STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: March 12, 2012)

LAURENCE F. RUTTER and M. ALEXANDRA C. RUTTER	:	
v.	:	**C.A. No. PC 10-4756**
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS; FIRST NATIONAL BANK OF ARIZONA; PENNYMAC LOAN SERVICES, LLC	:	
PENNYMAC LOAN SERVICES, LLC	:	
v.	:	**C.A. No. PD 10-4418 (Consolidated)**
LAURENCE RUTTER and/or All Other Unknown Current Occupants, and M. ALEXANDRA RUTTER and/or All Other Unknown Current Occupants	:	

DECISION

SILVERSTEIN, J. Before this Court is Mortgage Electronic Registration Systems (MERS) and PennyMac Loan Services, LLC's (PennyMac) Motion for Summary Judgment on all counts of the Verified Complaint (Complaint) filed by Plaintiffs Laurence F. Rutter and M. Alexandra C. Rutter (collectively, Rutters or Plaintiffs) in C.A. No. PC 10-4756 and on Counts I and II of the Counterclaim, as well as on the claims of PennyMac in C.A. No. PD 10-4418. This consolidated case concerns a disputed foreclosure on a mortgage involving MERS.

I

Facts and Travel

On January 8, 1988, the Rutters purchased the real property (the Property) located at 10 Courageous Circle in Bristol, Rhode Island. (Mallory J. Garner Aff. ¶ 2, Sept. 14, 2011.) In

2007, that Property was appraised at approximately $1,735,000. Id. On July 18, 2007, the Rutters entered into a $1,301,250 mortgage loan (the Loan) with First National Bank of Arizona (FNBA), as evidenced by a promissory note titled Adjustable Rate Note (the Note). (Garner Aff. ¶ 3, Ex. 2.) FNBA was listed as the Lender on the Note, which was signed by the Rutters. (Garner Aff. Ex. 2.) The Note provided that the "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.'" Id. at § 1. Pursuant to the Note, the Rutters agreed to make payments on the first day of each month. Id. at § 3(A). In the event the Rutters did not pay the minimum amount on the due date, the Note provided they would be in default. Id. at § 7(B). Thirty days after providing notice of the default, the Note Holder could require full, immediate payment. Id. at § 7(C).

Contemporaneously with the Note, the Rutters also entered into a Mortgage on the Property (the Mortgage). (Garner Aff. Ex. 3.) The Mortgage was intended as security for the Note. (Garner Aff. ¶ 3.) The Mortgage listed the Rutters as the mortgagors and MERS as the mortgagee, acting as a nominee for Lender, FNBA, and Lender's successors and assigns.[1] (Garner Aff. Ex. 3 at 1-2.) Under the Mortgage, the Rutters mortgaged the Property to MERS and its successors and assigns with the Statutory Power of Sale.[2] (Garner Aff. Ex. 3 at 3.)

[1] Specifically, the Mortgage provided, in pertinent part:

> "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument." (Garner Aff. Ex. 3 at 1.)

[2] The Mortgage provided, in pertinent part:

> "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

Further, the Mortgage specifically provided that MERS had the right to foreclose on and sell the Property.[3] Id.

On June 30, 2008, FNBA merged into First National Bank of Nevada (FNBN), and FNBA ceased to exist as a separate entity. (Garner Aff. ¶ 3.) The Note was purportedly endorsed by FNBA payable to the order of FNBN, pursuant to an undated Allonge to Note signed without recourse by Amy Quintero as Assistant Vice President of FNBA. (Garner Aff. ¶ 3, Ex. 3.) On July 25, 2008, the Federal Deposit Insurance Corporation (FDIC) was named Receiver for FNBN. (Garner Aff. ¶ 4.) The Note, pursuant to the same undated Allonge to Note, was purportedly endorsed to FDIC by Amy Quintero, this time as Assistant Vice President of FNBN. (Garner Aff. ¶ 4, Ex. 3.)

The Rutters failed to make their required payments on the Note on November 1, 2008. (Garner Aff. ¶ 5.) On December 17, 2008, Specialized Loan Servicing LLC (SLS) sent a Notice of Default and Notice of Intent to Foreclose (the Notice) to Laurence Rutter at the Property address for the $15,740.59 in payments due. (Garner Aff. Ex. 4.) SLS was the servicer of the Loan for FDIC as Receiver of FNBN. (Garner Aff. ¶ 6.) The Rutters have not made any payments on the Note since the date of the Notice. (Garner Aff. ¶ 7.)

> Statutory Power of Sale, the following described property . . . ." (Garner Aff. Ex. 3 at 3.)

[3] The Mortgage provided, in pertinent part:

> "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 including, but not limited to, releasing and canceling this Security Instrument." (Garner Aff. Ex. 3 at 3.)

FDIC, as Receiver of FNBN, formed FNBN I, LLC (FNBN I). (Garner Aff. ¶ 8.) On December 29, 2008, FDIC, as Receiver of FNBN, transferred the right, title, and interest in a portfolio of loans containing the Rutters' Loan to FNBN I, pursuant to a Loan Contribution and Assignment Agreement. (Garner Aff. ¶ 9, Ex. 5.) Contemporaneous with the transfer, the Note was purportedly endorsed by FDIC, as Receiver of FNBN, payable to the order of FNBN I without recourse and without representation or warranty, pursuant to an Allonge to the Note. (Garner Aff. ¶ 10, Ex. 2.) Also on December 29, 2008, FNBN I entered into a Servicing Agreement with PennyMac, engaging PennyMac as servicer of the loan portfolio including the Loan. (Garner Aff. ¶ 11, Ex. 6.) The Servicing Agreement appointed PennyMac to service the loans and collateral, and to declare default, accelerate maturity of the loan, institute foreclosure proceedings, accept a deed in lieu of foreclosure, purchase the collateral at foreclosure, and obtain deficiency judgments.[4] (Garner Aff. Ex. 6 at §§ 2.01, 3.02.) Finally, on the same date,

[4] The Servicing Agreement provided, in pertinent part:

