

I

Facts & Travel

The facts alleged in the Complaint and gleaned from the exhibits attached to the Complaint and incorporated therein are as follows: On February 13, 2007, Plaintiff executed a note (“Note”) in favor of lender First Horizon for \$232,000, using the loan proceeds to finance the purchase of the Property. (Compl. Ex. 2 at 2.) Simultaneously, Plaintiff executed a mortgage (“Mortgage”) on the Property to secure the Note. (Compl. Ex. 2.) The Mortgage designates First Horizon as the “Lender” and also designates MERS as “mortgagee” and as “nominee for [First Horizon] and [First Horizon’s] successors and assigns.” Id. at 1-2. The clear, unambiguous language of the Mortgage provides that “Borrower does hereby mortgage, grant and convey to MERS, (solely as nominee for [First Horizon] and [First Horizon’s] successors and assigns) and to the successors and assigns of MERS, with Mortgage Covenants upon the Statutory Condition and with the Statutory Power of Sale.” Id. at 3. The Mortgage further provides that:

“Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for [First Horizon] and [First Horizon’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 Horizon].” Id.

The Mortgage was recorded in the land evidence records of the City of Warwick.

On February 17, 2010, MERS, as nominee for First Horizon and as mortgagee, assigned the Mortgage interest to FNMA. See Compl. Ex. 3. Thus, FNMA became the assignee of MERS possessing the “Mortgage Covenants upon the Statutory Condition and with the Statutory Power of Sale” (Compl. Ex. 2 at 3) as acknowledged by Plaintiff

(borrower and mortgagor) through his execution of the Mortgage. That assignment was recorded in the land evidence records of the City of Warwick.

Thereafter, a foreclosure sale was conducted on Plaintiff's Property. (Compl. ¶¶ 37, 40, 43-46, 68, 78.) On January 26, 2011, Plaintiff filed a *lis pendens* on the Property in the land evidence records of the City of Warwick prior to filing the instant action.² On April 28, 2011, Plaintiff filed the instant Complaint seeking nullification of the foreclosure sale and return of title to him. Plaintiff also alleges in his Complaint that the Note is current or has been satisfied. (Compl. ¶ 54.) Defendants responded by filing a Motion to Dismiss pursuant to Rule 12(b)(6) and a Motion for Judgment on the Pleadings pursuant Rule 12(c). Plaintiff filed an objection to Defendants' Motion to Dismiss averring that the Complaint properly sets forth a claim for relief. At the Motion hearing, both parties agreed to waive oral argument, and hence, this Court took the matter under advisement.

II

Standard of Review

A

12(b)(6) Motion to Dismiss

“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

² As a matter of law, one cannot legitimately record a *lis pendens* prior to filing a complaint challenging title to real property as the primary purpose of the notice of *lis pendens* is to give notice to all potential buyers of a pending lawsuit concerning the property. See Darr v. Muratore, 143 B.R. 973, 979 (D.R.I. 1992); see also Montecalvo v. Mandarelli, 682 A.2d 918, 924 (R.I. 1996). Thus, there can be no notice of a pending lawsuit if no lawsuit has been filed.

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) (quotation omitted)). Thereafter, a Rule 12(b)(6) motion to dismiss may be granted only “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)).

B

12(c) Motion for Judgment on the Pleadings

“A Rule 12(c) Motion for Judgment on the Pleadings provides a trial court with the means of disposing of a case early in the litigation process when the material facts are not in dispute, after the pleadings have been closed, and only questions of law remain to be decided.” Haley v. Town of Lincoln, 611 A.2d 845, 847 (R.I. 1992) (citing 5A Wright & Miller, Federal Practice and Procedure, Civil 2d § 1367 at 509-10 (West 1990)). The Rule 12(c) standard is a restrictive one. “The court is to view the alleged facts presented in the pleadings in the manner most favorable to the nonmoving party,” and the “factual allegations contained in the nonmovant’s pleadings are admitted as true for purposes of the motion.” Id. “In this fashion the court considering a Rule 12(c) motion ensures that the rights of the nonmovant are adjudicated as fully as if there had been a trial.” Id.

III

Analysis

The allegations set forth in the instant Complaint—specifically concerning 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 Plaintiff contains the same operative language as the Mortgage considered in Chhun. No. PC 2011-4547, 2012 WL 2648200 (R.I. Super. June 26, 2012) (Rubine, J.). Further, Plaintiff's arguments are 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.

