UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re:	)	
	)	
Calvin Martinez Harris,	)	Case No. 15-81295
	)	
Debtor.	)	
	)	
	)	
	)	
Calvin Martinez Harris	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 15-09047
	)	
Bayview Loan Servicing,	)	
	)	
Defendant.	)	
	)	

ORDER GRANTING MOTION TO DISMISS AND DENYING MOTION TO AMEND

This adversary proceeding is before the Court on the Defendant's Motion to Dismiss filed on January 29, 2016 [Doc. # 8] by Bayview Loan Servicing ("Bayview" or "Defendant"). In its motion, Bayview moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the Complaint (the "Motion to Dismiss"). The Plaintiff filed a Response on February 15, 2016 [Doc. # 13] (the "Response"). Also before the Court is the

Plaintiff's Amended Motion to Amend the Complaint [Doc. # 19]("Motion to Amend"). The Court conducted a hearing on the Motion to Dismiss on February 18, 2016. Benjamin D. Busch appeared on behalf of the Plaintiff, and Caleb Thomas appeared on behalf of the Defendant.

Having considered the filings of the parties, the record in this case, and the arguments of counsel, the Court finds that the Motion to Dismiss should be granted and the Adversary Proceeding should be dismissed. Furthermore, because the amendment proposed in the pending Motion to Amend would be futile, the Motion to Amend will be denied.

BACKGROUND

The Plaintiff filed a Complaint on December 8, 2015 [Doc. # 1], seeking equitable review by this Court of a foreclosure sale conducted on October 22, 2015, on the grounds that the foreclosure was inadequate and contained a material irregularity. The foreclosure sale resulted in a conveyance of Plaintiff's residence to Bayview by credit bid. In the Complaint, the Plaintiff alleges that on or about July 23, 2003, Robert Blue executed a promissory note in the amount of $47,550 to American General Financial Services, Inc., and a deed of trust securing the Plaintiff's residence located at 648 Ray Street, Raeford, NC ("Note and Deed of Trust"). Upon Robert

Blue's death, Plaintiff inherited a one-half share of the property.

Springleaf Financial Services of North Carolina, Inc., as successor to American General Financial Services, Inc. ("Springleaf"), declared the note to be in default, accelerated the balance, and thereafter appointed STS as Substitute Trustee to commence foreclosure. The foreclosure order was entered on July 17, 2014, by the Hoke County Clerk. The Plaintiff filed a Chapter 13 bankruptcy petition on July 28, 2014 (the "first bankruptcy case"), and the automatic stay halted the foreclosure and prevented STS from conducting the foreclosure sale. Due to the bankruptcy filing and the automatic stay, STS cancelled the foreclosure sale.

The Debtor's first bankruptcy case was dismissed on January 28, 2015, and STS reactivated the foreclosure. On July 2, 2015, Springleaf assigned the note and deed of trust to Bayview. STS remained Substitute Trustee. Acting pursuant to the sale authority previously granted to it by the state court, STS issued a new notice of foreclosure sale, with the sale to occur on September 29, 2015. At the re-noticed sale on October 22, 2015, Bayview purchased the property by a credit bid of $22,800. The ten day upset period passed, and, on November 12, 2015, STS conveyed the property to Bayview by trustee's deed.

The Plaintiff alleges that the foreclosure, initiated and completed by STS at the time when Bayview was the holder of the Note and Deed of Trust, was improper because STS did not obtain an order from the state court finding that Bayview was the proper holder of the Note and Deed of Trust. Instead, STS relied upon the previous order issued by the Hoke County Clerk at a time when Bayview's assignor, Springleaf, was the holder of the note and deed of trust. The Complaint alleges that Bayview's failure to seek a new order determining it to be the holder of the note and deed of trust rendered the foreclosure sale improper and irregular pursuant to North Carolina General Statutes 45-21.16(d), which requires the clerk to determine that there is a valid debt of which the party seeking to foreclose is the holder.[1] The Plaintiff contends that, since the foreclosure did not comply with state law, it is not presumed to have resulted in reasonably equivalent value under 11 U.S.C. § 548, and in fact did not result in reasonably equivalent value being paid. See BFP v. Resolution Trust Corp., 511 U.S. 531, 545, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) (reasonably equivalent value for foreclosed property is defined as the price in fact received

[1] Plaintiff also alleged in the Complaint that STS abused its discretion in selling the tracts en masse rather than as separate parcels to maximize the proceeds of the sale, and that the $22,800 purchase price was therefore inadequate as the Plaintiff believes the property to be worth $48,000. The Plaintiff stated in the Response and at the hearing that he has abandoned his argument that the combined sale constituted a material irregularity. Therefore, this argument need not be addressed by the Court.

at the foreclosure sale as long as all requirements of the state's foreclosure law have been met). Therefore, the Plaintiff requests that the Court equitably set aside the foreclosure sale and set aside the foreclosure deed under 11 U.S.C. § 548.

