STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(Filed: June 26, 2012)

FRANCESCO SCARCELLO	:	
GUISEPPE SCARCELLO	:	
	:	
v.	:	**C.A. No. KC 2011-0548**
	:	
MORTGAGE ELECTRONIC	:	
REGISTRATION SYSTEMS, INC.;	:	
HOMECOMINGS FINANCIAL	:	
NETWORK, INC..; AURORA LOAN	:	
SERVICES, INC.; AND JOHN DOE	:	
SECURITIZED TRUST	:	

DECISION

RUBINE, J. Before the Court is Defendants' Mortgage Electronic Registration Systems, Inc. ("MERS") and Aurora Loan Services, Inc. ("Aurora") (collectively, "Defendants")[1] Motion to Dismiss Plaintiffs' Francesco Scarcello and Guiseppe Scarcello (collectively, "Plaintiffs") complaint ("Complaint") pursuant to Rule 12(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure. Plaintiffs allege in their Complaint that the assignment of the mortgage interest by MERS was unlawful and ineffective, and therefore, the successor and assignee of MERS, Aurora, a mortgage servicer, obtained no rights in the mortgage ("Mortgage") and could not exercise the statutory power of sale. Thus, Plaintiffs allege that Aurora's subsequent foreclosure on real property located at 16 Ball Avenue, West Warwick, Rhode Island ("the Property") is a nullity as Aurora lacked the requisite standing to foreclose. Accordingly, Plaintiffs seek to quiet title by way of a determination that they remain the exclusive title holder of the Property.

[1] Defendants Homecomings Financial Network, Inc.. and John Doe Securitized Trust are not parties to this Motion to Dismiss.

I

Facts & Travel

The following facts are derived from the Complaint and exhibits attached thereto and incorporated therein: On April 28, 2006, Plaintiffs executed a promissory note ("Note") in favor of lender Homecomings Financial Network, Inc.. ("Homecomings"), for $240,000, which proceeds were used to finance the purchase of the Property. To secure the Note, Plaintiffs contemporaneously executed a Mortgage on the Property. (Compl. ¶ 10.) The Mortgage designates MERS as "mortgagee" and further designates MERS as "nominee for Lender and Lender's successors and assigns." (Compl. Ex. 2 at 1.) 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." (Compl. Ex. 2 at 3.) In addition, the Mortgage provides that

> "Borrower understands and agrees that MERS holds only legal title to the interests granted 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 interest, including, but not limited to, the right to foreclose and sell the Property; and to take any action requirement of Lender." Id.

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

On October 26, 2010, MERS, as mortgagee and as nominee for Homecomings, executed an assignment of the Mortgage interest to Aurora. That assignment was recorded in the land evidence records of the Town of West Warwick on November 4, 2010. See Compl. Ex. 3.

Thereafter, Plaintiffs defaulted in that they failed to make timely payments under the Note. Following Plaintiffs' default, Aurora, as assignee of MERS, commenced foreclosing proceedings, subsequently foreclosing on the Property. Following the foreclosure sale, Plaintiffs filed the instant Complaint wherein Plaintiffs seek declaratory and injunctive relief pursuant to G.L. 1956 § 9-30-1. Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(6) averring that Plaintiffs have failed to state a claim upon which relief may be granted. At the hearing, both parties agreed to waive oral argument and submit this matter on the briefs, at which time this Court took the matter under advisement.

II

Standard of Review

"The 'sole function of a motion to dismiss' pursuant to Rule 12(b)(6) is 'to test the sufficiency of the complaint.'" McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005) (quoting Rhode Island Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)). For purposes of the motion the Court "assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the plaintiffs." Giuliano v. Pastina, Jr., 793 A.2d 1035, 1036-37 (R.I. 2002) (quotation omitted).

The United States Supreme Court has adopted the view that a complaint must allege facts that "raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007) (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004)). Hence, a plaintiff has an obligation to plead "the 'grounds' of his 'entitlement to relief.'" Id. (citing Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932 (1986)). This "requires more than labels

and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. (citing Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932 (1986)). Accordingly, a plaintiff's factual allegations contained in a complaint must be specific enough to cross "the line from conceivable to plausible." Id. at 570.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" Id. at 678 (quoting Twombly, 550 U.S. at 557). "Only a complaint that states a plausible claim for relief survives a motion to dismiss." Id. at 679 (citing Twombly, 550 U.S. at 556). A complaint that states "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," will not suffice. Id. at 678 (citing Twombly, 550 U.S. at 555). However, "when there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id. at 679. "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. (citing Iqbal v. Hasty, 490 F.3d 143, 157-58 (C.A.2 2007)).

