STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: March 13, 2013)

ALAN SMITH	:	
	:	
v.	:	**C.A. No. PC 2010-0431**
	:	
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; FIELDSTONE MORTGAGE COMPANY; US BANK NATIONAL ASSOCIATION; CHASE HOME FINANCE LLC; AURORA LOAN SERVICES	:	

DECISION

RUBINE, J. Defendants Mortgage Electronic Registration Systems, Inc. ("MERS"), US Bank National Association ("US Bank"), and Aurora Loan Services ("Aurora") (collectively, "Defendants")[1] move for summary judgment pursuant to Super. R. Civ. P. 56. Plaintiff filed a declaratory judgment action petitioning this Court to declare the foreclosure sale of his property at 70-72 Robin Street, Providence, Rhode Island (the "Property") void and to quiet his title to the Property. The verified complaint ("Complaint") alleges that due to purported defects in the foreclosure process, the foreclosing party, MERS, had no right to exercise the statutory power of sale under Rhode Island law; thus, rendering the foreclosure sale a nullity.

[1] Defendant Fieldstone Mortgage Company is not a party to this Motion. Defendant Chase Home Finance LLC was voluntarily dismissed with prejudice.

I

FACTS & TRAVEL

The record reflects that on March 23, 2005, Plaintiff executed an adjustable rate note ("Note") in favor of lender Fieldstone Mortgage Company ("Fieldstone") for $212,000. (Defs.' Mot. Summ. J. Ex. B.) Fieldstone thereafter endorsed the Note in blank, and subsequently transferred the Note to Aurora. (Santoro Aff. ¶¶ 6, 12.)

To secure the Note, Plaintiff contemporaneously executed a mortgage ("Mortgage") on the Property. The Mortgage designates Fieldstone as the "Lender" and further designates MERS as the "mortgagee" as well as the "nominee for [Fieldstone] and [Fieldstone's] successors and assigns." (Compl. Ex. 2 at 1-2.) The plain, unambiguous language of the Mortgage provides that "Borrower does hereby mortgage, grant and convey to MERS, (solely as nominee for [Fieldstone] and [Fieldstone'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 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 [Fieldstone] and [Fieldstone'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 [Fieldstone]." Id.

The Mortgage was recorded in the land evidence records of the City of Providence. (Defs.' Mot. Summ. J. Ex. A.)

On April 5, 2006, MERS, as mortgagee and as nominee for Fieldstone, assigned the Mortgage interest to US Bank. (Compl. Ex. 4.) The assignment was recorded in the

land evidence records of the City of Providence. Id. Thereafter, on August 5, 2006, Aurora became the servicer of the Mortgage. (Santoro Aff. ¶ 8.) Plaintiff subsequently defaulted on his monthly mortgage payments, and therefore, Plaintiff and Aurora executed a Special Forbearance Agreement ("Agreement") whereby Plaintiff acknowledged the debt owed and agreed to make modified monthly payments to Aurora under the terms of the Note and Mortgage. See Santoro Aff. ¶ 9; Defs.' Mot. Summ. J. Ex. D.

On October 24, 2006, US Bank, as assignee of MERS, and also as mortgagee, assigned the Mortgage interest back to MERS. (Compl. Ex. 5.) Thus, MERS once again became the mortgagee possessing the right "to exercise any or all of those interests [granted by Borrower in the Mortgage], including, but not limited to, the right to foreclose and sell the Property." (Compl. Ex. 2 at 3.) In or about April 2007, Plaintiff failed to make timely payments pursuant to the Agreement and committed a default; thus, MERS, as mortgagee, commenced foreclosure proceedings. (Santoro Aff. ¶¶ 11, 14-15.)

Thereafter, on July 30, 2007, Plaintiff filed his first Chapter 13 Voluntary Petition in the United States Bankruptcy Court for the District of Rhode Island. See In re: Alan Mark Smith, No. 1:07-BK-11428 (Bankr. D.R.I. March 25, 2008) (dismissed). As a result of this filing, Defendants cancelled the foreclosure sale that was scheduled for August 1, 2007.