> "Section 2.01 . . . [FNBN I] appoints the Servicer to service and administer the Loans and any Collateral on behalf of and as an agent of [FNBN I]."
>
> . . . .
>
> "Section 3.02 . . . Upon the occurrence of an event of default under any of the Loan Documents, but subject to the other terms and conditions of this Agreement, including the Servicing Obligations of the Servicer and such direction as [FNBN I] may otherwise provide that is consistent with the Servicer's compliance with the Servicing Standard, the Servicer shall cause to be determined in response to such default and course of action with respect to such default, including (a) the selection of attorneys to be used in connection with any action, whether judicial or otherwise, to protect the respective interests of [FNBN I] and the Participant in the Loan and the Collateral, (b) the declaration and recording of a notice of such default and the acceleration of the maturity of the Loan, (c) the institution of proceedings to foreclose the Loan Documents securing the Loan pursuant to the power of sale contained therein or through a judicial action, (d) the institution of proceedings against any Guarantor, (e) the acceptance of a deed in

December 29, 2008, FDIC purportedly transferred its interest in FNBN I to PNMAC Mortgage Co., LLC (PNMAC Mortgage Company). (Garner Aff. ¶ 12.) On January 15, 2009, FNBN I delivered the Note to PennyMac, who has been holder of the Note since that date. Id.

On April 28, 2009, PennyMac, pursuant to the Servicing Agreement, noticed the Rutters and advertised a public auction foreclosure sale of the Property. (Garner Aff. ¶ 13.) PennyMac cancelled that foreclosure when the Rutters agreed to a deed-in-lieu-of-foreclosure transaction, by which the Rutters would convey the Property to PennyMac and PennyMac would permit them sixty days further occupancy. Id. On August 18, 2009, MERS assigned the Mortgage to PennyMac, pursuant to a recorded Assignment of Mortgage (the Assignment). (Garner Aff. Ex. 7.) On or about August 27, 2009, PennyMac sent the deed-in-lieu documents to the Rutters, but PennyMac never received a response to the documents, despite several attempts to contact the Rutters. (Garner Aff. ¶ 15.) After several months, on January 4, 2010, PennyMac duly noticed the foreclosure sale of the Property for February 24, 2010, and in the weeks preceding that date PennyMac duly published notice of the foreclosure sale. (Garner Aff. ¶ 16.)

Five days (three business days) before the scheduled foreclosure and well over a year after first receiving Notice of their default, the Rutters mailed PennyMac a purported Qualified Written Request (QWR) letter under the Real Estate Settlement Procedures Act (RESPA), codified at 12 U.S.C. § 2601 et seq. (Garner Aff. ¶ 17.) PennyMac did not receive the letter until February 23, 2010—the day before the foreclosure sale. (Garner Aff. ¶ 18.) PennyMac

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> lieu of foreclosure, (f) the purchase of the real property Collateral at a foreclosure sale or trustee's sale or the purchase of the personal property Collateral at a Uniform Commercial Code sale, and (g) the institution of continuation of proceedings to obtain a deficiency judgment against such Borrower or any Guarantor and the collection of such judgment." (Garner Aff. Ex. 6 at §§ 2.01, 3.02.)

rejected the letter as insufficient to be a QWR under RESPA, informing the Rutters of that decision by letter dated February 25, 2010. (Garner Aff. ¶ 18, Ex. 10.)

PennyMac proceeded with the foreclosure sale on February 24, 2010, fourteen months after the Notice. (Garner Aff. ¶ 19.) Bidding $1,100,000, PennyMac was the only bidder on the property. Id. On the day of the foreclosure sale, the Rutters' counsel sent PennyMac's foreclosure counsel a recorded lis pendens. (Garner Aff. ¶ 20.) On July 1, 2010, PennyMac recorded the foreclosure deed of the Property to PennyMac. (Garner Aff. ¶ 21.)

PennyMac was served with the Complaint on August 16, 2010. (Garner Aff. ¶ 20.) In their Complaint, the Rutters request declaratory judgment and quiet title that they own the Property, and they seek unspecified compensatory damages for violation of RESPA. (Compl. ¶¶ 40-52, Aug. 13, 2010.) In their Counterclaim, MERS and PennyMac request declaratory judgment that the foreclosure was proper and that there was no RESPA violation, and they bring an additional claim for slander of title (Count III). (Countercl. ¶¶ 42-50, Oct. 4, 2010.) Previously, on April 13, 2010, PennyMac had filed a Complaint in Rhode Island District Court to evict the Rutters from the Property after PennyMac purchased the Property at the foreclosure and demanded possession. (Compl. for Eviction for Reasons other than Non-Payment of Rent ¶¶ 5-13, Apr. 13, 2010.) Judgment in the District Court entered in favor of PennyMac by stipulation on July 23, 2010, and the Rutters filed a Notice of Appeal to the Superior Court on July 26, 2010. The two cases were consolidated by Order on March 22, 2011.

On September 15, 2011, MERS and PennyMac (collectively, the Movants) brought this Motion for Summary Judgment (Motion). The Movants claim there is no genuine dispute of material fact that (1) the Rutters were adequately noticed of their default, (2) the assignment of the Mortgage to PennyMac was proper, and (3) the foreclosure conducted on the Property by

PennyMac was valid. The Movants request summary judgment declaring the foreclosure proper under law, dismissing all counts of the Rutters' Complaint, and entering judgment in favor of the Movants on Counts I and II of the Counterclaim in PC 10-4756 and in favor of PennyMac in PD 10-4418.

II

Standard of Review

Summary judgment is proper when "no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Rule 56(c)). On consideration of a motion for summary judgment, this Court must draw "all reasonable inferences in the light most favorable to the nonmoving party." Hill v. Nat'l Grid, 11 A.3d 110, 113 (R.I. 2011) (quoting Fiorenzano v. Lima, 982 A.2d 585, 589 (R.I. 2009)). However, the burden lies on the nonmoving party to "prove the existence of a disputed issue of material fact by competent evidence," rather than resting on the pleadings or on mere legal opinions and conclusions. Hill, 11 A.3d at 113. The opposing party has "an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact." Lynch v. Spirit Rent-a-Car, Inc., 965 A.2d 417, 424 (R.I. 2009) (quoting Providence Journal Co. v. Convention Ctr. Auth., 774 A.2d 40, 46 (R.I. 2001).

