STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED – DECEMBER 20, 2012)

SETHA SAM	:	
YOY SAM	:	
	:	
v.	:	**C.A. No. PC 2011-4372**
	:	
MORTGAGE ELECTRONIC	:	
REGISTRATION SYSTEMS, INC.;	:	
AMERICAN MORTGAGE	:	
NETWORK, INC.; FEDERAL	:	
NATIONAL MORTGAGE	:	
ASSOCIATION	:	

DECISION

RUBINE, J. Before the Court is Defendants', Mortgage Electronic Registration Systems, Inc. ("MERS") and Federal National Mortgage Association ("FNMA") (collectively, "Defendants"),[1] Motion to Dismiss Plaintiffs' Complaint ("Complaint") pursuant to Rule 12(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure. 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 32 Melissa Street, Providence, 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 the foreclosing mortgagee allegedly had no standing to exercise the statutory power of sale under G.L. 1956 § 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.

[1] Defendant American Mortgage Network, Inc. is not a party to this Motion.

I

FACTS & TRAVEL

The facts gleaned from the Complaint and the exhibits attached thereto and incorporated therein are as follows: On March 6, 2006, Plaintiffs executed a note ("Note") in favor of lender American Mortgage Network, Inc. d/b/a Amnet Mortgage ("Amnet") in the amount of $107,000. (Compl. Ex. 2 at 2.) Contemporaneously with the execution of the Note, Plaintiffs executed a mortgage ("Mortgage") on the Property to secure the Note. (Compl. Ex. 2.) The Mortgage defines the lender as Amnet, and it defines MERS as "mortgagee" as well as "nominee for Lender and Lender's successors and assigns." Id. at 1-2. The following language appears in the Mortgage instrument, "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 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 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 City of Providence. (Compl. Ex. 2.)

On July 22, 2010, MERS as nominee for Amnet and Amnet's successors and assigns, as well as mortgagee, assigned the Mortgage interest to FNMA. (Compl. Ex. 3.) Thus, FNMA became the mortgagee possessing 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 [Amnet]." (Compl. Ex. 2 at 3.) The assignment was recorded in the land evidence records of the City of Providence. (Compl. Ex. 3.)

Thereafter, a foreclosure sale was conducted on Plaintiffs' Property. On July 26, 2011, Plaintiffs recorded a *lis pendens* on the Property in the land evidence records of the City of Providence, effectively putting all third parties on notice of a title dispute concerning the Property.[2] On July 29, 2011, Plaintiffs filed the instant Complaint seeking nullification of the foreclosure sale and return of title to them. 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.[3] (Compl. ¶¶ 44-46, 55.) Defendants then filed this Motion to Dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(6) and Motion to Dissolve the *Lis Pendens*. Plaintiffs have objected to Defendants' Motion averring that they have set forth a claim for relief. At the Motion hearing, both parties agreed to waive oral argument, and thus, this Court took the matter under advisement.

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

[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.

[3] The Complaint does not specifically allege the defects in the foreclosure notice or publication.

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, "[t]he grant of a Rule 12(b)(6) motion to dismiss is appropriate [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)).

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 the Mortgage considered in Chhun. No. PC 2011-4547, 2012 WL 2648200 (R.I. Super. June 26, 2012) (Rubine, J.). Further, Plaintiffs' arguments on objection to the Motion to Dismiss 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, the Court dismissed plaintiffs' complaint for failure to state a claim for relief. The same outcome is obtained in this case with respect to the aforementioned legal issues.

Notwithstanding the substantial similarity between this matter and Chhun, there are two additional allegations of fact in the instant Complaint—that the Note is current or has been satisfied and 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 these allegations 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, this Court is not persuaded by this position. 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, 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 challenges the validity of the assignment of the Mortgage interest from MERS to FNMA, and thus, FNMA's alleged lack of standing to foreclose on the Property, which argument has previously been rejected by this Court.

Nevertheless, Plaintiffs allege that the Note is current or has been satisfied and that the statutory foreclosure sale notice and publication requirements were not properly

performed. See Section 34-11-22 (providing for notice and publication requirements to be followed by the foreclosing mortgagee exercising the statutory power of sale). 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 a 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 (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). For that reason alone, Plaintiffs' Complaint cannot be dismissed, and Plaintiffs must be given an opportunity to have these issues considered at trial.[4] 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 Plaintiffs, Plaintiffs have set forth allegations in the Complaint which, if true, establish a claim for relief. 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 been previously decided by this Court in a manner contrary to the alleged interest of the mortgagor/

[4] If Defendants can establish as undisputed facts the borrower's default, and that the notice and publication of the foreclosure sale were consistent with statute, then the Defendants could have those issues determined by the pretrial filing of a motion for summary judgment.

homeowner.[5] 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

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

[5] If this case is not dismissed pre-trial, then the trial will focus only on disputed facts as to default, notice and publication. The Court deems all of the remaining legal issues raised by the Complaint to have been resolved on the basis of earlier Superior Court precedent.