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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000054-MR

CHARLES NUNN AND
LORI MICHELLE NUNN — APPELLANTS

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 12-CI-00295

FEDERAL NATIONAL MORTGAGE
ASSOCIATION; BANK OF AMERICA, NA,
SUCCESSOR BY MERGER TO BAC HOME LOANS
SERVICING, LP, FORMERLY KNOWN AS COUNTRYWIDE
HOME LOANS SERVICING, LP;
TAX EASE LIEN INVESTMENTS 1,
LLC; FIFTH THIRD BANK (LOUISVILLE); AND
MOORING TAX ASSET GROUP, LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, KRAMER, AND TAYLOR, JUDGES.

KRAMER, JUDGE: Charles Nunn and Lori Michelle Nunn appeal from the Shelby Circuit Court's order denying their motion to set aside the judgment and order of sale of property located at 65 Persimmon Ridge Drive, Louisville, Kentucky ("the property"). The judgment and order of sale was entered subsequent to the circuit court's opinion and order granting Federal National Mortgage Association's (FNMA) motion for summary judgment.[1] Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2003, the Nunns executed a promissory note in favor of America's Wholesale Lender (AWL), which was a registered name for Countrywide Home Loans, in the amount of $300,000.00 for the purchase of the property. The note was secured by a mortgage in favor of Mortgage Electronic Registration Systems, Inc. (MERS) as a nominee for AWL and its successors and assigns.

In 2008, MERS assigned the note and mortgage to Countrywide Home Loans, Inc. d/b/a AWL (Countrywide Inc.). Subsequently, the Nunns defaulted on payment, and Countrywide Inc. filed a foreclosure action; however, the action was dismissed without prejudice.

[1] FNMA is the substitute plaintiff for Bank of America. Summary judgment was also granted in favor of Tax Ease Lien Investments 1, LLC, which is the holder of certificates of delinquency for real property taxes due and owing on the property. Fifth Third Bank (Louisville) and Mooring Tax Asset Group, LLC were also named as parties; however, neither filed an answer. Therefore, the circuit court also granted default judgment against them.

In 2009, the note and mortgage were transferred to Countrywide Home Loans Servicing, LP (Countrywide LP). Countrywide LP filed a second foreclosure action against the Nunns in 2009. The action was stayed because the Nunns filed for Chapter 7 bankruptcy. Around the same time, Countrywide LP changed its name to BAC Home Loans Servicing, LP (BAC), and filed a claim in the bankruptcy action.

In October 2009, the Nunns received a discharge in the bankruptcy action. In addition to discharging other debts, the discharge eliminated the Nunns' personal obligation for the note and mortgage. Rather than walk away from the property after the discharge, the Nunns entered into a loan modification agreement with BAC. Per the terms of the agreement, the Nunns would pay the remaining balance on the note. Due to the loan modification agreement, the 2009 circuit court action was voluntarily dismissed by the parties.

Between 2010 and 2011 BAC merged with Bank of America, N.A. (BANA). Around the same time, the Nunns defaulted on their loan modification payments. It is undisputed that the Nunns have not made a loan payment since on or about December 30, 2011, even though they have continued to reside in the home. It is also undisputed that FNMA and/or its predecessors have paid the taxes and insurance on the real property since that time. As a result, in April 2012, BANA filed the instant action against the Nunns, asserting it was entitled to

foreclose on the property because it was the holder of the note and mortgage and because the Nunns defaulted on their loan payments.

