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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000401-MR

DONALD G. PRIDDY, SR.;
and MAXINE PRIDDY — APPELLANTS

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 12-CI-00531

EMC MORTGAGE, LLC,
F/K/A EMC MORTGAGE
CORPORATION — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, KRAMER,[1] AND MAZE, JUDGES.

KRAMER, JUDGE: EMC Mortgage, LLC, F/K/A EMC Mortgage Corporation (EMC) filed a foreclosure action against Maxine and Donald Priddy in McCracken

[1] Judge Joy A. Kramer, formerly Judge Joy A. Moore.

Circuit Court. Following a summary judgment and order of sale entered in favor of EMC, the Priddys now appeal. We affirm.

FACTUAL AND PROCEDURAL HISTORY

On or about November 23, 2004, Donald and Maxine Priddy entered into an agreement with Wells Fargo Bank for an adjustable rate loan in the principal amount of $132,500 to purchase residential rental property situated in Paducah, Kentucky; Wells Fargo took a mortgage on the rental property as security. In November, 2006, Wells Fargo transferred the Priddys' promissory note and assigned its rights relating to the mortgage to EMC. The Priddys later experienced financial hardship and either defaulted on their loan or came close to doing so, which prompted them to ask EMC for a loan modification. Subsequently, in March, 2010, the Priddys and EMC agreed to modify terms of the loan to include, among other things, a new principal balance of $149,706.49; monthly payments of $1,379.91;[2] and a non-adjustable interest rate of 7.5%.

In March, 2011, EMC notified the Priddys that it was assigning servicing rights regarding the Priddys' loan (*i.e.*, the right to collect payments from the Priddys) to JP Morgan Chase Bank, effective April 1, 2011. On April 13, 2012, JP Morgan Chase Bank, in turn, notified the Priddys that it was transferring the servicing rights to Residential Credit Solutions, Inc., (RCS) effective May 1, 2012. Its notice added that "This transfer of servicing of your loan does not affect

[2] $1,046.77 of this payment amount was for principal and interest on the loan; the remaining $333.14 was for escrow to cover additional items such as taxes and insurance premiums and was subject to change if the cost of taxes or premiums increased or decreased.

any term or condition of your mortgage documents, other than terms directly related to the servicing of your loan."

With the above in mind, it is uncontested that after June 1, 2011, the Priddys stopped making payments on their loan, and the outstanding balance of their loan as of that date was $147,964.99.[3] EMC ultimately filed a foreclosure action against the Priddys on May 15, 2012. However, the Priddys filed an answer denying that EMC had the right to foreclose. In support, they asserted essentially two defenses: 1) EMC lacked standing to file its foreclosure action; and 2) even if EMC did have standing, they had no obligation to make payments on the loan because EMC had been demanding payments in excess of the amount specified in their modification agreement.

EMC thereafter moved for summary judgment, asserting that it had produced uncontested evidence demonstrating the amount and terms of the Priddys' indebtedness; that the indebtedness was secured by a mortgage on the Priddys' residential property; that the Priddys were in default; and that EMC was, and continued to be, the holder of the Priddys' promissory note and mortgage.

Regarding the Priddys' defense that EMC was no longer the holder of their promissory note or the mortgage on their residential property, EMC explained that the Priddys were actually referencing the fact that EMC had, as noted, changed

[3] These points were alleged in EMC's foreclosure complaint and were not denied. To the contrary, the Priddys represented in their answer that "as of January 2011" they "stop[ped] all transactions with [EMC]." When EMC later moved for summary judgment, the Priddys also filed a response reemphasizing that they "have not denied that the account is behind[.]"

its servicing agent for their loan on two occasions between April, 2011, and May, 2012.[4] EMC pointed out that pursuant to the terms of the mortgage agreement it was expressly permitted to change its servicing agent without selling the Priddys' promissory note and mortgage.[5] EMC further pointed out that none of the documentation relied upon by the Priddys reflected that EMC had transferred its ownership of their promissory note and mortgage to any other entity. Thus, EMC argued that it was entitled to enforce the promissory note as the real party in interest and, accordingly, that it had standing to file its foreclosure action. Also, regarding the Priddys' second defense, EMC added that the Priddys had produced no evidence demonstrating that it had ever charged or expected a mortgage payment in excess of what was allowed by the terms of the March, 2010 modification agreement.

