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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2011-2012

2100235

James M. Perry

v.

Federal National Mortgage Association

Appeal from Shelby Circuit Court
(CV-09-900606)

PITTMAN, Judge.

James M. Perry appeals from a summary judgment in favor of the Federal National Mortgage Association ("Fannie Mae") in an ejectment action. We reverse and remand.

Facts and Procedural History

Perry obtained a loan in the amount of $144,433 from RBMG, Inc., to purchase a home. On August 12, 2003, he executed a promissory note in favor of RBMG and a mortgage securing the note in favor of Mortgage Electronic Registrations Systems, Inc. ("MERS"), as nominee for the lender RBMG. The note and the mortgage were, at different times, subsequently transferred to EverHome Mortgage Company ("EverHome"). Perry made the payments due on the mortgage indebtedness until November 2007, when he was injured in a work-related accident. After the injury, Perry experienced a reduction in his income and began to have difficulty in making his mortgage payments.

In support of its summary-judgment motion, Fannie Mae submitted evidence indicating that on July 16, 2008, it had sent a notice-of-default letter to Perry at the address listed on the note and mortgage. In his response in opposition to the motion, Perry submitted an affidavit stating that he had contacted EverHome in an effort to obtain a loan-modification or "work-out" plan through EverHome's loss-mitigation program. Between July 23, 2008, and August 4, 2009, EverHome and Perry

were in contact concerning loss-mitigation alternatives to foreclosure, and EverHome agreed to suspend Perry's mortgage payments for three months, beginning August 1, 2008, and ending November 1, 2008. Perry, however, was never able to bring his loan to a current status, and EverHome declined to consider any further loss-mitigation measures because it concluded that Perry's expenses exceeded his income.

On July 2, 2009, an attorney retained by EverHome notified Perry via a mailed letter that EverHome was accelerating the maturity date of the loan and commencing foreclosure proceedings, with a foreclosure sale scheduled for August 4, 2009. The letter enclosed a copy of the foreclosure notice to be published in the newspaper. The notice named EverHome as the assignee of the mortgage.

It is undisputed that on July 6, 2009, EverHome conveyed its interest in the property to Fannie Mae by special warranty deed; that the notices of the foreclosure sale were published on July 8, July 15, and July 22, 2009, in the Shelby County Reporter; and that on July 15, 2009, MERS assigned the mortgage to EverHome. At the foreclosure sale on August 4, 2009, EverHome purchased the property for $137,896.50. The

same day, EverHome's attorney sent Perry a demand for possession of the property. On August 21, 2009, the assignment of the mortgage and the special warranty deed were both recorded in the Shelby County Probate office; the deed was recorded two seconds after the assignment.

On August 17, 2009, Fannie Mae filed a complaint alleging that it was the owner of the property by virtue of its special warranty deed from EverHome and seeking to eject Perry from the property. Fannie Mae attached to the complaint EverHome's foreclosure deed and its own special warranty deed. Perry answered and denied that Fannie Mae had the right to eject him from the property because, he claimed, the foreclosure sale and the foreclosure deed were void as a consequence of what, Perry claimed, had been "defective notice and a defective sale."

Following discovery, Fannie Mae moved for a summary judgment. In support of that motion, Fannie Mae submitted the note, the mortgage, EverHome's foreclosure deed, its own special warranty deed, and the affidavit of Nik Fox, custodian of EverHome's books and records relating to Perry's loan. Fox stated that he had reviewed EverHome's records concerning

Perry's loan and that he had personal knowledge of the facts set forth in his affidavit. He authenticated the pertinent documents, including the series of loss-mitigation letters that EverHome had sent to Perry and the notice-of-acceleration and demand-for-possession letters that attorneys for EverHome had sent to Perry. With respect to the promissory note that Perry had executed in favor of RBMG on August 12, 2003, Fox authenticated EverHome's copy of the note, which had been stamped with the following preprinted blank indorsement:

"Pay to The Order of
_____
Without Recourse
[illegible signature]
Senior Vice President
RBMG, Inc."

Fox averred that EverHome had "acquired its interest in the note on or about July 2, 2007."

