STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**
(Transferred to Kent, SC.)

(FILED: August 1, 2016

GILBERT J. MENDOZA, and LISA M. MENDOZA	:	
v.	:	**C.A. No. PC-2011-2547**
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., NEW ENGLAND REGIONAL MORTGAGE CORPORATION, JPMORGAN CHASE BANK, N.A.	:	

DECISION

RUBINE, J. Before the Court is a motion for summary judgment in a dispute centered on a transaction involving Defendants Mortgage Electronic Registration Systems, Inc. (MERS) and JPMorgan Chase Bank, N.A. (Chase) (collectively, Defendants). Plaintiffs Gilbert J. Mendoza and Lisa M. Mendoza (Plaintiffs or the Mendozas) filed this action seeking to invalidate a foreclosure upon their home. MERS and Chase have moved for summary judgment on all counts in the Complaint. Plaintiffs also named Defendant New England Regional Mortgage Corp. (New England Regional Mortgage), which has not, however, joined the instant motion.

I

Facts and Travel

The origin of this litigation lies in the events of January 24, 2005, and those facts are undisputed. On that day, Plaintiffs mortgaged their home, located at 6 Albemarle

Avenue in the Town of Johnston, Rhode Island, to secure a $154,050 loan extended by New England Regional Mortgage. This mortgage was recorded on the same day in the Land Evidence Records of the Town of Johnston at Book 1517, Page 1. MERS was listed as the nominee of New England Regional Mortgage on the note and mortgage.

New England Regional Mortgage, on an uncertain date, endorsed the promissory note over to Washington Mutual Bank, FA (WaMu). On September 25, 2008, WaMu was placed in Federal Deposit Insurance Corporation (FDIC) receivership, pursuant to a determination made by the United States Office of Thrift Supervision. The same day, FDIC sold the assets of WaMu to Chase; the written Purchase and Sale Agreement included all assets of WaMu, which included the Mendozas' promissory note. Following this sale, MERS assigned the accompanying mortgage to Chase on December 3, 2010, and recorded the assignment in the Land Evidence Records of the Town of Johnston at Book 2114, Page 243.

The note and mortgage are thirty-year agreements requiring monthly payments beginning in March 2005 and terminating in February 2035. Plaintiffs failed to make their May 2010 payment. Chase notified Plaintiffs of their default on August 4, 2010; Plaintiffs failed to cure their default within forty-five days of this notice. Foreclosure proceedings were initiated on February 25, 2011 by notice of the time and place of the foreclosure sale; Chase also published notice of the foreclosure sale in the Providence Journal for three consecutive weeks (March 28-April 11, 2011). Chase conducted the foreclosure sale on April 18, 2011; the Federal Home Loan Mortgage Corporation (Freddie Mac) purchased the property, with the foreclosure deed executed on September 29, 2011. Plaintiffs filed suit on May 3, 2011, shortly after the foreclosure.

II

Standard of Review

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. Mortg. 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.'" Id. (quoting Swain v. Estate of Tyre ex rel. Reilly, 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)).

III

Analysis

MERS and Chase move for summary judgment, contending that there are no genuine issues of material fact and that the Mendozas lack any standing to challenge an assignment of the note and mortgage. The Mendozas have filed an objection which is unsupported by affidavit; to the extent that they attempt to create a genuine issue of material fact for trial, they have failed to do so. Their only hope to avoid summary judgment lies in establishing some reason why MERS and Chase are not entitled to judgment as a matter of law based on the uncontested facts.

Plaintiffs assert several grounds as to why these Defendants are not entitled to summary judgment. In their written objection, Plaintiffs contend that the Complaint gives rise to legal issues which defeat Defendants' legal entitlement to judgment. This Court and the Rhode Island Supreme Court, however, have previously addressed these arguments and determined, under similar facts, that Plaintiffs' allegations fail to support a claim as to the invalidity of the foreclosure. The Plaintiffs contend that Chase did not have authority to foreclose on the mortgage; they also attack the validity of the mortgage assignment; and they assert that Freddie Mac is actually the lender. They fail to establish any facts in support of these claims. In addition to the arguments advanced in their written objection, Plaintiffs raised a new argument at the hearing on this motion on June 15, 2016. They urge the Court to hold that the FDIC-arranged sale of the note—along with all other WaMu assets transferred in the receivership—is invalid, because it fails to comply with state law requirements regarding the assignment of mortgages. See G.L. 1956 §§ 34-11-1; 34-13-1(7).