Where it is concluded "that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law," summary judgment shall properly enter. Malinou v. Miriam Hosp., 24 A.3d 497, 508 (R.I. 2011) (quoting Poulin v. Custom Craft, Inc., 996 A.2d 654, 658 (R.I. 2010)); see also Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d

331, 334 (R.I. 1992) (stating "summary judgment is proper when there is no ambiguity as a matter of law"). Conversely, "if the record evinces a genuine issue of material fact, summary judgment is improper." Shelter Harbor Conservation Soc'y, Inc. v. Rogers, 21 A.3d 337, 343 (R.I. 2011) (citations omitted). "Summary judgment is an extreme remedy that should be applied cautiously." Hill, 11 A.3d at 113 (quoting Plainfield Pike Gas & Convenience, LLC v. 1889 Plainfield Pike Realty Corp., 994 A.2d 54, 57 (R.I. 2010)).

III

Discussion

Movants present this Motion arguing essentially that foreclosure on the Property was valid, and there are no genuine disputes of fact to preclude this Court from issuing such a finding. The Movants argue specifically that (1) the Rutters defaulted and received notice, (2) MERS was properly the mortgagee and lender's nominee, (3) the Rutters lack standing to challenge the Assignment from MERS to PennyMac, but, in any event, the Assignment was valid, (4) the foreclosure was thus proper, and (5) there was no RESPA violation affecting the foreclosure. Movants rely on the recent line of cases from this state's Superior Court—including one from this Court—addressing MERS mortgages.[5] Further, Movants rely on the Affidavit of Mallory J. Garner (Garner Aff.) to establish the undisputed, material facts. The Rutters, conversely, argue that there are genuine disputes of fact surrounding the chain of title of the Note

[5] The line of Rhode Island cases includes, from the first to most recent: Bucci v. Lehman Bros. Bank, FSB, No. PC-2009-3888, 2009 R.I. Super. LEXIS 110 (R.I. Super. Aug. 25, 2009) (Silverstein, J.); Porter v. First NLC Fin. Servs., LLC, No. PC-2010-2526, 2011 WL 1251246 (R.I. Super. Mar. 31, 2011) (Rubine, J.); Payette v. Mortg. Elec. Registration Sys., No. PC-2009-5875, 2011 WL 3794700 (R.I. Super. Aug. 22, 2011) (Rubine, J.); Kriegel v. Mortg. Elec. Registration Sys., No. PC-2010-7099, 2011 WL 4947398 (R.I. Super. Oct. 13, 2011) (Rubine, J.); DeRobbio v. Cent. Pac. Mortg. Co., No. PC-2010-2188, slip op. (R.I. Super. Oct. 31, 2011) (Rubine, J.). The Rhode Island Supreme Court has yet to address the issues typically associated with MERS mortgages.

and Mortgage. The Rutters further contend that MERS could not have been the mortgagee and nominee of the Lender, that the Assignment from MERS to PennyMac was invalid, that the foreclosure was improper as a result, and that the Movants violated RESPA.

As a brief foreword, it is helpful to consider the role of MERS in the context of modern mortgage transactions. MERS was established during the real estate boom of the 1990's to improve the efficiency and profitability of the mortgage industry. See Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487, 490 (Minn. 2009). In the modern system, mortgages are rarely held for the life of the loan by the original lender, and are more often sold and resold multiple times on the mortgage-backed securities markets. Id. at 502; John R. Hooge, Mortgage Electronic Registration Systems, Inc.: A Survey of Cases Discussing MERS' Authority to Act, No. 8 Norton Bankr. L. Adviser 1 (Aug. 2010) (hereinafter Hooge, A Survey of Cases Discussing MERS). Mortgage lenders and other institutions subscribe to MERS and pay its fees for it to process and track transfers of ownership interests in residential mortgages. See MERSCORP, Inc. v. Romaine, 861 N.E.2d 81, 83 (N.Y. 2006). MERS is named in the mortgage as the nominal mortgagee of record. See Jackson, 770 N.W.2d at 490. This allows MERS members to transfer interests in the mortgage to other members, while MERS internally tracks the assignment of interests in the mortgage and remains the mortgagee of record. See id. Thus, lenders are able to sell their interests to other investors without having to record the transaction, perhaps saving time and reducing paperwork. See id.; Mortg. Elec. Registration Sys., Inc. v. Nebraska Dep't of Banking & Fin., 704 N.W.2d 784, 785 (Neb. 2005).

Beginning with this Court's 2009 decision in Bucci,[6] Rhode Island courts have routinely enforced foreclosures based on MERS mortgages. Fortunately or unfortunately, MERS mortgages are becoming more and more common, and the benefits and drawbacks of the MERS mortgages are well-documented. On one side of the proverbial scale, the traditional, statutory recording system is grounded in seventeenth-century property law and does not comport with or provide for the sort of financial transactions commonplace today. Yet, weighing on the other side of the scale is the fact that the MERS system presents new problems and complications, at least for borrowers and others attempting to determine the identity of the current mortgage holder. See Hooge, A Survey of Cases Discussing MERS.

