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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

LEONARDO N. DIGIOVANNI,

Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST
COMPANY f/k/a BANKERS TRUST
COMPANY OF CALIFORNIA,
NATIONAL ASSOCIATION AS
TRUSTEE FOR THE HOLDERS OF
THE VENDEE MORTGAGE TRUST
1998-2; UNKNOWN SPOUSE OF
LEONARDO DIGIOVANNI a/k/a
LEONARDO N. DIGIOVANNI; RIVER
CROSSING COMMUNITY
ASSOCIATION INC.; UNKNOWN
TENANT #1; UNKNOWN TENANT #2,

Appellees.

Case No. 2D18-530

Opinion filed November 25, 2020.

Appeal from the Circuit Court for
Hillsborough County; Mark D. Kiser,
Judge.

Michael Alex Wasylik of Ricardo &
Wasylik, PL, Dade City, for Appellant.

Shaib Y. Rios of Brock & Scott, PLLC,
Ft. Lauderdale, for Appellee Deutsche
Bank National Trust Company f/k/a
Bankers Trust Company of California,
National Association as Trustee for The

Holders of The Vendee Mortgage Trust
1998-2.

No appearance for remaining Appellees.

MORRIS, Judge.

Leonardo N. DiGiovanni appeals from a final judgment of foreclosure entered in favor of Deutsche Bank National Trust Company f/k/a Bankers Trust Company of California, National Association as Trustee for the Holders of the Vendee Mortgage Trust 1998-2. Because we conclude that Deutsche failed to prove that the note was not seized, transferred, or sold prior to filing the foreclosure complaint and that the trial court erred by taking judicial notice of a document purportedly showing that Deutsche was renamed from Bankers Trust and thus was the proper plaintiff, we must reverse and remand for dismissal of the foreclosure case.

BACKGROUND

Deutsche filed the complaint in 2013, listing itself as the plaintiff and formerly known as Bankers Trust Company of California, National Association, as trustee for the holders of the Vendee Mortgage Trust 1998-2. The complaint contained a count to reestablish a lost note, but attached to the complaint was a note that was payable to the Secretary of the United States Department of Veteran Affairs and that contained a specific indorsement to "Bankers Trust Company of California" as trustee. Notably, the complaint did not have a lost note affidavit attached. The complaint alleged that Bankers Trust had been assigned the mortgage as trustee and that it had the right to enforce the note when loss of possession occurred or that it had obtained ownership of the note from a person entitled to enforce it when loss of possession occurred.

However, Deutsche did not provide any specific detail as to how it was entitled to enforce the note. It was not until six months after the filing of the complaint that Deutsche filed a lost note affidavit with the trial court, executed by an employee of Bank of America.¹ The lost note affidavit did not include any facts demonstrating how Deutsche had the right to enforce the note. In his answer and affirmative defenses, DiGiovanni disputed Deutsche's standing to enforce the note based on the fact that it was indorsed to a third party.

Despite the fact that the trial court directed the parties to disclose and exchange all trial exhibits no later than ten days before trial, Deutsche filed a request for judicial notice the day before trial. The document underlying the request was a printout from the National Information Center website that purportedly showed that Bankers Trust had changed its name to Deutsche Bank National Trust Company. No explanation was offered as to why the document was not previously disclosed, nor was any explanation offered as to its authenticity or admissibility.

At trial, Deutsche only offered the testimony of a Bank of America records custodian. That witness did not have personal knowledge of the facts of the case but instead relied solely on the business records of his employer. Out of all the documents introduced into evidence, only one, a limited power of attorney that was executed after the filing of the complaint, mentioned Deutsche. The remaining documents all named Bankers Trust. After Deutsche rested its case, DiGiovanni moved for an involuntary dismissal, arguing that Deutsche failed to prove its standing at inception of the case and its right to enforce the note due to the fact that it failed to prove a connection with

¹Bank of America was the servicer of the loan.

Bankers Trust. In response, Deutsche asked to reopen its case to elicit testimony on the lost note claim.

After reserving ruling on the motion for involuntary dismissal, the trial court asked Deutsche whether it wanted to present its request for judicial notice. DiGiovanni objected, arguing that the request was untimely and therefore an improper matter for judicial notice. DiGiovanni also argued that it was improper for the trial court to even consider the issue because Deutsche had rested its case without seeking a ruling on it. Ultimately, however, the trial court granted Deutsche's request for judicial notice and permitted it to reopen its case for the limited purpose of inquiring further on the issue of "assignment or seizure or transfer" of the note. After DiGiovanni renewed his motion for involuntary dismissal, the trial court denied it.

Subsequently, DiGiovanni filed a written motion, first arguing that his motion to dismiss should have been granted because Deutsche failed to prove that the note had not been seized or sold prior to commencing the foreclosure action. He also argued that the trial court should not have considered the document underlying the request for judicial notice and that without consideration of that document, Deutsche failed to prove the connection to Bankers Trust. DiGiovanni also asserted that even if the printout was considered, it was not introduced into evidence, it constituted inadmissible hearsay, and it was not the proper subject of judicial notice. The written motion was ultimately denied. A renewed motion for reconsideration was also denied. The final judgment of foreclosure was entered a few days thereafter.

ANALYSIS

We review de novo a trial court's ruling on a motion for involuntary dismissal based on lack of standing. Home Title Co. of Md., Inc. v. LaSalla, 257 So. 3d 640, 642-43 (Fla. 2d DCA 2018).

