STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: March 7, 2013)

JO-ANN VAN HOECKE	:	
	:	
v.	:	**C.A. No. KC 2009-0743**
	:	
FIRST FRANKLIN FINANCIAL CORPORATION; MERRILL LYNCH BANK AND TRUST COMPANY, FSB; HOME LOAN SERVICES, INC.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; LASALLE BANK, N.A., AS A TRUSTEE ONLY	:	

DECISION

RUBINE, J. Before the Court is Defendants', First Franklin Financial Corporation ("First Franklin"), Merrill Lynch Bank and Trust Company, FSB ("Merrill Lynch"), Home Loan Services, Inc. ("Home Loan"),[1] Mortgage Electronic Registration Systems, Inc. ("MERS"), and LaSalle Bank, N.A., as a Trustee only ("LaSalle") (collectively, "Defendants"), Motion for Summary Judgment pursuant to Super. R. Civ. P. 56. Plaintiff filed a complaint ("Complaint") to quiet title to certain real property located at 25 Leroy Avenue, Warwick, Rhode Island (the "Property"). According to the allegations as set forth in the Complaint, the assignment of the mortgage interest by MERS to LaSalle failed to adequately transfer the right to exercise the statutory power of sale in the mortgage by LaSalle as the foreclosing mortgagee rendering the foreclosure sale of the Property a nullity.

[1] Home Loan merged with BAC Home Loans Servicing, LP, which later merged with Bank of America, N.A. (Silva Aff. ¶¶ 2, 10; Defs.' Mot. Summ. J. Ex. E.)

I

FACTS & TRAVEL

The record reflects that on June 24, 2007, Plaintiff executed an adjustable rate note ("Note") in favor of lender First Franklin for $288,000. (Defs.' Mot. Summ. J. Ex. B at 1.) First Franklin thereafter endorsed the Note in blank. Id. at 4.

To secure the Note, Plaintiff contemporaneously executed a mortgage ("Mortgage") on the Property. (Compl. Ex. A; Defs.' Mot. Summ. J. Ex. A.) The Mortgage designates MERS as "mortgagee" and as "nominee for lender and lender's successors and assigns." (Compl. Ex. A at 1.) The Mortgage provides that, "Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with the 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 Lender and Lender'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 Lender." Id.

The Mortgage was recorded in the land evidence records for the City of Warwick on June 27, 2007. (Defs.' Mot. Summ. J. Ex. A.)

On March 1, 2008, MERS, as mortgagee and as nominee for First Franklin, assigned the Mortgage to LaSalle, which was designated in the Mortgage assignment as "LaSalle Bank National Association as Trustee for Merrill Lynch First Franklin

Mortgage Loan Trust 2007-5, Mortgage Loan Asset-Backed Certificates, Series 2007-5." (Defs.' Mot. Summ. J. Ex. C; Silva Aff. ¶ 8.) Thereafter, Plaintiff failed to make timely payments under the terms of the Note. (Silva Aff. ¶ 14.) Thus, LaSalle, as mortgagee, commenced foreclosure proceedings, successfully foreclosing upon the Property on December 2, 2008. (Silva Aff. ¶ 11.) At the time of foreclosure, Plaintiff was also delinquent as to her January 2008 payment under the Note. (Silva Aff. ¶ 15.)

LaSalle, as the successful bidder at the foreclosure sale, recorded the foreclosure deed in its name, and thereafter commenced eviction proceedings against Plaintiff in the Third Division District Court ("District Court"). (Defs.' Mot. Summ. J. Ex. D.) LaSalle obtained a judgment for possession in the District Court. (Compl. ¶ 35.) Thereafter, Plaintiff appealed the District Court judgment to the Superior Court for a trial de novo. Id. Subsequently, on May 22, 2009, Plaintiff's appeal was dismissed by agreement, and the matter was remanded to the District Court for issuance of execution on the judgment for possession. Id.

