

[Cite as *U.S. Bank Natl. Assn. v. Duvall*, 2010-Ohio-6478.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94714

U.S. BANK NATIONAL ASSN.

PLAINTIFF-APPELLANT

vs.

ANTOINE DUVALL, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-638676

BEFORE: Sweeney, J., Gallagher, A.J. and DeGenaro, J.*

RELEASED AND JOURNALIZED: December 30, 2010

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JAMES J. SWEENEY, J.:

{¶ 1} Plaintiff-appellant U.S. National Bank Association, as Trustee for CMLTI 2007-WFHE2 c/o Wells Fargo Bank, N.A., (“plaintiff”), appeals the dismissal of its complaint in foreclosure against defendants-appellees Antoine

Duvall and Madinah Samad (“defendants”). After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On December 26, 2006, defendants executed a promissory note for \$90,000 (“the note”) secured by a mortgage on property located at 13813 Diana Avenue, in Cleveland (“the mortgage”), with Wells Fargo Bank (“Wells Fargo”). On March 1, 2007, Wells Fargo transferred the note, among other assets, to a trust, of which plaintiff was trustee. Subsequently, defendants defaulted on the note. On October 15, 2007, plaintiff filed a complaint in foreclosure.

{¶ 3} On February 5, 2008, Wells Fargo assigned the mortgage to plaintiff as trustee of the previously mentioned trust.

{¶ 4} On October 24, 2008, plaintiff filed a summary judgment motion, supported by an affidavit from a Wells Fargo representative. This affidavit stated that plaintiff acquired the note on April 10, 2007.¹ The affidavit also stated that Wells Fargo “assigned and transferred” the mortgage to plaintiff. Crucial to the outcome of this case, the affidavit did not state when plaintiff acquired the mortgage, although it stated that the “assignment of mortgage instrument” was filed in the Cuyahoga County Recorder’s Office on February 14, 2008.

{¶ 5} Defendants did not dispute the delinquent payments in court; rather, on November 10, 2009, in their brief in opposition to plaintiff’s summary judgment motion, defendants requested that this case be dismissed for lack of standing. Defendants relied on this court’s decision in *Wells Fargo Bank v. Jordan*,

¹ There is a discrepancy in the record as to whether the note was transferred on March 1, 2007 or April 10, 2007; however, this inconsistency is not material to the

Cuyahoga App. No. 91675, 2009-Ohio-1092, ¶23, which held that a foreclosure “complaint must be dismissed if the plaintiff cannot prove that it owned the note *and the mortgage* on the date the complaint was filed.” (Emphasis added.)

{¶ 6} On December 8, 2009, the court ordered plaintiff to supplement the record “with some definitive proof of the acquisition date of the subject note and mortgage within 20 days of this court’s entry. Failure to do so shall result in dismissal.”

{¶ 7} On December 28, 2009, plaintiff supplemented the record with a second affidavit and a “Schedule of Mortgage Loans” from Wells Fargo. However, these documents, along with a previously filed document entitled “Pooling and Service Agreement,” merely reiterated that Wells Fargo transferred the note to the trust of which plaintiff was trustee.

{¶ 8} On January 21, 2010, the court dismissed the instant case, stating in its journal entry, in pertinent part, as follows: “The court has reviewed the documents submitted by plaintiff to address the issue of standing. * * * The documents remain devoid of what the court is requesting. * * * The mortgage assignment was * * * dated and subsequently filed with the recorder after the filing of the complaint. * * * As plaintiff has failed to show standing pursuant to *Wells Fargo Bank v. Jordan*, * * * this case is dismissed in its entirety.”

disposition of the instant case.

{¶ 9} Plaintiff appeals and raises one assignment of error for our review.

I. “The Trial Court erred in dismissing this mortgage foreclosure action for a supposed lack of standing.”

{¶ 10} Lack of standing is properly raised by a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. See *A-1 Nursing Care of Cleveland, Inc. v. Florence Nightingale Nursing, Inc.* (1994), 97 Ohio App.3d 623, 647 N.E.2d 222. “A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *Assn. for the Defense of the Washington Local School Dist. v. Kiger* (1989), 42 Ohio St.3d 116, 117, 537 N.E.2d 1292, 1293. Thus, the movant may not rely on allegations or evidence outside the complaint; otherwise, the motion must be treated, with reasonable notice, as a Civ.R. 56 motion for summary judgment. Civ.R. 12(B); *State ex rel. Natalina Food Co. v. Ohio Civ. Rights Comm.* (1990), 55 Ohio St.3d 98, 99, 562 N.E.2d 1383.” *State v. ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548, 506 N.E.2d 378.

{¶ 11} Appellate review of granting summary judgment is de novo. Pursuant to Civ.R. 56(C), the party seeking summary judgment must prove that (1) there is no genuine issue of material fact; (2) they are entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

{¶ 12} In the instant case, defendants did not file a motion to dismiss or a motion for summary judgment. Plaintiff argues that we should review this case under a de novo standard, citing to authority on the standard of review for summary judgment. Defendants, on the other hand, argue that the court involuntarily dismissed the instant case under Civ.R. 41(B)(1), which requires an abuse of discretion standard of review. Under either standard, we conclude that the court did not err.

{¶ 13} Ohio law holds that “[a]n action on a note and an action to foreclose a mortgage are two different beasts.” *Gevedon v. Hotopp*, Montgomery App. No. 20673, 2005-Ohio-4597, ¶28. See, also, *Third Fed. Savs. Bank v. Cox*, Cuyahoga App. No. 93950, 2010-Ohio-4133; *Fifth Third Bank v. Hopkins*, 177 Ohio App.3d 114, 2008-Ohio-2959, 894 N.E.2d 65.

{¶ 14} In *Jordan*, supra, this court held that “[t]he owner of rights or interest in property is a necessary party to a foreclosure action. * * * Thus, if plaintiff has offered no evidence that it owned the note and mortgage when the complaint was filed, it would not be entitled to judgment as a matter of law.” *Id.*, ¶¶22-23.

{¶ 15} Accordingly, we conclude that plaintiff had no standing to file a foreclosure action against defendants on October 15, 2007, because, at that time, Wells Fargo owned the mortgage. Plaintiff failed in its burden of demonstrating that it was the real party in interest at the time the complaint was filed. Plaintiff’s sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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.

JAMES J. SWEENEY, JUDGE

SEAN C. GALLAGHER, A.J., and
*MARY DEGENARO, J., CONCUR

*(Sitting by Assignment: Judge Mary DeGenaro of the Seventh District Court of Appeals.)