

STATE OF RHODE ISLAND AND PROVIDENCE PLANATATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(Filed: July 10, 2012)

RAFAEL JIMENEZ

:

v.

:

C.A. No. PC 2010-5586

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PEOPLE’S CHOICE HOME LOAN,
INC.; ORLANS MORANS, PLLC;
AND LASALLE BANK, N.A., AS
TRUSTEE FOR WASHINGTON
MUTUAL ASSET-BACKED
CERTIFICATES WMABS SERIES
2006 HE-5 TRUST

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DECISION

RUBINE, J. Defendant LaSalle Bank, N.A., as Trustee for Washington Mutual Asset-Backed Certificates WMABS Series 2006 HE-5 Trust (“LaSalle”) moves this Court to dismiss Plaintiff Rafael Jimenez’s (“Plaintiff”) complaint (“Complaint”) which contains claims for Declaratory Judgment and to Quiet Title to certain real property at 190 Linwood Avenue, Providence, Rhode Island (“the Property”). The gravaman of the Complaint concerns the effect of the language contained in the original mortgage as well as the rights of successors to the mortgage and the mortgage debt. According to the Complaint, the allegedly invalid assignment of the mortgage interest left the foreclosing party, LaSalle, without the requisite standing to foreclose, thereby allegedly rendering the foreclosure sale a nullity.

I

Facts & Travel

The facts as set forth in the Complaint and exhibits attached to the Complaint are as follows: On May 19, 2006, Plaintiff executed a note (“Note”) and mortgage

(“Mortgage”) in favor of lender People’s Choice Home Loan, Inc. (“People’s”),¹ with respect to a mortgage loan in the amount of \$308,750. (Compl. ¶¶ 9-10.) The Note was secured by a Mortgage on the Property. The Mortgage provides “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.” (Compl. Ex. 2 at 3.) The Mortgage was later recorded in the land evidence records for the City of Providence on May 24, 2006. The parties failed to attach “Exhibit A” to the Mortgage as a legal description of the Property; however, the Mortgage does contain the plat and lot numbers as well as the street address, therefore adequately describing the Property which secures the Mortgage debt.

Due to the absence of the legal description in the original Mortgage, Plaintiff executed a corrective mortgage in favor of People’s and MERS, as mortgagee and as nominee of People’s, on April 21, 2008. The purpose of the corrective mortgage was to rectify the omission of the legal description of the original Mortgage. See Compl. Ex. 2 at 9. The corrective mortgage contains the duplicate provisions and exact language of the original Mortgage, with the addendum of the legal description. The corrective mortgage was recorded in the land evidence records for the City of Providence on April 22, 2008.

Thereafter, on September 17, 2008, MERS, as mortgagee and as nominee for People’s and People’s successors and assigns, executed an assignment of the Mortgage interest to LaSalle. The assignment references an effective date of March 13, 2008 and refers to the original Mortgage. See Compl. Ex. 3. Nevertheless, the assignment did not become effective until signed by MERS on September 17, 2008.

¹ Defendant People’s is not a party to this Motion to Dismiss.

Shortly thereafter, on October 24, 2008, People's was dissolved by the State of Wyoming. (Compl. ¶ 15.) Hence, as of the time of the dissolution of People's, MERS had assigned the Mortgage interest to LaSalle as MERS' assignee thereby granting LaSalle the Statutory Power of Sale as expressly granted to MERS in the Mortgage instrument.

Meanwhile, Plaintiff defaulted on his obligations contained in the Note and Mortgage on November 1, 2007. Plaintiff subsequently failed to cure his default and on February 15, 2010, LaSalle, as assignee of the Mortgage interest from MERS, commenced foreclosure proceedings. After the advertising of foreclosure notices for three consecutive weeks, LaSalle ultimately foreclosed on the Property on April 13, 2010. LaSalle prevailed as the highest bidder and thus purchased the Property for \$121,500. A foreclosure deed was thereafter recorded in the land evidence records for the City of Providence on April 29, 2010, designating LaSalle as the rightful owner of the Property.

