STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: February 20, 2013)

JAMES C. BATISTA	:	
JOANNE BATISTA	:	
	:	
v.	:	**C.A. No. PC 2011-2922**
	:	
MORTGAGE ELECTRONIC	:	
REGISTRATION SYSTEMS, INC.;	:	
ROSE MORTGAGE CORP.;	:	
OCWEN LOAN SERVICING, LLC;	:	
AND DEUTSCHE BANK NATIONAL	:	
TRUST COMPANY, AS TRUSTEE	:	
FOR IXIS REAL ESTATE CAPITAL	:	
TRUST 2007-HE-1 MORTGAGE PASS	:	
THROUGH CERTIFICATES, SERIES	:	
2007-HE-1	:	

DECISION

RUBINE, J. Before this Court is Defendants', Mortgage Electronic Registration Systems, Inc. ("MERS"), Ocwen Loan Servicing, LLC ("Ocwen"), and Deutsche Bank National Trust Company, as Trustee for IXIS Real Estate Capital Trust 2007-HE-1 Mortgage Pass Through Certificates, Series 2007-HE-1 ("Deutsche Bank") (collectively, "Defendants"),[1] Motion for Summary Judgment pursuant to Super. R. Civ. P. 56. Plaintiffs filed a complaint ("Complaint") seeking declaratory and injunctive relief. The gravamen of Plaintiffs' Complaint challenges the foreclosure sale of Plaintiffs' real property located at 12 Falmouth Street, Johnston, Rhode Island (the "Property") conducted by Ocwen as servicer for Deutsche Bank, as well as the validity of the assignment of the mortgage interest to Deutsche Bank.

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[1] Defendant Rose Mortgage Corp. is not a party to this Motion.

I

FACTS & TRAVEL

The record reflects that on June 29, 2006, Plaintiffs executed a balloon note ("Note") in favor of lender Rose Mortgage, Inc. ("Rose") for $310,000. (Defs.' Mot. Summ. J. Ex. B, C.) The Note provides that "I [borrower] understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" (Defs.' Mot. Summ. J. Ex. C.)

Contemporaneously with the execution of the Note, Plaintiffs executed a mortgage ("Mortgage") on the Property to secure the Note. (Defs.' Mot. Summ. J. Ex. B.) The Mortgage identifies Rose as the "Lender" and further identifies MERS as "mortgagee" and "nominee for Lender and Lender's successors and assigns." (Compl. Ex. 2.) The Mortgage provides, "Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for [Rose] and [Rose'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 2. 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 [Rose] and [Rose'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 [Rose]." Id. at 3.

The Mortgage was recorded in the land evidence records of the Town of Johnston. (Compl. Ex. 2.)

On March 2, 2011, MERS, as mortgagee and as nominee for Rose, assigned the Mortgage interest to Deutsche Bank. (Compl. Ex. 3.) Thus, Deutsche Bank became the mortgagee possessing all of the rights of the assignor including, but not limited to, the right to exercise the statutory power of sale and to foreclose on the Property. See Compl. Ex. 2 at 2. The assignment was recorded in the land evidence records of the Town of Johnston. Id.

Thereafter, Plaintiffs failed to make payments as due under the Note and Mortgage, thereby entering into default under the terms of the Note. (Jones Aff. ¶ 9.) On May 18, 2011, Ocwen, as servicer of the loan and acting on behalf of Deutsche Bank, foreclosed on the Property. (Jones Aff. ¶¶ 8, 12; Defs.' Mot. Summ. J. Ex. E.) Deutsche Bank prevailed as the successful bidder at the foreclosure sale. (Jones Aff. ¶ 13.)

Following the foreclosure sale Plaintiff filed the instant Complaint seeking declaratory judgment and injunctive relief. Defendants then filed this Motion for Summary Judgment pursuant to Rule 56. Plaintiffs objected to Defendants' Motion averring that genuine issues of material fact exist, and therefore, that Defendants are not entitled to judgment as a matter of law.

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 Plaintiffs, "'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

Since the facts herein are nearly identical to the facts in Payette v. Mortg. Elec. Registration Sys., Inc., and the Mortgage executed by Plaintiffs contains the same operative language as that of the mortgage considered in Payette, this Court will incorporate and adopt the reasoning set forth in Payette. No. PC 2009-5875, 2011 WL 3794701 (R.I. Super. Aug. 22, 2011) (Rubine, J.). The Court will then address any additional issues that are unique to this matter that were not addressed in the aforementioned decision.

