

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: July 23, 2013)

ANTIMO MASTROSTEFANO, III :  
v. :  
MORTGAGE ELECTRONIC :  
REGISTRATION SYSTEMS, INC.; :  
DREAM HOUSE MORTGAGE :  
CORPORATION; U.S. BANK :  
NATIONAL ASSOCIATION :

C.A. No. PC 2010-1539

DECISION

RUBINE, J. Defendants U.S. Bank National Association, as Trustee for Terwin Mortgage Trust 2005-16HE, Asset-Back Certificates, Series 2005-16HE, without Recourse (US Bank) and Mortgage Electronic Registration Systems, Inc. (MERS) (collectively, Defendants) move this Court for summary judgment pursuant to Super. R. Civ. P. 56.<sup>1</sup> Plaintiff Antimo Mastrostefano, III filed a verified complaint (Verified Complaint) seeking declaratory and injunctive relief and to quiet title to certain real property located at 182 Chestnut Hill Road, Glocester, Rhode Island (the Property). The gravamen of Plaintiff's Verified Complaint challenges the foreclosure sale of the Property, alleging that Defendant US Bank, the foreclosing party, failed to possess the right to exercise the statutory power of sale; thus, rendering the foreclosure sale a nullity.

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<sup>1</sup> Dream House Mortgage Corporation is not a party to this Motion.

## I

### FACTS & TRAVEL

The undisputed facts as set forth in Defendants' Affidavit and the parties' Stipulation and Pre-Trial Order are as follows. On August 1, 2005, Plaintiff executed a note (Note) in favor of the original lender, Dream House Mortgage Corporation (Dream House) for \$316,000. (Stipulation and Pre-Trial Order ¶ 4; Ex. C.) The Note was endorsed in blank by Dream House. Id. at ¶ 5; Ex. C. On that same date, Plaintiff executed a mortgage (Mortgage) to secure the Note. Id. at ¶ 3; Ex. B. Both the Note and Mortgage define the Lender as Dream House, and the Mortgage defines MERS as "mortgagee" and "nominee for Lender and Lender's successors and assigns." Id. Further, 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 Ex. B. 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 of the Town of Gloucester. (Stipulation and Pre-Trial Order ¶ 3; Ex. B.)

Soon after the execution of the Note and Mortgage, the Note was transferred to Deutsche Bank National Trust Company (Deutsche Bank),<sup>2</sup> which physically held the Note as document custodian on behalf of US Bank—the party entitled to payment under

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<sup>2</sup> Deutsche Bank is not a named defendant in this action.

the Note pursuant to the terms of a pooling and servicing agreement. (Defs.' Aff. ¶¶ 6-7, 10-11.) In November 2008, MERS executed an assignment of the Mortgage to US Bank, and the assignment was recorded on November 20, 2008, in the Land Evidence Records for the Town of Gloucester. (Stipulation and Pre-Trial Order ¶ 6; Ex. D.)

Thereafter, Plaintiff defaulted under the terms of the Note and Mortgage for failure to pay his monthly Mortgage payments. Id. at ¶ 7. On or about December 1, 2009, US Bank, through its attorneys, sent Plaintiff notice of default and acceleration of the Note. Id. at ¶ 7; Ex. E. Notice of the foreclosure sale was then published in the Providence Journal for four consecutive weeks. Id. at ¶ 8. On January 21, 2010, US Bank, as noteholder and as mortgagee by assignment from MERS, conducted a foreclosure sale of the Property at which US Bank was the successful bidder. (Stipulation and Pre-Trial Order ¶¶ 8-9; Ex. F; Defs.' Aff. ¶ 11.) Finally, on February 2, 2010, a foreclosure deed (Foreclosure Deed) to US Bank was recorded in the Land Evidence Records for the Town of Gloucester. Id. at ¶ 10; Ex. F.