Bayview argues in its Motion to Dismiss that the Complaint fails to state a claim because North Carolina law has no requirement that the substitute trustee obtain a new order authorizing the foreclosure if a note is assigned after the state court already has authorized the foreclosure sale. Therefore, the Defendant argues that the foreclosure was conducted in accordance with North Carolina law. For the reasons that follow, this Court agrees that STS was not required to obtain another order authorizing the sale from the clerk of court under North Carolina law as a result of the assignment. Therefore, the Complaint will be dismissed for failure to state a claim for which relief may be granted.

STANDARD OF REVIEW

The Defendants bring this Motion to Dismiss the Complaint on the basis that (1) the Complaint fails to state a claim for which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and (2) the Plaintiff failed to join a necessary party to the Complaint. Under Rule 12(b)(6), made applicable to this adversary proceeding by Bankruptcy Rule

7012(b),"[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Although a plaintiff need only plead a short and plain statement of the claim establishing that he or she is entitled to relief, Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992), "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555, 127 S.Ct. at 1965. Thus, the Plaintiff's claim for relief will survive the Motion to Dismiss only if the Complaint contains "sufficient factual matter, accepted as true, 'to state a claim for relief that is plausible on its face.'" Iqbal, 556 U.S. at 678, 129 S.Ct. 1937 (quoting Twombly, 550 U.S. at 570, 127 S.Ct. 1955). The United States Supreme Court set forth this plausibility standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Id. (citations omitted).

To determine plausibility, all facts set forth in the Complaint are taken as true. However, "legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement" will not constitute well-pled facts necessary to withstand a motion to dismiss. Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009).

ANALYSIS

The Complaint's sole claim for relief asks the Court to set aside the foreclosure sale of the Plaintiff's Property and set aside the foreclosure deed under 11 U.S.C. § 548 as constructively fraudulent because the sale price did not constitute reasonably equivalent value for the transfer of the property. Section 548 provides in relevant part:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

> (iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

In an action to set aside a mortgage foreclosure, the United States Supreme Court has held that "a fair and proper price, or a 'reasonably equivalent value' for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with." BFP, 511 U.S. at 545, 114 S.Ct. at 1765 In re Roszkowski, 494 B.R. 671, 679 (Bankr. E.D.N.C. 2013) (permitting a complaint to survive a motion to dismiss where it demonstrated possible existence of an irregularity due to fact that the defendants' counsel was acting both as trustee and representing the defendant in the foreclosure proceeding, possibly leading to an inadequate sales price). In BFP, the Court explained:

> Any irregularity in the conduct of the sale that would permit judicial invalidation of the sale under applicable state law deprives the sale price of its conclusive force under § 548(a)(2)(A), and the transfer may be avoided if the price received was not reasonably equivalent to the property's actual value at the time of the sale (which we think would be the price that would have been received if the foreclosure sale had proceeded according to law).

BFP, 511 U.S. at 545-546, 114 S.Ct. at 1765; Roszkowski, 494 B.R. at 679.

In North Carolina, an action to set aside a foreclosure will be successful only if "the inadequacy of the purchase price

is coupled with some other irregularity in the sale." Griffin v. Roberts, 88 N.C.App. 734, 736, 364 S.E.2d 698, 699–700 (1988). When considering whether to set aside a foreclosure, the court should: (1) evaluate the adequacy of the sales price; (2) identify whether any irregularities occurred in connection with the sale; and (3) determine if the irregularities were material. Beneficial Mortg. Co. of N.C. v. Peterson, 163 N.C.App. 73, 80, 592 S.E.2d 724, 728 (2004). A material defect cannot be established by relying on the inadequacy of the purchase price alone. In re Dowdy, No. 09–00336, 2009 WL 3336116, at *4 (Bankr.E.D.N.C. Oct. 14, 2009). See Roszkowski, 494 B.R. at 681 (discussing the North Carolina law requirements of finding an irregularity in a sale).