Although many other states have taken similar approaches to MERS cases as the Rhode Island trial courts, many jurisdictions have differed as well. See, e.g., LaSalle Bank Nat'l Ass'n v. Lamy, No. 030049/2005, 2006 WL 2251721, at *3 (N.Y. Sup. Ct. Aug. 7, 2006) (determining indorsement of note and assignment of mortgage did not pass ownership of mortgage to foreclose and holding foreclosing entity must own both note and mortgage at time of foreclosure); Saxon Mortg. Servs., Inc. v. Hillery, No. C-08-4357 EMC, 2008 WL 5170180, at *5 (N.D. Cal. Dec. 9, 2008) (holding note must also be assigned with mortgage and no evidence MERS held note); Bellistri v. Ocwen Loan Serv'g, LLC, 284 S.W.3d 619, 624 (Mo. App. 2009) (determining MERS' assignment of mortgage had no force because MERS never held promissory note); Mortg. Elec. Registration Sys., Inc. v. Johnston, No. 420-6-09 RDCV, slip op. (Vt. Super. Ct. Oct. 28, 2009) (determining MERS has no standing to bring foreclosure in its own name or as nominee, declining to follow In re Huggins, 357 B.R. 180 (Bankr. D. Mass.)). However, it seems that the "clear majority of cases" have enforced MERS-related foreclosures.

[6] Bucci v. Lehman Bros. Bank, FSB, No. PC-2009-3888, 2009 R.I. Super. LEXIS 110 (R.I. Super. Aug. 25, 2009).

See Mortg. Elec. Registration Sys., Inc. v. Revoredo, 955 So.2d 33, 34 (Fla. App. 2007). This Court will rely primarily on the reasoning of its decision in Bucci and the persuasive value of the subsequent decisions of Justice Rubine,[7] unless or until the Rhode Island Supreme Court weighs in on the MERS mortgage issues.

The Rutters' counsel in this matter contends largely that the existing trial court decisions on MERS cases are "flawed beyond all reason" and are "bad decision[s]" that have "missed the boat" and state "untenable position[s] as real as the Land of Oz." See Supplemental Mem. in Supp. of Obj. to Mot. for Summ. J. (Rutters' Supplemental Mem.) 5, 7, 9, Jan. 13, 2012. Rather than distinguishing the recent case law, the Rutters, in their papers, have chosen primarily to criticize the judiciary's decisions as "fatally flawed." See id. at 15. To say the least, this Court is not persuaded by that argument. See Commonwealth Prop. Advocates v. U.S. Bank Nat'l Ass'n, No. 11-4168, slip op. at 1-2 (10th Cir. Mar. 6, 2012) (affirming district court where appellant's counsel criticized rather than distinguished prior MERS cases).[8]

Before reaching the particular issues here, the Court notes that, in the case at bar, there is no dispute that the Rutters defaulted on their mortgage. See Mem. in Supp. of Obj. to Mot. to Summ. J. (Rutters' Mem.) 3 ("[t]here is no question that the Rutters fell behind on their mortgage"), 7 ("there is no dispute that the Rutters have not been making payments on the note"), Oct. 11, 2011; Rutters' Supplemental Mem. 21 ("The Rutters do not contest that they fell

[7] Pursuant to Administrative Order No. 2010-14, the Presiding Justice of the Superior Court assigned all causes of action regarding MERS to Justice Rubine.

[8] Commonwealth Property Advocates, a very recent judgment by the Tenth Circuit Court of Appeals in a MERS case, states in its entirety:

> "The issues presented in this appeal have been previously decided. Counsel were given an opportunity to distinguish our prior cases but Appellant's counsel used that opportunity to criticize, rather than distinguish, them. There is nothing more to say. AFFIRMED." No. 11-4168, slip op. at 1-2.

This Court identifies with that reasoning.

behind on their payments and that they were notified of a foreclosure"). There is also no dispute that the Rutters received proper notice of the default and scheduled foreclosure. See Rutters' Supplemental Mem. 21; see generally Laurence F. Rutter Aff., Oct. 10, 2011 (failing to raise any dispute in affidavit opposing Motion that the Rutters did not receive proper notice).

A

Current Rhode Island Case Law

The lower courts of this State have made it clear that, in general, "foreclosure sales conducted by MERS or one of MERS' assignees [a]re valid." Kriegel, 2011 WL 4947398, slip op. at 5. The mortgage documents in Bucci, Porter, Payette, and Kriegel all contain the same operative language. See id. at 6. When that mortgage language states that MERS is the mortgagee, MERS is the nominee of the Lender and its assigns, and MERS has the Statutory Power of Sale, then the mortgagor signs that document, that clear and unambiguous language is legally binding. See id. at 6-7. The Mortgage in the case at bar shares the same, identical language as the mortgages in the aforementioned MERS decisions. See Garner Aff. Ex. 3.

When terms of a contract are clear and unambiguous, the contract will be applied as written, binding parties to its plain and ordinary language. See McBurney v. Teixeira, 875 A.2d 439, 443 (R.I. 2005); Zarrella v. Minnesota Mut. Life Ins. Co., 824 A.2d 1249, 1259 (R.I. 2003). These Mortgage forms and the language therein have been determined to be clear and unambiguous and have been applied as written by Rhode Island courts. See Kriegel, 2011 WL 4947398, slip op. at 6-7; Payette, 2011 WL 3794700, slip op. at 10-11; Porter, 2011 WL 1251246, slip op. at 6-8; Bucci, 2009 R.I. Super. LEXIS 110 at *10-14. The Mortgage here, as in the other cases, stated that MERS was the mortgagee, MERS was the nominee for Lender and Lender's successors and assigns, and the borrowers mortgaged the Property to MERS and its

successors and assigns with the statutory power of sale and the right to foreclose and sell the Property. (Garner Aff. Ex. 3 at 1, 3.)

In the past, this very language has been enforced by this Court and other trial courts of the State. See Bucci 2009 R.I. Super. LEXIS 110 at *10-14 (finding contractual authority for MERS to foreclose). The general rules of contract interpretation govern the authority to foreclose in MERS transactions. See id. Here, MERS was the mortgagee. It, as well as its assigns, were nominee for the Lender and its assigns. As the Note passed from FNBA to FNBN and then to FNBN I, MERS remained the mortgagee and nominee of the Lender who held the interest at the time.[9] See Porter, 2011 WL 1251246, slip op. at 8. "MERS, while not the lender, may invoke the statutory power of sale as the mortgagee and nominee for the lender, and that . . . foreclosure sale [i]s valid in all respects." Id. at 9. MERS also had the authority pursuant to the Mortgage to, as here, assign its interest as mortgagee. See Payette, 2011 WL 3794700, slip op. at 11-12 (upholding foreclosure by MERS' assignee). Based on this State's jurisprudence to date, the chain of title of the Note and Mortgage here are consistent with PennyMac's right to foreclose. See id. at 20.

