STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: March 26, 2013)

THOMAS H. MCGOVERN, III	:	
	:	
v.	:	**C.A. No. KC 2010-1681**
	:	
BANK OF AMERICA, NA;	:	
BAC HOME LOANS; AND	:	
FEDERAL HOME LOAN	:	
MORTGAGE CORPORATION	:	

DECISION

RUBINE, J. Before the Court is Defendants', Bank of America, NA ("BOA"), BAC Home Loans ("BAC"), and Federal Home Loan Mortgage Corporation ("FHLMC") (collectively, "Defendants"), and intervening party's, Celtic Roman Group, LLC ("Celtic"), Joint Motion for Summary Judgment pursuant to Super. R. Civ. P. 56. Following a foreclosure sale conducted by BOA of certain real property located at 159 Spencer Woods Drive, Warwick, Rhode Island (the "Property"),[1] Plaintiff filed a verified complaint ("Verified Complaint") seeking declaratory and injunctive relief. As set forth in the Verified Complaint, Plaintiff challenges the foreclosure sale alleging that the foreclosure is invalid due to BOA's failure to send Plaintiff additional notice following the adjournment of a previous foreclosure sale and BOA's alleged failure to hold both the note ("Note") and mortgage ("Mortgage") upon commencement of the foreclosure proceedings. Plaintiff further avers that he was not in default of his obligations under the

[1] Both the Mortgage and the Note refer to the Property as located in East Greenwich; however, the Mortgage was ultimately recorded in Warwick, and all of the parties refer to the Property as located in Warwick. Also, a description of the Property within the Mortgage refers to the Property as located in Warwick. Thus, this Court will consider the Property to be situated in Warwick.

Note, indicating thereby that there was no default which would have been a condition precedent to the commencement of foreclosure.

I

FACTS & TRAVEL

The undisputed material facts, as set forth in the pleadings, exhibits, and affidavits, are as follows. On August 7, 2001, Plaintiff and his wife, Carol McGovern, executed a Note in favor of lender BOA for $180,000. (Compl. Ex. 3.) To secure the Note, Plaintiff and his wife contemporaneously executed a Mortgage on the Property. (Compl. Ex. 2.) The Mortgage designated BOA as the "Lender" and as the "mortgagee." Id. at 1-2. In addition, the Mortgage granted BOA the right to exercise the statutory power of sale pursuant to G.L. 1956 § 34-11-22 in the event of Plaintiffs' default under the terms of the Note. Id. at 3.

Plaintiff thereafter defaulted on his monthly Mortgage payments.[2] (Jackson Aff. ¶¶ 8, 9.) On February 19, 2010, BOA sent notice of the foreclosure sale to Plaintiff by certified mail, return receipt requested, noticing the sale scheduled for April 21, 2010. (Hardiman Aff. ¶¶ 4-8.) Plaintiff signed the return receipt acknowledging receipt of the notice. (Hardiman Aff. ¶ 7; Defs.' Joint Mot. Summ. J. Ex. B2.) Further, BOA published notice of the foreclosure sale in the Kent County Daily Times on March 29, 2010, and then again during the next three successive weeks. (Hardiman Aff. ¶¶ 9, 10; Defs.' Joint Mot. Summ. J. Ex. B4.)

[2] As discussed infra, Plaintiff alleges in his Verified Complaint that he was not in default under his loan (Compl. ¶ 18); however, he has failed to submit any other evidence, apart from this conclusory statement, to support the allegation that his loan payments were current.

BOA adjourned the foreclosure sale that was scheduled for April 21, 2010 in order to determine whether Plaintiff was eligible for the Home Affordable Modification Program ("HAMP").[3] (Hardiman Aff. ¶ 12.) During the adjournment, BOA continually published notice of the foreclosure sale in the Kent County Daily Times on a weekly basis. (Hardiman Aff. ¶¶ 12-16; Defs.' Joint Mot. Summ. J. Ex. B4.)