On March 14, 2008, the Bankruptcy Court entered a consent order granting MERS relief from stay and leave to foreclose the Mortgage. See Consent Order Granting Motion for Relief From Stay, In re: Alan Mark Smith, No. 1:07-BK-11428. Then, as a result of Plaintiff's failure to keep up with his Chapter 13 Plan payments, the Bankruptcy

Court entered an order discharging the Chapter 13 Trustee, thereby closing the case on June 19, 2008. In re: Alan Mark Smith, No. 1:07-BK-11428. This prompted Plaintiff to file another Chapter 13 Voluntary Petition, which was also subsequently dismissed on October 28, 2008, and closed on November 10, 2008, after Plaintiff failed to file required documents. See In re: Alan Smith, No. 1:08-BK-13267 (Bankr. D.R.I. Oct. 28, 2008) (dismissed). Plaintiff's filing of a second Voluntary Petition for bankruptcy forced MERS to cancel another foreclosure sale scheduled for October 22, 2008. Finally, on February 19, 2009, Plaintiff filed a Chapter 7 Voluntary Petition in Bankruptcy Court. That petition was also subsequently dismissed on February 27, 2009, and closed on March 10, 2009, for Plaintiff's failure to file required documents. See In re: Alan Smith, No. 1:09-BK-10570 (Bankr. D.R.I. Feb. 27, 2009) (dismissed).

MERS, as mortgagee possessing the right to exercise the statutory power of sale, foreclosed on the Property on February 20, 2009. (Santoro Aff. ¶ 11.) Aurora prevailed as the successful bidder at the foreclosure sale. Id. At the time of the foreclosure sale, Plaintiff was delinquent as of his April 1, 2007, payment. Id. at ¶ 15. MERS thereafter conveyed title to Aurora through the execution and recordation of a foreclosure deed. (Santoro Aff. ¶ 13; Defs.' Mot. Summ. J. Ex. F.)

On January 8, 2010, Plaintiff filed a *lis pendens* on the Property in the land evidence records for the City of Providence, thereby putting all third parties on notice of a dispute of title to the Property.[2] Plaintiff thereafter filed the instant Complaint seeking

[2] As a matter of law, one cannot legitimately record a *lis pendens* prior to filing a complaint challenging title to real property as the primary purpose of the notice of *lis pendens* is to give notice to all potential buyers of a pending lawsuit concerning the property. See Darr v. Muratore, 143 B.R. 973, 979 (D.R.I. 1992); see also Montecalvo v.

a declaratory judgment quieting title to the Property in his name. Defendants then filed this Motion for Summary Judgment. Plaintiff objected to Defendants' Motion averring that there are genuine issues of material fact, and therefore, Defendants are not entitled to judgment as a matter of law.

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 &

Mandarelli, 682 A.2d 918, 924 (R.I. 1996). Thus, there can be no notice of a pending lawsuit if no lawsuit has been filed.

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

Res Judicata

Defendants aver that they are entitled to judgment as a matter of law as Plaintiff's claims are barred by the doctrine of res judicata given Plaintiff's multiple appearances in the United States Bankruptcy Court for the District of Rhode Island. Specifically, Defendants rely on the consent order granting MERS relief from automatic stay and leave to foreclose the Mortgage. See Consent Order Granting Motion for Relief From Stay, In re: Alan Mark Smith, No. 1:07-BK-11428.

"Res judicata, or claim preclusion, prohibits the relitigation of all issues that were tried *or might have been tried* in the original suit." Bossian v. Anderson, 991 A.2d 1025, 1027 (R.I. 2010) (emphasis added) (internal quotation marks omitted). More specifically, "[c]laim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." Plunkett v. State, 869 A.2d 1185, 1188 (R.I. 2005). "[T]he doctrine of res judicata serves as an absolute bar to a second cause of action where there exists identity of the parties, identity of issues, and finality of judgment in an earlier action." Bossian, 991 A.2d at 1027.

