IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

CLETE PAVONE,

Plaintiff,

v. **Civil Action No. 19-C-110**

NPML MORTGAGE ACQUISITIONS, LLC,
a foreign corporation,

Defendant.

ORDER GRANTING DEFENDANT NPML MORTGAGE ACQUISITIONS, LLC SUMMARY JUDGMENT AND ORDER DENYING PLAINTIFF CLETE PAVONE SUMMARY JUDGMENT

On September 9, 2020, came the Plaintiff, Clete Pavone, by and through counsel, Edmund J. Rollo, and the Defendant, NPML Mortgage Acquisitions, LLC, by and through its counsel, Buddy Turner, Esq., and the law firm of Gaydos & Turner, PLLC, for a hearing on Plaintiff's prior noticed "*Motion for Summary Judgment On Counts One Through Four.*"

Arguments both in support and opposing the motion were heard upon the record. Having heard the arguments from both parties and having reviewed all filings, the Court ruled upon the motion for summary judgment.

Whereupon the Court, having considered the arguments of counsel, is of the opinion and does hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Patrick Russell purchased property in Granville by deed dated June 25, 199.

2. About six months later on December 20, 1999, Mr. Russell obtained a $20,000 loan from Equity South Mortgage.

3. The Equity South Mortgage was recorded in the Office of the Clerk of the County Commission of Monongalia County, West Virginia in Trust Deed Book 963, at page 690 that encumbers the real property at issue in this action. (hereinafter, "Russell DOT").

4. Plaintiff Clete Pavone purchase the real estate located at 320 Price Street, Granville, West Virginia on October 21, 2018.

5. The Russell DOT was duly recorded on or about December 29, 1999.

6. The Russell DOT has never been released.

7. The Russell DOT has been assigned to Defendant NPML.

8. The assignments to Defendant NPML are recorded in the Office of the Clerk of the County Commission of Monongalia County, West Virginia in the proper order as follows:

- By Deed of Trust dated December 20, 1999, of record in the Office of the Clerk of the County Commission of Monongalia County in Trust Deed Book 963, at page 690, Patrick Russell, a single man, conveyed to Peter D. Dinardi, trustee, for the benefit of Equity South Mortgage LLC, certain real estate described therein and situate at 320 Price Street, Granville, West Virginia 26505 to secure the sum of $20,000.00 ("Russell DOT").

- By Assignment dated January 16, 2000, recorded on February 7, 2019 in said Clerk's office in Assignment Book 139, at page 340, Equity South Mortgage LLC assigned to EFC Mortgage Corp. all beneficial interest in the Russell DOT.

- By Assignment dated January 7, 2000, recorded on February 11, 2019 in said Clerk's office in Assignment Book 139, at page 351, EFC Mortgage Corp. assigned to Life Bank all beneficial interest in the Russell DOT.

- By Assignment dated August 15, 2005, recorded on February 12, 2019 in said Clerk's office in Assignment Book 139, at page 360, Life Bank assigned to Franklin Credit Management Corporation all beneficial interest in the Russell DOT.

- By Assignment dated February 4, 2009, recorded on February 13, 2019 in said Clerk's office in Assignment Book 139, at page 361, Franklin Credit Management Corporation assigned to Deutsche Bank National Trust Company, as Trustee for Franklin Credit Trust Series I all beneficial interest

in the Russell DOT.

- By Assignment dated January 30, 2019, recorded on February 14, 2019 in said Clerk's office in Assignment Book 139, at page 376, Deutsche Bank National Trust Company, as Trustee for Franklin Credit Trust Series I assigned to NPML Mortgage Acquisition LLC all beneficial interest in the Russell DOT.

9. The Complaint in this matter was filed on April 26, 2019. An Amended Complaint was filed on or about November 19, 2019.

10. On May 1, 2020, Plaintiff filed a motion for summary judgment entitled "*Plaintiff's Motion for Summary Judgment.*"

11. On May 8, 2020, Defendant filed a response to Plaintiff's motion for summary judgment and cross-motion for summary judgment entitled "*Opposition to Plaintiff's Motion for Summary Judgment on Behalf of Defendant NPML Mortgage Acquisition LLC and Cross-Motion for Summary Judgment on Behalf of Defendant NPML Mortgage Acquisition LLC*".

12. On September 7, 2029, Plaintiff filed "*Plaintiff's Response to Cross-Motion for Summary Judgment on Behalf of Defendant NPML Mortgage Acquisition LLC*".

CONCLUSIONS OF LAW

1. Under Rule 56 of the West Virginia Rules of Civil Procedure, a party is entitled to summary judgment:

> . . . if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.

