STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: July 25, 2013)

CLARA AKALARIAN	:	
	:	
v.	:	**C.A. No. PC 2010-5404**
	:	
RBMG, INC.; INDYMAC FEDERAL BANK, F.S.B.; ONEWEST BANK, F.S.B.; BENDETT & MCHUGH, P.C.	:	

DECISION

RUBINE, J. Before the Court is Defendants' Super. R. Civ. P. 56 Motion for Summary Judgment[1] filed by OneWest Bank, F.S.B. (OneWest) and Mortgage Electronic Registration Systems, Inc. (MERS). Plaintiff Clara Akalarian filed a complaint (Complaint) seeking declaratory and injunctive relief and to quiet title to certain real property located at 365 Atlantic Avenue, Warwick, Rhode Island (the Property). Plaintiff also originally sought damages for fraud and slander of title.[2] The gravamen of Plaintiff's Complaint challenges the foreclosure sale of the Property, alleging that Defendant OneWest, the foreclosing party, failed to possess the statutory power of sale; thus, rendering the foreclosure sale a nullity, and rendering void any title acquired by reason of the allegedly defective foreclosure.

[1] The parties filed a stipulation with the Court dismissing all claims against Defendant Bendett & McHugh, P.C. with prejudice and without attorneys' fees or costs.

[2] Plaintiff's counsel concedes in his Memorandum in Objection to Defendants' Motion for Summary Judgment that Count III of the Complaint alleging a claim for slander of title may be dismissed voluntarily. (Pl.'s Mem. in Obj. to Defs.' Mot. Summ. J. 12.)

I

FACTS & TRAVEL

The record,[3] for summary judgment purposes, reflects that on June 3, 2004, Plaintiff executed a note (Note) in favor of the original lender, RBMG, Inc., for $261,250. (Boyle Aff. ¶ 2; Ex. A; Req. Admis. ¶ 2.) On that same date, Plaintiff executed a mortgage (Mortgage) to secure the Note. (Boyle Aff. ¶ 3; Ex. B; Req. Admis. ¶¶ 6-7.) Both the Note and Mortgage define the Lender as RBMG, Inc., and the Mortgage defines MERS as "mortgagee" and "nominee for Lender and Lender's successors and assigns." (Boyle Aff. Exs. A, B.) 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." (Boyle Aff. 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 [RBMG, Inc.] and [RBMG, Inc.'s] successors and assigns) has the right: to exercise any or all of those interests, including, but not

[3] The key issues in this matter—specifically concerning Plaintiff's default under the terms of the note and the mortgage, notice of the foreclosure sale, and the validity of one of the mortgage assignments and its execution—have been conclusively admitted given Plaintiff's failure to respond to Defendant OneWest's Requests for Admissions. See Super. R. Civ. P. 36; see also Cardi Corp. v. State, 524 A.2d 1092, 1095 (R.I. 1987). Defendants submitted Plaintiff's admissions with their Motion, and Plaintiff did not object or move for withdrawal of those admissions. See Rhode Island Insurer's Insolvency Fund v. Leviton Mfg. Co., Inc., 763 A.2d 590, 599 (R.I. 2000) (finding that "it is wholly improper for a party, without leave of court, to make admissions and then subsequently attempt to avoid the effects of those admissions, thus prejudicing the opposing party.").

> limited to, the right to foreclose and sell the Property; and to take any action required of [RBMG, Inc.]." Id.

The Mortgage was recorded in the Land Evidence Records of the City of Warwick. (Boyle Aff. ¶ 3.)

The Note was specially endorsed by RBMG, Inc. to IndyMac Bank, F.S.B. (IndyMac), and IndyMac thereafter endorsed the Note in blank and the Note was transferred to Defendant OneWest, which held the Note at the time of foreclosure. (Boyle Aff. ¶ 2; Ex. A.) In July 2008, IndyMac was placed in the control of Federal Deposit Insurance Corporation (FDIC) as Receiver as the result of a federal receivership. (Compl. ¶ 43.) FDIC reorganized IndyMac into a new entity it named IndyMac Federal Bank, F.S.B. (IndyMac Federal), and transferred all of IndyMac's assets to IndyMac Federal. Subsequently, on March 19, 2009, OneWest purchased all of the assets of IndyMac Federal.