In October 2016, BANA made a motion to substitute FNMA as the plaintiff. The Nunns did not file a responsive pleading to BANA's motion or oppose the motion. The circuit court granted the motion. FNMA moved for summary judgment in April 2018. In their opposition to summary judgment, the Nunns asserted that FNMA had no standing to maintain the litigation because it was not a real party in interest. Many of the arguments raised by the Nunns were the same previously raised against BANA when it unsuccessfully motioned the circuit court for summary judgment in 2013.[2] The Nunns asserted that FNMA obtained the note and mortgage through fraud. They argued that the note was not lawfully transferred to FNMA and that FNMA did not have proper assignment of the mortgage. The Nunns' argument was based on their assertion that the note was endorsed by David Spector, a former employee of Countrywide Inc. who the Nunns allege left the company in approximately 2006. Therefore, the Nunns claimed his signature was fraudulently added after "Spector had long left the employ of Countrywide." However, FNMA produced the original note to the

[2] BANA filed the first motion for summary judgment in December 2013. At the time, the Nunns asserted that BANA was not a real party in interest and that numerous payments they made were not properly applied. The motion was denied, and the Nunns were permitted to continue discovery.

Nunns and the circuit court prior to the date FNMA filed its motion for summary judgment.

The circuit court granted summary judgment in favor of FNMA and subsequently entered an *in rem* judgment and order of sale. The action was referred to the master commissioner for a judicial sale. The Nunns filed a motion to have the judgment set aside, which was subsequently denied by the circuit court after a hearing. This appeal followed.

The Nunns believe they provided the circuit court with sufficient evidence to show there were genuine issues of material fact pertaining to whether: 1) FNMA was the real party in interest and had standing; 2) the alleged default on the note and mortgage was caused by the mortgage company; 3) the mortgage company acted in good faith and fair dealing; and 4) the Nunns were entitled to further discovery based upon the discovery of a second allonge. We disagree.

STANDARD OF REVIEW

Summary judgment is granted when "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[3] 56.03. The record is viewed "in a light most favorable to the party opposing the motion

[3] Kentucky Rule of Civil Procedure.

for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). Moreover, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id.* at 482 (citations omitted).

The standard of review 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." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (citations omitted). Considering only legal issues are before the Court and there are no factual issues, our review is *de novo*. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

ANALYSIS

1) The Nunns have failed to submit evidence creating a genuine issue of fact that FNMA is not the real party in interest and that it lacks standing.

The primary issue presented by the Nunns is whether FNMA is a real party in interest and has standing to litigate the action. The circuit court found that there was no genuine issue of material fact related to FNMA's standing because FNMA "is in possession of the original 'blue-ink' note which is endorsed in blank,

and therefore, as holder of the note is entitled to enforce the instrument." KRS[4] 355.3-301. It is undisputed that FNMA has physical possession of the original note.

In foreclosure cases, 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[.]" 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). Here, FNMA produced the original note prior to filing its motion for summary judgment. Kentucky law requires only that the foreclosing party be the holder of the note creating the debt. Because FNMA is the holder of the note as defined by KRS Chapter 355, it is therefore the real party in interest. *See id.*; *Croushore v. BAC Home Loans Servicing, L.P.*, 381 S.W.3d 331, 332 (Ky. App. 2012).

The Nunns assert, nonetheless, that the note was obtained by FNMA through fraudulent means and point to the signature of David Spector to support this assertion. A signature on a note is presumed valid unless it is specifically denied in the pleadings. KRS 355.3-308(1). Only then would the burden shift to the party claiming the signature is valid. Pleadings include a complaint, answer, counterclaim, reply to a counterclaim, an answer to a cross-claim, a third-party

[4] Kentucky Revised Statute.

complaint and any answer thereto. CR 7.01; *Bingham Greenbaum Doll, LLP v. Lawrence*, 567 S.W.3d 127, 131 (Ky. 2018) (Pleadings are limited under CR 7.01); *Fratzke v. Murphy*, 12 S.W.3d 269, 272 (Ky. 1999) (CR 7.01 provides an inclusive list of documents constituting pleadings); and *Powell v. Powell*, 423 S.W.2d 896, 897 (Ky. 1968) (CR 7.01 enumerates the allowable pleadings and limits them).

We have reviewed the Nunns' answer and counterclaim in the record before us. The validity of David Spector's signature was not specifically denied or challenged in either, as required by KRS 355.3-308. Rather, his signature was challenged only in response to motions for summary judgment. This is not a pleading as defined by CR 7.01. *Id*. Therefore, the Nunns had the burden to prove David Spector's signature was fraudulent. Based on the evidence in the record, the Nunns have not done so.

