

[Cite as *Wells Fargo Bank, N.A. v. Stovall*, 2010-Ohio-236.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91802

WELLS FARGO BANK, N.A., TRUSTEE, ETC.

PLAINTIFFS-APPELLEES

vs.

NELLIE A. STOVALL, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV- 615473

BEFORE: Blackmon, P.J., Cooney, J., and Jones, J.

RELEASED: January 28, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANTS

John P. Malone, Jr.
1150 Rockefeller Building
614 W. Superior Avenue
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE WELLS FARGO BANK, N.A.

Daniel A. Cox
Sallie A. Conyers
Matthew C. Steele
Reisenfeld & Associates LPA LLC
3962 Red Bank Road
Cincinnati, Ohio 45227

ATTORNEY FOR APPELLEE NATIONAL CITY BANK

National City Bank
C/O Legal Department
1900 East Ninth Street
Cleveland, Ohio 44114

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellants Nellie Stovall and Lanette Gibbs, et al. (“Stovall”) appeal the trial court’s decision granting summary judgment in favor of Wells Fargo Bank, N.A. (“Wells Fargo”). Stovall assigns the following errors for our review:

“I. The trial court erred when it granted summary judgment (Docketed 6/17/08) to appellee because at the time it filed the complaint, appellee did not have the right to invoke the jurisdiction of the court and thus was not entitled to judgment as a matter of law.”

“II. The trial court erred when it granted summary judgment (Docketed 6/17/08) based on an affidavit (Docketed 7/30/07) which was not properly admissible.”

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court’s decision. The apposite facts follow.

{¶ 3} On April 28, 2004, Stovall and Lanette Gibbs signed a promissory note and mortgage to secure a loan for the purchase of a house located at 3219 East 137th Street, Cleveland, Ohio 44120. Stovall and Gibbs executed these instruments in favor of Argent Mortgage Company, LLC (“Argent”).

{¶ 4} On February 9, 2007, Wells Fargo as Trustee for the Benefit of the Certificate Holders of Asset-Backed Pass-Through Certificate Series 2004-WCW1 filed a complaint for money, foreclosure, and other equitable relief against Stovall and Gibbs. In its complaint, Wells Fargo alleged it was the holder of the note and mortgage. Wells Fargo also alleged that Stovall and Gibbs defaulted in payment on the note; consequently, they owed Wells Fargo

\$74,862.20, plus interest, prepayment penalties if applicable, escrow advances, court costs, and other expenses.

{¶ 5} On April 27, 2007, Stovall and Gibbs filed an answer admitting that they had an interest in the property but denying that they had defaulted in the payments. As an affirmative defense, Stovall and Gibbs asserted that Wells Fargo was not a real party in interest; therefore, it had no legal right to file suit to foreclose on the instant property.

{¶ 6} On July 30, 2007, Wells Fargo filed a motion for summary judgment arguing there was no genuine issue of material fact because Stovall and Gibbs were in default under the terms and conditions of the Note and Mortgage. Wells Fargo attached an affidavit to its motion for summary judgment stating that it was in custody of and maintained the records related to the promissory note and mortgage that was the subject of the foreclosure action.

{¶ 7} Wells Fargo also supported the motion by attaching an assignment dated May 3, 2004. The assignment reflected that all interest in the subject mortgage had been duly assigned to Wells Fargo, as Trustee for the Benefit of the Certificate Holders of Asset-Backed Pass-Through Certificate Series 2004-WCW1. In addition, Wells Fargo attached a final judicial report and a military affidavit.

{¶ 8} On March 4, 2008, Stovall and Gibbs filed a memorandum in opposition arguing that Wells Fargo did not establish itself as the holder of the

note and mortgage. Stovall and Gibbs also argued that the affidavit in support was self-serving.

{¶ 9} On June 17, 2008, the trial court granted summary judgment in favor of Wells Fargo. This appeal follows.

Summary Judgment

{¶ 10} In the first assigned error, Stovall and Gibbs argue that the trial court erred in awarding summary judgment to Wells Fargo because they were not a party in interest at the time the complaint was filed. We disagree.

{¶ 11} We review an appeal from summary judgment under a de novo standard of review.¹ Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate.² Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can reach only one conclusion that is adverse to the non-moving party.³

¹*Baiko v. Mays* (2000), 140 Ohio App.3d 1, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35; *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188.

²*Id.* at 192, citing *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704.

³*Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶ 12} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment.⁴

If the movant fails to meet this burden, summary judgment is not appropriate; if the movant does meet this burden, summary judgment will be appropriate only if the non-movant fails to establish the existence of a genuine issue of material fact.⁵

{¶ 13} In the instant case, the issue to be determined is whether Wells Fargo was the real party in interest at the time the complaint was filed.

{¶ 14} “Every action shall be prosecuted in the name of the real party in interest.”⁶ A real party in interest is one who is directly benefited or injured by the outcome of the case.⁷ The real-party-in-interest requirement, “enables the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party at interest on the same matter.”⁸

⁴*Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107.

⁵*Id.* at 293.

⁶ *Deutsche Bank Natl. Trust Co. v. Pagani*, 5th Dist. No. 09CA000013, 2009-Ohio-5665; Civ.R. 17(A).

⁷ *U.S. Bank Natl. Assn. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, citing *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24.

⁸*Id.*, *Shealy* at 24-25, quoting *In re Highland Holiday Subdivision* (1971), 27 Ohio App.2d 237.

