IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING LP,	:	
	:	**C.A. No: K10L-11-105 RBY**
_____Plaintiff,	:	
	:	
v.	:	
	:	
KIRK D. ALBERTSON and EDWARD M. ALBERTSON,	:	
	:	
Defendants.	:	

Submitted: January 7, 2014
Decided: February 10, 2014

Upon Consideration of Plaintiff's Motion for Summary Judgment
GRANTED

Upon Consideration of Defendants' Motion for Summary Judgment
DENIED

ORDER

Lisa R. Hatfield, Esquire, Morris, Hardwick & Schneider, Newark, Delaware for Plaintiff.

Steven Schwartz, Esquire, Schwartz & Schwartz Attorneys at Law, Dover, Delaware for Defendants.

Young, J.

SUMMARY

BAC Home Loans Servicing, LP ("Plaintiff"), moves to enter an order granting Summary Judgment in favor of Plaintiff pursuant to Superior Court of Delaware Rule 56. Plaintiff seeks judgment against the subject property under a mortgage, and judicial sale for non-payment of that mortgage by Kirk D. Albertson and Edward M. Albertson ("Defendants"). Plaintiff argues that Defendants' responses in its Answer to Plaintiff's Complaint fail to develop a valid defense to non-payment of the mortgage, which leaves no issue of material fact to be decided.

Defendants' Motion for Summary Judgment focuses mainly on Defenses 1-5, 7 and 8, which were introduced in Defendants' Answer to Plaintiff's Complaint. Defense 6 has already been litigated in favor of the Plaintiff.[1] Defendants set forth the following defenses: 1) Plaintiff failed to meet conditions precedent to the lender's right to accelerate and foreclose in the "Notice of Intent to Accelerate" ("the Demand Letter") sent to Defendants; 2) Plaintiff fails to allege a valid assignment pursuant to 25 *Del. C. Section* 2109; and 3) Plaintiff failed to process a loan modification application in August, 2009.

However, Defendants do not have standing to challenge the validity of the assignment, because Defendants are not parties or third party beneficiaries to the contract between Plaintiff and Mortgage Electronic Registration Systems ("MERS"), the assignor. Therefore, Defendants' Motion for Summary Judgment is

[1] Defendant's Answer to Plaintiff's Complaint, p.3.

DENIED. The assignment was properly executed, granting Plaintiff the right to foreclose in 2009. Furthermore, the assignment meets the basic requirements for validity set forth under 25 *Del. C. Section* 2109. Thus, Plaintiff has a valid assignment to the mortgage, making it a proper party to bring this foreclosure action. Plaintiff's Motion for Summary Judgment is **GRANTED**.

FACTS AND PROCEDURAL POSTURE

On February 28, 2008, Kirk D. Albertson purchased a $200,000 Note from Quicken Loans Inc. On the same date, Kirk D. Albertson and his father, Edward M. Albertson received a $200,000 mortgage ("the Mortgage") from MERS as nominee for Quicken Loans, Inc. Allegedly, Edward M. Albertson did not receive any part of the loan proceeds, did not sign the Note, and was not liable on it. MERS assigned the Mortgage to Plaintiff on July 22, 2009. Mary Kist, purported Vice President of MERS, including two witnesses, signed the assignment.

When Kirk D. Albertson fell behind in his monthly mortgage loan payments, Edward M. Albertson made a payment on August 6, 2009 that brought the balance of the loan current. Allegedly, Edward M. Albertson made this payment on the basis that Plaintiff would process Kirk D. Albertson's application for modification of the loan to reduce the monthly payment. Subsequently, Defendants defaulted on the mortgage.

In 2010, Plaintiff brought the instant *in rem* foreclosure proceeding, seeking judgment against the Property and judicial sale for non-payment of the mortgage pursuant to the mortgage agreement on February 28, 2008. Paragraph 22 of the Mortgage requires a 30 day notice of default and notice to Defendants of the right

to assert defenses before initiation of the foreclosure proceeding. On September 20, 2010, Plaintiff mailed the Demand Letter to Defendants by first-class U.S. mail, notifying Defendants of Plaintiff's intent to accelerate the balance of the Mortgage.

