STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(Filed: January 24, 2013)

DEUTSCHE BANK NATIONAL TRUST COMPANY	:	
v.	:	**C.A. No. KD 2011-1345**
JOSEFINA MONEGRO, JOHN DOE, JANE DOE AND ALL OTHER OCCUPANTS	:	

DECISION

RUBINE, J. Before the Court is a trespass and ejectment action by Plaintiff Deutsche Bank National Trust Company ("Deutsche Bank") to obtain possession of certain real property located at 84 Rosemere Street, Warwick, Rhode Island (the "Property") from Defendant Carlos Martinez ("Martinez"), a tenant of the former Property owner, Josefina Monegro ("Monegro"). This case is on appeal from a judgment for possession entered against Martinez after trial in the District Court, and now it is presently before the Court for trial de novo.[1] See G.L. 1956 § 9-12-10.1; see also Bernier v. Lombardi, 793 A.2d 201, 202 (R.I. 2002). Deutsche Bank claims that Martinez is a tenant at sufferance as well as a holdover tenant, given his residence at the Property following the foreclosure sale at which Deutsche Bank was the successful bidder and obtained title to the Property. Martinez, on the other hand, alleges that the foreclosure sale was invalid, that Deutsche Bank should not be considered the valid title holder of the Property, and therefore that Deutsche Bank could not properly evict him.

[1] The instant matter only involves Defendant Martinez as the District Court entered default judgment against Monegro. Monegro appealed the entry of default judgment and this Court dismissed the appeal on July 12, 2011.

I

FACTS & TRAVEL

The record reflects the following undisputed facts as presented at trial, as well as through the exhibits, the authenticity of which are not disputed and each of which is found to be a full and accurate representation of that which it purports to be:

1. On September 25, 2006, Monegro executed a note ("Note") in the amount of $256,500 in favor of the lender, First NLC Financial Services, LLC ("First NLC"). (Ex. 2 at 1.)
2. To secure the Note, Monegro contemporaneously executed a mortgage ("Mortgage") on the Property. (Ex. 2.)
3. The Mortgage designates First NLC as "Lender" and further designates Mortgage Electronic Registration Systems, Inc. ("MERS") as "mortgagee" as well as "nominee for [First NLC] and [First NLC's] successors and assigns." (Ex. 2 at 1.)
4. The Mortgage provides that "Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for [First NLC] and [First NLC'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." (Ex. 2 at 3.) In addition, the Mortgage 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 [First NLC] and [First NLC'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 [First NLC]." Id.

5. On September 29, 2008, MERS, as mortgagee and as nominee for First NLC, assigned the Mortgage interest to "Deutsche Bank National Trust Company, as Trustee for IXIS 2006-HE2 of c/o Saxon Mortgage Services, Inc." ("DB 2006-HE2"). (Ex. 3.)
6. On May 8, 2009, DB 2006-HE2, as mortgagee by way of assignment from MERS, assigned the Mortgage instrument to Deutsche Bank National Trust Company, as Trustee for Morgan Stanley IXIS Real Estate Capital Trust 2006-2, c/o Saxon Mortgage Services, Inc. ("DB 2006-2"). (Ex. 4.) Thus, after the assignment, DB 2006-2 possessed the right to exercise the statutory power of sale granted by the Mortgage. (Ex. 2 at 3.)
7. As recited in the affidavit of sale which accompanied the foreclosure deed, Monegro defaulted resulting in Saxon Mortgage Servicer, Inc. ("Saxon"), as servicer for DB 2006-2 and acting on its behalf, to commence foreclosure proceedings. (Ex. 5.) On July 2, 2009, Saxon foreclosed on the Property on behalf of DB 2006-2. Id. DB 2006-2 prevailed as the successful bidder at the foreclosure sale, purchasing the Property for $106,250. Id. Thereafter, DB 2006-2 executed and recorded a foreclosure deed. Id.
8. On October 12, 2010, Deutsche Bank filed a complaint for eviction of tenancy at sufferance against Monegro and all other occupants in the Third Division District Court ("District Court"). Thereafter, Deutsche Bank obtained a default judgment

against Monegro on January 11, 2011, in the District Court eviction action. (Stipulation ¶ 1, dated Dec. 8, 2011 ("Stip.").)

