STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: NOVEMBER 16, 2012)

GARY S. GRAY	:	
JEAN G. GRAY	:	
	:	
v.	:	**C.A. No. PC 2011-1830**
	:	
MORTGAGE ELECTRONIC	:	
REGISTRATION SYSTEMS, INC.;	:	
ACCESS NATIONAL MORTGAGE	:	
CORPORATION; WELLS FARGO	:	
BANK, NA; AND	:	
HARMON LAW OFFICES, PC	:	

DECISION

RUBINE, J. Before the Court is Defendants' Mortgage Electronic Registration Systems, Inc. ("MERS") and Wells Fargo Bank, NA ("Wells Fargo") (collectively, "Defendants"),[1] Motion to Dismiss Plaintiffs' complaint ("Complaint") pursuant to Rule 12(b)(6) of the Rhode Island Superior Court Rules of Civil Procedure. Through the Complaint, Plaintiffs seek declaratory and injunctive relief pursuant to G.L. 1956 § 9-30-1, et seq., petitioning this Court to quiet title in favor of Plaintiffs and to declare Defendant Wells Fargo's foreclosure on the real property located at 155 Fuller Street, Pawtucket, Rhode Island (the "Property") null and void, and therefore ineffective, as Defendants allegedly had no standing to exercise the statutory power of sale under § 34-

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

11-22. Plaintiffs further set forth allegations in their Complaint concerning the alleged negligent misrepresentation of Defendants. Finally, Plaintiffs allege that the mortgage note is current or has been satisfied.

I

Facts & Travel

The facts derived from the Complaint and the exhibits attached to the Complaint and incorporated therein are as follows: On October 24, 2008,[2] Plaintiffs executed a Note in favor of lender Access National Mortgage Corporation ("ANMC") for $275,103. To secure the Note, Plaintiffs contemporaneously executed a Mortgage on the Property. The Mortgage provides that "[t]his Security Instrument is given to . . . MERS, (solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns), as mortgagee." (Compl. Ex. 2 at 1.) The Mortgage further defines the lender as ANMC. Id. 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 was subsequently recorded in the land evidence records of the City of Pawtucket on November 10, 2008.

[2] In the Complaint, Plaintiffs allege that the Mortgage was executed on October 25, 2008. (Compl. ¶ 10.) However, the Mortgage explicitly provides that the date of the execution of the Mortgage instrument was October 24, 2008. The Court will not accept as true "facts which are legally impossible . . . or facts which by the record or by a document attached to the [C]omplaint appear to be unfounded." 27A Federal Procedure L. Ed. § 62:467 (West 2012). "In the case of conflict between the pleading and the exhibit, the exhibit controls." Robert B. Kent et al., Rhode Island Civil Procedure § 10:3 (West 2011); see also 5A Wright & Miller, Federal Practice & Procedure, Civil 3d § 1327 (West 2012).

On August 18, 2010, MERS, as mortgagee under the Mortgage instrument and as nominee for ANMC, assigned the Mortgage to Wells Fargo. Thus, by way of assignment from MERS, if the borrower (mortgagor) were to default, Wells Fargo would become the entity entitled to exercise the statutory power of sale under § 34-11-22, as explicitly granted by Plaintiffs in the Mortgage. That assignment was recorded in the land evidence records of the City of Pawtucket on August 19, 2010. See Compl. Ex. 3. Thereafter, Wells Fargo commenced foreclosure proceedings, ultimately foreclosing on the Property on October 14, 2010.

On April 6, 2011, Plaintiffs filed the instant Complaint seeking nullification of the foreclosure sale and return of title to them as well as a claim for damages as a result of alleged negligent misrepresentation. Plaintiffs also allege in their Complaint that the Note is current or has been satisfied. (Compl. ¶ 68.) Defendants then filed this Motion to Dismiss pursuant to Rule 12(b)(6), and Plaintiffs responded by filing an objection to Defendants' Motion averring that the facts alleged in the Complaint are sufficient to establish a valid cause of action. Both parties waived oral argument, thereby submitting this matter to the Court for consideration on the briefs. The Court then took this matter under advisement.