On November 22, 2010, Plaintiff filed this foreclosure action on the Mortgage. Plaintiff sought judgment against the subject property of the Mortgage ("the Property") and judicial sale for Defendants' nonpayment of the mortgage pursuant to the mortgage agreement executed on February 28, 2008. Defendants were served personally with a copy of the Complaint on December 9, 2010. Defendants filed their Answer on June 4, 2012. Plaintiff filed a Superior Court Civil Rule 4(f)(4) Affidavit on March 21, 2011.

On December 13, 2013, Plaintiff filed a Motion for Summary Judgment, which included the Demand Letter sent to Defendants and the assignment, listed as Exhibits A and B respectively. On the same day, Defendants also filed a Motion for Summary Judgment along with a Brief In Support, which was accepted on December 16, 2013. Defendants filed a Response to Plaintiff's Motion on December 17, 2013.

On December 27, 2013, Plaintiff filed a Supplement to the Motion for Summary Judgment in order to file a missing exhibit that was referenced in the original motion but was not uploaded to "File & Serve". On December 31, 2013, Plaintiff filed a Memorandum of Law in Response to Defendants' Motion for Summary Judgment and In Support of Plaintiff's Motion for Summary Judgment. On January 29, 2014, Defendants filed an Amended Response to Plaintiff's

Motion for Summary Judgment.

STANDARD OF REVIEW

Pursuant to Superior Court Civil Rule 56, summary judgment is appropriate when there is no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. In ruling on a Motion for Summary Judgment, the Court must consider the facts in the light most favorable to the non-moving party.[2] The moving party bears the burden of showing that no genuine material of fact exists.[3] If, in a properly supported motion for summary judgment, the moving party shows that there is no genuine issue of material fact, then the burden shifts to the non-moving party to prove that there is a material issue of fact in dispute.[4] In order to carry its burden, the non-movant must produce specific facts, which would sustain a verdict in its favor.[5] The non-movant cannot create a genuine issue for trial through bare assertions or conclusory allegations.[6] In weighing a motion for summary judgment under this rule, the Court must examine the record, including pleadings, depositions, admissions, affidavits, answers to interrogatories, and any other product of discovery.[7]

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[2] *Schagrin v. Wilmington Medical Center, Del. Super.*, 304 A.2d 61 (1973).

[3] *Moore v. Sizemore, Del. Super.*, 405 A.2d 679 (1979).

[4] *Id*. at 681.

[5] *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986).

[6] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[7] *G.R. Sponaugle & Sons v. Mcknight Construction Co.*, Del. Super. Ct., 304 A.2d 339 (1973); *Oliver B. Cannon & Sons v. Door Oliver, Inc.*, Del. Super. Ct., 312 A.2d 322 (1973).

DISCUSSION

I. Plaintiff has met the notice requirements in compliance with the Mortgage.

Defenses 1, 2 and 7 of Defendants' Answer allege that Plaintiff fails to state a claim upon which relief may be granted. Defendants assert that the Plaintiff failed to meet conditions precedent to the lender's right to accelerate and foreclose in the Demand Letter sent to Defendants. Specifically, Defendants allege that Plaintiff failed to provide notice in accordance with paragraph 22 of the Mortgage, which requires a 30 day notice of default and notice to Defendants of the right to assert defenses before initiation of the foreclosure proceeding. On September 20, 2010, Plaintiff mailed the Demand Letter to Defendants by first-class U.S. mail. Paragraph 15 of the Mortgage provides that a notice sent by first class mail begins the tolling of the 30 day time period at the date of mailing. In this case, the letter was mailed on September 20, 2010, while the Complaint was not filed until November 22, 2010. Clearly, Plaintiff met the 30 day notice requirement in accordance with the Mortgage.

