STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(Filed: July 10, 2012)

WALTER J. MRUK, JR.	:	
	:	
v.	:	**C.A. No. KC 2010-1618**
	:	
MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC.; DOLLAR MORTGAGE CORPORATION; HARMON LAW OFFICES, PC; INDYMAC MORTGAGE SERVICES; ONEWEST BANK, FSB; AND FEDERAL NATIONAL MORTGAGE ASSOCIATION	:	

DECISION

RUBINE, J. Before this Court is Defendants' Mortgage Electronic Registration System, Inc. ("MERS"), IndyMac Mortgage Services ("IndyMac"), OneWest Bank, FSB ("OneWest"), and Federal National Mortgage Association ("FNMA") (collectively, "Defendants")[1] Motion for Summary Judgment pursuant to Rhode Island Superior Court Rules of Civil Procedure 56. Plaintiff Walter J. Mruk, Jr. ("Plaintiff") filed a verified complaint ("Complaint") seeking declaratory and injunctive relief. The gravaman of the Plaintiff's Complaint challenges Defendant FNMA's statutory power of sale under the mortgage instrument at issue, as well as the validity of the assignment of the mortgage to FNMA.

[1] Defendant Dollar Mortgage Corporation is not a party to this Motion for Summary Judgment. Defendant Harmon Law Offices, PC was voluntarily dismissed with prejudice.

I

Facts & Travel

On April 16, 2006, Plaintiff executed a note ("Note") in favor of lender Dollar Mortgage Corporation ("DMC") in the amount of $236,000, having borrowed that amount to purchase certain real property located at 44 Pine Tree Road, Coventry, Rhode Island ("the Property"). The Note provides "I [borrower] understand that the Lender may transfer this Note. The Lender or any one who takes this Note by transfer and who is entitled to receive payment under this Note is called the 'Note-holder.'" (Defs.' Ex. B at 1.)

Contemporaneously with the execution of the Note, Plaintiff executed a mortgage ("Mortgage") on the Property to secure the Note. The following language appears in the Mortgage deed, "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." (Compl. Ex. 2 at 3.) The Mortgage further 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." (Compl. Ex. 2 at 2.) In addition, the Mortgage designates MERS as "nominee for Lender and Lender's successors and assigns," and as "mortgagee under this Security Instrument." (Compl. Ex.

2 at 1.) The Mortgage was recorded in the land evidence records for the Town of Coventry on April 25, 2006.

On April 24, 2006, DMC endorsed the Note in blank and delivered the Note to IndyMac. (Boyle Aff. ¶¶ 7, 9.) Thereafter, on March 19, 2009, OneWest became the servicer of the Note when it acquired substantially all the assets and mortgage servicing rights of IndyMac. (Boyle Aff. ¶ 10.)

On March 3, 2010, MERS as mortgagee and nominee for OneWest, assigned the Mortgage interest to FNMA. The assignment was recorded in the land evidence records of the Town of Coventry on March 5, 2010. See Compl. Ex. 3.

Plaintiff failed to make timely payments as obligated under the Note and Mortgage. As a result of Plaintiff's default, FNMA foreclosed on the Property on April 27, 2010. At the time of the foreclosure sale, Plaintiff was delinquent as to the November 1, 2009 payment. (Boyle Aff. ¶ 16.) At the foreclosure sale, FNMA prevailed as the successful bidder. Thereafter, FNMA executed and recorded the foreclosure deed in the land evidence records of the Town of Coventry. See Defs.' Ex. E.

Following the foreclosure sale Plaintiff filed the Complaint seeking declaratory judgment and injunctive relief from this Court. Defendants then filed this Motion for Summary Judgment pursuant to Rule 56. Plaintiff has objected to Defendants Motion averring that there exists genuine issues of material fact for the trier of fact to determine and therefore Defendants are not entitled to judgment as a matter of law.

II

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 matter of law." Super. R. Civ. P. 56(c).

The nonmoving party, in this case the Plaintiffs, "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 considered by the Court in Payette v. Mortgage Elec. Reg. Sys., and the Mortgage as executed and acknowledged 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, No. PC 2009-5875, 2011 WL 3794701 (R.I. Super. August 22, 2011)

(Rubine, J.).[2] The Court will then address any additional issues that are unique to this matter that were not addressed in the aforementioned decision.

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 lender DMC. To secure the Note, Plaintiff contemporaneously executed a Mortgage on the Property. The Mortgage designated MERS as nominee for DMC and DMC's successors and assigns, as well as mortgagee. See Compl. Ex. 2 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; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument." (Compl. Ex. 2 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 March 3, 2010, MERS assigned its interest in the Mortgage to FNMA. Upon Plaintiff's default, FNMA, as 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 after Plaintiff's default.

