

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: January 18, 2012)

LUCAS REYES :
ALBA REYES :
v. :
MORTGAGE ELECTRONIC :
REGISTRATION SYSTEMS, INC.; :
BAC HOME LOAN SERVICING; :
FEDERAL NATIONAL :
MORTGAGE ASSOCIATION :

C.A. No. PC 2011-4094

DECISION

RUBINE, J. Before the Court is Defendants', Mortgage Electronic Registration Systems, Inc. ("MERS"), BAC Home Loan Servicing ("BAC"),1 and Federal National Mortgage Association ("FNMA") (collectively, "Defendants"), Motion to Dismiss Plaintiffs', Lucas Reyes and Alba Reyes (collectively, "Plaintiffs"), verified complaint ("Complaint") pursuant to Super. R. Civ. P. 12(b)(6). Through the Complaint, Plaintiffs seek a declaration from this Court quieting title and declaring that the foreclosure sale conducted by FNMA on certain real property located at 199 Gray Street, Providence, Rhode Island (the "Property") was null and void as FNMA allegedly failed to possess the statutory power of sale upon the commencement of foreclosure proceedings. Plaintiffs further set forth an allegation in the Complaint that the foreclosure sale was not noticed or published as required by the terms of the Mortgage. Finally, Plaintiffs allege that there was a breach of the duty of good faith and reasonable diligence.

1 On July 1, 2011, BAC merged into Bank of America, N.A.

## I

### FACTS & TRAVEL

The following facts are derived from the Complaint and the exhibits attached thereto and incorporated therein. On May 21, 2007, Plaintiffs executed a note (“Note”) in favor of lender Countrywide Home Loans, Inc. (“Countrywide”) for \$180,000, which proceeds were used to finance the purchase of the Property. (Compl. Ex. 2 at 1.) Contemporaneously, Plaintiffs executed a mortgage (“Mortgage”) on the Property to secure the Note. (Compl. Ex. 2.) The Mortgage designates MERS as “mortgagee” and “nominee for Lender and Lender’s successors and assigns.” Id. at 1. In addition, 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 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 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. at 3.

The Mortgage was thereafter recorded in the land evidence records of the City of Providence. (Compl. Ex. 2.)

On July 6, 2009, MERS, as mortgagee and as nominee for Countrywide, assigned the Mortgage interest to BAC. (Compl. Ex. 3.) Thus, BAC became the mortgagee by way of assignment from MERS, and thus obtained all “Mortgage Covenants upon the Statutory Condition and with the Statutory Power of Sale.” (Compl. Ex. 2 at 2.)

Subsequently, on February 19, 2010, BAC as an assignee of MERS, and therefore as nominee for Countrywide, assigned the Mortgage interest to FNMA. (Compl. Ex. 4.) Thus, FNMA, as an assignee of BAC, was authorized to exercise the statutory power of sale and to foreclose on the Property in the event of default under the Note.

FNMA conducted a foreclosure sale of the Property. Plaintiffs thereafter filed the instant Complaint seeking nullification of the foreclosure sale and return of title to them, as well as setting forth a claim for breach of the duty of good faith and reasonable diligence. Plaintiffs also allege that the foreclosure sale was not properly noticed or published according to the terms of the Mortgage. (Compl. ¶ 54.) Defendants then filed this Motion to Dismiss pursuant to Rule 12(b)(6) averring that Plaintiffs have failed to set forth a claim for relief. Plaintiffs object to Defendants' Motion arguing that the Complaint states a claim for relief. At the Motion hearing, both parties agreed to waive oral argument, and thus, this Court took the matter under advisement based upon the written memoranda of the parties.

## II

### STANDARD OF REVIEW

“The solitary purpose of a Rule 12(b)(6) ‘motion to dismiss is to test the sufficiency of the complaint.’” 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)). For purposes of the motion, the Court assumes “the allegations contained in the complaint are true and examin[es] the facts in the light most favorable to the plaintiff.” Id. The complaint must “provide the opposing party with ‘fair and adequate notice of the type of claim being asserted.’” Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009) (quoting Gardner v.

