

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

RBS CITIZENS, N.A., fka CITIZENS BANK, N.A., SUCCESSOR BY MERGER TO CHARTER ONE BANK, N.A.,	:	OPINION
	:	
Plaintiff-Appellee,	:	CASE NO. 2014-T-0111
	:	
- vs -	:	
	:	
GERALDINE M. STRUHARIK, aka GERRI STRUHARIK, aka GERALDINE STRUHARIK, et al.,	:	
	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 13 CV 1296.

Judgment: Affirmed.

Johna M. Bella, Goranson, Parker & Bella Co., L.P.A., 405 Madison Avenue, Suite 2200, Toledo, OH 43604 (For Plaintiff-Appellee).

Bruce M. Broyles, 5815 Market Street, Suite 2, Youngstown, OH 44512 (For Defendant-Appellant).

DIANE V. GRENDALL, J.

{¶1} Defendant-appellant, Geraldine M. Struharik, appeals the October 30, 2014 Judgment of foreclosure in favor of plaintiff-appellee, RBS Citizens, N.A. The issue before this court is whether a bank may prove, for the purposes of summary judgment, its standing to enforce a note as a successor by merger to the original lender

through an employee affidavit identifying the bank as the successor by merger. For the following reasons, we affirm the decision of the lower court.

{¶2} On June 17, 2013, RBS Citizens filed a Complaint for Foreclosure in the Trumbull County Court of Common Pleas against Struharik and other defendants.¹ Attached to the Complaint were a Note and Mortgage, dated October 25, 2002, executed by Struharik in favor of Charter One Bank, N.A., in the principal amount of \$206,000, and secured by property located at 109 Royal Troon Drive, Warren, Ohio, and 963 North Highland Avenue, Girard, Ohio.

{¶3} On September 23, 2013, with leave of the trial court, Struharik filed her Answer to Complaint instanter.

{¶4} On October 10, 2013, RBS Citizens filed a Motion for Summary Judgment. In support of the Motion, RBS Citizens submitted the Affidavit of Debra J. VanBuskirk. VanBuskirk identified herself as “an Employee of RBS Citizens, N.A., fka Citizens Bank, N.A., sbm to Charter One Bank, N.A., the duly authorized servicing agent for Charter One Bank, N.A.,” with firsthand knowledge of the account of Geraldine M. Struharik “based upon my job duties and responsibilities.” VanBuskirk stated that Struharik’s account has been in default since June 1, 2011, with an unpaid balance, as of October 15, 2013, of \$216,718.86 (representing a principal of \$176,839.55 plus interest, taxes, and other charges in the amount of \$39,879.31). VanBuskirk further stated that RBS Citizens is “in possession of the aforesaid promissory note and is the owner and holder of the promissory note and mortgage attached to the plaintiff’s Complaint.”

1. In addition to various unknown defendants, the Complaint identified Warren Country Club Villas Condominium, Portfolio Recovery Associates, LLC, Nancy Blackburn, Transamerica Financial Services, the Department of Justice, the State of Ohio Department of Taxation, and Christ Michelakis (Trumbull County Treasurer).

{¶5} On September 24, 2014, Struharik filed a Memorandum in Opposition to Summary Judgment. Struharik contended that RBS Citizens “failed to demonstrate that it was the holder and owner of the promissory note,” but, instead, “only submitted evidence that it was in possession of an unendorsed promissory note made payable to Charter One Bank, N.A.” Struharik further contended that RBS Citizens “failed to establish that it complied with all conditions precedent.” Struharik cited to paragraph 6(C) of the Note:

If I am in default, the Note Holder may send me written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount.

And paragraph 22 of the Mortgage:

Lender shall give notice to Borrower prior to acceleration following Borrower’s breach of any covenant or agreement in this Security Instrument * * *.

{¶6} On October 22, 2014, RBS Citizens filed a Reply Memorandum in Support of Motion for Summary Judgment. Attached thereto was a second Affidavit sworn by VanBuskirk, authenticating a “demand letter sent by Plaintiff’s employees to Geraldine M. Struharik by first class mail on October 6, 2011 and that * * * has never been returned to Plaintiff as undelivered.” The letter advised Struharik that her loan was in default and that failure to cure the default could result in “i) the full amount of unpaid

principal, all interest, other charges and advances, if any, being immediately due and payable, and ii) a foreclosure sale of your property.”

