

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.

SUPERIOR COURT

(Filed: February 4, 2013)

WILLIAM T. O'BRIEN III :
 :
v. :
 :
MORTGAGE ELECTRONIC :
REGISTRATION SYSTEMS, INC.; :
AMERICAN MORTGAGE NETWORK, :
INC.; ONEWEST BANK, FSB; AND :
FEDERAL NATIONAL :
MORTGAGE ASSOCIATION :

C.A. No. KC 2011-0972

DECISION

RUBINE, J. Before this Court is Defendants', Mortgage Electronic Registration Systems, Inc. ("MERS"), OneWest Bank, FSB ("OneWest"), and Federal National Mortgage Association ("FNMA") (collectively, "Defendants"),¹ Motion to Dismiss Plaintiff's complaint ("Complaint") pursuant to Super. R. Civ. P. 12(b)(6). Plaintiff, through his Complaint, seeks declaratory and injunctive relief pursuant to G.L. 1956 § 9-30-1, *et seq.*, petitioning this Court to quiet title in favor of Plaintiff and to declare the foreclosure sale of his real property located at 149 Rocky Point Avenue, Warwick, Rhode Island (the "Property") null and void. Plaintiff alleges in his Complaint that the several assignments of the mortgage interest were unlawful and ineffective and therefore, the foreclosing mortgagee obtained no rights in the mortgage. Ultimately, Plaintiff alleges that none of the Defendants possessed the requisite standing to foreclose, rendering the foreclosure sale a nullity. Plaintiff further sets forth allegations in his Complaint that the

¹ Defendant American Mortgage Network, Inc. is not a party to this Motion.

mortgage note is current or has been satisfied 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 gleaned from the Complaint and exhibits attached thereto and incorporated therein are as follows. On December 19, 2006, Plaintiff executed a note (“Note”) in favor of lender American Mortgage Network, Inc. d/b/a Amnet Mortgage (“Amnet”) for \$304,000. (Compl. Ex. 2 at 2.) To secure the Note, Plaintiff contemporaneously executed a mortgage (“Mortgage”) on the Property. (Compl. Ex. 2.) The Mortgage identifies Amnet as the “Lender” and further identifies MERS as “mortgagee” and “nominee for [Amnet] and [Amnet’s] successors and assigns.” Id. at 1-2. In addition, the Mortgage provides that “Borrower does hereby mortgage, grant and convey to MERS, (solely as nominee for [Amnet] and [Amnet’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 [Amnet] and [Amnet’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 [Amnet].” Id.

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

On April 4, 2008, MERS, as mortgagee and as nominee for Amnet, executed an assignment of the Mortgage interest to IndyMac, thereafter recording the assignment in the land evidence records of the City of Warwick. (Compl. Ex. 3.) On July 11, 2008, IndyMac was closed by the Office of Thrift Supervision (“OTS”) and the FDIC was appointed as receiver of IndyMac. (Compl. ¶¶ 26-27.) FDIC, as Receiver for IndyMac Federal Bank, FSB, successor in interest to IndyMac, then assigned the Mortgage interest to OneWest on April 22, 2011. Id. That assignment was also recorded in the land evidence records of the City of Warwick. Id. Subsequently, on May 10, 2011, OneWest executed an assignment of the Mortgage interest to FNMA. Id. Likewise, the assignment of the Mortgage interest to FNMA was recorded in the land evidence records of the City of Warwick. Id.

A foreclosure sale was conducted on Plaintiff’s Property and thereafter, Plaintiff filed the instant Complaint seeking nullification of the foreclosure sale and return of title to him. (Compl. ¶¶ 92, 98.) Plaintiff also alleges that the Note is current or has been satisfied and that the foreclosure sale was not properly noticed or published. (Compl. ¶¶ 64-66, 74.) Defendants then filed this Motion to Dismiss pursuant to Rule 12(b)(6). Plaintiff objected to Defendants’ Motion averring that the Complaint states a claim for relief. At the Motion hearing, the parties stipulated to waive oral argument and to submit this matter to the Court on the briefs; thus, the Court took the matter under advisement.

II

STANDARD OF REVIEW

“The solitary purpose of a Rule 12(b)(6) ‘motion to dismiss is to test the sufficiency of the complaint.’” Tarzia v. State, 44 A.3d 1245, 1251 (R.I. 2012) (quoting

Narragansett Elec. Co. v. Minardi, 21 A.3d 274, 277 (R.I. 2011)). For purposes of the motion, the Court assumes “the allegations contained in the complaint are true and examin[es] the facts in the light most favorable to the plaintiff.” Id. The complaint must “provide the opposing party with ‘fair and adequate notice of the type of claim being asserted.’” Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009) (quoting Gardner v. Baird, 871 A.2d 949, 953 (R.I. 2005) (internal quotation marks omitted)). Thereafter, “[t]he grant of a Rule 12(b)(6) 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 the plaintiff’s claim.’” Palazzo v. Alves, 944 A.2d 144, 149-50 (R.I. 2008) (quoting Ellis v. Rhode Island Pub. Transit Auth., 586 A.2d 1055, 1057 (R.I. 1991)).

