

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Deutsche Bank National Trust Company, :
As Indenture Trustee of the Aames :
Mortgage Investment Trust 2005-1, :
Plaintiff-Appellee, :
v. : No. 09AP-865
(C.P.C. No. 09CVE-01-1102)
Nancy P. Cassens, : (REGULAR CALENDAR)
Defendant-Appellant, :
John Doe et al., :
Defendants-Appellees. :

D E C I S I O N

Rendered on June 22, 2010

Lerner, Sampson & Rothfuss, Donald K. Swartz, and M. Elizabeth Hils, for plaintiff-appellee.

McGookey Law Offices, and Daniel L. McGookey; Hardy Law Offices, LLC, and Richard B. Hardy, III, for defendant-appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Nancy P. Cassens, from an entry of the Franklin County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, Deutsche Bank National Trust Company.

{¶2} On January 23, 2009, appellee filed a complaint in foreclosure against appellant, alleging that appellant was in default on a promissory note under a loan modification agreement, owing appellee the sum of \$164,839.93. According to the complaint, the loan modification agreement was executed between the parties in October 2007. Appellee attached copies of a mortgage and loan modification agreement as exhibits to the complaint. Appellant filed an answer on February 20, 2009, raising several defenses, including the defense that appellee was not the real party in interest.

{¶3} On May 18, 2009, appellee filed a motion for summary judgment. Appellant filed a memorandum contra appellee's motion for summary judgment, again asserting that appellee was not the real party in interest. On August 21, 2009, the trial court filed an entry granting appellee's motion for summary judgment, finding appellee had submitted evidence that it was the owner of both the note and mortgage at the time the complaint in foreclosure was filed, therefore establishing standing to bring the action.

{¶4} On appeal, appellant sets forth the following assignment of error for this court's review:

THE TRIAL COURT ERRED IN GRANTING PLAINTIFF/
APPELLEE SUMMARY JUDGMENT IN THAT PLAINTIFF/
APPELLEE FAILED TO PROVE IT WAS THE OWNER AND
HOLDER OF DEFENDANT/APPELLANT'S NOTE AND
MORTGAGE, AND THAT IT HAD STANDING TO BRING
AND MAINTAIN ITS CLAIM.

{¶5} Appellant contends the trial court erred in granting summary judgment in favor of appellee because genuine issues of material fact exist as to whether appellee was the owner and holder of the note and mortgage at the time the complaint was filed. Appellant argues that the evidence submitted by appellee in support of summary

judgment was insufficient to establish appellee as the real party in interest in the foreclosure proceeding.

{¶6} This court's review of summary judgment is de novo. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, ¶24, citing *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 2000-Ohio-186. Pursuant to Civ.R. 56(C), "summary judgment shall be granted when the filings in the action, including depositions and affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Bonacorsi* at ¶24.

{¶7} As noted, in its answer to appellee's complaint, appellant asserted as an affirmative defense that appellee was not the real party in interest. Civ.R. 17(A) states in part:

Every action shall be prosecuted in the name of the real party in interest. * * * No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

{¶8} If a party to an action is not the real party in interest, such party lacks standing to prosecute the action. *Bank of New York v. Stuart*, 9th Dist. No. 06CA008953, 2007-Ohio-1483, ¶9. Lack of standing "may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter." *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 77. Under Ohio law, "[t]he current holder of the note and mortgage is the real party in interest in a foreclosure action." *Wells Fargo Bank, N.A. v. Stovall*, 8th Dist. No. 91802, 2010-Ohio-236, ¶15.