On April 8, 2010 Plaintiff sent BOA a Qualified Written Request ("QWR") pursuant to 12 U.S.C. § 2605.[4] (McGovern Aff. ¶ 8; Pl.'s Mem. in Support of Obj. to Mot. Summ. J. Ex.) On July 6, 2010, Dilworth Paxson ("Dilworth")—a Philadelphia, Pennsylvania law firm representing BAC—responded to the QWR, stating that it was overly broad and unduly burdensome. Id. Nevertheless, Dilworth responded to a portion of Plaintiff's inquiry stating that "the current owner of the note is FHLMC."[5] (McGovern Aff. ¶ 9; Pl.'s Mem. in Support of Obj. to Mot. Summ. J. Ex.)

BOA determined that Plaintiff was not eligible for HAMP, and thus, proceeded to move forward with a rescheduled foreclosure sale. BOA foreclosed on the Property on July 27, 2010. (Hardiman Aff. ¶ 17.) Celtic was the successful bidder at the foreclosure

[3] HAMP is a home mortgage modification program administered by the federal government, and its goal is to make monthly mortgage payments more affordable and sustainable for mortgagors who are delinquent or in danger of becoming delinquent on their mortgage payments. See Home Affordable Modification Program, Making Home Affordable,- http://www.makinghomeaffordable.gov/programs/lower-payments/Pages/hamp.aspx.

[4] Pursuant to 12 U.S.C. § 2605, a Qualified Written Request is written correspondence from a mortgagor to a mortgage loan servicer for information regarding the mortgage, and the statute provides for certain guidelines a loan servicer must follow in response to a mortgagor's request.

[5] Defendants contend that this is a misstatement of the facts by Dilworth, though they have failed to provide an explanation for this alleged misstatement.

sale. Id. On November 3, 2010, Plaintiff filed a *lis pendens* in the land evidence records for the City of Warwick, which led to Celtic not completing its purchase of the Property.[6]

On November 18, 2010, Plaintiff filed this Verified Complaint, seeking rescission of the foreclosure sale and return of title to him. Plaintiff asserts that he was current with his Mortgage payments and that his Mortgage was not in arrears. (Compl. ¶ 18.) Subsequently, Celtic filed a motion to intervene which was granted by this Court on January 13, 2011. Defendants and Celtic then filed this Joint Motion for Summary Judgment pursuant to Rule 56. Plaintiff has objected to the Joint Motion, averring that genuine issues of material fact exist—specifically whether Plaintiff was in default for failure to make payments as obligated under the Note and whether the foreclosing mortgagee held the Note at the time of the foreclosure sale. Plaintiff further avers that there is a question of law as to whether BOA had a statutory obligation to send additional notices to Plaintiff following the adjournment of the previous foreclosure sale.

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

[6] 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. 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.

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.

Notice of the Foreclosure

Plaintiff avers that BOA's failure to send any notice of the adjournment of the foreclosure sale was fatal error, and thus, renders the foreclosure sale conducted on July 27, 2010, a nullity. To the contrary, Defendants aver that no genuine issue of material fact exists with respect to whether the foreclosure sale was properly noticed. According to Defendants, when a foreclosure sale is not completed on the date set forth in the written notice, § 34-11-22 provides for the power to adjourn the sale with no further written notice to the homeowner. Defendants aver that under §§ 34-11-22 and 34-27-4,

all that is required is that the notice of the adjourned sale is published weekly, commencing the week following the originally scheduled date and continuing weekly until the week of the actual sale. Thus, Defendants contend that the foreclosure conducted by BOA fully complied with all notice requirements under the Mortgage and pursuant to Rhode Island law.