Perry filed a response in opposition to Fannie Mae's summary-judgment motion, attaching, among other materials, his own affidavit and arguing that the foreclosure sale and the foreclosure deed were void for the following reasons: (1) EverHome did not have the right to exercise the power of sale under the mortgage because, Perry said, it was not the assignee of the mortgage when it commenced the foreclosure

proceedings; (2) EverHome had failed to comply with the notice requirements in the mortgage instrument; (3) EverHome had failed to comply with the statutory notice requirements of § 35-10-13, Ala. Code 1975, because, Perry said, the first foreclosure notice published in the newspaper on July 8, 2009, reflected that the mortgage had been assigned to EverHome, when, in fact, MERS did not assign the mortgage to EverHome until July 15, 2009; (4) EverHome had failed to comply with its loss-mitigation program; (5) the foreclosure sale was wrongful because EverHome had breached its fiduciary duty by intentionally underbidding the value of the property and creating a sham deficiency; and (6) Fannie Mae's summary-judgment motion was not supported by admissible evidence under Rule 56, Ala. R. Civ. P. Specifically, Perry argued that Fox's affidavit was not based on personal knowledge and failed to state how or when EverHome had obtained an interest in the note that Perry had executed in favor of RBMG.

Fannie Mae filed a reply to Perry's response and moved to strike a portion of Perry's affidavit. The trial court granted the motion to strike and entered a summary judgment in favor of Fannie Mae on August 24, 2010, setting out the

reasons for its decision. Perry filed a motion to alter, amend, or vacate the judgment on September 22, 2010. The trial court denied Perry's postjudgment motion on October 29, 2010, and Perry timely appealed on December 9, 2010. The supreme court subsequently transferred the appeal to this court pursuant to Ala. Code 1975, § 12-2-7(6).

Standard of Review

Appellate review of a summary judgment is de novo. Ex parte Ballew, 771 So. 2d 1040 (Ala. 2000). A motion for a summary judgment is to be granted when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. A party moving for a summary judgment must make a prima facie showing "that there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Rule 56(c)(3); see Lee v. City of Gadsden, 592 So. 2d 1036, 1038 (Ala. 1992). If the movant meets this burden, "the burden then shifts to the nonmovant to rebut the movant's prima facie showing by 'substantial evidence.'" Lee, 592 So. 2d at 1038 (footnote omitted). "[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons

in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989); see Ala. Code 1975, § 12-21-12(d).

EverHome's Right to Exercise the Power of Sale

Perry contends that the foreclosure sale was defective because EverHome was not the assignee of the mortgage when it initiated the foreclosure proceedings. A party "initiates" foreclosure proceedings when it accelerates the maturity date of the indebtedness and publishes notice of a foreclosure sale. See Sturdivant v. BAC Home Loans Servicing, LP, [Ms. 2100245, December 16, 2011] ___ So. 3d ___, ___ (Ala. Civ. App. 2011). On July 2, 2009, EverHome's attorney notified Perry that EverHome was accelerating the maturity date of the indebtedness and initiating foreclosure proceedings; on July 8, 2009, Everhome first published notice of a foreclosure sale scheduled for August 4, 2009; on July 15, 2009, MERS assigned the mortgage to EverHome.

In Sturdivant, supra, a majority of this court held that, because the foreclosing entity was not the assignee of the mortgage when the foreclosure proceedings were initiated, the

foreclosing entity had no authority to foreclose and no standing to prosecute its ejectment action. Unlike in Sturdivant, the timing of the assignment of the mortgage is not determinative in this case. In support of its summary-judgment motion, Fannie Mae submitted Fox's affidavit testimony indicating that on July 2, 2007, two years before EverHome initiated the foreclosure proceedings, EverHome had acquired the promissory note that Perry had executed to RBMG in 2003. The parties do not dispute the fact that the note was a negotiable instrument, i.e., that it represented Perry's unconditional promise to pay RBMG a fixed sum of money at a definite time, without requiring any other undertaking by Perry. See Ala. Code 1975, § 7-3-104. The parties also do not dispute that EverHome became, at some point, a "holder" of the note. A holder is entitled to enforce the terms of a negotiable instrument. Ala. Code 1975, § 7-3-301. The dispute concerns when EverHome became a holder of the note. If EverHome became a holder of the note before it initiated the foreclosure proceedings in July 2009, then EverHome was authorized to exercise the power of sale contained in the mortgage by virtue of § 35-10-12, Ala. Code 1975.

