IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BRANCH BANKING AND TRUST COMPANY,	)	
Plaintiff,	)	
v.	)	C.A. No. N11L-12-270 CEB
HATEM G. EID A/K/A HATEM EID; YVETTE EID,	)	
Defendants.	)	

Date Submitted: March 28, 2013
Date Decided: June 13, 2013

MEMORANDUM OPINION.

Upon Consideration of
Plaintiff's Motion For Summary Judgment.
GRANTED.

Robert T. Aulgur, Jr., Esquire and Monica L. Townsend, Esquire, WHITTINGTON & AULGUR, Middletown, Delaware. Michael Montecalvo, Esquire, WOMBLE CARLYLE SANDRIDGE & RICE, LLP, Winston-Salem, North Carolina. Attorneys for Plaintiff Branch Banking and Trust Company.

Stephen B. Brauerman, Esquire and Colin R. Robinson, Esquire, BAYARD, P.A., Wilmington, Delaware. William J. Barnes, Esquire, W.J. BARNES, P.A., Beverly Hills, California. Attorneys for Defendants Hatem Eid and Yvette Eid.

BUTLER, J.

INTRODUCTION

The present controversy began with a standard execution of a note secured by a mortgage. It ends with plaintiff Branch Banking and Trust Co. ("BB&T" or "plaintiff") seeking summary judgment. Before ruling, a review of the facts is in order.

FACTUAL BACKGROUND

In February of 2008, Hatem Eid ("Mr. Eid") executed a promissory note ("the Note")[1] in favor of US Mortgage Finance Corporation ("US Mortgage") for $187,500 plus interest at a rate of 6.875%. Around that same time Mr. Eid and his sister, Yvette Eid ("Ms. Eid") executed a mortgage (the "Mortgage")[2] that secured the Note in favor of "MERS" as "nominee" for the lender, US Mortgage, on property located in Newark, Delaware.[3] The Mortgage was duly filed and recorded in the real property records of New Castle County, Delaware as well as with the Mortgage Electronic Registration System ("MERS"). Through a series of transfers, the Note and the Mortgage ultimately landed in the hands of BB&T. The Eids took possession of the Newark property and, since approximately December, 2008 to today – approximately 4 ½ years -- have not made a mortgage payment.

---

[1] Ex. A. to Plaintiff's Complaint (hereinafter "Ex. ___ to Complaint").

[2] Ex. B to Complaint.

[3] Parcel No. 09-022.20-012.

On February 29, 2008 Mr. Eid received and signed a notice informing him that US mortgage was transferring its interest in the mortgage to BB&T effective April 1, 2008. The notice advised him that the Mortgage would thereafter be serviced by BB&T.[4] The mortgage transfer was duly recorded in MERS. The Note was physically transferred to BB&T by Southwest Securities, FSB which held the Note as custodian and bailee on behalf of US Mortgage pursuant to a special power of attorney.

On April 14, 2008 BB&T transferred its interest in the Note to Federal Home Loan Mortgage Corporation ("Freddie Mac"), but pursuant to a contractual agreement with Freddie Mac, BB&T remained the servicer of the Mortgage and held the Note as a custodian for Freddie Mac. On July 7, 2009 Freddie Mac transferred its interest in the Note back to BB&T. On or around that same day MERS assigned the Mortgage to BB&T and the assignment was recorded in the real property records of New Castle County, Delaware.[5] As a result of these transfers and assignments, BB&T maintains it is the mortgagee under the Mortgage, the loan servicer and the current owner and holder of the Note.

As noted above, Defendants have failed to make payments under the Note since December, 2008. BB&T filed a complaint with this Court on December 29,

[4] Ex. C to Complaint.

[5] Ex. E to Complaint.

2011 alleging breach of contract and seeking a writ of scire facias on the Mortgage, a Sherriff's sale of the property and repayment of the outstanding balance under the Note.

For much of the subsequent year after filing the complaint, defendants represented themselves pro se. Plaintiff's discovery to the defendants went unanswered and plaintiff moved for summary judgment. Finally, defendants secured counsel and formally opposed summary judgment. Argument was held on March, 7, 2013 with the relatively recently retained counsel for defendants. The Court expressed some skepticism that defendants had presented bona fide issues for trial, but gave both parties the opportunity to further expand their arguments before the Court would rule. The parties duly filed supplemental briefs on summary judgment.

It is worth noting that the defendants did not, and still have not, sought to take discovery of plaintiff. Rather, it appears that defendants are content to rely upon what they perceive to be fatal weaknesses in plaintiff's moving papers to avoid summary judgment.

