mortgagor's) performance of her repayment obligations. Not only does Plaintiff fail to allege fraud with sufficient particularity as required by Rule 9 of the Rhode Island Superior Court Rules of Civil Procedure, but Plaintiff also fails to allege the essential elements of fraud—that an intentional misrepresentation was made by any of the defendants, which misrepresentation she relied on, causing her damage. See Women's Development 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)).

Plaintiff suffered loss of her house not as a result of defective assignments, but rather as a result of her failure to repay the money which she borrowed, the consequence of which was the loss of her home by foreclosure. The assignment of the note does not excuse repayment thereunder, but only modifies the party to whom payment must be made. Assignment of the mortgage does not invalidate the statutory power of sale, but only changes the party which is entitled to exercise the power, following default under the note.

Plaintiff further avers that the Note remains payable to New Century, a bankrupt entity, and that the note was never endorsed, therefore no party has standing to foreclose. (Compl. ¶ 13.) Likewise, this allegation, even if true, fails to state a claim for relief. The identity of the note-holder is irrelevant as it is well established under this Court's interpretation of current Rhode Island law that MERS and the assignees of MERS act as nominee of the current note-holder as well as mortgagee. 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 v. Lehman Brothers Bank, FSB, No. PC 2009-3888, 2009 WL 3328373 (R.I. Super. Aug. 25, 2009) (Silverstein, J.). Moreover, Plaintiff concedes in her Objection that the Note was filed in Plaintiff's Chapter 13 bankruptcy case as part of a proof of claim by UBS on December 22, 2009. Therefore, Plaintiff concedes that UBS was the note holder at the time it submitted the proof of claim to the bankruptcy court on December 22, 2009, and thereafter subsequently transferred the Mortgage interest and debt thereby secured to USA Residential on December 28, 2010. According to the plain unambiguous language of the Note, New Century, as the original lender, had the authority to "transfer th[e] Note," and MERS as mortgagee had the authority to transfer the mortgage, containing the statutory power of sale. (Compl. Ex. B at 1.)

Lastly, Plaintiff alleges that MERS lacks standing to foreclose. This allegation fails to establish a claim for relief in the instant matter as MERS was not the foreclosing party. Accordingly, MERS' standing to foreclose is irrelevant with respect to the instant matter. Nevertheless, the Rhode Island Superior Court has previously found that MERS, as the original mortgagee, does have the authority to foreclose and may assign that right under Rhode Island law, thereby allowing the assignee to exercise the statutory power of sale, following a mortgagor's default. See Bucci v. Lehman Brothers Bank, FSB, No. PC 2009-3888, 2009 WL 3328373 (R.I. Super. Aug. 25, 2009) (Silverstein, J.); see also Porter v. First NLC Financial Services, No. PC 2010-2526, 2011 WL 1251246 (R.I. Super. March 31, 2011) (Rubine, J.).

Plaintiff's Complaint merely alleges conclusory and erroneous statements of Rhode Island law, which legal theories are belied by the previous decisions of this Court.

Plaintiff alleges legal conclusions not reflecting this Court's earlier conclusions of law, but rather alleges law as Plaintiff would like it to be, which allegations of law, as opposed to fact, the Court is not obligated to accept as true for purposes of the motion. The issues presented in this matter have been previously decided by this Court on material facts substantially similar to those alleged by this Plaintiff. See Kriegel, 2011 WL 4947398; see also Rutter, 2012 WL 894012; Payette, 2011 WL 3794701; Porter, 2011 WL 1251246 ; Bucci, 2009 WL 3328373. Accordingly, Plaintiff's Complaint must be dismissed for failure to state a claim for relief. In the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of Superior Court cases on this subject represent the prevailing view of the law in Rhode Island. 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.

IV

Conclusion

Defendants' Motion to Dismiss is granted. Counsel for the prevailing party shall submit an Order and form of judgment in accordance with this Decision.