On May 26, 2009, Plaintiff filed this Complaint to quiet title to the Property, as well as a request for a temporary restraining order ("TRO") seeking to vacate or stay the eviction in District Court. This Court granted Plaintiff's request for a TRO pursuant to Super. R. Civ. P. 65. No further hearing was held on Plaintiff's request for injunctive relief; thus, the TRO, which had previously issued, expired by its terms.

Defendants thereafter filed a Motion to Dismiss this quiet title action. At the hearing on Defendants' Motion to Dismiss, Plaintiff's counsel informed this Court that Plaintiff had filed a Chapter 13 Bankruptcy Petition on January 15, 2010. Defendants passed the pending Motion to Dismiss as a result of the automatic stay. On April 20,

2010, LaSalle was granted relief from the automatic stay by the Bankruptcy Court, in order to conduct a foreclosure in accordance with the statutory power of sale. (Defs.' Mot. Summ. J. Ex. 1.)

Defendants have now filed this Motion for Summary Judgment pursuant to Rule 56 averring that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. Plaintiff filed an objection setting forth in her memorandum only disputes of law, as opposed to setting forth genuine issues of material fact incorporated through materials appropriate under Rule 56. The parties entered into a stipulation agreeing to waive oral argument and to submit the matter to the Court for decision upon the written memoranda already presented to the Court.

II

STANDARD OF REVIEW

The Court will only grant a motion for summary judgment if "'after viewing the [admissible] evidence in the light most favorable to the nonmoving party,'" Jessup & Conroy, P.C. v. Seguin, 46 A.3d 835, 838 (R.I. 2012) (quoting Empire Acquisition Group, LLC v. Atlantic Mortgage Co., 35 A.3d 878, 882 (R.I. 2012)), "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law." Super. R. Civ. P. 56(c).

The nonmoving party, in this case the Plaintiff, "'has 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.'" Liberty Mut. Ins. Co. v. Kaya, 947 A.2d 869, 872 (R.I. 2008) (quoting D'Allesandro v.

Tarro, 842 A.2d 1063, 1065 (R.I. 2004)). To meet this burden, "'[a]lthough an opposing party is not required to disclose in its affidavit all its evidence, he [or she] must demonstrate that he [or she] has evidence of a substantial nature, as distinguished from legal conclusions, to dispute the moving party on material issues of fact.'" Jessup & Conroy, P.C., 46 A.3d at 839 (quoting Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998)) (alteration in original).

III

ANALYSIS

Since the material facts herein are nearly identical to the facts underlying the decision of this Court in Payette v. Mortg. Elec. Registration Sys., Inc., and the Mortgage as executed and acknowledged by Plaintiff contains the same operative language as that of the mortgage considered in Payette, this Court will incorporate and adopt the reasoning set forth in Payette. No. PC 2009-5875, 2011 WL 3794701 (R.I. Super. Aug. 22, 2011) (Rubine, J.); see also Kriegel v. Mortg. Elec. Registration Sys., Inc., No. PC 2010-7099, 2011 WL 4947398 (R.I. Super. October 13, 2011) (Rubine, J.). The Court will then address any additional issues that are unique to this matter that have not been previously determined by this Court.

Plaintiff, in her Objection to Defendants' Motion for Summary Judgment, avers that MERS, and thus any assignee of MERS, fails to properly hold the statutory power of sale, an argument that has been consistently rejected by this Court. See Kriegel, 2011 WL 4947398; see also Payette, 2011 WL 3794701; Porter v. First NLC Fin. Serv., No. PC 2010-2526, 2011 WL 1252146 (R.I. Super. March 31, 2011) (Rubine, J.); Bucci v. Lehman Bros. Bank, FSB, No. 2009-3888, 2009 WL 3328373 (R.I. Super. Aug. 25,

2009) (Silverstein, J.); Rutter v. Mortg. Elec. Registration Sys., Inc., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012 (R.I. Super. March 12, 2012) (Silverstein, J.). In the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of the Superior Court decisions on this subject represents the prevailing view of the law in Rhode Island.