Section 35-10-12 provides, in pertinent part, that

> "[w]here a power to sell lands is given in any mortgage, the power is part of the security and may be executed by any person, or the personal representative of any person who, by assignment or otherwise, becomes entitled to the money thus secured."

(Emphasis added.) In Harton v. Little, 176 Ala. 267, 270, 57 So. 851, 851 (1911), our supreme court held that "[i]t is not at all necessary that a mortgage deed be assigned in order to enable the owner of the debt to foreclose under a power of sale."

> "The power of sale is a part of the security, and may be exercised by an assignee, or any person who is entitled to the mortgage debt. And a transfer of the debt, by writing or by parol, is in equity an assignment of the mortgage."

176 Ala. at 270, 57 So. at 851-52 (citations omitted). See also Ala. Code 1975, § 8-5-24 ("The transfer of a ... note given for the purchase money of lands, whether the transfer be by delivery merely or in writing, expressed to be with or without recourse on the transferor, passes to the transferee the lien of the vendor of the lands."). See generally Restatement (Third) of Property: Mortgages § 5.4(a) (1997) (stating that "[a] transfer of an obligation secured by a

mortgage also transfers the mortgage unless the parties to the transfer agree otherwise").

Fox, the custodian of EverHome's records relating to Perry's loan, identified EverHome's copy of the note, which bore a blank indorsement by RBMG. A blank indorsement allows a party to transfer a note merely by possession. See Ala. Code 1975, § 7-3-205(b) ("When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed."); see also § 7-3-201(b). Although the indorsement was undated, Fox averred that EverHome had "acquired its interest in the note on or about July 2, 2007."

Perry argues that Fox's statement regarding the date on which EverHome acquired the note was inadmissible under Rule 56(e), Ala. R. Civ. P. That rule provides, in pertinent part:

> "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 stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Fox's affidavit stated, in part:

> "In my present position, I have direct access to the books and records of [EverHome] regarding the account which forms the basis of this action and am a custodian of said books and records. I have personal knowledge of the facts set forth in this affidavit and I have reviewed said relevant business books and records. ... I am competent to testify to the matters set forth in this affidavit, which are based upon my review of said books and records and my personal knowledge."

Perry maintains that Fox could not have had personal knowledge of the date on which possession of the note had been delivered to EverHome unless (a) Fox had been involved in the delivery "transaction" or (b) Fox had reviewed a record of EverHome documenting that "transaction." With respect to alternative (b) of his lack-of-personal-knowledge argument, Perry insists that, if Fox had reviewed and relied upon a record of EverHome documenting the "transaction" by which EverHome had acquired the note, then that record should have been, but was not, attached to Fox's affidavit.

Initially, we note that because a blank indorsement allows a party to transfer a note by possession alone, it is unlikely that any formal, documentable "delivery transaction" occurred. EverHome may, however, have made an entry in its files or on its books indicating that the note, a valuable financial asset, had been received and credited to its account

on a certain date. Nevertheless, aside from Fox's general assertion that he had reviewed EverHome's books and records and that he had personal knowledge of the contents of those books and records, Fox did not state (and Fannie Mae did not attach documentation to demonstrate) how Fox had gained his knowledge of the date on which EverHome had acquired possession of the note. Those omissions rendered Fox's affidavit testimony concerning the acquisition date of the note inadmissible. See Waites v. University of Alabama Health Servs. Found., 638 So. 2d 838 (Ala. 1994) (physician's affidavit failed to comply with Rule 56(e) because medical records, upon which physician relied for his opinion, were not attached); Pettigrew v. LeRoy F. Harris, M.D., P.C., 631 So. 2d 839 (Ala. 1993) (same); Ex parte Head, 572 So. 2d 1276, 1281 (Ala. 1990) (affiant's statement -- that he had gained personal knowledge of the relationship among the defendants by reviewing probate court records -- did not comply with Rule 56(e) because no probate court records were attached to the affidavit); Smith v. Secretary of Veterans Affairs, [Ms. 2100194, June 24, 2011] ___ So. 3d ___, ___ (Ala. Civ. App. 2011) (affidavit of loan servicer's vice president, which did

