

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THE BANK OF NEW YORK MELLON	:	JUDGES:
FKA THE BANK OF NEW YORK AS	:	Hon. W. Scott Gwin, P.J.
TRUSTEE FOR THE	:	Hon. William B. Hoffman, J.
CERTIFICATEHOLDERS OF	:	Hon. Patricia A. Delaney, J.
CWABS, INC, ASSET-BACKED	:	
CERTIFICATES, SERIES 2003-05	:	Case No. 2014CA00171
	:	
Plaintiff-Appellee	:	
	:	<u>OPINION</u>

-VS-

JERRY A. BLAKE

Defendant-Appellant

CHARACTER OF PROCEEDING:	Civil appeal from the Stark County Court of Common Pleas, Case No. 2011CV03288
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	June 1, 2015
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APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

AMANDA HOLZHAUER
25550 Chagrin Blvd.
Suite 406
Cleveland, OH 44122

JERRY A. BLAKE PRO SE
3310 Miles Ave. N.W.
Canton, OH 44718

JASON A. WHITACRE
4500 Courthouse Blvd.
Suite 400
Stow, OH 44224

Gwin, P.J.

{¶1} Appellant appeals the August 11, 2014 judgment entry of the Stark County Court of Common Pleas granting summary judgment in favor of appellee and entering a decree of foreclosure.

Facts & Procedural History

{¶2} On October 14, 2011, appellee The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of CWABS, Inc. Asset-Backed Certificates, Series 2003-5, filed a complaint against appellant Jerry A. Blake. A copy of the note, mortgage, two assignments of note and mortgage, and a loan modification agreement from 2008 were attached to the complaint. The note attached to the complaint and dated August 26, 2003, designates the Lender as Full Spectrum Lending (“Full Spectrum”). The note contains an indorsement from Full Spectrum to Countrywide Home Loans. The note also contains a blank indorsement from Countrywide Home Loans.

{¶3} The mortgage, dated August 26, 2003, secures the property located at 3310 Miles Avenue, Canton, Ohio. The Lender is listed on the mortgage as Full Spectrum with Mortgage Electronic Registration Systems (“MERS”) listed as the mortgagee and nominee for Lender and Lender’s successor and assigns. An “Assignment of Note and Mortgage” dated August 1, 2006 assigns the note and mortgage dated August 26, 2003 to The Bank of New York, as Trustee for the Certificateholders of CWABS 2003-5. The original lender listed on the assignment is Full Spectrum and the assignment is signed by MERS, as nominee for lender. A second “Assignment of Note and Mortgage” dated October 10, 2011 assigns the note

and mortgage dated August 26, 2003 to appellee. The loan modification, dated May 21, 2008, states that it supplements and amends the original note and mortgage dated August 26, 2003.

{¶4} In February of 2012, appellant filed a motion to dismiss the complaint, arguing that appellee had not complied with the terms of the governing trust agreement and that the note and mortgage were severed at origination because MERS was the named mortgagee. After appellee filed a response, the trial court overruled the motion. Appellant then filed an answer and counterclaims. After the case was sent to mediation and reactivated to the active docket, appellant filed a second motion to dismiss and argued that since appellee was not a party to a 2006 foreclosure, appellee had no standing in this case. The trial court overruled the motion in July of 2013. The trial judge transferred the case to a visiting judge in November of 2013. Appellant filed a third motion to dismiss on November 25, 2013.

{¶5} On April 1, 2014, appellee filed a motion for summary judgment. Appellee stated it is the holder of the note and mortgage. Appellee also argued as to why it was entitled to summary judgment on appellant's counterclaims. Attached to the motion for summary judgment was the affidavit of Jane Cashel ("Cashel"), Assistant Vice President of Bank of America, previously the loan servicer of the loan made to appellant. Cashel stated that the original note, indorsed in blank, has been in the custody of Bank of New York Mellon, its predecessor-in-interest, or one of its custodians since September 4, 2003. Also attached to the motion for summary judgment was the affidavit of Bryan Muncy ("Muncy"), Assistant Secretary of NationStar Mortgage, the current loan servicer of the loan. Muncy stated that appellee is the current holder of the note and mortgage

and has been at all times during the pendency of this action. Further, that the note, indorsed in blank, has been in the custody of Bank of New York Mellon, its predecessor-in-interest, or one of its custodians since September 4, 2003.