On September 3, 2010, after the filing of Plaintiff's Verified Complaint on March 12, 2010, the parties signed and filed a Stipulation and Pre-Trial Order wherein the parties stipulated to facts and submitted exhibits of relevant documents, including the Mortgage, Note, Mortgage assignment, and Foreclosure Deed. (Stipulation and Pre-Trial Order Exs. A-F.) This matter was assigned for trial in early 2011; however, that trial never occurred. After a status conference with the trial justice in March 2013, the parties agreed that no trial date would be given and that Defendants would file a Motion for Summary Judgment.

Thereafter, Defendants filed the instant Motion; Plaintiff responded with a Motion for Continuance pursuant to Super. R. Civ. P. 56(f) and Objection to Defendants' Motion. In his Motion for Continuance and Objection, Plaintiff's counsel argues that he must be allowed time for discovery as "it is an impossibility for Plaintiff to have sufficient knowledge to stipulate to facts." (Pl.'s Mot. for Continuance and Objection 1.) Plaintiff's Motion for Continuance was not accompanied by an affidavit as required by Rule 56(f). This Court denied Plaintiff's Motion for Continuance because Plaintiff and Defendants explicitly stipulated that "[t]he parties have completed their discovery in this matter." (Stipulation and Pre-Trial Order § VI. Discovery.)

## 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

The stipulation of facts and agreed upon exhibits submitted by the parties resolves this matter. Plaintiff has failed to establish a genuine issue of material fact in response to Defendants’ Motion for Summary Judgment. Additionally, Plaintiff has failed to respond to Defendants’ Motion with any affidavits or evidence, and instead Plaintiff is bound by the stipulation to which he agreed.

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. Oct. 13, 2011) (Rubine, J.). The Rhode Island Supreme Court in Bucci v. Lehman Bros. Bank, FSB, resolved many of the legal issues as raised in the Verified Complaint (see No. 2010-146-A., 2013 WL 1498655, \*17-18, 22, 24, 26-29 (R.I. Apr. 12, 2013)), and in Payette and Kriegel this Court addressed the additional issues concerning the effect of an assignment of mortgage, issues identically raised in the

instant Verified Complaint. See Payette, No. PC 2009-5875, 2011 WL 3794701; Kriegel, No. PC 2010-7099, 2011 WL 4947398. The Bucci decision is binding precedent that this Court is obligated to accept, and this Court must apply the reasoning and holdings concluded therein. See No. 2010-146-A., 2013 WL 1498655, \*24, 26-29.

While Bucci conclusively resolved—in MERS’s favor—the issue of MERS’s authority to act as mortgagee and nominee for the original lender, the Supreme Court has not yet ruled upon the issue of MERS’s authority to assign a mortgage. See No. 2010-146-A., 2013 WL 1498655, \*24, 26-29. Nevertheless, this Court finds that it follows from Bucci that MERS—as the lawful and contractually designated mortgagee and nominee for the lender/noteholder—may also lawfully assign its interest in a mortgage.<sup>3</sup>

#### IV

#### CONCLUSION

Accordingly, the stipulated facts and exhibits establish that no genuine issue of material fact exists. Thus, Defendants’ Motion for Summary Judgment is granted. Counsel for the prevailing party shall submit an order and form of judgment in accordance with this Decision.

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<sup>3</sup> While this Court acknowledges that in Bucci the Supreme Court applied the concept of agency as an issue of fact to the analysis of whether MERS may exercise the statutory power of sale on behalf of the noteholder, the Supreme Court has yet to rule on the effect of an assignment of mortgage and whether the issue of agency would apply equally thereto. See No. 2010-146-A., 2013 WL 1498655, \*18-20. In the absence of controlling authority from the Supreme Court on the mortgage assignment issue, the reasoning and result of the Superior Court decisions on this subject represent the prevailing view of the law in Rhode Island.



**RHODE ISLAND SUPERIOR COURT**  
*Decision Addendum Sheet*

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Registration systems, Inc., et al.**

**CASE NO:** **PC 2010-1539**

**COURT:** **Providence County Superior Court**

**DATE DECISION FILED:** **July 23, 2013**

**JUSTICE/MAGISTRATE:** **Rubine, J.**

**ATTORNEYS:**

**For Plaintiff:** **George E. Babcock, Esq.**

**For Defendant:** **Nicholas C. Barrett, Esq.**