STATE OF MICHIGAN

COURT OF APPEALS

DEUTSCHE BANK NATIONAL TRUST,

Plaintiff-Appellee,

v

JERRY GALILEI,

Defendant-Appellant,

and

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,

Defendant.

UNPUBLISHED
July 19, 2016

No. 327371
Genesee Circuit Court
LC No. 14-102161-CH

Before: RIORDAN, P.J., and SAAD and M. J. KELLY, JJ.

PER CURIAM.

In this dispute over a judicial foreclosure, defendant, Jerry Galilei, appeals by right the trial court's entry of a judgment of foreclosure against him after granting the motion for summary disposition by plaintiff, Deutsche Bank National Trust. On appeal, Galilei argues that the trial court should have denied Deutsche Bank's motion for summary disposition because he established a question of fact as to whether the mortgage at issue had been properly assigned to Deutsche Bank. The undisputed evidence before the trial court established that Galilei executed the note and mortgage at issue, that Galilei defaulted on the note, and that Deutsche Bank owned the note and—even if it had not been properly assigned to it—held the beneficial interest in the mortgage by operation of law. Because Galilei had no standing to challenge the assignments of the mortgage and did not present evidence establishing a dispute as to whether Deutsche Bank owned the note, which was secured by an otherwise valid mortgage, the trial court did not err when it granted Deutsche Bank's motion for summary disposition and entered a judgment of foreclosure against Galilei. Accordingly, we affirm.

I. BASIC FACTS

In June 2006, Galilei borrowed $269,100 from First Franklin a division of National City Bank of Indiana (First Franklin), to refinance his home. Galilei executed a note in favor of First Franklin in which he promised to repay the loan over a period of years. He also granted a

mortgage to Mortgage Electronic Registration Systems, Inc. (MERS), which held the mortgage solely as the nominee of First Franklin, to secure repayment of the note. First Franklin paid the note to the order of a sister corporation, which then endorsed the note in blank. The note was eventually transferred into an investment trust with Deutsche Bank as the trustee. MERS assigned the mortgage to Deutsche Bank as the trustee in July 2008.

Galilei negotiated a hardship modification to the note with the note's servicer in May 2010. Nevertheless, beginning in March 2013, Galilei ceased making payments under the note. In July 2013, Deutsche Bank's servicer sent Galilei a notice of default and informed him that he must cure the default by August 2013, or it would accelerate the note and foreclose the mortgage on behalf of the note's owner. Galilei did not cure the default and, in March 2014, Deutsche Bank sued Galilei for judicial foreclosure. It also sued MERS to discharge a mortgage on the same property that MERS held as the nominee of the lender of a previous note that was paid when Galilei refinanced his home.[1]

In August 2014, Deutsche Bank moved for summary disposition under MCR 2.116(C)(9) and (10). It presented evidence that it owned the note, that the mortgage securing the note had been assigned to it, and that Galilei had defaulted on the note. Deutsche Bank argued that it was entitled to summary disposition and a judgment of foreclosure because Galilei, who was then acting on his own behalf, did not properly challenge the note and mortgage and did not dispute that he had defaulted on the note. Galilei retained a lawyer and his new lawyer argued in response that he needed time to conduct discovery. The trial court agreed to allow Galilei some time for discovery and, in October 2014, it entered an order denying the motion without prejudice; it also provided that Deutsche Bank could re-notice the motion after the close of discovery.

Deutsche Bank re-noticed its motion for summary disposition in January 2015. In response, Galilei presented an affidavit by Peter Ancona, who stated that he was an expert on the secondary mortgage market. Ancona acknowledged that Galilei's note had been transferred into the trust and that Deutsche Bank, as the trustee, held title for the benefit of the trust's certificate holders, but then questioned whether the servicer had the authority to assign the mortgage. He outlined several actions, which—in his view—might amount to a breach of the contractual agreements governing the trust and its assets. Nevertheless, Galilei's lawyer did not discuss the affidavit and did not identify how these irregularities established a genuine issue as to any material fact.

The trial court held a hearing on the re-noticed motion for summary disposition in February 2015. The trial court first recognized that Deutsche Bank had presented evidence to establish that it held the note and mortgage and that Galilei defaulted. The court noted that Galilei had evidence from his expert that suggested that there might be an irregularity in the assignment of the note or mortgage, but stated that this evidence was insufficient because only the parties to the assignments had standing to challenge the transfers. Because Galilei presented

[1] The trial court ultimately entered a judgment in favor of Deutsche Bank on this claim and that judgment is not at issue on appeal.

no evidence that the parties had challenged the assignments, he could not rely on any purported irregularities to defeat Deutsche Bank's foreclosure. Consequently, the trial court granted Deutsche Bank's motion for summary disposition.

The trial court entered a judgment of foreclosure against Galilei in February 2015. Galilei moved for reconsideration in March 2015 and the trial court denied the motion in April 2015. Galilei then appealed in this Court.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Grandberry-Lovette v Garascia*, 303 Mich App 566, 572; 844 NW2d 178 (2014).