{¶6} In response to appellee's motion, appellant filed two motions to dismiss on May 1, 2014. On June 3, 2014, the trial court denied appellant's fourth and fifth motions to dismiss and gave appellant twenty-one (21) days to respond to the motion for summary judgment. In June of 2014, appellant filed two motions to vacate the trial court's orders. On July 8, 2014, appellant filed a motion to transfer to federal court and a notice that he had filed an affidavit of disqualification with the Ohio Supreme Court against the trial judge. On July 9, 2014, appellant filed a response to the motion for summary judgment. No Civil Rule 56(C) evidence was attached or included in his response. On August 1, 2014, the Ohio Supreme Court denied appellant's affidavit of disqualification.

{¶7} On August 11, 2014, the trial court issued a judgment entry denying appellant's third motion to dismiss (dated November 25, 2013), overruling appellant's objections, denying appellant's motion to transfer to federal court, granting appellee's motion for summary judgment on its complaint and on appellant's counterclaims, and entering a decree of foreclosure.

{¶8} Appellant appeals the August 11, 2014 judgment entry of the Stark County Court of Common Pleas and assigns the following as error:

{¶9} "I. THE TRIAL COURT ERRED WHEN JUDGE TARYN HEATH (CHOLLEY) FAILED TO DISCLOSE TO JERRY BLAKE HER EXTREME CONFLICTS, INCLUDING HER HUSBAND JOSEPH F. CHOLLEY BEING EMPLOYED BY

COMPANY WHO'S TRUSTEE, BANK DEPOSITORY, AND SHAREHOLDER SERVICE BEING PLAINTIFF/APPELLEE BANK OF NEW YORK MELLON FOR OVER TWO YEARS IN THESE PROCEEDINGS, AS SHE OVERRULED TWO MOTIONS FOR DISMISSAL AND LEFT MULTIPLE OTHER MOTIONS WITHOUT ANY RULING, THUS DENYING DUE PROCESS, ABILITY TO VERIFY COMPLAINT OR JURISDICTION, TO OBTAIN EVIDENCE AND DISCOVERY OR COMPLETE DEPOSITION PROCESS TO PREPARE FOR SCHEDULED JURY TRIAL.

{¶10} "II. TRIAL COURT ERRED IN IGNORING APPELLANT'S ALLEGATIONS OF EVIDENCE VIOLATIONS, SPOILATION, ALTERING CONTRACT LANGUAGE AND IN MAKING FALSE STATEMENTS BY APPELLEE BASED ON ONLY "EVIDENCE" PROVIDED IN THEIR APRIL 4, 2012 "SUPPLEMENTAL BRIEF" TO DEPRIVE APPELLANT OF DUE PROCESS, ALLOWING PERJURY BY PLAINTIFF WHICH FALSELY CLAIMED DEFENDANT HAD WAIVED HIS DEFENSES, TO MANIFEST TO THE POINT OF FRAUD UPON THE COURT, DEFILING THE INTEGRITY OF THESE ENTIRE PROCEEDINGS WHEREBY REASONABLE MINDS WOULD CONCLUDE PREJUDICIAL BIAS.

{¶11} "III. TRIAL COURT ERRED IN CONTINUING PROCEEDINGS WITHOUT ADDRESSING MULTIPLE CHALLENGES OF LACK OF STANDING OF APPELLEE BROUGHT FORTH BY APPELLANT ON NUMEROUS GROUNDS INCLUDING THE SCHWARTZWALD RULING OF THE OHIO SUPREME COURT AND APPELLEE'S LACK OF AN ASSIGNMENT FILED WITH ORIGINAL COMPLAINT AND NOT FILED ON COURT DOCKET FOR 148 DAYS AND A SECOND ASSIGNMENT BASED ON THE FIRST, BOTH OF WHICH ARE CONTRARY TO LAW AND IN

VIOLATION OF POOLING AND SERVICING AGREEMENT OF TRUST THAT APPELLEE BROUGHT SAID COMPLAINT "FOR" AS TRUSTEE AND BROKEN CHAIN OF TITLE, WHO WAS ALSO TRUSTEE FOR JUDGE'S HUSBAND'S EMPLOYER.