According to Plaintiff, her due process rights were denied as Defendants were not authorized to exercise the statutory power of sale under G.L. 1956 § 34-11-22, and thereby were not authorized to foreclose on the Property absent judicial order. This argument fails to establish a genuine issue of material fact sufficient to defeat Defendants' Motion for Summary Judgment. It is well-established that MERS and an assignee of MERS, such as LaSalle, may properly invoke the statutory power of sale as granted to the mortgagee by the plain, unambiguous language of the Mortgage. Plaintiff, through her acknowledgement and execution of the Mortgage, explicitly granted to MERS, and to the successors and assigns of MERS, the right to exercise the statutory power of sale and to foreclose on the Property. See Compl. Ex. A at 3. Thus, MERS and any assignee of MERS, in this case LaSalle, were entitled to foreclose on the Property following Plaintiff's default, without seeking judicial approval. Accordingly, Plaintiff was not denied any due process rights as a result of the invocation of the foreclosure process by LaSalle, the assignee of MERS.

Plaintiff further avers that mortgage servicers may not conduct a non-judicial foreclosure sale. According to Plaintiff, mortgage servicers are limited in the functions they may perform on behalf of the mortgagee. In the instant matter, Home Loan was the servicer of the Mortgage, acting on behalf of LaSalle, and it executed the foreclosure

deed on behalf of LaSalle. (Silva Aff. ¶ 9; Defs.' Mot. Summ. J. Ex. D.) Rhode Island law clearly establishes a role for mortgage servicers in the mortgage industry as mortgage servicers are included within the definition of "mortgagee" in § 34-26-8. See Section 34-26-8; see also Bucci, 2009 WL 3328373, at *12. Moreover, in Kriegel, this Court held that the mortgage servicer, acting on behalf of the mortgagee, was "properly authorized to exercise the statutory power of sale when [p]laintiff defaulted on its payment obligation under the [n]ote." Kriegel, 2011 WL 4947398, at *17. Thus, Home Loan, as servicer of LaSalle, the mortgagee and note holder, was properly authorized to execute the foreclosure deed on behalf of LaSalle.

Attempting to invalidate the foreclosure sale, Plaintiff avers that the assignment of the Mortgage interest and the foreclosure deed are void as they fail to conform to statutory law. Specifically, Plaintiff avers that the Mortgage assignment and foreclosure deed were signed by individuals without any record of their powers of attorney having been filed in the land evidence records for the Town of Warwick. To support this contention, Plaintiff relies upon §§ 18-3-5[2] and 34-11-34.

In her attempt to invalidate the foreclosure sale, Plaintiff avers that the individuals executing the assignment of the Mortgage interest and the foreclosure deed did not have the authority to do so. Under prevailing law, a plaintiff/mortgagor in these circumstances lacks standing to challenge the validity of the mortgage assignment.[3] See Payette, 2011

[2] Section 18-3-5 is part of the Fiduciaries' Emergency Act and therefore is inapplicable to this matter.

[3] It is a long-standing principle of Rhode Island law that strangers to a contract do not have standing to challenge the subsequent assignment of that contract. See Brough v. Foley, 525 A.2d 919, 921-22 (R.I. 1987). Although a recent decision from the First Circuit holds that mortgagors have standing to challenge a mortgage assignment under Massachusetts law, this Court is obligated to apply the common law of Rhode Island.

WL 3794701, at *15 (citing persuasive authority from several jurisdictions to support the holding that a plaintiff/mortgagor does not have standing to challenge a mortgage assignment); see also Rutter, 2012 WL 894012, at *16-17.