As a result of the foreclosure, Plaintiff filed the Complaint on September 23, 2010, seeking nullification of the foreclosure sale and return of title to him. Count I of Plaintiff's Complaint is a claim for "Declaratory Judgment" under § 9-30-1, et seq. (Compl. p. 5.) and Count II is a claim for "Quieting Title" pursuant to § 34-16-5. (Compl. p. 6.) In lieu of filing an answer, LaSalle responded with this Motion to Dismiss for failure to state a claim pursuant to Rhode Island Rules of Civil Procedure 12(b)(6). Defendant Orlans Moran, PLLC ("Orlans") also filed a Motion for Judgment on the Pleadings pursuant to Rhode Island Superior Court Rule of Civil Procedure 12(c). Orlans was voluntarily dismissed from this action without prejudice. Plaintiff thereafter filed his

objection to LaSalle's Motion to Dismiss. This Court then took this Motion to Dismiss under advisement.

II

Standard of Review

“The ‘sole function of a motion to dismiss’ pursuant to Rule 12(b)(6) is ‘to test the sufficiency of the complaint.’” McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005) (quoting Rhode Island Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)). For purposes of the motion the Court “assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the plaintiffs.” Giuliano v. Pastina, Jr., 793 A.2d 1035, 1036-37 (R.I. 2002) (quotation omitted).

The United States Supreme Court has adopted the view that a complaint must allege facts that “raise a right to relief above the speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007) (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004)). Hence, a plaintiff has an obligation to provide “the ‘grounds’ of his ‘entitlement to relief.’” Id. (citing Papasan v. Allain, 478 U.S. 265, 286, 106 S.Ct. 2932 (1986)). This “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Id. (citing Papasan v. Allain, 478 U.S. 265, 286, 106 S.Ct. 2932 (1986)). Accordingly, a plaintiff's factual allegations contained in a complaint must be specific enough to cross “the line from conceivable to plausible.” Id. at 570.

“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009)

(citing Twombly, 550 U.S. at 556). “Where a complaint pleads facts that are ‘merely consistent with’ and defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” Id. at 678, (quoting Twombly, 550 U.S. at 557). “Only a complaint that states a plausible claim for relief survives a motion to dismiss.” Id. at 679 (citing Twombly, 550 U.S. at 556). A complaint that states “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” will not suffice. Id. at 678 (citing Twombly, 550 U.S. at 555). However, “when there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” Id. at 679. “Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Id. (citing Iqbal v. Hasty, 490 F.3d 143, 157-58 (C.A.2 2007)).

The courts in Massachusetts have adopted the plausibility standard for whether a complaint can survive a motion to dismiss under the Federal Rules of Civil Procedure 12(b)(6) as articulated by the United States Supreme Court in Iqbal, 556 U.S. at 678-79 and Twombly, 550 U.S. at 550. See Iannacchino v. Ford Motor Car, 451 Mass. 623, 636 (2008); see also Peterson v. GMAC Mort., LLC, No. 11-11115-RWZ, Slip Copy, 2011 WL 5075613 at * 2 (D. Mass. Oct. 25, 2011) (Zobel, J.). Although Rhode Island has adopted the Federal Rules of Civil Procedure, the Rhode Island Supreme Court has yet to explicitly accept the Iqbal and Twombly standard as the operative standard with which to judge a Rule 12(b)(6) motion. In the case of Barrette v. Yakavonis, 996 A.2d 1231 (R.I. 2009), the Supreme Court interpreted the Rhode Island rules as follows: “a pleading need not include ‘the ultimate facts that must be proven in order to succeed on the

complaint . . . or . . . set out the precise legal theory upon which [the plaintiffs'] claim is based.” Id. at 1234 (quoting Gardner v. Baird, 871 A.2d 949, 953 (R.I. 2005)). All that is required is that the “complaint ‘provide the opposing party with fair and adequate notice of the type of claim being asserted.’” Id. Stated differently, the Court ruled: “th[e] Court examines the allegations contained in the plaintiff’s complaint, assum[ing] them to be true, and views them in the light most favorable to the plaintiff.” Id. (quoting Palazzo v. Alves, 944 A.2d 144, 149 (R.I. 2008)). Thereafter a motion to dismiss is “appropriate ‘when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of plaintiff’s claim.’” Id. However, based upon the analysis of the law as set forth below, Plaintiff’s Complaint cannot survive a Rule 12(b)(6) motion even under the more forgiving pleading standard articulated in Barrette and Palazzo. The Defendants are entitled to dismissal of a claim that the Plaintiff cannot prevail upon under any set of facts.

