

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(Filed: April 12, 2012)

DESMOND A. LEONE

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v.

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C.A. No. PC 2010-0801

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MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS;  
EQUITY ONE, INC.; ASSETS  
RECOVERY CENTER  
INVESTMENTS, LLC

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**DECISION**

**RUBINE, J.** Defendants Mortgage Electronic Registration Systems (“MERS”), Equity One, Inc. (“Equity One”), and Assets Recovery Center Investments, LLC (“ARC”) (collectively, “Defendants”) jointly move to dismiss Plaintiff Desmond A. Leone’s (“Plaintiff”) verified complaint (“Complaint”) for declaratory judgment and to quiet title to certain real property located at 24 Auburn Avenue, Johnston, Rhode Island (“the Property”). The Complaint, like an abundance of similar cases before this Court, concerns the effect of the language contained in the original mortgage as well as the foreclosure rights of successors to the original mortgagee and the mortgage debt. The ultimate consequence, according to the Complaint, is that the foreclosing party allegedly had no right to exercise the statutory power of sale, thus arguably rendering the foreclosure sale a nullity.

**I**

**Facts & Travel**

The facts as derived from the Complaint and the documents reviewed and considered by this Court are as follows: On December 8, 2006, Plaintiff executed an

adjustable rate note (“Note”) and mortgage in favor of lender Equity One, with respect to a mortgage loan in the amount of \$241,000. The Note provides “[Plaintiff] understand[s] that the lender [Equity One] may transfer this Note. The lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the ‘Note-holder.’” (Defs.’ Ex. A at 1.) The Note was secured by a mortgage on the Property. The mortgage provides: “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.” (Compl. Ex. 1 at 3, (hereinafter “Mortgage”).) The Mortgage further provides, “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 . . . .” (Mortgage at 3.) The Mortgage was duly executed and recorded in the land evidence records for the Town of Johnston on December 11, 2006.

Thereafter, Equity One (the original lender) executed a limited power of attorney in favor of ARC. The limited power of attorney authorized ARC to act on behalf of the Equity One’s successor to the Note and Mortgage, Fulcrum Chicago Corporation (“Fulcrum”). In addition, the power of attorney granted ARC the right to “execute endorsements, assignments of notes, contracts, mortgages and security agreements and other documents and instruments” as well as “generally, to do and perform any and all

things necessary and appropriate in connection with the [], Loan Sale Agreement” between Equity One and Fulcrum. (Defs.’ Ex. D at 1.)<sup>1</sup>

On April 27, 2009, MERS, as nominee for the original lender Equity One and Equity One’s successors and assigns, assigned its interest in the Mortgage to ARC. See Compl. Ex. 3. As assignee of MERS, ARC succeeded to the Statutory Power of Sale upon the default of Plaintiff as explicitly acknowledged by the Plaintiff in the Mortgage instrument which identified Plaintiff as borrower and mortgagor and which was signed by the Plaintiff as borrower and mortgagor. The assignment was recorded in the land evidence records for the Town of Johnston on December 4, 2009.

Plaintiff failed to make timely payments pursuant to the terms of the Note. ARC, as mortgagee and possessing the limited power of attorney to act for Equity One and Fulcrum, commenced foreclosure proceedings. Plaintiff failed to cure the default and the foreclosure sale was thereafter conducted by ARC in November of 2009.

On February 5, 2010, Plaintiff filed the Complaint seeking a declaration that the foreclosure sale was null and void and the title to the Property be returned to the Plaintiff. Defendants filed this Motion to Dismiss pursuant to Rule 12(b)(6).

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<sup>1</sup> There is reference in the limited power of attorney to a loan sale agreement between Equity One and Fulcrum, a non-party to this matter. It is unclear to the Court whether Equity One or Fulcrum was the note-holder at the time of the foreclosure sale. Nevertheless, the Mortgage instrument is the instrument which contains the Statutory Power of Sale, thereby authorizing the mortgagee to foreclosure upon default by the Plaintiff. Furthermore, the assignment of the Mortgage interest from MERS to ARC carried with it the Note and debt thereby secured. Sec. 34-11-24.

## II

### Standard of Review

#### A

##### Conversion

Based on its consideration of exhibits outside of the pleadings, this Court will consider this Motion to Dismiss pursuant to Rule 12(b) as a Motion for Summary Judgment under Rule 56.

In this matter, Defendants' Motion annexes new documents, specifically the Note and the limited power of attorney. Thus, this Court must decide whether to exclude these materials because they are outside the pleadings and adjudicate using the motion to dismiss standard of review, or include them and convert the Motion into a motion for summary judgment under Rule 56. The Court is satisfied that the party opposing the 12(b) motion, Plaintiff, had adequate notice of conversion to a motion for Summary Judgment and a "reasonable opportunity to present all materials made pertinent to such a motion by Rule 56." Payette v. Mortgage Elec. Reg. Sys., No. PC-2009-5875, 2011 WL 3794701 at \* 6 (quoting Super. R. Civ. P. 12(c)). The Court therefore will consider Defendants' 12(b) motion as a Motion for Summary Judgment.

#### B

##### Summary Judgment Standard of Review

This Court will only grant a motion for summary judgment if "after reviewing the admissible evidence in the light most favorable to the nonmoving party[,]" Liberty Mut. Ins. Co. v. Kaya, 947 A.2d 869, 872 (R.I. 2008) (quoting Roe v. Gelineau, 794 A.2d 476, 481 (R.I. 2002)), "the pleadings, depositions, answers to interrogatories, and admissions

on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Super. R. Civ. P. 56(c).

