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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2016-00858

RAELISA PALACIO and
PEDRO PALACIO,
Plaintiffs

vs.

HSBC BANK USA, N.A., As Indentured Trustee for the
Registered Note Holders of Renaissance Home Equity Loan Trust 2007-1,
Defendant

MEMORANDUM AND DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This case arises out of a December 2006 refinancing by plaintiffs in which they borrowed $423,000 (the "loan" or the "mortgage loan") from Fidelity Mortgage, a division of Delta Funding Corporation ("Fidelity").[1] The loan was secured by a mortgage (the "mortgage") on plaintiffs' home at 17 Chatham Street, Lynn, Massachusetts (the "property"). The refinancing apparently paid off an earlier mortgage loan from another funding source. The original mortgagee at the time of the refinancing was Mortgage Electronic Registration Systems, Inc. ("MERS"), as

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[1]The court finds this and the following facts to be undisputed and presented to the court in proper form, as required by Mass. R. Civ. P. 56(e). See Affidavit of Howard Handville, with attached exhibits. [D. 26.3].

nominee for Fidelity and its future successors and assigns. The mortgage loan was securitized in 2007, and the trust for note holders was created (the "trust" or the "defendant trust"). In 2009 MERS assigned the Mortgage to the trust. HSBC Bank USA, N. A. has been indenture trustee for the trust sine November 17, 2015. Former defendant Ocwen Loan Servicing, Inc. ("Ocwen") has been the servicer of the mortgage loan since 2007. Ocwen received the original note and mortgage from the trust on June 20, 2014, which appointed Ocwen as its attorney-in-fact at that time. On February 6, 2017, defendant trust's counsel (Ryan S. Moore, Esq.) received the original note and mortgage from Ocwen, and retains possession of the instruments to this date.

In August 2008, more than ten years ago, plaintiffs stopped making payments under the promissory note (the "note"). On June 24, 2014, four days after Ocwen received possession of the note and mortgage, Ocwen sent plaintiffs a notice of default, with notice of their right to cure their default within 150 days of the notice. See G. L. c. 244, § 35A. Eventually, a foreclosure sale of the property was scheduled for June 13, 2016. This action was commenced by plaintiffs, then represented by counsel, on June 8, 2016, in an effort to prevent foreclosure. Plaintiffs' request for a preliminary injunction was denied by the court for failure to demonstrate a likelihood of success on the merits. [D. 3; 6/13/16]. The foreclosure sale took place

as scheduled and the defendant trust purchased the property for $351,000. On August 31, 2016, an "*Eaton* affidavit" was executed by the defendant trust, and thereafter recorded on November 7, 2017. The affidavit asserts that as of the dates the notice of sale were mailed and published, up to and including the foreclosure sale on June 13, 2016, the defendant trust was the holder of the promissory note secured by the mortgage on the plaintiffs' property.

Plaintiffs remain occupants of the property to date, despite the foreclosure sale. They never recommenced payments on the note.

On September 19, 2017, the court (Karp, J.) dismissed Counts II, III, and IV of plaintiffs' complaint. [D. 17]. The only remaining claim in this case is Count I, a declaratory judgment action against the defendant trust (only). The plaintiffs in their complaint seek a declaration that the defendant trust does not have the statutory authority to have initiated foreclosure under the power of sale contained in the mortgage; that under their mortgage MERS does not meet the "post-*Eaton*" definition of the term "mortgagee" and cannot assign plaintiffs' mortgage at any time;[2] and that the purported assignment documents are legal nullities, causing them to be void and precluding the defendant trust from foreclosing under the power of sale contained in

[2]Under *Eaton v. Fed. Nat. Mortg. Ass'n*, 462 Mass. 569 (2012), it must be shown by the foreclosing party that the mortgagee held the promissory note, either directly or through its loan servicer, during the foreclosure process.

the mortgage.

Now before the court is the defendant trust's motion for summary judgment [D. 26], seeking judgment of dismissal of the remaining claim in the complaint (i.e., Count I). Plaintiffs, now representing themselves *pro se*, filed a written opposition with extensive documentation attached as exhibits. [D. 31]. Included in plaintiffs' affidavit is a request under Mass. R. Civ. P. 56(f) for a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had. A separate motion to strike the affidavit of the defendant trust's counsel is also before the court. [D. 31.3].

Plaintiffs' request under Rule 56(f) is denied. This case was commenced on June 13, 2016, more than twenty-eight months ago. Moreover, plaintiffs' claims of newly discovered evidence and a need for further discovery are not relevant to the declaratory judgment claims before the court. Plaintiffs' request for a continuance and more irrelevant discovery is simply an attempt by plaintiffs to delay this matter as long as possible, with the benefit to them of their continued occupancy of the property without its associated financing costs. Plaintiffs' motion to strike the affidavit of Ryan Moore is also denied. The affidavit is not irrelevant to the case at hand, and plaintiffs' claims of new evidence and requests for more discovery have been rejected by the court. A non-evidentiary hearing was held on October 25, 2018.

