STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPERIOR COURT

(Filed: May 17, 2012)

KENNETH N. INGRAM :

OLIVIA INGRAM :

v. C.A. No. PC 2010-1940

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MORTGAGE ELECTRONIC : REGISTRATION SYSTEM, INC.; : LOANCITY; AND DEUTSCHE : BANK NATIONAL TRUST COMPANY :

DECISION

RUBINE, J. Before this Court is Defendants' Mortgage Electronic Registration Systems, Inc. ("MERS") and Deutsche Bank National Trust Company ("Deutsche Bank"), (collectively, "Defendants") Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Rhode Island Superior Court Rules of Civil Procedure. Plaintiffs Kenneth N. Ingram and Olivia Ingram, (collectively, "Plaintiffs") filed a declaratory judgment action petitioning this Court to quiet title to certain real property located at 6 Young Avenue, Providence, Rhode Island ("Property"). Plaintiffs are challenging Defendant Deutsche Bank's foreclosure on the Property which occurred on March 25, 2010, and the title recorded thereafter by Deutsche Bank, as it is alleged that the Bank's title is not valid since it was obtained by way of an allegedly invalid foreclosure.

Ι

Facts & Travel

The pleadings and exhibits referred to therein, and attached to the pleadings show that: On November 27, 2006, Plaintiffs executed a promissory note ("Note") in favor of

¹ Defendant Loancity is not a party to this Motion for Judgment on the Pleadings.

Loancity in the amount of \$212,500, having borrowed that amount to purchase the Property. See Ans. Ex. B. Contemporaneously, Plaintiffs executed a mortgage on the Property to secure the Note (hereinafter, "Mortgage"). The Mortgage states "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 the following described property located in the County [] of Providence." Compl. Ex. 1 at 2; Ans. Ex. A at 2. The Mortgage proceeds to describe the address of the Property as 6 Young Avenue, Providence, RI 02908. The Mortgage further states,

"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." Compl. Ex. 1 at 3; Ans. Ex. A at 3.

The Mortgage was recorded in the land evidence records of the City of Providence on December 1, 2006.

Thereafter, Loancity transferred the Note, through blank endorsement, to IndyMac Bank, FSB ("IndyMac") without recourse. (Ans. ¶ 4.) Subsequently, on February 1, 2007, IndyMac transferred the Note endorsed in blank to Deutsche Bank. Id. IndyMac remained the servicing agent of the Note on behalf of Deutsche Bank. Id.

On July 11, 2008, the Office of Thrift Supervision closed IndyMac and appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver for IndyMac. (Ans. ¶ 4.) See Ans. Ex. C. FDIC reorganized IndyMac into a new entity named IndyMac Federal, and appointed the FDIC as conservator for IndyMac Federal, transferring all of IndyMac's assets to FDIC as conservator. Id. see Ans. Ex. C. Then FDIC, again acting

as receiver for IndyMac Federal, assumed IndyMac's responsibilities as servicer of the Note that IndyMac had previously transferred to Deutsche Bank. <u>Id.</u> Thereafter, FDIC transferred its responsibilities as servicer to OneWest on March 19, 2009. <u>Id. See</u> Ans. Ex. D.

On November 4, 2009, MERS, as nominee for Loancity and Loancity's successors and assigns, assigned its interest in the Mortgage to Deutsche Bank, the then current note-holder. See Compl. Ex. 2; see also Ans. Ex. E. Thus, as of November 4, 2009, Deutsche Bank held the Note endorsed in blank from IndyMac and the assignment of the Mortgage with the Statutory Power of Sale from MERS. The Mortgage assignment was later recorded in the land evidence records for the City of Providence on November 12, 2009.

Plaintiffs failed to make timely payments pursuant to the terms of the Note. Subsequently, on March 25, 2010, Deutsche Bank, as note-holder and mortgagee, foreclosed on the Property. Deutsche Bank was the successful bidder at the foreclosure sale and recorded its foreclosure deed thereafter. See Ans. Ex. F.

On January 18, 2011, this Court denied Plaintiffs' Motion to Strike Defendants' Answer. Thereafter, Defendants filed this Motion for Entry of Judgment on the Pleadings under Rule 12(c). The Plaintiffs objected to Defendants' Motion and at the motion hearing, the parties agreed to submit supplemental memoranda to discuss the impact of the issued decision in <u>Porter v. First NLC Financial Services</u>, No. PC-2010-2526, 2011 WL 1251246 (R.I. Super. March 31, 2011) (Rubine, J.) on the instant motion. This Court then took the matter under advisement.

II

Standard of Review

A

Conversion to Summary Judgment

Based on its consideration of exhibits outside of the pleadings, this Court will consider this Motion for Judgment on the Pleadings (Rule 12(c)) as a Motion for Summary Judgment (Rule 56).