9. Monegro appealed the District Court judgment, which appeal was subsequently dismissed by the Superior Court and remanded to District Court on July 12, 2011.[2] (Stip. ¶ 2.)

10. On October 8, 2011, the District Court granted Martinez's Motion for Temporary Restraining Order and added Martinez as a party to the eviction action. (Stip. ¶ 3.) A trial in the District Court was held on October 25, 2011, with respect to Martinez only. At the trial, judgment for possession was entered in favor of Deutsche Bank. (Stip. ¶ 4.) Martinez then appealed that judgment to the Superior Court, C.A. No. KD 2011-1345, leading to the instant de novo proceeding. (Stip. ¶ 5.)

The Superior Court held a trial de novo on December 8, 2011, with respect to Martinez's appeal of the District Court judgment for possession. (Stip. ¶ 6.) At the trial de novo, Monegro and Martinez testified and all exhibits were accepted by the Court as full exhibits without objection. Both parties then agreed to submit memoranda to the Court, and to submit a stipulation as to the undisputed facts.[3] The Court has taken the matter under advisement for post-trial decision.

[2] District Court appeal, C.A. No. KD 2011-0054, was dismissed as to Monegro.

[3] The parties submitted memoranda outlining their arguments; however, the parties, with one exception, failed to submit a stipulation signed by each party with respect to agreed facts. Instead, each party presented its own proposed findings of fact based upon the trial testimony and exhibits.

II

STANDARD OF REVIEW

In a case tried to the Court upon stipulated facts, "the trial court does not play a fact-finding role, but is limited to 'applying the law to the agreed-upon facts.'" Delbonis Sand & Gravel Co. v. Town of Richmond, 909 A.2d 922, 925 (R.I. 2006) (quoting Hagenberg v. Avedisian, 879 A.2d 436, 441 (R.I. 2005)). When a case is submitted to the Court for decision, the Court will consider any stipulated facts and the inferences to be drawn therefrom. 73 Am. Jur. 2d Stipulations § 17 (West 2012). "Valid stipulations are controlling and conclusive, and courts are bound to enforce such stipulations." Burstein v. United States, 232 F.2d 19, 22 (8th Cir. 1956) (citing H. Hackfeld & Co. v. United States, 197 U.S. 442, 447 (1905)). Nevertheless, "[w]here . . . [there are] evidentiary facts stipulated, the court may, if more than one inference can be drawn from the facts, permissibly find the ultimate determinative facts from the evidence stipulated." 73 Am. Jur. 2d Stipulations § 17 (West 2012).

III

ANALYSIS

A

Standing

In his post-trial memorandum, Martinez avers that Deutsche Bank lacked standing to file the eviction action in the District Court as Deutsche Bank is not the record title owner named in the foreclosure deed. Specifically, Martinez is referring to the fact that Deutsche Bank filed suit as "Deutsche Bank National Trust Company," rather than "Deutsche Bank National Trust Company, as Trustee for Morgan Stanley IXIS Real

Estate Capital Trust 2006-2." Therefore, Martinez avers that Deutsche Bank is not the real party in interest and has no standing to file suit.

To the contrary, Deutsche Bank avers that Martinez has waived this affirmative defense as he failed to raise such a defense at trial or in any responsive pleading filed preceding trial. In the alternative, Deutsche Bank avers that Martinez was put on notice of the real party in interest because the foreclosure deed identified "Deutsche Bank National Trust Company, as Trustee for Morgan Stanley IXIS Real Estate Capital Trust 2006-2" as record title holder, which deed was attached to the complaint filed in District Court.