W. Va. R. Civ. P. 56(c) (2015).

2. For the purposes of deciding a motion for summary judgment, all facts and inferences of evidence must be viewed in the light most favorable to the nonmoving party. *Cavender v. Fouty*, 195 W.Va. 94, 464 S.E.2d 736 (1995).

3. The party who moves for summary judgment has the burden of establishing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for the purpose of such judgment. *Aetna Casualty and Surety Company v. Federated Insurance Company of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

4. If there are disputed material facts, summary judgment should be denied. The United States Supreme Court has defined materiality as:

> Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted . . .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

5. Summary judgment is only appropriate after adequate time and discovery and if the record contains no evidence concerning an essential element of a nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *See also Williams v. Precision Coil*, 194 W.Va. 52, 459 S.E.2d 329 (1995); Crain v. Lightner, 178 W.Va. 765, 364 S.E.2d 778 (1987); *Lowery v. Raptis*, 174 W.Va. 736, 329 S.E.2d 102 (1985).

6. In assessing the factual record, trial courts must "grant the nonmoving party the benefit of inferences, as [c]redibility determinations . . . are jury functions, not those of a judge." Williams v. Precision Coil, Inc., 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Further, "when a party can show that demeanor evidence legally could affect the result, summary judgment should be denied." *Williams*, 194 W.Va. at 59, 459 S.E.2d at 336. While it is true that "the party opposing summary judgment must satisfy the burden of proof by offering more than a mere scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor" 194 W.Va. at 60, 459 S.E.2d at 337, *citing Anderson*, 477 U.S. at 252 "[i]n cases of substantial doubt, the safer course of action

is to deny the motion and to proceed to trial." 194 W.Va. at 59, 459 S.E.2d at 336.Summary judgment is appropriate when "the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party cannot prevail under any circumstances." *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W. Va. 160, 171, 133 S.E.2d 770, 777 (1963).

7. Once a moving party has shown that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party to either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary. *Stonewall Jackson Memorial Hosp. Co. v. American United Life Ins. Co.*, 206 W. Va. 458, 466, 525 S.E.2d 649, 657 (1999). To meet this burden, the nonmoving party on a motion for summary judgment must offer more than a mere scintilla of evidence, and must produce evidence sufficient for a reasonable jury to find in a non-moving party's favor. *See Chafin v. Gibson*, 213 W. Va. 167, 171, 578 S.E.2d 361, 365 (2003); *Painter v. Peavy*, 192 W. Va. 189, 192-93, 451 S.E.2d 755, 758-59 (1994) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986)). The evidence illustrating the factual controversy which would preclude summary judgment cannot be conjectural or problematic or speculative. *See Belcher v. Wal-Mart Stores, Inc.*, 211 W. Va. 712, 721, 568 S.E.2d 19, 28 (2002).

8. Further, "when it is found from the pleadings, depositions and admissions on file, and the affidavits of any party, in a summary judgment proceeding under Rule 56 of the West Virginia Rules of Civil Procedure, that a party who has moved for summary judgment in his favor is not entitled to such judgment and that there is no genuine issue as to any material fact, a summary judgment may be rendered against such party in such proceeding." Syl. pt. 6, *Employers' Liab. Assurance Corp. v. Hartford Accident & Indem. Co.*, 151 W. Va. 1062, 158 S.E.2d 212 (1967).

9. Plaintiff argues that because the initial holder, Equity South Mortgage, assigned its interest in the deed of trust to EFC Mortgage Corporation by Assignment dated January 16, 2000, and EFC Mortgage Corporation assigned its interest in the deed of trust to Life Bank by Assignment dated January 7, 2000 – 9 days earlier, the whole assignment chain is invalid and NPML is not entitle to foreclose under the DOT.

10. Initially, the West Virginia Supreme Court of Appeals examined whether assignments must be recorded in the respective County Clerk's office where the encumbered real estate is situate in *State ex rel. U. S. Bank Nat'l Ass'n v. McGraw*, 234 W. Va. 687, 769 S.E.2d 476 (2015). The *McGraw* court held,

> The import of those statutes is that a party assigning a trust deed or mortgage, or receiving an assignment, is under no statutory duty to record the assignment in the office of the county clerk. Recording a trust deed assignment is not mandatory. The assignment is valid among the parties thereto, without any failure of the security, represented by the underlying trust deed or mortgage, for payment of the promissory note.

McGraw, 234 W. Va. at 693, 769 S.E.2d at 482. *See also* 55 Am. Jur. 2d Mortgages § 924 (2009) ("The assignment of a note and mortgage does not need to be recorded to be valid.").