III

ANALYSIS

The allegations set forth in the instant Complaint—specifically concerning the assignment of the Mortgage, the disconnect between the Note and Mortgage, and the authority of certain individuals to execute assignments on behalf of MERS—are nearly identical to the allegations in the complaint in Chhun v. Mortg. Elec. Registration Sys., Inc., and the Mortgage as executed by Plaintiff contains the same operative language as that of the Mortgage considered in Chhun. No. PC 2011-4547, 2012 WL 2648200 (R.I. Super. June 26, 2012) (Rubine, J.). Further, Plaintiff’s arguments are identical to the arguments raised in Chhun and are based on substantially identical facts. Therefore, this Court will incorporate and adopt the reasoning set forth in Chhun in ruling on Defendants’ Motion. In Chhun, the plaintiffs failed to adequately allege in their

complaint the grounds entitling them to relief, merely alleging legal conclusions; thus, this Court dismissed plaintiffs' complaint for failure to state a claim for relief. The same outcome obtains in this case with respect to the aforementioned legal issues.

Moreover, Plaintiff's allegation with respect to the reorganization of IndyMac fails to state a claim for relief. In Payette v. Mortg. Elec. Registration Sys., Inc., this Court analyzed the effect of IndyMac's subsequent receivership with the FDIC on previous mortgage assignments against the background of statutory law on receivership and reorganization. In that case, this Court found that FDIC lawfully acquired the rights and assets of IndyMac pursuant to statutory receivership law. See No. PC 2009-5875, 2011 WL 3794701, at *13 (R.I. Super. Aug. 22, 2011) (Rubine, J.). Furthermore, this Court found that FDIC properly transferred those rights and assets to IndyMac Federal, which was a newly created entity established during the IndyMac receivership. Id. Ultimately, IndyMac Federal also entered into FDIC receivership, and this Court found in Payette that "[t]he entity that purchases the asset from the receiver has acquired all the rights of the note holder and mortgagee by way of its purchase from the receiver." Id. (citing 12 U.S.C. § 1821(d)(2)(A); 12 U.S.C. § 1821(d)(2)(G)(i)).

Applying that analysis here, MERS' assignment of the Mortgage to IndyMac before it went into receivership was a valid transaction. Subsequent to that assignment, the receiver's assignment of the Mortgage to OneWest was also valid. Finally, because OneWest acquired by way of assignment all of the rights FDIC had in the Mortgage, OneWest was then able to assign its rights to FNMA. Therefore, FNMA became the mortgagee possessing 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

[Amnet].” (Compl. Ex. 2 at 3.) Thus, Plaintiff’s allegation with respect to the reorganization of IndyMac fails to state a claim upon which relief may be granted.

Notwithstanding the substantial similarity between this matter and Chhun, there are two additional allegations of fact in the Complaint—that the Note is current or has been satisfied and that the foreclosure sale was not noticed or published as required by statute and by the terms of the Mortgage. If these allegations are accepted as true for purposes of the Defendants’ Motion, Plaintiff’s Complaint cannot be dismissed, and Plaintiff must be given an opportunity to be heard with respect to the allegations concerning whether default under the Note was sufficient to trigger the right to foreclose and whether the notice and publication requirements were properly undertaken by the foreclosing mortgagee. See 55 Am. Jur. 2d Mortgages § 508, 511 (2009) (a foreclosing mortgagee’s failure to comply with certain notice requirements contained in the Mortgage and in the pertinent state statute will invalidate a foreclosure sale). For that reason alone, Plaintiff’s Complaint cannot be dismissed, and Plaintiff must be given an opportunity to have these issues considered at trial.² Accordingly, Defendants’ Motion to Dismiss must be denied.

However, the legal issues presented in this matter—specifically concerning the assignment of the Mortgage interest, the disconnect between the Note and Mortgage, and the authority of certain individuals to execute assignments on behalf of MERS—have been previously decided by this Court in a manner contrary to the alleged interest of the

² If Defendants can establish as undisputed facts the borrower’s default, and that the notice and publication of the foreclosure sale were consistent with statute, then the Defendants could have those issues determined as a matter of law by the pretrial filing of a motion for summary judgment.

mortgagor/homeowner.³ See Payette, 2011 WL 3794701; see also Rutter v. Mortg. Elec. Registration Sys., Inc., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012, at *10 (R.I. Super. March 12, 2012) (Silverstein, J.).

IV

CONCLUSION

In sum, Plaintiff has set forth allegations in the Complaint that, if true, state a claim for relief. Accordingly, Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) is Denied. Counsel for the prevailing party shall submit an Order in accordance with this Decision.

³ If this case is not dismissed, then the trial will focus only on disputed facts as to default, notice and publication. The Court deems all of the remaining legal issues raised by the Complaint to have been resolved on the basis of earlier Superior Court precedent.