

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[Filed: July 22, 2015]

TROY R. LEBEAU

:

v.

:

C.A. No. PC 2011-4088

:

NEW CENTURY MORTGAGE

:

CORPORATION; WELLS FARGO

:

BANK, N.A.; and U.S. BANK, NA, as

:

Trustee for Asset-Backed Pass-Through

:

Certificates, Series 2006-NC2

:

**DECISION AND ORDER**

**RUBINE, J.** This matter came before this Honorable Court, Justice Allen P. Rubine presiding, on June 16, 2015 on Defendants Wells Fargo Bank, N.A.<sup>1</sup> and U.S. Bank, NA, as Trustee for Asset-Backed Pass-Through Certificates, Series 2006-NC2’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>2</sup> this Court did not hear oral arguments and considered the parties’ arguments solely on their briefs.<sup>3</sup> After consideration, this Court finds as follows:

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<sup>1</sup> Wells Fargo Bank, N.A. is the servicer of U.S. Bank, NA, as Trustee for Asset-Backed Pass-Through Certificates, Series 2006-NC2.

<sup>2</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 Plaintiff’s 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>3</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).

“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 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)).

In this matter, the Plaintiff has failed to submit competent evidence demonstrating issues of material fact. The Plaintiff contends that only the original “Lender” can foreclose pursuant to the power of sale in the Mortgage. Our Supreme Court has rejected similar arguments in Bucci v. Lehman Bros. Bank, FSB, 68 A.3d 1069 (R.I. 2013) and Mruk, 82 A.3d at 527, and this Court find these cases to be controlling here. Id.

The Plaintiff further contends that U.S. Bank never had possession of the Note so it could not have conducted a foreclosure. This Court has addressed a similar argument in the recent decision of Merola v. Mortg. Electronic Registration Systems, No. PC-2011-4089, 2015 WL 1606035, at \*3-\*4 (R.I. Super. Apr. 7, 2015) (Rubine, J.). This Court reiterates that G.L. 1956 § 34-11-24 provides:

“An assignment of mortgage substantially following the form entitled ‘Assignment of Mortgage’ shall, when duly executed, have the force and effect of granting, bargaining, transferring and making over to the assignee, his or her heirs, executors, administrators, and assigns, the mortgage deed with the note and debt thereby secured, and all the right, title and interest of the mortgagee by virtue thereof in and to the estate described therein, to have and to hold the mortgage deed with the privileges and appurtenances thereof to the assignee, his or her heirs, executors, administrators and assigns in as ample manner as the assignor then

holds the same, thereby substituting and appointing the assignee and his or her heirs, executors, administrators and assigns as the attorney or attorneys irrevocable of the mortgagor under and with all the powers in the mortgage deed granted and contained.” (Emphasis added.)

Nevertheless, Plaintiff argues that the Uniform Commercial Code controls in this case. This Court acknowledges that the Uniform Commercial Code, codified at G.L. 1956 § 6A-3-205 defines who is a “holder” entitled to enforce the obligations under a note, and provides, “[w]hen indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.” However, based on the principles of statutory interpretation, “[S]tatutes relating to the same subject matter should be considered together so that they will harmonize with each other and be consistent.” S. Cnty. Post & Beam, Inc. v. McMahan, No. 2014-24-APPEAL, 2015 WL 3534116, at \*8 (R.I. June 5, 2015) (quoting State ex rel. Webb v. Cianci, 591 A.2d 1193, 1203 (R.I. 1991)). “When a specific statute conflicts with a general statute, our law dictates that precedence must be given to the specific statute.” Id. (quoting Warwick Hous. Auth. v. McLeod, 913 A.2d 1033, 1036–37 (R.I. 2007)). Here, § 34-11-24 specifically deals with promissory notes transferred by mortgage assignments, while § 6A-3-205 deals with promissory notes in general. Therefore, § 34-11-24 is given precedence over the UCC. See Warwick Hous. Auth., 913 A.2d at 1036-37. When the two statutes are read together in accordance with the rules of statutory construction in Rhode Island, a mortgage note may be transferred by assignment of the corresponding mortgage.

The particular Note in this case contains an endorsement in blank by Accredited Home Lenders, Inc. It does not contain any other endorsements. When a note is endorsed in blank, a party becomes a holder entitled to pursue collection of the debt and enforce the terms of the note merely by coming into possession of it. See § 6A-3-205. In this case, Defendant has provided

sufficient evidence that the Mortgage was transferred to U.S. Bank from New Century Mortgage Corporation via assignment of mortgage. See § 34-11-24. For these reasons, this Court finds sufficient evidence uncontradicted by any evidence submitted by the Plaintiff that U.S. Bank now holds the Note and is entitled to enforce its terms. See § 34-11-24; § 6A-3-205; Warwick Hous. Auth., 913 A.2d at 1036-37. See also Merola, 2015 WL 1606035, at \*3-\*4.

Finally, the Plaintiff contends that Defendants have not complied with the notice requirements as set forth in the mortgage contract. The undisputed facts, as established by the uncontradicted affidavits of Brian M. Kiser and Andrea Kruse demonstrate that the plaintiff borrower in fact received the notice called for in the mortgage. After reviewing the memoranda and attached authenticated exhibits, and the responses thereto, this Court finds no genuine dispute of material fact. Defendants, Wells Fargo Bank, N.A. (Wells Fargo) and U.S. Bank, NA, as Trustee for Asset-Backed Pass-Through Certificates, Series 2006-NC2, are entitled to judgment as a matter of law.

Defendants' motion for summary judgment is hereby granted.

Judgment dismissing Plaintiff's Complaint shall be entered. Lis pendens is dissolved. Reasonable attorneys' fees and costs will be awarded, in accordance with the terms of the Note and Mortgage which provide that the mortgagee is entitled to recover the reasonable costs of enforcing the terms of those instruments, including reasonable attorneys' fees incurred. A separate hearing with notice to the Plaintiff shall be held to determine the amount of attorneys' fees to be awarded.

Entered as an Order of this Court on this \_\_\_\_\_ day of July, 2015.

ENTER:

PER ORDER:

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Allen P. Rubine  
Associate Justice

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Clerk



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** LeBeau v. New Century Mortgage Corporation, et al.

**CASE NO:** PC 2011-4088

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** July 22, 2015

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

**ATTORNEYS:**

For Plaintiff: George E. Babcock, Esq.

For Defendant: Bethany M. Whitmarsh, Esq.