STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: April 7, 2015]

FRANK MEROLA AND	:	
TARA MEROLA,	:	
Plaintiffs,	:	
VS.	:	**C.A. No. PC 11-4089**
	:	
MORTGAGE ELECTRONIC	:	
REGISTRATION SYSTEMS, ET AL.,	:	
Defendants.	:	

DECISION

FACTS AND TRAVEL

RUBINE, J. Plaintiffs Frank Merola and Tara Merola executed a note in favor of Equity One, Inc. for $368,650.00 on May 22, 2007. To secure the Note, Plaintiffs contemporaneously executed a Mortgage on certain real property located at 125-127 Tell Street in Providence, Rhode Island. The Mortgage names MERS as mortgagee and nominee for Equity One, and provides MERS and its "successors and assigns" with the statutory power of sale. The Mortgage was executed and recorded on May 22, 2007 in Providence at Book 8684 on Page 149. On July 8, 2009, MERS assigned the Mortgage by Assignment of Mortgage to Bayview Loan Servicing, LLC (Bayview). The Assignment of Mortgage was recorded in Providence at Book 9547 on Page 122, on October 14, 2009.

Defendants have alleged that Plaintiffs have been in default since December 2010. On July 8, 2011, Bayview conducted a foreclosure sale. At the sale, Bayview was the highest bidder at $ 135,000.00. The Defendants allege that an outstanding balance of $385,187.89 remains on the Note.

Plaintiffs filed their Complaint on July 18, 2011 seeking declaratory judgment and injunctive relief to void the foreclosure sale and quiet title. Defendants subsequently filed a 12(b)(6) Motion to Dismiss. On February 12, 2013, this Court issued a decision denying Defendants Motion to Dismiss because Plaintiffs set forth claims that, if taken as true, would serve as grounds to void foreclosure sale. Merola v. Mortgage Electronic Registration Systems, et al., No. PC-2011-4089, 2013 WL 597210 (R.I. Sup. Ct. Feb. 12, 2013) (Rubine, J.). Namely, Plaintiffs contended (1) that the Note was current; and (2) that notice and publication of the foreclosure sale failed to meet statutory requirements. Id. On January16, 2014, Defendant Bayview filed an Amended Answer and Counterclaim against Plaintiffs for failure to make payments required under contract, seeking the balance of the funds due under the Note and Mortgage for the property and the value of the benefit that Bayview conferred upon Plaintiff. Entry of Default was filed by the Court's Clerk against Plaintiffs (Counterclaim Defendants) on the counterclaim on May 30, 2014, for failure to plead or otherwise defend as provided in the Rhode Island Superior Court Rules of Civil Procedure.[1] Defendants made a series of unanswered attempts at discovery in this case. Notably, Plaintiffs failed to answer Requests for Admissions pursuant to Rule 36 of the Rhode Island Superior Court Rules of Civil Procedure. Consequently, this Court deems the following facts admitted: (1) that all foreclosure notices sent regarding the foreclosure of the Property adhere to applicable statutory requirements; and (2) that Plaintiffs were in default of obligations under the note. Defendants now file a Motion for Summary Judgment and dismiss the claims asserted in Plaintiffs' Complaint. Defendants do not seek judgment in regards to the counterclaim filed against Plaintiffs.

[1] Though an Entry of Default was filed, a Default Judgment was not entered on the Counterclaim.

STANDARD OF REVIEW

It is well settled that when deciding a motion for summary judgment, '"the Court views the evidence in the light most favorable to the nonmoving party."' Mruk v. MERS, et al., 82 A.3d 527, 532 (R.I. 2013) (quoting Beauregard v. Gouin, 66 A.3d 489, 493 (R.I. 2013)). '"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."' Id. (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. Fluette, 64 A.3d 302, 304 (R.I. 2013)).