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[4] The documentation the Priddys relied upon to support that EMC was no longer the holder of their note and mortgage consisted of two items. The first was a September 14, 2011 letter from JPMorgan Chase Bank, N.A., which explained that on September 30, 2011, "your EMC mortgage, which is serviced by Chase, will change to Chase's systems," and instructed the Priddys regarding how to go about remitting payments to it, rather than EMC, after that date. The second item was a notice from Residential Credit Solutions, Inc. dated "5/05/12," explaining that RCS was the servicer of the Priddys' loan and that the name of the Priddys' creditor was "EMC MORTGAGE, LLC." Neither document indicates that JPMorgan or RCS functioned in any role outside of EMC's loan servicing agent or that EMC's status as the holder of the Priddys' loan and mortgage, as reflected in the loan documents of record, ever changed.

[5] In relevant part, the mortgage agreement provides:

> 20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to the sale of the Note. . . .

The Priddys responded to EMC's motion by reasserting the allegations in their answer. In addition, their response included requests for the circuit court to reschedule the hearing date for EMC's summary judgment motion to either of the first two weeks in March, 2013, rather than the noticed date of January 11, 2013, and to provide them with a jury trial. On February 4, 2013, the circuit court entered summary judgment in favor of EMC and ordered the sale of the Priddys' property. This appeal followed. Additional details relating to this appeal will be discussed in the context of our analysis, below, as they become relevant.

STANDARD OF REVIEW

At the onset, the Priddys argue that the circuit court erred because it granted judgment in favor of EMC without first providing them with a jury trial. However, the case at bar is a civil matter and in civil matters the right to any kind of trial is qualified by the summary judgment standard of Kentucky Rules of Civil Procedure (CR) 56.

Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. It is well established that a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Casualty Co. v. Belknap Hardware & Manufacturing Co*.,

281 S.W.2d 914 (Ky. 1955). "[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citing *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)). "'Belief' is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky.1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) ("A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment."). Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 481 (Ky. 1991) (internal citations and quotations omitted).

On appeal, we must consider the evidence of record in the light most favorable to the non-movant, and must further consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky.App.1996). "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*." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

ANALYSIS

The Priddys maintain that EMC had no right to file a foreclosure proceeding against them because it was not the holder of their promissory note and mortgage. We disagree.

A "holder" is defined 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." Kentucky Revised Statutes (KRS) 355.1-201(2)(u)(1). A party lawfully in possession of the original note is entitled to enforce such note. *Stevenson v. Bank of America*, 359 S.W.3d 466, 470 (Ky. App. 2011); *see also* KRS 355.3-301(1). Here, the record reflects that EMC presented uncontested evidence that it was lawfully in possession of the note on the Priddys' property. This evidence consisted of a copy of the Priddys' mortgage agreement with Wells Fargo; a copy of the Priddys' promissory note, which Wells Fargo had indorsed in blank;[6] a copy of the agreement between Wells Fargo and EMC assigning EMC the Priddys' promissory note and mortgage; and, a copy of the modification agreement between EMC and the Priddys.

The Priddys do not challenge the authenticity of any of these documents, nor do they point to any evidence challenging EMC's possession of their promissory note. Instead, as EMC pointed out below, their argument

[6] The blank indorsement made the promissory note bearer paper by operation of KRS 355.3-109(1).

regarding EMC's standing depends entirely upon what they perceived was the effect of EMC's decision to assign servicing rights regarding the Priddys' loan. But, this assignment of rights did not transfer ownership or possession of the Priddys' promissory note; it therefore did not affect EMC's status as the holder; and, nothing of record demonstrates that EMC's assignment of its servicing rights otherwise divested it of the right to enforce the note through legal proceedings.

Next, the Priddys argue that "Through the course of the loan modification the monthly payment continued to escalate until the monthly payments was [sic] more than what [they] could afford to pay which was not a part of the loan modification agreement." EMC has interpreted this argument as either a theory of equitable estoppel, or as an assertion that EMC unilaterally altered the agreed-upon terms of the modification agreement to require increased payments from the Priddys and, as such, the Priddys were therefore excused from making any payments at all to avoid default. Under either interpretation, this argument has no merit.