{¶7} On October 30, 2014, the trial court entered a Judgment, Foreclosure, [and] Order of Sale, granting summary judgment in favor of RBS Citizens “in the sum of \$176,839.55 plus interest at the rate of 6.50% per annum from May 1, 2011 together with late fees, attorney fees and costs,” and ordering the sale of the property if the sum was not paid. The court recognized that Warren Country Club Villa Condominiums and the United States of America had an interest in the property “subsequent” to RBS Citizens’ interest. The court further held that any interest possessed by the remaining defendants in the subject property was extinguished.

{¶8} On November 21, 2014, the trial court entered a Nunc pro Tunc Judgment, Foreclosure, Order of Sale, amending the prior judgment to identify the State of Ohio Department of Taxation as having an interest in the subject property “subsequent” to RBS Citizens’ interest.

{¶9} On November 26, 2014, Struharik filed a Notice of Appeal from the October 30, 2014 Judgment. On appeal, Struharik raises the following assignment of error:

{¶10} “[1.] The trial court erred in granting summary judgment to Appellee when there were genuine issues of material fact still in dispute.”

{¶11} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows “that there is no genuine issue as to any material fact” to be litigated, (2) “the moving party is entitled to judgment as a matter of law,” and (3) “it appears from the evidence * * * that reasonable minds can come to but one conclusion and that

conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence * * * construed most strongly in the party's favor." A trial court's decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). "Under this standard, the reviewing court conducts an independent review of the evidence before the trial court and renders a decision de novo, i.e., as a matter of law and without deference to the conclusions of the lower court." (Citation omitted.) *Wells Fargo Fin. Ohio I, Inc. v. Mulrooney*, 11th Dist. Trumbull No. 2014-T-0085, 2015-Ohio-960, ¶ 12.

{¶12} Preliminarily, RBS Citizens contends that Struharik has forfeited the opportunity to raise the issue of standing on appeal.

{¶13} RBS Citizens argues that the present appeal is "defective" because it was taken from the October 30, 2014 Judgment, rather than the November 21, 2014 Nunc pro Tunc Judgment. We disagree.

{¶14} The October 30, 2014 Judgment was and remained a valid final judgment.

{¶15} "The function of an entry *nunc pro tunc* is the correction of judicial records insofar as they fail to record, or improperly record, a judgment rendered by the court, as distinguished from the correction of an error in the judgment itself, or in the failure to render the judgment." *Caprita v. Caprita*, 145 Ohio St. 5, 60 N.E.2d 483 (1945), paragraph two of the syllabus. "Therefore, a nunc pro tunc entry by its very nature applies retrospectively to the judgment it corrects." *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, ¶ 19 (cases cited); *Webb v. W. Res. Bond & Share Co.*, 115 Ohio St.

247, 257, 153 N.E. 289 (1926) (“the judgment *nunc pro tunc* relates back to the time that it was actually rendered”).

{¶16} A *nunc pro tunc* entry does not affect the period within which an appeal may be prosecuted “unless additional rights are created or an existing right denied by such *nunc pro tunc* entry, or unless the appeal or error proceeding grows out of such *nunc pro tunc* entry, as distinguished from the original order or entry.” *Perfection Stove Co. v. Scherer*, 120 Ohio St. 445, 448-449, 166 N.E. 376 (1929); *Morton v. Morton*, 19 Ohio App.3d 212, 483 N.E.2d 1192 (8th Dist.1984), paragraph two of the syllabus (“[w]here the trial court, *sua sponte*, in a second judgment entry, corrects a clerical error made in a prior judgment entry, the date on which the first judgment was received and filed by the clerk of court constitutes the commencement date for calculating the time within which a notice of appeal must be filed pursuant to App.R. 4(A)”).

{¶17} In the present case, the November 21, 2014 *Nunc pro Tunc* Judgment neither created nor denied rights with respect to Struharik or RBS Citizens, but merely corrected the failure to acknowledge the State of Ohio’s interest in the prior Judgment. Struharik may challenge the grant of summary judgment by appealing from the October 30, 2014 Judgment.