not explain how affiant had acquired personal knowledge of assignment of mortgage, mortgagor's default, and commencement of foreclosure proceedings, and to which unsworn, uncertified, or otherwise unauthenticated documents were attached, did not comply with Rule 56(e)). Cf. Welch v. Houston Cnty. Hosp. Bd., 502 So. 2d 340, 344 (Ala. 1987) (physician's deposition testimony regarding his findings, which findings were based on physician's review of hospital chart and interviews with personnel, and not on his personal knowledge, were inadmissible because neither the chart nor affidavits or depositions of personnel who were interviewed by physician were contained in the record).

In Johnson v. Layton, 72 So. 3d 1195 (Ala. 2011), our supreme court held that it was not necessary that a patient's chart be attached to a physician's affidavit that referenced the chart because it was clear that the physician had relied on personal knowledge gained by treating the patient, not on the chart, in rendering the opinion he expressed in his affidavit. The court distinguished Welch, Head, Pettigrew and Waites, stating that those decisions "demonstrate that an affiant must submit with his or her affidavit documents that

he or she has relied upon in rendering the opinion expressed in the affidavit." 72 So. 3d at 1201.

Fannie Mae argues that Perry failed to preserve for review any argument as to a defect in Fox's affidavit because Perry did not move to strike the affidavit. We disagree. Perry clearly called the trial court's attention to the inadmissibility of Fox's testimony regarding the alleged date on which EverHome had acquired the note, and he devoted a considerable portion of his response in opposition to Fannie Mae's summary-judgment motion to explaining the basis for his objection. This court recently stated:

> "'On the question whether a trial court should consider a defective affidavit introduced in support of a motion for summary judgment and not objected to by the opposing party, we have consistently held that a failure to object constitutes a waiver of the right to object to the affidavit and that in the absence of an objection the trial court may properly consider such an affidavit, even if an objection alleging the particular defect would clearly have been proper. See Lennon v. Petersen, 624 So. 2d 171 (Ala. 1993); Cain v. Sheraton Perimeter Park S. Hotel, 592 So. 2d 218 (Ala. 1991); Morris v. Young, 585 So. 2d 1374 (Ala. 1991); Perry v. Mobile County, 533 So. 2d 602 (Ala. 1988). An objection need not be made in any particular form. See McMillian v. Wallis, 567 So. 2d 1199, 1205 (Ala. 1990) (holding

> that a party must "call the [trial] court's attention" to the fact that a deposition or affidavit is inadmissible and that by failing to do so a party waives any objection to the court's considering the affidavit or deposition).'
>
> "[Ex parte Elba Gen. Hosp. & Nursing Home, Inc., 828 So. 2d 308, 312-13 (Ala. 2001)] ([e]mphasis added[).]
>
> "In the case now before us, although [the ejectment defendant] did not move to strike [the] affidavit [of the loan servicer's vice president] and the unsworn, uncertified, and unauthenticated documents that accompanied it, [the ejectment defendant's] response to the summary-judgment motion called the trial court's attention to the inadmissibility of the affidavit and those documents by objecting to them and stating the grounds of the objection. Therefore, we find no merit in [the ejectment plaintiff's] argument that [the ejectment defendant] waived his objection to the ... affidavit and the documents that accompanied it because he failed to move to strike them. See Ex parte Elba Gen. Hosp. & Nursing Home, Inc."

Smith v. Secretary of Veterans Affairs, ___ So. 3d at ___.

We conclude that the date-of-acquisition-of-the-note portion of Fox's affidavit was inadmissible. Fox's knowledge of the matters to which his affidavit was addressed was obviously derived from his review of EverHome's records, and he relied on those records in executing the affidavit, yet there was no documentation attached to his affidavit that accounted for his having gained knowledge of when EverHome

acquired possession of the note. Without the objectionable portion of Fox's affidavit testimony, Fannie Mae could not establish either (1) that EverHome, at the time it initiated the foreclosure proceedings, was entitled to exercise the power of sale in the mortgage or (2) that EverHome's foreclosure deed was valid.