The Plaintiff contends that the foreclosure was irregular in this case because the mortgagee and the trustee did not obtain an order from the state court finding that Bayview was the proper holder of the Note and Deed of Trust after Springleaf assigned the note to Bayview. As a result of STS's failure to obtain another order from the state court finding that Bayview was the proper holder of the Note and Deed of Trust, the Plaintiff argues that the foreclosure is not presumed to have resulted in reasonably equivalent value under 11 U.S.C. § 548, and in fact did not result in reasonably equivalent value being paid.

The issue here is whether North Carolina law requires a substitute trustee to obtain a new order authorizing a foreclosure if a note is assigned before the foreclosure sale occurs but after the state court has authorized the substitute trustee to conduct the foreclosure sale. For the reasons set forth below, the Court holds that no new order is required under North Carolina law.

N.C. Gen. Stat. § 45-21.16 requires that the mortgagee or substitute trustee seeking to exercise a power of sale file with the clerk of court a notice of hearing. Subparagraph (d) of that section requires that the foreclosure hearing be held before a clerk of court in the county where the land is situated and requires that the clerk consider evidence to confirm, among other things, the existence of "a valid debt, of which the party seeking to foreclose is the holder." N.C. Gen. Stat. § 45-21.16(d)(i).

In this case, there is no dispute that STS, as substitute trustee, was authorized by the clerk to conduct the sale and that the originally authorized sale was stayed and postponed due to the Debtor's prior bankruptcy case. After dismissal of the Debtor's earlier bankruptcy, the automatic stay terminated with respect to the Debtor and the property. See 11 U.S.C. § 362(c)(1), 362(c)(2), and 349(b)(3).

N.C. Gen. Stat. § 45-21.22 provides for the procedure to be followed when a sale is postponed due to an intervening bankruptcy filing by the mortgagor as follows:

> When, after the entry of any authorization or order by the clerk of superior court pursuant to G.S. 45-21.16 and before the expiration of the 10-day upset bid period, the foreclosure sale is stayed pursuant to 11 U.S.C. § 105 or 362, and thereafter the stay is lifted, terminated, or dissolved, the trustee or mortgagee shall not be required to comply with the provisions of G.S. 45-21.16, but shall advertise and hold the sale in accordance with the provisions of G.S. 45-21.16A, 45-21.17, and 45-21.17A.

The Plaintiff does not contend that STS failed to comply with the terms of N.C. Gen. Stat. § 45-21.22(c) in re-advertising and conducting the sale. Instead, the Plaintiff argues that STS was not entitled to merely re-advertise and conduct the sale under the terms of N.C. Gen. Stat. § 45-21.22 because the holder of the Note and Deed of Trust changed in the interim due to the assignment to Bayview.

The statutory language does not support the Plaintiff's argument. The statutes authorize either the mortgagee or the substitute trustee to obtain authority to foreclose under a power of sale. See N.C. Gen. Stat. § 45-21.16 et seq. N.C. Gen. Stat. § 45-22(c), in turn, specifically states that, after a stay due to an intervening bankruptcy, the trustee "shall not be required to comply with the provisions of G.S. 45-16." In this case, STS was authorized to foreclose, and STS remained the

trustee after the assignment to Bayview. Once STS properly received that authority, there is nothing in the statute to suggest that STS needed further authorization to foreclose in the event of a subsequent assignment by the holder. On the contrary, the statute expressly provides that it did not have to do so.

The Plaintiff does not dispute that Springleaf assigned the Note and Deed of Trust to Bayview. Instead, the Plaintiff attempts to find irregularity in the foreclosure by arguing that STS was required to obtain renewed authority to foreclose. The Plaintiff premises this argument solely on the fact that the pre-assignment order authorizing the foreclosure found that Springleaf, rather than Bayview, was the holder of the valid debt. This argument not only lacks merit based upon the specific authority of the statute as stated above, but also based upon the status and rights conferred on assignees pursuant to N.C. Gen. Stat. § 47-17.2.