III

Analysis

A

The Original Mortgage is Valid

Plaintiff alleges that the original Mortgage is invalid as it failed to contain a legal description of the Property which secures the Mortgage debt. According to Plaintiff, due to the lack of legal description within the language of the Mortgage, the Mortgage failed to convey any interest in the Property to MERS. (Pl.’s Mem. in Supp. of Obj. to Def.’s Mot. to Dismiss at 5.)

Our Supreme Court has ruled that a mortgage will not be held void for uncertainty, . . . , where by any reasonable construction it can be sustained; and where the description used furnishes a key whereby a person, aided by extrinsic evidence, can ascertain what property is covered, such description is sufficient. (Emphasis added.) In re Barnacle, 623 A.2d 445, 451 (1993) (quoting Caraway Bank v. United States, 258 Ark. 858, 859, 529 S.W.2d 351, 351-52 (1975)). Furthermore, “a recorded mortgage [is] not . . . ineffective . . . whereby the description contained in the mortgage furnishes adequate information to aid a third party in identifying the land.” In re Barnacle, 623 A.2d at 451.

The Mortgage at issue in the instant matter contains a description of the plat and lot numbers, as well as the full street address of the Property securing the Mortgage debt. This Court is satisfied that a third party looking at the Mortgage language could easily ascertain the location of the Property which secures the Mortgage debt, without relying upon an addendum of the legal description of the Property. This Court finds there to be no uncertainty or ambiguity within the original Mortgage as to what property secures the Mortgage debt. Therefore, the description of the plat and lot numbers, as well as the street address, sufficiently describes the Property; hence, the original Mortgage is valid. See Patterson v. F.D.I.C., 918 F.2d 540, 13 U.C.C. Rep. Serv. 2d 1160 (5th Cir. 1990) (a street address sufficiently described the property so that a deed of trust was not void for indefiniteness under Texas law).

B

Assignment of the Mortgage Interest from MERS to LaSalle

Plaintiff alleges that the assignment is invalid as it refers to the original Mortgage. (Pl.’s Mem. in Supp. of Obj. to Def.’s Mot. to Dismiss at 5.) Thus, according to Plaintiff,

since the Mortgage is invalid and fails to convey an interest in the Property to MERS neither does the assignment of that Mortgage interest. Id. Plaintiff further alleges that since the assignment has an effective date of March 13, 2008, and the corrective mortgage was not executed until April 22, 2008, the assignment at best purports to assign an invalid Mortgage. (Pl.'s Mem. in Supp. of Obj. to Def.'s Mot. to Dismiss at 6.)

As set forth supra, the original Mortgage is valid even though it lacks a legal description, as this Court finds that the Property was sufficiently described by the language contained in the original Mortgage. Therefore, it is axiomatic that since the original Mortgage is valid, an assignment of the original Mortgage would not be rendered invalid merely because of the imprecise allegations of the Plaintiff with regard to the property description contained in the original Mortgage. Further, the execution of the corrective mortgage was merely a precaution taken by the parties; it does not render the original Mortgage a nullity. The corrective mortgage contains the duplicate provisions and exact language of the original Mortgage, with the addendum of the legal description. Plaintiff's obligations pursuant to the Mortgage and Mortgage debt were not affected by the execution of the corrective mortgage. Moreover, since the original Mortgage was found to be valid, this Court declines to find the assignment invalid simply because it references the original Mortgage.

Finally, Plaintiff, in further attempting to invalidate the assignment, attacks the authenticity of the signatory to the assignment. Plaintiff alleges in the Complaint that Rick Wilken ("Wilken") had no authority to assign the Mortgage interest to LaSalle. (Compl. ¶ 12.) It is well-settled that homeowners lack standing to challenge the propriety of mortgage assignments and the effect those assignments, if any, could have on the

