RENDERED: JULY 29, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000597-MR

CHRISTOPHER MORGAN
AND SHARON TAKVAM — APPELLANTS

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 08-CI-00512

HSBC BANK USA, NA — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT AND MOORE, JUDGES; ISAAC,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Christopher Morgan and Sharon Takvam appeal from the Shelby Circuit Court's entry of summary judgment in favor of HSBC Bank USA, NA in a foreclosure action. After a careful review of the record and the parties' briefs, we reverse and remand for proceedings consistent with this opinion.

[1] Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On August 22, 2005, Morgan and Takvam executed a note in the amount of $101,200.00 to Ownit Mortgage Solutions, Inc. (Ownit). That same day, Morgan and Takvam granted a mortgage to Mortgage Electronic Registration Systems, Inc., (MERS) as nominee for Ownit. The mortgage encumbered the property located at 12233 Mount Eden Road, Mount Eden, Kentucky 40046. After executing the note and mortgage, Morgan and Takvam defaulted on their payments and currently owe for their March 1, 2008, payment. At the time of this appeal, they owed $101,066.87, plus interest at 9.875% per year from February 1, 2008, in addition to court costs, advances, and other charges, including a reasonable attorney fee, as allowed by law.

On July 31, 2008, HSBC Bank USA, National Association, as Trustee for Ownit Mortgage Loan Trust, Mortgage Loan Asset Backed Certificates, Series 2005-5 (HSBC) instituted foreclosure proceedings by filing a complaint against Morgan and Takvam, based on their alleged default under the note and mortgage. In the complaint, HSBC claimed to be the holder of the note on Morgan and Takvam's home, but stated that a copy of the note was unavailable at the time the complaint was filed. Rather than filing an answer, Morgan[2] moved to dismiss the complaint, arguing that HSBC did not have standing to sue and that the complaint failed to state a claim for which relief may be granted. The basis for Morgan's

[2] We note that while Takvam was named on the Notice of Appeal, she does not appear to have actively participated at the trial court level below, and she has not filed a separate brief on appeal. Thus we refer only to Morgan throughout the opinion.

motion to dismiss was that HSBC did not attach a copy of the note to its complaint, and thus there was no proof that they had standing to enforce the note.

HSBC responded to the motion to dismiss on September 11, 2008, and in its response attached a copy of an adjustable rate note between Ownit, as lender, and Morgan and Takvam, as borrowers. HSBC was not a party to this note. On August 11, 2008, an assignment of mortgage from Ownit to HSBC dated August 4, 2008, was recorded in Shelby County, Kentucky. While Morgan's motion to dismiss was still pending, HSBC filed for summary judgment on December 3, 2008. The copy of the note HSBC attached to the motion for summary judgment included an undated "Note Allonge" signed by Richard Williams as Vice President of Litton Loan Servicing, LP and as Attorney in Fact of Ownit. This document purported to negotiate the note to HSBC.

On January 7, 2009, the trial court held a hearing on Morgan's motion to dismiss and HSBC's motion for summary judgment. Subsequently, on February 25, 2009, the trial court denied Morgan's motion to dismiss and entered summary judgment in HSBC's favor. Morgan filed a timely motion to vacate under Kentucky Rules of Civil Procedure (CR) 59.05 on March 6, 2009, and on March 18, 2009, the trial court orally denied Morgan's motion and noted the same on the docket sheet.

Morgan filed a notice of appeal on April 2, 2009. On April 8, 2009, this Court, *sua sponte*, raised the issue of jurisdiction and ordered Morgan to show why the appeal should not be dismissed as being interlocutory because no order

appeared in the record denying Morgan's CR 59.05 motion. After considering Morgan's response, this Court entered another order on June 8, 2009, ordering that the appeal be held in abeyance for thirty days to allow the circuit court to enter an order in accordance with its March 18, 2009, docket sheet notation overruling Morgan's motion to vacate.

Although the case was returned to this Court's active docket automatically at the expiration of that thirty-day period per the Court's order, the record did not reflect that the trial court ever entered an order denying the motion to vacate. On March 16, 2011, this court again held the matter in abeyance for thirty days to permit the parties to petition the trial court to enter a proper order denying the CR 59.05 motion. On March 31, 2011, the parties tendered an order from the trial court denying the CR 59.05 motion, and this case was returned to our active docket for consideration of the merits on appeal.

On appeal, Morgan raises two arguments; namely, 1) that HSBC was not entitled to a judgment as a matter of law because it did not have authority to enforce the note and 2) that summary judgment was premature because discovery was incomplete and because he did not have time to conduct discovery to determine whether HSBC breached an assumed duty.

In *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), this Court set forth the standard of review in an appeal from the entry of a summary judgment:

> The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in *Steelvest[, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991),] used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. [Citations in footnotes omitted.]

Morgan's first argument addresses whether HSBC was entitled to judgment as a matter of law based upon the argument that HSBC lacked standing to enforce the note. Initially, we note that the particular facts of this case, in particular the sequence of events that unfolded, is troubling. In its complaint, HSBC alleged that it was the holder of the note on Morgan's home but claimed that a copy of the note was unavailable. Morgan moved to dismiss on grounds that HSBC failed to produce the note and thus had no proof that, as the holder of the note, it was entitled to proceed in foreclosure against Morgan and Takvam.