ARGUMENTS AND EVIDENCE

Plaintiffs allege in their Complaint that (1) MERS could not act as mortgagee or assign the Mortgage; (2) the assignment from MERS to Bayview was invalid; (3) that Plaintiffs were not in default; and (4) that notice was invalid. In support of their Motion for Summary Judgment, Defendants argue that they are entitled to judgment as a matter of law because (1) Plaintiffs have admitted that the foreclosure notice was proper and Plaintiffs were in default by failing to comply with Rule 36 of the Rhode Island Superior Court Rules of Civil Procedure; and (2) there is no genuine dispute of material fact. In support of these arguments, Defendants include several notarized exhibits. Through the following affidavits and evidence, the Defendants established the travel of the Mortgage through Assignment of Mortgage from MERS

to Bayview. Defendants also established that the statutory notice and publication requirements were met and that Plaintiffs are in default.[2]

The following documents are properly authenticated by the movant through the affidavit of:

- **Exhibit A:** Notarized Warranty Deed from Harry McNabb to Frank and Tara Merola;
- **Exhibit B:** Notarized Copy of Mortgage from Frank and Tara Merola to MERS as nominee for Equity One, securing a note in the amount of $368,650.00;
- **Exhibit C:** Notarized Assignment of Mortgage, assigning mortgage from MERS on behalf of Equity One to Bayview;
- **Exhibit E:** Notarized Foreclosure Deed from Bayview to Bayview, including:
  - Notarized affidavit by Craig Stein, swearing to the publication of the notice of sale on and a copy of such publication, swearing to the mailing of notice not less than thirty days prior to first publication;
  - Notarized affidavit by JoAnn Snyder of non-military service;
  - Notarized affidavit by JoAnn Snyder of compliance with Sec. 13-216 of the Providence Code of Ordinances (non-residential exception to conciliation notice);
- **Exhibit G:** Defendant Bayview's First Set of Requests for Admission to Plaintiff Frank Merola, Defendant Bayview's First Set of Requests for Admission to Plaintiff Tara Merola;
- **Exhibit H:** Notarized Affidavit by Harry Castleman, foreclosure counsel for Bayview, swearing to the publication dates in the Providence Journal, swearing to the truth and accuracy of the attached notice letters, swearing to the truth and accuracy of the foreclosure deed;
- **Exhibit I:** Notarized Affidavit by Eldon Lewis, Senior Commercial Asset Manager at Bayview, swearing to the truth and accuracy of the Assignment of Mortgage, the Mortgage, and swearing to the fact of default.

[2] There appears to have been a compiling error in Defendants' Motion. Defendants state in their memorandum of support, which is attached to their summary judgment motion, that they attached a copy of the Note at Exhibit H and a copy of the publication newspaper tear sheet at Exhibit D. However, Exhibit H is not a copy of the Note and Exhibit D was never given to the Court. The evidence of proper notice and publication is, however, established through the affidavits attached to the foreclosure deed. Additionally, the Note can be found attached to Defendant Bayview's Counterclaim at Exhibit A. Moreover, in accordance with Rule 36 of the Rhode Island Rules of Civil Procedure, this Court also considers the facts that (1) Plaintiffs executed a promissory note in conjunction with a mortgage in favor of Equity One on May 22, 2007; and (2) foreclosure notices were proper to have been admitted.

Plaintiffs filed an objection to Defendants' Motion for Summary Judgment. Plaintiffs argue that Bayview could not have properly foreclosed on the property as there is no evidence that Bayview was the note holder or an agent of the note holder.[3] Plaintiffs have also submitted the counter affidavit of Mr. Frank Merola (Plaintiff). Yet, this counter affidavit fails to dispute any of the evidence presented by Defendants in this matter. Instead, the affidavit makes generalized statements like "To the best of my knowledge, Bayview Loan Servicing and Equity One never entered into any contractual relationship."

ANALYSIS

It is now well settled in Rhode Island that an entity may exercise the statutory power of sale as long as it is the mortgagee and either the note holder or an agent of the note holder. See Bucci v. Lehman Bros. Bank, FSB, 68 A.3d 1069 (R.I. 2013). Our Supreme Court has held that MERS, acting in a nominee capacity for the owner of the promissory note, can be a "mortgagee" as that term is used in G.L. 1956 § 34-11-22. Id. at 1085. "Any of the obligations placed upon a 'mortgagee' may be fulfilled by either the mortgage holder or the owner of the note, provided that an agency relationship exists between the two." Id. at 1087. Thus, MERS may serve as mortgagee without holding the Note, as a nominee relationship is considered an agency relationship in this instance. Id. at 1085-89.

Our Supreme Court established that when the provisions of a mortgage instrument explicitly grant the statutory power of sale to MERS, the "[borrowers] explicitly grant[] the statutory power of sale and the right to foreclose to MERS, and consequently, MERS has the contractual authority to exercise that right." Id. at 1081. Further, where the mortgage instrument

[3] Plaintiffs also argue that the affidavits submitted by Defendants are inadmissible. This Court rejects these arguments as it finds the affidavits to be reliable and in compliance with Rhode Island law. Moreover, even if the affidavits were defective, each exhibit was individually authenticated by a notary and the issues of notice and default were admitted through Rule 36.

explicitly grants the statutory power of sale to MERS and its "successors and assigns," an assignee of MERS acquires all of the rights which MERS originally possessed as mortgagee including the power of sale. Mruk, 82 A.3d at 538.