Rule 17(a) of the Rhode Island Superior Court Rules of Civil Procedure provides that "[e]very action shall be prosecuted in the name of the real party in interest." Super. R. Civ. P. 17(a). The purpose of requiring prosecution in the name of the real party in interest is to protect a defendant from multiple suits regarding the same claim. See Esquire Swimming Pool Prod., Inc. v. Pittman, 114 R.I. 238, 239-40, 332 A.2d 128, 130 (1975). In accordance with pleading standards, a defendant may raise failure to prosecute a claim in the name of the real party in interest in a manner similar to raising an affirmative defense. See Super. R. Civ. P. 17(a); see also Esquire Swimming Pool Prod., Inc., 114 R.I. at 239, 332 A.2d at 129-30; Robert B. Kent et al., Rhode Island Civil Procedure § 17:1 (West 2011). Any objection concerning whether the plaintiff is a real party in interest must be raised as promptly as possible and failure to do so may result in waiver, and promptness with respect to raising this objection is within the discretion of the trial justice. See Kent, Rhode Island Civil Procedure § 17:1; see also Calenda v. Allstate Ins. Co., 518 A.2d 624, 627 (R.I. 1986). "[C]ourts should be allowed as much

discretion as possible in handling real-party-in-interest objections." Calenda, 518 A.2d at 627. Our Supreme Court has stated that it will not allow a defendant to withhold a real party in interest objection "until the eleventh hour in order to entrap the plaintiff." Esquire Swimming Pool Prod., Inc., 114 R.I. at 241, 332 A.2d at 130.

Here, Martinez failed to promptly raise the real party in interest defense within a reasonable period of time after commencement of suit in this matter. See Kent, Rhode Island Civil Procedure § 17:1; see also Calenda v. Allstate Ins. Co., 518 A.2d 624, 627 (R.I. 1986). In fact, Martinez raised this defense for the first time, not in a pleading, but solely by way of argument in his post-trial memorandum. Accordingly, having failed to exercise reasonable promptness in making the real party in interest objection, Martinez has waived such a defense. See Esquire Swimming Pool Prod., Inc., 114 R.I. at 240, 332 A.2d at 130.

Martinez further avers that there is no evidence proving that Deutsche Bank is owner of the Property. This argument is without merit as the foreclosure deed was executed and recorded in favor of Deutsche Bank National Trust Company, as Trustee for Morgan Stanley IXIS Real Estate Capital Trust 2006-2. That recording of the acknowledged foreclosure deed is presumptive evidence of Deutsche Bank's title to the Property after foreclosure, and that presumption may be rebutted only by clear and convincing proof of fraud. See Butler v. Encyclopedia Brittanica, Inc., 41 F.3d 285, 294-95 (7th Cir. 1994) (citing 1 Am. Jur. 2d Acknowledgments § 83 (1994)) (acknowledged deeds and mortgages of real estate will not be set aside absent clear and convincing evidence that the certificate of acknowledgment is false); see also Dolan v. Hughes, 20 R.I. 513, 40 A. 344 (1898) (citing Johnson v. Thayer, 17 Me. 401, 403 (1840)) (the

presumption in favor of a valid recorded assignment may be rebutted only by proof that the assignment was fraudulently made); 65 Am. Jur. 2d Quieting Title § 73 ("In a quiet title action, there is a presumption in favor of the record titleholder, and the evidence to overcome that presumption must be clear and convincing."). Defendant has not presented clear and convincing evidence that the acknowledged and recorded foreclosure deed is false or fraudulent; thus, the foreclosure deed establishes presumptive evidence that Deutsche Bank is the owner of the Property.

B

Martinez is a Tenant at Sufferance

Martinez contends that he is a residential tenant under § 34-18-1, et seq., and therefore that DB 2006-2, as the purchaser at the foreclosure sale, took title to the Property subject to his tenancy. Further, Martinez argues that Deutsche Bank incorrectly brought suit against Martinez under § 34-18.1 rather than § 34-18. Deutsche Bank, on the other hand, argues that Martinez is a tenant at sufferance by virtue of the fact that Martinez is a holdover tenant of Monegro, a mortgagor in possession after the foreclosure sale and a tenant at sufferance.