11. The West Virginia Supreme Court also recognized that in preparation for a foreclosure an assignment would be recorded "from MERS to the trust that allegedly holds the accompanying note and that seeks to commence foreclosure proceedings." *McGraw*, 234 W. Va. at 690 n.5, 769 S.E.2d at 479.

12. As such, under West Virginia law, to foreclose under a deed of trust, all that is necessary is that the foreclosing party produce and record assignments showing that the foreclosing party is the proper party to foreclose. *See also Bambas v. CitiMortgage, Inc.*, 577 Fed. Appx. 461, 468 (6th Cir. 2014) ("There appears to be no compelling reason to require that the recordings be

chronological before the foreclosure can proceed, as long as the chain is complete and the rightful holder of the mortgage can be discerned from the public record.").

13. In this case, the assignments from Equity South Mortgage to NPML are of record and recorded. Defendant is the proper party to foreclose on the default of the Russell DOT.

14. As such, based upon everything presented, and finding it proper to do so, the Court FINDS that there is no genuine issue of material fact and that summary judgment for the Plaintiff is DENIED and that summary judgment is GRANTED to the Defendant.

15. Even if the assignments were not chronologically recorded, the doctrine of after acquired title cues any purported error in the assignment dates between Equity South Mortgage, EFC Mortgage Corporation and Life Bank.

16. "The after-acquired title doctrine states that title acquired by a grantor, who previously attempted to convey title to land which the grantor did not in fact own, inures automatically to the benefit of prior grantees." 9 *Thompson on Real Property*, Thomas Editions § 82.11 (2020).

17. Thus, in this case, paraphrasing the *Thompson* quotation above, the after-acquired doctrine states that the January 16, 2000 assignment from Equity South to EFC Mortgage Corporation, who previously attempted to assign the beneficial interest in the Russell DOT to Life Bank which EFC Mortgage Corporation did not in fact own, inures automatically to the benefit of Life Bank.

18. Being the majority rule, *see Miller-Long v. John Hanson Sav. & Loan, Inc.*, 676 F. Supp. 298, 300 (D.D.C. 1987) ("[t]his rule, followed in a majority of jurisdictions"), West Virginia has long recognized the doctrine. *See, e.g.*, *Summerfield v. White*, 54 W. Va. 311, 318, 46 S.E. 154, 157 (1903) ("Such after acquired title enures to the benefit of the grantee and passes to him.").

19. At least two courts have dealt with this issue and found that assignments out of date are subject to the after-acquired title doctrine and foreclosure was appropriate.

20. In *Shepard v. CitiMortgage, Inc.*, No. 4:12CV00129 ERW, 2012 U.S. Dist. LEXIS 84054, (E.D. Mo. June 18, 2012), the United States District Court for the Eastern District of Missouri examined a chain of assignments that was similar to the one at issue in this case. The facts of Shepard are that the homeowners

> purchased property located at 2340 Windsor Drive in Florissant, Missouri ("the Property"). Plaintiffs obtained financing to purchase the Property through Equifirst Corporation ("Equifirst"), executing a Note secured by a Deed of Trust ("DOT"). The DOT, which was recorded with the St. Louis Recorder of Deeds, appointed Integrity Land Title Company ("Integrity Land Title") as Trustee. On August 31, 2010, CitiMortgage appointed the Millsap & Singer, P.C. ("Millsap & Singer") law firm as Successor Trustee to Integrity Land Title under the DOT. On May 6, 2011, Mortgage Electronic Registration System, Inc. ("MERS"), as nominee of Equifirst under the DOT, assigned the DOT to CitiMortgage.

Id. at *1-2. Thus, the successor trustee was appointed by the assignee a year prior to the assignee being appointed.

21. In finding that the doctrine of after-acquired title vested title in the successor trustee one year after it was appointed the Missouri court wrote,

> Plaintiffs base their lack-of-standing and lack-of-authority arguments on the timing of the appointment of the trustee, the assignment of the DOT, and the endorsement of the Note. However, under Missouri's after-acquired title doctrine, title immediately vested in CitiMortgage's appointed Successor Trustee, Millsap & Singer, when MERS assigned the DOT to CitiMortgage on May 6, 2011.

Id. at *9.

22. Similarly, the Sixth Circuit examined a fact pattern similar to the facts at issue in this case when one link was recorded (not merely executed like in our case) after a predecessor link. *See Bambas v. CitiMortgage, Inc.*, 577 Fed. Appx. 461 (6th Cir 2014). In *Bambas*, the homeowner acquired a house in 1993 and a deed of trust to Gehrke Mortgage Corporation was filed in the

Livingston County Register of Deeds. *Id.* at 463.

