

assignment of the mortgage interest from MERS. Plaintiff further sets forth allegations in the Complaint that the underlying debt has been paid in full and that the foreclosure sale was not noticed or published as required by statute and by the terms of the mortgage.

I

FACTS & TRAVEL

The facts set forth in the Complaint and gleaned from the exhibits attached thereto are as follows. On August 20, 2007, Plaintiff executed a note (“Note”) in favor of lender Shamrock Financial Corporation (“Shamrock”) for \$220,000. (Compl. Ex. 2 at 1.) To secure the Note, Plaintiff contemporaneously executed a mortgage (“Mortgage”) on the Property. (Compl. Ex. 2.) The Mortgage designates Shamrock as the “Lender” and further designates MERS as “mortgagee” as well as “nominee for [Shamrock] and [Shamrock’s] successors and assigns.” Id. at 1. The clear, unambiguous language of the Mortgage provides that “Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for [Shamrock] and [Shamrock’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 [Shamrock] and [Shamrock’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 [Shamrock].” Id.

The Mortgage was recorded in the land evidence records of the City of Pawtucket. (Compl. Ex. 2, 3.)

On or about October 16, 2009, MERS, as mortgagee and as nominee for Shamrock, assigned the Mortgage interest to Saxon. (Compl. Ex. 3.) Thus, Saxon became an assignee of MERS and therefore had the right to exercise the statutory power of sale and to foreclose and sell the Property. (Compl. Ex. 2 at 3.) The assignment was recorded in the land evidence records of the City of Pawtucket. (Compl. Ex. 3.)

Thereafter, Saxon conducted a foreclosure sale of the Property, and FHLMC purchased the Property taking a foreclosure deed. (Compl. ¶¶ 5, 30-32, 36, 47.) In April 2010, FHLMC filed an eviction action against Plaintiff in the Sixth Division District Court. By agreement, judgment for possession was entered in favor of FHLMC; however, the parties agreed that FHLMC would not seek execution of the judgment until the resolution of this quiet title action. Plaintiff filed the instant Complaint to quiet title, seeking nullification of the foreclosure sale and return of title to him. Plaintiff also alleges in the Complaint that the debt underlying the Mortgage has been paid in full and that the foreclosure sale was not properly noticed or published. (Compl. ¶¶ 34, 37-38, 46.) Defendants then filed this Motion to Dismiss pursuant Super. R. Civ. P. 12(b)(5) averring that Plaintiff failed to serve Defendants within 120 days as required by Super. R. Civ. P. 4(1) and that Plaintiff's Complaint fails to set forth a claim entitling Plaintiff to relief pursuant Super. R. Civ. P. 12(b)(6). Plaintiff has objected to Defendants' Rule 12(b)(6) Motion averring that he has set forth a claim for relief. Plaintiff has failed to file an objection to the Rule 12(b)(5) Motion with respect to failure to serve Defendants within 120 days. Moreover, there is no return of service in the file. Without objection or return of service, this Court must conclude service of process was lacking.

II

ANALYSIS

Rule 4(l) provides that if “service of the summons and complaint is not made upon defendant within 120 days after the commencement of the action, the court upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice.” Super. R. Civ. P. 4(l). Rule 4(l) also provides that the Court may extend the time for service for “good cause;” however, the burden is on the plaintiff to show good cause. See Super. R. Civ. P. 4(l); see also Gucfa v. King, 865 A.2d 328, 331-32 (R.I. 2005). Further, if the plaintiff fails to serve the defendant within 120 days and fails to show good cause for that failure, “Rule 4(l) requires dismissal, allowing the motion justice no discretion to do anything other than to dismiss the case without prejudice.” Gucfa, 865 A.2d at 331-32.

In this matter, Defendants claim that Plaintiff failed to effect service within 120 days as required by Rule 4(l). Defendants’ Motion was filed in July 2011 and Plaintiff has since filed several objections in response. However, no where in any of Plaintiff’s memoranda submitted in objection to Defendants’ Motion does Plaintiff respond to Defendants’ claim that Plaintiff failed to serve Defendants in 120 days after commencement of this action. Therefore, this Court finds that Plaintiff has failed to show good cause that would justify an extension of time to properly serve Defendants in accordance with Rule 4(l).

This Court has found that Plaintiff’s Complaint must be dismissed for failure to effect service on Defendants within 120 days after commencement of this action. Since the Complaint will be dismissed for failure to comply with Rule 4(l), this Court need not rule on whether Plaintiff’s Complaint should be dismissed for failure to state a claim upon which relief may be granted.

III

CONCLUSION

Accordingly, Plaintiff's Complaint is dismissed without prejudice as against Defendants MERS, Saxon, and FHLMC for failure to effect service on these Defendants as required by the Rhode Island Superior Court Rules of Civil Procedure. Defendants shall prepare, serve, and submit an appropriate form of Order reflecting the result of this Decision.