STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: April 18, 2012)

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS SUCCESSOR IN TO JP MORGAN CHASE BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE FIRST NLC TRUST 2005-2 MORTGAGE BACK CERTIFICATES, SERIES 2005-2	:	
v.	:	**C.A. No. PD 2010-0988**
ROSA CUEVAS	:	
ROSA MARIA CUEVAS, and all other occupants	:	
v.	:	**C.A. No. PC 2010-0553 (Consolidated)**
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS; FIRST FINANCIAL SERVICES LLC; THE BANK OF NEW YORK	:	

DECISION

RUBINE, J. Before the Court, for trial and decision, is a dispute referred to in consolidated cases that the Court will consider in accordance with the parties' stipulated facts. By reason of the facts as stipulated, there is no need for a trial to determine disputed issues of fact. These cases concern the effect of a foreclosure sale, conducted by The Bank of New York f/k/a the Bank of New York, as Successor in to JP Morgan Chase Bank, National Association, as Trustee for the First NLC Trust 2005-2 Mortgage Back Certificates, Series 2005-2 ("Bank of New York"), on title to certain real property located at 786-788 Atwells Avenue, Unit 2, Providence, Rhode Island ("the Property"). The first

action consists of a trespass and ejectment action by Bank of New York to obtain possession of the Property from the purported owner Rosa Maria Cuevas ("Cuevas") on appeal from a judgment of possession entered after trial in the District Court. The appeal which followed is before the Court for trial de novo. The second action is Cuevas' petition to quiet title to the Property via a Complaint for Declaratory Judgment.[1] See Rhode Island Gen. Laws § 34-16-5. Bank of New York claims Cuevas is a tenant at sufferance and subject to eviction as a holdover tenant after having received a "notice to quit." Cuevas, the tenant, challenges the status of Bank of New York, as the owner of the Property, by reason of the alleged unlawful foreclosure. Accordingly, the issue of the validity of the foreclosure sale is the primary issue in both the quiet title claim as well as the district court appeal regarding eviction.

I

Facts & Procedural History

The Court's findings of fact will be based upon and incorporate the facts as stipulated by the parties. The material stipulated facts are as follows:

1. On May 25, 2005, Cuevas executed a promissory note ("Note") in the amount of $252,000 to document a loan made by First NLC Financial Services LLC ("First NLC") to Cuevas as borrower. (Stipulated Facts ¶ 3.)
2. To secure the Note, Cuevas contemporaneously executed a Mortgage. (Stipulated Facts ¶ 4.)
3. The Mortgage designated Mortgage Electronic Registration Systems ("MERS") as "a nominee for Lender and Lender's successors and assigns," and stated "Borrower

[1] Defendants Mortgage Electronic Registration Systems and First NLC Financial Services LLC were dismissed without prejudice in the matter PC-2010-0553. (Stipulated Facts at 1, ¶ 3.)

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 customs, MERS (as nominee for 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 including, but not limited to, releasing and canceling this Security Instrument." (Stipulated Facts ¶¶ 4-5.) See Ex. 3 at 1, 3.

4. On October 24, 2007, MERS assigned the Mortgage interest to Bank of New York. (Stipulated Facts ¶ 6.) See Ex. 4. The assignment was recorded in the land evidence records for the City of Providence on October 31, 2007. Id.

5. On July 29, 2008, Litton Loan Servicing ("Litton") sent notice to Cuevas that her Mortgage deed was in default and she was required to pay the sum of $11,810.26 to cure the default. (Stipulated Facts ¶ 7.) See Ex. 5.

6. The borrower did not cure the default and a foreclosure sale followed.

7. At the foreclosure sale held on February 12, 2009, Bank New York purchased the Property. (Stipulated Facts ¶ 8.) Bank of New York recorded the foreclosure deed in the land evidence records for the City of Providence on April 17, 2009. (Stipulated Facts ¶ 9.) See Ex. 6. As a matter of law, that recording is presumptive evidence of Bank of New York's title after foreclosure. See 65 Am. Jur. 2d Quieting Title § 73 (in a quiet title action, there is a presumption in favor of the record titleholder); see also Breliant v. Preferred Equities Corp., 112 Nev. 663, 918 P.2d 314 (1996).

8. On April 23, 2009, counsel for Bank of New York mailed Cuevas a notice to quit and vacate the Property. (Stipulated Facts ¶ 10.) See Ex. 7.

