STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 18, 2013)

EILEEN VIEIRA	:	
	:	
v.	:	**C.A. No. PC 2009-4334**
	:	
GE MONEY BANK; WMC MORTGAGE CORP.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; ARCH BAY HOLDINGS, LLC	:	

DECISION

RUBINE, J. Defendants Mortgage Electronic Registration Systems, Inc. (MERS) and Arch Bay Holdings, LLC (Arch Bay) (collectively, "Defendants")[1] move for summary judgment pursuant to Super. R. Civ. P. 56. Plaintiff Eileen Vieira filed a verified complaint (Verified Complaint) seeking a declaration from this Court that the assignment of her mortgage was void and that none of the Defendants have an interest in certain real property located at 888 Chopmist Road, Scituate, Rhode Island. Plaintiff also sought injunctive relief to stay the previously pending foreclosure sale of the Property. The gravamen of Plaintiff's Verified Complaint challenges the legal effect of the assignment of her mortgage and MERS' authority under Rhode Island law to act as a mortgagee and nominee of the lender as defined in the mortgage contract. Finally, Plaintiff avers that notice of the previously pending foreclosure sale was defective.

[1] Defendants GE Money Bank and WMC Mortgage Corp. are not parties to this Motion.

I

FACTS & TRAVEL

The record, for summary judgment purposes, reflects that on February 2, 2007, Plaintiff executed a note (Note) in favor of lender GE Money Bank for $272,000. (McCloskey Aff.[2] ¶ 3; Defs.' Mot. Summ. J. Ex. A.) GE Money Bank endorsed the Note in blank, and the Note was subsequently transferred to Arch Bay, which is the current holder of the Note. (McCloskey Aff. ¶¶ 4, 6; Defs.' Mot. Summ. J. Ex. A.) Contemporaneously with the execution of the Note, Plaintiff executed a mortgage (Mortgage) on the Property to secure the Note. (McCloskey Aff. ¶¶ 3, 5; Defs.' Mot. Summ. J. Ex. B; Pl.'s Mem. in Support of Obj. Ex. A.) The Mortgage designates GE Money Bank as the "Lender" and further designates MERS as the "mortgagee" as well as the "nominee for Lender and Lender's successors and assigns." (Pl.'s Mem. in Support of Obj. Ex. A at 1.) In addition, 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." Id. at 2. 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. at 3.

[2] Defendants submitted two affidavits from Mark McCloskey, which are substantively similar. For the purposes of this Decision, this Court will refer only to the second McCloskey affidavit dated October 18, 2012, and attached as Exhibit B to Defendants' November 19, 2012 Motion for Leave to File a Supplemental Affidavit in Support of Summary Judgment.

On February 9, 2007, the Mortgage was recorded. See Pl.'s Mem. in Support of Obj. Ex. B; Defs.' Mot. Summ. J. Ex. C.

On August 22, 2008, MERS, as mortgagee and as nominee of GE Money Bank, assigned the Mortgage to Arch Bay – Series 2008B (Arch Bay). (McCloskey Aff. ¶ 7; Pl.'s Mem. in Support of Obj. Ex. B; Defs.' Mot. Summ. J. Ex. C.) Thereafter, Plaintiff defaulted on her monthly Mortgage payments, and the last payment that Plaintiff made on her Mortgage was posted on January 1, 2009. (McCloskey Aff. ¶¶ 8-9.) Plaintiff was sent notice of her default and the possibility of the commencement of foreclosure proceedings if she failed to cure her default. (McCloskey Aff. ¶ 10.) Plaintiff did not respond to that letter or cure her default, and thus, foreclosure proceedings commenced. (McCloskey Aff. ¶¶ 10-11.) Arch Bay, through its attorney, sent Plaintiff notice of the foreclosure sale, which was originally scheduled for August 6, 2009; however, that foreclosure sale did not go forward. (McCloskey Aff. ¶¶ 11-12; Defs.' Mot. Summ. J. Ex. D, E.)

On July 31, 2009, Plaintiff filed the instant Verified Complaint and the Superior Court issued a Temporary Restraining Order enjoining the scheduled foreclosure sale. Nevertheless, this Court later vacated the Temporary Restraining Order, and Arch Bay, through its attorneys, rescheduled another foreclosure sale. (McCloskey Aff. ¶ 14.) Again, Arch Bay, through its attorneys, sent Plaintiff notice of the foreclosure sale rescheduled for January 8, 2010. (McCloskey Aff. ¶ 14; Defs.' Mot. Summ. J. Ex. F, G.) On January 8, 2010, Arch Bay conducted a foreclosure sale of the Property at which Arch Bay was the highest bidder, and Arch Bay later executed and recorded a foreclosure deed in its name. (McCloskey Aff. ¶ 15; Defs.' Mot. Summ. J. Ex. H.)

