

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.

SUPERIOR COURT

(Filed: August 24, 2012)

ROBERT W. MALLETT, JR.

:

v.

:

C.A. No. KC 2010-1753

:

NATIONAL CITY MORTGAGE, A
DIVISION OF NATIONAL CITY
CITY BANK, NA AND PNC
MORTGAGE

:

:

:

:

:

DECISION

RUBINE, J. Defendants National City Mortgage, a Division of National City City Bank, NA (“NCM”) and PNC Mortgage (“PNC”) (collectively, “Defendants”) move this Court to dismiss the verified complaint (“Complaint”) pursuant to Rule 12(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure. In the Complaint, Plaintiff Robert W. Mallett, Jr. (“Plaintiff”) alleges that PNC lacked standing to foreclose on real property located at 315 East Greenwich Avenue, West Warwick, Rhode Island (“the Property”) as there was never an assignment of the mortgage (“Mortgage”) interest from NCM to PNC. Defendants further move to dissolve the *lis pendens* recorded on the Property in the land evidence records of the Town of West Warwick.

I

Facts & Travel

The facts as derived from the Complaint and the exhibits considered by this Court are as follows: On February 9, 2007, Plaintiff executed a note (“Note”) in favor of lender NCM in the amount of \$436,500. To secure the Note, Plaintiff contemporaneously executed a Mortgage on the Property. The Mortgage designates NCM as the “Lender”

and “mortgagee under this Security Instrument.” (Compl. unmarked ex. at 3-4.) The Mortgage further provides that “Borrower does hereby mortgage, grant and convey to Lender, with Mortgage Covenants upon the Statutory Condition and with the Statutory Power of Sale.” Id. at 5.

On November 7, 2009, NCM merged with PNC. Thus, by operation of law, PNC succeeded to all the rights and interests of NCM, including the statutory power of sale, contained in the Mortgage as held at the time of the merger. See 12 U.S.C. § 215(a)-1. Thereafter, Plaintiff failed to pay his Mortgage debt timely, thus resulting in a default under the Note, which default triggers the right to foreclose under the Mortgage. On March 4, 2011, PNC, as successor by merger to NCM, foreclosed on the Property.

Plaintiff filed the instant Complaint seeking to quiet title to the Property, alleging that Plaintiff’s original interest in his own Property should not be overridden by title resulting from the allegedly flawed foreclosure. Defendants followed with this Motion to Dismiss under Rule 12(b)(6). Plaintiff objected to Defendants’ Motion averring that PCN improperly foreclosed upon the Property due to PCN’s lack of standing to foreclose under G.L. 1956 § 34-11-22. According to Plaintiff, the only proper method under Rhode Island law to convey an interest in a mortgage is by way of assignment in accordance with §§ 34-11-1 and 34-11-24. In other words, the assignor must execute such an assignment which then must be recorded in order to effectuate the transfer of the Mortgage interest. At the hearing, both parties waived oral argument and agreed to submit this matter on memoranda of law. The Court then took this matter under advisement.

II

Standard of Review

A

Conversion

Based on its consideration of exhibits outside of the pleadings, this Court will consider this Motion to Dismiss under Rule 12(b)(6) as a Motion for Summary Judgment pursuant to Rule 56.

In this instant matter, Defendants have submitted with their Motion documents not attached to the Complaint. Thus, if this Court is to consider such documents, the Motion must be converted to a motion for summary judgment. The Court must decide whether to exclude these materials because they are outside the pleadings and adjudicate using the motion to dismiss standard of review, or consider them and convert the Motion into a Motion for Summary Judgment under Rule 56. The Court is satisfied that the party opposing the Rule 12(b)(6) Motion had adequate notice of conversion to a Motion for Summary Judgment and a “reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.”¹ Payette v. Mortgage Elec. Reg. Sys., No. PC 2009-5875, 2011 WL 3794701 at * 6 (quoting Super. R. Civ. P. 12(c)). The Court therefore will consider the documents submitted by Defendants, and as a result, consider Defendants’ 12(b)(6) Motion will be treated as a Motion for Summary Judgment.