9. Cuevas was served with the summons and complaint on May 22, 2009 with respect to eviction proceedings in the Sixth Division District Court. (Stipulated Facts ¶ 11.) See Ex. 8. Cuevas failed to appear at the eviction hearing on June 23, 2009. (Stipulated Facts ¶ 12.) In light of Cuevas' failure to attend the eviction hearing, she was adjudged in default. Bank of New York offered an oral proof of claim, and a Default Judgment for possession was entered in the Sixth Division District Court. Id. The Sixth Division District Court issued the execution for possession in favor of Bank New York, on July 17, 2009. (Stipulated Facts ¶ 13.) See Ex. 9.

10. On July 31, 2009, Cuevas filed a motion to stay the eviction and to void the judgment in the Sixth Division District Court. (Stipulated Facts ¶ 14.) This motion was denied by the Sixth Division District Court on February 5, 2010. (Stipulated Facts ¶ 16.) Cuevas sought to appeal that ruling to this Court four days later on February 9, 2010. (Stipulated Facts ¶ 17.) However, no timely appeal was taken from the Default Judgment entered on June 23, 2009. Accordingly, this Court has no jurisdiction to hear the District Court appeal. See Rhode Island Gen. Laws § 9-12-10. The Court's jurisdiction is with respect to judgments entered in the District Court. Sec. 9-12-10. This Court does not have jurisdiction to hear interlocutory appeals with respect to an order denying stay of execution.

11. Meanwhile, on January 27, 2010, after the foreclosure sale was completed, Cuevas filed a Complaint for Declaratory Judgment in this Court. In her Complaint, Cuevas seeks to quiet title and declare that the post-foreclosure conveyance of the

property was void (Compl. ¶ 40(e)) and that fee simple title remains with her. (Compl. ¶ 47 (c)).

12. On March 8, 2010, by agreement of the parties, these matters were consolidated. (Stipulated Facts ¶ 18.)

13. In the quiet title action, each party seeks a declaration that they are the rightful owners of the Property. (Stipulated Facts at 3.)

14. At this point in time, Cuevas remains in possession of the Property, and remains a tenant at sufferance as defined in Title 34, Chapter 18.1.

II

Standard of Review

A

The Parties' Arguments Regarding the Applicable Standard of Review

Bank of New York suggests that in an appeal from a District Court judgment of possession, the Court is to review the decision of the District Court with deference. Such an appellate standard of review is not applicable in Rhode Island when a District Court judgment is appealed to the Superior Court. However, Bank of New York correctly asserts that since Cuevas failed to file a notice of appeal with the Sixth Division District Court within five days after its entry of judgment, pursuant to § 9-12-10, Cuevas is not entitled to a trial de novo.

The result of an appeal from a District Court judgment of possession is trial de novo in Superior Court, not review under an appellate standard of review. However, as set forth supra, this Court has no jurisdiction to hear trespass and ejectment matters originally filed in the District Court, except as provided in § 9-12-10.1. Upon the entry

of a District Court judgment, an appeal may be taken to the Superior Court for trial de novo. Section 9-12-10.1 of the Rhode Island General Laws permits the aggrieved party in a landlord-tenant action to appeal to the Superior Court for a "trial [de novo] on all questions of law and fact." Spano v. Abdalla, 2002 WL 31324132 (R.I. Super. October 3, 2002); see also § 9-12-10.1. Accordingly, the only appellate right that was available to Cuevas was trial de novo on appeal, following judgment of the District Court. However, no such timely appeal was filed. This Court has no subject matter jurisdiction to consider an appeal from the District Court's interlocutory order denying a motion to stay execution. For that reason alone, the District Court appeal must be dismissed, and the matter remanded to the District Court for execution of the outstanding judgment.

Nonetheless, the parties in this matter agreed to consolidate the District Court appeal and the Declaratory Judgment action. Upon consolidation of these matters, the parties stipulated to the relevant facts. Therefore, the standard of review applicable to this matter is the standard of review in a case tried to the Court upon the stipulated facts.

B

Standard of Review on Stipulated Facts

With the dismissal of the District Court appeal for lack of jurisdiction, the only action remaining in these consolidated cases is the original claim to quiet title. The parties have agreed to have that matter tried on stipulated facts. In a case tried to the Court upon stipulated facts, "the trial court does not play a fact-finding role, but is limited to applying the law to the agreed-upon facts." Delbonis Sand & Gravel Co. v. Town of Richmond, 909 A.2d 922, 925 (R.I. 2006). Stipulated facts, upon which a case is submitted for decision, may be taken with all the admitted facts and the inferences

legitimately to be drawn from them. 73 Am. Jur. 2d Stipulations § 17. Where . . . [there are] evidentiary facts stipulated, the court may, if more than one inference can be drawn from the facts, permissibly find the ultimate determinative facts from the evidence stipulated. Id. Valid stipulations are controlling and conclusive, and courts are bound to enforce such stipulations. Burstern v. U.S., 232 F.2d 19, 22 (C.A. 8 1956) (citing H. Hackfeld & Co. v. United States, 197 U.S. 447, 25 S. Ct. 456, 49 L. Ed. 826 (1905)). Upon the dismissal of the appeal in PD-2010-0988, the sole issues remaining in these consolidated cases is consideration of the validity of the foreclosure as alleged in the quiet title action. The Court will consider the quiet title action submitted for decision following trial on stipulated facts.

