

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[Filed: July 22, 2015]

JAMES B. SCANLON AND
DARLENE E. SCANLON

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v.

C.A. No. PC 2010-2129

HSBC BANK USA, N.A. AND
WELLS FARGO BANK, N.A.

DECISION AND ORDER

RUBINE, J. This matter came before this Honorable Court, Justice Allen P. Rubine presiding, on June 16, 2015 on Defendants HSBC Bank USA, N.A. and Wells Fargo Bank, N.A.’s motion for summary judgment pursuant to Rule 56(b) of the Rhode Island Superior Court Rules of Civil Procedure. Due to Plaintiffs’ counsel’s unexcused absence,¹ this Court did not hear oral arguments and considered the parties’ arguments solely on their briefs and other written materials.² After consideration, this Court finds as follows:

“Summary judgment is appropriate when no genuine issue of material fact is evident from ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with

¹ Counsel cannot assume his absence is excused, based upon an oral statement left in a message to the Clerk that he is ill and that a doctor advised he was medically unable to attend. This is particularly true when counsel wishes to obtain a continuance based upon his medical condition and when opposing counsel did not consent to such continuance. See generally Silvia v. Brule, 9 A.3d 659, 660 n.2 (R.I. 2010). This Court also notes that Plaintiffs’ counsel did not submit a certificate of a practicing physician until a day after the scheduled hearing date. See Super. R. Civ. P. 40 (“A motion for a continuance on the ground of sickness of a party or witness shall be accompanied by a certificate of a practicing physician stating the fact of said sickness, and the kind, degree, and the time of beginning thereof.”)

² Subsequently, Plaintiffs’ counsel filed an objection to the submission of arguments on the briefs, arguing that his client’s due process rights were violated. This objection is without merit as there is no constitutional right to oral arguments at a summary judgment hearing, and “[t]he decision as to whether or not to hold a hearing and allow oral argument is within the discretion of the [superior] court.” Ryan v. Roman Catholic Bishop of Providence, 941 A.2d 174, 187-88 (R.I. 2008).

the affidavits if any,' and the motion justice finds that the moving party is entitled to prevail as a matter of law.” Mruk v. Mort. Elec. Registration Sys., Inc., 82 A.3d 527, 532 (R.I. 2013) (quoting Swain v. Estate of Tyre, 57 A.3d 283, 288 (R.I. 2012)). “[T]he nonmoving party bears 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.” Id. (quoting Daniels v. Fluette, 64 A.3d 302, 304 (R.I. 2013)).

In this matter, the Plaintiffs have failed to submit competent evidence demonstrating the existence of issues of material fact. It is now well-settled in Rhode Island that an entity may exercise the statutory power of sale as long as it is the mortgagee and either the note holder or an agent of the note holder. See Bucci v. Lehman Bros. Bank, FSB, 68 A.3d 1069 (R.I. 2013). In this case, the terms of the Mortgage grant the Lender the statutory power of sale. The Mortgage also states “the Note or a partial interest in the Note (together with this Security instrument) can be sold one or more times without prior notice to Borrower.”

Defendants have provided sufficient evidence that the Note and Mortgage were transferred to HSBC USA, N.A. (HSBC) from Wells Fargo Bank, N.A. (Wells Fargo). The Note contains a special endorsement from Wells Fargo to HSBC. A review of the Note indicates that there are no other endorsements on the Note. Moreover, HSBC has recorded an assignment of the Mortgage from Wells Fargo to HSBC. Plaintiffs have provided this Court with no evidence to contradict that HSBC is the current mortgagee and note holder. Thus, there is no genuine dispute that HSBC holds the Note and the Mortgage, and that it may exercise the statutory power of sale upon default by the borrower See Bucci, 68 A.3d at 1069. See also G.L. 1956 § 34-11-24; G.L. 1956 § 6A-3-205.

The Plaintiffs further contend that the Defendants have not complied with the notice requirements as set forth in the mortgage contract. The undisputed facts of this case provide no support for Plaintiffs' claims that they were not notified in accordance with the notification requirements set forth in the Mortgage.

After reviewing the memoranda and attached and authenticated exhibits, and the responses thereto, this Court finds no genuine dispute of material fact. Defendants, HSBC Bank USA, N.A. and Wells Fargo Bank, N.A., are entitled to judgment as a matter of law. Finally, Defendants are entitled to attorneys' fees and costs in this case pursuant to the language in the Note and the Mortgage. See Napier v. Epoch Corp., 971 A.2d 594, 598 n.4 (R.I. 2009).

Defendants' motion for summary judgment is hereby granted.

Plaintiffs' Complaint is dismissed. Lis pendens is dissolved. Reasonable attorneys' fees and costs will be awarded, in accordance with the terms of the Note and Mortgage which provide that the mortgagee is entitled to recover the reasonable costs of enforcing the terms of those instruments, including reasonable attorneys' fees incurred. A separate hearing with notice to the Plaintiff shall be held to determine the amount of attorneys' fees to be awarded.

Entered as an Order of this Court on this _____ day of July, 2015.

ENTER:

PER ORDER:

Allen P. Rubine
Associate Justice

Clerk



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: James B. Scanlon, et al. v. HSBC Bank USA, N.A., et al.

CASE NO: PC 2010-2129

COURT: Providence County Superior Court

DATE DECISION FILED: July 22, 2015

JUSTICE/MAGISTRATE: Rubine, J.

ATTORNEYS:

For Plaintiff: George E. Babcock, Esq.

For Defendant: Bethany M. Whitmarsh, Esq.