B

Summary Judgment Standard of Review

The Court will only grant a motion for summary judgment if “after reviewing the

¹ In fact, Plaintiff, in his memorandum, asserted that the documents submitted by Defendants “may have the effect of converting this 12(b)(6) Motion to a Motion for Summary Judgment.” (Pl.’s Mem. in Supp. of Obj. to Mot. to Dismiss at 2). Accordingly, Plaintiff had notice of the possibility of conversion.

admissible evidence in the light most favorable to the nonmoving party[.]” Liberty Mut. Ins. Co. v. Kaya, 947 A.2d 869, 872 (R.I. 2008) (quoting Roe v. Gelineau, 794 A.2d 476, 481 (R.I. 2002)), “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, “have 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., 947 A.2d at 872 (quotation omitted). 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.” Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998) (quotation omitted).

III

Analysis

The crux of Plaintiff’s Complaint challenges the authority of PCN, as successor by merger of NCM, to exercise the statutory power of sale and foreclose on the Property following Plaintiff’s default. Plaintiff alleges that NCM never assigned the Mortgage interest to PCN, and therefore, PCN never had standing to foreclose on the Property. (Compl. ¶¶ 10, 15-26.) In support of their Motion, Defendants aver that there is no need to record a formal assignment in order to transfer any interests in the Note or Mortgage to PNC as they are the proper holders of the Note and Mortgage by operation of the merger.

Thus, Defendants conclude that PNC had all rights originally belonging to NCM, including the authority to foreclose and exercise the statutory power of sale following Plaintiff's default.

Through the merger, PCN became successor of NCM, thereby succeeding to all the right, title and interest in the Note and Mortgage executed by Plaintiff in favor of NCM. See Defs.' Ex. A. Pursuant to 12 U.S.C. § 215(a)-1, "[a] national bank may engage in a consolidation or merger under this subchapter with an out-of-State bank if the consolidation or merger is approved pursuant to section 1831u of this title." 12 U.S.C. § 215(a)-1; see also 10 Am. Jur. 2d Banks and Financial Institutions § 201 (a national bank may engage in a consolidation or merger with an out-of-state bank if the consolidation or merger is approved pursuant to the Federal Deposit Insurance Act). Section 1831u provides:

"the responsible agency may approve a merger transaction under section 1828(c) of this title between insured banks with different home States, without regard to whether such transaction is prohibited under the law of any State." 12 U.S.C. § 1831u(a)(1).²

It is undisputed that PNC obtained the approval of the United States Office of the Comptroller of the Currency, thereby approving the merger of NCM with PNC as of November 6, 2009. PNC became the surviving, merged institution. See Defs.' Ex. A. As successor of NCM, PNC was granted the right to exercise the statutory power of sale, as contained in the Mortgage which Plaintiff assented to by his signature thereon, in the event of Plaintiff's default. Since PCN was successor of NCM, PCN received "upon the

² Notwithstanding 12 U.S.C. § 1831u(a)(1), "a merger transaction may not be approved . . . if the transaction involves a bank in the home State of which has enacted a law after September 29, 1994, and before June 1, 1997 that—(i) applies equally to all out-of-State Banks; and (2) expressly prohibits merger transactions involving out-of-State banks." 12 U.S.C. 1831u(a)(2)(A). Accordingly, no such State law is applicable to the instant matter. See 5 Del.C. § 781, et seq.; see also Ohio Rev. Code T. XI, Ch. 1115.

merger and without any order or other action on the part of any court or otherwise, . . . all rights of property, franchises, and interests, including appointments, designations, and nominations, . . . in the same manner and to the same extent as such rights, franchises and interests were held or enjoyed by [NCM] . . . at the time of the merger.” Section 215(a). Thus, PCN became the mortgagee of the Mortgage and obligee of the Note by operation of law. Accordingly, there is no need for an assignment of the mortgage interest from NCM to PCN as Plaintiff erroneously contends. See Sec. 215(a). Therefore, after Plaintiff’s default, PCN properly exercised its right to enforce the statutory power of sale and foreclose on the Property. As a matter of law, the foreclose sale conducted by PCN is valid. Accordingly, the *lis pendens* as recorded in the Land Evidence Records of the Town of West Warwick must be dissolved as the foreclosure was proper and record title was properly conveyed.

IV

Conclusion

Defendants’ Motion, treated as one for Summary Judgment, demonstrates that there is no genuine issue of material fact, and that Defendants are entitled to judgment as a matter of law. Accordingly, the Rule 12(b)(6) Motion to Dismiss, considered as a Motion for Summary Judgment, is granted in favor of Defendants. The *lis pendens* filed in the Land Evidence Records of the Town of West Warwick is hereby dissolved as there is no pending litigation with respect to the Property. Counsel for the prevailing party shall submit an Order in accordance with this Decision.