underlying obligation. Payette v. Mortgage Electronic Registration Systems, No. PC-2009-5875, 2011 WL 3794701 (R.I. Super. August 22, 2011) (Rubine, J.); see also Kriegel v Mortgage Electronic Registration Systems, No. PC-2010-7099, 2011 WL 4947398 (R.I. Super. October 13, 2011) (Rubine, J.); Fryzel v. Mortgage Elec. Registration Sys., 2011 U.S. Dist. LEXIS 95114 (D.R.I. June 10, 2011); Brough v. Foley, 525 A.2d 919 (R.I. 1987) (holding that the plaintiff, whose property purchase was thwarted by an assignee's exercise of the assigned right of first refusal, had no standing to challenge the validity of the assignment); Peterson v. GMAC Mort., LLC, No. 11-11115-RWZ, Slip Copy, 2011 WL 5075613 at * 4 (D. Mass. Oct. 25, 2011) (Zobel, J.) (court refused to read U.S. Bank Nat. Ass'n v. Ibanez, 458 Mass. 637, 941 N.E.2d 40 (2011) as an independent basis for mortgagors to collaterally contest previously executed mortgage assignments to which they are not a party and that do not grant them any interests or rights; finding mortgagors have no legally protected interests in the assignment of the mortgage and therefore lack standing to challenge it); In re Correia, 452 B.R. 319 (B.A.P. 1st Cir. 2011) (the bankruptcy appellate panel affirming the finding of the bankruptcy judge that mortgagors lacked standing to challenge the validity of the mortgage assignment). Furthermore, Plaintiff's allegations regarding the authenticity of Wilken's signature, as well as his authorization to execute the assignment on behalf of MERS, must fail as these allegations are not specific enough to cross "the line from conceivable to plausible." Twombly, 550 U.S. at 555. Plaintiff's allegations are merely conclusory and thus fail to state a claim for relief. See Iqbal, 556 U.S. at 678. Since Plaintiff has no standing to challenge the validity of the assignment, the allegations with respect to the authority of the signatory for the assignor cannot be considered at this time. See Payette,

2011 WL 3794701; see also Kriegel, 2011 WL 4947398; Brough, 525 A.2d at 919. In addition, the assignment is presumptively valid. Dolan v. Hughes, 20 R.I. 513, 40 A. 344 (1898) (citing Johnson v. Thayer, 17 Me. 403 (1840)) (the presumption of law is in favor of the validity of the assignment, and of the good faith of the transaction thereunder; and they must be proved to have been fraudulently made before the court can decide against them).

C

No Disconnection of the Note and Mortgage Occurred

Plaintiff alleges that the Note was bifurcated the day he signed it and it never reconnected with the Mortgage. (Pl.’s Mem. in Support of Obj. to Def.’s Mot. to Dismiss at 6.) As evidence of this bifurcation of the Note and Mortgage, Plaintiff asserts that People’s never negotiated the Note to any other party. Id. The Note is not a part of the record. Neither party has introduced evidence purporting to prove the identity of the current note-holder. Regardless of who or what entity currently holds the Note, MERS is designated the nominee for whatever financial entity holds the beneficial interest of the Note based upon the broad language contained in the Mortgage Agreement.² Porter v. First NLC Financial Services, No. PC-2010-2526, 2011 WL 1252146 at * 8 (R.I. Super. March 31, 2011) (Rubine, J.). Moreover, under § 34-11-24, “an assignment of mortgage . . . shall . . . have the force and effect of granting, bargaining, transferring and making over to the assignee, . . . the mortgage deed with the note and debt thereby secured.” Kriegel, 2011 WL 4947398 at * 7. Thus, upon MERS assignment of the Mortgage

² The operative language of the Mortgage at issue is identical to the operative language of the mortgage in Porter v. First NLC Financial Services, No. PC-2010-2526, 2011 WL 1252146 (R.I. Super. March 31, 2011) (Rubine, J.), Bucci v. Lehman Brothers Bank, FSB, No. PC-2009-3888, 2009 WL 3328373 (R.I. Super. August 25, 2009) (Silverstein, J.), Payette, 2011 WL 3794701, and Kriegel, 2011 WL 4947398.

interest to LaSalle, MERS was acting as nominee of People's and People's successors and assigns, and LaSalle became the assignee of the Mortgage together with the Note and debt thereby secured, regardless of the identity of the note-holder. Also, MERS, as well as its successors and assigns, acted as nominee of the lender, note-holder, even without physical possession of the Note, which was the instrument giving rise to the debt secured by the Mortgage. It is well established by this Court's earlier precedent that the designation of MERS as mortgagee of the Mortgage to MERS does not fatally disconnect the Note and Mortgage. See Payette, 2011 WL 3794701; see also Kriegel, 2011 WL 4947398; Porter, 2011 WL 1252146; Bucci v. Lehman Brothers Bank, FSB, No. PC-2009-3888, 2009 WL 3328373 (R.I. Super. August 25, 2009) (Silverstein, J.). Accordingly, this Court finds Plaintiff's argument that the mortgagee and lender must be the same party under Rhode Island statutory law fails to state a claim for relief.

