STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: JUNE 4, 2012)

WILLIAM T. O'BRIEN	:	
	:	
v.	:	**C.A. No. KC 2009-1695**
	:	
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS; NEW CENTURY MORTGAGE; DEUTSCHE BANK NATIONAL TRUST CO. AS TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT DATED AS OF MAY 1, 2007 SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2007-BR4 MORTGAGE PASS-THROUGH CERTIFICATE SERIES 2007-BR4	:	

DECISION

RUBINE, J. Before the Court, for trial and decision, is a dispute that the Court will consider in accordance with the parties' stipulated facts. Since the parties have stipulated to all material facts, there is no need for a trial to determine disputed issues of fact. This matter filed as a quiet title action, G.L. 1956 § 34-16-1, et seq., concerns the effect of a foreclosure sale, conducted by Defendant Deutsche Bank National Trust Co. as Trustee Under the Pooling and Servicing Agreement dated as of May 1, 2007 Securitized Asset Back Receivables, LLC Trust 2007-BR4 Mortgage Pass-Through Certificate Series 2007-BR4 ("Deutsche Bank"), on title to certain real property located at 645 Cedar Avenue, East Greenwich, Rhode Island ("the Property"). Following the foreclosure sale, Plaintiff William T. O'Brien ("Plaintiff") filed this declaratory judgment action wherein he prays that this Court quiet title to the Property. Plaintiff is challenging Defendant Deutsche

Bank's foreclosure on the Property and the effect of the recording of the foreclosure deed recorded thereafter by Deutsche Bank as the foreclosure buyer. Because the Plaintiff claims the foreclosure sale was not held in accordance with applicable Rhode Island law, he further claims that the foreclosure deed recorded after the foreclosure sale was ineffective in transferring title to the Property, and that Plaintiff should be adjudged the rightful title holder.

I

Facts & Travel

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 January 3, 2007, Plaintiff executed a promissory note ("Note") in favor of the original lender New Century Mortgage Corporation ("New Century") in the amount of $266,400. (Stipulated Facts ¶ 3.) See Stipulated Facts Ex. B.
2. To secure the Note, Plaintiff contemporaneously executed a mortgage ("Mortgage") on the Property. The Mortgage was recorded in the land evidence records in the Town of East Greenwich on January 3, 2007. (Stipulated Facts ¶ 1.) See Stipulated Facts Ex. A.
3. The Mortgage designated Mortgage Electronic Registration Systems, Inc. ("MERS") as "a nominee for Lender and Lender's successors and assigns," and as "mortgagee under this Security Instrument." (Stipulated Facts ¶ 2, Stipulated Facts Ex. A at 1.) 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 including, but not limited to, releasing and canceling this Security Instrument." (Stipulated Facts Ex. A at 3.)

4. On January 9, 2007, a corrective mortgage ("Corrective Mortgage") was executed. The Corrective Mortgage provides, "[t]his Corrective Mortgage is being recorded to replace that certain defective mortgage that was recorded on January 3, 2007 at 3:15 p.m. in the East Greenwich" land evidence records. (Stipulated Facts ¶¶ 4, 5.) The Corrective Mortgage was recorded in the land evidence records for the Town of East Greenwich on January 9, 2007. (Stipulated Facts ¶ 4.) See Stipulated Facts Ex. C.
5. On March 10, 2008, MERS assigned the Mortgage interest to Deutsche Bank. (Stipulated Facts ¶ 6.) See Stipulated Facts Ex. D. The assignment was recorded in the land evidence records for the Town of East Greenwich on March 13, 2008.
6. On December 31, 2008, Plaintiff filed a Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the District of Rhode Island. (Stipulated Facts ¶ 7.) See Stipulated Facts Ex. E. Subsequently, on March 24, 2009, Plaintiff's bankruptcy petition was dismissed. (Stipulated Facts ¶ 8.)
7. Following default by the borrower, on June 15, 2009, Deutsche Bank, as mortgagee, foreclosed on the Property. (Stipulated Facts ¶ 9.) At the foreclosure sale, Deutsche Bank prevailed as the highest bidder. Id. Deutsche Bank thereafter recorded a foreclosure deed in the land evidence records for the Town

of East Greenwich on July 29, 2009. (Stipulated Facts ¶ 10.) See Stipulated Facts Ex. F.