III

Analysis

A

The Parties' Arguments: Generally

The parties have raised numerous issues for determination by this Court. These issues are: (1) whether Cuevas' appeal and Complaint for Declaratory Judgment are barred by the doctrine of claim preclusion; (2) whether MERS is a mortgagee which can exercise the Statutory Power of Sale in conformance with Rhode Island Statutory law; (3) whether the mortgage assignment from MERS to Bank of New York is valid; (4) whether the foreclosing party must hold both the Note and Mortgage in order to exercise the Statutory Power of Sale contained in the Mortgage (the so-called disconnection issue); (5) whether MERS has standing to foreclose; and (6) whether Rule

52 of the Superior Court Rules of Civil Procedure prohibits Bank of New York from submitting the affidavit of Diane Dixon ("Dixon").

In determining the issues in this action, this Court will continue to follow its rationale and holdings as stated in past precedent. In Kriegel v. Mortgage Electronic Registration Systems, No. PC-2010-7099, 2011 WL 4947398 (R.I. Super. October 13, 2011) (Rubine, J.), this Court ruled as a matter of law that the foreclosure sale conducted by one of MERS' assignees was valid, basing its ruling on earlier Superior Court precedent. See Bucci v. Lehman Bros. Bank, No. PC-2009-3888, 2009 WL 3328373 (R.I. Super. August 25, 2009) (Silverstein, J.); see also Porter v. First Financial Services, No. PC-2010-2526, 2011 WL 1252146 (R.I. Super. March 31, 2011) (Rubine, J.); Payette v. Mortgage Electronic Registration Systems, No. PC-2009-5875, 2011 WL 3794701 (R.I. Super. August 21, 2011) (Rubine, J.); Rutter v. Mortgage Electronic Registration Systems, Nos. PC-2010-4756, PD-2010-4418, 2012 WL 894012 (R.I. Super. March 12, 2012) (Silverstein, J.). Since the stipulated facts are materially identical to those considered in the earlier cases, this Court will apply the settled Rhode Island law to the agreed upon facts; accordingly, this Court will follow the results and reasoning in the Kriegel, 2011 WL 4947398, Payette, 2011 WL 3794701, Porter, 2011 WL 1251246, Bucci, 2009 WL 3328373, and Rutter, 2012 WL 894012, cases. In addition, this Court will address any new issues that are raised in this matter that are not addressed in this Court's earlier rulings.

B

Doctrine of Claim Preclusion

Bank of New York argues that the District Court appeal and Declaratory Judgment action are barred by the doctrine of claim preclusion. Bank of New York bases this argument on the Sixth Division District Court Judgment, in which the court impliedly found Bank of New York to be the owner of the property at issue and entered a judgment for possession. Bank of New York contends that the Court could not have concluded that Bank of New York was owner of the Property unless it had found the foreclosure sale to be proper and valid. (Bank of New York's Mem. in Support of Mot. to Dismiss at 8.) Cuevas argues that the Sixth Division District Court did not and could not have heard her claims to quiet title, as only the Superior Court has jurisdiction to determine title to property.

In opposition to the District Court's entry of judgment, Cuevas raised the same claims she raises on her District Court appeal and Declaratory Judgment action. However, Cuevas is correct in stating that only the Superior Court has jurisdiction to determine title to property. Nevertheless, Cuevas speciously relies upon § 8-8-3 to support her contentions that the District Court did not have jurisdiction to hear her claims for declaratory relief. Pursuant to § 8-8-3(a)(2), the District Court has jurisdiction in all actions between landlords and tenants pursuant to Chapter 18, title 34 and all other actions for possession of premises . . . . Sec. 8-8-3(a)(2). Accordingly, the provisions of § 8-8-3 grant exclusive original jurisdiction to District Court over matters relating to trespass and ejectment. Since the Superior Court has exclusive original jurisdiction over claims to quiet title and in actions seeking declaratory relief, this Court holds that the