Even if this Court were to find that Plaintiff had standing to challenge the execution of the Mortgage assignment and the foreclosure deed, this Court finds that the assignment of the Mortgage interest was executed by an individual who represented to a Notary Public that she was an employee of MERS and that she was authorized to execute the assignment on behalf of MERS,[4] the nominee for the original lender First Franklin. See Compl. Ex. C. This assignment conforms to the statutory form of assignments of a mortgage interest as set forth in § 34-11-12. See Section 34-11-12. Further, the assignment was duly executed and recorded in accordance with § 34-11-1, and therefore is presumptively valid.[5] See Butler, 41 F.3d at 294-95 (citing 1 Am. Jur. 2d

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See Culhane v. Aurora Loan Services of Nebraska, No. 12-1285, 2013 WL 563374, at *5 (1st Cir. Feb. 15, 2013). Furthermore, it is this Court's interpretation of the Culhane decision that the court holds that a mortgagor has standing to challenge a mortgage assignment on the basis that the assignor had no interest to assign, rather than holding that a mortgagor has standing to assert defects in the execution of a particular mortgage assignment. See id. at *5-6.

[4] Recorded documents, including mortgage assignments, must bear a notarized signature of the assignor. If such person falsely swears to his authority, such may constitute a crime in this State. See Section 11-33-4. However, a title examiner must assume the validity of each signature signed before a Notary, and the stated authority of such person to act on behalf of the assignor. If this were not so, anyone checking the land evidence records would be required to make independent inquiry as to the actual authority of each person signing on behalf of a corporate grantor, rendering the reliability of land evidence records in shambles. This Court agrees with the Seventh Circuit's analysis that "[i]f a notary's certificate were vulnerable to attack every time an interested witness contradicted the certificate and the notary did not have a personal recollection of the event, 'it would shock the moral sense of the community, deny justice, and create chaos in land titles[]' and every other type of document requiring notarization." Butler v. Encyclopedia Brittanica, Inc., 41 F.3d 285, 294-95 (7th Cir. 1994).

[5] A very similar argument—challenging the validity of a mortgage assignment on the basis of lack of authority by the individual executing the assignment on behalf of

Acknowledgments § 83 (1994)) (acknowledged deeds and mortgages of real estate will not be set aside absent clear and convincing evidence that the certificate of acknowledgment is false); see also Dolan v. Hughes, 20 R.I. 513, 40 A. 344 (1898) (citing Johnson v. Thayer, 17 Me. 401, 403 (1840)) (the presumption in favor of a valid recorded assignment may be rebutted only by proof that the assignment was fraudulently made); 65 Am. Jur. 2d Quieting Title § 73 ("In a quiet title action, there is a presumption in favor of the record titleholder, and the evidence to overcome that presumption must be clear and convincing."). Plaintiff, on the other hand, has not submitted an affidavit or other evidence admissible pursuant to Rule 56 that would raise a genuine issue of material fact as to the validity of the execution of the Mortgage assignment. In sum, Plaintiff's argument that the Mortgage assignment is void fails to establish a genuine issue of material fact, and it does not alter the analysis that even if this Court were to assume Plaintiff had standing to challenge the assignment on the undisputed facts, the assignment of the mortgage herein is valid as a matter of law.

Furthermore, the foreclosure deed was executed by an employee of Home Loan, as attorney in fact and servicer for LaSalle, and the foreclosure deed meets all necessary statutory requirements. See Defs.' Mot. Summ. J. Ex. D; see also Section 34-11-22; Section 34-27-4. As set forth supra, mortgagees are authorized to employ mortgage servicers to service the mortgage loan on their behalf under Rhode Island statutory law. See Bucci, 2009 WL 3328373, at *12; see also Kriegel, 2011 WL 4947398, at *17.

MERS—was raised by the plaintiff in a matter before the First Circuit. See Culhane, 2013 WL 563374, at *8. The argument was also rejected by Judge Selya who found that the mortgage assignment in that case was signed by an individual duly certified as a vice president of MERS and then notarized in accordance with Massachusetts statutory law. Id.

While this Court acknowledges that § 34-11-34 requires the recording of a power of attorney for any conveyance executed by an attorney on behalf of the grantor, Plaintiff has failed to set forth facts by way of affidavit or other admissible evidence that raise an issue as to whether LaSalle failed to record the power of attorney allowing Home Loan to act as its attorney in fact and execute the foreclosure deed. Rather, all Plaintiff has submitted to this Court in response to Defendants' Motion is a memorandum of law from which this Court may not infer genuine issues of material fact. Accordingly, this Court finds that Plaintiff has failed to establish a genuine issue of material fact with respect to the execution of the foreclosure deed.