{¶12} "IV. THE TRIAL COURT ERRED BY FAILURE TO HOLD OR RULE ON JERRY BLAKE'S NOVEMBER 25, 2013 MOTION FOR DISMISSAL FILED IMMEDIATELY AFTER RECUSAL OF JUDGE HEATH, WHICH APPELLEE FAILED TO RESPOND FOR 31 DAYS, AND NEVER SENT THIS 17 DAY LATE RESPONSE TO "THE DEFENDANT," DEPRIVING DEFENDANT THE ABILITY TO DEFEND HIS CASE OR COUNTERCLAIM, SUPPRESSING SUBSTANTIVE EVIDENCE FROM JURY FOR FACT-FINDING WHEN COURT INSTITUTED SUMMARY JUDGMENT OVER OBJECTIONS OF MR. BLAKE IN EXTREME ABUSE OF A PRO-SE LITIGANT.

{¶13} "V. TRIAL COURT ERRED IN WILLFULLY SUBJECTING APPELLANT TO "DEPRIVATION OF RIGHTS UNDER COLOR OF LAW" WHEN IN CONTEMPT OF THE JUNE 28TH 2012 COURT ORDER FOR JURY TRIAL AND CASE MANAGEMENT AND TRIAL ORDER OF AUGUST 14TH 2013, VISITING JUDGE PATRICIA ANN COSGROVE FAILED TO APPEAR FOR FINAL PRE-TRIAL HEARING OF JANUARY 15TH 2014, CANCELLED JERRY BLAKE'S JURY TRIAL VIA PHONE AND VIOLATED HIS COUNTERCLAIMS TO FORCE HIM INTO SUMMARY JUDGMENT EVEN THOUGH HIS JURY TRIAL WAS DEMANDED, APPROVED, SCHEDULED, AND ALSO PAID FOR IN ADVANCE.

{¶14} "VI. THE TRIAL COURT ERRED IN EXTREME VIOLATION OF A DEFENDANT'S SEVENTH AMENDMENT RIGHT TO JURY TRIAL UNDER THE

UNITED STATES CONSTITUTION AND HIS RIGHT TO JURY TRIAL UNDER THE OHIO CONSTITUTION ARTICLE I "INALIENABLE RIGHTS" AND ARTICLE V. "TRIAL BY JURY," WITH STIPULATIONS THAT HIS RIGHT TO JURY TRIAL IS FURTHER PROTECTED BY THE U.S. SUPREME COURT DECISION "MARBURY V. MADISON" OF 1803 THAT "CONFIRMS AND STRENGTHENS THE PRINCIPLE, SUPPOSED TO BE ESSENTIAL TO ALL WRITTEN CONSTITUTIONS, THAT A LAW REPUGNANT TO THE CONSTITUTION IS VOID, AND THAT COURTS, AS WELL AS OTHER DEPARTMENTS, ARE BOUND BY THAT INSTRUMENT."

I., II., & V.

{¶15} In his first assignment of error, appellant argues that the first trial judge to preside over the case failed to disclose conflicts and violated the Canons and Rules of Ohio Judicial Conduct. In his second assignment of error, appellant argues that the trial court exhibited prejudicial bias in ignoring his evidence and in accepting false statements by appellee.

{¶16} It is well-established that, pursuant to R.C. 2701.03, the Chief Justice of the Supreme Court of Ohio has exclusive jurisdiction to determine a claim that a common pleas judge is biased or prejudiced. See *Jones v. Billingham*, 105 Ohio App.3d 8, 11, 663 N.E.2d 657 (2d Dist. 1995). If a common pleas litigant wishes to raise a challenge to a trial judge's objectivity, he or she must utilize the procedure set forth in R.C. 2701.03. See *In re Baby Boy Eddy*, 5th Dist No. 99CA22, 2000 WL 1410 (1999). Disqualification proceedings are not initiated in the court of appeals and are not subject to review by the court of appeals. *Beer v. Griffith*, 54 Ohio St.2d 440, 377 N.E.2d 775 (1978). Thus, an appellate court lacks the authority to pass upon the

disqualification of a common pleas court judge or to void the judgment of a trial court on that basis. *State v. Ramos*, 88 Ohio App.3d 394, 623 N.E.2d 1336 (Ohio App. 9th Dist. 1993). Accordingly, appellant's first and second assignments of error are overruled.

{¶17} In his fifth assignment of error, appellant argues that the visiting judge assigned to preside over the instant case deprived him of all rights. Appellant includes in his assignment of error the same conduct that he included in his motion for disqualification of the visiting judge made to the Ohio Supreme Court. In an August 1, 2014 judgment entry, the Chief Justice of the Ohio Supreme Court denied appellant's affidavit of disqualification based upon this conduct. Accordingly, appellant's fifth assignment of error is overruled.

III.

{¶18} In his third assignment of error, appellant argues the trial court erred in granting summary judgment to appellee because appellee lacked standing.