II

Standard of Review

"The solitary purpose of a Rule 12(b)(6) 'motion to dismiss is to test the sufficiency of the complaint.'" 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)). For purposes of the motion, the Court assumes "the allegations contained in the complaint are true and

examin[es] the facts in the light most favorable to the plaintiff." Id. The complaint must "provide the opposing party with 'fair and adequate notice of the type of claim being asserted.'" Barrette v. Yakavonis, 966 A.2d 1231, 1234 (R.I. 2009) (quoting Gardner v. Baird, 871 A.2d 949, 953 (R.I. 2005) (quotation omitted)). Thereafter, "[t]he grant of a Rule 12(b)(6) motion to dismiss is appropriate 'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief from the defendant under any set of facts that could be proven in support of the plaintiff's claim.'" 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)).

III

Analysis

Since the allegations set forth in the instant Complaint—specifically concerning the assignment of the Mortgage interest, the disconnect between the Note and Mortgage, and the authority of certain individuals to execute assignments on behalf of MERS—are similar to the allegations of the complaint in Payette v. Mortg. Elec. Registration Sys., Inc., and the Mortgage executed by Plaintiffs contains similar 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. Aug. 22, 2011) (Rubine, J.); see also Kriegel v. Mortg. Elec. Registration Sys., Inc., No. PC 2010-7099, 2011 WL 4947398 (R.I. Super. Oct. 13, 2011) (Rubine, J.). Notwithstanding this similarity, there is an allegation in the instant Complaint that the Note is current or has been satisfied. If this allegation is accepted as true for purposes of the Rule 12(b)(6) Motion to Dismiss, Plaintiffs' Complaint cannot be dismissed, and Plaintiffs must be

given an opportunity to be heard with respect to the allegation concerning whether default under the Note was sufficient to trigger the right to foreclose.

Plaintiffs, in their memoranda, fail to distinguish this matter from the Court's earlier determination of similar cases. Rather, Plaintiffs have chosen to primarily criticize the precedent of the Rhode Island Superior Court as erroneous, attaching thereto and incorporating therein an analysis labeled "Deconstruction of Payette." This Court is not persuaded by Plaintiffs' arguments and believes Plaintiffs' criticism of past precedent is properly suited for appellate review. 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. Mortg. Elec. Registration Sys., Inc., No. PC 2009-4144, 2012 WL 1154738 (R.I. Super. April 3, 2012) (Rubine, J.); see also Rutter v. Mortg. Elec. Registration Sys., Inc., Nos. PC 2010-4756, PD 2010-4418, 2012 WL 894012 (R.I. Super. March 12, 2012) (Silverstein, J.) (noting plaintiffs' failure to persuade the court to stray from prior precedent established in MERS cases when plaintiffs merely criticized, rather than distinguished, the past precedent); Commonwealth Prop. Advocates v. U.S. Bank Nat'l Ass'n, No. 11-4168, 459 Fed. Appx. 770 (10th Cir. March 6, 2012) (affirming district court where appellant's counsel criticized, rather than distinguished, prior MERS cases).

Likewise, Plaintiffs' reliance on case law from other jurisdictions, which is not binding precedent upon this Court, to criticize this Court's past decisions is unavailing. This is especially true when this Court's legal analysis of the issues raised in the Complaint appears to be consistent with the analysis made by the majority of courts addressing the identified issues. See Oum v. Wells Fargo, N.A., 842 F. Supp. 2d 407,

413 & n.12 (D. Mass. 2012) (citing cases from several jurisdictions and noting the "near uniformity of opinion" with respect to the issue of a mortgagor's standing to challenge the validity of an assignment); Bridge v. Aames Capital Corp., No. 1:09CV2947, 2010 WL 3834059, at *3 (N.D. Ohio Sept. 29, 2010) ("Courts have routinely found that a debtor may not challenge an assignment between an assignor and assignee.").

The crux of Plaintiffs' Complaint challenges the validity of the assignment of the Mortgage interest by MERS to Wells Fargo, and thus, Wells Fargo's standing to foreclose on the Property following Plaintiffs' default. Specifically, Plaintiffs' allege in their Complaint that Andrew S. Harmon ("Harmon") is not an assistant secretary or vice president of MERS, and therefore was not authorized to execute the assignment on behalf of MERS; thus, allegedly rendering the assignment a nullity. (Compl. ¶¶ 17-19.)