Plaintiff further attempts to create a genuine issue of material fact by averring that Defendants cannot demonstrate possession of the Note nor have they proven through any transaction that they have acquired ownership of the Note. The absence of identity of the note holder fails to establish a genuine issue of material fact sufficient to defeat Defendants' Motion for Summary Judgment. See Payette, 2011 WL 3794701, at *14. Moreover, Defendants have demonstrated, by affidavit admissible pursuant to Rule 56 and uncontested by Plaintiff, that at the time of the foreclosure sale LaSalle was the holder of the Note endorsed in blank. (Silva Aff. ¶¶ 7, 12.) This is sufficient to establish that no genuine issue of material fact exists with respect to the identity of the note holder.

Lastly, Plaintiff avers that Defendants failed to follow the statutory law pertaining to trusts, specifically, that LaSalle failed to record a copy of its appointment as trustee in accordance with § 18-2-9[6] and that MERS failed to follow the requirements of § 18-10-1. In addition, Plaintiff avers that the trust is not summarized and recorded in the land

[6] Section 18-2-9 provides for the recording of decrees of appointment. Since the trustees in this matter were not court-appointed, § 18-2-9 is inapplicable.

evidence records of the Town of Warwick in accordance with § 34-4-27. As a result, Plaintiff avers that LaSalle does not hold fee simple title to the Property.

Section 18-10-1 pertains to the authority to register a security in the name of a nominee. Section 18-10-1 provides that a bank or trustee "may" register any "notes, mortgages, or other securities" in the name of a nominee. Section 8-10-1. It is axiomatic that the use of the word "may" indicates a discretionary rather than a mandatory provision. Quality Court Condominium Ass'n v. Quality Hill Dev. Corp., 641 A.2d 746, 751 (R.I. 1994); see also Downey v. Carcieri, 996 A.2d 1144, 1151 (R.I. 2010). Therefore, it was not necessary for First Franklin, and the successors and assigns of First Franklin, as the original note holder, to register the Note and Mortgage in the name of MERS, and the successors and assigns of MERS, as First Franklin's nominee. Section 18-10-1 merely permits First Franklin, and the successors and assigns of First Franklin, to register the Note and Mortgage in the name of its nominee. Thus, Plaintiff has failed to establish a genuine issue of material fact with respect to this issue.

Finally, § 34-4-27 pertains to real property which is held in trust as well as to recorded instruments pertaining to real property. As set forth in § 34-4-27:

> "[p]roperty to be held in trust shall be conveyed to the trustees of the subject trust. . . . Any transfer or mortgage of trust property by the trustees shall require the recording of the trust instrument as amended or restated, or, in the alternative, the recording of the affidavit or memorandum of trust." Section 34-4-27.

In the instant matter, the property held in trust is not real property, but rather a pool of mortgages securing the debt owed. However, that pool of mortgages consists of recorded instruments pertaining to real property; thus, § 34-4-27 may require LaSalle to record a trust instrument or memorandum of trust. Nonetheless, § 34-4-27 does not provide that

failure to record a trust instrument upon transfer of trust property invalidates or voids that transfer. Accordingly, whether or not LaSalle failed to record a trust summary in accordance with § 34-4-27, LaSalle was authorized to exercise the statutory power of sale in the Mortgage and to foreclose on Plaintiff's Property.

IV

CONCLUSION

In sum, a review of the record in this case reveals no genuine issue of material fact for trial and that Defendants are entitled to judgment as a matter of law. Accordingly, Defendants' Motion for Summary Judgment is granted. Counsel for the prevailing party shall submit an Order in accordance with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Cover Sheet

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DATE DECISION FILED:	March 7, 2013
JUSTICE/MAGISTRATE:	Rubine, J.
ATTORNEYS:	
For Plaintiff:	Keven A. McKenna, Esq.
For Defendant:	Bethany M. Whitmarsh, Esq.