N.C. Gen. Stat. § 47-17.2 discusses the effect of assignments of mortgages, deeds of trusts, or other agreements pledging real property as security, provides:

> It shall not be necessary in order to effect a valid assignment of a note and deed of trust, mortgage, or other agreement pledging real property or an interest in real property as security for an obligation, to record a written assignment in the office of the register of deeds in the county in which the real property is located. A transfer of the promissory note

> or other instrument secured by the deed of trust, mortgage, or other security interest that constitutes an effective assignment under the law of this State shall be an effective assignment of the deed of trust, mortgage, or other security instrument. The assignee of the note shall have the right to enforce all obligations contained in the promissory note or other agreement, and all the rights of the assignor in the deed of trust, mortgage, or other security instrument, including the right to substitute the trustee named in any deed of trust, and to exercise any power of sale contained in the instrument without restriction. The provisions of this section do not preclude the recordation of a written assignment of a deed of trust, mortgage, or other security instrument, with or without the promissory note or other instrument that it secures, provided that the assignment complies with applicable law.

(emphasis added). Therefore, as assignee of the Note and Deed of Trust, Bayview received all Springleaf's rights as a beneficiary under STS's exercise of the power of sale contained in the instrument without restriction.

The North Carolina Court of Appeals has refused to add additional requirements to foreclosure beyond those set forth in the statute. In In re Fortescue, 80 N.C. App. 297, 341 S.E.2d 757 (1986), the court considered whether a trustee was required to re-notice the foreclosure hearing where the note and deed of trust was assigned after notice was given under N.C. Gen. Stat. § 45-21.16, but prior to the foreclosure hearing before the clerk of court. In that case, the notice of foreclosure properly and accurately included the identification of the holder of the note and deed of trust. Id. at 300, 341 S.E.2d at

758. The identification of the holder was correct at the time the notice was given, but after the trustee provided the requisite notice and before the foreclosure hearing, the mortgage holder assigned the mortgage to Lillian Skolnik. Id. at 298, 341 S.E.2d at 758. At the hearing before the clerk, the mortgagor objected, arguing that the notice improperly identified the holder of the note. Id. The clerk authorized the foreclosure sale over the mortgagor's objection. Id. at 299, 341 S.E.2d at 758. Fortescue appealed the clerk's ruling to the North Carolina Superior Court, arguing again that the notice was improper because it incorrectly identified the original mortgage holder and not the current holder, Skolnik. Id. The Superior Court affirmed the clerk's ruling. On appeal to the North Carolina Court of Appeals, the court found that N.C. Gen. Stat. § 45-21.16 did not prohibit an assignment or negotiation of the debt instrument during the interval between the date notice was issued and the time of the hearing. Id. at 301-302, 341 S.E.2d at 759. The court rejected the mortgagor's objection to the foreclosure, holding that N.C. Gen. Stat. § 45-21.16 does not prohibit an assignment of the debt instrument even after notice of the foreclosure hearing. As stated by the court:

> In the case at bar, even a formalistic reading of the statute reveals that notice was technically proper. At the time notice was issued, the original holder, who

> was also the then-present holder, was A.S. Browning. The statute does not prohibit an assignment or negotiation of the debt instrument during the interval between the date notice is issued and the time of the hearing, and it is silent as to whether additional notification is necessary when an assignment takes place.

Id. at 300, 341 S.E.2d 300. Therefore, the court upheld the foreclosure, finding that it met the statutory requirements. Similarly in this case, the notice of foreclosure and the clerk's ruling each were correct, and nothing in the statute requires additional steps in the event of an assignment after any step that is properly followed under the terms of the statute.

Having found that technical compliance with the statute is all that is required even if the note is subsequently assigned, the court in Fortescue needed no further analysis. Nevertheless, the court supported its holding by further considering the policy behind the notice requirements, finding that its holding was consistent with the purposes of the statute as well. The court noted that the mortgagor in fact received all the notice to which he was entitled as a matter of policy. Id. at 301, 341 S.E.2d at 759. The court stated, "[t]aking a less formalistic and more policy-oriented view of the statute, we conclude that the purpose of the notice provision was fully satisfied in the case at bar. The latest we can say Fortescue must have known the identity of the holder of the note and deed

of trust was . . . the date of the hearing before the clerk of superior court." Id. The court observed that notice was required to give the mortgagor ample time before foreclosure to make "last minute attempts" to finally resolve with the then current mortgagee the matter of the outstanding debt. Id. at 300, 341 S.E.2d at 758.

The Plaintiff argues that this last minute opportunity was not afforded to him in this case because he was not notified of the assignment prior to the foreclosure sale. Even if the Plaintiff had not been afforded the opportunity to seek a last minute re-negotiation of his mortgage, STS appropriately followed the statute in this case and a failure of any additional notice that is not required by either due process or statute will not be added by this Court.