It is well established that "homeowners lack standing to challenge the propriety of mortgage assignments and the effect those assignments, if any, could have on the underlying obligation." Payette, 2011 WL 3794701; see also Rutter, 2012 WL 894012, at *17 (quoting Fryzel v. Mortg. Elec. Registration Sys., Inc., C.A. No. 10-325 M, 2011 U.S. Dist. LEXIS 95114, at *41-42 (D.R.I. June 10, 2011) (dismissed on other grounds)) (the principle that a non-party to the contract does not have standing to challenge the contract's subsequent assignment is well established); Brough v. Foley, 525 A.2d 919, 922 (R.I. 1987) (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, 2011 WL 5075613, at *4 (D. Mass. Oct. 25, 2011) (Zobel, J.) (court refused to read U.S. Bank Nat. Ass'n v. Ibanez, 941 N.E.2d 40 (Mass. 2011) as an independent basis for mortgagors

to collaterally contest previously executed mortgage assignments to which they were not a party and that did not grant them any interests or rights; finding mortgagors had no legally protected interests in the assignment of the mortgage, and therefore lacked 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). Even if this Court were to find Plaintiffs have standing to challenge the assignment of the Mortgage interest, Plaintiffs must allege facts entitling them to relief. Palazzo, 944 A.2d at 149-50. As this Court has proclaimed time and again, Plaintiffs' allegation with respect to the invalidity of the assignments of the Mortgage interest is a legal conclusion not supported by the prevailing case law and is insufficient to survive a motion to dismiss.

In this matter, Plaintiffs contest the validity of the recorded corporate resolution authorizing Harmon and others to execute certain documents on behalf of MERS. (Compl. ¶¶ 20-23, 26-28, 30-36.) There is no requirement under Rhode Island law that MERS record a power of attorney, or any other document, in order for Harmon to act on its behalf. See Section 34-13-1. Even assuming the veracity of Plaintiffs' allegation, that the corporate resolution failed to grant Harmon the authority to execute documents on behalf of MERS, this allegation does not entitle Plaintiffs to the relief they seek.

Plaintiffs further set forth legal conclusions in the Complaint that are in direct conflict with this Court's interpretation of Rhode Island law. Plaintiffs contend that an assignment is not necessary in order to foreclose under Rhode Island law, and therefore, the corporate resolution does not authorize the assignment of the Mortgage interest by Harmon acting for MERS. (Compl. ¶ 24.) However, in order for the foreclosing party,

Wells Fargo, to have properly foreclosed on the Property following default, they must have obtained the Mortgage interest, and the statutory power of sale contained therein, by way of assignment. Thus, an assignment from MERS to Wells Fargo, authorizing Wells Fargo to exercise the statutory power of sale in the event of default, is necessary in order for Wells Fargo to foreclose under § 34-11-22.

Additionally, Plaintiffs aver that the Note was never transferred to or negotiated by Defendants. (Compl. ¶ 69.) Likewise, this allegation fails to state a fact entitling Plaintiffs to relief. The identity of the note holder is irrelevant as it is well established under current Rhode Island law that MERS and the assignees of MERS act as nominee of the current note holder. See 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 Payette, 2011 WL 3794701; Bucci v. Lehman Brothers Banks, FSB, No. PC 2009-3888, 2009 WL 3328373 (R.I. Super. Aug. 25, 2009) (Silverstein, J.).

Likewise, Plaintiffs attempt to invalidate the foreclosure sale by averring that the note holder and mortgagee must be one in the same. Specifically, Plaintiffs aver that under §§ 34-11-21, 22, and 24, the note holder and mortgagee must be the same party.

The assertion by Plaintiffs that §§ 34-11-21, 22, and 24 require the note holder and mortgagee to be the same party is erroneous as a matter of law. Justice Silverstein has interpreted § 34-11-21 as to "not require 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." Rutter, 2012 WL 894012 at *15. "Interpreting § 34-11-21 to require the mortgagee and lender always be the same entity would reach 'an absurd result because named mortgagees and lenders would be precluded from employing servicers to service

and collect obligations secured by real estate mortgages,' and 'clearly, the General Assembly envisioned a role for mortgage servicers in the mortgage lending industry.'" Id. at *14 (quoting Bucci, 2009 WL 3328373 at *18-19). Moreover, "the designation of MERS as mortgagee and lender's nominee, does not as a matter of law, cause a fatal defect in the foreclosure." Kriegel, 2011 WL 4947398 at *9.