8. As a result of the recording of the foreclosure deed, whereby Deutsche Bank became the record title holder, Deutsche Bank filed a complaint in the Third Division District Court on August 20, 2009, to evict the tenants from the Property, as they were not in possession of the Property by way of any leasehold interest therein. (Stipulated Facts ¶ 11.) On October 27, 2009, Plaintiff entered into an agreement with Deutsche Bank in the District Court eviction action whereby judgment for possession entered in favor of Deutsche Bank. (Stipulated Facts ¶ 13.) See Stipulated Facts Ex. G.
9. On October 27, 2009, Plaintiff filed an action for declaratory judgment in the Kent County Superior Court which case was voluntarily dismissed by Plaintiff on November 11, 2009. (Stipulated Facts ¶¶ 12, 14.)
10. On December 8, 2009, Plaintiff recorded a notice of lis pendens in the land evidence records in the Town of East Greenwich, putting all on notice of the dispute over title to the Property. (Stipulated Facts ¶ 15.)
11. Thereafter, on December 21, 2009, Plaintiff filed this Complaint seeking declaratory judgment and injunctive relief to enjoin the foreclosure sale. Since the foreclosure sale has now been completed, the claim for injunctive relief is now moot. (Stipulated Facts ¶ 16.) See Compl.
12. The parties have agreed to submit this quiet title action for consideration by this Court based on the Stipulated Facts.[1]

[1] Defendant New Century is not a party to this trial and decision.

II

Standard of Review

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 fact 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 (1905)).

III

Analysis

A

Doctrine of Res Judicata

Defendants aver that Plaintiff's claims are barred by the doctrine of res judicata. In support of this position, Defendants claim that the agreement for judgment stipulated to by the parties in the District Court precludes Plaintiff from now raising claims to challenge Deutsche Bank's claim of title to the Property as well as Deutsche Bank's standing to foreclose on the Property.

Defendants' reliance on the doctrine of res judicata is contrary to common sense and erroneous. "Since the Superior Court has exclusive jurisdiction over claims to quiet

title and in actions seeking declaratory relief, . . . the District Court could not, and did not, resolve the title questions incident to entry of a[n] [agreed] judgment of possession." The Bank of New York Mellon v. Cuevas, Nos. PD-2010-0988, PC-2010-0553, 2012 WL 1388716 (R.I. Super. April 19, 2012) (Rubine, J.); see also Section 8-2-13; Section 9-30-1 et al; Section 34-16-1, et al. Since Plaintiff is requesting declaratory relief, and this Court has exclusive jurisdiction to hear his claim regarding the request to quiet title in the form of declaratory relief pursuant to § 8-2-13, Plaintiff's claims are not barred under the doctrine of res judicata; as the District Court could not and did not hear Plaintiff's claims for declaratory relief.[2] See Cuevas, 2012 WL 1388716.

B

MERS as Nominee for New Century

Plaintiff avers that New Century filed bankruptcy, and as a result, its nominee relationship with MERS was terminated. Plaintiff further avers that MERS is not an authorized signatory for New Century as there is no recorded power of attorney.

In Porter v. First NLC Financial Services, LLC this Court held that plaintiff's specific and express agreement through her execution of the mortgage instrument that specifically and clearly provided that MERS could act as mortgagee and nominee of the lender and its successors and assigns precluded plaintiff from asserting that MERS did not have the right to foreclose on the property at issue. No. PC-2010-2526, 2011 WL 1251246 (R.I. Super. March 31, 2011) (Rubine, J.). Moreover, all subsequent Superior

[2] Furthermore, facts established by stipulation generally do not have issue preclusive effect because the issues have not been litigated. 21A Fed. Proc., L. Ed. § 51:263; see also General Dynamics Corp. v. American Telephone and Telegraph Co., 650 F.Supp. 1274, 1283 (1986) (quoting Otherson v. Department of Justice, Immigration and Naturalization Service, 711 F.2d 267, 274-75 (D.C. Cir. 1983) (when a particular fact is established not by judicial resolution but by stipulation of the parties, the facts has not been actually litigated and thus is not a proper candidate for issue preclusion).

Court decisions[3] determine that MERS acting as the mortgagee was valid and binding on the mortgagor and that MERS therefore as lender's nominee MERS was authorized to enforce the Note and commence the foreclosure process upon borrower's default under the Note. Cuevas, 2012 WL 1388716; see also Payette v. Mortgage Electronic Registration Systems, No. PC-2009-5875, 2011 WL 3794701 at * 11 (R.I. Super. August 22, 2011) (Rubine, J.); Porter, 2011 WL 1251246 at * 2, 5. Accordingly, New Century's designation of MERS as mortgagee and nominee of New Century and New Century's successors and assigns, as consented to by Plaintiff through his execution of the Mortgage instrument, is now binding upon Plaintiff. See Rutter, 2012 WL 894012 (when that mortgage language states that MERS is the mortgagee, MERS is the nominee of the lender and its assigns, and MERS has the statutory power of sale, then the mortgagor signs that document, that clear and unambiguous language is legally binding). Thus, MERS in its capacity as mortgagee and nominee for New Century and New Century's successors and assigns, regardless of the alleged bankruptcy of New Century[4] properly assigned the Mortgage interest to Deutsche Bank. The Mortgage instrument was executed by the Plaintiff well before the bankruptcy of the original lender, New Century, thus the bankruptcy has no effect on the legal authority of New Century to appoint a mortgagee to act on its behalf. That designation of MERS occurred prior to its bankruptcy. "MERS is designated the nominee for the current beneficial owner of the