If EverHome's foreclosure deed was invalid, then Fannie Mae's special warranty deed was also invalid. On July 6, 2009, when EverHome conveyed the property to Fannie Mae by special warranty deed, EverHome did not have title. The equitable doctrine of after-acquired title would, under other circumstances, have operated to perfect title in EverHome when EverHome later purchased the property at the foreclosure sale on August 4, 2009, and title would then have passed to Fannie Mae immediately. See Jett v. Lawyers Title Insurance Corp., 985 So. 2d 434 (Ala. Civ. App. 2007):

> "'"In no State perhaps has the rule been more rigidly adhered to than in this, 'that when one sells land to which he has no right, with warranty of title, and he afterwards acquires a good title, it passes instantly to his vendee, and he is estopped from denying that he had no right at the time of the sale.'..."'"

985 So. 2d at 438 (quoting Turner v. Lassiter, 484 So. 2d 378, 380 (Ala. 1985), quoting in turn Doolittle v. Robertson, 109 Ala. 412, 413, 19 So. 851, 851 (1895)).

Because Fannie Mae failed to establish by admissible evidence that EverHome was the holder of the note that would have enabled EverHome to initiate foreclosure proceedings, which, in turn, would have enabled EverHome to receive a valid foreclosure deed, and to transfer valid title to Fannie Mae, Fannie Mae did not make a prima facie showing that it was entitled to a summary judgment on its ejectment claim. The judgment of the Shelby Circuit Court must, therefore, be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

Bryan, Thomas, and Moore, JJ., concur.

Thompson, P.J., concurs specially.

THOMPSON, Presiding Judge, concurring specially.

I write specially to express my concerns about the handling of foreclosures in cases such as the one at bar. First, however, I would like to make clear that I recognize the difficulty in which financial institutions find themselves in this economic climate and the strain caused by the current volume of foreclosures. Although I have sympathy for mortgagors who often find themselves unable to meet their financial obligations, I support the efforts of mortgagees to recover, to the extent possible, their investments in mortgaged properties. However, I think it should be emphasized that the entities that negotiate with mortgagors or initiate foreclosure proceedings should actually be the mortgagees for the loans at issue, i.e., that the foreclosing entities should ensure that they have an interest in the loans at issue before representing themselves as an entity with such an interest to mortgagors.

The records in several cases presented to this court indicate instances in which the foreclosing entities have proceeded to negotiate with borrowers or to begin the foreclosure process before those entities have any interest in

the mortgages at issue. On some occasions, the records before this court have indicated that foreclosure proceedings have been initiated after the foreclosing entity has refused a mortgagor's requests, made under loss-mitigation procedures, for mortgage assistance and, often, well before the foreclosing entity obtains an interest in the mortgage it is attempting to foreclose. (In this case, unlike in others, there is an indication that the Federal National Mortgage Association had an interest in the property well before foreclosure process had begun, but that evidence was not properly included in the record on appeal.) My concern is that the cases that have been before this court are not the only instances in which such practices have been utilized.

In the vast majority of cases, the property subject to foreclosure serves as the primary residence for the mortgagor. The defaulting mortgagors often cannot afford an attorney and, in fact, are often ultimately responsible for the attorney fees of the mortgagor. Recently, this court has held that a party seeking foreclosure must have a valid interest in the mortgage indebtedness before initiating foreclosure proceedings. See Sturdivant v. BAC Home Loans Servicing, LP,

[Ms. 2100245, Dec. 16, 2011] ___ So. 3d ___ (Ala. Civ. App. 2011). I also believe that it is incumbent on the foreclosing entity (or other potential mortgagee) to have a valid interest in the mortgage at the time it demands payment from a mortgagor or offers the mortgagor the opportunity to apply for assistance under its loss-mitigation procedures. An entity that makes or purchases mortgages is the party in control of ensuring that it has the interest in the property that it claims.