B

Disconnect of the Note and Mortgage

In a familiar argument, the Rutters contend that under Rhode Island law, the Note and Mortgage must be held by the same entity. The Rutters suppose that G.L. 1956 § 34-11-21 and the surrounding sections require the mortgagee be the same entity that receives payments on the loan.[10] Curiously, the Rutters rely almost exclusively on authority outside of this state in

[9] The Court will discuss the arguments surrounding the Note transactions and effect of the receivership infra section D.

[10] The statute provides for the "statutory mortgage condition," stating in pertinent part:

support of that contention. See Rutters' Mem. 29-32 (arguing against Bucci citing primarily foreign authority); Rutters' Supplemental Mem. 11-13.

This Court has already held that there is no fatal disconnect of the Note from the Mortgage in the common MERS transaction structure.[11] Bucci, 2009 R.I. Super. LEXIS 110 at *18-19. Interpreting § 34-11-21 to require the mortgagee and lender always be the same entity would reach "an absurd result because named mortgagees and lenders would be precluded from employing servicers to service and collect obligations secured by real estate mortgages," and "[c]learly, the General Assembly envisioned a role for mortgage servicers in the mortgage lending industry." Id. "[A]ssignment of the mortgage to MERS together with the designation of MERS, as the nominee of the lender and lender's successors and assigns, having language identical to the language at hand, does not fatally disconnect a note from a mortgage." Kriegel, 2011 WL 4947398, slip op. at 8. Justice Rubine has followed this Court's decision in Bucci and noted the "voluminous and well-reasoned authority on this matter." Payette, 2011 WL 3794700, slip op. at 14. Other jurisdictions have held likewise. See, e.g., US Bank, N.A. v. Flynn, 897 N.Y.S.2d 855, 859 (N.Y. Sup. Ct. 2010). In US Bank, the New York court explained:

> "Provided, nevertheless, and this conveyance is made upon the express condition, that if the mortgagor or his or her heirs, executors, administrators or assigns shall pay to the mortgagee or his or her heirs, executors, administrators, or assigns the principal and interest of that certain promissory note bearing even date with this deed and secured by this deed, at the time provided in the promissory note or in this deed, and shall also pay all taxes and assessments of every kind levied or assessed upon or in respect of the mortgaged premises, then this deed, and also the promissory note, shall become and be absolutely void to all intents and purposes whatsoever." Sec. 34-11-21.

[11] The MERS transaction model is so consistent that a national secondary source includes typical provisions of the MERS mortgage form that match the provisions in this Mortgage. See Hooge, A Survey of Cases Discussing MERS.

> "Where, as here, an entity such as MERS is identified in the mortgage indenture as the nominee of the lender and as the mortgagee of record and the mortgage indenture confers upon such nominee all of the powers of such lender, its successors and assigns, a written assignment of the note and mortgage by MERS, in its capacity as nominee, confers good title to the assignee and is not defective for lack of an ownership interest in the note at the time of assignment." Id.

This Court's interpretation of § 34-11-21 is that it does not require the Note and Mortgage be held by the same entity, at the time of foreclosure or at the time MERS assigns the Mortgage to another entity. See Bucci, 2009 R.I. Super. LEXIS 110 at *17-19 (finding the statute does not prevent MERS from invoking statutory power of sale even where MERS as foreclosing entity does not hold note).

The Rutters' reliance on Eaton v. Fed. Nat'l Mortg. Ass'n, No. 11-1382, 2011 WL 3322892 (Mass. Super. Jun. 17, 2011), is misplaced. First, Eaton, a decision only months old, has already been questioned and distinguished by at least two other cases. See In re Marron, 462 B.R. 364, 374 (Bankr. D. Mass. 2012) (declining to follow the trial court ruling in Eaton); Juarez v. U.S. Bank Nat'l Ass'n, No. 11-10318-DJC, 2011 WL 5330465, at *5 (D. Mass. Nov. 4, 2011) (declining to adopt Eaton and noting "Eaton does not appear to be an accurate reflection of the law in Massachusetts"). But see Culhane v. Aurora Loan Servs. of Nebraska, No. 11-11098-WGY, 2011 WL 5925525, at *9 (D. Mass. Nov. 28, 2011) (following Eaton for Massachusetts law that although note and mortgage may be separated, they must be rejoined in same entity or in entity and its servicer for foreclosure proceedings). Secondly, Eaton is a Massachusetts trial court decision contradicting this Court's prior holding in Bucci. This Court will not overturn its own prior ruling in favor of another state's lower court opinion that has already been called into doubt by subsequent decisions.

Regardless, here, there was unity of the Mortgage and Note at the time of foreclosure. Both were held by PennyMac when PennyMac foreclosed on the Property. (Garner Aff. ¶¶ 12, 14.) This factual distinction similarly presented itself in Payette. 2011 WL 3794700, slip op. at 14-15. There, Justice Rubine was not convinced of any difference from the Bucci analysis when MERS assigned its nominee status and mortgagee interest to another entity, which became the foreclosing party. See id. at 11-15. The mortgage documents expressly permitted such assignments and foreclosure. See id. Therefore, the "designation of MERS as mortgagee and lender's nominee, does not as a matter of law, cause a fatal defect in the foreclosure." Kriegel, 2011 WL 4947398, slip op. at 9. At the time of foreclosure here, PennyMac had full authority and right to exercise the power of sale as assignee of MERS, which was the mortgagee, and as the current note holder. See Payette, 2011 WL 3794700, slip op. at 14.

C

Assignment of the Mortgage

The Rutters also directly contest the Assignment from MERS to PennyMac. The Movants, however, argue that the Rutters do not have standing to challenge that assignment, and even if they did have standing, the Assignment is valid. This Court agrees with the Movants.