Over the course of six years of continuing litigation, the Nunns provided the following evidence to demonstrate that David Spector's signature is fraudulent: their own affidavits; affidavits from Byron Grimes and Glen Augenstein (two individuals employed in the secondary mortgage industry); and a proxy statement filed with the SEC by Penny Mac Financial Services, Inc.[5] At no

[5] The Nunns believe Penny Mac Financial Services, Inc. is the employer of the same David Spector who endorsed the note. The only relevant portion of this proxy statement is a brief biographical blurb about David Spector's employment history.

time did they seek to depose anyone associated with FNMA or its predecessors to garner evidence that would be sufficient to support their burden of proof on this issue.

As for the proxy statement regarding "David Spector," it is nothing more than inadmissible hearsay and is not based on personal knowledge pursuant to CR 56.03. Nor is it conclusive evidence that it is the same "David Spector" who was employed by Countrywide. Moreover, the entirety of the Nunns' claims regarding Spector are based on nothing more than speculation and conjecture. The note was executed in 2003, and no evidence of record supports that Spector did not endorse the note while employed by Countrywide. This was the Nunns' burden to prove. The time to submit evidence into the record to meet their burden on this issue has long come and gone, and the Nunns' unsupported allegations are insufficient to defeat a motion for summary judgment.

Mr. Grimes's and Mr. Augenstein's affidavits provide generalized information about fraudulent practices in the mortgage industry. There is nothing to demonstrate firsthand knowledge of Mr. Grimes or Mr. Augenstein regarding the specific facts of this case. The affidavits merely set forth the history of fraudulent behavior on the part of lenders within the mortgage industry and do not provide the basis to create a genuine issue of material fact to defeat summary judgment.

The Nunns also point to "further hint of fraudulent activity"[6] because they allege that the allonge presented during their bankruptcy proceedings was not the same as the allonge presented in the instant action that transfers the note from Countrywide LP to BANA. The Nunns state only that the allonges "look different," and insist that the only explanation for any difference is fraudulent behavior. Other than conclusory and speculative statements, the Nunns have not provided any affirmative evidence to support their claims.

Accordingly, we hold that the circuit court did not err in its conclusion that there was no question of material fact regarding whether FNMA was a real party in interest to this action.

2) The remaining issues are not properly before the Court for failure to comply with CR 76.12.

The Nunns raised three additional issues in Argument Section C, "Errors Regarding Summary Judgment Analysis by Trial Court," of their brief. The whole of the Nunns' commentary on these issues is as follows:

> The affidavit of the Appellants found at pages 501-509, and 763-775, of the designated Record on Appeal, provide an excellent analysis of the mishandling of their second loan modification, response to the claims of default and response to the selected sections of their depositions provided by the Mortgage Company. These two affidavits explain why the Trial Court should have

[6] *See* Appellants' Brief at pg. 13.

> made a finding of default and should have prompted the Trial Court to find that the applicable servicer acted in a fashion that was in bad faith, and did not constitute fair dealing but in fact, was a breach of contract. See Wigod (supra).
>
> Certainly, these affidavits establish, material facts in dispute and should have precluded the Trial Court from entering a summary judgment in [sic] behalf of the Appellee. Steelvest (supra).

See Appellant's Brief at pg. 18.

The Nunns address these issues by directing the Court to read their affidavits. Pursuant to CR 76.12(4)(c)(iii) and (v), the Nunns were required to raise all issues by supporting their contentions of error with arguments, which are to be supported by ample citations to case law and the record. Here, the Nunns have not made any arguments regarding the three remaining "issues." Because the remaining portion of the Nunns' brief does not comply with the requirements of CR 76.12(4)(c)(iii) and (v), we will not consider them.

CONCLUSION

For the foregoing reasons, we affirm the Shelby Circuit Court.

ALL CONCUR.

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