Likewise, the Mortgage was eventually assigned to OneWest after a series of prior assignments. First, on or about September 21, 2004, RBMG, Inc. assigned the Mortgage to MERS and that assignment was recorded.[4] (Defs.' Mot. Summ. J. Ex. 3.) Next, on March 9, 2009, MERS, as mortgagee and as nominee for RBMG, Inc. and RBMG, Inc.'s successors and assigns, assigned the Mortgage to IndyMac Federal and that assignment was also recorded. (Defs.' Mot. Summ. J. Ex. 4.) Finally, on August 4, 2010, FDIC, as Receiver for IndyMac Federal, assigned the Mortgage to OneWest by

[4] This first assignment was likely unnecessary as MERS was already designated the mortgagee pursuant to the terms of the Mortgage.

way of a recorded Corrective Assignment.[5] (Boyle Aff. ¶ 4; Ex. C; Req. Admis. ¶¶ 13-16.) Therefore, as of August 4, 2010, OneWest held both the Note and Mortgage, and OneWest has not transferred or delivered the Note to any other entity. (Boyle Aff. ¶ 2.)

Upon Plaintiff's payment default under the terms of the Mortgage and the Note, OneWest, through its attorney, sent Plaintiff notice of default and of her right to cure the default prior to acceleration of the debt. (Boyle Aff. ¶¶ 5-7; Ex. D; Req. Admis. ¶¶ 1, 10-12.) However, Plaintiff failed to cure her default. (Boyle Aff. ¶ 7; Req. Admis. ¶¶ 9, 12.) OneWest, through its attorney, subsequently sent Plaintiff notice of the foreclosure sale. (Boyle Aff. ¶ 6; Ex. D; Req. Admis. ¶ 17.)

On September 15, 2010, Plaintiff filed the instant Complaint as well as a "Motion for Stay Pending Lite."[6] Subsequent to the filing of this action, Plaintiff recorded a Notice of Lis Pendens concerning the Property. (Defs.' Mot. Summ. J. Ex. 10.) Thereafter, Defendant OneWest proceeded with a foreclosure sale of the Property on October 6, 2010 (Compl. ¶ 23.), and a third party, EXPO Realty, LLC, was the highest bidder.[7]

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[5] This assignment corrected the assignor named in a previously recorded, yet ineffective, assignment from IndyMac Federal to OneWest on April 29, 2009. See Defs.' Mot. Summ. J. Ex. 5. That assignment was invalid as all of IndyMac Federal's assets were, at the time of the purported assignment, already sold to OneWest on March 19, 2009.

[6] Plaintiff also had previously filed a Chapter 7 Voluntary Petition for Bankruptcy in the United States Bankruptcy Court for the District of Rhode Island. See In re: Clara Akalarian, No. 1:09-BK-12681 (Bankr. D.R.I. Apr. 28, 2011) (closed). Prior to closure of the case, the Bankruptcy Court entered an order granting OneWest's Motion for Relief from the Automatic Stay pursuant to 11 U.S.C. § 362(a) allowing OneWest to proceed with its foreclosure action against the subject property. See Order Granting Motion for Relief, In re: Clara Akalarian, No. 1:09-BK-12681.

[7] This Court never entered an order enjoining the One West foreclosure.

Defendants filed this Motion for Summary Judgment averring that no genuine issues of material fact exist with respect to the validity of the foreclosure sale and that Defendants are entitled to judgment as a matter of law.[8] Plaintiff filed an objection to Defendants' Motion—consisting of a memorandum of law, a deposition unrelated to Plaintiff or Plaintiff's Note and Mortgage, and a copy of a California bankruptcy court decision—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 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.

[8] Defendants OneWest and Bendett & McHugh, P.C. originally filed a joint Motion for Summary Judgment before Bendett & McHugh, P.C. was dismissed from this action. Shortly thereafter, MERS filed a Motion for Summary Judgment joining Defendants OneWest and Bendett & McHugh, P.C. in their Motion.

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 gravamen of Plaintiff's Complaint challenges the authority of MERS to act as mortgagee and nominee of the original lender, RBMG, Inc., and to assign the Mortgage; thus, invalidating the foreclosure sale conducted by OneWest, MERS' assignee. This issue has been conclusively resolved by the recent Rhode Island Supreme Court decision in Bucci v. Lehman Bros. Bank, FSB wherein the Court affirmed MERS' authority to act as a mortgagee and as nominee of the lender pursuant to a mortgage contract and to exercise the statutory power of sale granted to MERS under that contract. See No. 2010-146-A., 2013 WL 1498655, *17-18, 22, 24 (R.I. Apr. 12, 2013). Here, Plaintiff explicitly acknowledged that MERS, and MERS' successors and assigns, had the right to exercise the statutory power of sale and to foreclose and sell the Property. See Boyle Aff. Ex. B. While the Bucci decision did not address the specific issue of MERS' authority to assign a mortgage, it follows from the reasoning in 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. Plaintiff's claims to the contrary merit no further discussion.

