

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000058-MR

GLENN D. AUGENSTEIN

APPELLANT

v.

APPEAL FROM HENRY CIRCUIT COURT
HONORABLE KAREN CONRAD, JUDGE
ACTION NO. 07-CI-368

DEUTSCHE BANK NATIONAL
TRUST COMPANY, AS TRUSTEE
FOR THE CERTIFICATEHOLDERS
OF SOUNDVIEW HOME LOAN TRUST
2005-OPT4, ASSET BACKED
CERTIFICATES, SERIES 2005-OPT4;
PAMELA FOREE; AND
DONALD T. PRATHER

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: DIXON AND MOORE, JUDGES; ISAAC,¹ SENIOR JUDGE.

MOORE, JUDGE: Glenn D. Augenstein appeals the Henry Circuit Court's grant of summary judgment in favor of Deutsche Bank and subsequent entry of a

¹ Senior Judge Sheila R. Issac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

judgment and order of sale. He also appeals the court's denial of his motion to alter, amend, or vacate the judgment. After a careful review of the record, we vacate because Deutsche Bank did not have standing at the time it commenced this appeal.

I. FACTS AND PROCEDURAL BACKGROUND

Glenn executed an adjustable rate mortgage and promissory note in favor of Option One Mortgage Corporation on or about September 9, 2005. The mortgage and note were secured by two parcels of land, located in Henry County, Kentucky.

It is undisputed that Glenn failed to make any of the mortgage payments due after August 1, 2007. As such, Deutsche Bank commenced foreclosure proceedings by filing a Complaint on December 13, 2007. Option One Mortgage Company thereafter assigned its interest in the mortgage by an assignment of mortgage dated January 3, 2008, which was filed in the Henry County Clerk's Office on January 11, 2008.

Deutsche Bank thereafter filed a motion for summary judgment. Glenn contested Deutsche Bank's standing to commence the action and its purported status as owner and holder of the mortgage, stating that no assignment existed, nor did Deutsche Bank account for how it had obtained rights to the mortgage. The court granted Deutsche Bank's motion on June, 12, 2008, finding that no genuine issue of material fact existed, and entering a judgment in favor of

Deutsche Bank in the amount of \$166,182.66, with interest. The court also adjudged that the claim of Donald T. Prather,² in his capacity as Trustee, for unpaid real estate taxes took priority over that of Deutsche Bank. Glenn now appeals.

Before we turn to the merits of this appeal, we note that an appellee brief was not timely filed by Deutsche Bank. Pursuant to CR 76.12(8) and numerous cases, we are granted wide discretion in deciding an appeal where an appellee brief is not filed. For example, we may accept Glenn's factual statements as true. We may also accept his issues as correct, reverse or vacate the judgment if we believe Glenn's brief supports the relief he seeks. Additionally, we may treat Deutsche Bank's failure to file a brief as a confession of error and vacate the judgment without reaching the merits of the case.

II. ANALYSIS

Glenn argues that the court erred by exercising particular case jurisdiction over this claim because Deutsche Bank did not have standing. He contends that the assignment of mortgage was not executed in favor of Deutsche Bank until after the complaint was filed. Thus, Glenn argues, that Deutsche Bank failed to show that it was the real party in interest at the time the action was commenced.

CR³ 17.01 provides that "every action shall be prosecuted in the name of the real party in interest, but...an assignee for the benefit of creditors... may bring an action..." It follows that, where a cause of action has been assigned, the

² Mr. Prather is not a party to this appeal.

³ Kentucky Civil Rule of Procedure.

assignee becomes the real party in interest. *See* CR 17.01. However, “[i]n no event may an assignee maintain an action for any part of a claim which has not been assigned to him.” *Works v. Winkle*, 234 S.W.2d 312, 315 (Ky. App. 1950).

A mere expectancy is not enough to establish standing, a party must prove a “present or substantial interest.” *Plaza B.V. v. Stephens*, 913 S.W.2d 319, 322 (Ky. 1996) (quoting *Ashland v. Ashland F.O.P. No.3, Inc.*, 888 S.W.2d 667 (Ky. 1994)).

In this case, the complaint was filed on December 17, 2007, but the assignment of mortgage was not executed until January 3, 2008. Thus, Deutsche Bank had no present interest when it filed its complaint and failed to take any steps to correct this. Allowing Deutsche Bank to commence this action at a time when it lacked standing impermissibly allowed litigation to commence based upon mere expectancy of an interest. *See Plaza B.V.*, 913 S.W.2d at 322. Accordingly, the trial court erred when it did so; thus, it should not have entered summary judgment for Deutsche Bank. This issue being dispositive of the appeal, we decline to review the remainder of Glenn’s arguments.

In light of our analysis, we vacate the entry of summary judgment because Deutsche Bank did not have standing to commence this action when it did. This matter is therefore remanded to the circuit court for the purpose of entering an order consistent with this opinion removing this case from its docket.

ALL CONCUR.

BRIEF FOR APPELLANT:

Glenn D. Augenstein
Pendleton, Kentucky

BRIEF FOR APPELLEE:

None filed.