

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.

SUPERIOR COURT

(FILED: April 11, 2013)

MARK ADAMS

:

v.

:

C.A. No. KC 2011-0589

:

:

MORTGAGE ELECTRONIC

:

REGISTRATION SYSTEMS, INC.;

:

GMAC MORTGAGE, LLC; and

:

FEDERAL NATIONAL MORTGAGE

:

ASSOCIATION

:

DECISION

**RUBINE, J.** Defendants Mortgage Electronic Registration Systems, Inc. (MERS), GMAC Mortgage, LLC (GMAC), and Federal National Mortgage Association (FNMA) (collectively, “Defendants”) move this Court to dismiss Plaintiff’s complaint (Complaint) pursuant to Super. R. Civ. P. 12(b)(6) and to dissolve lis pendens. Plaintiff, through the Complaint, seeks declaratory and injunctive relief to quiet title to certain real property located at 104 Horseneck Road, Warwick, Rhode Island (the “Property”). Plaintiff alleges that the foreclosure sale conducted by FNMA is null and void as FNMA did not have the authority to exercise the statutory power of sale upon commencement of foreclosure proceedings as a result of an invalid assignment of the mortgage. Plaintiff further sets forth allegations in the Complaint that the mortgage note is current or has been satisfied and that the foreclosure sale was not noticed or published as required by statute and by the terms of the mortgage.

## I

### FACTS & TRAVEL

The facts set forth in the Complaint and gleaned from the exhibits attached thereto are as follows. On May 1, 2006, Plaintiff executed a note (Note) in favor of GMAC Mortgage Corporation for \$187,000. (Compl. Ex. 2 at 2.) To secure the Note, Plaintiff contemporaneously executed a mortgage (Mortgage) on the Property. (Compl. Ex. 2.) The Mortgage designates GMAC Mortgage Corporation as the “Lender” and further designates MERS as “mortgagee” as well as “nominee for Lender and Lender’s successors and assigns.” Id. at 1-2. The clear, unambiguous language of 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 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 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 City of Warwick. See Compl. Ex. 3.

On March 7, 2011, MERS, as mortgagee and as nominee for GMAC Mortgage Corporation, assigned the Mortgage interest to FNMA. (Compl. Ex. 3.) Thus, FNMA became an assignee of MERS and therefore, after the assignment, had the right to exercise the statutory power of sale and to foreclose and sell the Property. (Compl. Ex. 2

at 3.) The assignment was recorded in the land evidence records of the City of Warwick.  
(Compl. Ex. 3.)

Thereafter, on May 5, 2011, FNMA conducted a foreclosure sale of Plaintiff's Property. (Defendants' Mot. Dismiss Ex. D.) Plaintiff filed the instant Complaint to quiet title, seeking nullification of the foreclosure sale and return of title to him. Plaintiff also alleges in the Complaint that the Note is current or has been satisfied and that the foreclosure sale was not properly noticed or published.<sup>1</sup> Defendants filed this Rule 12(b)(6) Motion to Dismiss Plaintiff's Complaint and to Dissolve Lis Pendens averring that Plaintiff's Complaint fails to state a claim upon which relief may be granted. Plaintiff has objected to Defendants' Motion averring that he has set forth a claim for relief. Both parties signed a written stipulation agreeing to waive oral argument on Defendants' Motion and to submit the matter for decision based upon legal memoranda.

However, before the Court could rule on the Motion, Defendant GMAC filed a Notice of Bankruptcy and Effect of Automatic Stay due to GMAC's filing for protection under the United States Bankruptcy Code, referencing a bankruptcy filing in the United States Bankruptcy Court for the Southern District of New York. This Court ruled that it was unable to decide the pending Motion to Dismiss given the automatic stay in the related bankruptcy court matter. This Court later lifted its stay in this case, given the Order of the Bankruptcy Court partially lifting the automatic stay. Thus, this Court believes the bankruptcy automatic stay no longer prevents this Court from resolving the pending Motion.

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<sup>1</sup> The Complaint does not specifically allege the defects in the foreclosure notice or publication.

