

STATE OF MICHIGAN
COURT OF APPEALS

MELVIN DAWSON and KIMBERLY
ALEXANDER-DAWSON,

UNPUBLISHED
June 28, 2011

Plaintiffs-Appellants,

v

No. 297709
Oakland Circuit Court
LC No. 2009-103709-CH

INDYMAC FEDERAL BANK FSB,

Defendant,

and

ONE WEST BANK FSB,

Defendant-Appellee.

Before: METER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a trial court order granting One West Bank's motion for summary disposition in this action to set aside a sheriff's sale. We affirm.

Plaintiff Kimberly Alexander-Dawson obtained a loan from Quicken Loans in 2005. She and her husband, plaintiff Melvin Dawson, issued a mortgage to Mortgage Electronic Registration Systems, Inc. ("MERS") to secure the loan. Quicken Loans appointed IndyMac Bank as servicing agent "to receive and track [the] mortgage payments." In July 2008, IndyMac Bank was shut down and the FDIC, as receiver of IndyMac's assets, transferred the servicing rights of the mortgage loan to the newly-created IndyMac Federal Bank (IFB), which was the servicing agent as of October 13, 2008, the day statutory foreclosure proceedings were initiated, but MERS did not formally assign the mortgage to IFB until October 28, 2008. IFB purchased the property at the sheriff's sale and later transferred it to One West Bank ("defendant"), a division of which had become the servicing agent some months earlier. Plaintiffs thereafter filed suit, challenging IFB's authority to initiate the foreclosure proceeding and the trial court ultimately granted summary disposition in defendant's favor.

The trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). The

crux of plaintiffs' argument is that IFB lacked authority to initiate foreclosure proceedings as of October 13, 2008, because it was not the holder of the mortgage at that time.

A party may foreclose on a mortgage if five circumstances exist: (1) the mortgage contains a power of sale upon default, (2) the mortgage is in default, (3) an action to recover the debt secured by the mortgage is not pending, (4) the mortgage has been properly recorded, and (5) "[t]he party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage." MCL 600.3201; MCL 600.3204(1). "If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale . . . evidencing the assignment of the mortgage to the party foreclosing the mortgage." MCL 600.3204(3).

This Court has held that § 3204(3) does not excuse compliance with § 3402(1)(d), and thus if the assignment of the mortgage has not been completed before foreclosure proceedings are initiated, the assignee is not "the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage" and lacks the statutory authority to foreclose, which renders the foreclosure proceedings invalid. *Davenport v HSBC Bank USA*, 275 Mich App 344, 346-348; 739 NW2d 383 (2007). Because the mortgage had not been assigned to IFB at the time it initiated the foreclosure proceedings, it lacked authority to initiate those proceedings as either "the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage."

However, "the servicing agent of the mortgage" is also authorized to initiate foreclosure proceedings and it is undisputed that at the time IFB initiated the foreclosure proceedings, it was the servicing agent of the loan secured by the mortgage. While plaintiffs contend that the servicing agent of the loan is not "the servicing agent of the mortgage" for purposes of § 3204(1)(d), they have not offered any authority in support of their argument, which is therefore deemed abandoned.¹ *Coble v Green*, 271 Mich App 382, 391; 722 NW2d 898 (2006). Accordingly, we cannot find that the trial court erred in granting defendant's motion.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto

¹ We note that one federal district court has held that the party servicing the loan is authorized to foreclose under § 3204(1)(d). *Stein v US Bancorp*, No.10-14026; 2011 WL 740537 (ED Mich, February 24, 2011), slip op at 12; *Muneio v Fed Nat'l Mortgage Ass'n*, No. 09-12973; 2010 WL 5146328 (ED Mich, December 13, 2010), slip op at 2 n 4.