

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(Filed: February 12, 2013)

FRANK MEROLA

:

TARA MEROLA

:

:

v.

:

C.A. No. PC 2011-4089

:

MORTGAGE ELECTRONIC

:

REGISTRATION SYSTEMS, INC.;

:

EQUITY ONE, INC.; BAYVIEW

:

LOAN SERVICING, LLC; AND

:

JOHN DOE SECURITIZED

:

TRUST

:

**DECISION**

**RUBINE, J.** Defendant Bayview Loan Servicing, LLC (“Bayview”)<sup>1</sup> moves this Court to dismiss Plaintiffs’ complaint (“Complaint”) pursuant to Super. R. Civ. P. 12(b)(6). Plaintiffs, through the Complaint, seek declaratory judgment and injunctive relief to quiet title to certain real property located at 125-127 Tell Street, Providence, Rhode Island (the “Property”). Plaintiffs allege that the foreclosure sale conducted by Bayview is null and void as Bayview did not have the authority to exercise the statutory power of sale upon commencement of foreclosure proceedings as a result of an invalid assignment of the mortgage interest. Plaintiffs further set forth allegations in their Complaint that the 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.

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<sup>1</sup> Defendants Mortgage Electronic Registration Systems, Inc., Equity One, Inc., and John Doe Securitized Trust are not parties to this Motion.

## I

### FACTS & TRAVEL

The facts set forth in the Complaint and gleaned from the exhibits attached to the Complaint are as follows. On May 22, 2007, Plaintiffs executed a note (“Note”) in favor of lender Equity One, Inc. d/b/a Equity One Mortgage Company (“Equity One”) for \$368,650. (Compl. Ex. 2 at 2.) To secure the Note, Plaintiffs contemporaneously executed a mortgage (“Mortgage”) on the Property. (Compl. Ex. 2.) The Mortgage designates Equity One as the “Lender” and further designates Mortgage Electronic Registration Systems, Inc. (“MERS”) as “mortgagee” as well as “nominee for [Equity One] and [Equity One’s] successors and assigns.” Id. at 1-2. The clear, unambiguous language of the Mortgage provides that “Borrower does hereby mortgage, grant and convey to MERS, (solely as nominee for [Equity One] and [Equity One’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 [Equity One] and [Equity One’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 [Equity One].” Id.

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

On July 13, 2009, MERS, as mortgagee and as nominee for Equity One, assigned the Mortgage interest to Bayview. (Compl. Ex. 3.) Thus, Bayview 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 Providence. See Compl. Ex. 3.

Thereafter, a foreclosure sale was conducted on Plaintiffs' Property. (Compl. ¶¶ 31, 75.) Plaintiffs filed the instant Complaint to quiet title, seeking nullification of the foreclosure sale and return of title to them. Plaintiffs also allege in their Complaint that the Note is current or has been satisfied and that the foreclosure sale was not properly noticed or published.<sup>2</sup> (Compl. ¶¶ 45-47, 56.) Bayview filed this Rule 12(b)(6) Motion to Dismiss averring that Plaintiffs' Complaint fails to state a claim upon which relief may be granted. Plaintiffs have objected to Defendant's Motion averring that they have set forth a claim for relief. At the Motion hearing, both parties waived oral argument and thus, this Court took the matter under advisement.

## II

### ANALYSIS

For the purpose of a Rule 12(b)(6) motion to dismiss, the Court assumes the allegations set forth in the Complaint are true and views them in the light most favorable to plaintiff. 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)). The motion will be granted only if it appears clear beyond a reasonable doubt that there is no set of facts which could entitle plaintiff to relief. 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)).

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<sup>2</sup> The Complaint does not specifically allege the defects in the foreclosure notice or publication.

Applying that standard here, Defendant's Motion to Dismiss must be denied. There are at least two allegations which, if taken as true, would be grounds to invalidate the foreclosure. Plaintiffs have set forth an allegation that the Note is current. (Compl. ¶ 56.) If that is proven to be a truthful allegation, there would be no payment default, which under the mortgage is a condition precedent to foreclosure. In addition, Plaintiffs set forth an allegation in the Complaint that notice and publication of the sale failed to adhere to statutory requirements. (Compl. ¶¶ 45-47.) Under prevailing law, failure to follow the notice procedures as provided in the statute may be grounds to render the foreclosure sale a nullity. See 55 Am. Jur. 2d Mortgages § 508, 511 & n.3 (2009) (citing persuasive authority therein) (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). Once again, if the Court views that allegation as true, Defendant's Motion to Dismiss must be denied.

For the above reasons, Defendant's Motion to Dismiss is denied. As to the other grounds alleged in the Complaint, based on earlier precedent, those allegations fail to state a claim as a matter of law. See Payette v. Mortg. Elec. Registration Sys., Inc., No. PC 2009-5875, 2011 WL 3794701 (R.I. Super. Aug. 22, 2011) (Rubine, J.); Porter v. First Fin. Serv., No. PC 2010-2526, 2011 WL 1251246 (R.I. Super. March 31, 2011) (Rubine, J.); Bucci v. Lehman Bros. Bank, FSB, No. PC 2009-3888, 2009 WL 3328373 (R.I. Super. Aug. 25, 2009) (Silverstein, J.).

### **III**

#### **CONCLUSION**

In sum, Plaintiffs have set forth allegations in the Complaint that, if true, state a claim for relief. Accordingly, Defendant's 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.