> A review of all of the exhibits presented by the parties establishes a record chain of title constituted by the following duly recorded assignments: Gehrke to Marathon Mortgage Corporation, recorded on November 5, 1993; Marathon to Union Federal Savings Bank of Indianapolis, recorded on March 15, 1995; Union Federal to Waterfield Mortgage Company, Inc., recorded on October 7, 1999; Waterfield to Union Federal, recorded on December 12, 2003; Waterfield to Mortgage Electronic Registration Systems, Inc., (MERS), as nominee for CitiMortgage, recorded on August 15, 2006; MERS to CitiMortgage, recorded on July 28, 2008; and finally, the Hunting National Bank, successor through Sky Bank to Union Federal Bank, to Waterfield, recorded on September 2, 2008. The most salient quirk in this record chain of title is that the link in the chain between Union Federal and Waterfield was recorded after both the Waterfield-MERS and MERS-CitiMortgage assignments.

Id. at 463-64.

23. Like this case, the *Bambas* plaintiff argued that the mortgage was held by someone else and that the assignment was erroneous as one of the assignor's had no interest in the mortgage at the time of the assignment. *Id.* at 466 (arguing "Waterfield had no interest in the mortgage, because its interest in the mortgage must have been held by either Fannie Mae or Union Federal Bank, to which Waterfield had already made separate assignments."). Rejecting this argument, the Sixth Circuit wrote, "[a]s inexplicable as this set of assignments is, all that matters for purposes of Bambas's challenge to the foreclosure sale is whether there is a 'record chain of title,'. *Id.* Since record chain of title existed in Bambas and exists in this case, foreclosure was appropriate. *Id.*

24. Specifically, as to the doctrine of after-acquired title doctrine, the Sixth Circuit held that the doctrine applied to mortgage assignments writing,

> The late assignment and recordation that purported to retroactively fix the missing link in the "record chain of title," *see* Mich. Comp. Laws § 600.3204(3), appear to be valid under Michigan's after-acquired title doctrine. Although we have found no Michigan case law applying that doctrine to mortgages, there are sound reasons why Michigan would extend the doctrine, typically applied to fee titles, to mortgages.
>
> > The after-acquired title doctrine in Michigan is clear and straightforward, at least as typically applied to titles in real property:

> Under the doctrine of after-acquired title, if a grantor by warranty deed conveys an estate that the grantor does not own and subsequently acquires title to that estate, that title inures to the benefit of his or her grantee. This is a form of estoppel, and the grantor is estopped to deny the title the grantor subsequently acquired.
>
> *Richards v. Tibaldi*, 272 Mich. App. 522, 726 N.W.2d 770, 781 (Mich. Ct. App. 2006) (quoting 1 John G. Cameron, Jr., *Michigan Real Property Law* § 10.24, at 366 (3d ed. 2005)). Contrary to Bambas's argument, *Richards v. Tibaldi* actually supports applying the doctrine to mortgages. In *Richards*, the Michigan Court of Appeals held that "quitclaim deeds can never operate to convey an after-acquired title," because such deeds "d[o] not contain any express or implicit statement that the grantors were seised of a title in fee, or, stated otherwise, that the grantors warranted title." *Id.* at 782. *See also* Mich. Comp. Laws § 565.3 (regarding quitclaim deeds); *see also Ziegler v. Simmons*, 353 Mich. 432, 91 N.W.2d 819, 822 (Mich. 1958) (same). Under Mich. Comp. Laws § 565.152, which formalizes the requirements of quitclaim deeds, a quitclaim deed must announce itself as such, effectively denying that there is any warranty. In contrast to an avowed denial, an "express or implicit statement" that the grantor has title is sufficient to pass after-acquired title. *Richards*, 726 N.W.2d at 782 (emphasis added). Indeed, some older Michigan Supreme Court cases have held that the doctrine of after-acquired title applies to non-quitclaim deeds that lack an explicit covenant of warranty. *Klever v. Klever*, 333 Mich. 179, 52 N.W.2d 653, 659-60 (Mich. 1952) (citing *Pendill v. Marquette Cnty. Agric. Soc'y*, 95 Mich. 491, 55 N.W. 384, 385 (Mich. 1893)); *see also Richards*, 726 N.W.2d at 781-82. There being no quitclaim-like denial of warranty in the mortgage assignments in this case, the after-acquired title doctrine applies.
>
> Consistent with the principles of estoppel, this rule protects the interests of the parties who in good faith paid valuable consideration for the assignment of the mortgage. All that Michigan law necessarily requires with respect to the "record chain of title" is that all interim assignments be recorded prior to the date of sale. *Kim v. JPMorgan Chase, N.A.*, 493 Mich. 98, 825 N.W.2d 329, 332 (Mich. 2012); *see also Sobh v. Bank of Am., NA*, No. 308441, 2013 Mich. App. LEXIS 993, 2013 WL 2460022, at *3 (Mich. Ct. App. June 6, 2013). The record-chain-of-title requirement serves as an assurance that the foreclosing party rightfully holds the mortgage. ***There appears to be no compelling reason to require that the recordings be chronological before the foreclosure can proceed, as long as the chain is complete and the rightful holder of the mortgage can be discerned from the public record.***