Treating this argument as a theory of equitable estoppel is incompatible with the undisputed facts of this case. As to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. *Sebastian–Voor*

Properties, LLC v. Lexington–Fayette Urban County Gov't, 265 S.W.3d 190, 194-95 (Ky. 2008). Here, the Priddys are asserting that they *knew* EMC was charging them an excessive repayment rate that was not in conformity with the terms of their written modification agreement. Moreover, assuming that EMC did demand payments in excess of the rate provided by the plain terms of the modification agreement, nothing of record demonstrates that the Priddys made the excessive payments and thereby relied upon EMC's purported demands; to the contrary, EMC filed its foreclosure action because the Priddys were not making any payments at all.

This argument also fails if it stands for the proposition that the Priddys were excused from making any payments on their mortgage because EMC purportedly altered the agreed-upon terms of the modification agreement to require increased payments. As an aside, the Priddys do not explain how EMC could have unilaterally altered the terms of their contract in this manner in any binding fashion; nor, for that matter, do they cite any legal authority demonstrating that demands for excessive payments excuse an obligor from making any payments to avoid default.

Irrespective of the bona fides of this theory, however, it primarily fails because there is no evidence of record supporting that EMC ever demanded payments in excess of what it was permitted to charge under the terms of the modification agreement. Specifically, the Priddys asserted in their answer that EMC was charging them $3,000 per month by January, 2011, and that an unnamed

representative of EMC had informed them during a telephone conversation at an unspecified point in time that if they did not pay it, EMC would proceed with a foreclosure action. However, EMC denied that such a telephone conversation had ever occurred, and the Priddys' answer does not qualify as evidence to the contrary. *Educ. Training Sys., Inc. v. Monroe Guar. Ins. Co.*, 129 S.W.3d 850, 853 (Ky. App. 2003) (pleadings are not evidence). There is no affidavit from the Priddys verifying the particulars of this alleged conversation, or whether it in fact occurred. Furthermore, the documentation that the Priddys cited below[7] in support of this argument fails to support that EMC ever demanded a rate of payment that was not permitted under the terms of the modification agreement. That documentation consisted of: (1) an undated notice from EMC informing the Priddys that a payment of $1,379.91 (their contracted-for payment amount) would be due on "08/01/10," and that the Priddys owed a past due amount of $4,139.73;[8] (2) a "payment description" from EMC, dated January 12, 2011, noting that the Priddys had chosen to make a payment of $1,677 on December 29, 2010; and (3) a debt validation statement from RCS to the Priddys providing that a payment of $1,391.17 was due on July 1, 2011.[9]

[7] On appeal, the Priddys do not cite any part of the record in support of this particular argument.

[8] The Priddys do not offer any explanation for this past due amount, but it might indicate that they missed three payments prior to August 1, 2010. This amount, $4,139.73, divided by three, is exactly the Priddys' contractual monthly payment amount of $1,379.91.

[9] As an obvious matter, $1,391.17 per month is more than $1,379.91 per month, but it is nowhere near the $3,000 per month the Priddys assert they were required to pay. There is no explanation in the record for why the Priddys' payment slightly increased at this point in time, but it is safe to assume that it was due to either an increase in property taxes, insurance premiums, or other items subject to escrow. *See supra*, Note 2.

The Priddys' final argument on appeal is that the circuit court erred because it heard EMC's motion for summary judgment on January 11, 2013, and did not continue the hearing date to one of the first two weeks in March of that year.

As a preliminary matter, it is debatable whether the Priddys effectively brought their request to the circuit court's attention or effectively preserved this as an appealable issue. To the extent that they moved for a continuance, their motion was raised for the first and only time in the final sentence of a filing which they had styled as a response to EMC's summary judgment motion; and, to the extent that the circuit court made any ruling upon it, its ruling is only implicit from the fact that the circuit court held the hearing on January 11, 2013. *See Felts v. Edwards*, 181 Ky. 287, 204 S.W. 145, 149 (1918) (The appellants "did not choose to call the motions to the attention of the court or to cause any ruling to be had upon them, and hence must be considered to have waived any objections on that ground.").

Even if this issue had been preserved, however, it would at best be an example of harmless error. As discussed, we agree with the circuit court that the balance of the Priddys' arguments in opposition to EMC's motion for summary judgment lacked merit; and, the Priddys do not explain how the outcome of this matter would have been any different had they attended the hearing. *See* CR 61.01 (providing reversible error must be predicated upon an error or defect in the proceedings that affects "the substantial rights of the parties.").

CONCLUSION

For these reasons, we AFFIRM.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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