Plaintiffs, in their memorandum, fail to offer any material distinctions between the undisputed facts in this matter and the facts relied upon in the Court's earlier

determination of similar cases. Rather, Plaintiffs have chosen to primarily criticize the precedent of the Rhode Island Superior Court as "flawed," thereby incorporating into their memorandum a document entitled "The Deconstruction of Payette" and "The Deconstruction of Kriegel." Plaintiffs' counsel fails to distinguish the earlier precedent merely arguing that the earlier cases were wrongly decided, and this Court is not persuaded by this argument. See Rutter v. Mortg. Elec. Registration Sys., Inc., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012, at *10 (R.I. Super. March 12, 2012) (Silverstein, J.); see also Commonwealth Prop. Advocates v. U.S. Bank Nat'l Ass'n, No. 11-4168, 459 Fed. App. 770 (10th Cir. March 6, 2012) (affirming district court where appellant's counsel criticized, rather than distinguished, prior MERS cases).

Plaintiffs challenge the affidavit of Nichelle Jones ("Jones"), a loan analyst employed by Ocwen. Specifically, Plaintiffs aver that the affidavit is not based upon the affiant's personal knowledge, and therefore, that the affiant is not competent to make statements with respect to the documents which pertain to this matter.

Pursuant to Rule 56(e), "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Super. R. Civ. P. 56(e). Moreover, this Court and at least one other jurisdiction have found that the testimony of an employee of a mortgagee who provides an affidavit with respect to documents in the mortgagee's file is not hearsay as the documents that form the basis of that employee's testimony are admissible under the business records exception. See Rutter v. Mortg. Elec. Registration Sys., Inc., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012, at *23-24 (R.I. Super. March 12, 2012) (Silverstein, J.);

see also Charter One Mortg. Corp. v. Keselica, No. 04CA008426, 2004 WL 1837211, at *4 (Ohio Ct. App. Aug. 18, 2004). Further, a hearsay business record is admissible under Rule 803(6) of the Rhode Island Rules of Evidence if it is established that the business record meets the definition as contained therein.

Here, Defendants submitted the affidavit of Jones, a loan analyst for Ocwen, the mortgage servicer. (Jones Aff. ¶ 1.) Jones attested in the affidavit that she was "familiar with the facts and circumstances" of this matter "[b]ased upon [her] personal knowledge and review of the referenced documents and proceedings." (Jones Aff. ¶ 1.) Jones further set forth the details establishing her personal knowledge of the matter. Thus, Jones has established that she has personal knowledge of the matters as set forth in her affidavit. Accordingly, Jones is competent to testify as to the statements made in her affidavit. See Rutter, 2012 WL 894012, at *23-24.

In their affidavits, Plaintiffs primarily make statements aimed at attacking the legal validity of the Mortgage assignment. Under prevailing law, a plaintiff/mortgagor in these circumstances lacks standing to challenge the validity of the mortgage assignment. See 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 to support the holding that a plaintiff/mortgagor does not have standing to challenge a mortgage assignment); see also Rutter, 2012 WL 894012; 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 an assignment). Likewise, Plaintiffs' lack of personal knowledge with respect to the

execution of the Mortgage assignment at issue renders Plaintiffs' affidavits, at least with respect to those sections, ineffective. Moreover, Plaintiffs have not properly alleged fraud in that they fail to allege the essential elements of fraud—that an intentional misrepresentation was made by Defendants, which misrepresentation they relied on, causing them 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)). Therefore, through their affidavits, Plaintiffs have failed to establish a genuine issue of material fact.

Lastly, Plaintiffs aver that there is a genuine issue of material fact with respect to the date of execution of the allonge to the Note, which constitutes endorsement of the Note in blank. The date the allonge was executed is not a material issue of fact which is sufficient to defeat Defendants' Motion. It is well established under current Rhode Island law that MERS and MERS' assignees and successors act as nominee for the current note holder under the express terms of the MERS form of mortgage. See Porter v. First NLC Fin. Serv., 2011 WL 1251246, at *8 (R.I. Super. March 31, 2011) (Rubine, J.) ("whatever financial entity currently holds the beneficial interest of the Note, MERS is designated the nominee for the current beneficial owner of the Note based upon the broad language contained in the Mortgage Agreement"). Likewise, MERS' assignment of the Mortgage to Deutsche Bank had the effect of transferring the Note as well as the Mortgage. See Section 34-11-24 (an assignment of the mortgage is deemed as an assignment of the note and debt secured thereby). Accordingly, there is no genuine issue of material fact with respect to the execution of the allonge to the Note.

IV

CONCLUSION

In sum, a review of the record in this case reveals no genuine issue of material fact for trial, and the Court finds on the basis of the undisputed facts and legal analysis that Defendants are entitled to judgment as a matter of law. Plaintiffs, in their attempt to show a genuine issue of material fact, have failed to meet their burden of showing by competent evidence that such an issue exists. Accordingly, Defendants' Motion for Summary Judgment is granted. Counsel for the prevailing party shall submit an Order in accordance with this Decision.