STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 8, 2013)

U.S. BANK NATIONAL ASSOCIATION AS SUCCESSOR TRUSTEE TO BANK OF AMERICA NATIONAL ASSOCIATION AS SUCCESSOR BY MERGER TO LASALLE BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR OWNIT MORTGAGE LOAN TRUST, OWNIT MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2006-4	:	**C.A. No. PC 2009-2776**
v.	:	
ODELISA N. ALFAIA AND RUI O. ALFAIA AND ASSET ACCEPTANCE, LLC	:	

DECISION

RUBINE, J. Plaintiff U.S. Bank National Association as Successor Trustee to Bank of America National Association as Successor by Merger to LaSalle Bank National Association, as Trustee for Ownit Mortgage Loan Trust, Ownit Mortgage Loan Asset-Backed Certificates, Series 2006-4 (Plaintiff) moves for summary judgment pursuant to Super. R. Civ. P. 56 seeking judgment in its favor as to all counts of the supplemental complaint (Supplemental Complaint) and as to all counts of Defendants Odelisa N. and Rui O. Alfaia's (the Alfaias') Counterclaim. Plaintiff's Supplemental Complaint seeks a declaration from this Court pursuant to G.L. 1956 § 9-30-1 et seq., establishing Plaintiff's rights with respect to certain real property located at 2650 Pawtucket Avenue, East Providence, Rhode Island (the Property). Plaintiff seeks a declaration that the subject Note and mortgage with respect to the Property are valid and binding upon the Alfaias

and that the mortgage may be immediately recorded, *nunc pro tunc*, thereby establishing Plaintiff's priority interest in the Property as of February 13, 2006. Additionally, Plaintiff demands damages, fees, and costs as a result of Defendant Odelisa N. Alfaia's (Ms. Alfaia's) alleged breach of contract and default of her obligations under the Note or, in the alternative, as a result of Ms. Alfaia's unjust enrichment. Finally, Plaintiff seeks judgment in its favor on a claim for book account relative to Ms. Alfaia's breach of contract, as well as attorneys' fees pursuant to § 9-1-45.

I

FACTS & TRAVEL

The record, for summary judgment purposes, reflects that on February 13, 2006, Ms. Alfaia executed the Note in favor of the original lender, Ownit Mortgage Solutions, Inc. (Ownit), for $304,000. (Janice Ledet Aff. ¶ 5; Pl.'s Mot. Summ. J. Ex. A; Supplemental Compl. Ex. A.) To secure the Note, the Alfaias contemporaneously executed a mortgage (Mortgage) on the Property. (Ledet Aff. ¶ 6; Pl.'s Mot. Summ. J. Ex. B.) Both the Note and the Mortgage define the lender as Ownit, and the Mortgage designates MERS as "mortgagee" and as "nominee for Lender and Lender's successors and assigns." (Pl.'s Mot. Summ. J. Exs. A, B.) Furthermore, 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 Mortgage Covenants upon the Statutory Condition and with the Statutory Power of Sale." (Pl.'s Mot. Summ. J. Ex. B at 2.) Soon after loan closing, through inadvertence or mistake, the Mortgage was incorrectly recorded in the Providence Land Evidence Records, rather than the East Providence Land Evidence Records. (Paul Myers Aff. ¶ 9;

Supplemental Compl. Ex. B.) However, an original certified copy of the incorrectly recorded Mortgage was subsequently recorded in the East Providence Land Evidence Records on June 25, 2012. (Myers Aff. ¶ 10.)

On May 4, 2009, MERS, as mortgagee and as nominee for Ownit, assigned the Mortgage to Plaintiff. (Pl.'s Mot. Summ. J. Ex. E.) The assignment was recorded in the Land Evidence Records of the City of East Providence. Id. Thereafter, on June 27, 2011, a confirmatory assignment of the Mortgage was executed and recorded to correct an alleged scrivener's error.[1] (Ledet Aff. ¶ 9; Pl.'s Mot. Summ. J. Ex. F.) Ms. Alfaia failed to make timely payments under the terms of the Note,[2] and as a result, Litton Loan Servicing, LP (Litton Loan), as servicer of the Mortgage loan, made demand upon Ms. Alfaia for payment of all sums due and owing under the Note. (Ledet Aff. ¶¶ 3, 14-16.) Ms. Alfaia has failed to cure her default. (Ledet Aff. ¶ 16.)