Bambas, 577 F. App'x 461 at 466-68. In short, the after-acquired title doctrine cures irregularities such as the one at issue in this case when the chain of title is clearly intended.

25. Moreover, title standards published by various states recognize that anomalies such as errors in dates, amounts, books, pages, etc., are insufficient to void the assignment. *See New Hampshire Bar Association Title Examination Standards* at p. 28 (2016) ("An instrument is sufficient as an assignment, discharge or partial discharge of a mortgage notwithstanding errors in dates, amounts, book and page of record, property descriptions, names and positions of parties, if, from circumstances of record, it can be inferred with reasonable certainty that assignment or discharge was intended."); *Mississippi Title Examination Standards* at pp. 17-4 to 17-5 (First. Ed. 2019) ("An instrument is sufficient as an assignment or release, notwithstanding typographical or other minor errors in dates, amounts, book and page or instrument number of record, or the names and positions of parties, if said assignments or releases give enough correct data to identify the instruments being assigned or released with reasonable certainty.").

26. Nowhere in any of the documents filed does the Plaintiff allege that the real estate is not encumbered by a valid existing deed of trust.

27. Instead, Plaintiff recognizes that the deed of trust is valid but mistakenly believes it is held by EFC Mortgage in Plaintiff's Motion for Summary Judgment writing, "EFC Mortgage continues to hold the deed of trust." Plaintiff's MSJ at p. 4.

28. This assertion is erroneous. Under the after-acquired title doctrine, EFC Mortgage is estopped from claiming ownership in the Russell DOT.

29. As a matter of law, upon execution of the January 16, 2000 Assignment from Equity South to EFC Mortgage, Life Bank was the beneficial owner of the Russell DOT as a matter of law.

30. Subsequent recorded assignments reveal that the present beneficial owner of the Russell DOT is Defendant NPML.

31. Based upon everything presented and finding it proper to do so, the Court FINDS that there is no genuine issue of material fact and that the Defendant is entitled to summary judgment as a matter of law.

32. As such, based upon everything presented, and finding it proper to do so, and for the reasons stated upon the record in this action, the Court FINDS that the Defendant is the proper party to foreclose on the delinquent Russell DOT and GRANTS Defendant summary judgment on this issue.

33. As such, based upon everything presenting, and finding it proper to do so, and for the reasons stated upon the record in this action, the Court DENIES Plaintiff's motion for summary judgment.

34. Finding it proper to do so, the Court further ORDERS that Defendant NPML shall not commence foreclosure proceedings on the real property at issue in this action for at least thirty (30) days after the entry of this order in accordance with Rule 5 of the West Virginia Rules of Appellate Procedure.

35. In the event that Plaintiff desires to appeal this Order, Plaintiff is DIRECTED to file a motion for stay of further proceedings in accordance with Rule 28 of the West Virginia Rules of Appellate Procedure.

To all of which the Court does note the objections and exceptions of the parties.

The Clerk of this Court is directed to transmit certified copies of this Order to counsel of record.

IT IS SO ORDERED.

ENTER: 10/27/2020

ENTERED: 10/27/2020

Judge

Clerk

by: Susan Trowbridge

ENTERED: Oct 27, 2020

DOCKET LINE 73, Jean Friend, Clerk

Prepared by:

Mark E. Gaydos, Esquire
WV State Bar ID No. 4252
Buddy Turner, Esquire
WV State Bar ID No. 9725
Gaydos & Turner, PLLC
P.O. Box 585
Kingwood, WV 26537
Phone: (304) 329-0773
Fax: (304) 329-0595

STATE OF WEST VIRGINIA, SS:

I, Jean Friend, Clerk of the Circuit/Family Court of Monongalia County State aforesaid do hereby certify [illegible] attached ORDER is a true copy of the original [illegible] made and entered by said Court.

Circuit [illegible]