Baird, 871 A.2d 949, 953 (R.I. 2005) (internal quotation marks omitted)). Thereafter, “[t]he grant of a Rule 12(b)(6) 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 the plaintiff’s claim.’” 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)).

### III

#### ANALYSIS

The allegations set forth in the instant Complaint—specifically concerning the assignment of the Mortgage, the disconnect between the Note and Mortgage, and the authority of certain individuals to execute assignments on behalf of MERS—are nearly identical to the allegations in the complaint in Chhun v. Mortg. Elec. Registration Sys., Inc., and the Mortgage as executed by Plaintiffs contains the same operative language as that of the Mortgage considered in Chhun. No. PC 2011-4547, 2012 WL 2648200 (R.I. Super. June 26, 2012) (Rubine, J.). Further, Plaintiffs’ arguments are nearly identical to the arguments raised in Chhun, and are based on substantially identical facts. Therefore, this Court will incorporate and adopt the reasoning set forth in Chhun in ruling on Defendants’ Motion. In Chhun, the plaintiffs failed to adequately allege in their complaint the grounds entitling them to relief, merely alleging conclusory statements; thus, this Court dismissed plaintiffs’ complaint for failure to state a claim for relief. The same outcome obtains in this case with respect to the aforementioned legal issues. This is the third motion to dismiss, all of which were scheduled to be heard on the same day, addressing the same legal theories put forward by Plaintiff’s counsel. This Court, as a

matter of consistent jurisprudence, must determine the outcome of each of these motions by way of similar analysis; thus, the outcome of each motion is the same. See Buckley v. Mortg. Elec. Registration Sys., Inc., No. KC 2011-0990, slip op. (R.I. Super. Jan. 14, 2013) (Rubine, J.); Machado v. Mortg. Elec. Registration Sys., Inc., No. PC 2011-4092, slip op. (R.I. Super. Jan. 15, 2013) (Rubine, J.).

Notwithstanding the substantial similarity between this matter and Chhun, there is an allegation of fact in the instant Complaint that the foreclosure sale was not noticed or published as required by the terms of the Mortgage. If this allegation is accepted as true for purposes of the Defendants' Motion, Plaintiffs' Complaint cannot be dismissed, and Plaintiffs must be given an opportunity to be heard with respect to the allegation concerning whether the notice and publication requirements were properly undertaken by the foreclosing mortgagee. See 55 Am. Jur. 2d Mortgages § 508, 511 (2009) (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).

Apart from the allegation that there was a defect in the notice and publication of the foreclosure sale, Plaintiffs set forth allegations in the Complaint relative to MERS' authority to act as nominee of the lender and its authority to execute mortgage assignments. Contrary to Plaintiffs' assertion, an assignment by MERS authorizes the assignee, in this case FNMA, to exercise the statutory power of sale, and thus to foreclose following a mortgagor's default. An assignment of the Mortgage does not cause a disconnect between the note and mortgage rendering the assignment a nullity. Rather, under § 34-11-24, an assignment of the mortgage carries with it "the note and debt thereby secured." Section 34-11-24. Therefore, in this case, the assignment of the

Mortgage interest from MERS to FNMA transferred the Mortgage as well as “the [N]ote and debt thereby secured.” Id. FNMA then became an assignee of MERS thereby possessing all of the rights as mortgagee, including the statutory power of sale. See Kriegel v. Mortg. Elec. Registration Sys., Inc., No. PC 2010-7099, 2011 WL 4947398, at \*13-14 (R.I. Super. Oct. 13, 2011) (Rubine, J.) (quoting Weybosset Hill Inv., LLC v. Rossi, 857 A.2d 231, 240 (R.I. 2004)) (affirming the argument that an assignee steps into the shoes of the assignor and can avail itself of the assignor’s rights).