Without commencing foreclosure on the property, on May 14, 2009, Plaintiff filed the instant complaint seeking relief under the Uniform Declaratory Judgments Act to establish the validity and binding effect of the Note and Mortgage.[3] The original

[1] In the Ledet Affidavit that Plaintiff submitted in support of summary judgment, which attaches a copy of both the original assignment and the Confirmatory Assignment, Ms. Ledet stated that the Confirmatory Assignment was executed and recorded to correct a scrivener's error; however, the affidavit does not specify what error was corrected, and a comparison of the two documents shows that the substance of the two assignment instruments appears to be identical.

[2] Only Ms. Alfaia executed the Note as borrower; however, both Mr. and Mrs. Alfaia are identified as mortgagors under the Mortgage.

[3] This Court notes the well-established principle that in order for a court to exercise jurisdiction under the Uniform Declaratory Judgments Act, an actual justiciable controversy must exist. See Sullivan v. Chafee, 703 A.2d 748, 751 (R.I. 1997). "A declaratory-judgment action may not be used 'for the determination of abstract questions or the rendering of advisory opinions.'" Id. (quoting Lamb v. Perry, 101 R.I. 538, 542, 225 A.2d 521, 523 (1967)). Without the Plaintiff seeking to enforce the Mortgage by way of foreclosure, the declaratory relief that Plaintiff seeks in this case suggests a

complaint was filed only against Mr. and Mrs. Alfaia. Subsequently, Plaintiff sought leave to file the Supplemental Complaint, adding Asset Acceptance, LLC (Asset Acceptance) as an additional defendant in connection with the declaratory relief sought. Plaintiff claims that the original Mortgage was not recorded in the appropriate records of land evidence through inadvertence or mistake and that the original Note and Mortgage have been misplaced or otherwise cannot be located. (Supplemental Compl. ¶¶ 9, 11.) Thus, a portion of the declaratory relief sought by Plaintiff is a declaration that the Mortgage, which was eventually recorded in the City of East Providence on June 25, 2012, is entitled to priority as though properly recorded on February 13, 2006, the date of the mistaken recording in the City of Providence.

The Ledet affidavit refers to two title examinations of the Property showing no other mortgage attachments or liens were recorded in the Land Evidence Records of the City of East Providence prior to the recordation of the lis pendens on May 14, 2009. (Ledet Aff. ¶¶ 11-13.) The Supplemental Complaint recites that Asset Acceptance recorded an execution against Mr. Alfaia in the Land Evidence Records of the City of East Providence on February 11, 2011. (Supplemental Compl. ¶ 38.) Thus, if the original recording of the Mortgage was made or deemed to have been made on February 13, 2006, that Mortgage would be prior in time to the recording of the execution and would therefore be entitled to priority over said execution. If, however, the Mortgage is found to be recorded as of the date of its actual, late recording on June 25, 2012, without any *nunc pro tunc* declaration from this Court, the Asset Acceptance execution would take priority over the Mortgage or the assignment thereof, since it was recorded prior in

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request for an advisory opinion on the binding effect and priority of an unrecorded mortgage and the enforceability of a lost negotiable instrument.

time. In other words, without the requested declaration from this Court, the Mortgage would be subordinate to the execution.

Contemporaneously with the filing of the original Complaint, Plaintiff filed a lis pendens on the Property in the Land Evidence Records of the City of East Providence, thereby putting all third parties on notice of a dispute concerning title to the Property. (Ledet Aff. ¶ 10; Supplemental Compl. Ex. D.) Defendants responded to the original Complaint with a counterclaim that sets forth allegations of fraud, deceptive trade practices, and slander of title. Prior to the filing of the Supplemental Complaint, Plaintiff filed this Motion for Summary Judgment pursuant to Rule 56 averring that no genuine issues of material fact exist, and thus, that Plaintiff is entitled to judgment as a matter of law. Defendants Rui and Odelisa Alfaia objected to Plaintiff's Motion averring that genuine issues of material fact exist, and this Court took the matter under advisement.