{¶ 15} The current holder of the note and mortgage is the real party in interest in a foreclosure action.⁹ Where a party fails to establish itself as the current holder of the note and mortgage, summary judgment is inappropriate.¹⁰

{¶ 16} In the present case, we find that Wells Fargo provided evidence to demonstrate that it was the current holder and owner of the note and mortgage at the time the complaint was filed. In its motion for summary judgment, Wells Fargo attached a copy of a duly executed assignment demonstrating that all interest in the mortgage of the subject property had been assigned to it effective May 3, 2004. The assignment was duly recorded in the Cuyahoga County Recorder's Office on March 19, 2007.

{¶ 17} Here, the record indicates that Wells Fargo filed the foreclosure complaint on February 9, 2007, almost three years after all interest in the note and mortgage had been duly assigned to the company. Although Wells Fargo did not record the assignment until after the complaint was filed, this was not fatal. Wells Fargo was still the real party in interest since all interest in the note and mortgage had been assigned to it prior to the filing of the complaint.¹¹ Consequently, as the real party in interest, Wells Fargo could properly bring the foreclosure action.

⁹*Chase Manhattan Mtge. Corp. v. Smith*, 1st Dist. No. C061069, 2007-Ohio-5874.

¹⁰*First Union Natl. Bank v. Hufford* (2001), 146 Ohio App.3d 673, 677, 679-680.

¹¹*Deutsche Bank Natl. Trust Co. v. Ingle*, Cuyahoga App. No. 92487, 2009-Ohio-3886.

{¶ 18} Further, since Wells Fargo filed the assignment with the trial court prior to judgment being entered, the trial court, as well as Stovall and Gibbs, were sufficiently alerted that Wells Fargo was the real party in interest.¹² Finally, the record indicates that Wells Fargo filed its motion for summary judgment on July 30, 2007, with the aforementioned assignment attached and evidence of its recording. Stovall and Gibbs filed their motion in opposition on March 4, 2008. As such, Stovall and Gibbs had reason to know, for approximately seven months prior to the filing of their motion in opposition, that Wells Fargo was the real party in interest.

{¶ 19} Here, despite evidence showing, prior to the filing of their brief in opposition, that Wells Fargo had a duly assigned mortgage, which was recorded shortly after the filing of the complaint, Stovall and Gibbs still argued that Wells Fargo lacked standing. Thus, we find Stovall and Gibbs's argument lacks merit.

{¶ 20} We conclude the evidence established that Wells Fargo was the real party in interest for purposes of filing the foreclosure action and that the trial court as well as Stovall and Gibbs were sufficiently apprised of this fact before judgment was entered. Consequently, the trial court correctly awarded

¹²*Bank of New York v. Stuart*, 9th Dist. No. 06CA008953, 2007-Ohio-1483. See, also, *Campus Sweater and Sportswear Co. v. M.B. Kahn Constr. Co.* (D.C.S.C. 1979), 515 F.Supp. 64, 84-85.

summary judgment in favor of Wells Fargo. Accordingly, we overrule the first assigned error.

Supporting Affidavit

{¶ 21} In the second assigned error, Stovall and Gibbs argue the trial court erred when it granted summary judgment in favor of Wells Fargo because the supporting affidavit was inadmissible. We disagree.

{¶ 22} Civil Rule 56(E) requires:

“Supporting and opposing affidavits 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 in the affidavit. Sworn or certified copies of all paper or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.”¹³

{¶ 23} In the instant case, Stovall and Gibbs argue the supporting affidavit is from an employee of a company that is not a party to the action. However, having concluded in the first assigned error that Wells Fargo was the real party in interest, we find this claim to be without merit.

{¶ 24} In the instant case, in support of its motion for summary judgment, Wells Fargo filed an affidavit executed on May 15, 2007, by Rocio de los Santos.

Santos averred that she was a litigation liaison for Countrywide Home Loans, the servicing agent for Wells Fargo. Santos averred that in her capacity, she

¹³ *Wells Fargo Bank, NA v. Shalvey*, 5th Dist. No. 06CAE090060, 2007-Ohio-3928.

had custody of the records and had personal and first-hand knowledge of the subject account. Santos specifically averred that the subject account was in default, and attached a copy of the note, mortgage, as well as a detailed payment history of the subject account.

{¶ 25} From these facts concerning Santos's position and relationship with the subject account, personal knowledge as to the interest due and default in payment may be inferred. We conclude the first requirement of Civ. Rule 56(E) was met. Santos, the affiant, was a company official, and the facts asserted are within the scope of her asserted duties.

{¶ 26} The final requirement is that the affidavit sets forth facts that would be admissible in evidence. The essential fact set forth in Santos's affidavit is that the note is in default. Default is the absence of payment according to the terms of the instrument.¹⁴ Although Stovall and Gibbs assert that the affidavit is self-serving and conclusory, a review of the attached payment history reveals that Stovall and Gibbs's last payment on the mortgage was recorded in October 2006.

{¶ 27} We conclude that Santos's affidavit satisfies the requirement of Civ. R. 56(E), was predicated upon personal knowledge and hence was admissible. As such, there are no genuine issues of material fact; therefore the trial court

¹⁴*Beneficial Mortgage Company v. Grover* (July 20, 1983), 3rd Dist. No. 13-82-41.

properly granted summary judgment in favor of Wells Fargo. Accordingly, we overrule the second assigned error.

Judgment affirmed.

It is ordered that appellees recover from appellants their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

COLLEEN CONWAY COONEY, J., and
LARRY A. JONES, J., CONCUR