{¶18} RBS Citizens further argues that Struharik did not raise the issue of its standing before the trial court, and, thus, “has waived the right to assert it for the first time on appeal.” RBS Citizens is incorrect. Struharik expressly asserted that RBS Citizens “failed to demonstrate that it is the holder and owner of the promissory note” in her Memorandum in Opposition to Summary Judgment.

{¶19} Turning to the merits of the appeal, the issue before this court is whether RBS Citizens established, as a matter of law, its standing to prosecute the foreclosure action as a successor by merger to Charter One Bank.

{¶20} In order to properly invoke the jurisdiction of the common pleas court in a foreclosure action, the plaintiff must have standing, i.e., an interest in the note and/or mortgage, at the time the complaint is filed. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 28 and 40; *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 23. “[P]roof of standing may be submitted subsequent to the filing of the complaint.” *Wells Fargo Bank, N.A. v. Horn*, ___ Ohio St.3d ___, 2015-Ohio-1484, ___ N.E.3d ___, ¶ 17.

{¶21} A party which is successor by merger to the lender/payee of a note has standing to enforce the note. *CitiMortgage, Inc. v. Evans*, 8th Dist. Cuyahoga No. 101882, 2015-Ohio-1384, ¶ 26; *CitiMortgage, Inc. v. Roznowski*, 5th Dist. Stark No. 2012-CA-93, 2014-Ohio-4792, ¶ 29; *Morris v. Invest. Life Ins. Co.*, 27 Ohio St.2d 26, 31, 272 N.E.2d 105 (1971) (“[i]t is settled law that a merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former”).

{¶22} In the present case, RBS Citizens established its standing to enforce the note through the affidavit testimony of its employee, Debra J. VanBuskirk: “I am an Employee of RBS Citizens, N.A., fka Citizens Bank, N.A., sbm to Charter One Bank, N.A., the duly authorized servicing agent for Charter One Bank, N.A.” VanBuskirk averred that, in preparing her affidavit, she relied upon “memorandum, reports, records or other data that were made by a person with knowledge of the facts of made from

information transmitted by a person with knowledge of the facts, were made at or near the time of the acts upon which my affidavits are based, were made as part of the regular practice of Plaintiff's business activity and are kept in the course of Plaintiff's regularly conducted business activity." Based on this information, "Plaintiff is in possession of the * * * promissory note and is the owner and holder of the promissory note and mortgage attached to the plaintiff's Complaint."

{¶23} VanBuskirk's affidavit is competent evidence under the Civil Rules that RBS Citizens has standing to enforce the Note. Struharik has offered no evidence to the contrary, but merely relies on the argument that RBS Citizens did not meet its burden on summary judgment. Struharik's unsupported argument is insufficient to create a genuine issue of material fact with respect to RBS Citizens' standing to enforce the Note.

{¶24} Other appellate districts have affirmed grants of summary judgment in similar circumstances. In *U.S. Bank, N.A. v. Detweiler*, 191 Ohio App.3d 464, 2010-Ohio-6408, 946 N.E.2d 777 (5th Dist.), the court of appeals found a bank employee's affidavit "sufficient" to support the motion for summary judgment, noting that the "Appellants have not provided any Civ.R. 56 evidence to demonstrate that Appellee is not the owner of the Note and Mortgage by virtue of the merger." *Id.* at ¶ 31. Likewise, in *BAC Home Loans Serv. v. Taylor*, 2013-Ohio-355, 986 N.E.2d 1028 (9th Dist.), the court of appeals affirmed the grant of summary judgment: "The Taylors have not cited any authority for the proposition that the sworn testimony of a vice president of a bank regarding the bank's merger with another entity is incompetent evidence under Civil Rule 56. They also have not explained why they believe that [the bank's vice

president's] testimony about the merger required some additional 'factual basis' or supporting documentation of the merger." *Id.* at ¶ 8.

{¶25} The sole assignment of error is without merit.

{¶26} For the foregoing reasons, the October 30, 2014 Judgment of the Trumbull County Court of Common Pleas, granting summary judgment in favor of RBS Citizens, is affirmed. Costs to be taxed against appellant.

THOMAS R. WRIGHT, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.