

RENDERED: NOVEMBER 9, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000770-MR

KENNETH R. REED; AND
LORI S. REED

APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 09-CI-03345

CITIZENS BANK, N.A.,
f/k/a RBS CITIZENS,
NATIONAL ASSOCIATION,
successor by merger to
CITIZENS BANK OF
MASSACHUSETTS

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: J. LAMBERT, MAZE, AND NICKELL, JUDGES.

MAZE, JUDGE: This appeal arises from the Kenton Circuit Court granting Citizens Bank's summary judgment of foreclosure. As the record of evidence shows that summary judgment was proper, we affirm.

Background

In 2006, Kenneth and Lori Reed ("the Reeds") executed a promissory note and mortgage in favor of First Financial Bank, N.A. to purchase a home. Later, First Financial indorsed the note to Countrywide Bank, N.A., using an allonge and executed an assignment of the mortgage to Mortgage Electronic Registration System (MERS).

In 2007, Citizens Bank of Massachusetts ("Citizens") then purchased the Reeds's loan as part of a loan sale. Wells Fargo Bank Minnesota, N.A. is Citizens's records custodian and therefore the note was sent to Wells Fargo. Later in 2009, MERS executed an assignment of the mortgage to Citizens, and Countrywide Home Loans, Inc., on behalf of Countrywide Bank, N.A., indorsed the promissory note to Citizens using an allonge. A day later, Citizens filed a foreclosure action based on the fact that the Reeds defaulted on the note by failing to make monthly payments beginning in 2009.

In 2013, Citizens moved for summary judgment. The Reeds propounded certain discovery requests and Citizens withdrew their summary judgment motion. In 2016, Citizens renewed the motion for summary judgment and proceeded on a lost-note theory. The trial court granted summary judgment in

Citizens's favor, and this appeal follows. Further facts may be developed as necessary within the opinion.

Standard of Review

The standard of review governing an appeal of a summary judgment is well-settled. Because summary judgment involves no fact finding, we review the trial court's decision *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

“[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). For summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). Therefore, we will find summary judgment appropriate only “if 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.” CR¹ 56.03.

Analysis

¹ Kentucky Rules of Civil Procedure.

On appeal, the Reeds contend that there were factual questions remaining as to whether Citizens was the real party in interest and that the Reeds should have been allowed time to complete necessary discovery in light of new issues raised in the motion for summary judgment. Therefore, the Reeds argue that summary judgment was not appropriate.

A determination of whether a party “is the real party in interest hinges upon whether it was the holder of the note and requires an examination of the applicable provisions of Kentucky’s Uniform Commercial Code, KRS Chapter 355.” *Acuff v. Wells Fargo Bank, N.A.*, 460 S.W.3d 335, 338-39 (Ky. App. 2014). KRS² 355.3-309 applies to situations involving lost notes. It states that a person not in possession of a note may enforce the note if that person proves certain elements. *Id.* First, they must prove that they were “entitled to enforce the instrument when loss of possession occurred; or [h]as directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred[.]” KRS 355.3-309(1)(a)(1-2). Second, they must prove that “[t]he loss of possession was not the result of a transfer by the person or a lawful seizure.” KRS 355.3-309(1)(b). Third, they must prove that they cannot reasonably obtain possession of the note because the note “was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found” KRS 355.3-309(1)(c). Lastly, if the person can prove the terms of the instrument and their right to enforce

² Kentucky Revised Statutes.

it, the court will treat the person as if they possess the note. KRS 355.3-309(2). However, the “court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument.” *Id.*

Here, the note went missing by 2013 while the foreclosure action was pending, but after it had been both indorsed and assigned to Citizens. Citizens therefore requested summary judgment on a lost-note theory and attached a lost-note affidavit to its second summary judgment motion. The affidavit was executed by the Assistant Vice President of Bank of America, the Servicer of the loan. She stated in the affidavit that the note had been lost and that a good faith effort was made to locate the note and that “on information and belief, after due diligence, possession of the note cannot reasonably be obtained because the Note was destroyed, its whereabouts cannot be determine, or it is in the wrongful possession of an unknown person.” She went on to state that “the loss of possession of the Note is not the result of a rightful transfer or a lawful seizure of the Note.” Additionally, an “Indemnification For Affidavit Of Lost Note” was attached holding The Reeds harmless for any loss that might occur from reliance on the affidavit. Therefore, the elements of KRS 355.3-309 were met and the trial court was correct in finding that there were no genuine issues of material fact, regardless of the fact that the note was lost.

The Reeds also contend that summary judgment was inappropriate because they were entitled to additional time for discovery to investigate issues raised in second motion for summary judgment.

To request additional time for discovery in response to a summary judgment motion, a party would need to provide an affidavit under CR 56.06 alleging genuine issues pertaining to material facts, or request “a continuance to obtain affidavits pursuant to CR 56.06.” *Hartford Ins. Group v. Citizens Fidelity Bank Trust Co.*, 579 S.W.2d 628, 630-31 (Ky. App. 1979). Here, the Reeds made various accusations in their response to the summary judgment, including accusations regarding the authenticity of the documents produced, but did not supply an affidavit alleging genuine issues to a material fact. The Reeds were therefore not entitled to additional time for discovery.

Conclusion

For the reasons stated herein, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Michael L. Baker
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BRIEF FOR APPELLEES:

Brian M. Bennett
Louisville, Kentucky