

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.

SUPERIOR COURT

(FILED: JANUARY 14, 2013)

RUSSELL A. BUCKLEY :
CHERYLE A. BUCKLEY :
v. :
MORTGAGE ELECTRONIC :
REGISTRATION SYSTEMS, INC.; :
ALLIED HOME MORTGAGE :
CAPITAL CORPORATION- :
BRANCH 571; BAC HOME LOAN :
SERVICING, LP; AND JOHN DOE :
SECURITIZED TRUST :

C.A. No. KC 2011-0990

DECISION

RUBINE, J. Defendants Mortgage Electronic Registration Systems, Inc. ("MERS") and Bank of America, N.A., successor by merger to BAC Home Loan Servicing, LP ("BAC")1 (collectively, "Defendants")2 jointly move to dismiss Plaintiffs' Russell A. Buckley and Cheryle A. Buckley (collectively, "Plaintiffs") complaint ("Complaint") for declaratory and injunctive relief. Through the Complaint, Plaintiffs seek declaratory and injunctive relief pursuant to G.L. 1956 § 9-30-1, et seq., petitioning this Court to quiet title in favor of Plaintiffs and to declare the foreclosure sale of their real property located at 13 Kathleen Court, West Warwick, Rhode Island (the "Property") null and void. Plaintiffs allege that the foreclosure sale was ineffective because the assignment of the mortgage interest was invalid and Defendants allegedly had no standing to exercise the

1 Effective July 1, 2011, BAC merged into Bank of America, N.A., thereby becoming Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP.

2 Defendants Allied Home Mortgage Capital Corporation-Branch 571 and John Doe Securitized Trust are not parties to this Motion.

statutory power of sale under § 34-11-22. Plaintiffs further set forth allegations in their Complaint that the mortgage note is current or has been satisfied and that the foreclosure sale was not noticed or published as required by statute and by the Mortgage. Plaintiffs also seek punitive damages in the amount of \$10,000,000.

## I

### FACTS & TRAVEL

The facts as derived from the Complaint and exhibits attached thereto and incorporated therein are as follows: On September 8, 2004, Plaintiffs executed a note (“Note”) in favor of lender Allied Home Mortgage Capital Corporation-Branch 571 (“Allied”) for \$306,000, using the loan proceeds to finance the purchase of the Property. (Compl. Ex. 2 at 1.) To secure the Note, Plaintiffs contemporaneously executed a mortgage (“Mortgage”) on the Property. (Compl. Ex. 2.) The Mortgage designates Allied as the “Lender” and further designates MERS as “mortgagee” and as “nominee for Lender and Lender’s successors and assigns.” Id. at 1. The Mortgage further 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. In addition, the Mortgage 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.

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

On May 7, 2010, MERS, as nominee for Allied and as mortgagee, assigned the Mortgage interest to BAC. See Compl. Ex. 3. Thus, BAC succeeded to all the rights granted to MERS through Plaintiffs' execution of the Mortgage instrument, including the "Mortgage Covenants upon the Statutory Condition and with the Statutory Power of Sale." (Compl. Ex. 2 at 2.) The assignment was recorded in the land evidence records of the Town of West Warwick. See Compl. Ex. 3.

Thereafter, a foreclosure sale was conducted on Plaintiffs' Property. On August 2, 2011, Plaintiffs filed a *lis pendens* on the Property in the land evidence records of the Town of West Warwick, effectively putting all third parties on notice of a dispute concerning title to the Property.<sup>3</sup> Thereafter, on August 5, 2011, Plaintiffs filed the instant Complaint to quiet title, seeking nullification of the foreclosure sale and return of title to them, as well as a claim for punitive damages in the amount of \$10,000,000. Plaintiffs also allege in their Complaint that the Note is current or has been satisfied and that the foreclosure sale was not properly noticed or published. (Compl. ¶¶ 45-47, 56.) Defendants then filed this Motion to Dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(6) and Motion to Dissolve the Lis Pendens recorded on the Property. Plaintiffs have objected to Defendants' Motion averring that they have set forth a claim for relief. Both parties stipulated to submit this matter to the Court on the pleadings and supporting memoranda, thereby waiving oral argument; thus, the Court took the matter under advisement.

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<sup>3</sup> 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.

## 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 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. Moreover, there is an allegation that the foreclosure sale was not noticed or published as required by statute and by the terms of the Mortgage. If these allegations are 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 default under the Note was sufficient to trigger the right to foreclose and whether the notice and publication requirements were properly followed 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 the Note is current, Plaintiffs, in their memorandum, fail to distinguish this matter from the Court's earlier determination and dismissal of similar cases. Rather, Plaintiffs have chosen to primarily criticize the precedent of the Rhode Island Superior Court as "flawed," attaching thereto and incorporating by reference an exhibit to their memorandum entitled "Deconstruction of

Payette.” Plaintiffs’ counsel fails to distinguish the earlier precedent merely arguing that the earlier cases were wrongly decided, and this Court is not persuaded by this argument. See Rutter v. Mortg. Elec. Registration Sys., Inc., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012, at \*10 (R.I. Super. March 12, 2012) (Silverstein, J.); see also Commonwealth Prop. Advocates v. U.S. Bank Nat’l Ass’n, No. 11-4168, 459 Fed. Appx. 770 (10th Cir. March 6, 2012) (affirming district court where appellant’s counsel criticized, rather than distinguished, prior MERS cases).

Likewise, Plaintiffs’ 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 view of the 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.). The legal 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 Chhun, 2012 WL 2648200; Rutter, 2012 WL 894012; 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 Plaintiffs’ opposition to the Motion to Dismiss is based upon the conclusory legal challenges set

forth in the Complaint, such as the alleged invalidity of the assignment of the Mortgage interest from MERS to BAC and BAC's standing to foreclose on the Property, which legal theories have previously been rejected by this Court.

Nevertheless, Plaintiffs allege as fact that the Note is current or has been satisfied and that the foreclosure sale notice and publication requirements were not properly followed. Considering these allegations as true and in the light most favorable to Plaintiffs, Defendants' Motion to Dismiss must be denied because the absence of default and the defect in notice and publication of the foreclosure sale, 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. See 55 Am. Jur. 2d Mortgages § 508, 511. For that reason alone, Plaintiffs' Complaint cannot be dismissed, and Plaintiffs must be given an opportunity to have these factual issues considered at trial.<sup>4</sup> However, the legal theories as alleged in the Complaint 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 been previously 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.

Finally, given that this Court has found that Plaintiffs have set forth factual allegations that may entitle them to declaratory relief, this Court will not rule on Plaintiffs' claim for punitive damages at this time.

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<sup>4</sup> If defendants believe that compliance with notice and other statutory requirements for foreclosure, or existence of default may be established as undisputed fact, then the matter could be resolved pretrial by way of a motion for summary judgment.

## IV

### CONCLUSION

In sum, Plaintiffs have set forth allegations in the Complaint that, if true, state a claim for declaratory relief. Accordingly, Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) is Denied. Likewise, the motion to dissolve the recorded *lis pendens* is Denied. Counsel for the prevailing party shall submit an Order in accordance with this Decision.