Simply, Rhode Island trial courts have held 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, 2011 WL 3794700, slip op. at 15 (citing Fryzel v. Mortg. Elec. Registration Sys., C.A. No. 10-325 M, 2011 U.S. Dist. LEXIS 95114, at *41-42 (D.R.I. June 10, 2011)). In these cases, "it is undisputed that Plaintiffs are not parties to the assignment agreements . . . . Thus, Plaintiffs do not have standing to assert legal rights based on these documents." Fryzel, 2011 U.S. Dist. LEXIS at *41 (determining standing under Rhode Island

law in MERS case). "The principle that a party to a contract does not have standing to challenge the contract's subsequent assignment is well established." Id. at *42 (citations omitted). In fact, it is a long-standing principle of Rhode Island law. See Brough v. Foley, 525 A.2d 919, 922 (R.I. 1987) (holding strangers to a contract do not have rights to challenge the transaction).

Here, the Rutters have no standing to challenge the Assignment from MERS to PennyMac. See Brough, 525 A.2d at 922; see also 6 Am. Jur. 2d Assignment § 2 ("an assignment generally requires neither the knowledge nor the assent of the obligor . . . because an assignment cannot change the obligor's performance"). As an obligor who agreed by the express terms of the Mortgage to allow assignment, the Rutters have no standing to now contest it. See Garner Aff. Ex. 3 at 3; Brough, 535 A.2d at 922; Kriegel, 2011 WL 4947398, slip op. at 10 (holding borrower not a party to assignment from MERS to foreclosing entity and "consequently lacks standing to contest the legal rights of an assignee under these documents").

Even if the Rutters had standing to challenge the Assignment to PennyMac, and, accordingly, PennyMac's ability to foreclose, this Court finds the Assignment was proper. This State's Superior Court has enforced foreclosures conducted by an assignee of MERS. See Payette, 2011 WL 3794700, slip op. at 11-12, 20. The Assignment is "permitted by the unambiguous Mortgage language" and not prohibited by §§ 34-11-21, 22. Payette, 2011 WL 3794700, slip op. at 12; see also Kriegel, 2011 WL 4947398, slip op. at 14-17 (upholding foreclosure by servicer of MERS assignee); 6 Am. Jur. 2d Assignment § 18 ("term of a contract manifesting an obligor's assent to the future assignment of a right . . . is effective despite any subsequent objection"). Other jurisdictions have also upheld an assignment of a Mortgage from MERS under similar facts. See, e.g., Deutsche Bank Nat. Trust Co. v. Pietranico, 928 N.Y.S.2d 818, 835 n.16 ("There is no question that under the mortgage documents, MERS has the

authority to assign the mortgage"). The Mortgage signed by the Rutters directly listed MERS and its assignees as having the statutory power of sale, therefore permitting MERS to assign the Mortgage and permitting the assignee to foreclose. See Garner Aff. Ex. 3 at 3.

D

Transfers of the Note

Another issue raised by the Rutters in this case is the transfers of the Note while MERS held the interest as mortgagee and nominee of Lender. This Court in Bucci cited a Massachusetts Bankruptcy Court case in determining that MERS may foreclose on the mortgage in that case. See generally In re Huggins, 357 B.R. 180 (Bankr. D. Mass. 2006). Recently, that court confirmed that transfers of interest in the note changes nothing because MERS remains the mortgagee and nominee of whomever owns interest in the note. See In re Marron, 455 B.R. 1, 7 (Bankr. D. Mass. 2011). That court stated:

> "The fact that the . . . note passed like a hot potato down a line of owners, including some in bankruptcy and liquidation, with no accompanying assignment of the note owner's beneficial interest in the mortgage, changes nothing. Through all of these transfers right up until it finally assigned the mortgage to [MERS' assignee], MERS remained the mortgagee . . . as nominee for whomever happened to have the note." Id.

Further, this State's Superior Court has enforced foreclosures on notes held by financial institutions that have been through receivership. See Payette, 2011 WL 3794700, slip op. at 13; Porter, 2011 WL 1251246, slip op. at 7-8. In Payette, Justice Rubine determined that the lender's relationship with MERS does not terminate when the lender goes into receivership, and the fact that the lender reorganized as a different entity "does not affect MERS' contractual and statutory authority as nominee of the lender." Payette, 2011 WL 3794700, slip op. at 13. "[W]hatever financial entity currently holds the beneficial interest of the Note, MERS is

designated the nominee of [that entity] based upon the broad language contained in the Mortgage Agreement." Porter, 2011 WL 1251246, slip op. at 8. When the FDIC properly transfers rights and assets of the entity in receivership to a new entity, the new entity acquires all of the rights of the note holder and mortgagee. Payette, 2011 WL 3794700, slip op. at 13 (citing 12 U.S.C. § 1821(d)(2)(A), (G)(i)).

Here, FNBN went into receivership and was properly reformed by its receiver, FDIC, as FNBN I. FNBN I was transferred by FDIC to PNMAC Mortgage Company. PennyMac was appointed servicer of the Loan and was delivered the Note. The Movants' affidavit discusses these transactions. See Garner Aff. ¶¶ 4-5, 8-13. The fact that MERS held the Mortgage interest throughout these transfers, as mortgagee and nominee for the holder of the Note at any given time, does not affect MERS' later assignment of the Mortgage or PennyMac's later foreclosure. See Payette, 2011 WL 3794700, slip op. at 13; Porter, 2011 WL 1251246, slip op. at 8. This State has allowed for this sort of handling of the Note without defeating any right to foreclosure on the part of MERS or its assignee. See Payette, 2011 WL 3794700, slip op. at 13.

E

Alleged Impropriety and Lack of Authority of MERS Officers

The Rutters also raise various claims regarding MERS and the MERS transaction model that this Court deems both unsubstantiated and unavailing. See Corey Allard Aff., Oct. 11, 2011; Rutter Aff., Oct. 10, 2011. Through vague and conclusory statements in their supporting papers, the Rutters attempt to portray MERS as having engaged in misconduct.