In her opposition to summary judgment, Plaintiff argues that MERS and the FDIC were not the duly authorized agents of the noteholder at the time each entity executed an assignment of the Mortgage, rendering those Mortgage assignments invalid. However, this Court has held on numerous occasions that a plaintiff/mortgagor in these circumstances lacks standing to challenge the validity of a mortgage assignment.[9] See, e.g., Payette, No. PC 2009-5875, 2011 WL 3794701, at *15; see also Rutter v. Mortg. Elec. Registration Sys., Inc., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012, at *16-17 (R.I. Super. Mar. 12, 2012) (Silverstein, J.). Further, the Rhode Island Supreme Court recently reaffirmed its holding in Brough v. Foley, 525 A.2d 919, 922 (R.I. 1987) that one not a party to an agreement has no standing to challenge the validity of the agreement. See DePetrillo v. Belo Holdings, Inc., 45 A.3d 485, 492 (R.I. 2012). Nevertheless, assuming arguendo that Plaintiff has standing to challenge the assignments of her Mortgage on the basis of lack of agency between the assignor and the noteholder, this Court finds the challenge unavailing.

In Bucci, our Supreme Court addressed the issue of agency with respect to MERS' authority to foreclose as mortgagee and as agent of the noteholder; however, the Supreme Court has yet to rule on any issues concerning the validity of mortgage assignments in the context of a MERS form mortgage. See Bucci, No. 2010-146-A., 2013 WL 1498655, *25-27. While a foreclosing mortgagee must hold the mortgage and

[9] Plaintiff's counsel also sets forth in his memorandum an argument concerning the receivership of IndyMac, averring that somehow IndyMac's reorganization invalidated the Mortgage assignments in this matter. This Court has held on several occasions that the reorganization of IndyMac fails to invalidate MERS's authority, and that of MERS's successors and assigns, to act as nominee for the original lender, and the successors and assigns of that lender, and therefore to assign the mortgage. See, e.g., Payette, No. PC 2009-5875, 2011 WL 3794701, at *12-13.

the note or be acting as an agent of the noteholder (see id.), a mortgagee executing a mortgage assignment need not be explicitly acting as an agent of the noteholder in order to transfer its bare legal interest in the mortgage as "the mortgagee is an equitable trustee who holds bare legal title to the mortgaged premises in trust [implied by law] for the noteholder." Culhane v. Aurora Loan Servs. of Neb., 708 F.3d 282, 292 (1st Cir. 2013) (discussing common law principles concerning mortgages pursuant to Massachusetts law); see also Bucci, No. 2010-146-A., 2013 WL 1498655, *28-29 (citing Culhane, 708 F.3d at 293) (finding that "'MERS's role as mortgagee of record and custodian of the bare legal interest as nominee for the [noteholder], and the [noteholder's] role as owner of the beneficial interest in the loan' . . . reside comfortably within [Rhode Island law]."). "Absent a provision in the mortgage instrument restricting transfer . . . a mortgagee may assign its mortgage to another party," and "[t]he noteholder possesses an equitable right to demand and obtain an assignment of mortgage" as the owner of the beneficial interest in the loan. Culhane, 708 F.3d at 293. Here, that is exactly what occurred. The Note and Mortgage were eventually reunited in the same entity such that the foreclosing mortgagee and holder of the Mortgage—in this case, OneWest—also held the Note, rendering the issue of agency moot.[10] Also, under Rhode Island statutory law, an assignment of a mortgage effectively results in an assignment of the note and debt secured thereby. See

[10] Plaintiff also sets forth a convoluted argument that proof of agency requires the recording of a power of attorney and that, here, Defendants failed to record powers of attorney to act on behalf of any of the other banks involved, including IndyMac and FDIC. In Rhode Island, an agency agreement relating to a mortgage need not be in writing, much less recorded. See Bucci, No. 2010-146-A., 2013 WL 1498655, *18 n.10; see also UXB Sand & Gravel, Inc. v. Rosenfeld Concrete Corp., 641 A.2d 75, 79 n.1 (R.I. 1994). Further, none of the facts in this matter demonstrate that any entity executed a conveyance on behalf of another entity as attorney in fact such that recording of a power of attorney was required pursuant to G.L. 1956 § 34-11-34.