[3] In the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of the Superior Court cases on this subject matter represents the prevailing view of the law in Rhode Island. Breggia v. Mortgage Electronic Registration Systems, No. PC-2009-4144, 2012 WL 1154738 (R.I. Super. April 3, 2012) (Rubine, J.); see also Rutter v. Mortgage Electronic Registration Systems, Nos. PC-2010-4756, PD-2010-4418, 2012 WL 894012 (R.I. Super. March 12, 2012) (Silverstein, J.)

[4] The Court notes that Plaintiff has submitted no evidence to support the allegation that New Century filed bankruptcy. Furthermore, "[P]laintiff has not cited a single provision of the Bankruptcy Code, or any interpretation thereof to support [the] claim that the [New Century] Bankruptcy (if indeed there was such a bankruptcy) in any way affected [P]laintiff's pre-bankruptcy designation of MERS as mortgagee to enforce the statutory power of sale contained in the [M]ortgage." Porter, 2011 WL 1251246 at * 7.

Note based upon the broad language contained in the Mortgage [instrument]." Porter, 2011 WL 1251246 at * 8; see also Bucci v. Lehman Brothers Bank, FSB, No. PC-2009-3888, 2009 WL 3328373 (R.I. Super. August 25, 2009) (Silverstein, J.).

In addition, there is no requirement under Rhode Island law that New Century shall record a power of attorney in order for MERS to act on its behalf as its nominee. See Section 34-13-1. By the plain, unambiguous language contained within the Mortgage instrument, which was recorded in the land evidence records in the Town of East Greenwich in accordance with Rhode Island General Laws, MERS was designated as the mortgagee and nominee of New Century and New Century's "successors and assigns," (Stipulated Facts Ex. A at 1.), thus obviating the need for a recorded power of attorney.

C

Assignment of the Mortgage Interest Was Proper

Plaintiff alleges that the assignment of the Mortgage interest by MERS to Deutsche Bank is void. Specifically, Plaintiff avers that the assignment is defective as it purports to transfer the rights in the defective Mortgage, rather than the Corrective Mortgage.[5] Therefore, Plaintiff contends that the operative Mortgage was never assigned to Deutsche Bank, thus Deutsche Bank lacks the statutory power of sale. As a matter of law, a deed which adequately describes the property conveyed or a mortgage which encumbers the property is sufficient as between the parties. See Bullock v. Whipp and Others, 15 R.I. 195, 2 A. 309, 310 (1885) (finding that a mortgage lacking formal requisites is not a legal mortgage, but, at most, only an agreement to give a mortgage,

[5] The alleged defect is that the original mortgage described the Property by reference to plat and lot numbers as well as the street address only, whereas the so called "corrective mortgage" described the Property by metes and bounds in addition to plat and lot numbers and the street address.

which is deemed effective as between the parties, even if not effective and not enforceable against third parties).

This Court has already held that there is no requirement that the note-holder and mortgagee be the same party at the time of the foreclosure sale. Rutter, 2012 WL 894012 at * 14. There is no requirement under Rhode Island law that the "Note and Mortgage be held by the same entity, at the time of foreclosure or at the time MERS assigns the Mortgage to another entity." Id. at * 15. In addition, the Mortgage instrument expressly permitted such assignment of the Mortgage interest by MERS and such authority was specifically approved by the mortgagor at the time he executed the Mortgage. See Id. (quoting Payette, 2011 WL 3794700) ("the assignment is 'permitted by the unambiguous mortgage language' and not prohibited by § 34-11-21, 22"); see also Stipulated Facts Ex. A. Accordingly, MERS had the authority to assign the Mortgage interest to Deutsche Bank, which authority is contained in both the corrective mortgage deed as well as the original Mortgage deed.