A

The Lender's Authority to Foreclose and the Standing Issue

It is clear under Rhode Island law that original mortgagees, their successors, and their assigns have the authority to foreclose despite not being the original lender or mortgagee if based on the express terms of the mortgage. Bucci v. Lehman Bros. Bank FSB, 68 A.3d 1069, 1080-81 (R.I. 2013). In Bucci, the Rhode Island Supreme Court determined that the plaintiffs in the case had explicitly granted statutory power to foreclose to MERS as lender's nominee, and, consequently, MERS had the authority to exercise that statutory power of sale and to assign that right to its successors and assigns,

notwithstanding the fact that it was not the original lender. Id. at 1081. Thus, Plaintiffs' claim that only the original "Lender" can foreclose pursuant to the power of sale in the mortgage is without merit. See id. Insofar as Plaintiffs claim that Freddie Mac is the true lender, discussed further *infra*, no facts in the record support such a conclusion; nor is there any citation to authority that would indicate that such a conclusion is supported under Rhode Island law.[1]

More importantly, Plaintiffs do not have standing to challenge the validity of the mortgage assignments. Plaintiffs assert that the various assignments in this case, between New England Regional Mortgage and WaMu and between WaMu and Chase, are void because they were executed without authority. It is well settled, however, that in a suit challenging the validity of a foreclosure based upon a defect in assignment, the party challenging the assignment must have standing to do so. See Cruz v. Mortg. Elec. Registration Sys., Inc., 108 A.3d 992, 996 (R.I. 2015) (quoting Narragansett Indian Tribe v. State, 81 A.3d 1106, 1110 (R.I. 2014)).

The rule does afford an exception with respect to residential homeowners, allowing for third-party homeowner challenges to assignments where it is alleged that there is an assignment that is "invalid, ineffective, or void." Id. at 997. There is a difference, however, between a void agreement and one that is merely voidable; the former allows a challenge, while the latter does not. Id. (citing Wilson v. HSBC Mortg. Servs., Inc., 744 F.3d 1, 9-10 (1st Cir. 2014)). Defendants assert that this challenge to the

[1] It appears likely that this contention originates out of Freddie Mac's role as an investor of the original note—i.e., that it funded the original mortgage—but this does not make it the lender, as Freddie Mac does not extend loans itself. See "Frequently Asked Questions About Freddie Mac," available at: http://www.freddiemac.com/corporate/company_profile/faqs.

various assignments of the mortgage raises an issue only as to the voidability of the agreement, as it is clear that Plaintiffs are only challenging the authority of the parties to assign the mortgage.

A lack of contracting authority will allow a party to the contract to void it, but does not render the agreement itself void *ab initio*, as the party also retains the option to ratify the contract. Id. (quoting Moura v. Mortg. Elec. Registration Sys., Inc., 90 A.3d 852, 857 (R.I. 2014)). Defendants therefore accurately characterize the issue: Plaintiffs do not have standing to challenge the assignments of the mortgage in this case. The defects Plaintiffs allege would result in the assignments being merely voidable, rather than void. Because the assignments are merely voidable, Plaintiffs do not have standing to challenge the assignments.

B

The Lack of a Written Assignment in the FDIC Receivership Transfer

The Mendozas further contend that the FDIC receivership sale of WaMu assets fails to conform to Rhode Island state law, rendering the transaction invalid. Defendants, however, correctly point out that FDIC receiverships are governed by federal law, which raises a question of preemption. When the FDIC acts as the receiver of a failed financial institution, it is empowered by federal law to "transfer any asset or liability of [the failed bank] . . . without any approval, assignment, or consent with respect to such transfer." Demelo v. U.S. Bank Nat'l Ass'n, 727 F.3d 117, 125 (1st Cir. 2013) (quoting 12 U.S.C. § 1821(d)(2)(G)(i)(II)).