Both plaintiffs were present and Raelisa Palacio addressed the court. Pedro Palacio was given an opportunity to address the court, but declined. For reasons discussed below, the court **ALLOWS** the defendant trust's motion for summary judgment, finding that as a matter of law, the plaintiffs are not entitled to the declarations they seek.

DISCUSSION

1. Summary Judgment Legal Principles

A motion for summary judgment should be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c). The moving party, here the defendant trust, bears the burden of affirmatively demonstrating the absence of a triable issue and that the record entitles it to judgment as a matter of law. *Pederson* v. *Time, Inc.*, 404 Mass. 14, 16–17 (1989). "The court must view the evidence in the light most favorable to the party against whom summary judgment is sought and draw all reasonable inferences in [its] favor." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); see also *Sullivan* v. *Liberty Mutual Ins. Co.*, 444 Mass. 34, 38 (2000) (same).

A party who does not bear the burden of proof at trial, like the defendant trust, may satisfy this burden either by submitting affirmative evidence that negates an

essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner* v. *Technical Commc'ns Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 714 (1991). Here, the defendant trust contends that undisputed facts preclude the requested declarations the plaintiffs seek.

Once the moving party "establishes the absence of a triable issue, the party opposing the motion (here, the plaintiffs) must respond and allege specific facts which would establish the existence of a genuine issue of material fact." *Pederson*, 404 Mass. at 17. "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248. "Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The nonmoving party cannot defeat a motion for summary judgment by resting on the pleadings and mere assertions of disputed facts. *LaLonde* v. *Eissner*, 405 Mass. 207, 209 (1989).

Here, plaintiffs raise no disputed facts that would preclude entry of judgment as a matter of law in favor of the defendant trust. The claimed disputed facts proffered by plaintiffs are simply not relevant to their requested declarations, and do not preclude entry of judgment of dismissal in favor of the defendant trust.

In deciding motions for summary judgment, the court may consider pleadings, deposition transcripts, answers to interrogatories, admissions on file, and affidavits. Mass. R. Civ. P. 56(c). "[A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Mass. R. Civ. P. 56(e); see also *Madsen* v. *Irwin*, 395 Mass. 715, 719 (1985) ("The requirements of Rule 56(e) are mandatory."). The court reviews the evidence in the light most favorable to the nonmoving party, but does not weigh evidence, assess credibility, or find facts. *Attorney Gen.* v. *Bailey*, 386 Mass. 367, 370–371 (1982).

2. Analysis

Little discussion is required as the actual issues to be decided by the court are simple and straightforward. The court agrees with the defendant trust that undisputed facts, and established case law, preclude plaintiffs as a matter of law from obtaining the declarations they seek. The mortgage loan was securitized and an interest transferred to the trust more than six months before Fidelity entered bankruptcy

proceedings on December 17, 2007. Because the mortgage loan was securitized on March 29, 2007, the bankruptcy has no impact on the mortgage loan or the trust. Plaintiffs' contention that MERS did not have the power to assign the mortgage loan has been rejected by other courts, and is rejected by this court. The court also agrees with the defendant trust that the requirements of *Eaton*, 462 Mass. at 589, n.28, are met by the affidavit recorded on November 7, 2017.[3]

Plaintiffs have presented in proper form no genuine disputes of material facts that preclude entry of judgment of dismissal in favor of the defendant trust as a matter of law. Plaintiffs' focus at the hearing was their claim that the refinancing by Fidelity in 2006 did not pay off the prior mortgage loan on the property. They allege some kind of theft or fraud whereby Fidelity pocketed the $423,000 proceeds of the promissory note. Given that plaintiffs concede that they did not continue to pay on their earlier financing obligations and their earlier lender never sought or demanded any payments, never gave notice of a default, and never initiated foreclose proceedings, the court finds that their wildly speculative allegations are misplaced and do not create a genuine dispute of facts relating to the documented and confirmed

[3]The *Eaton* case was decided on June 22, 2012, more than two years before notice of default was sent to plaintiffs under G. L. c. 244, § 35A. It would be surprising indeed if two years after *Eaton*, the defendant trust did not comply with its requirements in attempting to foreclose on plaintiffs' property.

facts that control the defendant trust's motion for summary judgment.

ORDER

Plaintiffs are not entitled to the declarations they seek in Count I of the complaint. Defendant trust's motion for summary judgment is **ALLOWED**. Judgment of dismissal shall enter accordingly. Both parties to bear their own costs.

Timothy Q. Feeley
Associate Justice of the Superior Court

October 29, 2018