## II

### ANALYSIS

For the purpose of a Rule 12(b)(6) motion to dismiss, the Court assumes the allegations set forth in the complaint are true and views them in the light most favorable to plaintiff. Tarzia v. State, 44 A.3d 1245, 1251 (R.I. 2012) (quoting Narragansett Elec. Co. v. Minardi, 21 A.3d 274, 277 (R.I. 2011)). The motion will be granted only if it appears clear beyond a reasonable doubt that there is no set of facts which could entitle plaintiff to relief. Palazzo v. Alves, 944 A.2d 144, 149-50 (R.I. 2008) (quoting Ellis v. Rhode Island Pub. Transit Auth., 586 A.2d 1055, 1057 (R.I. 1991)).

Applying that standard here, Defendants' Motion to Dismiss and to Dissolve Lis Pendens must be denied. There are at least two allegations which, if taken as true, would be grounds to invalidate the foreclosure. Plaintiff has set forth an allegation that the Note is current. (Compl. ¶ 51.) If that is proven to be a truthful allegation, there would be no payment default, which, under the Mortgage, is a condition precedent to foreclosure. In addition, Plaintiff sets forth an allegation in the Complaint that notice and publication of the sale failed to adhere to statutory requirements as well as to the requirements provided by the terms of the Mortgage. (Compl. ¶¶ 41-43.) Under prevailing law, failure to follow the notice procedures as provided in the statute may be grounds to render the foreclosure sale a nullity. See 55 Am. Jur. 2d Mortgages § 508, 511 & n.3 (2009) (citing persuasive authority therein) (a foreclosing mortgagee's failure to comply with certain notice requirements contained in the Mortgage and in the pertinent state statute will

invalidate a foreclosure sale). Once again, if the Court views that allegation as true, Defendants' Motion to Dismiss must be denied.<sup>2</sup>

For the above reasons, Defendants' Motion to Dismiss is denied. As to the other grounds alleged in the Complaint, based on earlier precedent, those allegations fail to state a claim as a matter of law. See Payette v. Mortg. Elec. Registration Sys., Inc., No. PC 2009-5875, 2011 WL 3794701 (R.I. Super. Aug. 22, 2011) (Rubine, J.); Porter v. First Fin. Serv., No. PC 2010-2526, 2011 WL 1251246 (R.I. Super. Mar. 31, 2011) (Rubine, J.); Bucci v. Lehman Bros. Bank, FSB, No. PC 2009-3888, 2009 WL 3328373 (R.I. Super. Aug. 25, 2009) (Silverstein, J.).

### III

#### CONCLUSION

In sum, Plaintiff has set forth allegations in the Complaint that, if taken as true, state a claim for relief. Accordingly, Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) and to Dissolve Lis Pendens is denied. Counsel for the prevailing party shall submit an order in accordance with this Decision.

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<sup>2</sup> Defendants may not be required to proceed to trial in order to test the veracity of the allegations with respect to default and notice and publication of the foreclosure sale. If Defendants can establish the default and notice as an undisputed fact, they may move for summary judgment prior to trial. The pending Motion, however, must be considered according to the standards applicable to a Rule 12(b)(6) Motion. An allegation in a complaint must be taken as true for purposes of a motion to dismiss, even if defendants file in opposition recorded documents which refute the allegations in the Complaint. Only by way of a motion for summary judgment can the Court consider evidence submitted by the moving party and, depending on the presentation of competing evidence from the plaintiff, determine whether a genuine issue of material fact exists so as to warrant a trial on the merits of plaintiff's claims.



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

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**TITLE OF CASE:** Mark Adams v. Mortgage Electronic Registration Systems, Inc., et al.

**CASE NO:** KC 2011-0589

**COURT:** Kent County Superior Court

**DATE DECISION FILED:** April 11, 2013

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

**ATTORNEYS:**

For Plaintiff: George Babcock, Esq.  
Corey J. Allard, Esq.

For Defendant: Brian S. Grossman, Esq.