{¶9} Attached to appellee's complaint in foreclosure as Exhibit A was a copy of a mortgage in favor of "Aames Funding Corporation DBA Aames Home Loan" (hereafter "Aames"). The mortgage was signed by appellant and dated December 27, 2004. The mortgage referenced a promissory note signed by the borrower, dated December 27, 2004, stating that borrower owes lender the amount of \$157,600. Also attached to the complaint in foreclosure as Exhibit B was a document entitled "Loan Modification of Mortgage Agreement" (hereafter "loan modification agreement"), which provided in part:

This Loan Modification Agreement ("Agreement") made this 11th day of October, 2007, between, Nancy P. Cassens, Single ("Borrower") and Deutsche Bank National Trust Company, As Indenture Trustee of the Aames Mortgage Investment Trust 2005-1, ("Lender") amends and supplements (1) the Mortgage, Deed of Trust or Deed to Secure Debt ("the Security Instrument") dated December 27, 2004 and recorded as Instrument Number 200501040002426 of the Official Records of Franklin County Ohio (2) the Note bearing the same date as, and secured by, the Security Instrument which covers the real and personal property described in the Security Instrument and defined therein as the "Property" located at

2159 SHADEMONT COURT
COLUMBUS, OHIO 43235

{¶10} The loan modification agreement indicated that, as of October 1, 2007, the amount of \$166,426.33 was payable under the note and security instrument. The document was signed by appellant and dated October 17, 2007.

{¶11} After appellant filed her answer, asserting as a defense that appellee was not the real party in interest, appellee filed with the trial court a "Notice of Filing of Promissory Note." Attached to the notice as an exhibit was a copy of an "Adjustable Rate Note" bearing appellant's signature.

{¶12} In support of its motion for summary judgment, appellee submitted the affidavit of Christopher Spradling, "an employee of Litton Loan Servicing, a loan servicing agent for Plaintiff" (appellee). In the affidavit, Spradling averred in part:

That Plaintiff is the owner in possession of the complete copy of the promissory note and mortgage which are attached as Exhibits A and B hereto;

Plaintiff purchased, acquired and/or otherwise obtained possession of the note and mortgage before January 21, 2009, and prior to the execution of the Assignment of Mortgage evidencing the transfer of record;

That on or about February 6, 2009, Accredited Home Lenders, Inc., a California Corporation successor by merger to Aames Funding Corporation dba Aames Home Loan, a California Corporation executed an Assignment of Note and Mortgage, which was recorded on February 24, 2009, Instrument No: 200902240024221 and that the copy of the Assignment of Mortgage attached hereto as Exhibit C is a true and accurate copy of the original instrument.

Plaintiff further states that it has exercised the option contained in said mortgage note and has accelerated and called due the entire principal balance due thereon;

That affiant has examined and has personal knowledge of the loan account of Nancy P. Cassens, Defendant herein; that said account is under affiant's supervision; that there is presently due a principal balance of \$164,839.93 with interest thereon at the rate of 8% per annum from September 1, 2008; that said account has been and remains in default.

{¶13} As an exhibit to the motion for summary judgment, appellee again submitted a copy of the adjustable rate note, dated December 27, 2004. In addition, attached to the adjustable rate note was an "Endorsement and Assignment of Note," dated December 31, 2004, stating in part that "Ames Funding Corporation, DBA Aames Home Loan," for value received, does "hereby transfer, endorse and assign" the note and

deed of trust to "Deutsche Bank National Trust Company, as Indenture Trustee of the Ames Mortgage Investment Trust 2005-1." That document also identified the loan number, property address (2159 Shademont Court, Columbus), borrower's name (Nancy P. Cassens), the loan date (December 27, 2004), and the loan amount (\$157,600).

{¶14} On August 6, 2009, appellee filed its reply in support of its motion for summary judgment, and attached as "Exhibit C" a document titled "Assignment of Note and Mortgage," which stated in part:

KNOW ALL MEN BY THESE PRESENTS, that Accredited Home Lenders, Inc., a California Corporation successor by merger to Aames Funding Corporation dba Aames Home Loan, a California Corporation * * *, for valuable consideration, the receipt of which is hereby acknowledged, does hereby sell, assign, transfer and set over, without recourse, unto Deutsche Bank National Trust Company, an Indenture Trustee of the Ames Mortgage Investment Trust 2005-1 whose address is c/o Litton Loan Servicing, LP * * * a certain Mortgage Deed bearing the date of December 31, 2004, executed and delivered by Nancy P. Cassens, unmarried, and recorded in * * * the Franklin County Recorder's Office on January 4, 2005, together with the Promissory Note secured thereby and referred to therein; and all sums of money due and to become due thereon.

