STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: February 21, 2019)

WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST AS OWNER TRUSTEE OF THE RESIDENTIAL CREDIT OPPORTUNITIES TRUST V,	:	
Plaintiff,	:	
v.	:	**C.A. No. PC-2018-0576**
RANDALL T. JOHNSON, SANDRA L. JOHNSON,	:	
Defendants.	:	

DECISION

LANPHEAR, J. This matter came on for hearing before Mr. Justice Lanphear on January 30, 2019, on the motion of plaintiff to foreclose a mortgage with judicial authorization. Defendants have been defaulted by the Clerk. The Court took this matter under advisement. At the hearing, only the plaintiff appeared; the defendants-homeowners have not responded to service of process.[1]

Analysis

A

The Foreclosure Process

There are essentially two methods of foreclosing a mortgage in Rhode Island. The most common method is to foreclose via the "statutory power of sale." Most mortgage notes and

[1] Here, one of the mortgagors-owners was actually served in hand. The other was served via another adult at the address being foreclosed. The Court is unaware if he continues to reside there. This case is similar to many others that have recently appeared on the Formal and Special Cause Calendar; though in several cases, the mortgagors-owners are not served in hand.

deeds contain language expressly set forth by G.L. 1956 §§ 34-11-12, *et seq.* which allows mortgagee-lenders to foreclose after notice and newspaper advertising, but without a court case. The other method is to foreclose pursuant to a court order.

With the rise of modern homeownership and commercial financing in the twentieth century, the Rhode Island General Assembly moved to ease the complexities of mortgages. Section 34-11-22 allowed the lender to simply insert the words "statutory power of sale" on the mortgage deed, which automatically incorporated by reference a vast array of uniform terms to the document defining the process to foreclose. By incorporating these four words, the process of foreclosure, the frequency and the location of advertisements for the foreclosure, the requirement of the owner to pay taxes, assessments and insurance and the right to surplus funds were all incorporated by reference into the mortgage agreement. Given the ease of foreclosing without court litigation, judicial foreclosures became uncommon[2] and were, in practice, reserved for clearing titles with ancient mortgages which were never discharged, or other title issues. *See* Joseph A. Montalbano, Esq., *Equity Actions: Clearing Clouds on Title* (May 1998.) As Charles A. Lovell and Michael B. Mellion indicated in A Practical Guide to Residential Real Estate Transactions and Foreclosure in Rhode Island § 10.1.1, *Methods of Foreclosure in Rhode Island* (1st ed. 2012),

> "Judicial process under R.I.G.L. § 34-27-1 is generally used only where there is a title defect that must be cured by the court. Foreclosure by entry and possession under R.I.G.L. § 34-23-3 is rarely used in Rhode Island. The final, and overwhelmingly preferred course of action, is foreclosure under the statutory power of sale, which is contained in R.I.G.L. § 34-11-22."

[2] Avoiding judicial intervention for a foreclosure accelerated the speed of foreclosure, dispensed with the need for attorneys to litigate, brought uniformity to where and how the foreclosure should be advertised, and provided finality by limiting the ability of the mortgagor-owner to redeem after foreclosure. Secs. 34-11-22 and 34-23-3.

The Rhode Island General Assembly, aware that non-judicial foreclosures had become the norm, kept watch on the process to ensure fairness to the consumer-homeowner. It increased the time for pre-foreclosure notice to the mortgagor-owner, prior to advertising (P.L. 2003, ch. 233, §§ 1-3), and required that credit counseling be offered to mortgagors-owners in 2009. Sec. 34-27-3.1(b).[3]

Through the 1980s and 1990s, investing in residential home financing became more attractive in financial markets. Lending institutions began to bundle a large number of mortgages and sell them in bulk to private investors. With this growth, mortgages were often assigned and reassigned to various lenders and investors in large bundles. When foreclosures arose during cyclical changes in the economy, the mortgagors-owners questioned whether the foreclosing banks held the original notes or were true assignees of the mortgage. Mortgagee-lenders often struggled to locate the original promissory notes, mortgages and multiple assignments. *See Mruk v. Mortg. Elec. Registration Sys., Inc.*, 82 A.3d 527, 537 (R.I. 2013); *Bucci v. Lehman Bros. Bank, FSB*, 68 A.3d 1069, 1084-85 (R.I. 2013). With the confusion, more litigation arose, perhaps to eliminate the risk that the statutory foreclosure was done by the incorrect assignee.[4] Over the past few years, the Court has seen a marked increase in the requests to foreclose by court order.