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 Defendants, "'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

A

Declaratory Judgment

Plaintiff avers that even though the original Mortgage was not properly recorded in the East Providence Land Evidence Records, and even though the original Note and Mortgage were allegedly lost due to inadvertence or mistake, the Note and Mortgage are nevertheless valid and binding as to the parties to those instruments and as to all third parties having notice thereof. Therefore, according to Plaintiff, this Court should enter an order declaring the validity and binding effect of the Note and Mortgage and declaring that the Mortgage, which was properly recorded in the East Providence Land Evidence Records on June 25, 2012, be given priority as if recorded on February 13, 2006.

"When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." Section 9-30-11. Our

Supreme Court has held that "this provision is mandatory and that failure to join all persons who have an interest that would be affected by the declaration ordinarily is fatal to an action." Thompson v. Town Council of the Town of Westerly, 487 A.2d 498, 499 (R.I. 1985). An essential purpose of a declaratory judgment action is to "terminate the uncertainty or controversy giving rise to the proceeding." Section 9-30-6; see also Thompson, 487 A.2d at 500. Likewise, every party who has an interest that would be affected or prejudiced by a declaration is necessary and indispensable and that party must be joined for the action to survive. See Meyer v. City of Newport, 844 A.2d 148, 152 (R.I. 2004); see also § 9-30-11.

In this case, Asset Acceptance would surely be affected by the requested declaration or denial thereof. For that reason, it was properly joined as a party to the Supplemental Complaint. However, this Motion for summary disposition of the declaratory claim was filed before Asset Acceptance was joined as a party, and before it filed a responsive pleading. Accordingly, they received no notice of the filing of this Motion, nor were they afforded an opportunity to be heard in opposition. For that reason, it would be inappropriate to grant summary judgment to declare that Plaintiff's Mortgage has rights superior to the Asset Acceptance execution. Accordingly, Plaintiff's Motion for Summary Judgment with respect to Count I is denied, without prejudice to Plaintiff filing a new motion with respect to declaratory relief after Asset Acceptance is properly served and is given appropriate notice of this motion.

B

Breach of Contract/Book Account

In addition to the declaratory relief with respect to the Mortgage, Plaintiff seeks to enforce, by way of a claim for breach of contract and book account, the debt owed by Mrs. Alfaia as a result of her default and failure to pay the Note in accordance with its terms. To enforce the Note as an obligation under a negotiable instrument, the party seeking enforcement must be a "person entitled to enforcement" under § 6A-3-301 of the Uniform Commercial Code (UCC). Section 6A-3-301.[4] In order to obtain summary judgment on that count, Plaintiff must show the absence of dispute as to its status as a person entitled to enforce the Note either as a (i) holder of the instrument, (ii) a non-holder in possession, or (iii) a person not in possession of the instrument yet entitled to its enforcement under § 6A-3-309. See id. Pursuant to § 6A-3-309, Plaintiff must establish more than the simple fact that the instrument was lost or stolen, but, in addition, that: (i) Plaintiff "was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by [Plaintiff] or a lawful seizure, and (iii) [Plaintiff] cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process." Section 6A-3-309(a).

In the instant matter, the Supplemental Complaint alleges that "The original Note and Mortgage instruments have been misplaced or otherwise cannot be located."

[4] As a matter of law, the Court finds that the promissory note in question is a negotiable instrument as defined in § 6A-3-104, and therefore governed by the provisions of the UCC applicable to negotiable instruments. Section 6A-3-101 et seq.

(Supplemental Compl. ¶ 9.) Contrary to that allegation, Plaintiff submitted an affidavit, executed under oath and on personal knowledge, that the Note was endorsed in blank and currently held by Plaintiff. (Myers Aff. ¶ 6.) A copy of the Note attached to the Ledet Affidavit also reveals an endorsement in blank by the original lender, Ownit. (Ledet Aff. Ex. A.) Additionally, Ms. Alfaia states in her affidavit that "The note that has been provided to this Court is not a true and accurate copy of the note that [she] signed at closing." (Ms. Alfaia's Aff. ¶ 31.)