In the Demand Letter, Paragraph 5 states, "Further, you may have the right to bring a court action to assert the non-existence of a default or any other defense you may have to acceleration and foreclosure."[8] Plaintiff complied with the requirements of Paragraph 22 in the Mortgage by providing this information in the Demand Letter. Therefore, Plaintiff met its notice obligations to Defendants, and

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[8] (Exhibit A)

did not fail to state a claim upon which relief may be granted.

II. Plaintiff's assignment is valid, making Plaintiff a proper party to bring the foreclosure action.

Defenses 3, 4 and 5 of Defendants' Answer all relate to whether Plaintiff is a proper party in order to foreclose on the property. Defendants contend that Plaintiff has failed to allege any means by which Plaintiff acquired the lender's rights under the Mortgage. Furthermore, Defendants argue that Plaintiff fails to allege a valid assignment under 25 *Del. C. Section* 2109. Defendants contend that the only evidence of an assignment to Plaintiff is an assignment instrument which Plaintiff's then employee, Mary Kist, signed, acting in the capacity of MERS' Vice President. Defendants allege that Mary Kist was not Vice President of MERS when she signed the assignment, making the assignment false.

Defendants also assert that the assignment is false because it was assigned by MERS, which is purported to have engaged in routine deceptive trade practices. Defendants reference the Delaware Attorney General's Verified Complaint in the Delaware Court of Chancery case, *State of Delaware v. Merscorp, Inc. and Mortgage Electronic Registration Systems, Inc.*, C.A. 6987-CS, to demonstrate that Plaintiff's assignment is part of a larger, more extensive pattern of alleged deceptive trade practices by MERS. However, Delaware courts will not invalidate

a mortgage assignment merely because it is assigned by MERS.[9]

In the instant case, the assignment was properly executed, granting Plaintiff the right to foreclose in 2009. Under 25 *Del. C. Section* 2109, a valid assignment of mortgage is an instrument which is attested to by one credible witness. All assignments made in the presence of one witness are valid. In this case, two witnesses signed the assignment document. Therefore, the assignment meets the basic requirements set forth under 25 *Del. C. Section* 2109. Hence, Plaintiff is a proper party to bring the foreclosure action..

III. Defendants do not have standing to challenge the validity of the assignment, because Defendants are not parties to the assignment contract.

Plaintiff asserts that Defendants, as mortgagors, do not have standing to challenge a contract, because a mortgagor is not a party or a third party beneficiary. In *CitiMortgage, Inc. v. Bishop*, 2013 WL 1143670, at *4 (Del. Super. Ct. March 4, 2013), the Court held that, "a mortgage-debtor lacks standing to challenge the validity of the assignment." This holding is based on several recent

[9] *Id.*("Delaware courts have shown little appetite for invalidating mortgage assignments merely because they were assigned by MERS," citing *Savage v. U.S. Nat. Bank Ass'n*, 19 A.3d 302 (Del.2011)(upholding plaintiff's interest in defendant's mortgage acquired through an assignment from MERS.); *Citimortgage, Inc. v. Trader*, 2011 WL 3568180 (Del.Super. May 13, 2011)(finding plaintiff to be the proper party in interest after an assignment of a mortgage from MERS to plaintiff)).

federal decisions[10], and is also cited in *Branch Banking & Trust Co. v. Eid,* [11] which followed *Bishop*. Under Delaware contract law, a nonparty to a contract generally has no rights relating to it unless he or she is a third-party beneficiary to the contract. In order to qualify as a third-party beneficiary, a party must be an intended beneficiary. If a third-party happens to benefit from the performance of the contract indirectly, the third person has no rights under the contract.[12] This contract law principle is consistent with *Bishop's* statement that a debtor is not a party to a mortgage assignment, is not a third-party beneficiary to the assignment, and cannot show legal harm as a result of the assignment.[13]

In an Amended Response to Plaintiff's Motion for Summary Judgment, Defendants rely on the recent decision *Gunn v. United States Bank Nat'l Ass'n*, where the Delaware Supreme Court remanded the case to the trial court in order to permit the property owner to conduct discovery on the issue of the mortgage assignment's validity to the foreclosing plaintiff. Defendants argue that, since the