[3] The requirement for pre-foreclosure counseling has since been repealed. P.L. 2014, ch. 543, § 2.

[4] The case at bar illustrates the complexity of the record real estate title. Although no independent title certification is submitted, the exhibits attached to the January 2018 complaint show four different assignments of the mortgage. (Ex. C, D, E and F.) A statutory offer to mediate during the next sixty days is dated October 2, 2014. (Ex. H.) On the fifty-ninth day, Sunday, December 1, 2014, a letter of default was issued. (Ex. G)

B

The Legislature's Desire for Mediation

The United States District Court for the District of Rhode Island, suddenly burdened with over 500 cases by homeowners seeking to slow foreclosures, issued an order requiring mediation of its pending foreclosure-related cases in an effort to resolve and control the backlog. *In re Mortgage Foreclosure Cases*, Misc. No. 11-mc-88-M-LDA., 2012 WL 3011760 (D.R.I. July 23, 2012). Although the Circuit Court of Appeals construed this order to be an inappropriate preliminary injunction, *Fryzel v. Mortg. Elec. Registration Sys., Inc.*, 719 F.3d 40 (1st Cir. 2013), the Rhode Island General Assembly had already mandated that mediations be conducted prior to mortgage foreclosures. Sec. 34-27-3.2(b).

Section 34-27-3.2(d) now requires that a notice indicating the availability of mediation be sent by the mortgagee-creditor to the mortgagor-owner "prior to initiation of foreclosure." If the notice is not sent within 120 days after the date of default, the mortgagee-bank must pay a penalty of $1000 per month for each month of delay. Sec. 34-27-3.2(d)(1). While there were certain exceptions to the statute for bankruptcies, soldiers and sailors, and lenders who could establish their good faith, these exceptions apparently did not apply to all mortgages in default. This Court soon noticed an increased number of cases seeking foreclosure by judicial order, particularly for mortgages which had been in default for extended periods.

This Court does not reach the question of whether the new mediation statute applies to judicial foreclosures. That issue is not presently before the Court. It is noteworthy that the mandatory mediation statute indicates the legislature's concern with reaching a "positive outcome for homeowners and lenders," alike (§ 34-27-3.2(b)), but the legislature also expresses

concern for "the increasing numbers of foreclosures" (§ 34-27-3.2(a)). That issue of statutory construction has not been raised here; rather, these defendant-homeowners are in default.

C

Other Concerns

Obviously, the Court is concerned with fairness and the need for notice and opportunity to be heard by interested parties.

For more than a century, the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale*, 68 U.S. 223, 233 (1863). *See Windsor v. McVeigh*, 93 U.S. 274, 277-80 (1876); *Hovey v. Elliott*, 167 U.S. 409, 415 (1897); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). The Court is also concerned for the expenses to the defaulted parties. As costs for foreclosures are often passed onto a defaulted owner-mortgagee, it may be unfair to elect a more expensive method of foreclosure, and to then add those expenses to the amount of the owner-mortgagee's arrearages or credit report. This is inconsistent with the legislative intent of the foreclosure statutes.

As noted, judicial foreclosures were uncommon for many years, unless the title was burdened with substantial title problems. As the Court is concerned with notice and opportunity to be heard for all with an interest in the realty, the Court will rely on chapter 44-9 of the Rhode Island General Laws which sets forth an established procedure for foreclosure of the right of

redemption following a tax sale. Chapter 44-9 has been revised repeatedly by the legislature to ensure fairness and notice to those with an interest in the title.

This Court is also concerned with the process of bundling described on page 3 herein, as the party attempting to foreclose may not be the true, present owner of record. The amendment to the Complaint to substitute a new plaintiff in the case at bar illustrates the ever changing identity of the mortgage holder, resulting in confusion to the homeowner and the Court.

With the increase in the number of judicial foreclosures, this Court strives to provide uniformity and predictability to mitigating future legal expenses. Accordingly, the Court intends to set an established, uniform method to be applied to pending suits seeking judicial foreclosure.

Finally, the Court seeks to ensure that the judicial foreclosure method is used only where necessary, not to avoid the protections set forth by our legislature in the statutory foreclosure laws.

The instant case requests a mortgage foreclosure by court order and involves a residential mortgage in default for an extended period. While one of the mortgagors-owners in this action was actually served in hand (unlike many others that appear before the Court), the owners failed to respond.