Therefore, it appears that the very conflict between the allegations in the pleading, and the statements in the parties' affidavits, create a genuine issue of fact which precludes summary judgment. By alleging that the original Note was misplaced or otherwise cannot be located, that allegation by Plaintiff is deemed conclusive of that fact as a judicial admission, and it cannot later be contradicted in an affidavit in support of summary judgment. See Ogden v. Rabinowitz, 86 R.I. 294, 300, 134 A.2d 416, 419 (1957). Thus, whether Plaintiff was in possession of the Note and entitled to enforce it when the loss occurred is a material fact relative to Plaintiff's status under § 6A-3-301 as a person entitled to enforce a lost note. Plaintiff, in its memorandum, states in conclusory fashion that it is entitled to enforce the Note as a holder of the Note endorsed in blank. This argument by Plaintiff is belied by its own allegation contained in the Supplemental Complaint that the instrument was lost. The Motion for Summary Judgment does not point to specific facts to determine Plaintiff's eligibility to enforce its rights in a lost or stolen instrument under § 6A-3-309. Simply reciting that the Note was lost does not state sufficient facts to qualify Plaintiff as a person entitled to enforce a lost instrument.

Moreover, the Court is unable to calculate the amount of the indebtedness under the Note. Although the Ledet Affidavit makes reference to an amount owed for accrued interest, the Court would only be guessing as to the default rate of interest set forth in the Note, in that the copy of the Note attached to the Ledet Affidavit is illegible and there is no reference in any affidavit as to the calculation of the amount of interest added. Also, the Ledet Affidavit includes a reference to $36,196.49, for other fees and costs of collection. Before granting summary judgment with respect to the amount of attorneys' fees, Plaintiff and the Court must be mindful of our Supreme Court's holding in Colonial Plumbing & Heating Supply Co. v. Contemporary Constr. Co., Inc., 464 A.2d 741, 743-44 (R.I. 1983). Our Supreme Court, in deciding whether a trial justice should determine the reasonableness of an attorney's fee without the aid of expert testimony or other specific factual evidence, has held that the determination of what constitutes a reasonable attorney's fee requires particular facts supported by affidavits or expert testimony on the issue. The requisite affidavits which would allow the Court to add to the judgment an amount for reasonable attorneys' fees as prayed have not been included in support of the Motion for Summary Judgment. Accordingly, Plaintiff's Motion is denied with respect to Counts II and III for breach of contract and book account.

C

Quantum Meruit/Unjust Enrichment

Plaintiff has further set forth, in the alternative to the breach of contract claim, a claim for unjust enrichment on the basis that Ms. Alfaia was enriched given her receipt of loan proceeds from the original lender, Ownit, and such enrichment was unjust unless she

now compensates Plaintiff, as the assignee of the original lender, for the loan proceeds, she received.

It is entirely appropriate for a party to plead and proceed to trial on the alternate theories of breach of contract and unjust enrichment. See Hasbro, Inc. v. Mikohn Gaming Corp., No. Civ. A. 05-106 S., 2006 WL 2035501, *8 (D.R.I. July 18, 2006) (citing Richmond Square Capital Corp. v. Ins. House, 744 A.2d 401, 402 (R.I. 1999)). However, where the relief a party seeks is governed by the terms of an express contract, relief under the doctrine of unjust enrichment is inappropriate. See Nash v. GMAC Mortg., LLC, No. CA 10-493 S., 2011 WL 2470645, *11 (D.R.I. May 18, 2011) (quoting Mehan v. Gershkoff, 102 R.I. 404, 409, 230 A.2d 867, 870 (R.I. 1967)).

In the instant case, although Plaintiff has failed to establish the absence of a genuine issue of material fact with respect to Plaintiff's breach of contract claim, this is not because there is no contract to enforce. Instead, this is because Plaintiff has not established that Plaintiff is the person entitled to enforce the Note under § 6A-3-301. The basis of Plaintiff's claim for relief under the doctrine of unjust enrichment is the disbursement of loan proceeds to Ms. Alfaia pursuant to the express terms of the Note. Therefore, because of the existence of the Note, as a contract subject to enforcement as against Ms. Alfaia, Plaintiff's claim for unjust enrichment fails. Accordingly, Plaintiff's Motion with respect to Count IV of the Supplemental Complaint is denied.

