SUPREME COURT OF RHODE ISLAND

Thomas H. McGovern, III v. Bank of America, N.A. et al.

91 A.3d 853 (R.I. 2014) · No. No. 2013-184-Appeal (KC 10-1681) · Decided June 9, 2014

SUMMARY

The Rhode Island Supreme Court affirmed summary judgment upholding a foreclosure sale involving Thomas H. McGovern, III and Bank of America, N.A. The court held that the plaintiff failed to present competent evidence creating a genuine issue concerning loan default or Bank of America's possession of the note, and that statutory notice requirements for the adjourned foreclosure sale were satisfied. The court also held that an unauthenticated letter concerning ownership of the note could not be considered for summary-judgment purposes.

CASE DETAILS

COURT	Supreme Court of Rhode Island
WRITING FOR THE COURT	Associate Justice Gilbert V. Indeglia; Chief Justice Suttell; Justice Goldberg; Justice Flaherty; Justice Robinson; Justice Indeglia
JURISDICTION	Rhode Island
DECIDED	June 9, 2014
DOCKET	No. 2013-184-Appeal (KC 10-1681)
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiff appealed from the Kent County Superior Court's grant of summary judgment for the defendants, which declared the foreclosure sale valid and discharged the notice of lis pendens.
STANDARD OF REVIEW	The Supreme Court reviewed the grant of summary judgment de novo, applying the same standards and rules as the Superior Court. Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.
PRECEDENTIAL VALUE	Published Rhode Island Supreme Court opinion; precedential
PARTIES	Thomas H. McGovern, III v. Bank of America, N.A., BAC Home Loans, Federal Home Loan Mortgage Corporation, Celtic Roman Group, LLC

TOPICS

summary judgment · foreclosure · mortgages · evidence · appellate procedure

PRACTICE AREAS

real estate · civil procedure · appellate procedure · evidence

QUESTIONS PRESENTED

1. Whether summary judgment was proper on the issue of McGovern's alleged default when defendants submitted affidavits and payment records and McGovern offered only a conclusory allegation that the loan was not in arrears.
2. Whether the adjourned foreclosure sale was properly noticed under Rhode Island's statutory power-of-sale provisions.
3. Whether McGovern submitted competent, authenticated evidence creating a genuine issue of material fact about whether Bank of America held the note at the time of foreclosure.

HOLDINGS

1. Once the moving party establishes grounds for summary judgment, the nonmoving party must present competent evidence establishing a genuine issue of material fact. McGovern's conclusory statement that the mortgage was not in arrears was insufficient to rebut defendants' affidavit and payment-history evidence of default.
2. A mortgagee exercising the statutory power of sale may adjourn the foreclosure sale if publication of the notice and notice of the adjournment continue at least once each week and the adjourned sale occurs during the same calendar week as the last publication, at least one day after that publication. The foreclosure sale here satisfied those requirements.
3. An unauthenticated letter is not competent evidence sufficient to create a genuine issue of material fact on summary judgment. Because McGovern failed to authenticate the letter stating that FHLMC owned the note, he failed to counter Bank of America's evidence that it held the note at foreclosure.

KEY QUOTATIONS

> *"If we conclude, after viewing the evidence in the light most favorable to the nonmoving party, that there is no genuine issue of material fact to be decided and that the moving party is entitled to judgment as a matter of law, we will affirm the grant of summary judgment."* (at -6-)

> *"The plaintiff is therefore correct that "[t]he moving party bears the initial burden of establishing the absence of a genuine issue of fact.""* (at -7-)

> *"The plaintiff's subjective lack of awareness of the continued publication of these advertisements is irrelevant."* (at -8-)

> *"We therefore conclude that plaintiff failed to submit any competent evidence to counter Bank of America's evidence that it held the note at the time of foreclosure."* (at -11-)

FACTUAL BACKGROUND

On August 7, 2001, Thomas H. McGovern, III and his wife executed an adjustable-rate note for $180,000 and a mortgage securing the loan, designating Bank of America as lender and mortgagee with statutory power of sale. Bank of America notified McGovern of a foreclosure sale scheduled for April 21, 2010; the sale was postponed several times while McGovern pursued assistance under HAMP and ultimately occurred on July 27, 2010, with Celtic Roman Group, LLC making the successful bid. Bank of America submitted affidavits and payment records showing that it held the note and mortgage and that McGovern was in arrears, while McGovern relied primarily on an unauthenticated letter stating that FHLMC owned the note.

PROCEDURAL HISTORY

Bank of America foreclosed on the plaintiff's property after repeated postponements of the sale. The plaintiff filed a verified complaint seeking to invalidate the foreclosure sale and vest title in him. After Celtic Roman Group, LLC intervened, the defendants moved for summary judgment. The Superior Court granted the motion, entered judgment declaring the foreclosure sale valid, and discharged the lis pendens. The Rhode Island Supreme Court affirmed.

DISPOSITION

affirmed

REMAND INSTRUCTIONS

The record was remanded to the Kent County Superior Court. No substantive remand instructions were stated.

CASES CITED

- Sisto v. American Condominium Association, Inc., 68 A.3d 603, 611 (R.I. 2013)
- Empire Fire and Marine Insurance Cos. v. Citizens Insurance Co. of America/Hanover Insurance, 43 A.3d 56, 59 (R.I. 2012)
- Generation Realty, LLC v. Catanzaro, 21 A.3d 253, 258 (R.I. 2011)
- Pereira v. Fitzgerald, 21 A.3d 369, 372 (R.I. 2011)
- Lacey v. Reitsma, 899 A.2d 455, 457 (R.I. 2006)
- Riel v. Harleysville Worcester Insurance Co., 45 A.3d 561, 570 (R.I. 2012)
- Salisbury v. Stone, 518 A.2d 1355, 1358 (R.I. 1986)
- Plainfield Pike Gas & Convenience, LLC v. 1889 Plainfield Pike Realty Corp., 994 A.2d 54, 57 (R.I. 2010)
- D’Allesandro v. Tarro, 842 A.2d 1063, 1065 (R.I. 2004)
- Ryan v. Roman Catholic Bishop of Providence, 941 A.2d 174, 185 (R.I. 2008)
- Superior Boiler Works, Inc. v. R.J. Sanders, Inc., 711 A.2d 628, 632 n.3 (R.I. 1998)
- Rhode Island Managed Eye Care, Inc. v. Blue Cross & Blue Shield of Rhode Island, 996 A.2d 684, 691 (R.I. 2010)
- Levine v. Bess Eaton Donut Flour Co., Inc., 705 A.2d 980, 984 (R.I. 1998)
- Gross v. State, Division of Taxation, 659 A.2d 670, 672 (R.I. 1995)