Conclusion

Accordingly, it is ORDERED:

1. The Plaintiff's motion is denied without prejudice.

2. The party seeking to foreclose by judicial foreclosure shall set forth the reasons for seeking foreclosure in an affidavit to be submitted to the Court within twenty (20) days of the date of this Order. The affidavit shall indicate:

a. What attempts were undertaken to mediate with the mortgagors-owners, including copies of all notices offering mediation, and identifying the results of all attempts at mediation;

b. What impediments, if any, limit the ability of the parties to mediate;

c. Whether the moving party seeks to avoid mediation;

d. Why judicial foreclosure is desired over statutory foreclosure;

e. Why a mediation was not commenced and completed within the timeframe of § 34-27-3.2, if it was not;

f. Identify precisely any defects in title to be cured;

g. Identify whether there is a statutory power of sale in the mortgage documents, the amount of the original debt, the amount of the current debt, the amount currently in arrears, the date the mortgage first went into default, the date on which the mortgagors-owners were initially warned of the likelihood of foreclosure and attach a copy of each notice thereof;

h. Identify the present location of the original promissory note and attach a copy thereof; and

i. Attach copies of all assignments of the mortgage which have not been recorded.

3. The party seeking to foreclose shall, within fourteen (14) days of the date of this order, at his or her own cost, select, with the approval of the Court, an independent title company or an attorney familiar with the examination of land titles. This company or attorney shall make an examination of the title satisfactory to the Court and sufficient to determine the persons who may be interested in the title.

4. The party seeking to foreclose shall set forth by affidavit a description of the land to which it seeks to foreclose with its assessed valuation; the party's source of title, providing a reference to the place, book and pages of record; identify any persons known to be residing in the property; identify the current residence of the owner of record; indicate if the property is abandoned or wasting; and, any other facts as may be necessary for the information of the Court. Two or more parcels of land may be included in any request if the parcels are in the same record ownership at the time of filing of the request to foreclose.

5. The party seeking to foreclose shall, upon the filing of the examiner's report, notify all persons appearing to be interested, whether as equity owners, legal owners, mortgagees, lienors, attaching creditors, or otherwise (hereinafter referred to as "parties in interest to the realty") of the pendency of this action seeking to foreclose. The notice is to be sent to each party by registered or certified mail, return receipt requested. Where service is required in hand by a statute or court rule, this paragraph shall not modify that requirement. If the subject property is residential, the petition shall also be tacked to the front door of the subject property. Other and further notice by publication or otherwise shall be given as the Court may at any time order, but the Court will require service of process to each party in interest of the realty. Proof of compliance with this paragraph shall be sent to this Court.

6. The notice shall include the name of the party seeking to foreclose and the name, address and telephone number of its attorney, if known; the names and addresses of all known parties in interest to the realty; a legal description of the property; the street address of the property; an indication in plain English that the party is seeking to

foreclose; and, the nature of the petition shall fix the time when appearance may be entered. The notice shall describe the procedure for entering an appearance and shall contain a statement that unless the notified party shall appear within the fixed time, a default may be entered.

7. If any party cannot be notified by certified mail, return receipt requested, notice shall be given by special order of this Court only. The party seeking to foreclose shall state to the Court, with particularity, why notice could not be given and describe all attempts to give notice. It shall state the last known address of the party to be served and the source of the information.

8. If any owner (legal or equitable) or other lienholder cannot be located, the Court, by subsequent order, may appoint a constable or other appropriate person as an officer of the court to make a personal inquiry into the whereabouts of any party of interest in the realty.

9. The Court finds that judicial foreclosure is a unique, expensive method of foreclosing selected by the mortgagee-lender. Accordingly, the Court holds that the foreclosing party shall bear all expenses of foreclosure, including attorneys' fees, court costs and advertising, and not pass these debts onto the amount of debt, arrearage, or lien. The foreclosing party shall set forth any reasons specifying why any other parties (including the mortgagors-owners) should bear these expenses with legal support in a separate motion.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust as Owner Trustee of the Residential Credit Opportunities Trust V v. Randall T. Johnson, Sandra L. Johnson
CASE NO:	PC-2018-0576
COURT:	Providence Superior Court
DATE DECISION FILED:	February 21, 2019
JUSTICE/MAGISTRATE:	Lanphear, J.

ATTORNEYS:

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For Defendant:	