



## I

### FACTS & TRAVEL

The facts as set forth in the Complaint and gleaned from the exhibits as attached thereto and incorporated therein are as follows. On December 10, 2008, Plaintiffs executed a note (“Note”) in favor of the lender Maverick Funding Corp. (“Maverick”) for \$234,228. (Compl. Ex. 2 at 1.) Plaintiffs contemporaneously executed a mortgage (“Mortgage”) on the Property to secure the Note. (Compl. Ex. 2.) The Mortgage defines the lender as Maverick, and it defines MERS as “mortgagee” as well as “nominee for Lender and Lender’s successors and assigns.” Id. at 1. In addition, the Mortgage 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. 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. at 2.

The Mortgage was recorded in the land evidence records of the City of Providence. (Compl. Ex. 2.)

On April 26, 2011, MERS, as mortgagee and nominee for Maverick, assigned the Mortgage interest to Wells Fargo. (Compl. Ex. 3.) Thus, by way of assignment by MERS, Wells Fargo had the right “to exercise any or all of [the interests granted by Borrower in the Mortgage], including, but not limited to, the right to foreclose and sell

the Property.” (Compl. Ex. 2 at 2.) The assignment was duly executed and recorded in the land evidence records of the City of Providence. (Compl. Ex. 3.)

Thereafter, a foreclosure sale was conducted on Plaintiffs’ Property. 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.<sup>2</sup> (Compl. ¶¶ 44-46, 55.) Defendants filed this Motion to Dismiss pursuant to Rule 12(b)(6) averring that Plaintiffs failed to establish a claim entitling them to the relief sought. Plaintiffs have objected to Defendants’ Motion averring that they have set forth a claim for relief. At the Motion hearing, the parties stipulated to submit this matter to the Court on the briefs, thereby waiving oral argument. After submission of all memoranda, this Court took the matter under advisement.

## II

### ANALYSIS

For the purpose of a Rule 12(b)(6) motion to dismiss, the Court assumes the allegations set forth in the Complaint are true and views them in the light most favorable to plaintiff. 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)). The motion will be granted only if it appears clear beyond a reasonable doubt that there is no set of facts which could entitle plaintiff to relief. 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)).

Applying that standard here, Defendants’ Motion to Dismiss must be denied.

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<sup>2</sup> The Complaint does not specifically allege the defects in the foreclosure notice or publication.

There are at least two allegations, which, if taken as true, would be grounds to invalidate the foreclosure. Plaintiffs have set forth an allegation that the Note is current. (Compl. ¶ 55.) If that is proven to be a truthful allegation, there would be no payment default, which under the mortgage is a condition precedent to foreclosure. In addition, Plaintiffs set forth an allegation in the Complaint that notice and publication of the sale failed to adhere to statutory requirements. (Compl. ¶¶ 44-46.) Under prevailing law, failure to follow the notice procedures as provided in the statute may be grounds to render the foreclosure sale a nullity. See 55 Am. Jur. 2d Mortgages § 508, 511 & n.3 (2009) (citing persuasive authority therein) (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). Once again, if the Court views that allegation as true, Defendants' Motion to Dismiss must be denied.

### **III**

#### **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.