No statutory law in Rhode Island requires a foreclosing mortgagee to send a new and distinct notice to the mortgagor of the adjournment of a foreclosure sale or notice of a future date of sale after the original sale was postponed. See Horton v. Bassett, 16 R.I. 419, 421, 16 A. 715, 717 (1889) (finding renewal of the notification of sale was not necessary when the new date of the foreclosure sale was properly advertised). Section 34-11-22 provides the foreclosing mortgagee with the power to adjourn a foreclosure sale as long as the mortgagee continues to publish notice of the sale, together with notice of the adjournment of the sale, at least once each week following the week of the originally scheduled sale. See Sections 34-11-22 and 34-27-4. Section 34-27-4 merely requires that written notice of the time and place of the original sale be sent by certified mail, return receipt requested, to the address of the mortgagor. See Section 34-27-4(b). Moreover, § 34-27-4 requires that the notice be sent at least thirty days prior to the first publication of the original sale. See id. If the sale is adjourned, § 34-27-4 requires only that publication of the notice of the adjourned sale, together with a notice of the adjournment, be continually published at least once each week commencing with the calendar week following the originally scheduled day of sale. See Section 37-24-4(a).

In the instant matter, it is undisputed that BOA sent Plaintiff notice on February 19, 2010 of the foreclosure sale originally scheduled for April 21, 2010. In addition, it is

undisputed that BOA, through its representative Bendett & McHugh, P.C., published the notice of sale in the Kent County Daily Times commencing on March 29, 2010, and continuing for the next three consecutive weeks. Furthermore, BOA continued to publish notice of sale referencing the adjournment of the prior sale, while the Bank considered whether Plaintiff was eligible for HAMP. (Hardiman Aff. ¶¶ 12-16.) See Defs.' Joint Mot. Summ. J. Ex. B4. Following BOA's determination that Plaintiff failed to meet the necessary qualifications for HAMP, BOA proceeded to schedule a new foreclosure sale with respect to the Property. Based upon the undisputed facts, BOA complied with the statutory notice requirements pursuant to §§ 34-11-22 and 34-27-4. Accordingly, as to the issue of whether the foreclosure sale complied with notice requirements under Rhode Island law, Defendants are entitled to judgment as a matter of law.

B.

Identity of the Note Holder at the Time of Foreclosure

According to Plaintiff, the note holder and the mortgagee must be the same party in order to properly exercise the statutory power of sale and to foreclose on the Property. Plaintiff contends that the foreclosure sale was invalid as BOA was not the note holder at the time of the foreclosure sale, and therefore, avers that a genuine issue of material fact exists with respect to who was the actual note holder at the time of the foreclosure sale. Specifically, Plaintiff contends that BOA endorsed the Note in blank and transferred the Note to FHLMC. To support this contention, Plaintiff has submitted an affidavit wherein he states that BOA is not the owner of the Note and to which he has attached Dilworth's response to his QWR stating that FHLMC was the owner of the Note.

While there may be an issue of fact as to who physically held the Note at the time of the foreclosure sale,[7] this is insufficient to establish a genuine issue of material fact. It is well established under current Rhode Island law that a mortgagee exercising the statutory power of sale following a mortgagor's default, and thereby foreclosing on the property securing the debt under the note, acts on behalf of the note holder. See Bucci v. Lehman Bros. Bank, FSB, No. PC 2009-3888, 2009 WL 3328373 (R.I. Super. Aug. 25, 2009) (Silverstein, J.); see also Porter v. First NLC Fin. Serv., No. PC 2010-2526, 2011 WL 1251246 (R.I. Super. March 31, 2011) (Rubine, J.); Payette v. Mortg. Elec. Registration Sys., No. PC 2009-5875, 2011 WL 3794701 (R.I. Super. Aug. 22, 2011) (Rubine, J.); Kriegel v. Mortg. Elec. Registration Sys., No. PC 2010-7099, 2011 WL 4947398 (R.I. Super. Oct. 13, 2011) (Rubine, J.). Furthermore, Rhode Island law provides an assignment of the mortgage operates as an assignment of "the note and debt thereby secured," (Section 34-11-24) and this statutory construct allows a foreclosing party to act on behalf of the note holder as long as the foreclosing party holds the mortgage, by way of assignment or otherwise.