A

Identity of Parties

All three Bankruptcy Court actions were filed by Plaintiff and centered on

Plaintiff's financial condition and default on his obligations. MERS was a secured creditor as the loan was collateralized by the subject property when creditor (MERS) sought relief in the first Bankruptcy Court action. Ultimately, MERS received the relief requested from the Bankruptcy Court in the form of a consent order granting MERS relief from stay and leave to foreclose the Mortgage. In Rhode Island, the application of res judicata does not require the identical arrangement of identical parties. Rather, all that is required for res judicata to have effect in a subsequent action is that the parties to the second action be the same as or in privity with the parties to the first action. See Duffy v. Milder, 896 A.2d 27, 36 (R.I. 2006). Moreover, "[p]arties are in privity when there is a commonality of interest between the [] entities and when they sufficiently represent each other's interests." Id. (internal quotation marks omitted).

Here, Defendant MERS was a party to the Bankruptcy Court action and MERS received relief in that action in the form of a consent order. Additionally, Defendants US Bank and Aurora are parties in privity with MERS given that both Defendants share a common interest in this Court's determination that the Mortgage assignments and subsequent foreclosure sale were valid. Further, all three Defendants seek to preclude Plaintiff, the debtor in the prior Bankruptcy Court actions, from relitigating his claim against the propriety of the same foreclosure sale that was permitted to go forward after entry of the consent order by the Bankruptcy Court. Thus, the Court finds that identity of parties exists.

B

Identity of Issues

Our Supreme Court follows the "transactional" rule to discern the identity of

issues between the original action and the action sought to be precluded by res judicata. Bossian, 991 A.2d at 1027. "The transactional rule provides that all claims arising from the same transaction or series of transactions which *could have properly been raised* in a previous litigation are barred from a later action." Id. (emphasis added) (internal quotation marks omitted). Further, a transaction is comprised of facts that are related in terms of "time, space, origin, or motivation" and that form a convenient trial unit reflecting the parties' expectations. Plunkett, 869 A.2d at 1189 (quoting Restatement (Second) of Judgments § 24).

In the present matter, the facts giving rise to Plaintiff's claim are similar facts that were involved in Plaintiff's prior Bankruptcy Court action wherein MERS was granted relief from the automatic stay and leave to foreclose the Mortgage by consent order. The making of the Note and Mortgage contracts, Plaintiff's liabilities under the Agreement, and Plaintiff's default precipitated both the Bankruptcy Court actions and this matter. Likewise, in the first Bankruptcy Court matter, Plaintiff objected to MERS' Motion for relief from the automatic stay and leave to foreclose the Mortgage. See Debtor's Obj. Mot. Relief from Stay, In re: Alan Mark Smith, No. 1:07-BK-11428. In that objection, Plaintiff could have also properly raised his present objections to the validity of MERS' authority to foreclose the Mortgage; however, Plaintiff neglected to do so. See Bossian, 991 A.2d at 1027. Moreover, Plaintiff filed two additional actions in the Bankruptcy Court which had the effect of canceling two scheduled foreclosure sales of the Property. This Court is satisfied that Plaintiff had three opportunities to be heard, in the forum of Plaintiff's own choosing, on his claims of defective title and the validity of MERS' authority to foreclose; thus, an identity of issues exists.

C

Finality of Judgment

The third element of res judicata is also satisfied because the consent order entered by the Bankruptcy Court had the effect of producing a final judgment which granted MERS relief from stay and leave to foreclose the Mortgage. Additionally, Plaintiff's two subsequent Bankruptcy Court actions were dismissed following Plaintiff's failure to file the required documentation, and there is no evidence that any of these Bankruptcy Court actions have been appealed.