Our Supreme Court has held that a mortgagor in possession following a foreclosure sale is a tenant at sufferance. Hebden v. Antonian, 518 A.2d 1362, 1362 (R.I. 1986) (citing Johnson v. Donaldson, 17 R.I. 107, 108, 20 A. 242, 243 (1890)); see also Regan v. Rogers, 68 R.I. 319, 323, 27 A.2d 302, 304 (1942). Hence, Monegro became a tenant at sufferance following the foreclosure sale conducted by Saxon as servicer acting on behalf of DB 2006-2. It follows, then, that Martinez, as a tenant of Monegro, is also a tenant at sufferance following the foreclosure sale.

C

Assignments of the Mortgage Interest

Martinez further avers that the first assignment of the Mortgage interest from MERS to DB 2006-HE2 failed to transfer the Mortgage interest because the assignment purported to assign the beneficial interest of the Mortgage—an interest which Martinez contends cannot be conveyed under Rhode Island law. According to Martinez, beneficial interests are personal property, and therefore cannot be transferred by way of a mortgage assignment. Martinez further avers that both the first and second assignments, as well as the foreclosure deed, are void as there is no recorded power of attorney authorizing the individuals who signed the assignments and the foreclosure deed to execute those documents. Defendant relies upon his interpretation of § 34-11-34 as requiring a recorded power of attorney and implying that if no such recording is made then the conveyance is invalidated.

It has previously been determined by this Court and other courts 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. Mortg. Elec. Registration Sys., Inc., No. PC 2009-5875, 2011 WL 3794701 (R.I. Super. Aug. 22, 2011) (Rubine, J.) (citing persuasive authority from several jurisdictions); see also Rutter v. Mortg. Elec. Registration Sys., Inc., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012 (R.I. Super. March 12, 2012) (Silverstein, J.); Oum v. Wells Fargo, N.A., 842 F. Supp. 2d 407, 413 & n.12 (D. Mass. 2012) (citing cases from several jurisdictions and noting the "near uniformity of opinion" with respect to the holding that a mortgagor does not have standing to challenge the validity of a mortgage assignment).

Therefore, just as Monegro, the mortgagor in this matter, lacks standing to challenge the Mortgage assignments, Martinez, as a tenant of the mortgagor/homeowner, lacks standing to challenge the validity of assignments of the Mortgage to which he is a stranger.[4]

Assuming arguendo that this Court found that Martinez had standing to challenge the assignments of the Mortgage interest as well as the validity of the foreclosure deed, his claims are without merit. Martinez argues that §§ 34-11-1, 34-11-34, and 34-27-4 require that a mortgagee must record a power of attorney in order for individuals to execute mortgage assignments and foreclosure deeds on behalf of the mortgagee. This Court does not agree. Section 34-11-1 simply provides for the requirement that certain conveyances must be in writing and recorded. Section 34-27-4 merely provides for the notice and publication requirements that must be adhered to once a mortgagee begins to exercise the statutory power of sale following a mortgagor's default.[5] There is no requirement under § 34-27-4 that mortgagees by assignment cannot exercise the statutory power of sale absent a recorded power of attorney. Finally, § 34-11-34 does not establish that a conveyance is void absent the recording of a power of attorney. Therefore, Martinez's assertion is not supported by the plain, unambiguous language of the statutes. Moreover, no statute exists in Rhode Island requiring individuals who execute assignments on behalf of an assignor to record their power of attorney in order to execute an assignment of a mortgage interest on behalf of the assignor.

[4] As a matter of fact, Martinez is not only a stranger to the assignments of the Mortgage interest, but he is also a stranger to the Mortgage instrument and to the Note which is secured by the Mortgage.

[5] Section 34-27-4 also provides for the rights of active military servicemembers and the notice that should be provided to those servicemembers.

