

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000495-MR

PERRY PROBUS, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 09-CI-008651

BANK OF AMERICA, N.A. SUCCESSOR BY MERGER
TO BAC HOME LOANS SERVICING, L.P. F/K/A
COUNTRYWIDE HOME LOAN SERVICING, L.P.

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: JONES, MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: Perry Probus, Jr. appeals from a judgment and order of sale entered by the Jefferson Circuit Court. The order of sale stemmed from a

foreclosure action originally initiated by BAC Home Loans Servicing (“BAC”).

Mr. Probus argues that Bank of America has not proven that it is the owner of the mortgage note. We disagree and affirm.

On September 16, 2005, Francis Bickett entered into a loan agreement with America's Wholesale Lender ("AWL") and signed a promissory note. Ms. Bickett used her property located in Louisville, Kentucky to secure the debt. Ms. Bickett died in 2007 and Mr. Probus was named the heir to her estate.

On August 24, 2009, BAC filed a complaint asserting a default on the loan obligation. On April 4, 2012, Bank of America was substituted as the plaintiff of record because BAC had merged into Bank of America. From January of 2010 to April of 2013, BAC and Bank of America filed five motions for summary judgment arguing that they were entitled to foreclose on the property. These motions were all passed by the trial court to a Master Commissioner. These five motions were either denied or withdrawn due to procedural errors or a lack of evidence showing BAC and Bank of America properly obtained the note from AWL.

On September 16, 2013, Bank of America then filed a sixth motion for summary judgment. This motion was also referred to the Master Commissioner. The Master Commissioner recommended to the trial court that the motion be denied because Bank of America had failed to show that it was the successor institution and the proper holder of the note. Bank of America then filed exceptions to the Master Commissioner's report. On February 20, 2014, the trial court granted Bank of America's motion for summary judgment and issued a judgment and order of sale directing the Master Commissioner to sell the property at issue. This appeal followed.

The standard of review on appeal of a 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. Kentucky Rules of Civil Procedure (CR) 56.03. . . . “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary “judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances.” *Steelvest*, 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985). Consequently, summary judgment must be granted “[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . . .” *Huddleston v. Hughes*, 843 S.W.2d 901, 903 (Ky. App. 1992)[.]

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

We believe that the trial court correctly granted summary judgment in favor of Bank of America. The evidence submitted by Bank of America unequivocally proved it was the holder and owner of the note in three different ways.

First, evidence in the record shows that the note was transferred from AWL to BAC. Kentucky Revised Statute 355.3-203 states:

- (1) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.
- (2) 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, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the

transferee engaged in fraud or illegality affecting the instrument.

A copy of the promissory note was entered into evidence. This note contained an allonge, which is a piece of paper attached to a negotiable instrument that then becomes part of the instrument. KRS 355.3-204(1)(c). This allonge stated that AWL transferred the note at issue to BAC. The allonge was signed by Keri Selman, Assistant Vice President of AWL. This signature and transfer is called an indorsement. KRS 355.3-204. Bank of America then presented evidence that BAC had merged into Bank of America. This evidence was in the form of an affidavit from a Bank of America officer, Assistant Vice President Diana Lyons. Additionally, Bank of America provided a Secretary of State filing showing that BAC had merged into Bank of America.

A holder of a negotiable instrument, like a mortgage note, is entitled to enforce it. KRS 355.3-301(1). A holder is defined as:

1. The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;
2. The person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession; or
3. A person in control of a negotiable electronic document of title[.]

KRS 355.1-201(u). Here, AWL transferred and indorsed the note to BAC, thereby making BAC the holder. BAC then merged with Bank of America. Bank of America then became the holder of the note.

The second way Bank of America proved it was entitled to enforce the note is that the note was also stamped with a blank indorsement. The blank indorsement was signed by David A. Spector, Managing Director of Countrywide Home Loans, Inc., which was doing business as AWL. Bank of America provided evidence in the form of a Secretary of State filing showing that Countrywide Home Loans, Inc. was d/b/a AWL.

KRS 355.3-205 states in relevant part:

- (1) If an indorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the indorsement identifies a person to whom it makes the instrument payable, it is a “special indorsement.” When specially indorsed, an instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person. . . .
- (2) If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a “blank indorsement.” When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.

The Selman allonge discussed previously is a special indorsement. The Spector indorsement is a blank indorsement because it is not made payable to a specific person or entity. By virtue of possessing the note with the blank indorsement, Bank of America is a holder and entitled to enforce the instrument.

Finally, Bank of America is able to enforce the note because it owns all of the companies at issue. BAC merged into Bank of America. Also, Bank of America provided evidence in the form of a document from the National

Information Center¹ showing that Bank of America owns Countrywide Home Loans, Inc. As previously mentioned Countrywide Home Loans, Inc. was d/b/a AWL.

Mr. Probus' only arguments in this case are that the two different indorsements are suspicious and that there was insufficient evidence of corporate mergers. Bank of America provided ample evidence that it is the holder of the note. Mr. Probus provided no affirmative evidence to the contrary. He also does not contest the fact that he is in default. "A party opposing a motion for summary judgment cannot rely merely on the unsupported allegations of his pleadings, but is required to present some affirmative evidence showing that there is a genuine issue of material fact for trial." *Godman v. City of Fort Wright*, 234 S.W.3d 362, 370 (Ky. App. 2007) (internal quotation marks and citations omitted). Here, Bank of America proved it was entitled to enforce the mortgage note in three different ways; therefore, summary judgment was appropriate.

For the foregoing reasons, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

¹ The National Information Center is a government repository of financial data and institution characteristics collected by the Federal Reserve System.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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