Here, the exhibits and affidavits demonstrate the absence of a genuine dispute that, at the time of foreclosure, Bayview was the mortgagee on the property in question by way of assignment. The affidavits and exhibits establish a clear line of travel of the Mortgage, with MERS as the original mortgagee, and thereafter to Bayview, then by way of assignment from MERS to Bayview. Moreover, it is well established that MERS may assign the power of sale if the language of the mortgage so states. See id. The mortgage instrument in this case explicitly provides: "Borrower does hereby mortgage, grant and convey to MERS . . . and to the successors and assigns of MERS . . . the Statutory Power of Sale." As Defendants have provided this Court with authenticated copies of the Assignment of Mortgage (assigning the Mortgage to Bayview) and the Mortgage itself, which contains the aforementioned language, there is no genuine dispute of material fact that Bayview at the time of the foreclosure had the authority to conduct the foreclosure sale in the event of default. See Mruk, 82 A.3d at 538. With respect to Plaintiffs' argument that there is no evidence that Bayview was a note holder or an agent of the note holder, this Court points out that MERS was explicitly stated to be the nominee of the lender, and further that § 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." Sec. 34-11-24 (emphasis added).

Therefore, this Court concludes that a note may be transferred by assignment of the corresponding mortgage. The particular Note in this case contains an endorsement in blank by Equity One. It does not contain any other endorsements. When a note is endorsed in blank, a party receives legal authority to enforce it merely by coming into possession of the note. See G.L. 1956 § 6A-3-205 ("When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed."). As Defendants, in support of their Motion, have provided evidence that Bayview is in possession of the Note, this Court is satisfied that at the time of foreclosure Bayview was the rightful note holder, as well as the mortgagee by way of mortgage assignment.

Notwithstanding, in order for a foreclosure sale to be valid, there still must be a default of the obligations under the note and proper notice and publications of the foreclosure sale. During discovery, Plaintiffs failed to timely respond to Defendants' Requests for Admission, pursuant to Rule 36 of the Rhode Island Civil Rules of Civil Procedure. Those facts which were set forth in the Requests are deemed conclusively established. Accordingly, Plaintiffs have admitted that they were in default of their obligations under the Note and that the foreclosure sale notices satisfied statutory requirements. Notably, it was Plaintiffs' allegations that the Note was current and that the foreclosure notices were invalid, which caused this Court to deny Defendants' Motion to Dismiss over two years ago. See Merola v. Mortgage Electronic Registration Systems, et al., No. PC-2011-4089, 2013 WL 597210 (R.I. Sup. Ct. Feb. 12, 2013) (Rubine, J.). As issues of foreclosure notice and default are not in dispute, Defendants are entitled to judgment as a matter of law.

Nevertheless, Defendants would have been entitled to judgment as a matter of law even if Plaintiffs had complied with Rule 36. Defendants have included a notarized affidavit by a Senior Commercial Asset Manager at Bayview swearing to the fact that Plaintiffs have been in default since December 2010. Defendants have also included exhibits and affidavits demonstrating that both notice by mail and notice by publication were proper in this case. Plaintiffs have provided this Court with no contradictory evidence. As "[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," this Court finds there is no genuine dispute of material fact as to the borrower's default or the adequacy of foreclosure notice. See Mruk, 82 A.3d at 532.

CONCLUSION

As Plaintiffs have failed to demonstrate a genuine dispute of material fact in this case, Defendants are entitled to judgment as a matter of law on Plaintiffs' Complaint. The Defendants' Counterclaim remains pending notwithstanding entry of default, as no default judgment has entered in favor of the Defendants as counterclaim Plaintiffs.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Frank Merola and Tara Merola v. Mortgage Electronic Registration Systems, et al.
CASE NO:	PC 11-4089
COURT:	Providence County Superior Court
DATE DECISION FILED:	April 7, 2015
JUSTICE/MAGISTRATE:	Rubine, J.
ATTORNEYS:	
For Plaintiff:	George E. Babcock, Esq.
For Defendant:	Jeanne M. Scott, Esq.