The courts in Massachusetts have adopted the plausibility standard for whether a complaint can survive a motion to dismiss under the Federal Rules of Civil Procedure 12(b)(6) as articulated by the United States Supreme Court in Iqbal, 556 U.S. at 678-79 and Twombly, 550 U.S. at 550. See Iannacchino v. Ford Motor Car, 451 Mass. 623, 636

(2008); see also Peterson v. GMAC Mort., LLC, No. 11-11115-RWZ, Slip Copy, 2011 WL 5075613 at * 2 (D. Mass. Oct. 25, 2011) (Zobel, J.). Although Rhode Island has adopted the Federal Rules of Civil Procedure, the Rhode Island Supreme Court has yet to explicitly accept the Iqbal and Twombly standard as the operative standard with which to judge a Rule 12(b)(6) motion. In the case of Barrette v. Yakavonis, 996 A.2d 1231 (R.I. 2009), the Supreme Court interpreted the Rhode Island rules as follows: "a pleading need not include 'the ultimate facts that must be proven in order to succeed on the complaint . . . or . . . set out the precise legal theory upon which [the plaintiff's] claim is based.'" Id. at 1234 (quoting Gardner v. Baird, 871 A.2d 949, 953 (R.I. 2005)). All that is required is that the "complaint 'provide the opposing party with fair and adequate notice of the type of claim being asserted.'" Id. Stated differently, the Court ruled: "th[e] Court examines the allegations contained in the plaintiff's complaint, assum[ing] them to be true, and views them in the light most favorable to the plaintiff." Id. (quoting Palazzo v. Alves, 944 A.2d 144, 149 (R.I. 2008)). Thereafter, a 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 plaintiff's claim.'" Id. However, based upon the analysis of the law as set forth below, Plaintiffs' Complaint cannot survive a Rule 12(b)(6) motion even under the more forgiving pleading standard articulated in Barrette and Palazzo. The Court cannot hear facts or legal argument from Plaintiffs to prove an alleged defect in an assignment since Plaintiffs lack standing, as strangers to the assignment, and therefore cannot prove their claim by proving that the assignment document evidences flaws that might effect the enforcement of the assignment by the assignor or the assignee. Since Plaintiffs are

neither, they are without standing to seek relief on that basis. The Defendants are entitled to dismissal of a claim that Plaintiffs cannot prevail upon under any set of facts dealing with defects in an assignment.

III

Analysis

Since the allegations set forth in the instant Complaint are nearly identical to the allegations of the complaint in Kriegel v. Mortgage Electronic Registration Systems, and the Mortgage executed by Plaintiffs contains the same operative language as the mortgage considered in Kriegel, this Court will incorporate and adopt the reasoning set forth in Kriegel, No. PC 2010-7099, 2011 WL 4947398 (R.I. Super. Oct. 13, 2011) (Rubine, J.). In that case, plaintiff failed to adequately allege in his complaint the grounds entitling him to the relief sought, merely alleging conclusory statements; thus, the Court dismissed plaintiff's complaint for failure to state a claim for relief. The same outcome obtains in this case.

The crux of Plaintiffs' Complaint challenges the validity of the assignment of the Mortgage interest by MERS to Aurora, and the standing of Aurora to foreclose following Plaintiffs' default. Specifically, Plaintiffs allege in the Complaint that Theodore Schultz ("Schultz") had no authority to assign the Mortgage interest on behalf of MERS as Schultz was an employee of Aurora, not MERS. (Compl. ¶¶ 12, 13.) Hence, Plaintiffs argue that Schultz was attempting to assign the Mortgage interest on behalf of Aurora, not MERS. (Compl. ¶¶ 17-19.) If this were accepted as fact, Aurora would be the assignor and assignee of the Mortgage, a proposition that is inherently flawed.

