

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY

SUPERIOR COURT

No. 218-2010-CV-501

Steven Baril

v.

JP Morgan Chase Bank N.A.

ORDER

The plaintiff, Steven Baril (“Baril”), brings suit against the defendant, JP Morgan Chase Bank N.A. (“Chase”), alleging that Chase lacked requisite legal standing in regard to following through on a foreclosure, and further that, prior to the foreclosure auction, Chase advised potential bidders, in public, against buying the pertinent property. Baril avers that because of Chase’s actions, he has suffered “irreparable harm, loss and unnecessary expense.” See Writ.

Chase has filed a Motion for Partial Summary Judgment addressing Baril’s challenge to the validity of its foreclosure.¹ Baril objects, and has interposed a Cross Motion for Partial Summary Judgment. After considering the parties’ pleadings, other submissions, arguments, and the applicable law, the Court **GRANTS** Chase’s Motion and **DENIES** Baril’s Motion.

On March 15, 2006, Baril, as part of a refinancing, provided a mortgage regarding 45 Stonegate Lane, Unit 47, Derry, N.H. with Mortgage Electronic Registration Systems, Inc. (“MERS”) as the mortgagee. Def.’s Mot. Part. Summ. J., Ex. C. Prior to the

¹ The Court understands Baril’s “legal standing” claim to constitute a challenge to Chase’s right to follow through on, or to pursue, a foreclosure.

foreclosure auction discussed below, (which occurred on May 28, 2010), MERS purportedly assigned the mortgage to Chase.²

On March 3, 2010, Chase, through its attorneys, the Harmon Law Offices, P.C. (“Harmon”), notified Baril of its intent to foreclose. Def.’s Mot. Part. Summ. J., Ex. C. Baril responded to this notice in a letter to Harmon dated March 22, 2010, in which he expressly questioned the propriety of any foreclosure and requested that he be provided with certain information or materials, to include the names and contact information for the original and subsequent holders of both the mortgage and mortgage note, “a comprehensive accounting,” copies of any and all assignments of the mortgage and mortgage note, a copy of the current mortgage note, and the name of a current contact person to discuss payment options on the mortgage loan account. Id., Ex. G.

On March 23, 2010 (received by Baril on March 24, 2010), Chase, through Harmon, provided Baril with formal notification that a public auction foreclosure sale would occur on April 21, 2010. Id., Exs. C, D. The notice contained the following language:

PURSUANT TO NEW HAMPSHIRE RSA 479:25, YOU ARE HEREBY NOTIFIED THAT YOU HAVE A RIGHT TO PETITION THE SUPERIOR COURT FOR THE COUNTY IN WHICH THE MORTGAGED PREMISES ARE SITUATED, WITH SERVICE UPON THE MORTGAGEE, AND UPON SUCH BOND AS THE COURT MAY REQUIRE TO ENJOIN THE SCHEDULED FORECLOSURE SALE.

Id., Ex. D.

On March 27, 2010, Baril wrote a letter to Harmon demanding that the “foreclosure proceeding be immediately cancelled until and unless [Chase] can substantiate its legal standing to foreclose (as the current holder in due course of both the subject mortgage and the mortgage note) by responding to [his] requests for the information and disclosures

² The assignment is dated March 8, 2010, and was recorded in the Rockingham County Registry of Deeds on April 22, 2010. See attachments to Supplemental Aff. of J. Patrick Kennedy, dated June 13,

outlined in [his] letter of March 22, 2010.” Id., Ex. E. On April 20, 2010, and after receiving another letter from Baril on April 8, 2010, demanding proof of Chase’s “legal standing to foreclose,” id., Ex. C, Harmon informed Baril that the foreclosure sale would be continued from the April 21, 2010 date “to allow time to provide [him] with an explanation as to the reason why [Chase] believes the account is in default, statement of the current amount that [Chase] believes is owed on the underlying debt, the name of the original creditor, if [Baril has] requested this, and portion of the payment history which demonstrates the default on this loan.” Id., Ex. F.

Chase, however, through Harmon, still moved forward with the foreclosure, scheduling the auction for May 28, 2010. Id., Ex. C. It also recorded the assignment it purportedly had received from MERS on April 22, 2010, something Baril quickly came to be aware of. Id., Ex. B (Dep. of Steven Baril, May 6, 2011 at p. 47-49). Though further communications occurred between Baril and Harmon before the known scheduled May 28, 2010 auction, no resolution of issues was obtained. Id., Ex. C. Significantly, there is no dispute that Baril did not, though he had been provided notice that he could do so, petition the Court to enjoin the foreclosure prior to the May 28, 2010 auction. The plaintiff came to file the instant action on June 24, 2010.