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[10] *In re: Romie David Bishop*, and *Shirley Ann Bishop*, Case No. 11-12338 (BLS) and *Bishops v. Argent Mortgage Company, LLC*, Adv. Pro. No. 11-53412 (BLS), at 3. See also *Blake v. Bank of America,* 845 F.Supp.2d 1206 (D. Alabama 2012); *In re Walker*, 466 B.R. 271, 285 (Bankr.E.D.Pa.2012); *In re Washington*, 469 B.R. 587, 591 (Bankr.W.D.Pa.2012); *Metcalf v. Deutsche Bank Nat. Trust Co.*, 2012 WL 2399369, at *5 (D. N.D. Tex. June 26, 2012); *In re Edwards*, 2011 WL 6754073, at *4 (Bankr.E.D. Wisconsin Dec. 23, 2011); See *Juarez v. U.S. Bank Nat. Ass'n*, 2011 WL 533046, at *4 (D.Mass. Nov. 4, 2011).

[11] 2013 WL 3353846, at *4 (Del. Super. Ct. June 13, 2013).

[12] 2013 WL 1143670, at *5.

[13] *Id*.

Gunn property owner had standing to challenge the validity of the mortgage assignment, Defendants have standing to do the same. However, *Gunn* is inapposite to the case at hand. In *Gunn*, the plaintiff sent a notice of intention to accelerate to the mortgage-debtors before the mortgage was ever assigned to the plaintiff.[14] In the instant case, the assignment was assigned to Plaintiff in 2009, and the Demand Letter was sent in 2010. Therefore, Plaintiff had a valid assignment before any notice of foreclosure was sent to the Defendants.

In addition, *Gunn* involved another purchase of the subject property by quitclaim deed from the borrowers by Gunn, a subsequent purchaser, who had no notice of the alleged mortgages or foreclosure actions on the property. Furthermore, the assignment to the plaintiff was not recorded with the Recorder of Deeds to place Gunn on notice of the ensuing foreclosure. In addition, the Delaware Supreme Court notes that Gunn was not a party entitled to conduct discovery regarding the assignment until the Superior Court granted his motion to intervene. The Court granted no such motion in the case at hand. Further, this case does not involve a subsequent purchase by quitclaim deed or a mortgage assignment that was not recorded by the Plaintiff.

The assignment here is a contract between MERS, the assignor, and Plaintiff, the assignee. Defendants are not parties to the assignment contract between MERS and Plaintiff, because Defendants merely benefitted from the assignment coincidentally once Defendants purchased the loan from Plaintiff. Thus, Defendants do not have standing to challenge the assignment of the

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[14] *Gunn*, at *3.

Mortgage to Plaintiff.

Finally, Defense 8 of Defendants' Answer alleges that Plaintiff failed to process a loan modification application in August, 2009. Plaintiff asserts that, even if there were some merit to this argument, this claim is not a valid defense in an *in Rem* proceeding. The Delaware Superior Court has held that defenses to an *in Rem* proceeding are limited to those that arise from the original mortgage transaction, which include payment, satisfaction, access of seal or plea in avoidance of the deed.[15] *Lasalle National Bank v. Ingram* does state that a plea in avoidance of the original mortgage transaction may actually include a challenge to the validity of an assignment.[16] However, as stated above, Defendants may only have standing to challenge this assignment if Defendants are parties to the assignment contract. Defendants, as mortgage-debtors, do not have standing to challenge the validity of the instant Mortgage assignment because Defendants merely benefitted from the assignment coincidentally. Defendants have raised no other genuine issues of material fact.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is **GRANTED**. Defendants' Motion for Summary Judgment is **DENIED**.

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[15] *Gordy v. Preform Building Components, Inc.* 310 A.2d 893 (1973).

[16] 2005 WL 1284049, at *1(Del. Super. Ct. May 19, 2005) (citing *Gordy*, 310 A.2d 893, 895-896).

IT IS SO ORDERED.

/s/ Robert B. Young
J.

RBY/lmc
oc: Prothonotary
cc: Counsel
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