The nonmoving party “has the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions.” Liberty Mut., 947 A.2d at 872 (quotation omitted). To meet this burden, “[a]lthough an opposing party is not required to disclose in its affidavit all its evidence, he [or she] must demonstrate that he [or she] has evidence of a substantial nature, as distinguished from legal conclusions, to dispute the moving party on material issues of fact.” Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998) (quotation omitted).

### III

#### Analysis

Since the material facts, as set forth in the Complaint and the documents reviewed and considered by the Court, herein are undisputed and nearly identical to the material facts in Payette, and the Mortgage as executed by Plaintiff contains the same operative language as the mortgage considered in Payette, this Court will incorporate and adopt the reasoning set forth in Payette, 2011 WL 3794701.<sup>2</sup> In that case, this Court determined that according to undisputed material facts, the defendants were entitled to judgment as a matter of law. The same result controls this case.

The undisputed facts, as evidenced by the Complaint and the provisions of the undisputed documents, are as follows: Plaintiff executed the Note in favor of the original

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<sup>2</sup> This Court further notes that the parties in their memoranda fail to offer any material distinctions between the undisputed facts relied upon in the Court’s earlier determination of similar cases.

lender Equity One. To secure the Note, Plaintiff contemporaneously executed a Mortgage on the Property. The Mortgage designated MERS as nominee of Equity One, as well as mortgagee. See Mortgage at 1. Further, as mortgagee, MERS, as well as the successors and assigns of MERS, were expressly granted the “right[] to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property . . . .” (Mortgage at 3.) Hence, by the clear unambiguous language of the Mortgage instrument, as acknowledged and signed by Plaintiff as borrower and mortgagor, MERS, as well as the successors and assignees of MERS, were explicitly granted the Statutory Power of Sale. Thereafter, on April 27, 2009, MERS assigned its interest in the Mortgage to ARC, the party authorized to act on behalf of Equity One and Fulcrum, as evidenced by the limited power of attorney. Upon Plaintiff’s default, ARC, acting under its limited power of attorney for the current note-holder, and mortgagee by way of assignment from MERS, possessed the Statutory Power of Sale as granted in the Mortgage and therefore had the right and ability to exercise the Statutory Power of Sale, if borrower were to default under the Note. See Kriegel v. Mortgage Elec. Reg. Sys., No. PC-2010-7099, 2011 WL 4947398 (R.I. Super. October 13, 2011) (Rubine, J.) (quoting Sec. 34-11-24) (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). Foreclosure proceedings were properly commenced and completed against Plaintiff. Accordingly, Plaintiff is not entitled to clear the title as the foreclosure sale was lawfully noticed and resulted in the lawful transfer of title to the entity which purchased the Property at the foreclosure sale. Title no longer resides with the Plaintiff. Therefore, the successful bidder of the foreclosure sale is

entitled to record title of the Property.<sup>3</sup>

Plaintiff has failed to demonstrate by affidavit, or otherwise, that there exists a genuine issue of material fact to vary this outcome.<sup>4</sup> Furthermore, the issues presented in this matter have been previously decided by this Court. See Kriegel, 2011 WL 4947398; see also Payette, 2011 WL 3794701; Porter, 2011 WL 1252146; Bucci v. Lehman Brothers Bank, FSB, No. PC-2009-3888, 2009 WL 3328373 (R.I. Super. August 25, 2009) (Silverstein, 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.). Accordingly, Defendants are entitled to judgment as a matter of law based on the above cited authority. 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 represent the prevailing view of the law in Rhode Island. Breggia v. Mortgage Electronic Registration Systems, No. PC-2009-4144 (R.I. Super. April 3, 2012) (Rubine, J.); see also Rutter, 2012 WL 894012. The decisions of the Superior Court unanimously

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<sup>3</sup> Although not an issue raised by the Plaintiff, the Court notes that the assignment was not recorded prior to the foreclosure sale. Nevertheless, the assignment is valid and binding as between the parties even though recorded after ARC foreclosed on the Property. See Sec. 34-11-1; see also In re Barnacle, 623 A.2d 445 (R.I. 1993).

<sup>4</sup> Although Plaintiff alleges that MERS' assignment of the Mortgage interest was not signed by an authorized representative, Plaintiff has presented no evidence to demonstrate that the signature is unauthorized. See Payette, 2011 WL 3794701 at \* 11 (finding the contention that MERS' assignments were executed by an unauthorized signatory to be a mere conclusion or legal opinion that was insufficient to create a genuine issue of material fact). The nonmoving party "has the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions." Liberty Mut., 947 A.2d at 872 (quotation omitted). The party opposing the Motion for Summary Judgment, Plaintiff, has not met his burden to show that there exists a genuine issue of material fact as to whether the assignment was executed by a person not authorized by the assignee to execute that document. The invocation of the phrase "robosigning" does not render an otherwise facially valid assignment void. 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).

support this result. The Court hereby incorporates by reference the reasoning and authorities relied upon in those previous decisions.

#### **IV**

#### **Conclusion**

Defendants' Motion to Dismiss, decided as a Motion for Summary Judgment, is granted. Counsel for the prevailing party shall submit an Order in accordance with this decision.