

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.

SUPERIOR COURT

(FILED: February 10, 2014)

JANET M. HAGEN and WILLIAM SPATH :

V. :

FLEET NATIONAL BANK and :

BANK OF AMERICA :

C.A. No. WC 2011-0517

ADDENDUM TO BENCH DECISION

RUBINE, J. This is an addendum to the Bench Decision rendered on January 14, 2014, in which this Court granted Defendants’ converted Motion for Summary Judgment. After this Court rendered its Decision, Plaintiffs requested that this Court specifically address a couple of the arguments they made in their briefs and during oral argument. Specifically, Plaintiffs requested that this Court address their contention that Bank of America did not have the authority to foreclose on Plaintiffs’ Property (located at 27 Conanicus Road in Narragansett) because Freddie Mac held both the Note and the Mortgage on April 12, 2011 (the date of the foreclosure sale).

As this Court mentioned during its January 14, 2014 Bench Decision, this motion first came before this Court in April 2012 on Defendants’ Rule 12(c) Motion for Judgment on the Pleadings. This Court converted the motion to a Rule 56 Motion for Summary Judgment because Bank of America had submitted exhibits attached to its pleadings. After a period for discovery and several continuances, the parties appeared before this Court on September 17, 2013 and again on November 26, 2013 for oral argument. At the November 26, 2013 hearing, this Court asked the parties to submit a stipulation with respect to which affidavits this Court was

to consider when making its decision on the motion, because the affidavits filed by each party at that time contained defects of form and/or timeliness. This Court was crystal clear that, once the parties filed the stipulation, the Court would make and render its decision based solely on these affidavits and the record in this case thus far.

As mentioned in the Bench Decision, the parties filed the requested stipulation. Through the stipulation, the parties waived all objections to the form and/or timing of five affidavits—three from Bank of America and two from Plaintiffs.

In support of its motion, Defendants filed three affidavits:

1. Declaration of Eva Massimino, attorney with Bendett & McHugh, P.C. (who represented Bank of America in connection with the foreclosure on the Property). The attached exhibits demonstrate notice of Bank of America's intent to foreclose and publication of the date of the foreclosure sale.
2. Affidavit of Christopher Montalbano of Pilgrim Title Insurance Company attesting to the results of a title search on the Property.
3. Declaration of Devra Lindgren of Bank of America attesting to the official certification of the Office of the Comptroller of the Currency (dated June 8, 2005) certifying the merger of Fleet National Bank into Bank of America.

As the nonmoving party, Plaintiffs submitted two affidavits, both from Plaintiff Janet Hagen. In the first affidavit, Plaintiff Hagen outlines a portion of the travel of this motion and requests that the motion be continued for further discovery.¹ In the second affidavit, Plaintiff Hagen presents several exhibits and asserts several legal conclusions. The exhibits include:

1. A letter dated April 9, 2011 in which BAC Home Loans Servicing, LLP invites Plaintiffs to apply for the Home Affordable Modification Program. (Ex. A)
2. An undated notice from Bank of America Home Loans advising Plaintiffs that the servicing of their loan would be transferred to Bank of America effective July 1, 2011. The second and third pages contain a Fair Debt Collections

¹ This affidavit also points out that the Montalbano Affidavit states that FHLMC was the successful bidder at the April 12, 2011 foreclosure sale (Montalbano Aff. ¶ 7), whereas the Massimino Declaration states that Reservoir Ventures II, LLC was the party to whom the Property was sold at the foreclosure sale (Massimino Aff. ¶ 8.). This factual discrepancy has no bearing on whether Bank of America had the authority to conduct the foreclosure sale.