CONTENTIONS OF THE PARTIES

The premise of BB&T's first brief in support of its motion for summary judgment is that defendants have admitted to the material allegations of the complaint through their answer and failure to respond to plaintiff's request for

admissions. BB&T contends it has established that 1) defendants failed to make the payments required under the Note, 2) said failure constitutes a default under the Note and Mortgage, and 3) BB&T is the current holder of the Note and Mortgage. BB&T reasons that since no genuine issues of material fact remain, summary judgment is appropriate. BB&T concludes it is entitled to accelerate the debt and foreclose on the property.

The defendants respond with two arguments: 1) Mr. Rick Miller, upon whose affidavit BB&T relies in support of its motion, lacked firsthand knowledge of the relevant transfers and 2) BB&T has not shown that it is the real party in interest to prosecute this foreclosure action, asserting that MERS is nothing more than an entity that tracks the transfer and servicing rights in mortgage loans. Scire facias sur mortgage foreclosures are governed by 10 *Del.C.* § 5061(a) which provides that the only parties entitled to institute a foreclosure action are the mortgagee and the heirs, executors, administrators, successors, and assigns thereof. Defendants maintain that BB&T is not the proper party in interest and may not foreclose on the property.

ANALYSIS

In reviewing the record and questioning defense counsel on the issue directly during a March 2013 hearing, the Court finds that no genuine issues of material fact remain to be litigated. BB&T has set forth clearly in its motion the necessary

elements for relief in this case. In their Answer, defendants admit that Mr. Eid executed the Note and further that defendants collectively executed the Mortgage on the Newark property. Defendants admitted through their Answer that beginning in December of 2008 and continuing to the present they have failed to make the required payments under the Note. They acknowledge that failure to make these required monthly payments constitutes an event of default under the Note and Mortgage.

Defendants took the funds, but have failed to make the agreed upon payments constituting a default under the Note and Mortgage. Pursuant to the agreed upon terms of the relevant documents, BB&T is entitled to foreclose on the property.[6] Defendants have not attacked the authenticity of either document nor have they argued any defenses to excuse their default. Simply stated, the defendants entered into a contract, subsequently breached that contract and do not effectively deny it, all of which entitles plaintiff to relief under the contract.

All of this is abundantly evident from the record before the Court and indeed, is not seriously contested by defendants. But two issues raised by defendants merit further consideration: whether BB&T's affiant must have "personal knowledge" of the transactions to which he refers and whether BB&T is the "real party in interest."

[6] Ex. B to Complaint at p. 13, ¶22.

With respect to the bank's affiant, Mr. Miller, we think defendants attach more importance to the affidavit than it deserves. Mr. Miller is Assistant Vice President in the Non-Performing assets division of BB&T.[7] His affidavit references the Note, the assignment and the Mortgage, all of which are attached as exhibits and the authenticity of which is not disputed by the defendants. Those documents speak for themselves and Mr. Miller's affidavit is little more than a leisurely walk through the documents, stopping to point out relevant paragraphs along the way. Defendants' problem is not the Miller affidavit; it is the documents appended thereto. The authenticity and correctness of these documents are not challenged, we presume because they cannot be.[8]

Defendants complain that the Miller Affidavit is deficient because he did not swear to personal knowledge of the passing of the Mortgage from US Mortgage to MERS. Defendants' closely related claim is that even if Mr. Miller could swear to personal knowledge about this transfer, plaintiff's case would be wanting because

---

[7] Miller Affidavit, ¶2.

[8] Documents affecting an interest in property are an exception to the hearsay rule. See D.R.E. 803 (15): "A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document."

plaintiff has not shown it has standing to sue or, alternatively, that it is not the "real party in interest" to bring a foreclosure action. [9]

There are at least two responses to defendants' argument. First, it happens that in this particular case, the "Mortgagee" under the Mortgage was (and always was) MERS. MERS did not acquire its interest in the Mortgage by way of assignment from US Mortgage, so there was no need to have a witness with "personal knowledge" of that transfer because no transfer ever happened. There was indeed an assignment from MERS to BB&T; the corporate assignment from MERS to BB&T was indeed signed by Mr. Miller and notarized on June 10, 2009 and is in the record. We may fairly infer that he had personal knowledge of the document he signed. Moreover, BB&T filed its assignment with the New Castle County Recorder of Deeds, an assignment of which the Court may take judicial notice even if Mr. Miller did not have personal knowledge.[10] More fundamentally, the issue whether Mr. Miller must swear to personal knowledge of the assignment of the mortgage presumes that defendants have some rights to object to the chain of assignment resulting in plaintiff's acquisition of its cause of action against defendants. This presumption is further expanded when defendants argue that