Moreover, § 34-11-24 provides that an assignment of the mortgage shall also be deemed an assignment of the debt secured thereby. Rutter, 2012 WL 894012; see also Kriegel, 2011 WL 4947398. Once the lender designates MERS as its nominee, MERS, and thus any assignee of MERS, also acts as holder of the debt secured by the mortgage and has the authority to assign the mortgage interest. Kriegel, 2011 WL 4947398 at *15. By the clear and unambiguous language of § 34-11-24, an assignment of the mortgage deed assigns the mortgage with "the note and debt thereby secured." Section 34-11-24. Therefore, the assignment of the Mortgage interest from MERS to Wells Fargo had the effect of transferring the Mortgage as well as "the [N]ote and debt thereby secured." Section 34-11-24. Wells Fargo then became an assignee of MERS thereby possessing all the rights as mortgagee, including the statutory power of sale. See Kriegel, 2011 WL 4947398 at *13-14 (quoting Weybosset Hill Inv., LLC v. Rossi, 857 A.2d 231, 240 (R.I. 2004)) (an assignee steps into the shoes of the assignor and can avail itself of the assignor's rights).

Plaintiffs rely on a United States Supreme Court case, Carpenter v. Longan, wherein the 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. 271, 274 (1872). This holding is in

direct conflict with § 34-11-24. Unlike the law of Colorado, under § 34-11-24, as discussed supra, an assignment of the mortgage 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 an assignment of a mortgage interest a nullity by the plain, unambiguous language of the statute itself. "It is well settled that when the language of a statute is clear and unambiguous, this Court must interpret the 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. To accept Plaintiffs' interpretation of § 34-11-24, thereby rendering the assignment of the Mortgage interest a nullity, would lead to an absurd result. "Statutes should not be construed to reach an absurd result." Bucci, 2009 WL 3328373 at *12; see also Brennan v. Kirby, 529 A.2d 633, 637 (R.I. 1987). Accordingly, an assignment of the mortgage interest carries with it the note and debt thereby secured and will not be rendered a nullity, even if the mortgagee does not simultaneously hold the note Since these allegations are merely conclusory statements of law, they fail to establish factual allegations necessary to state a claim for relief.

In addition, Plaintiffs erroneously rely on Eaton v. Fed. Nat'l Mortg. Ass'n, No. SUCV201101382, 29 Mass. L. Rptr. 115 (Mass. Super. June 17, 2011) (Eaton I). However, since the submission of Plaintiffs' memorandum, Eaton was overruled by the Supreme Judicial Court of Massachusetts. See Eaton v. Fed. Nat'l Mortg. Ass'n, 969 N.E.2d 1118 (Mass. 2012) (Eaton II). While Eaton I stands for the proposition that under Massachusetts law one must hold the note and mortgage in order to properly foreclose, in Eaton II the court held that the mortgagee must either hold the note or act on behalf of the

note holder. See id. at 1121. Regardless, neither decision is binding precedent upon the Rhode Island Superior Court, nor do those decisions change this Court's analysis under prevailing Rhode Island Law. As Justice Silverstein stated in Rutter, the Eaton case "has already been questioned and distinguished by" other cases, and directly "contradict[s] this Court's prior holding in Bucci" as well as other Superior Court cases. 2012 WL 894012 at *15. Accordingly, this Court "will not overturn its own prior ruling[s] in favor of another state's lower court opinion that has already been called into doubt by subsequent decisions." Id.

There is a wide array of case law throughout this country evidencing a split of authority. This Court follows the precedent of the Rhode Island Superior Court, that the assignment of the mortgage does not create a fatal disconnect between the note and the mortgage. Furthermore, no Rhode Island case law or statutory law requires that the foreclosing party hold the note and mortgage in order to foreclose. In effect, Rhode Island case law states that the foreclosing party acts as nominee for the note holder. See Porter v. First NLC Fin. Serv., No. PC 2010-2526, 2011 WL 1251246 (R.I. Super. March 31, 2011) (Rubine, J.); see also Bucci, 2009 WL 3328373; Kriegel, 2011 WL 4947398.

Additionally, Plaintiffs have failed to state a claim for negligent misrepresentation.