Moreover, Plaintiffs allege that the assignment was not duly executed as the individual who signed the Mortgage assignment was not an employee of MERS, and therefore, did not have the authority to execute the assignment on behalf of MERS. (Compl. ¶¶ 34-37.) It is well established 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.); see also Rutter v. Mortg. Elec. Registration Sys., Inc., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012, at \*17 (R.I. Super. March 12, 2012) (Silverstein, J.) (quoting Fryzel v. Mortg. Elec. Registration Sys., Inc., C.A. No. 10-325M, 2011 U.S. Dist. LEXIS 95114, at \*41-42 (D.R.I. June 10, 2011)) (the principle that a non-party to the contract does not have standing to challenge the contract’s subsequent assignment is well established); 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). Thus, Plaintiffs’ allegation with respect to the invalidity of the

Mortgage assignment on the basis of lack of authority or otherwise is not supported by the prevailing case law and is insufficient to survive a motion to dismiss.

Furthermore, Plaintiffs set forth allegations pertaining to breach of the duty of good faith and reasonable diligence. Specifically, Plaintiffs allege that “Defendant, OneWest, owed Plaintiffs, Gilmar Reyes and Doris Reyes, a duty of good faith and fair dealing in the conduct leading up to the foreclosure” (Compl. ¶ 85) and “by conducting [the] foreclosure proceedings without a valid assignment from MERS, the Defendant, OneWest, violated this duty.” (Compl. ¶ 86.) OneWest is not a party to this matter. Likewise, Gilmar Reyes and Doris Reyes are not parties to this matter, but rather the Plaintiffs are Lucas Reyes and Alba Reyes. The failure to allege facts pertaining to the parties involved in this suit establishes Plaintiffs’ failure to set forth a claim for relief relative to breach of the duty of good faith and reasonable diligence.<sup>2</sup>

Nevertheless, Plaintiffs allege that the foreclosure sale notice and publication requirements were not properly performed. Considering this allegation as true and in the light most favorable to Plaintiffs, Defendants’ Motion to Dismiss must be denied because defect in notice and publication of the foreclosure sale raises an issue of fact relative to the validity of the foreclosure sale. See 55 Am. Jur. 2d Mortgages § 508, 511. For that reason alone, Plaintiffs’ Complaint cannot be dismissed, and Plaintiffs must be given an

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<sup>2</sup> “[V]irtually every contract contains an implied covenant of good faith and fair dealing between the parties.” Dovenmuehle Mortg., Inc. v. Antonelli, 790 A.2d 1113, 1115 (R.I. 2002) (alteration in original) (quoting Centerville Builders, Inc. v. Wynne, 683 A.2d 1340, 1342 (R.I. 1996)). In this matter, it seems that Plaintiffs are attempting to use a variation of the implied covenant of good faith and fair dealing as simply another avenue through which to challenge the Mortgage assignment as defective. Plaintiffs have failed to set forth a cognizable claim under this theory, however.

opportunity to have these issues considered at trial.<sup>3</sup> However, the legal issues presented in this matter—specifically concerning the assignment of the Mortgage interest, the disconnect between the Note and Mortgage, and the authority of certain individuals to execute assignments on behalf of MERS—have previously been decided by this Court in a manner contrary to the alleged interest of the mortgagor/homeowner. See Kriegel, 2011 WL 4947398; see also Payette, 2011 WL 3794701.

#### IV

#### CONCLUSION

In sum, Plaintiffs have set forth an allegation in the Complaint that, if true, may state a claim for relief. Accordingly, Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) is Denied. Other legal challenges alleged in the Complaint have previously been rejected by the Court, and the Court similarly rejects those legal theories in this case. Counsel for the prevailing party shall submit an Order in accordance with this Decision.

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<sup>3</sup> If Defendants can establish as an undisputed fact that the notice and publication of the foreclosure sale were consistent with statute, then the Defendants could have that issue determined as a matter of law by the pretrial filing of a motion for summary judgment.