District Court could not, and did not, resolve the title questions incident to entry of a judgment of possession. See § 8-2-13; see also § 9-30-1, et al; § 34-16-1, et al. Accordingly, Bank of New York's argument regarding claim preclusion has no merit. Since Cuevas is requesting declaratory relief, and this Court has exclusive jurisdiction to hear her claim regarding her requests to quiet title in the form of declaratory relief pursuant to § 8-2-13, these claims are not barred under the doctrine of claim preclusion as the District Court could not and did not hear Cuevas' claims for Declaratory relief. This Court will only determine the issues of title with respect to Cuevas' claims to quiet title. The District Court appeal is dismissed as untimely and the judgment of possession entered therein has no preclusive effect on this Court's resolution of the declaratory action to quiet title. See supra.

C

MERS as Mortgagee

Cuevas alleges that under Rhode Island case law and statutory law, the use of a third party as a mortgagee, acting as a nominee for a lender, is prohibited. Specifically, Cuevas argues, without citation to any Rhode Island authority, that MERS cannot be a mortgagee under Rhode Island statutory law.

Bank of New York contends that under the plain language of the mortgage, MERS is the mortgagee named therein. (Supp. Mem. in Support of Mot. to Dismiss at 19.) Bank of New York specifically asserts that under the Mortgage, Cuevas explicitly agreed that MERS was the mortgagee and nominee of the original lender, having the right to exercise any interests of the original lender and its successors and assigns. Id. at 21.

The mortgage at issue here contains the identical operative language as the mortgages considered in Bucci, 2009 WL 3328373, Porter, 2011 WL 1251246, Payette, 2011 WL 3794701, Kriegel, 2011 WL 4947398, and Rutter, 2012 WL 894012. In Kriegel, this Court held that it is clear beyond a reasonable doubt that the original lender's designation of MERS as mortgagee in the mortgage instrument was binding on plaintiff, as plaintiff acknowledged and agreed by his signature thereon to the terms contained therein. 2011 WL 4947398 at * 7; see also McBurney v. Teixiera, 875 A.2d 439, 443 (R.I. 2005) (holding "[i]f the court finds that the terms of an agreement are clear and unambiguous, the task of judicial construction is at an end and the agreement must be applied as written").

Other Superior Court cases have been consistent in the legal propriety of lender's appointment of MERS as the mortgagee and authorizing MERS to act as lender's nominee, by enforcing the Note obligations through the foreclosure process upon borrower's default under the Note. See Payette, 2011 WL 3794701 at * 11; see also Porter, 2011 WL 1251246 at * 2, 5. Thus, as nominee of First NLC and its successors and assigns, MERS is authorized to act as original mortgagee and nominee of the lender/note-holder, by designation in the Mortgage instrument, to which Cuevas, the borrower and mortgagor, is contractually bound.

D

Validity of Assignment from MERS to Bank of New York

Cuevas also asserts that the assignment from MERS to Bank of New York is void because MERS is not a mortgagee under Rhode Island law and did not possess the Mortgage Note. (Cuevas' Mem. in Supp. of Ownership at 53.) Cuevas asserts that the

assignment is invalid as it was not duly executed and was not delivered after it was recorded prior to the expiration of six years from the date of its execution. Counsel for Cuevas does not cite a single authority for the position that there is a time limit for recordation of an assignment of an interest in real estate.

The analyses in both Porter, 2011 WL 1251246 and Bucci, 2009 WL 338373 presupposes that an assignment of the mortgage from MERS does not fatally disconnect the note and mortgage debt. Payette, 2011 WL 3794701 at * 14. As in Payette, it is notable that in this matter, both the Mortgage and Note were held by Bank of New York at the time of the foreclosure, as they were both transferred to Bank of New York as of October 24, 2007, prior to the foreclosure sale. See Payette, 2011 WL 3794701 at * 14.

Cuevas further asserts that the assignment is a void conveyance as it was not duly executed by the assignor, by execution of an agent as authorized to sign such an assignment. It is well established that Cuevas does not have standing to challenge the validity of the assignment or transfer of the Mortgage interest, to which she was a stranger. See Payette, 2011 WL 3794701; see also Kriegel, 2011 WL 4947398 (Plaintiff was a stranger to that assignment and consequently lacks standing to contest the legal rights of an assignee under these documents); Fryzel v. Mortgage Elec. Registration Sys., 2011 U.S. Dist. LEXIS 95114 at * 47 (D.R.I. June 10, 2011) (Section 34-16-4 does not provide Plaintiff with standing to sue but only serves as the legal basis for a plaintiff who already has standing to obtain declaratory relief); Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC, 339 F. App'x 97, 102 (6th Cir 2010) ("There is ample authority to support the proposition that a litigant who is not a party to an assignment lacks standing to challenge that assignment."); Brough v. Foley, 525 A.2d

919 (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). Even if Cuevas had standing to reach the issue of the validity of the assignment on the merits, there are no facts in the record to support such a claim. Because Cuevas, through counsel, agreed to submit this case for trial on stipulated facts, the lack of authority of the person executing the assignment on behalf of MERS is not a stipulated fact, and the Court cannot now open the record to consider evidence of the lack of authority of the person purporting to act on behalf of MERS as assignor.