As earlier stated, Chase moves for partial summary judgment, averring that pursuant to RSA 479:25, II, Baril is barred, by virtue of not filing a petition to enjoin prior to the auction, from now asserting that the pursued foreclosure was invalid. Baril objects, contends RSA 479:25, II-a is the applicable statutory provision, and asserts he is entitled to partial summary judgment.

In ruling on a motion for summary judgment, the Court construes “the pleadings,

discovery and affidavits in the light most favorable to the non-moving party to determine whether the proponent has established the absence of a dispute over any material fact and the right to judgment as a matter of law.” Thomas v. Tel. Publ’g Co., 155 N.H. 314, 321 (2007) (citing Porter v. Coco, 154 N.H. 353, 356 (2006)).

The Court first addresses the applicability here of RSA 479:25, II-a, which provides that “[n]o claim challenging the form of notice, manner of giving notice, or the conduct of the foreclosure sale shall be brought by the mortgagor or any record lienholder after one year and one day from the date of the recording of the foreclosure deed for such sale.”

Baril does not contend that he was not provided notice, or that such notice was provided improperly. Rather he particularly argues that Chase, through its agents, conducted the auction improperly, to his detriment and damage. While this claim appears properly presented per RSA 479:25, II-a, (see Gordonville Corp. N.V. v. LR1-A Ltd. P’ship, 151 N.H. 371, 377 (2004)) it is not treated here. Chase rightly points out that RSA 479:25, II-a is not applicable to Baril’s claim going to the “validity of the foreclosure,” that is, going to the legal right of Chase to follow through on foreclosure as it did.

Chase contends, citing RSA 479:25, II, that for Baril to now have any right to challenge Chase’s pertinent actions to schedule and pursue the foreclosure on the basis that Chase lacked proper legal status to do so, he would have had to institute and serve an appropriate prior petition to enjoin.

R.S.A. 479:25, II provides that a mortgagor must provide notice by registered or certified mail to the mortgagee at least 25 days prior to the foreclosure action; that the notice is sufficient so long as it specifies “the date, time, and place of sale,” the address

of the subject property, “the date of the mortgage, the volume and page of the recording of the mortgage[,] and the terms of the sale”; and contains particular language expressly notifying the mortgagor of his right to petition the superior court to enjoin the foreclosure sale. It further significantly provides in regard to the importance of such a petition:

Failure to institute such petition and complete service upon the foreclosing party, or his agent, conducting the sale prior to the sale shall thereafter bar any action or right of action of the mortgagor based on the validity of the foreclosure.

Id. This statute has been interpreted to “bar any action based on facts which the mortgagor knew or should have known soon enough to reasonably permit the filing of a petition prior to the sale.” Murphy v. Fin. Dev. Corp., 126 N.H. 536, 540 (1985).

Here, the undisputed facts demonstrate that prior to the sale: (1) Chase, through Harmon, sent Baril notice of the foreclosure sale via certified mail which Baril received on March 24, 2010 (Def.’s Mot. Part. Summ. J., Ex. B (Dep. of Baril, May 6, 2011 at p. 23-24), Exs. C, D); (2) the notice provided the requisite information and notifications (Id., Ex. D); (3) the notice contained the statutorily required language informing Baril of his right to petition the superior court to enjoin the foreclosure (Id., Ex. D); (4) Baril was aware of the foreclosing institution, Chase, and was in contact with Chase’s counsel (Id., Exs. E, G); (5) Baril was aware, sometime in April, and well prior to the foreclosure auction, of the purported recorded assignment by MERS to Chase (Ex. B, Dep. of Baril, May 6, 2011 at p. 47-49); and (6) Baril had in his mind, again well prior to the foreclosure sale and soon enough to have reasonably filed a petition to enjoin prior to the sale, the grounds to challenge Chase’s pursuit of the foreclosure which he here seeks to litigate (Id., Ex. A (Dep. of Steven Baril, April 8, 2011 at p. 34); Exs. C, E, G;

attachments to Supplemental Aff. of J. Patrick Kennedy).

The Court concludes that the record indisputably establishes that Baril is barred, by virtue of RSA 479:25, II, from proceeding here to challenge the “validity” of Chase’s right to pursue the foreclosure. Chase’s Motion for Partial Summary Judgment is **GRANTED**, and Baril’s Motion is **DENIED**.

The Court also **DENIES** Baril’s two pending Motions to Compel Production of Documents (filed April 27, 2011 and May 10, 2011). Both motions pertain to information related to Baril’s now dismissed “legal standing” claim. Further, the Court **DENIES** Baril’s Motion to Allow an Interlocutory Appeal respecting its decision, dated April 25, 2011, dealing with certain requested discovery.

So **ordered**.

7/20/11

Date

John M. Lewis
Presiding Justice