Defendants later filed this Motion for Summary Judgment averring that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. Plaintiff objected to Defendants' Motion claiming that genuine issues of material fact exist. After some discussion among the parties concerning which affidavits were admissible for purposes of Rule 56, the parties filed a written stipulation agreeing that Defendants could submit the second McCloskey Affidavit and that it may be considered as part of the record for summary judgment purposes. This Court has had the opportunity to review the parties' memoranda and supporting affidavits.

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 Mortg. 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

A

MERS Authority to Act as Mortgagee and Nominee

Plaintiff's argument concerning MERS' authority under Rhode Island law to act as mortgagee and nominee of the lender as defined in the Mortgage has been conclusively resolved by the recent decision of the Rhode Island Supreme Court in Bucci v. Lehman Bros. Bank, FSB. See No. 2010-146-A., 2013 WL 1498655 (R.I. April 12, 2013). In Bucci, the Supreme Court affirmed the Superior Court's holding that MERS has the contractual authority to act as mortgagee and to exercise the statutory power of sale. See id. at *8-9. Further, the Supreme Court held that MERS may act as nominee of the lender as defined in a mortgage and that "the designation of MERS as grantee of the mortgage, as nominee for the lender, was not a clear and certain violation of [Rhode Island statutory law]. See id. at *11-12 (internal quotation marks omitted). Therefore, Plaintiff's claims concerning MERS' authority to act as mortgagee and nominee of the lender fail to establish a genuine issue of material fact and they no longer present a viable legal conclusion.

Moreover, although Plaintiff does not make any allegations concerning a disconnect between the Note and Mortgage in her Verified Complaint, Plaintiff's counsel

argues in legal memoranda submitted in objection to Defendants' Motion that any assignment of the Mortgage is defective as MERS does not hold the Note. The Rhode Island Supreme Court in Bucci explicitly resolved this issue holding that MERS, as mortgagee and nominee of the lender, may enforce the mortgage and act as an agent of the owner of the note. See id. at *16. The Supreme Court cited the First Circuit's analysis of this issue with approval finding that MERS' role as mortgagee and as nominee for the note holder fits "comfortably within the law of our state." Id. at 15. Therefore, Plaintiff's argument concerning MERS' inability to hold the Note, and any subsequent searation of the Note and Mortgage as a result of the Mortgage assignment, is no longer a viable legal position given the recent decision in Bucci.

B

Validity of the Mortgage Assignment

The gravamen of Plaintiff's Verified Complaint[3] challenges the legal effect of the assignment of her Mortgage from MERS to Arch Bay. Plaintiff contends that the Mortgage assignment is ineffective due to MERS' invalid status as mortgagee and nominee.[4] Although not expressly addressed by the Supreme Court in Bucci, the issue of

[3] This Court notes that Plaintiff's Verified Complaint does not confirm that the statements made therein are made on personal knowledge, but rather Plaintiff verifies that the statements are made "to the best of [her] knowledge." Thus, Plaintiff's Verified Complaint is not the functional equivalent of an affidavit for summary judgment purposes. See Sheinkopf v. Stone, 927 F.2d 1259, 1262-63 (1st Cir. 1991). Nevertheless, even if this Court considers Plaintiff's Verified Complaint as an affidavit in opposition to summary judgment, Plaintiff fails to establish thereby a genuine issue of material fact.

[4] In her legal memorandum in support of her objection to Defendants' Motion, Plaintiff challenges the authority of the individual who executed the assignment on the basis that that individual is a "robo-signer"; however, Plaintiff failed to raise this allegation in her Verified Complaint. Thus, this argument is not properly before the Court, and even if it were, this Court finds that this issue has already been resolved on numerous occasions in

the legal effect of a mortgage assignment was implicitly resolved through the Bucci Court's discussion of Eaton v. Fed. Nat'l Mortg. Assoc., 969 N.E.2d 1118 (Mass. 2012).