Examining the Rutters' contentions, this Court does not believe they preclude summary judgment. The Superior Court in Payette determined that the United States Department of Treasury Consent Order—raised here through the affidavit of Corey Allard in an effort to

establish that MERS has engaged in unsound business practices—does not present any issue of fact. 2011 WL 3794700, slip op. at 17; Allard Aff. ¶ 6. This Court agrees. In addition, Mr. Rutter in his affidavit raises deposition testimony of a MERS officer taken in connection with a case filed in the Superior Court of New Jersey. See Rutter Aff. ¶ 7. Even ignoring issues of authenticity and admissibility of this alleged testimony, the Rutters cite it for the fact that MERS officers have little contact with MERS. See id. This Court fails to see how that purported evidence, taken as true and judged in the light most favorable to the Rutters, establishes a dispute of material fact in this case. See Hill, 11 A.3d at 113 (providing summary judgment standard that inferences must be drawn in light most favorable to non-moving party); Payette, 2011 WL 3794700, slip op. at 18-19 (declining to find similar deposition testimony from other case and jurisdiction presents genuine issue of material fact).

F

Issues with the Mortgage and Note Transfers

With further regard to the signatures and authority of the signers, the Rutters contend that the person who signed the Assignment from MERS to PennyMac lacked authority and the Assignment was a so-called "robosigning" transaction. The mortgagors in Payette raised an identical argument. See 2011 WL 3794700, slip op. 18-19. Justice Rubine determined that the "contention that MERS' assignments were executed by an unauthorized signatory is a mere conclusion or legal opinion that is insufficient to create a genuine issue of material fact to defeat [a] Motion for Summary Judgment." Payette, 2011 WL 3794700, slip op. at 19 (citations omitted). In Payette, the borrowers similarly submitted a deposition from a different case, and Justice Rubine found the "enigmatic references . . . irrelevant, and [found] that [the borrowers] failed to present an issue of fact as to [the signer's] authority." Id. Following the reasoning of

Justice Rubine, this Court fails to find an issue of material fact as to the signature on the Assignment.

The Rutters also claim issues of material fact regarding the indorsements of the Note.[12] The Rutters claim in their papers that there are issues of fact surrounding the undated allonges indorsing the Note and the authority of the person signing the allonges. The Movants, however, provide an affidavit detailing the chain of title of the Note, and provide the Note and its allonges as an exhibit to the affidavit. See Garner Aff. Ex. 2.

It is a long-held principle of Rhode Island law that in an action on a promissory note, when the traditional defendant has not notified the plaintiff to prove the authenticity of the signatures, the plaintiff need only produce the note, and then, if it is payable or indorsed to him, he may rest his case, unless the defendant shows evidence of bad faith or fraud. Hutchings v. Reinalter, 23 R.I. 518, 51 A. 429, 429 (1902); see Thompson Trading, Ltd. v. Allied Breweries Overseas Trading, Ltd., 748 F. Supp. 936, 946 (D.R.I. 1990) ("Under Rhode Island law, to prevail in a suit on a promissory note, it is necessary only to produce the note and produce evidence that the opposing party signed it"). Chapter three of the Uniform Commercial Code (UCC), as adopted by the General Assembly, applies to negotiable instruments such as the Note in this case.[13] See G.L. 1956 § 6A-3-1 et seq. Under the UCC, "the authenticity of, and

[12] This Court addressed above, supra section D, the involvement of the FDIC and receivership proceeding, finding it has no effect on the transaction in this case. This Court now addresses claims raised by the Rutters on the authenticity of the transfers of the Note.

[13] A negotiable instrument, as defined in the UCC, is:

> ". . . an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:
>
> (1) Is payable to bearer or to order at the time it is issued or first comes into possession of the holder;
>
> (2) Is payable on demand or at a definite time; and

authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings." Sec. 6A-3-308. Generally, ". . . the signature is presumed to be authentic and authorized . . . ." Id.; see Esposito v. Fascione, 111 R.I. 91, 94, 299 A.2d 165, 167 (1973) (explaining that under earlier but similar version of UCC, "intended that until some evidence was introduced which would support a finding that the signature is forged or unauthorized, the plaintiff is not required to prove that such signature is authentic"). Although it does not appear this State has provided further guidance on the standard of denial in the pleadings, other jurisdictions have held that there must be a specific rather than general denial of the signature on the note. See, e.g., Wesla Fed. Credit Union v. Henderson, 655 So.2d 691, 693 (La. Ct. App. 1995) (determining general denial of paragraphs insufficient to constitute a specific denial of the authenticity of the signature); Dryden v. Dryden, 621 N.E.2d 1216, 1219 (Ohio Ct. App. 1993) (defining specific denial as "statement that denies a particular fact and then states what actually occurred" and ruling general denial without more insufficient); Bank of New England, N.A. v. Greer, 1991 Mass. App. Div. 202, 1991 WL 285755, at *2 (Mass. Dist. Ct. 1991) (holding general denials in defendants' answer were insufficient to put the genuineness of signatures on the note into controversy).

> (3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of the obligor."

Sec. 6A-3-104.

There is no genuine dispute that the Note in this matter is a negotiable instrument.

Here, the Movants through their Counterclaim laid out the indorsements of the Note. (Countercl. ¶¶ 9, 10, 15.) The Rutters failed to specifically deny the indorsements in their Answer. See Ans. to Defs.' Countercl. ¶¶ 9, 10, 15 (stating "Defendant is without sufficient knowledge to admit or deny"). Accordingly, the indorsements on the negotiable instrument are presumed authentic. See § 6A-3-308 (requiring specific denial in pleading); Esposito v. Fascione, 111 R.I. at 94, 299 A.2d at 167 (shifting burden to require proof of authenticity of signatures when "defendants specifically denied the genuineness of [the] signature on the notes").