In this matter, Defendants' Motion does not apprehend any new documents; rather, it incorporates by reference the same exhibits as originally attached to Defendants' Verified Answer.² 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(c) standard. See Super. R. Civ. P. 10(c). Therefore, this Court may properly consider the written instruments attached to Defendants' Answer as exhibits. However, documents not attached to a pleading, but rather to a motion, have been submitted by Plaintiffs.³ Defendants'

² Defendants' Verified Answer contains the following exhibits:

a. The Mortgage in its entirety (Ex. A).

b. The Note (Ex. B).

c. The Office of Thrift Supervision's Order placing IndyMac into conservatorship with FDIC (Ex. C).

d. FDIC's Resolution reorganizing IndyMac into IndyMac Federal (Ex. D).

e. The Assignment from MERS, as nominee for Loancity's successors and assigns, to Deutsche Bank of the Mortgage (Ex. E).

f. Foreclosure Deed (Ex. F-1); Affidavits of Sale (Ex. F-2) and Non-Military Service (F-3); and the foreclosure advertisements (Ex. F-4).

³ Plaintiffs' Objection contains the following new materials:

a. FDIC's Power of Attorney transferring its assets to OneWest (unmarked ex.).

b. A list of names entitled "Exhibit A Attorneys-in-Fact" (unmarked ex.).

c. A flow chart entitled "Dan & Teri Securities Transaction Process Reverse Engineered Version 4.1" (Plaintiffs in this matter are named Kenneth and Olivia Ingram) (unmarked ex.).

d. A flow chart purporting to describe the travel of Plaintiffs' Mortgage and Note (unmarked ex.).

e. The certifications of verified answers for this matter as well as some of Plaintiffs' attorney's other cases (unmarked ex.).

Supplemental Memorandum also contains an additional item,⁴ as does Plaintiffs' Supplemental Memorandum.⁵ Thus, this Court must decide whether to exclude these materials because they are outside the pleadings and adjudicate using the judgment on the pleadings standard of review, or include them and convert the Motion into a Motion for Summary Judgment under Rule 56. The Court is satisfied that the party opposing the 12(c) 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." 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 Defendants' 12(c) motion as a motion for Summary Judgment.

В

Summary Judgment Standard of Review

This Court will only grant a motion for summary judgment if "after reviewing the admissible evidence in the light most favorable to the nonmoving party[,]" <u>Liberty Mut. Ins. Co. v. Kaya</u>, 947 A.2d 869, 872 (R.I. 2008) (quoting <u>Roe v. Gelineau</u>, 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 a matter of law." Super.

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⁴ Defendants' Supplemental Memorandum attached a flow chart purporting to trace the travel of Plaintiffs' obligations.

⁵ Plaintiffs' Supplemental Memorandum includes the following new materials:

a. Deposition of Erica Johnson-Seck in <u>IndyMac v. Machado</u>, No. 20 2008 CA 037322XXXX MB A W (Fla. Cir. Ct. Palm Beach County) (Ex. 1).

b. An assignment of a mortgage for a Woonsocket, Rhode Island property (not the subject property in dispute) from MERS to IndyMac Federal (Ex. 2).

c. Flow Charts purporting to describe the travel of the mortgage and other homeowners Plaintiffs' attorney represents in other cases. (Ex. 3).

d. A United States Department of Treasury Consent Order wherein MERS agrees to review its business operations and to take quality assurance measures (Ex. 4).

R. Civ. P. 56(c).

The nonmoving party "has 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." <u>Liberty Mut.</u>, 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." <u>Bourg v. Bristol Boat Co.</u>, 705 A.2d 969, 971 (R.I. 1998) (quotation omitted).

Ш

Analysis

Since the material facts herein are nearly identical to the facts underlying the decision of this Court in <u>Payette v. Mortgage Elec. Reg. Sys.</u> and the Mortgage as executed by Plaintiffs contains the same operative language as the mortgage considered in <u>Payette</u>, this Court will incorporate and adopt the reasoning set forth in <u>Payette</u>, 2011 WL 3794701.⁶ In that case, this Court determined that according to undisputed material facts the defendants were entitled to judgment as a matter of law. The same outcome obtains in this case.