In any event, the Plaintiff was afforded every reasonable opportunity in this case. Even if the Court of Appeals were correct in its estimation that the purpose behind the notice provisions of the statute is to give mortgagor's last minute opportunities to negotiate with mortgagees, and even if this policy could add additional requirements that are not found in the statute or in constitutional notions of due process, the Plaintiff in this case had more than ample opportunities to attempt to effectuate a resolution of the mortgage prior to foreclosure. [Complaint, ¶ 10-12]. The foreclosure sale was

effectuated only after it had been noticed on two prior occasions. Id., ¶ 10-15. The first attempt to foreclose, when Springleaf held the mortgage, was stayed by the Plaintiff's previous Chapter 13 filing. Id., ¶10-11. At that time, and through that process, the Plaintiff had the ability to cure arrearages. In fact, the court confirmed a chapter 13 plan that provided for curing the mortgage default. [Case. No. 14-80823, Doc. # 20]. The case was dismissed shortly after on the grounds that the Plaintiff failed to make plan payments. [Case. No. 14-80823, Doc. # 23]. The second foreclosure process was postponed, again by Springleaf. [Complaint, ¶ 12]. STS was authorized to foreclose under the power of sale at the foreclosure hearing, and STS remained the Trustee entitled to exercise the power of sale after Springleaf had assigned the note to Bayview. [Complaint, ¶ 10-12]. The Debtor elected not to file a second bankruptcy prior to the expiration of the upset bid period, and the foreclosure sale was complete prior to the filing of this case. See In re Dilard, Bankr. Case No. 00-11636, 2000 WL 33673760 (Bankr. M.D.N.C. August 22, 2000).

Nothing in N.C. Gen. Stat. § 45-21.1 et seq. prevents an assignment of the mortgage post foreclosure hearing or requires the trustee or new holder to re-initiate the foreclosure hearing upon receipt of the note. The Plaintiff had notice of the original foreclosure initiated by STS, and STS remained the

trustee throughout the foreclosure process. The Plaintiff's right to notice of foreclosure was not harmed by the subsequent transfer of the mortgage after the foreclosure hearing and before the foreclosure sale.

The Complaint, therefore, fails to state a claim for which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure as no material irregularity has been alleged.

Pending Motion to Amend the Complaint

As a secondary basis to dismiss the Complaint, the Defendant argued that the Plaintiff failed to join a co-owner of the property as a necessary party. Due to the dismissal of the Complaint for the reasons stated above, the Court does not need to consider whether the co-owner was a necessary party. Nevertheless, in response to this second basis upon which the Defendant argued the Complaint should be dismissed, the Plaintiff filed a Motion to Amend Complaint, seeking to add Quintin Harris as a nominal party [Doc. # 14], and amended that motion on March 7, 2016, in order to attach the proposed amended complaint. [Doc. # 19]. The proposed amendment does not add any substantive allegations, but merely seeks to join the co-owner of the property as an additional party. The proposed amended complaint does not allege any additional bases for irregularities in the foreclosure process. As the addition of a party will not remedy the basis for granting a motion to dismiss

as stated herein, the amendment merely to add the co-owner would be futile.

THEREFORE, it is HEREBY ORDERED, ADJUDGED, and DECREED, that the Motion to Dismiss is GRANTED, the Amended Motion to Amend Complaint is DENIED, and the adversary proceeding is DISMISSED.

[END OF DOCUMENT]

PARTIES TO BE SERVED

Benjamin D. Busch, Esq.
The Law Office of Benjamin D. Busch, PLLC
4220 Apex Hwy Suite 230
Durham, NC 27713

Bayview Loan Servicing, LLC
c/o Corporation Service Company
327 Hillsborough Street
Raleigh, NC 27603-1725

William L. Esser, IV
c/o Parker Poe Adams & Bernstein, L.L.P.
Three Wachovia Center
401 South Tryon Street, Suite 3000
Charlotte, NC 28202

Stephen Troy Staley
Hutchens, Senter, Kellam and Pettit, P.A.
4317 Ramsey Street
P.O. Box 2505
Fayetteville, NC 28302

Substitute Trustee Services, Inc.
Attn: L.W. Blake
201 S McPherson Church Rd Ste 232
Fayetteville, NC 28303
910-864-6888

William P. Miller
101 South Edgeworth Street
Greensboro, NC 27401

Richard M. Hutson, II
302 East Pettigrew St., Suite B-140
P.O. Box 3613
Durham, NC 27702