

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC.

SUPERIOR COURT

[Filed: July 27, 2015]

APRIL ARACRI

:

v.

:

C.A. No. NC 2011-0420

:

WASHINGTON MUTUAL BANK, FA

:

JP MORGAN CHASE BANK, NA

:

DECISION

**RUBINE, J.** This matter came before this Court, Justice Allen P. Rubine presiding, on June 16, 2015 on Defendant JP Morgan Chase Bank, NA’S motion for summary judgment pursuant to Rule 56(b) of the Rhode Island Superior Court Rules of Civil Procedure. Due to Plaintiff’s counsel’s unexcused absence,<sup>1</sup> this Court did not hear oral arguments and considered the parties’ arguments solely on their briefs and other written materials.<sup>2</sup> After consideration, this Court finds as follows:

“Summary judgment is appropriate when no genuine issue of material fact is evident from ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any,’ and the motion justice finds that the moving party is entitled to prevail as a

<sup>1</sup> Counsel cannot assume his absence is excused, based upon an oral statement left in a message to the Clerk, that he is ill and that a doctor advised he was medically unable to attend. This is particularly true when counsel wishes to obtain a continuance based upon his medical condition and when opposing counsel did not consent to such continuance. See generally, Silvia v. Brule, 9 A.3d 659, 660 n.2 (R.I. 2010). This Court also notes that Plaintiffs’ Counsel did not submit a certificate of a practicing physician until a day after the scheduled hearing date. See Super. R. Civ. P. 40 (“A motion for a continuance on the ground of sickness of a party or witness shall be accompanied by a certificate of a practicing physician stating the fact of said sickness, and the kind, degree, and the time of beginning thereof.”).

<sup>2</sup> This Court notes that there is no constitutional right to oral arguments at a summary judgment hearing, and “[t]he decision as to whether or not to hold a hearing and allow oral argument is within the discretion of the [superior] court.” Ryan v. Roman Catholic Bishop of Providence, 941 A.2d 174, 187-88 (R.I. 2008).

matter of law.” Mruk v. Mort. Elec. Registration Sys., Inc., 82 A.3d 527, 532 (R.I. 2013) (quoting Swain v. Estate of Tyre, 57 A.3d 283, 288 (R.I. 2012)). “[T]he nonmoving party bears 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.” Id. (quoting Daniels v. Flurette, 64 A.3d 302, 304 (R.I. 2013)).

Before this Court may consider the merits of Plaintiff’s complaint regarding the invalidity of foreclosure, it first must address the threshold question of justiciability. See State v. Lead Indus. Ass’n, Inc., 898 A.2d 1234, 1237 (R.I. 2006). Our Supreme Court has “recognizes the need, apart from certain exceptional circumstances, to confine judicial review only to those cases that present a ripe case or controversy.” Id. at 1238. Accordingly, our Supreme Court “will not issue advisory opinions or rule on abstract questions.” Id. (quoting Vose v. Rhode Island Bhd. of Corr. Officers, 587 A.2d 913, 915 n.2 (R.I. 1991)); see also Morris v. D’Amario, 416 A.2d 137, 139 (R.I. 1980) (“As a general rule we only consider cases involving issues in dispute; we shall not address moot, abstract, academic, or hypothetical questions”).

The Plaintiff’s complaint is in two counts. Plaintiff seeks declaratory judgment declaring the alleged foreclosure sale invalid and a claim to quiet title, pursuant to G.L. 1956 § 34-16-5. In this case, a foreclosure occurred; however, the foreclosure was deemed invalid prior to recording a foreclosure deed because of an error relating to notice to the Internal Revenue Service. Therefore, in effect, the foreclosure never took effect and the borrower is still the title owner.

The Defendant argues that this case presents a justiciable issue. In a memorandum to this Court, Defendant’s counsel stated that it inquired with foreclosure counsel about the status of the rescheduled foreclosure and discovered that both the default letter and the acceleration letter

which form the basis for the Amended Complaint would not be drafted or mailed again. In other words, the rescheduled foreclosure sale, which Defendant represents will occur in the fall, will rely upon the same notices already provided to this Court.

Nevertheless, pursuant to § 34-27-4, Defendant will be required to send Plaintiff a new written notice of the rescheduled foreclosure, as well as publish such notice. At this time, even assuming that a foreclosure is imminent, it is impossible for this Court to predict whether the Defendant will meet the requirements set forth in § 34-27-4. The Court should not rule on the adequacy of notice that has yet to be given. Accordingly, this case is not ripe for review. The Uniform Declaratory Judgments Act cannot be used by a plaintiff to obtain an advisory opinion, as there must be a present case or controversy for the Court to entertain issuing a declaratory ruling.<sup>3</sup> Under the current circumstances, the Plaintiff seeks an advisory determination as to whether the Defendant can exercise the statutory power of sale as contained in the mortgage.

For the foregoing reasons, this Court finds that this case is not ripe for review. Accordingly, the Plaintiff's complaint is dismissed without prejudice for lack of jurisdiction. State v. Gaylor, 971 A.2d 611, 613 (R.I. 2009) ("It is well settled in this jurisdiction that, as a general rule, a necessary predicate to a court's exercise of its jurisdiction is an actual justiciable controversy."); Rogers v. Rogers, 18 A.3d 491, 493 (R.I. 2011) (holding that subject-matter jurisdiction is an indispensable ingredient of any judicial proceeding, and it can be raised *sua sponte* by the court).

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<sup>3</sup> This Court also questions whether a quiet title action is appropriate based on the recent case of Lister v. Bank of America, N.A., No. 14-1448, 2015 WL 3635282, at \*4 (1st Cir. June 12, 2015).



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** April Aracri v. Washington Mutual Bank, FA, et al.

**CASE NO:** NC 2011-0420

**COURT:** Newport County Superior Court

**DATE DECISION FILED:** July 27, 2015

**JUSTICE/MAGISTRATE:** Rubine, J.

**ATTORNEYS:**

For Plaintiff: George E. Babcock, Esq.

For Defendant: David J. Pellegrino, Esq.