Notwithstanding the substantial similarity between this matter and Chhun, there is an allegation of fact in the instant Complaint that the Note is current or has been satisfied. If this allegation is accepted as true for purposes of the Defendants' Motion, Plaintiff's Complaint cannot be dismissed, and Plaintiff must be given an opportunity to be heard at trial³ with respect to the allegation concerning whether default under the Note was sufficient to trigger the right to foreclose.

³ The Defendants may not be required to proceed to trial in order to test the veracity of the allegation with respect to default. If the Defendants can establish the default as an undisputed fact, they may move for summary judgment prior to trial.

Apart from the allegation that the Note is current, Plaintiff, in his memorandum, fails to distinguish this matter from the Court's earlier determination and dismissal of similar cases.⁴ Rather, Plaintiff has chosen to primarily criticize the precedent of the Rhode Island Superior Court as "misplaced holdings," attaching thereto and incorporating therein an exhibit to his memorandum entitled "Deconstruction of Payette." Plaintiff's counsel fails to distinguish the earlier precedent, merely arguing that the earlier cases were wrongly decided; 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).

Likewise, Plaintiff's reliance on case law from other jurisdictions, which is not binding precedent on this Court, to further criticize this Court's past decisions is also unconvincing. In the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of the Superior Court decisions on this subject represents the prevailing law in Rhode Island. Breggia v. Mortg. Elec. Registration Sys., Inc., No. PC 2009-4144, 2012 WL 1154738 (R.I. Super. April 3, 2012) (Rubine, J.); see also

⁴ The Court's determination that this matter is similar to the matters previously decided by this Court, and therefore the Court's decision to treat the legal issues presented in this matter like the other matters, does not "pigeon hole" this case as Plaintiff suggests. The Court has chosen to rely upon its previously determined, well-reasoned cases as dispositive authority of the law in Rhode Island, absent a ruling on this subject from the Rhode Island Supreme Court. If Plaintiff chooses to allege nearly identical facts and claims in his Complaint and to raise the same issues and arguments as other litigants previously before this Court, Plaintiff's counsel should not be surprised by the outcome, and Plaintiff will receive the same result from the Court.

Rutter, 2012 WL 894012. The issues presented in this matter have been previously decided by this Court. See Kriegel v. Mortg. Elec. Registration Sys., Inc., No. PC 2010-7099, 2011 WL 4947398 (R.I. Oct. 13, 2011) (Rubine, J.); see also Payette v. Mortg. Elec. Registration Sys., Inc., No. PC 2009-5875, 2011 WL 3794701 (R.I. Super. Aug. 22, 2011) (Rubine, J.); Porter v. First Fin. Serv., No. PC 2010-2526, 2011 WL 1251246 (R.I. Super. March 31, 2011) (Rubine, J.); Bucci v. Lehman Brothers Bank, FSB, No. PC 2009-3888, 2009 WL 3328373 (R.I. Super. Aug. 25, 2009) (Silverstein, J.). The Court hereby incorporates by reference the reasoning and authorities relied upon in those previous decisions. The emphasis of Plaintiff's opposition to the Motion to Dismiss challenges the validity of the assignment of the Mortgage interest from MERS to FNMA, and thus, FNMA's standing to foreclose on the Property, which argument has previously been rejected by this Court.

Nevertheless, Plaintiff alleges that the Note is current or has been satisfied. Considering this allegation as true and in the light most favorable to Plaintiff, Defendants' Motion to Dismiss must be denied because the absence of default, if established as true by the finder of fact, would be a defense to a foreclosure allegedly triggered by borrower's default under the Note. For that reason alone, Plaintiff's Complaint cannot be dismissed, and Plaintiff must be given an opportunity to have the issue of default considered at trial. But see supra n.3. Accordingly, Defendants' Motion to Dismiss must be denied. Accepting the allegations set forth in the Complaint as true, and viewing them in the light most favorable to the Plaintiff, Plaintiff has set forth an

allegation in the Complaint which, if true, establishes a claim for relief.⁵ 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 Rutter, 2012 WL 894012; Payette, 2011 WL 3794701; Porter, 2011 WL 1251246; Bucci, 2009 WL 3328373.

IV

Conclusion

Plaintiff has alleged a fact in his Complaint concerning the absence of default which, if true, would entitle him to the relief sought. Accordingly, Defendants' Motion to Dismiss under Rule 12(b)(6) is Denied. Counsel for the prevailing party shall submit an Order in accordance with this Decision.

⁵ This ruling will essentially render the trial of this matter a one-issue test of the factual allegation concerning whether or not Plaintiff defaulted under the Note prior to commencement of foreclosure. If Defendants believe that they can establish Plaintiff's default as an undisputed fact, they need not wait for trial, but may test the veracity of this allegation by way of pre-trial motion for summary judgment. See supra n.3.