The assignment of the mortgage from WaMu to Chase was therefore carried out "by operation of federal law, which specifically authorizes the FDIC to transfer assets of

a failed financial institution 'without . . . assignment.'" Id. (quoting 12 U.S.C. § 1821(d)(2)(G)(i)(II)). Such a transfer being "authorized by federal law, obviates [what] . . . state law would otherwise require." Id. To enforce a state law setting any conditions or requirements upon the validity of mortgage assignments in the face of this clear provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) would "turn the Supremacy Clause upside down." Id. (internal citation omitted).

C

The Motion to Amend

Plaintiffs have failed to establish any grounds that would invalidate the foreclosure or prevent Defendants from being entitled to judgment as a matter of law. A review of the documentary evidence and affidavit submitted by Defendants makes it clear that they have complied with all relevant statutes pertaining to notice and foreclosure. In a final effort to defeat summary judgment, Plaintiffs seek to amend their Complaint for the purpose of conducting additional discovery.

The basis for Plaintiffs' motion to amend is a new assertion that "[p]rior to January 24, 2006, the Mendoza Note was endorsed in blank and delivered to Federal Home Loan Mortgage Corporation (Freddy Mac) or maintained by WaMu on Freddie Mac's behalf as Document Custodian." Mot. to Amend, 1. The original note is endorsed over to WaMu and was purchased, along with WaMu's other assets, by Chase from the FDIC receiver. It is unclear why Plaintiffs seek to join Freddie Mac as a defendant in this case, given that there is no indication it ever played any role beyond funding the initial loan. This role simply does not make it the lender. The original mortgagee remains New

England Regional Mortgage, and it maintained that status until the endorsement of the note over to WaMu and the subsequent receivership sale to Chase.

More importantly though, even if the motion to amend is allowed and Freddie Mac is brought into the case, the only issue Plaintiffs' motion to amend raises is that "Chase did not have specific authority from note-holder Freddie Mac to give notice of default, send and publish notice of mortgagee's foreclosure sale, nor did Chase have specific authority from Freddie Mac to conduct the foreclosure sale or make conveyance by foreclosure deed." Mot. to Amend, 2. This is simply a restatement of the arguments previously advanced and rejected *supra*.

Even if Freddie Mac held or now holds the note and Chase is but a mere agent, the question of the authority between the two is one for Freddie Mac and Chase to litigate, not an issue that may be litigated between the Mendozas and Chase. Plaintiffs have no standing to challenge the assignment of the note, mortgage, or any other contractual rights between a defendant and a third-party with whom they are not in privity. Cruz, 108 A.3 at 996. The substance of the proposed motion to amend is futile; the motion to amend is therefore denied. See Medeiros v. Cornwall, 911 A.2d 251, 254 (R.I. 2006); Super. R. Civ. P. 15(a).

IV

Conclusion

In a motion for summary judgment, once the moving party has established grounds for summary judgment, "'the opposing party, who counters that there is a material factual dispute, . . . must set forth specific facts that would constitute a genuine issue for resolution at trial.'" McGovern v. Bank of Am., N.A., 91 A.3d 853, 858 (R.I.

2014) (quoting Riel v. Harleysville Worcester Ins. Co., 45 A.3d 561, 570 (R.I. 2012)). Plaintiffs have failed to do so. Conversely, Defendants have provided an uncontested copy of the mortgage deed, as well as copies of relevant assignments, and an affidavit attesting to the material facts. As Plaintiffs have submitted no affidavits or other documentary evidence into the record, this Court must find that there exists no genuine dispute as to any material fact. For the foregoing reasons, judgment as a matter of law is appropriate on those undisputed facts. The Defendants' motion for summary judgment is granted.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Mendoza v. Mortgage Electronic Registration Systems, Inc., et al.**
CASE NO:	**PC-2011-2547**
COURT:	**Providence County Superior Court (Transferred to Kent County Superior Court)**
DATE DECISION FILED:	**August 1, 2016**
JUSTICE/MAGISTRATE:	**Rubine, J.**
ATTORNEYS:	
For Plaintiff:	**George E. Babcock, Esq.**
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