---

[9] *See*, D.R.C.P. Rule 17

[10] *See generally*, *Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 363845, at n. 58 (Del. Ch. Jan. 27, 2010) aff'd, 7 A.3d 485 (Del. 2010)(taking judicial notice that a loan and mortgage had been satisfied through a Mortgage Satisfaction Piece filed with the Recorder of Deeds of Sussex County, Delaware).

plaintiff has not shown it is the "real party in interest" to press the foreclosure claim.

We think defendants have it wrong here. The supposition underlying defendants' claim is that they may challenge the assignment (or proof of the assignment) of their debt. Defendants attack the assignment of the Mortgage from MERS to BB&T. As a matter of Delaware law, for an assignment to be valid and to convey all the interest of the assignor it must be attested by one credible witness.[11] The assignment at issue was notarized by Tamie Scott and therefore meets the requirements set forth in the Delaware Code. Plaintiff cites no authority suggesting that MERS assignments are treated differently than any other assignment in Delaware. On the contrary, Delaware Courts have shown little appetite for invalidating mortgage assignments merely because they were assigned by MERS.[12]

---

[11] 25 *Del.C.* § 2109(a): An assignment of a mortgage or any sealed instrument attested by 1 creditable witness shall be valid and effectual to convey all the right and interests of the assignor. (b) All assignments of mortgages or any sealed instruments heretofore made in the presence of 1 witness and all satisfactions made by assignees in such assignments are made good and valid.

[12] *See, e.g., Savage v. U.S. Nat. Bank Ass'n*, 19 A.3d 302 (Del. 2011)(upholding plaintiff's interest in defendant's mortgage acquired through an assignment from MERS.); *Citimortgage, Inc. v. Trader*, 2011 WL 3568180 (Del. Super. May 13, 2011)(finding plaintiff to be the proper party in interest after an assignment of a mortgage from MERS to plaintiff).

In *CitiMortgage, Inc. v. Bishop*,[13] Judge Scott of this Court addressed a similar case with a similar defense. Judge Scott noted that a debtor is not a party to a mortgage assignment, is not a third party beneficiary to the assignment and cannot show legal harm as a result of the assignment. As such, the debtor has no legally cognizable interest in an assignment and therefore is not in a position to complain about it. Thus, it is not plaintiff who lacks standing to sue, but defendants who lack standing to contest the assignment. Indeed, this appears to be the weight of authority in federal court as well.[14]

BB&T is the current holder of the Note and the Mortgage. The Note is a negotiable instrument.[15] The transfer of an instrument, "vests in the transferee any right of the transferor to enforce the instrument."[16] "An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to

---

[13] 2013 WL 1143670 (Del. Super. Mar. 4, 2013).

[14] *See, In re Perretta,* 2011 WL 6305552 (Bankr.D. R.I. Dec. 16, 2011)(finding that the debtors were not a party to any of the assignments, nor third party beneficiaries of the assignments, and therefore lacked standing to challenge these assignments); *In re Walker,* 466 B.R. 271, 285 (Bankr.E.D.Pa.2012) (acknowledging the development of a judicial consensus that a borrower lacks standing to challenge an assignment when he is neither a party to nor a third party beneficiary of the securitization agreement); *In re Edwards,* 2011 WL 6754073, at *4 (Bankr.E.D. Wisconsin Dec. 23, 2011)(Finding a debtors standing to be lacking where he was neither a party to the pooling or servicing agreements nor a potential third party beneficiary of those agreements).

[15] 6 *Del.C.* § 3-104(a): Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:(1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder.

[16] *Id.*

the person receiving delivery the right to enforce the instrument."[17] By endorsing the instrument, the Note became payable to any bearer and, BB&T is the current holder and it is therefore entitled to payment thereon.[18]

CONCLUSION

In considering the record as a whole, the Court finds no issues of material fact remain. Further, the Court has determined that BB&T is the proper party in interest to bring suit. Plaintiff's Motion for Summary Judgment is therefore **GRANTED**.

IT IS SO ORDERED.

Judge Charles E. Butler

[17] 6 *Del.C.* § 3-203.

[18] *See,* 6 *Del.C.* § 3-204; 6 *Del.C.* § 1-201(b)(5); 6 *Del.C.* § 1-201(b)(21)(A).