In Eaton, the Supreme Judicial Court of Massachusetts held that the foreclosing mortgagee—which in that case was an assignee of MERS—must hold the mortgage and either hold the note or must be acting on behalf of the note holder in order to exercise the statutory power of sale granted in the mortgage. See Eaton, 969 N.E.2d at 1131, 1134. Our Supreme Court cited that case with approval and found "striking similarities" between Eaton and the facts presented in Bucci concluding that "we interpret the term 'mortgagee' in our statutes in a similar fashion as did the Supreme Judicial Court of Massachusetts." Bucci, No. 2010-146-A., 2013 WL 1498655, at *14. Furthermore, it follows from the conclusion that MERS may lawfully act as mortgagee and nominee of the lender and that MERS in that capacity may also lawfully assign its interest in a mortgage and its right to exercise the statutory power of sale. Therefore, once faced with the facts presented in Eaton where an assignee of MERS attempts to exercise the statutory power of sale, it is likely that our Supreme Court will find a duly executed assignment[5] of the mortgage by MERS valid. Finally, the legal issue of MERS' authority

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a manner inconsistent with the position that Plaintiff takes herein. See Payette v. Mortg. Elec. Registration Sys., No. PC 2009-5875, 2011 WL 3794701 (R.I. Super. Aug. 22, 2011) (Rubine, J.); see also Rutter v. Mortg. Elec. Registration Sys., Inc., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012 (R.I. Super. Mar. 12, 2012) (Silverstein, J.); Kriegel v. Mortg. Elec. Registration Sys., Inc., No. PC 2010-7099, 2011 WL 4947398 (R.I. Super. Oct. 13, 2011) (Rubine, J.) Furthermore, Plaintiff's affidavit of John L. O'Brien, which Plaintiff submitted in order to establish that her claim of "robo-signing" involves a genuine issue of material fact, is inadmissible for failure to comply with the requirement pursuant to Rule 56 that affidavits be based on personal knowledge.

[5] An individual who swears before a notary to have the authority to act on behalf of a corporate grantor or assignor is sufficient for title purposes to presumptively establish that relationship. See Butler v. Encyclopedia Brittanica, Inc., 41 F.3d 285, 294-95 (7th Cir. 1994) (citing 1 Am. Jur. 2d Acknowledgments § 83 (1994)); see also 91 Am. Jur.

to execute a Mortgage assignment has previously been decided by this Court in a manner contrary to Plaintiff's position. See Payette, No. PC 2009-5875, 2011 WL 3794701; see also Rutter v. Mortg. Elec. Registration Sys., Inc., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012 (R.I. Super. Mar. 12, 2012) (Silverstein, J.); Kriegel v. Mortg. Elec. Registration Sys., Inc., No. PC 2010-7099, 2011 WL 4947398 (R.I. Super. Oct. 13, 2011) (Rubine, J.). Accordingly, this Court finds that Plaintiff has failed to establish a genuine issue of material fact concerning the Mortgage assignment, and has failed to establish that based on the undisputed facts as established by the movants, that the Defendants are not entitled to judgment as a matter of law.

C

Notice of the Foreclosure Sale

Plaintiff further avers in her Verified Complaint that notice of the originally scheduled foreclosure sale was defective for failure to name the holder of the Note and Mortgage in the notice. However, given that the original foreclosure sale was cancelled and rescheduled, Plaintiff's argument concerning notice of the original foreclosure sale is moot. Plaintiff does not set forth any claims or evidence of defective notice concerning the rescheduled foreclosure sale of the Property. Therefore, this Court finds that Plaintiff has failed to establish a genuine issue of material fact with respect to notice of the foreclosure sale. The propriety of the notice provided to the mortgagor has been established as an undisputed fact by the uncontested affidavit of McCloskey which

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Proof of Facts 3d 345 Acknowledgment of Real Property Instruments and Other Acknowledgments § 8 (2012); Rhode Island Title Standard No. 5.3. If such person falsely swears to a notary, such false swearing in Rhode Island carries criminal penalties, but does not otherwise affect the presumptive validity of the assignment. See G.L. 1956 § 11-33-4.

Defendants filed in support of the motion for summary judgment, which affidavit attests to the notice given to Plaintiff.

IV

CONCLUSION

Based on the foregoing, Defendants' Motion for Summary Judgment is granted. Plaintiff's claims denied and dismissed. Judgment entered for Defendants MERS and Arch Bay.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Eileen Vieira v. GE Money Bank; WMC Mortgage Corp.; Mortgage Electronic Registration Systems, Inc.; Arch Bay Holdings, LLC
CASE NO:	PC2009-4334
COURT:	Filed in Kent County Superior Court
DATE DECISION FILED:	April 18, 2013
JUSTICE/MAGISTRATE:	Rubine, J.
ATTORNEYS:	
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