§ 34-11-24. Accordingly, Plaintiff has failed to establish a genuine issue of material fact with respect to the assignment of the mortgage.

Furthermore, Plaintiff avers in her opposition to summary judgment that Erica Johnson-Seck, the individual who executed each of the Mortgage assignments except for the first assignment from RBMG, Inc. to MERS, was not authorized to do so and that Ms. Johnson-Seck is a "robo-signer."[11] This argument fails because Plaintiff has not demonstrated by affidavit, or otherwise, that the assignment was executed by a person not authorized by the assignor to execute that document.[12] Moreover, Plaintiff, by her failure to respond to Defendant OneWest's Requests for Admissions, conclusively admitted that Ms. Johnson-Seck was authorized to execute the final assignment from FDIC to OneWest. See Req. Admis. ¶ 16; see also Super. R. Civ. P. 36; see also Cardi, 524 A.2d at 1095. Plaintiff may not now attempt to avoid the effect of that conclusive admission. See Rhode Island Insurer's Insolvency Fund, 763 A.2d at 599. Even if this fact were not conclusively admitted, as stated supra, Plaintiff's averment fails for lack of standing to

[11] The term "robo-signer" is nowhere defined under Rhode Island law. Apparently, this colloquial term has been used to describe a person without authority signing a recorded document or conveyance.

[12] Plaintiff's counsel has submitted the deposition of Erica Johnson-Seck taken during the discovery process of a different case in a different jurisdiction not involving Plaintiff or the subject Property. It should be noted that Plaintiff's counsel, and other counsel who frequently represent mortgagors challenging foreclosure in this Court, have submitted this same deposition in a plethora of other cases. Each and every time this deposition has been submitted, this Court has found that a deposition from a different case involving different parties and different facts fails to raise a genuine issue of material fact concerning the record before the Court. See, e.g., Payette, No. PC 2009-5875, 2011 WL 3794701, at *18-19; Breggia v. Mortg. Elec. Registration Sys., Inc., No. PC 2009-4144, 2012 WL 1154738, at *5, 7 (R.I. Super. Apr. 3, 2012) (Rubine, J.); Ingram v. Mortg. Elec. Registration Sys., Inc., No. PC 2010-1940, 2012 WL 1889238, at *5, 8 (R.I. Super. May 17, 2012) (Rubine, J.); Noury v. Deutsche Bank National Trust Company, No. PC 2009-7014, 2012 WL 1670546, at *5, 8 (R.I. Super. May 7, 2012) (Rubine, J.).

challenge the validity of the mortgage assignment. See, e.g., Payette, No. PC 2009-5875, 2011 WL 3794701, at *15; see also DePetrillo, 45 A.3d at 492; Brough, 525 A.2d at 922; Rutter, Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012, at *16-17.

In addition, citing §§ 34-11-1 and 34-13-1, Plaintiff avers that Rhode Island statutes require the recording of all assignments of notes and mortgages and that the failure to record each transfer of the Note in this matter constituted a failure to comply with Rhode Island law. However, neither of these statutes, nor any other Rhode Island conveyance statute, requires the recording of assignments of a promissory note.[13] Thus, Plaintiff has failed to establish a genuine issue of material fact with respect to the transfer and recording of the Note.

Finally, in her Complaint, Plaintiff failed to properly allege the essential elements of fraud—that an intentional misrepresentation was made by Defendants, 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)).

IV

CONCLUSION

Accordingly, Plaintiff has failed to establish a genuine issue of material fact with respect to the claims asserted in the Complaint. Accordingly, Defendants' Motion for Summary Judgment is granted and the notice of lis pendens concerning the subject

[13] The transfer of any negotiable instrument is governed exclusively by Title 3 of the Uniform Commercial Code (UCC). See § 6A-3-101 et seq. This is true in Rhode Island and in any state which has adopted the UCC. Nothing in the UCC requires the recordation of the transfer of a negotiable instrument, such as a promissory note.

property shall be vacated. Counsel for the prevailing party shall submit an order and form of judgment in accordance with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Akalarian v. RBMG, Inc., et al.**
CASE NO:	**PC 2010-5404**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**July 25, 2013**
JUSTICE/MAGISTRATE:	**Rubine, J.**
ATTORNEYS:	
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