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 Mortgage Electronic Registration Systems, No. PC 2009-5875, 2011 WL 3794700 (R.I. Super. Aug. 22, 2011) (Rubine, J.); see also Rutter v. Mortgage Electronic Registration Systems, Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012 at * 17 (R.I. Super. March 12, 2012) (Silverstein, J.) (quoting Fryzel v. Mortgage Electronic Registration Systems, C.A. No. 10-325 M, 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); Brough v. Foley, 525 A.2d 919, 922 (R.I. 1987) (holding that the plaintiff, whose property purchase was thwarted by an assignee's exercise of the assigned right of first refusal, had no standing to challenge the validity of the assignment); Peterson v. GMAC Mortg., LLC, No. 11-11115-RWZ, Slip Copy, 2011 WL 5075613 at * 4 (D. Mass. Oct. 25, 2011) (Zobel, J.) (court refused to read U.S. Bank Nat. Ass'n v. Ibanez, 458 Mass. 637, 941 N.E.2d 40 (2011) as an independent basis for mortgagors to collaterally contest previously executed mortgage assignments to which they are not a party and that do not grant them any interests or rights; finding mortgagors have no legally protected interests in the assignment of the mortgage and therefore lack standing to challenge it); In re Correia, 452 B.R. 319 (B.A.P. 1st Cir. 2011) (the bankruptcy appellate panel affirming the finding of the bankruptcy judge that mortgagors lacked standing to challenge the validity of the mortgage assignment). Even if this Court were to find Plaintiffs have standing to challenge the assignment of the Mortgage interest, Plaintiffs must allege facts entitling them to relief. Twombly, 550 U.S. at 555. Plaintiffs'

allegations with respect to the invalidity of the assignment of the Mortgage interest are merely "conclusory statements" which are insufficient to survive a motion to dismiss. Iqbal, 556 U.S. at 678. Plaintiffs have failed to allege facts in their Complaint which "raise a right to relief above the speculative level." Twombly, 550 U.S. at 555. Accordingly, Plaintiffs' Complaint must be dismissed.

Additionally, Plaintiffs aver that the assignment of the Mortgage interest is invalid as there is no recorded power of attorney authorizing Schultz to act on behalf of MERS. (Compl. ¶ 20.) Under Rhode Island law, there is no requirement that MERS record a power of attorney in order for Schultz to act on its behalf. See § 34-13-1. By the plain, unambiguous language contained within the Mortgage instrument, which was recorded in the land evidence records in the Town of West Warwick in accordance with Rhode Island General Laws, MERS was designated as the mortgagee and nominee of Homecomings and Homecomings' "successors and assigns," (Compl. Ex. 2 at 1), thus obviating the need for a recorded power of attorney. Thus, even assuming the veracity of Plaintiffs' allegations, these allegations do not entitle Plaintiffs to the relief they seek.

Plaintiffs further aver that the Note was never transferred or negotiated to Aurora or MERS. (Compl. ¶ 54.) Likewise, this allegation fails to state a claim entitling Plaintiffs to relief. Twombly, 550 U.S. at 555. The identity of the note holder is irrelevant as it is well established under current Rhode Island law that MERS and the assignees of MERS, in this case Aurora, act as nominee of the current note holder. See The Bank of New York Mellon v. Cuevas, Nos. PD 2010-0988, PC 2010-0553, 2012 WL 1388716 (R.I. Super. April 19, 2012) (Rubine, J.); see also Payette, 2011 WL 3794701; Bucci v. Lehman Brothers Bank, FSB, No. PC-2009-3888, 2009 WL 3328373

(R.I. Super. August 25, 2009) (Silverstein, J.).

Accepting the allegations set forth in the Complaint as true, and viewing them in the light most favorable to the Plaintiffs, this Court finds that Plaintiffs have failed to establish a plausible claim for relief. Plaintiffs have merely alleged conclusory statements which are insufficient to "raise a right to relief above the speculative level" Twombly, 550 U.S. at 555, and even assuming the truth of those allegations, do not, as a matter of law, entitle Plaintiffs to the relief requested. Furthermore, the issues presented in this matter have been previously decided by this Court. See Kriegel, 2011 WL 4947398; see also Payette, 2011 WL 3794701; Porter, 2011 WL 1252146; Bucci, 2009 WL 3328373; Rutter v. Mortgage Electronic Registration Systems, Nos. PC-2010-4756, PD-2010-4418, 2012 WL 894012 (R.I. Super. March 12, 2012) (Silverstein, J.). Accordingly, Plaintiffs' Complaint is dismissed for failure to state a claim upon which relief could be granted. In the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of the Superior Court cases on this subject represent the prevailing view of the law in Rhode Island. Breggia v. Mortgage Electronic Registration Systems, No. PC 2009-4144 (R.I. Super. April 3, 2012) (Rubine, J.). The decisions of the Superior Court unanimously support this result. The Court hereby incorporates by reference the reasoning and authorities relied upon in those previous decisions.

IV

Conclusion

Defendants' Motion to Dismiss under Rule 12(b)(6) is granted. Counsel for the prevailing party shall submit an Order in accordance with this Decision.