Plaintiff argues that no finality of judgment exists which would justify the application of res judicata focusing primarily on Grella v. Salem Five Cent Savings Bank; however, the holding in that case is inconsistent with the instant matter. See 42 F.3d 26 (1st Cir. 1994). In Grella, the First Circuit held that a hearing on a motion for relief from the automatic stay pursuant to 11 U.S.C. § 362 of the Bankruptcy Code does not have preclusive effect with respect to a creditor's counterclaim in a subsequent proceeding. See id. at 28, 35. Notably, the court distinguished Grella from another Bankruptcy Court case, In re Monument Record Corp., 71 B.R. 853, 857-58 (Bankr. M.D. Tenn. 1987), wherein a consent agreement was entered into by the parties granting the creditor's motion for relief from stay. See id. at 35. The court in Monument Record held that the consent agreement was deemed to have res judicata effect. See 71 B.R. at 857-58 (finding that the "modern general rule [is] that a consent judgment merits res judicata effect"). The Grella court found the existence of a consent agreement alone to render In re Monument Record Corp. inapposite to the issue of whether a judgment entered after hearing on a motion for relief from stay has res judicata effect. See Grella, 42 F.3d at 35.

Hence, Grella is unconvincing as precedent in the instant matter where no hearing on the motion for relief from stay was held and relief from stay was instead granted by consent order.

Consent orders or judgments ordinarily receive res judicata effect. See 18A Wright & Miller, Federal Practice and Procedure, Juris. 2d § 4443 (West 2012); see also Arizona v. California, 530 U.S. 392, 414 (2000); United States v. Int'l Bldg. Co., 345 U.S. 502, 505-06 (1953). An exception to this general rule applies when there is an express reservation of rights included in the consent order or decree. See 21A Federal Procedure L. Ed. § 51:251 (West 2012).

United States v. Int'l Bldg. Co. is particularly illustrative of the way in which consent judgments have preclusive effect. See generally, 345 U.S. 502. In that case, the Commissioner of Internal Revenue assessed deficiencies against a taxpayer for the years 1933, 1938, and 1939. See id. at 503. The taxpayer later filed for bankruptcy, and this resulted in the taxpayer and the Commissioner filing stipulations in the pending Tax Court matter that there was no deficiency for the subject tax years. Id. at 503-04. The Tax Court entered a formal decision to that effect. Id. Nevertheless, the Commissioner later assessed deficiencies against the taxpayer for the years 1943, 1944, and 1945. Id. at 504. The United States Supreme Court held that the Tax Court's judgment entered reflecting the stipulation of the parties was res judicata with respect to the tax years 1933, 1938, and 1939. Id. at 505-06. However, that judgment did not have issue preclusive effect such that the taxpayer would be barred from raising the similar issues in objection to the deficiencies determined against him in 1943, 1944, and 1945. Id.

In the instant matter, Plaintiff seeks to invalidate the foreclosure of the same

Mortgage which was in effect at the time of all of his previous Bankruptcy Court actions. Further, in each Bankruptcy Court action—the forum of Plaintiff's choosing—Plaintiff had the opportunity to challenge MERS' authority to foreclose his Mortgage, but Plaintiff failed to do so, instead resolving the matter by consent order. Moreover, despite the express reservation in the consent order of Plaintiff's right to cure the entire post-petition arrearage on or before April 26, 2008, the consent order became a final judgment once Plaintiff failed to avail himself of the specific right reserved. See Consent Order Granting Motion for Relief From Stay, In re: Alan Mark Smith, No. 1:07-BK-11428; see also 21A Federal Procedure L. Ed. § 51:251. Thus, this Court finds that the Bankruptcy Court's order entered by consent was a final judgment that carries preclusive effect and that application of res judicata against Plaintiff is appropriate to bar the claims alleged in the instant matter.

In view of this conclusion, it becomes unnecessary to consider Plaintiff's remaining contentions that genuine issues of material fact exist.

IV

CONCLUSION

Plaintiff's claims are precluded as a matter of law pursuant to the doctrine of res judicata. Thus, Defendants are entitled to judgment as a matter of law. Defendants' Motion for Summary Judgment is granted. Counsel for the prevailing party shall submit an appropriate Order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	Alan Smith v. Mortgage Electronic Registration Systems, Inc.; Fieldstone Mortgage Company; US Bank National Association; Chase Home Financing LLC; Aurora Loan Services
CASE NO:	PC 2010-0431
COURT:	Filed in Kent County Superior Court
DATE DECISION FILED:	March 13, 2013
JUSTICE/MAGISTRATE:	Rubine, J.
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