KRS 355.1-201(2)(u) defines a "holder" as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." Morgan argues that at the time it filed suit, HSBC was not a holder of the note and accordingly could not enforce the note. In support of this argument, Morgan points out that the note was payable to a specific, identified entity: Ownit. Morgan argues that Ownit could have transferred or negotiated its rights to HSBC by endorsement, which requires a signature by an authorized representative of Ownit in the signator's official capacity, *see* KRS 355.3-402, but that it failed to properly do so.

Initially, HSBC produced a note between Ownit, Morgan, and Takvam, and subsequently, at summary judgment stage, produced another note with the aforementioned note allonge purporting to assign the note to HSBC. In its order granting summary judgment, the trial court held that the endorsement in the note allonge by Richard Williams, as president of Litton Loan Servicing LP and attorney- in- fact for Ownit, was sufficient proof that HSBC was a holder of the note. In support of this holding, the trial court explained that as an attorney- in-fact for Ownit, Williams was authorized to transact business for Ownit. However, we find it troubling that when HSBC initially filed suit, a copy of this note was not attached and that later, this undated note allonge purporting to indorse the note to HSBC appeared in the record.

Further, HSBC argues that under KRS 355.3-203(2), it has the power to enforce the note. That statute states that "[t]he transfer of an instrument,

whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument." The Official comment to Section 203(2) states: "If the transferee is not a holder because the transferor did not indorse; the transferee is nevertheless a person entitled to enforce the instrument under Section 3-301 if the transferor was a holder at the time of transfer."

Thus, according to HSBC, even if Ownit did not properly indorse the note, as Morgan claims on appeal, it can enforce the note if Ownit was a holder at the time of the transfer, or at the time the note allonge was signed. The difficulty in determining the applicability of the note allonge is the fact that it is not dated, and thus there is nothing in the record to determine whether the transferor, Ownit, was a holder at the time it allegedly transferred its interest in the note to HSBC.

This case is further complicated by the fact that the mortgage was not assigned to HSBC until August 4, 2008, and was subsequently recorded on August 11, 2008. HSBC filed suit on July 31, 2008, and the parties were served on August 2, 2008. Morgan argues that because HSBC did not have possession of the note *and* the mortgage when it filed suit, and thus had no standing, it cannot cure its lack of standing by subsequently acquiring an interest in the mortgage.

Because this is an issue of first impression in the state of Kentucky, Morgan cites to *Wells Fargo Bank, N.A. v. Marchione*, 887 N.Y.S.2d 615 (N.Y.A.D. 2 Dept. 2009), in support of this argument. In that case, the parties executed a mortgage with Option One Mortgage Corporation on September 2, 2005. *Id.* at 616. The parties allegedly failed to make payments beginning on

April 1, 2007, and Wells Fargo initiated suit by filing a summons and complaint on November 30, 2007. *Id.* Option One assigned its "right, title and interest" in the aforementioned mortgage to Wells Fargo in an assignment dated December 4, 2007. *Id.* The assignment contained a provision stating that it became effective on October 28, 2007. *Id.* The Appellate Court held that because Wells Fargo did not have an interest in the note and mortgage before they filed suit and only acquired such an interest after filing suit, the bank lacked standing to bring the suit. *Id*. at 617. Specifically, the trial court held, "[i]n order to commence a foreclosure action, the plaintiff must have a legal or equitable interest in the mortgage. . . . Here, Wells Fargo lacked standing to bring this foreclosure action because it was not the assignee of the mortgage on November 30, 2007, the day the action was commenced." *Id.* Ohio also requires that banks have an interest in the mortgage when suit is filed. *See Wells Fargo Bank, N.A. v. Byrd*, 897 N.E.2d 722 (Ohio App. 1 Dist. 2008) ("bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage.").

Because it is impossible to determine from the record when Ownit transferred its interest in the note to HSBC and because the mortgage was not assigned to HSBC until August 4, 2008, after HSBC filed suit against Morgan, we simply cannot say that HSBC had standing to bring the instant action. CR 17.01 provides that "every action shall be prosecuted in the name of the real party in interest, but…an assignee for the benefit of creditors…may bring an action…" It follows that, where a cause of action has been assigned, the assignee becomes the

real party in interest. *See* CR 17.01. However, "[i]n no event may an assignee maintain an action for any part of a claim which has not been assigned to him." *Works v. Winkle*, 234 S.W.2d 312, 315 (Ky. App. 1950). A mere expectancy is not enough to establish standing, a party must prove a "present or substantial interest." *Plaza B.V. v. Stephens*, 913 S.W2d 319, 322 (Ky. 1996) (quoting *Ashland v. Ashland F.O.P. No.3, Inc.*, 888 S.W.2d 667 (Ky. 1994)). In the instant case, HSBC cannot prove when it obtained a present or substantial interest in the note and it did not receive an interest in the mortgage until after it filed suit. Accordingly, the trial court's judgment as a matter of law that HSBC had standing to pursue its claims was in error.

For the foregoing reasons, we reverse the Shelby Circuit Court's summary judgment and remand this matter for further proceedings consistent with this opinion.

ISAAC, SENIOR JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT BY SEPARATE OPINION.

Respectfully, I concur with the result that HSBC Bank did not establish that it had standing to file a complaint at the time it commenced this action. Although a bankruptcy action, I agree with the analysis and detailed explanation set forth in *In re Veal*, ---B.R. ---, 2011 WL 2304200 (9th Cir. BAP, June 20, 2011) and find it to be persuasive and an excellent explanation relevant to the issue presently before the Court.

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