The undisputed facts, as evidenced by the provisions of the undisputed documents and affidavits, are as follows: Plaintiffs executed the Note in favor of the original lender Loancity. To secure the Note, Plaintiffs executed a Mortgage on the Property. The Mortgage designated MERS as nominee of Loancity, as well as mortgagee. Further, as

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⁶ The Court further notes that the parties in their memoranda fail to offer any material distinctions between the undisputed facts relied upon in the Court's earlier determination of similar cases.

mortgagee, MERS, as well as the successors and assignees of MERS, were expressly granted the "right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property," as set forth by the clear unambiguous language of the Mortgage instrument as acknowledged and signed by Plaintiffs as borrowers and mortgagors. Compl. Ex. 1 at 3; Ans. Ex. A at 3. Thereafter, on November 4, 2009, MERS assigned its interest in the Mortgage to Deutsche Bank, the then current note-holder through blank endorsement by IndyMac. Deutsche Bank then became an assignee of the Mortgage from MERS, and Deutsche Bank then succeeded to all rights as contained in the mortgage, including the Statutory Power of Sale, as granted in the assigned Mortgage. Upon Plaintiffs' default, Deutsche Bank, as note-holder, through endorsement of the Note in blank from IndyMac, and mortgagee, by way of assignment from MERS, had the right and ability to exercise the Statutory Power of Sale and properly commenced foreclosure proceedings against Plaintiffs. Deutsche Bank was the successful bidder at the foreclosure sale, subsequently recording a foreclosure deed in its name. Deutsche Bank, as the buyer at the lawfully convened foreclosure sale, currently holds the record title to the Property. Accordingly, Plaintiffs are not entitled to clear the title thereby leaving them as the owners of record in the instant matter as the foreclosure sale, which has led to the recording of a deed in favor of Deutsche Bank, was lawfully noticed and convened. Therefore, Deutsche Bank is deemed the owner of record, by reason of the recording of the presumptively valid foreclosure deed. See Restatement of the Law Third Property (Mortgages) (1997) § 4.9 (a purchaser at a foreclosure sale not only acquires the prior owner's equity of redemption, but a title free and clear of all interests that were junior to the lien that was foreclosed); see also 74 C.J.S. Quieting Title § 75 (2012) (every presumption will be made in favor of the holder of the legal title . . . title once established remains until the contrary appears); Sherbonday v. Surring, 194 Iowa 203, 188 N.W. 831 (1922) (the presumptions are in favor of the legal title); Babcock v. Dangerfield, 98 Utah 10, 94 P.2d 862 (1939) (citing Eltzroth v. Ryan, 89 Cal. 135, 26 P. 647 (1891)) (it having been proved that title was vested in plaintiff, such condition would be presumed to exist until the contrary be shown); 65 Am. Jur. 2d Quieting Title § 73 (in a quiet title action, there is a presumption in favor of the record title holder); Breliant v. Preferred Equities Corp., 112 Nev. 663, 918 P.2d 314 (1996); Franklin v. Laughlin, No. SA-10-CV-1027 XR, 2011 WL 598489 * 26 (W.D. Tex. Jan. 13, 2011) (in a quiet title action . . . the burden of proof rests with the plaintiff to prove good title in himself).

Plaintiffs have not demonstrated by affidavit, or otherwise, that there exists a genuine issue of material fact to vary this result. The Plaintiffs have not met their burden to show that there exists a genuine issue of material fact as to whether the assignment was executed by a person not authorized by the assignor to execute that document. Furthermore, the issues presented in this matter have been previously decided by this Court. See Kriegel v. Mortgage Elec. Reg. Sys., No. PC-2010-7099, 2011 WL 4947398 (R.I. Super. October 13, 2011) (Rubine, J.); see also Payette, 2011 WL 3794701; Porter, 2011 WL 1252146; Bucci v. Lehman Brothers Bank, FSB, No. PC-2009-3888, 2009 WL 3328373 (R.I. Super. August 25, 2009) (Silverstein, J.); Rutter v.

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⁷ Although Plaintiffs allege that MERS' assignment of the Mortgage interest was not signed by an authorized representative, Plaintiffs have presented no evidence to demonstrate that the signature is unauthorized. See Payette, 2011 WL 3794701 at * 11 (finding the contention that MERS' assignments were executed by an unauthorized signatory to be a mere conclusion or legal opinion that was insufficient to create a genuine issue of material fact). The nonmoving party "has 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).

Mortgage Electronic Registration Systems, Nos. PC-2010-4756, PD-2010-4418, 2012 WL 894012 (R.I. Super. March 12, 2012) (Silverstein, J.). Accordingly, Defendants are entitled to judgment as a matter of law based on the above cited authority. 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 (R.I. Super. April 3, 2012) (Rubine, J.). 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, treated as one for Summary Judgment, demonstrates that there is no genuine issue of material fact. Accordingly, the Motion for Judgment on the Pleadings, decided as a Motion for Summary Judgment, is granted in favor of Defendants MERS and Deutsche Bank. There being no just reason for delay, Final Judgment shall enter in favor of Defendants MERS and Deutsche Bank under Rule 54(b).