B. ANALYSIS

In its motion for summary disposition, Deutsche Bank argued that there was no genuine issue as to the fact that it owned the note at issue, that Galilei breached the terms of the note by failing to make timely payments, and that it had the right to foreclose the mortgage that Galilei granted to secure the note. In support of its motion, Deutsche Bank attached a copy of the note, which clearly shows that it was endorsed in blank. Because it was endorsed in blank, the note could be negotiated by transfer of possession alone. See MCL 440.3205(2). Thus, Deutsche Bank's possession of the note is evidence that it owned the note. When a note secured by a mortgage is transferred to a new owner, the transfer of the note necessarily includes the transfer of a beneficial interest in the mortgage. *Prime Financial Services LLC v Vinton*, 279 Mich App 245, 257; 761 NW2d 694 (2008). This is true even when a third-party—such as MERS—holds legal title to the mortgage as a matter of convenience for the owner of the note. See *Residential Funding Co, LLC v Saurman*, 490 Mich 909, 909-910; 805 NW2d 183 (2011). Deutsche Bank also attached records indicating that Galilei had not made the payments required under the note and that the mortgage securing the note had been assigned to Deutsche Bank. This evidence, if left unrebutted, established that Galilei breached the note and that Deutsche Bank had the right to judicially foreclose against Galilei's home. See MCL 600.3105(2); *Guardian Depositors Corp v Powers*, 296 Mich 553, 560; 296 NW 675 (1941) (stating that, in the event of nonpayment of the debt owed on a note secured by a mortgage, the note holder may foreclose in equity and seek a deficiency judgment). Because Deutsche Bank properly stated and supported its motion for summary disposition, the burden shifted to Galilei to establish that a genuine issue of disputed fact exists. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 370; 775 NW2d 618 (2009).

In response to Deutsche Bank's re-noticed motion for summary disposition, Galilei cited his previous response and an affidavit by Ancona. He then asserted that Ancona's affidavit "sets forth specific defects" in Deutsche Bank's or its predecessors' "mortgage," which would be a defense. Galilei's first response did not address the merits of Deutsche Bank's motion for summary disposition. And in his second response, Galilei did not identify the averments that he felt were relevant, did not explain how the averments established a question of fact for trial, and did not identify the applicable law. As such, he failed to rebut the evidence presented by

Deutsche Bank in support of its motion or otherwise establish a genuine issue of disputed fact for trial. *Id.* at 374-375. Even ignoring these defects, nothing in Ancona's affidavit establishes a question of fact that must be submitted to a jury before Deutsche Bank could assert its right to foreclose against the property.

Ancona made several averments concerning the terms of the agreements establishing the investment trust and stated that he "believe[d] that nothing short of producing the original note with the proper endorsements will suffice to accurately clarify ownership of the note," but he failed to address the evidence that the note was endorsed in blank and held by Deutsche Bank. Ancona's bare assertions of irregularities and that the lender's lawyers "misrepresented" the lender's status as the owner of the note were not sufficient to establish a question of fact as to whether Deutsche Bank owned the note. See *Bergen v Baker*, 264 Mich App 376, 389; 691 NW2d 770 (2004) (stating that the nonmoving party may not avoid summary disposition by submitting an affidavit with conclusory assertions unsupported by facts). Moreover, even if there were irregularities in the assignments of the note and mortgage, those irregularities would not provide Galilei with a defense under the facts of this case.

As our Supreme Court explained in *Bowles v Oakman*, 246 Mich 674, 678; 225 NW 613 (1929), the maker of a note cannot defend a payee's action to enforce it by asserting the rights of a third party who might be able to void the transfer of the note:

> The fraud . . . did not render the transfer void. It was at most voidable at the instance of those defrauded. Plaintiff was the holder of the note, and had title to it at the time of trial. . . .
>
> [The maker] had no defense of his own to the note. He ought not to have been permitted the defense that an indorsee had been guilty of fraud upon the payee or the equitable owners. An adjudication upon such defense would not bind the persons defrauded, as they are not parties hereto, and it would be idle. This action is by the person having legal title to the note. A judgment herein is conclusive. It makes no difference to [the maker] who may have the equitable title to the note, as he has no defense on the merits.

See also *Warth v Seldin*, 422 US 490, 499; 95 S Ct 2197; 45 LE2d 343 (1975) ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"). Here, nothing in Ancona's averments established that the negotiation of the note was absolutely void or that there was otherwise a risk that Galilei might have to pay the same debt twice. See 6A CJS Assignments § 133, pp 494-496 (2016). For the same reason, Galilei cannot challenge the assignment of the mortgage. Consequently, Galilei's claims that the transfers of the note and assignment of the mortgage were irregular did not constitute a defense to Deutsche Bank's claim of foreclosure.

III. CONCLUSION

Galilei failed to present evidence establishing that there existed a genuine issue of any material fact. Because the undisputed evidence established that Deutsche Bank was entitled to judicially foreclose against the mortgaged property, the trial court did not err when it granted Deustche Bank's motion for summary disposition and entered a judgment of foreclosure against Galilei.

Affirmed.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Michael J. Kelly