Pursuant to section 673.3091, Florida Statutes (2012), a person or entity not in possession of an instrument is entitled to enforce the instrument if certain requirements are met, including proving that "[t]he loss of possession was not the result of a transfer by the person or a lawful seizure." § 673.3091(1)(b). "A party seeking to reestablish a lost note may meet these requirements either through a lost note affidavit or by testimony from a person with knowledge." Home Outlet, LLC v. U.S. Bank Nat'l Ass'n, 194 So. 3d 1075, 1078 (Fla. 5th DCA 2016) (citing Figueroa v. Fed. Nat'l Mortg. Ass'n, 180 So. 3d 1110, 1114 (Fla. 5th DCA 2015)).

Here, Deutsche failed to attach a lost note affidavit to its complaint. The lost note affidavit was not filed until six months later. Yet the affidavit failed to set forth any facts that the note had not been seized, transferred, or sold prior to the filing of the complaint. Thus it did not meet the requirements of section 673.3091(1)(b). Deutsche's attempt to rectify this problem by reopening its case at trial to elicit testimony on that issue also failed. The testimony that was admitted, over DiGiovanni's hearsay objection, was that nothing in Bank of America's business records that had been admitted into evidence and reviewed by the records custodian reflected that the note had been seized, transferred, or sold. Essentially, Deutsche used the absence of such evidence in the documents to prove the fact in question. But for such testimony to be properly admitted, the witness would have had to testify that the seizure, transfer, or sale of the note would have been recorded in the documents in the ordinary course of

business. Cf. § 90.803(7), Fla. Stat. (2012) (providing that an absence of an entry in records of regularly conducted activity qualifies as an exception to the hearsay rule "if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances show lack of trustworthiness"). And here, Deutsche's witness failed to provide such testimony.

Deutsche argues that its witness testified that the business records reflected that Bank of America followed its normal procedures relating to a lost note and that because the witness demonstrated his familiarity with Bank of America's procedures, such testimony was sufficient to meet the requirements of section 673.3091. However, while that testimony established the witness's qualifications to testify about Bank of America's business records generally, it did not suffice to meet the requirements of section 673.3091(1)(b). Consequently, the trial court erred by admitting Deutsche's witness's testimony on the issue of whether the note had been seized, transferred, or sold and then relying on it to deny DiGiovanni's motion for involuntary dismissal. Deutsche failed to prove that the note had not been seized, transferred, or sold, thereby failing to prove its entitlement to enforce it pursuant to section 673.3091(1)(b). Therefore, we must reverse the final judgment of foreclosure and remand for involuntary dismissal. See Correa v. U.S. Bank N.A., 118 So. 3d 952, 955-57 (Fla. 2d DCA 2013).

We also write to address Deutsche's failure to prove that it was the proper plaintiff. Deutsche's last-minute request for judicial notice—one day prior to trial—of an unauthenticated document that had not been previously disclosed was improper, and

the document upon which it relied was insufficient to establish that it had the right to enforce the note. Deutsche relied on the National Information Center website printout to establish that Bankers Trust, the entity to which the note had been specially indorsed, had been renamed to Deutsche Bank National Trust Company. However, a request for judicial notice must be made pursuant to section 90.203, Florida Statutes (2012), which requires timely written notice so that the opposing party has sufficient time to meet the request. Here, despite the fact that the parties had been ordered to disclose and exchange all trial exhibits ten days before trial, Deutsche inexplicably waited until the afternoon of the day before trial to disclose the printout. No explanation was offered for why this document was not provided at an earlier time. Thus the request was untimely and should not have been granted.

Furthermore, the documents were not even the proper subject of judicial notice because they were not otherwise admissible. We addressed this very issue in a case involving these same parties but a different property. In DiGiovanni v. Deutsche Bank National Trust Co., 226 So. 3d 984, 989 (Fla. 2d DCA 2017), we explained that "judicially noticed documents must be otherwise admissible," and we rejected Deutsche's argument that the same document could be judicially noticed where Deutsche failed to authenticate the document via a statement or affidavit from someone with knowledge of the National Information Center website and where Deutsche failed to demonstrate that the contents of the printout qualified as an exception to the hearsay rule. Because there was nothing beyond the website printout that established that Bankers Trust had been renamed Deutsche Bank National Trust Company, we held that Deutsche failed to prove it had standing to foreclose. Id.

Here too, Deutsche failed to present testimony or an affidavit from anyone with knowledge of the National Information Center website. Likewise, it failed to prove that the printout was admissible as an exception to the hearsay rule. Thus because Deutsche failed to prove that the document was otherwise admissible, the printout should not have been judicially noticed. And without consideration of that document, there was no other evidence presented to show the connection between Bankers Trust and Deutsche. Accordingly, Deutsche failed to establish its right to enforce the note. Thus this issue also requires that we reverse and remand for an involuntary dismissal. Id. at 990.

ATTORNEYS' FEES

DiGiovanni seeks appellate attorneys' fees, relying on a provision in the underlying mortgage that permits the bank to recover fees in an action to enforce the mortgage and section 57.105(7), Florida Statutes (2020), which permits reciprocal awards of attorneys' fees to opposing parties where an underlying contract contains an attorneys' fees provision and the opposing party prevails. However, because DiGiovanni successfully challenged Deutsche's standing to foreclose by attacking the validity of the assignment of the note and mortgage, he cannot establish that he was in privity of contract with Deutsche. See Hopson v. Deutsche Bank Nat'l Tr. Co. as Tr. for New Century Home Equity Loan Tr. 2005-2, 278 So. 3d 306, 309-10 (Fla. 2d DCA 2019). Thus his motion for appellate attorneys' fees is denied.

Reversed and remanded.

NORTHCUTT and LUCAS, JJ., Concur.