Summary Judgment Standard

{¶19} Civil Rule 56(C) in reviewing a motion for summary judgment which provides, in pertinent part:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or

stipulation, and only from the evidence or stipulation, 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 or stipulation construed mostly strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

{¶20} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co.*, 67 Ohio St.2d 427, 424 N.E.2d 311 (1981). When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). This means we review the matter de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186, 738 N.E.2d 1243.

{¶21} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim. *Drescher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996). Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist. *Id.* The non-moving party may not rest upon the allegations and denials in

the pleadings, but instead must submit some evidentiary materials showing a genuine dispute over material facts. *Henkle v. Henkle*, 75 Ohio App.3d 732, 600 N.E.2d 791 (12th Dist. 1991).

{¶22} To properly support a motion for summary judgment in a foreclosure action, a plaintiff must show:

- (1) the movant is the holder of the note and mortgage, or is a party entitled to enforce the instrument;
- (2) if the movant is not the original mortgagee, the chain of assignments and transfers;
- (3) all conditions precedent have been met;
- (4) the mortgage is in default; and
- (5) the amount of principal and interest due.

Wachovia Bank of Delaware, N.A. v. Jackson, 5th Dist. Stark No. 2010-CA-00291, 2011-Ohio-3202.

{¶23} To have standing to pursue a foreclosure action, a plaintiff “must establish an interest in the note or mortgage at the time it filed suit.” *Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d, 2012-Ohio-5017, 979 N.E.2d 1214. The current holder of the note and mortgage is the real party in interest in a foreclosure action. *U.S. Bank Nat’l. Assn v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032 (7th Dist.), citing *Chase Manhattan Corp. v. Smith*, 1st Dist. Hamilton No. C061069, 2007-Ohio-5874.

{¶24} In this case, appellee presented Civil Rule 56(c) evidence to properly support a motion for summary judgment in a foreclosure action. The affidavit of Muncy

provides the amount of principal and interest due and states that the mortgage at issue is in default. Muncy and Cashel's affidavits further state that all conditions precedent to foreclosure have been satisfied. Muncy's affidavit establishes that appellee is the current holder of the note and mortgage securing the loan, and has been at all times during this action. The original note was indorsed by Full Spectrum to Countrywide Home Loans and then by Countrywide Home Loans in blank. Appellee is in possession of the note which is endorsed in blank. Further, appellee is also the holder of the mortgage. The mortgage was assigned from the originating lender to Bank of New York, as Trustee for Certificateholders of the CWABS, Inc. Asset-Backed Certificates, Series 2003-5, and then assigned to appellee prior to the filing of this action. Accordingly, appellee is the real party in interest with standing to bring this foreclosure action pursuant to *Federal Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214.

{¶25} Appellee thus met its summary judgment burden to establish its right to foreclose. Appellant did not provide any Civil Rule 56 evidence to create a genuine issue of material fact as to whether the mortgage is in default, whether all conditions precedent have been met, the amount of principal and interest due, the chain of assignments and transfers, or whether appellee was the owner and holder of the note and mortgage at the time the complaint was filed. Accordingly, the trial court did not err in granting summary judgment to appellee.

{¶26} In review of the 2006 foreclosure case cited by appellant, the case was dismissed in March of 2007. The instant case was filed in 2011 and based upon actions of non-payment on the note, mortgage, and loan modification agreement beginning on

June 1, 2008, actions all occurring after the dismissal of the prior case. Accordingly, we find the 2006 case has no impact on the standing of appellee in the instant case.

{¶27} Appellant's third assignment of error is overruled.

IV.

{¶28} In his fourth assignment of error, appellant argues the trial court erred by failing to rule on his November 25, 2013 motion to dismiss. In the trial court's August 11, 2014 judgment entry, the trial court specifically denied appellant's November 25, 2013 motion to dismiss. Accordingly, appellant's fourth assignment of error is overruled.

VI.

{¶29} In his sixth assignment of error, appellant argues the trial court erred and violated his right to jury trial by granting appellee's motion for summary judgment. Based upon our disposition of the previous assignments of error and our determination that the trial court did not err in granting appellee's motion for summary judgment, appellant's seventh assignment of error is overruled.

{¶30} Based upon the foregoing, we overrule appellant's assignments of error. The August 14, 2014 judgment entries of the Stark County Court of Common Pleas granting summary judgment in favor of appellee and entering a decree of foreclosure are affirmed.

By Gwin, P.J.,

Hoffman, J., and

Delaney, J., concur