In addition, the Rhode Island Superior Court[6] has held that "homeowners lack standing to challenge the propriety of mortgage assignments and the effect those assignments could have, if any, on the underlying obligation." Payette, 2011 WL 3794700; see also Rutter, 2012 WL 894012 at * 16. "The principle that a non-party to the contract does not have standing to challenge the contract's subsequent assignment is well established." Rutter, 2012 WL 894012 at * 17 (quoting Fryzel v. Mortgage Electronic Registration Systems, C.A. No. 10-325 M, 2011 U.S. Dist. LEXIS 95114, at * 41-42 (D.R.I. June 10, 2011)); see also Brough v. Foley, 525 A.2d 919, 922 (R.I. 1987)

[6] As set forth supra, in the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of the Superior Court cases on this subject matter represents the prevailing view of the law in Rhode Island. Breggia, 2012 WL 1154738.

(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); Peterson v. GMAC Mortg., LLC, No. 11-11115-RWZ, Slip Copy, 2011 WL 5075613 at * 4 (D. Mass. Oct. 25, 2011) (Zobel, J.) (court refused to read U.S. Bank Nat. Ass'n v. Ibanez, 458 Mass. 637, 941 N.E.2d 40 (2011) as an independent basis for mortgagors to collaterally contest previously executed mortgage assignments to which they are not a party and that do not grant them any interests or rights; finding mortgagors have no legally protected interests in the assignment of the mortgage and therefore lack standing to challenge it); In re Correia, 452 B.R. 319 (1st Cir. 2011) (affirming the bankruptcy appellate panel's finding that mortgagors lacked standing to challenge the validity of the mortgage assignment). Assuming arguendo this Court accepted Plaintiff's allegation that the assignment is defective as it purports to transfer the rights in a defective Mortgage rather than the Corrective Mortgage, this contention is irrelevant. The defective execution of a mortgage will not destroy its validity as between the parties, in the absence of fraud, or between the parties and their assigns. 59 C.J.S. Mortgages § 155; see also Bullock, 15 R.I. at 195, 2 A. at 310 (an instrument that is not a legal mortgage is only an agreement to give a mortgage, which, though good as between the parties, is not good and not enforceable against third parties); Duncan v. Ball, 172 Ga. App. 750, 324 S.E.2d 477 (1984); Seabrooke v. Garcia, 7 Ohio App. 3d 167, 454 N.E.2d 961 (9th Dist. Lorain County 1982). By assignment of the Mortgage interest by MERS to Deutsche Bank, the assignee, Deutsche Bank, obtained all the rights of the original mortgagee to MERS, including the statutory power of sale. See Seabrooke, 454 N.E.2d at 964. The general rule of assignments is that an assignee of a mortgage succeeds to all

of the rights which the assignor had. Seabrooke, 454 N.E.2d at 964; see also Kriegel, 2011 WL 4947398 (an assignee steps into the shoes of the assignor and can avail itself of the assignor's rights). The fact that the mortgage is allegedly defective should not affect this rule. Id. Accordingly, the allegedly defective Mortgage is valid as between Plaintiff, MERS, and MERS' assignee Deutsche Bank, thus the assignment of that Mortgage interest is valid as between the parties. See Id. By way of assignment, Deutsche Bank succeeded to the rights of MERS, specifically the right to exercise the statutory power of sale after Plaintiff's default.

Plaintiff further avers that the assignment of the Mortgage interest by MERS to Deutsche Bank is void because MERS possessed no beneficial interest in the Mortgage to transfer. According to Plaintiff, MERS is not the note-holder and therefore the transfer of the Note without the Mortgage is in violation of § 34-11-24. As discussed supra, this Court has found that MERS may assign the Mortgage interest as "permitted by the unambiguous language" of the Mortgage. Payette, 2011 WL 3794700; see also Rutter, 2012 WL 894012. Further, § 34-11-24 provides "an assignment of mortgage . . . shall . . . have the force and effect of granting, bargaining, transferring and making over to the assignee, . . . the mortgage deed with the note and debt thereby secured, ..." Kriegel, 2011 WL 4947398 (quoting Section 34-11-24) (emphasis added). Section 34-11-24 does not provide that the mortgage must follow the note, as Plaintiff erroneously contends. Rather, by the clear and unambiguous language of § 34-11-24, an assignment of the mortgage deed results in the assignment of "the note and debt thereby secured." Section 34-11-24. Therefore, the assignment of the Mortgage interest by MERS to Deutsche Bank transferred not only the Mortgage to Deutsche Bank, but "the [N]ote and debt

thereby secured" under the plain, unambiguous language of § 34-11-24. See Section 34-11-24. As assignee of MERS, Deutsche Bank then became mortgagee, as well as nominee for the current note-holder.