{¶15} As noted, appellant contends that appellee has failed to demonstrate it was the owner and holder of appellant's note and mortgage at the time the complaint was filed. Appellant argues that the affidavit of Spradling should be given little value because it purports to be from appellee's loan servicing agent (rather than, appellant argues, an officer of appellee). Appellant also contends that representations by Spradling in the affidavit that an assignment of note and mortgage was executed on February 6, 2009, and recorded on February 24, 2009, are inconsistent with Spradling's assertion that

appellee acquired possession of the note and mortgage prior to filing the action. We find appellant's contentions unpersuasive.

{¶16} A review of the documents before the trial court on summary judgment, as set forth above, indicates that appellant executed a promissory note with Aames, the original lender, on December 27, 2004, whereby Aames loaned appellant the amount of \$157,000. Appellee submitted a copy of an "allonge" to the note, containing an endorsement by Aames' assistant secretary, indicating that Aames transferred the note to appellee on December 31, 2004. The evidence also contains a copy of a 2007 loan modification agreement between "Nancy P. Cassens, Single ('Borrower') and Deutsche Bank National Trust Company, As Indenture Trustee of the Aames Mortgage Investment Trust 2005-1, ('Lender')," signed by appellant and dated October 17, 2007. Appellee submitted the affidavit of Spradling, a loan servicing agent for appellee, who averred that appellee was the current owner of the promissory note and mortgage, and that appellee acquired the note and mortgage prior to the filing of the complaint in foreclosure and prior to the execution of the assignment. The record further indicates that appellee recorded the assignment of the note and mortgage in Franklin County on February 24, 2009.

{¶17} Appellant's contention that there is an inconsistency between Spradling's claim that appellee owned the note and mortgage prior to the foreclosure action and his further representations that the execution and assignment of the mortgage occurred after the complaint was filed is unpersuasive. Ohio courts have held that, when "a promissory note is secured by a mortgage, the note constitutes the evidence of the debt" and, therefore, "the negotiation of a note operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered." *United States Bank*

Natl. Assn. v. Marcino, 181 Ohio App.3d 328, 2009-Ohio-1178, ¶52. Accordingly, courts have rejected claims that the execution of an assignment subsequent to the filing of a complaint necessarily precludes a party from prosecuting a foreclosure action as the real party in interest. See *LaSalle Bank Natl. Assn. v. Street*, 5th Dist. No. 08 CA 60, 2009-Ohio-1855 (despite fact that document purporting to assign bank both the note and mortgage was filed approximately one week after complaint in foreclosure was filed, record was sufficient to establish bank was real party in interest); *Stuart* at ¶12 (filing of assignment after complaint filed, but before judgment was entered, was sufficient to alert court and appellants that appellee was the real party in interest); *Wachovia Bank v. Cipriano*, 5th Dist. No. 09CA007A, 2009-Ohio-5470, ¶36 (although bank was not holder of note prior to filing of complaint, appellee was the real party in interest and holder of note prior to judgment being entered).

{¶18} We also find unpersuasive appellant's contention that the trial court should have given little or no weight to the affidavit of appellee's loan servicing agent. See *Deutsche Bank Natl. Trust Co. v. Ingle*, 8th Dist. No. 92487, 2009-Ohio-3886, ¶18 (affidavit of bank's loan servicing agent, along with other supporting documents, including allonge of the note, sufficient to show bank was the real party in interest). See also *Bank of New York v. Dobbs*, 5th Dist. No. 2009-CA-000002, 2009-Ohio-4742, ¶40 (affidavit of loan servicing agent, "even though * * * not employed by" appellee, sufficient to provide authentication of documents).

{¶19} In the present case, appellee submitted evidence in support of summary judgment indicating it was the owner of appellant's note and mortgage at the time the foreclosure action was commenced, and appellant failed to offer countervailing evidence

sufficient to create a genuine issue of material fact challenging appellee as the real party in interest. Accordingly, we find no error in the trial court's grant of summary judgment in favor of appellee.

{¶20} Based upon the foregoing, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK, P.J., and FRENCH, J., concur.