> "'To establish a prima facie case of negligent misrepresentation, . . . plaintiff[s] must establish the following elements: (1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting *in justifiable reliance*

> *on the misrepresentation*.'" Manchester v. Pereira, 926 A.2d 1005, 1012 (R.I. 2007) (citing Mallette v. Children's Friend and Serv., 661 A.2d 67, 69 (R.I. 1995)).

Plaintiffs allege in a conclusory fashion that Defendants recorded a fraudulent assignment, and thus misrepresented the ownership of the Mortgage. (Compl. ¶¶ 85, 87.) Since this Court has found the assignment is valid, thus authorizing Wells Fargo as mortgagee to exercise the statutory power of sale and to foreclose following default, there was no misrepresentation of any material fact to the Plaintiffs which Defendants knew or ought to have known was false, thereby causing Plaintiffs to act in reliance on that misrepresentation. Also, Plaintiffs acknowledged and executed the Mortgage instrument prior to the execution and recordation of the assignment. Plaintiffs accepted foreclosure as the ultimate consequence of default under the clear, unambiguous language of the Mortgage instrument. See Payette, 2011 WL 3794701 at *17 ("It strikes the Court as unfair to allow the borrowers to have benefited from the loan to purchase the property and thereafter escape their repayment obligations," thereby leaving the lender without the benefit of the security it bargained for when making the loan to the plaintiffs).[3] Plaintiffs are bound by the terms of the Mortgage instrument, which they acknowledged and

[3] Although the Court is aware anecdotally of the financial hardships of homeowners, during a time of economic adversity, the financial circumstance of the Plaintiffs at the time of default is not a matter alleged by Plaintiffs in the Complaint and is not relevant to Defendants' foreclosure decision in the context of a quiet title action. Cafua v. Mortg. Elec. Registration Sys., Inc., No. PC 2009-7407, 2012 WL 2377404 (R.I. Super. June 20, 2012) (Rubine, J.). Since the foreclosure has already occurred, the equitable considerations that would be relevant to the Court's consideration of injunctive relief are not part of the Court's decision in a quiet title action. Id. In addition, problems in the mortgage market and the mortgage servicing industry, including the creation and sale of mortgage-backed securities, have received wide attention in the public media. These matters of public policy must be addressed by the legislative and executive branches of government. A judicial decision in an individual case is not the proper forum to address problems in the mortgage industry generally. Id. (citing In re Correia, 452 B.R. at 325).

accepted. See Manchester, 926 A.2d at 1012 (quoting F.D. McKendall Lumber Co. v. Kalian, 425 A.2d 515, 518 (R.I. 1981)) ("'[A] party who signs an instrument manifests his assent to it and cannot later complain that he did not read the instrument or that he did not understand its contents.'").

Finally, Plaintiffs allege that the Note is current or has been satisfied. Considering this allegation as true and in the light most favorable to Plaintiffs, Defendants' Motion to Dismiss must be denied because the absence of default, if established as true by the finder of fact, would be a defense to a foreclosure allegedly triggered by borrower's default under the Note. For that reason alone, Plaintiffs' Complaint cannot be dismissed, and Plaintiffs must be given an opportunity to have the issue of default considered at trial. Accordingly, Defendants' Motion to Dismiss must be denied. Accepting the allegations set forth in the Complaint as true, and viewing them in the light most favorable to the Plaintiffs, Plaintiffs have set forth an allegation in the Complaint which, if true, establishes a claim for relief. However, the legal issues presented in this matter—specifically concerning the assignment of the Mortgage interest, the disconnect between the Note and Mortgage, and the authority of certain individuals to execute assignments on behalf of MERS—have been previously decided by this Court in a manner contrary to the alleged interest of the mortgagor/homeowner. See Kriegel, 2011 WL 4947398; see also Rutter, 2012 WL 894012; Payette, 2011 WL 3794701; Porter, 2011 WL 1251246; Bucci, 2009 WL 3328373.

IV

Conclusion

Plaintiffs' have alleged facts in their Complaint concerning the absence of default which, if true, would entitle them to the relief sought. Accordingly, Defendants' Motion to Dismiss under Rule 12(b)(6) is Denied. Counsel for the prevailing party shall submit an Order in accordance with this Decision.