D

The Foreclosure Was Proper

In a final attempt to invalidate the foreclosure sale, Plaintiff avers that pursuant to § 34-11-22, the foreclosing entity, Deutsche Bank, must be the note-holder having the right to enforce the Note and therefore have legal title by way of the Mortgage. For this reason, Plaintiff alleges that Deutsche Bank lacked standing to foreclose on the Property.

In support of his contentions, Plaintiff relies on Carpenter v. Longan, 83 U.S. 271 (1872). In Carpenter, the United States Supreme Court found the note and mortgage to be inseparable, holding that under Colorado law, the assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. 83 U.S. at 274. This holding is in direct conflict with Rhode Island law. The law of Rhode Island, unlike Colorado law, permits an assignment of the mortgage without the simultaneous assignment of the Note, Since assignment of the mortgage alone carries with it "the note and debt thereby secured." Section 34-11-24. Accordingly, when drafting § 34-11-24 the legislature did not intend to render a nullity an assignment of a mortgage interest without the simultaneous assignment of the Note as clearly intended by the plain, unambiguous language of the statute. "It is well settled that when the language of a statute is clear and unambiguous, this Court must interpret that statute literally and must give the words of the statute their plain and ordinary meanings." Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996); see also Bucci, 2009 WL

3328373 at * 10.

In addition, Plaintiff relies on Cuddy v. Saradrea et ux., 52 R.I. 465, 161 A. 297 (1932) for the proposition that whoever demands payment of a note must have possession of it at the time and produce or offer it if requested or the demand will be ineffectual.[7] 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, it is well-established under current Rhode Island law that MERS and the assignees of MERS acts as nominee of the current note-holder, and therefore, the Note and the Mortgage were both controlled by Deutsche Bank, at the time of foreclosure, by way of assignment from MERS. See Cuevas, 2012 WL 1388716; see also Payette, 2011 WL 3794701; Bucci, 2009 WL 3328373. Deutsche Bank, by way of assignment of the Mortgage interest by MERS, possessed the statutory power of sale as explicitly granted by Plaintiff through his acknowledgement and execution of the Mortgage instrument. Thus, Deutsche Bank was authorized to foreclose upon the Property after default by Plaintiff under the Note. See Deutsche Bank, et al v. Falconer, Nos. PD-2010-1588, PD-2010-1591, PC-2010-1996, slip op., (R.I. Super. May 1, 2012) (Rubine, J.) (according to the plain, unambiguous language contained in the mortgage instrument, the mortgagee possessed the contractual and statutory authority to foreclose following borrowers' default under the note). Deutsche Bank as the buyer at the lawfully convened foreclosure sale, holds the record title to the Property. Therefore, Deutsche Bank is the owner of record and holds title to the Property pursuant to the recorded foreclosure deed, which recorded deed is presumptively valid. See Noury v. Deutsche Bank National Trust Co., No. PC-2009-

[7] It should be noted that Cuddy was dealing with enforcement of a deficiency balance under the note. See Cuddy, 52 R.I. at 465, 161 A. at 297.

7014, slip op., 2012 WL 1670546 (R.I. Super. May 7, 2012) (Rubine, J.); see also Falconer, Nos. PD-2010-1588, PD-2010-1591, PC-2010-1996, slip. op., (R.I. Super. May 1, 2012) (Rubine, J.); Restatement of the Law Third Property (Mortgages) (1997) § 4.9 (a purchaser at a foreclosure sale not only acquires the prior owner's equity of redemption, but a title free and clear of all interests that were junior to the lien that was foreclosed); 74 C.J.S. Quieting Title § 75 (2012) (every presumption will be made in favor of the holder of the legal title . . . title once established remains until the contrary appears); Sherbonday v. Surring, 194 Iowa 203, 188 N.W. 831 (1922) (the presumptions are in favor of the legal title); Babcock v. Dangerfield, 98 Utah 10, 94 P.2d 862 (1939) (citing Eltzroth v. Ryan, 89 Cal. 135, 26 P. 647 (1891)) (it having been proved that title was vested in plaintiff, such condition would be presumed to exist until the contrary be shown); 65 Am. Jur. 2d Quieting Title § 73 (in a quiet title action, there is a presumption in favor of the record title holder); Breliant v. Preferred Equities Corp., 112 Nev. 663, 918 P.2d 314 (1996); Franklin v. Laughlin, No. SA-10-CV-1027 XR, 2011 WL 598489 * 26 (W.D. Tex. Jan. 13, 2011) (in a quiet title action, . . . the burden of proof rests with the plaintiff to prove good title in himself).

IV

Conclusion

Judgment in this matter shall enter in favor of Defendants MERS and Deutsche Bank. This Court finds the foreclosure was valid, and title is correctly recorded in the name of Deutsche Bank. The Court will enter judgment consistent with this Decision.