As a matter of Rhode Island law, the foreclosing party does not need to hold the Note in order to exercise the statutory power of sale. See Porter, 2011 WL 1251246, at *8. In this case, since the Mortgage is the instrument granting the statutory power of sale to BOA as mortgagee, in order for BOA to foreclose, and thereby to exercise the statutory power of sale, BOA need only hold the Mortgage to then act on behalf of the

[7] While Defendants have submitted competent affidavits in accordance with Rule 56 to demonstrate that BOA held the Note at the commencement of the foreclosure proceedings, as well as at the time of the foreclosure sale, (Jackson Aff. ¶¶ 8-9), Defendants are unable to provide the Court with an explanation of Dilworth's response to Plaintiff's QWR in which Dilworth stated that the Note was held by FHLMC.

current note holder. Hence, following Plaintiff's default, BOA had the right to, and properly did, commence foreclosure proceedings. Therefore, on this issue, as well as based upon the undisputed facts, Defendants are entitled to judgment as a matter of law. In other words, who the holder of the Note was at the time of foreclosure may be a fact in dispute, it is not, however, a material fact.

Plaintiff further avers, by way of the Verified Complaint and his memorandum in support of his Objection to Defendants' Motion, that the Mortgage was not in arrears, and therefore, that the foreclosure sale was invalid. Notably, Plaintiff's affidavits submitted in support of his Objection to Defendants' Motion do not address the issue of default. Therefore, the only evidence concerning default that Plaintiff submitted was the initial Verified Complaint, which is not alleged to be based on personal knowledge. Plaintiff's verification at the end of the Verified Complaint states, "I have read the facts set forth above and verify that they are true and accurate to the best of my knowledge." (Compl.) This statement is insufficient to render the Verified Complaint as the functional equivalent of an affidavit satisfying the requirements of Rule 56(e). See Sheinkopf v. Stone, 927 F.2d 1259, 1262-63 (1st Cir. 1991). Furthermore, even if this Court were to consider the Verified Complaint submitted in this matter as the functional equivalent of an affidavit that satisfies the requirements of Rule 56(e), in the Verified Complaint Plaintiff states in conclusory fashion, "The Mortgage is not in arrears." (Compl. ¶ 18.) This Court finds that this conclusory statement is insufficient to establish evidence substantial in nature to successfully oppose Defendants' Motion. See Jessup & Conroy, P.C., 46 A.3d at 839.

On the other hand, Defendants have submitted affidavits as well as evidence of

Plaintiff's Mortgage payment history, demonstrating that Plaintiff defaulted on his monthly Mortgage payments. See Defs.' Mot. Summ. J. Ex. C. Defendants further establish by affidavit that as of February 19, 2010, Plaintiff was in arrears of the payments due under the Mortgage and that at no time between February 19, 2010 and July 27, 2010 did Plaintiff bring his Note obligations current or cure the previous default resulting from the failure to make timely Mortgage payments. (Jackson Aff. ¶¶ 8-9.)

"[O]nce a party files and serves a properly supported summary-judgment motion, an alarm bell begins to toll and it is time for the opposing parties either to put up their evidence or shut up their case." Wright v. Zielinski, 824 A.2d 494, 499 (R.I. 2003). Plaintiff has failed to put up any evidence establishing a genuine issue of material fact with respect to his allegation that the Mortgage was current and not in arrears. Thus, Plaintiff has failed to satisfy his burden in order to defeat a motion for summary judgment. See Jessup & Conroy, P.C., 46 A.3d at 839. Accordingly, Plaintiff has failed to establish a genuine issue of material fact with respect to the issue of default, and Defendants are entitled to judgment as a matter of law on this issue.

IV

CONCLUSION

In sum, Plaintiff has failed to show evidence to establish a genuine issue of material fact. Accordingly, Defendants' and Celtic's Joint Motion for Summary Judgment is granted. Counsel for the prevailing parties shall submit to the Court an order and form of judgment in accordance with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	Thomas H. McGovern, III v. Bank of America, et al.
CASE NO:	KC 2010-1681
COURT:	Kent County Superior Court
DATE DECISION FILED:	March 26, 2013
JUSTICE/MAGISTRATE:	Rubine, J.
ATTORNEYS:	
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