D

Trust Summary

Lastly, Martinez avers that Deutsche Bank failed to file a trust summary in the land evidence records of the City of Warwick, and therefore that Deutsche Bank is not duly authorized to record conveyances in Rhode Island. Conversely, Deutsche Bank avers that the asset held by DB 2006-2 is not a trust, but rather a mortgage-backed security governed by a pooling and servicing agreement. According to Deutsche Bank, it acts as a fiduciary to a security, and thus does not have to record a memorandum of trust.[6]

A mortgage-backed security is essentially an investment security sold in the secondary market that is secured by, or at least represents an interest in, a pool of mortgage loans. Thomas P. Lemke et al., Mortgage-Backed Securities § 1:1 (West 2012). In other words, "a 'mortgage-backed security' is an asset-backed security or collateralized debt obligation that represents a claim on the cash flows from mortgage loans," in this instance encompassing loans on residential property. Id. Mortgage-backed securities are typically structured as trusts through which mortgage interest and principal payments are collected and then distributed to investors. In the mortgage securitization industry, it is common for the mortgage lender, or the originator, to sell mortgages to third party financial institutions. See Rajamin v. Deutsche Bank Nat'l Trust Co., No. 10 Civ. 7531, 2012 WL 1036075, at *2 (S.D.N.Y. March 28, 2012) (quoting In re Morgan Stanley Mortgage Pass-Through Certificates Litig., No. 09 Civ. 2137, 2010

[6] Deutsche Bank also avers that under the Rhode Island Title Standards, specifically Standard 7.11, the absence of a recorded affidavit or memorandum of trust does not render title to the Property conveyed by Deutsche Bank unmarketable. Although the Rhode Island Title Standards are not binding authority upon this Court, they are persuasive.

WL 3239430, at *2 (S.D.N.Y. Aug. 17, 2010). "The financial institutions then securitize the mortgages by pooling them together, depositing them in a trust, and selling interests in the trust to investors in the form of mortgage-backed securities." Id. This transaction renders the trustee the legal owner and holder of the trust assets for the benefit of the trust's certificate holders. Id. The pooling and servicing agreements merely govern the relationship among the trustee, the trust it manages, and the investors in the certificates held by the trust. See Deutsche Bank Nat'l Trust Co. v. Fed. Deposit Ins. Corp., 784 F. Supp. 2d 1142, 1149 (C.D. Cal. 2011). Thus, a mortgage-backed security is essentially a trust.

This Court is not persuaded by Deutsche Bank's argument that DB 2006-2 is not a trust. The Court finds that "Deutsche Bank National Trust Company, **as Trustee** for Morgan Stanley IXIS Real Estate Capital Trust 2006-2" is presumptively structured as a trust to securitize mortgage-backed securities given that Deutsche Bank's title in this matter identifies Deutsche Bank is acting "as Trustee" and also given the typical trust structure developed with respect to mortgage-backed securities.

Moreover, § 34-4-27 pertains to real property which is held in trust as well as to recorded instruments pertaining to real property. As set forth in § 34-4-27, "[p]roperty to be held in trust shall be conveyed to the trustees of the subject trust . . . Any transfer or mortgage of trust property by the trustees shall require the recording of the trust instrument as amended or restated, or, in the alternative, the recording of the affidavit or memorandum of trust." Section 34-4-27. In the instant matter, the property held in trust is not real property, but rather a pool of mortgages securing the debt owed. However, that pool of mortgages consists of recorded instruments pertaining to real property; thus,

§ 34-4-27 may require Deutsche Bank to record a trust instrument or memorandum of trust. Nonetheless, § 34-4-27 does not provide that failure to record a trust instrument upon transfer of trust property invalidates or voids that transfer. Accordingly, whether or not Deutsche Bank failed to record a trust summary in accordance with § 34-4-27, Deutsche Bank was authorized as Trustee for DB 2006-2 to employ its servicer to exercise the statutory power of sale in the Mortgage.

IV

CONCLUSION

In sum, judgment shall enter for Plaintiff Deutsche Bank as the foreclosure was valid and title was correctly recorded in the name of Deutsche Bank National Trust Company, as Trustee for Morgan Stanley IXIS Real Estate Capital Trust 2006-2. Accordingly, judgment for possession shall enter for Plaintiff. Other than a challenge to Deutsche Bank's status as record title holder, no other defenses have been raised challenging the validity of the eviction.