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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000047-MR

VALERI A. VYALKOV AND
SARAH J. VYALKOVA — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 11-CI-402912

BANK OF NEW YORK MELLON,
F/K/A THE BANK OF NEW YORK
AS TRUSTEE FOR THE CERTIFICATE HOLDERS
CWALT, INC. ALTERNATIVE LOAN TRUST,
2005-82 MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2005-82 — APPELLEE

AND NO. 2013-CA-000194-MR

VALERI A. VYALKOV AND
SARAH J. VYALKOVA — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 11-CI-402912

MORTGAGE ELECTRONIC

REGISTRATION SYSTEMS, INC. APPELLEE

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OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MAZE AND STUMBO, JUDGES.

MAZE, JUDGE: Valeri A. Vyalkov and Sarah J. Vyalkova (the Vyalkovs) bring these appeals from an order of the Jefferson Circuit Court denying their motion to dismiss the foreclosure action brought by Bank of New York Mellon (the Bank), and from a summary judgment and Order of Sale of the real property. The Vyalkovs argue that the Bank failed to establish standing as the real party in interest capable of bringing the action on the note and seeking foreclosure on the property. After review of the record, we agree with the trial court that the Bank had standing. Therefore, the trial court properly denied the motion to dismiss and granted summary judgment to the Bank. Hence, we affirm.

On October 10, 2005, the Vyalkovs executed an adjustable rate note in the amount of $1,560,000 to America's Wholesale Lender. The note was secured by real property located at 202 Waterleaf Way in Louisville, Kentucky. On August 26, 2011, the Bank brought this action against the Vyalkovs, claiming that it held the note and was assigned the mortgage on the property.[1] The Bank's

[1] The Complaint also named Mortgage Electronic Registration Systems, Inc. (MERS), based upon any potential interest which it may claim as nominee for America's Wholesale Lender or its assigns. MERS did not assert an interest in the mortgage, but remains a nominal party to this appeal.

complaint further alleged that the note was in default and sought foreclosure against the real property.

In their answer, the Vyalkovs admitted that payments on the note were delinquent. However, they stated that they were without sufficient information to respond to the allegation that the Bank was the holder of the note. Thereafter, on May 10, 2012, the Bank filed a motion for summary judgment. The Bank attached several exhibits to the motion to establish that it was the proper holder of the note and mortgage: (1) a copy of the note, which included an undated blank indorsement; (2) an assignment of the mortgage to the Bank, dated August 18, 2011; and (3) an affidavit from the Bank's servicing agent stating that the Bank was in possession of the note and setting out the amounts of the unpaid balance, accrued interest and costs.

In response, the Vyalkovs filed a motion to dismiss, asserting that the Bank had failed to show that it was the holder of the note at the time the Complaint was filed. The Vyalkovs pointed out that the note attached to the complaint, unlike the note attached to the Bank's motion for summary judgment, did not include the indorsements. Consequently, the Vyalkovs maintained that the Bank was not the real party in interest and thus did not have standing to bring the foreclosure action. A hearing was held before the Deputy Master Commissioner on July 25, 2012. Following that hearing, the Bank produced a copy of the original note, indorsed in blank. Based upon this and other evidence of record, the Commissioner entered an

order on September 18 concluding that the Bank was the real party in interest to bring this foreclosure action.

The trial court entered a Judgment and Order of Sale on October 3. Thereafter, the Vyalkovs filed a motion to alter, amend or vacate under Kentucky Rules of Civil Procedure (CR) 59, noting that the court's order did not specifically address their motion to dismiss. On January 11, 2013, the court entered an order formally denying the motion to dismiss. The Vyalkovs filed separate notices of appeal from the judgment and from the order denying their motion to dismiss.

The sole issue presented in this appeal for adjudication is whether the Bank is the real party in interest under CR 17.01. The Vyalkovs argue that the Bank failed to establish that it was the assignee of the note and mortgage on the date it brought this action. They contend that the blank indorsement on the note was insufficient to establish that the Bank is a holder in due course. They also argue that, by itself, the assignment of the mortgage was insufficient to make the Bank the real party in interest. Thus, the Vyalkovs assert that the Bank did not have standing to bring the foreclosure action.

This Court recently addressed the same issue in *Stevenson v. Bank of America*, 359 S.W.3d 466 (Ky. App. 2011). In *Stevenson*, similar to the present case, Bank of America (BAC) brought a foreclosure action against the Stevensons after they defaulted on a note. The Stevensons, like the Vyalkovs, argued that the blank indorsement was not sufficient to make BAC a holder in due course. And unlike the present case, the assignment of the mortgage was not filed until after

BAC brought the action. Nevertheless, this Court rejected the Stevensons' argument that BAC lacked standing to bring the 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...." "We think every one [*sic*] would agree that ordinarily the real party in interest is the person who is the beneficial owner of the cause of action sought to be prosecuted. Where the cause of action is assignable, and the entire cause has been assigned, clearly the assignee has become the owner of the cause and he is the real party in interest." *Louisville & N. R. Co. v. Mack Mfg. Corp.*, 269 S.W.2d 707, 709 (Ky. 1954) (*citing Works v. Winkle*, 314 Ky. 91, 234 S.W.2d 312 (1950); *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 70 S. Ct. 207, 94 L. Ed. 171 (1949)).
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> ….
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> KRS 355.1–201(2)(u)(1) 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[.]" The record reflects TBW endorsed the note in blank, transforming it into a bearer paper pursuant to KRS 355.3–109, and that BAC obtained rights to the note and the accompanying mortgage in August of 2009. BAC asserted that it was the holder of the note and was in possession of the original note. In support of its position, although it had previously produced exact copies of the documents, BAC produced the original note and mortgage before the Master Commissioner and Stevenson was permitted to inspect the documents. BAC noted that the assignment of mortgage was executed solely for the purpose of memorializing the transaction and updating the public records. The Master Commissioner was satisfied that BAC was, in fact, the holder of the note and entitled to maintain the instant action as the real party in interest.
>
> Contrary to Stevenson's contention, the assignment of mortgage was not the document which transferred enforcement rights on the note to BAC, and

> the date of its execution is immaterial to the case at bar. [*Footnote omitted*] Pursuant to KRS 355.3–201(2), "negotiation" means "a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.... If an instrument is payable by bearer, it may be negotiated by transfer of possession alone." Stevenson fails to comprehend that when the note was endorsed in blank it became a bearer instrument and no assignment was necessarily required to transfer the right to collect and enforce the note. Mere possession of the original note was sufficient. Because BAC was lawfully in possession of the original note, clearly it was entitled to enforce the obligations secured thereby and was the real party in interest in the litigation below. Any argument to the contrary is wholly without merit. The trial court did not err.

Id. at 469-70. *See also Croushore v. BAC Home Loans Servicing , LP*, 381 S.W.3d 331 (Ky. App. 2012).

As was the case in *Stevenson*, the original note was indorsed in blank and payable to the bearer. The Bank established that it was lawfully in possession of the note when it brought the foreclosure action. And, unlike in *Stevenson*, the August 18, 2011 assignment of the mortgage to the Bank was further proof authenticating the indorsement on the note. Consequently, there was sufficient evidence supporting the trial court's finding that the Bank was the real party in interest and had standing to bring this action. In the absence of any other genuine issues of material fact, the trial court properly granted summary judgment for the Bank and ordered sale of the real property.

Accordingly, the order of the Jefferson Circuit Court denying the Vyalkovs' motion to dismiss, and the Judgment and Order of Sale are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

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