

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.

SUPERIOR COURT

[Filed: July 22, 2015]

RAFAELA E. DAVIS

:

:

v.

:

C.A. No. KC 2011-0520

:

MORTGAGE ELECTRONIC

:

REGISTRATION SYSTEMS, INC.;

:

ACCREDITED HOME LENDERS, INC.;

:

GMAC MORTGAGE, LLC; AND U.S.

:

BANK, NA, AS TRUSTEE FOR

:

BASC2005AHL1

:

DECISION AND ORDER

RUBINE, J. This matter came before this Honorable Court, Justice Allen P. Rubine presiding, on June 16, 2015 on Defendants Mortgage Electronic Registration Systems, Inc., GMAC Mortgage, LLC, and U.S. Bank, NA, as Trustee for BASC2005AHLI’s motion for summary judgment pursuant to Rule 56(b) of the Rhode Island Superior Court Rules of Civil Procedure. Due to Plaintiff’s counsel’s unexcused absence,¹ this Court did not hear oral arguments and considered the parties’ arguments solely on their briefs.² After consideration of the parties’ briefs, this Court finds as follows:

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 Plaintiff’s 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 This Court notes that 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).

It is well settled that when deciding a motion for summary judgment, “the Court views the evidence in the light most favorable to the nonmoving party.” Mruk v. Mort. Elec. Registration Sys., Inc., 82 A.3d 527, 532 (R.I. 2013) (quoting Beauregard v. Gouin, 66 A.3d 489, 493 (R.I. 2013)). “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 the affidavits if any,’ and the motion justice finds that the moving party is entitled to prevail as a matter of law.” Mruk, 82 A.3d at 532 (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 support of their motion for summary judgment, Defendants attached several exhibits to their memorandum of law. However, although the Defendants include the affidavit of Crystal Kearse, a senior loan analyst at OCWEN Loan Servicing, LLC, it is not notarized and therefore is not competent evidence, which may authenticate the attached exhibits. Moreover, even if this affidavit had been notarized, it does not mention any of the other attached exhibits, and thus, would nevertheless fail to authenticate the documents.

Our Supreme Court has clearly stated that “unauthenticated documents . . . are not usually ‘competent evidence’ worthy of consideration by the court in ruling on a motion for summary judgment. Documents typically must be properly authenticated in order to qualify as admissible evidence.” McGovern v. Bank of America, N.A., 91 A.3d 853, 860-61 (R.I. 2014) (quoting Superior Boiler Works, Inc. v. R.J. Sanders, Inc., 711 A.2d 628, 632 n.3 (R.I. 1998)) (citing Rule 901 of the Rhode Island Rules of Evidence). As the Supreme Court has pointed

out, “[a]uthentication is not a high hurdle to clear: Rule 901(a) merely requires ‘evidence sufficient to support a finding that the matter in question is what its proponent claims.’” Id. (quoting R.I. R. of Evid. 901(a)). “For summary-judgment purposes, the ‘task [of authentication] can be accomplished in the usual course by submitting an affidavit of a person with personal knowledge of the documents who can attest to their authenticity and qualify them as admissible evidence.’” Id. (quoting Superior Boiler Works, Inc., 711 A.2d at 632 n.3); see also Charles Alan Wright et al., 10A Federal Practice and Procedure: Civil § 2722 at 382–84 (1998) (“To be admissible, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence.”).

Our Supreme Court has defined an affidavit as “a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.” Scarborough v. Wright, 871 A.2d 937, 939 (R.I. 2005) (adopting the Nebraska Supreme Court’s definition articulated in State v. Haase, 247 Neb. 817, 530 N.W.2d 617, 618 (1995)). Additionally, an affidavit must be notarized; one that is not notarized is deemed insufficient, incompetent, and invalid for the purposes of a Rule 56 motion for summary judgment. Scarborough, 871 A.2d at 938; Chrysler First Fin. Servs. Corp. v. Van Daam, 604 A.2d 339, 341 n.1 (R.I. 1992). Our Supreme Court has made clear that while some jurisdictions will accept a declaration that a document is “signed under the pain and penalties of perjury,” such a statement is insufficient for a motion for summary judgment in Rhode Island. Id. at 939 n.7. Such a declaration is viewed as a “promise that evidence would be offered at a later date,” which is insufficient as competent evidence of the absence of genuine issues of material fact. Id.

After reviewing the memoranda, the affidavit of Crystal Kears, and attached exhibits, it is clear that the Defendants have failed to properly authenticate their exhibits material to their defense pursuant to Rhode Island law. Therefore, Defendants, Mortgage Electronic Registration Systems, Inc., GMAC Mortgage, LLC, and U.S. Bank, NA, as Trustee for BASC2005AHLI, are not entitled to judgment as a matter of law.

Defendants' motion for summary judgment is hereby dismissed without prejudice.

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: Rafaela E. Davis v. Mortgage Electronic Registration Systems, Inc., et al.

CASE NO: KC 2011-0520

COURT: Kent County Superior Court

DATE DECISION FILED: July 22, 2015

JUSTICE/MAGISTRATE: Rubine, J.

ATTORNEYS:

For Plaintiff: George E. Babcock, Esq.

For Defendant: Samuel C. Bodurtha, Esq.