In a futile attempt to distinguish this case from the Court's earlier determination of similar cases, Plaintiff avers that the signature of Andrew S. Harmon ("Harmon") is not actually that of Harmon. As proof of this contention, Plaintiff has submitted various photocopies of numerous signatures. To authenticate the photocopies of these signatures,

[2] 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.

Plaintiff has submitted affidavits attesting to the authenticity of these photocopies. (Allard Aff. ¶ 16, Nota Aff. ¶ 16.) Nevertheless, these affidavits aver that both affiants "do not know if any of the[] [signatures], including the signature on the assignment in this case, were signed by [] Harmon." (Allard Aff. ¶ 22, Nota Aff. ¶ 21.) These averments are insufficient to establish a genuine issue of material fact to defeat Defendants' Motion for Summary Judgment. Naked conclusory assertions in an affidavit filed in opposition to a motion for summary judgment are inadequate to establish the existence of a genuine issue of material fact. Roitman & Son v. Crausman, 121 R.I. 958, 401 A.2d 58 (1979). Further, a litigant opposing a motion for summary judgment, in meeting its burden of proving the existence of a disputed issue of material fact cannot rest upon mere allegations or denials in the pleadings, mere conclusions, or mere legal opinions. Senn v. MacDougall, 639 A.2d 494 (R.I. 1994); see also Liberty Mut., 947 A.2d at 872. As set forth supra, to meet this burden, the opposing party "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, 705 A.2d at 971. When the moving party, in this case the Plaintiff, fails to carry its affirmative burden to set forth specific facts to demonstrate that there is a genuine issue of material fact to be resolved at trial, summary judgment is property entered. Grande v. Alamac's, Inc., 623 A.2d 971 (R.I. 1993). Thus, the averment that the signature on the assignment of the Mortgage interest is not actually Harmon's signature is conclusory and fails to raise a genuine issue of material fact sufficient to defeat Defendants' Motion for Summary Judgment.[3]

[3] The Court notes that generally Plaintiff does not have standing to challenge the validity of the assignment of transfer of the mortgage interest to which he is a stranger. The Bank of New York Mellon v. Cuevas,

Plaintiff challenges the allonge of the Note, wherein the Note is endorsed in blank. In support of this contention, Plaintiff has submitted an affidavit disputing the endorsement of the Note, as the endorsement fails to reference a date. (Mruk Aff. ¶ 47.) Plaintiff further challenges the authority of the signatory endorsing the Note in blank. (Mruk Aff. ¶ 47.) In addition, Plaintiff avers that "there is no proof that the [N]ote was endorsed" as it does not contain a seal. (Mruk Aff. ¶ 48.)

Under current Rhode Island law it is well established that the identity of the note-holder is not a genuine issue of material fact to defeat a movant's motion for summary judgment. This is because MERS and MERS' assignees act as nominee for the current note-holder. See Porter v. First NLC Financial Services, 2011 WL 1251246 at * 8 (R.I. Super. March 31, 2011) (Rubine, J.) (whatever financial entity currently holds the beneficial interest of the note, MERS is designated the nominee for the current beneficial owner of the note based upon the broad language contained in the mortgage agreement).

Furthermore, the mortgagors in Rutter raised an identical argument. See 2012 WL 894012 at * 20-22. In Rutter the Court determined that the bank "need only produce the note, and then, if it is payable or indorsed to [the bank], [the bank] may rest [its] case, unless [the mortgagor] shows evidence of bad faith or fraud." Rutter, 2012 WL 894012 at * 21 (citing Hutchings v. Reinalter, 23 R.I. 518, 51 A. 429 (1902)). Here, Plaintiff has failed to submit any evidence to this Court to illustrate the possibility of fraud with respect to the endorsement of the Note in blank. 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

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Nos. PD 2010-0988, PC 2010-0553, 2012 WL 1388716 at * 12 (R.I. Super. April 19, 2012) (Rubine, J.); see also Payette, 2011 WL 3794701; Brough v. Foley, 525 A.2d 919 (R.I. 1987).

legal opinions." Liberty Mut., 947 A.2d at 872 (quotations omitted). Plaintiff's averments with respect to the alleged fraudulent endorsement of the Note in blank are merely unsupported allegations and mere conclusions.

The court in Rutter further found that "under the UCC, 'the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings.'" 2012 WL 894012 at * 21-22 (quoting Sec. 6A-3-308). "Generally, '. . . the signature is presumed to be authentic and authorized . . . .'" Id. (quoting Sec. 6A-3-308). Likewise, in the instant matter, as in Rutter, Plaintiff has failed to specifically deny the endorsement of the Note in blank in the Complaint. Accordingly the endorsement is presumed valid. See Rutter, 2012 WL 894012 at * 21.