D

Attorneys' Fees

Lastly, Plaintiff asserts that it is entitled to an award of attorneys' fees pursuant to § 9-1-45. According to Plaintiff, Ms. Alfaia failed to pay as obligated under the Note, and Defendants filed frivolous defenses and counterclaims.

Section 9-1-45 provides:

> "The court may award a reasonable attorney's fee to the prevailing party in any civil action arising from a breach of contract in which the court: (1) Finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party . . . ." Section 9-1-45(1).

"Given a proper contractual, statutory, or other legal basis to do so, the award of attorney's fees rests within the sound discretion of the trial justice." Women's Dev. Corp. v. City of Central Falls, 764 A.2d 151, 162 (R.I. 2001).

It is not apparent that Defendants' counterclaim is completely devoid of a justiciable issue of law or fact. Specifically, Defendants have alleged claims of fraud, deceptive trade practices, and slander of title. Also, the contract claim has its basis in Plaintiff's enforcement of contractual rights in a negotiable instrument. As set forth supra, the issue of Plaintiff's status under §§ 6A-3-301 and 6A-3-309 is fraught with factual issues that remain to be proven by the Plaintiff. This Court is not convinced that Plaintiff has established undisputed facts adequate to support a motion for summary judgment, and similarly Plaintiff has failed to meet the standard for statutory attorneys' fees under § 9-1-45. Given the legally insufficient nature of Plaintiff's Motion for Summary Judgment, this Court cannot find Defendants' counterclaim to be frivolous or completely devoid of justiciable issues. See UXB Sand & Gravel, Inc. v. Rosenfeld

Concrete Corp., 641 A.2d 75, 80 (R.I. 1994) (the court can conclude that justiciable issues have been presented even when the evidence in support of those issues is eventually proven to be legally insufficient). Accordingly, Plaintiff is not entitled to attorneys' fees under § 9-1-45, and Plaintiff's Motion with respect to Count V is denied.

E

The Alfaias' Counterclaim

1.

Fraud

In their Counterclaim, Defendants set forth a count for fraud on the basis of Plaintiff's actions with respect to the Mortgage assignment. Defendants allege that Plaintiff attempted to obtain a property interest in Defendants' property, even though Plaintiff allegedly knew that the assignment of Mortgage was invalid by virtue of the lack of recordation of the original Mortgage. Defendants' allegations presume that an assignment of mortgage is insufficient if not recorded; however, under Rhode Island law, mortgages and assignments thereof are not required to be recorded. See Town of Johnston v. MERSCORP, Inc., No. 12-452-M, 2013 WL 3146771, *4-6 (D.R.I. June 21, 2013) (holding that Rhode Island law does not require the recording of all mortgages and assignments of mortgages). Recording merely establishes the binding effect of a mortgage on third parties. See id.

To prevail on a claim for fraud, a party must establish that an intentional misrepresentation was made by the other party, which misrepresentation she relied on, causing her damage. See Women's Dev. Corp. v. City of Central Falls, 764 A.2d 151, 160 (R.I. 2001) (citing Travers v. Spidell, 682 A.2d 471, 472-73 (R.I. 1996)). Here,

Defendants have not pled facts which would demonstrate how Defendants relied to their detriment on Plaintiff's alleged misrepresentation in the Land Evidence Records when Plaintiff failed to record the Mortgage assignment in the land evidence records of the proper municipality. See Countercl. ¶¶ 16-22. Defendants' affidavits also do not set forth facts which would demonstrate any damage suffered by Defendants in reliance on Plaintiff's tardy recordation of the Mortgage assignment or that Defendants' default was somehow caused by the Mortgage assignment. Accordingly, Plaintiff's Motion for Summary Judgment is granted with respect to dismissal of Count I of Defendants' Counterclaim.

2.