Practices Act and State Law Notice that begins with the statement that “the servicing of your home loan was transferred to Bank of America, N.A., effective July 1, 2011.” The notice further clearly states that FHLMC LBAC 173 is the creditor to whom the debt is owed, and that Bank of America is the servicer of the loan. In addition, the Notice lists an amount of debt as of June 25, 2011. (Ex. B)

3. A letter dated August 17, 2011 from Blank Rome LLP that serves as a response to Plaintiffs’ May 10, 2011 letter in which they requested information about their loan. On page four, under the heading “verification of debt,” the letter states that the owner of the note (as of August 17, 2011) was FHLMC.² (Ex. C)
4. A printout from an internet website. At the top of the printout, the following statement appears: “Yes. Our records show that Freddie Mac is the owner of your mortgage and it was acquired on July 20, 2009” The printout does not contain any information that could be used to identify to which mortgage the above statement refers. There are no names, addresses or loan numbers on this printout. (Ex. D)

After this Court rendered its Bench Decision granting summary judgment to Defendants, Plaintiffs argued that this Court had not specifically addressed their argument that Defendants did not have the authority to foreclose because of Plaintiffs’ allegations that Defendants did not hold the Note and Mortgage on April 12, 2011. Plaintiffs further argued that the foreclosure was in violation of G.L. 1956 § 34-27-3.1, which provides that “the mortgagee shall provide to an individual consumer mortgagor written notice of default and the mortgagee’s right to foreclose”

Ultimately, Plaintiffs did not provide competent evidence to “prove the existence of a disputed issue of material fact” regarding whether Freddie Mac owned or held the Note prior to the foreclosure sale on April 12, 2011. See Hill v. Nat’l Grid, 11 A.3d 110, 113 (R.I. 2011). Exhibit A is simply an invitation for Plaintiffs to apply to the Home Affordable Modification Program (Program), with many details about how the application is filed and processed. Plaintiff Hagen asserted in her affidavit that this letter indicates that a foreclosure sale would not be

² The date of the foreclosure sale was April 12, 2011.

conducted during the Program (Hagen Aff. ¶ 1.) This assertion is misleading because the letter actually states that a foreclosure sale will not be conducted during the Program *evaluation*. As the letter makes clear, the evaluation for the Program does not occur until the invitee has submitted the requested financial documents.

With respect to Exhibit B, this undated notice provides evidence that, at some point in time after June 25, 2011, Freddie Mac became the creditor or noteholder, and Bank of America became the servicer of the loan. Since the foreclosure sale was conducted on April 12, 2011, this exhibit does not represent competent evidence of a genuine dispute of material fact as to whether Defendants had the authority to foreclose. Exhibit C provides that Freddie Mac was the owner of the Note as of August 17, 2011. Again, the foreclosure sale was conducted on April 12, 2011. Finally, Exhibit D does not demonstrate a genuine issue of material fact because, in the absence of any identifying information, it represents an anonymous and undated printout from an internet site. The affidavit does not identify Plaintiffs' loan as the loan described.

Since Plaintiffs have failed to provide competent evidence of a genuine issue of material fact with respect to Defendants' authority to conduct the April 12, 2011 foreclosure sale, Plaintiffs have failed to meet their burden on this Motion for Summary Judgment. See Hill, 11 A.3d at 113. As explained in this Court's Bench Decision, Defendants have demonstrated the absence of a genuine issue of material fact with respect to its authority to properly foreclose on the Property. (See Montalbano Aff. ¶ 7 in which the affiant states that Fleet National Bank was the mortgagee of record from March 2, 2004 until Bank of America foreclosed on April 12, 2011; Lindgren Decl. ¶ 3 which refers to the official certification of the merger of Fleet National Bank with Bank of America; Massimino Decl. ¶¶ 3-7 in which the affiant provides facts as to the propriety of the foreclosure process, including copies of notices sent to Plaintiffs and

publications of the sale.) Therefore, Defendants are entitled to judgment as a matter of law on Plaintiffs' claims for declaratory and injunctive relief. Defendants' Motion for Summary Judgment is granted. Judgment shall enter in favor of the Defendants. Plaintiffs' Complaint is dismissed. Defendants' counsel shall prepare the appropriate order for entry.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Hagen v. Fleet National Bank, et al.

CASE NO: WC 2011-0517

COURT: Kent County Superior Court

DATE DECISION FILED: February 10, 2014

JUSTICE/MAGISTRATE: Rubine, J.

ATTORNEYS:

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John B. Ennis, Esq.

For Defendant: Harris K. Weiner, Esq.