Plaintiff has failed to raise a genuine issue of material fact sufficient to defeat Defendants' Motion for Summary Judgment. Plaintiff's lack of personal knowledge with respect to the endorsement of the Note in blank by DMC, and its subsequent negotiation of the Note to IndyMac, renders Plaintiff's affidavit, at least that section, ineffective. "Rule 56(e) requires that 'supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.'" Nichola v. Fiat Motor Co., Inc., 463 A.2d 511, 513 (R.I. 1983) (quoting Rule 56(e)). If a party's "affidavit fails to comply with these requirements, it is useless in establishing . . . a genuine issue of material fact." Id. Moreover, belief, no matter how sincere, is not equivalent to knowledge, and affidavits are insufficient to establish a genuine issue of material fact where they are based on information and belief of that affiant. 27A Fed. Proc., L. Ed. § 62:654. Likewise, an affidavit is insufficient where it is based on mere

suspicion. Id. Allegations not made from an affiant's own knowledge are subject to being stricken. 2A C.J.S. Affidavits § 45. In addition, absent a demonstration of personal knowledge, an affiant's statements may be stricken. Id. Plaintiff has failed to prove to this Court that he has personal knowledge with respect to the endorsement of the Note in blank by DMC. In fact, in the affidavit, the affiants admit they do not know if it is Harmon's signature. (Nota Aff. ¶ 21; Allard Aff. ¶ 22.) It is not up to the Court to compare signatures that purport to be that of Harmon to the signature that appears on the recorded assignment. Accordingly, this Court will disregard the incompetent portions of Plaintiff's affidavit. See DiCristoforo v. Beaudry, 110 R.I. 324, 293 A.2d 301 (1972) (failure of portion of an affidavit under Rule 56 to conform to the prescribed limitations does not require the court to expunge the entire affidavit, but courts should disregard the incompetent portions and consider only that which has been properly included).

Plaintiff further objects to the affidavit of Charles Boyle ("Boyle"). Specifically, Plaintiff avers that the affidavit is "a sham, is a fraud and is not made upon personal knowledge." Plaintiff further avers that the affidavit fails to set forth "facts that would be admissible in evidence" and that Boyle is incompetent.

Under the Rhode Island Rules of Evidence 803(6) "a hearsay business record is admissible if the information was regularly maintained in the course of regular business activity, the source of the information is a person with knowledge, and the information was recorded contemporaneously with the event or occurrence." Rutter, 2012 WL 894012 at * 23. "This 'rule is interpreted expansively in favor of admitting hearsay records in to evidence.'" Id. (quoting R.I. Managed Eye Care, Inc. v. Blue Cross & Blue Shield of R.I., 996 A.2d 684 (R.I. 2010)). In the instant matter, Defendants submitted the

affidavit of Boyle, a Vice President for IndyMac Mortgage Services, a division of OneWest. (Boyle Aff. ¶¶ 1, 2.) Boyle attested in the affidavit that he was "familiar with business records maintained by OneWest for the purpose of servicing mortgage loans." (Boyle Aff. ¶ 3.) Boyle further set forth that "these records . . . are made at or near the time by, or from information provided by, person with knowledge of the activity and transactions reflected in such records, and are kept in the course of business activity conducted regularly by OneWest." Id. The affidavit further sets forth the details concerning the endorsement of the Note in blank by DMC, its subsequent negotiation and transfer of the Note to IndyMac, and IndyMac's endorsement of the Note in blank. See Boyle Aff. ¶¶ 7, 8, 9. Accordingly, this meets the standard of competent evidence under Rule 56 and is admissible under the Rhode Island Rules of Evidence 803(6). See Rutter, 2012 WL 894012.

Plaintiff has failed to demonstrate by affidavit, or otherwise, that there exists a genuine issue of material fact which would result in the nullification of the foreclosure sale conducted by FNMA, whereby FNMA is currently the record title owner. Furthermore, the issues presented in this matter have previously been decided by this Court. See Kriegel v. Mortgage Elec. Reg. Sys., No. PC-2010-7099, 2011 WL 4947398 (R.I. Super. October 13, 2011) (Rubine, J.); 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, 2012 WL 894012. Accordingly, Defendants' are entitled to judgment as a matter of law based on the authority of the above cited cases. In the absence of controlling authority from the Rhode Island Supreme Court, the reasoning and result of Superior Court cases on this subject

represent the prevailing view of the law in Rhode Island on these subjects. The decisions of the Superior Court unanimously support this result. The Court hereby incorporates by reference the reasoning and authorities relied upon in those previous decisions.

Since Plaintiff concedes that summary judgment may enter in favor of Defendants with respect to Plaintiff's claims for negligent misrepresentation, the Court need not address this argument. Accordingly, Defendants are entitled to summary judgment dismissing the Plaintiff's claims for negligent misrepresentation.

IV

Conclusion

Defendants' Motion for Summary Judgment is granted. There being no just reason for delay, Final Judgment shall enter in favor of Defendants MERS, IndyMac, OneWest and FNMA under Rule 54(b).