Accordingly, as a matter of fact and law, this Court does not believe the allegation of lack of authority invalidates the presumptively valid recorded assignment. See Dolan v. Hughes, 20 R.I. 513, 40 A. 344 (1898) (citing Johnson v. Thayer, 17 Me. 403 (1840)) (the presumption of law is in favor of the validity of the assignment and of the good faith of the transactions thereunder, and they must be proved to have been fraudulently made before the court can decide against them).

E

Foreclosure was Proper

Cuevas alleges that in order to properly foreclose, the foreclosing party must be the holder of both the Note and Mortgage deed. (Cuevas' Mem. in Support of Ownership at 14.) Specifically, Cuevas argues that without ownership of the Note, no party, other than First NLC, can initiate statutory foreclosure proceedings. (Cuevas' Mem. in Support of Ownership at 45.) Therefore, since the Mortgage deed and the Note were held by different entities at the time of the foreclosure, Cuevas contends that Bank of New York

lacked standing to foreclose even though designated the mortgagee and nominee of lender by the terms of the Mortgage. (Resp. Mem. of Cuevas at 7.)

As previously discussed, pursuant to Payette, 2011 WL 3794701, Porter, 2011 WL 1251246 and Bucci, 2009 WL 3328373, a designation in the mortgage identifying MERS as mortgagee, together with the designation of MERS as the nominee of lender and lender's successors and assigns, having language identical to the mortgage language at hand, does not fatally disconnect a note from a mortgage. See Payette, 2011 WL 3794701; see also Porter, 2011 WL 1252146; Bucci, 2009 WL 3328373. The identity of the note-holder at the time of the foreclosure sale is not a stipulated fact and therefore, not part of the record before this Court. Nevertheless, the identity of the note-holder at the commencement of the foreclosure proceedings is irrelevant because the mortgagee, Bank of New York, acts as nominee of the current note-holder. See Bucci, 2009 WL 3328373; see also Payette, 2011 WL 3794701. Therefore, Bank of New York possessed the Statutory Power of Sale, expressly granted in the Mortgage instrument by Plaintiff, as mortgagee by way of assignment by MERS, upon commencement of foreclosure proceedings.

F

Rule 52

Finally, Cuevas insists that Exhibit H, the affidavit of Dixon, must be stricken as a post trial exhibit which is not applicable. (Resp. Mem. of Cuevas at 7.) Specifically, Cuevas asserts that Rule 52 of the Rhode Island Superior Court Rules of Civil Procedure prohibits Bank of New York from submitting the affidavit of Dixon.

Rule 52 contains no requirement that this Court's findings of fact be based upon undisputed facts. Rule 52 simply states: "In all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon, ..." See Super. R. Civ. P. Rule 52; see also Spangler v. Schaus, 106 R.I. 795, 264 A.2d 161 (R.I. 1970) (Subdivision (a) of this rule is satisfied if the findings of the court are definite and pertinent, if they cover the factual issues which are relevant to the controlling legal questions, and if they dispose of the contested issues.); Shoar-Elias Glass Co. v. Raymond Constr. Co., 114 R.I. 714, 339 A.2d 250 (R.I. 1975) (this rule does not demand an extensive analysis of the evidence and the trial judge need only make specific findings on factual issues relevant to the controlling legal questions which are endemic to the contested issues). However, the parties have agreed to submit this matter to the Court for trial based upon stipulated facts and exhibits. As set forth supra, the Court cannot now open the record to consider evidence with respect to the affidavit of Dixon which contains additional evidence beyond that which the parties stipulated to. Accordingly, the affidavit of Dixon will be stricken, and has not been considered by the Court in its fact-finding.

IV

Conclusion

Bank of New York's Motion to Dismiss is granted. Cuevas' District Court appeal is dismissed for lack of jurisdiction due to an untimely filing of notice of appeal. Accordingly, PD-2010-0988 is remanded to the District Court for issuance of execution on the Judgment entered therein. Counsel for the prevailing party shall submit an Order in accordance with this Decision.