D

Consent Order

In an attempt to discredit the authority and actions of MERS, Plaintiff relies upon an uncertified copy of a United States Department of Treasury Consent Order, asserting that the Order demonstrates that MERS engaged in wrongdoing to the extent that Plaintiff's obligations pursuant to the Note and Mortgage were affected. In Payette the plaintiffs attached the same Order to their objection asserting identical allegations in regards to the actions taken by MERS. 2011 WL 3794701. This Court found that the consent order submitted in Payette contained neither an admission of misconduct by MERS nor a finding of misconduct by the Department of Treasury. 2011 WL 3794701 at * 17. In addition, this Court determined that the consent order contained no reference to

any particular laws or regulations that apply to MERS that MERS could have violated. Id. Likewise, this Court finds that the Consent Order in this instant matter has no relevance or significance to this action, nor does it suggest any wrongdoing on behalf of MERS. See Payette, 2011 WL 3794701. Accordingly, this Court will not consider the Consent Order as affecting the outcome of this claim.

E

LaSalle's Authority to Exercise the Statutory Power of Sale

Plaintiff further argues that according to the language contained in the Mortgage, the mortgagee or its assigns may not invoke the Statutory Power of Sale. (Compl. ¶ 20.) Plaintiff contends that only the original lender may invoke the Statutory Power of Sale under the language of the Mortgage. (Compl. ¶¶ 24-29.) Therefore, according to Plaintiff, Defendants fail to possess the requisite standing to foreclose. (Compl. ¶¶ 33-35.)

LaSalle rebuts this argument by asserting that pursuant to the express language of the Mortgage, MERS was the mortgagee and thus was vested with the power to invoke the Statutory Power of Sale contained in the Mortgage. (Def.'s Mem. in Support of Mot. to Dismiss at 8.) Therefore, according to Defendants, that Mortgage interest was assignable and LaSalle, after the recordation of the assignment, became the mortgagee, vested with the power to invoke the Statutory Power of Sale in the mortgage, through lawful succession due to the assignment of the Mortgage interest from MERS. Id. Since Plaintiff defaulted on his obligations pursuant to the Mortgage and Mortgage debt, Defendants contends that the statutory condition within the Mortgage was triggered thereby prompting LaSalle's authority to invoke the Statutory Power of Sale. As the

Court noted when commenting on the homeowner, mortgagor's lack standing to challenge the assignment since the assignment does not affect the debtor's obligation under the note, only to whom that obligation is owed. In other words, the borrower cannot render a nullity his obligation to repay the borrowed funds merely because the debt was assigned as part of the mortgage assignment.

Accordingly, once the lender designates MERS as its nominee, MERS, and therefore any assignee of MERS, also acts as the holder of the debt secured by the Mortgage and thus is granted the ability to invoke the Statutory Power of Sale pursuant to the broad language contained in the Mortgage instrument. See Kriegel, 2011 WL 4947398 at * 15; see also Porter, 2011 WL 1252146 at * 7-8 (since plaintiff specifically and expressly agreed by her execution of the mortgage that MERS could act as mortgagee and nominee of the lender, and its successors and assigns, she cannot now contend that MERS did not have the right to initiate foreclosure proceedings.) Based on the broad language of the Mortgage instrument at issue, LaSalle, as assignee of MERS, was granted the right to exercise the Statutory Power of Sale upon Plaintiff's default.

IV

Conclusion

Defendant's Motion to Dismiss is granted. Counsel for the prevailing party shall submit an Order in accordance with this Decision. Since this Court has dismissed Plaintiff's Complaint on other grounds, it is not necessary to address LaSalle's argument pertaining to the Doctrine of Laches or the "Gavel Rule."