Deceptive Trade Practices

Defendants further set forth in Count II of their Counterclaim an allegation that Plaintiff has engaged in unlawful activity prohibited by the Rhode Island Deceptive Trade Practices Act. Section 6-13.1-2 provides that it is unlawful to engage in "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." While the definition of "trade" and "commerce" in the Act includes the advertising and sale of real property (see § 6-13.1-1(5)), the Act provides a right of action only to the Attorney General and to "[a]ny person who purchases or leases goods or services." Sections 6-13.1-5; 6-13.1-5.2; see also Scully Signal Co. v. Joyal, 881 F. Supp. 727, 741 (D.R.I. 1995). Some state deceptive trade practices acts define "goods" and "services" to include real estate, while the deceptive trade practices acts of other states, including that of Rhode Island, do not define those terms. See CCH State Unfair Trade Practices Law, § 1280 Goods or Services, 2010 WL 305441 (West 2013).

Likewise, some states include within the definition of a "consumer" entitled to protection under a state deceptive trade practices act a purchaser of real estate; however, no Rhode Island court has addressed this issue. There is a split of authority on this issue. See 63 A.L.R. 5th 1 (West 2013) (citing persuasive authority from other jurisdictions which define a "consumer" entitled to protection under state deceptive trade practices act as a purchaser of real estate as well as persuasive authority from jurisdictions that do not include a purchaser of real estate in such definition).

Regardless of whether Defendants, as mortgagors and purchasers of real estate, have standing to bring a private right of action under the Rhode Island Deceptive Trade Practices Act, Defendants have failed to plead facts which would bring them under the protection of the Act. In their Counterclaim, Defendants allege facts concerning the actions of MERS and Ownit, neither of which are plaintiffs in this action and therefore not counterclaim defendants. The only specific allegations against Plaintiff are those allegations concerning Plaintiff's recordation of the Mortgage assignment. It is not clear to this Court how the recordation of a Mortgage assignment could fall under "trade" or "commerce" and entitle Defendants to protection under the Act. Defendants set forth additional allegations in their affidavits concerning the closing of their Mortgage loan with respect to MERS and Ownit. However, as previously noted, MERS and Ownit are not parties to this action. Thus, Defendants have failed to adequately set forth a counterclaim under the Rhode Island Deceptive Trade Practices Act, and Plaintiff's Motion is granted dismissing this Count.

3.

Slander of Title

"Slander of title occurs when a party maliciously makes false statements about another party's ownership of real property, which then results in the owner suffering a pecuniary loss." Keystone Elevator Co., Inc. v. Johnson & Wales Univ., 850 A.2d 912, 923 (R.I. 2004) (citing DeLeo v. Anthony A. Nunes, Inc., 546 A.2d 1344, 1346 (R.I. 1988)). Our Supreme Court has held that malice may be inferred "when a party files a notice of lis pendens absent a good-faith belief in his claim to title of the property." Id. However, the mere assertion of an unfounded claim to property does not establish a presumption of malice. See Hopkins v. Drowne, 21 R.I. 20, 23, 41 A. 567, 568 (R.I. 1898). It must be proven that the party alleged to have slandered the title of another could not have reasonably believed in the existence of the right claimed. See id. at 568-69.

Here, this Court is not convinced that as a matter of fact or law that Plaintiff recorded the Mortgage assignment and lis pendens in bad faith. While this Court has found that Plaintiff is not entitled to summary judgment on its contract claim, this Court has also found that Defendants have failed to plead facts that would establish the existence of fraudulent or malicious activity by Plaintiff. Accordingly, Plaintiff's Motion is granted with respect to Count III of Defendants' Counterclaim.

IV

CONCLUSION

For the reasons set forth herein, Plaintiff's Motion for Summary Judgment is denied with respect to Counts I-V of the Supplemental Complaint and granted with respect to Counts I-III of Defendants' Counterclaim.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	U.S. Bank National Association as Successor Trustee to Bank of America National Association as Successor by Merger to LaSalle Bank National Association, as Trustee for Ownit Mortgage Loan Trust, Ownit Mortgage Loan Asset-Backed Certificates, Series 2006-4 v. Odelisa N. Alfaia and Rui O. Alfaia and Asset Acceptance, LLC
CASE NO:	PC 2009-2776
COURT:	Providence County Superior Court
DATE DECISION FILED:	August 8, 2013
JUSTICE/MAGISTRATE:	Rubine, J.
ATTORNEYS:	
For Plaintiff:	Stephen A. Izzi, Esq. Michael P. Robinson, Esq. Rene Picket, Esq.
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