Furthermore, at least one other jurisdiction has determined that an affidavit by an employee of the mortgagee testifying regarding the documents in the mortgagee's file is not hearsay because of the business records exception; therefore, the affidavit and statements therein referring to the business records are admissible. See Charter One Mortg. Corp. v. Keselica, No. 04CA008426, 2004 WL 1837211, at *4 (Ohio Ct. App. Aug. 18, 2004). The Rhode Island Rules of Evidence provide for the business records exception at Rule 803(6). A hearsay business record is admissible if the information was regularly maintained in the course of regular business activity, the source of the information is a person with knowledge, and the information was recorded contemporaneously with the event or occurrence. See R.I. Managed Eye Care, Inc. v. Blue Cross & Blue Shield of R.I., 996 A.2d 684, 91 (R.I. 2010). This "rule is interpreted expansively in favor of admitting hearsay records into evidence." Id. at 690-91 (citations omitted).

Here, the Movants submitted the affidavit of Mallory Garner, Deputy General Counsel for PennyMac. (Garner Aff. ¶ 1.) She testified in the affidavit as to "personal knowledge of the facts set forth herein based on a review of the relevant business records which are maintained in

the ordinary course of business." Id. Garner's affidavit details the indorsements on the Note. See Garner Aff. ¶¶ 3, 4, 10. This meets the standard of competent evidence on summary judgment and is admissible under the business records exception to the hearsay rule. Accordingly, Movants are entitled to judgment as a matter of law based on the facts presented in the Garner Affidavit, on which the Rutters have failed to prove the existence of material disputes. See Smiler, 911 A.2d at 1038 (providing for summary judgment as matter of law when no genuine disputes of material fact).

G

RESPA

Lastly, the Rutters argue that PennyMac's refusal to respond to their QWR received the day before the foreclosure constitutes a RESPA violation and somehow affects the propriety of the foreclosure or entitles them to damages. The Movants present that there was no RESPA violation because the Rutters' letter did not qualify as a QWR and because the Rutters have established no actual damages as a result of any alleged failure to reply.

A QWR is a written correspondence that includes the name and account of the borrower and "a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower." 12 U.S.C. § 2605(e)(1)(B). "If any servicer of a federally related mortgage loan receives a qualified written request from the borrower . . . for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days." Id. at (e)(1)(A). Within sixty days of receipt of the QWR, the servicer shall make necessary corrections, provide borrower with a written explanation or clarification, or provide a statement of reasons why the account is correct or the information is

unavailable. Id. at (e)(2). For violating these provisions, a servicer may be liable for "any actual damages to the borrower as a result of the failure" or other damages not exceeding $1,000. Id. at (f)(1). Some jurisdictions have determined that if a borrower fails to allege facts showing reasons for his or her belief that the account is in error, then a RESPA claim for failure to respond to the QWR fails. See, e.g., Soto v. Wells Fargo Bank, N.A., No. CV 11-1405 PSG (DTBx), 2011 WL 1743296, at *3 (C.D. Cal. May 6, 2011); Walker v. Equity 1 Lenders Grp., No. 09cv325 WQH (AJB), 2009 WL 1364430, at *5 (S.D. Cal. May 14, 2009); Pettie v. Saxon Mortg. Servs., No. C08-5089RBL, 2009 WL 1325947, at *2 (W.D. Wash. May 12, 2009) (holding RESPA "clearly requires that a disputing party give specific 'reasons' for claiming that an account is in error").

Here, PennyMac responded to the Rutters' purported QWR within the first, twenty-day period. See Garner Aff. Ex. 10. PennyMac informed the Rutters that the letter was not a valid QWR under RESPA, and because the loan was foreclosed on, that RESPA no longer applied. See id. The Rutters claim this was a violation of RESPA, but the Rutters fail to prove they suffered any actual damages. Compare Garner Aff. Ex. 9 (alleging "predatory lending" and "fraudulent and deceptive practices" without setting forth any specific reason for belief account is in error) with Pettie, 2009 WL 1364430 at *5 (requiring disputing party "give specific 'reasons' for claiming that an account is in error"). The Rutters do not and cannot show that failure to respond to their letter, received the day before the foreclosure, somehow created an invalid foreclosure causing them actual damages. See 12 U.S.C. § 2605(f)(1) (providing servicer may be liable for actual damages). This Court is not aware of any provision of RESPA providing that a foreclosure shall not continue if a written request for information is made just days prior. Here, the Rutters knew for over two years that they were in default on their loan.

See Garner Aff. Ex. 4. They acknowledged their default in their papers filed in connection with this Motion. See Rutters' Mem. 3, 7. The last-minute, purported QWR was, in the opinion of this Court, merely a delay tactic, similar to the Rutters' earlier request for a deed-in-lieu, which the Rutters then failed to execute. Further, the Rutters have failed to come forth with competent evidence to prove any actual damages as a result of PennyMac's decision not to respond to the letter requesting information.

IV

Conclusion

PennyMac, as assignee of the Mortgage from MERS and as holder of the Note, had complete legal right to foreclose on the Property. Echoing the sentiments of Justice Rubine, the borrowers "undisputedly borrowed the funds to buy [their] home, arranged for the home to serve as security for the Note, and subsequently defaulted by [their] nonpayment under the Note. No holding of this Court should invalidate the foreclosure, which [borrowers] agreed would ultimately be the consequence of nonpayment of the mortgage loan." Porter, 2011 WL 1251246, slip op. at 6. This Court is neither unaware of nor unsympathetic towards the plight of many facing foreclosure in this troubled economy; however, this Court is unwilling to disregard the existing case law to effectively allow the Rutters to remain in their $1.7 million dollar home in Bristol, secured by a Mortgage they signed, without making payments on the Note they signed.

Therefore, the Court grants Movants' Motion for Summary Judgment. Based on this State's case law, the Court determines that PennyMac properly foreclosed on the Property. There are no genuine disputes of material fact that could affect this finding, and judgment will enter as a matter of law. Summary judgment is granted in favor of Movants on all counts of C.A. No. PC 10-4756 and on Counts I and II of the Counterclaim, as well as in favor of PennyMac in

C.A. No. PD 10-4418. Prevailing counsel shall present an Order consistent herewith which shall enter after due notice to counsel of record.