[Cite as *Bank of Am. v. Allen*, 2017-Ohio-7726.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 105473**

## BANK OF AMERICA, N.A., S.B.M. TO BAC HOME LOANS SERVICING, L.P.

PLAINTIFF-APPELLEE

vs.

## ANGELA ALLEN, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:**
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CV-14-830005

**BEFORE:** Blackmon, J., McCormack, P.J., and E.T. Gallagher, J.
**RELEASED AND JOURNALIZED:** September 21, 2017

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PATRICIA ANN BLACKMON, J.:

**{¶1}** Appellant Angela Allen ("Allen") appeals the trial court's order confirming the sheriff's sale in the foreclosure action filed by Bank of America s.b.m. to BAC Home Loans ("Bank of America"). Allen assigns the following four errors for our review:

> I. The trial court abused its discretion when it confirmed the sale with the original plaintiff's name in the case caption.
>
> II. The trial court abused its discretion by confirming the sale when the appraised value was incorrect.
>
> III. The trial court abused its discretion by confirming the sale when [Bank of America] did not comply with conditions precedent to sale as required by 24 C.F.R. 203.604 after the trial modification did not become permanent.
>
> IV. The trial court abused its discretion by confirming the sale when R.C. 2329.31 was violated.

**{¶2}** Having reviewed the record and relevant law, we affirm the trial court's decision. The apposite facts follow.

**{¶3}** On June 23, 2008, Allen and Wallace Smith ("Smith") purchased a home in Richmond Heights, and signed a note in the amount of $148,824 The note was secured by a mortgage in favor of Taylor, Bean & Whitaker Mortgage Corp. ("Taylor Mortgage") and its successors and assigns. Allen and Wallace subsequently signed an amended and restated note in the amount of $175,925.09 with a lowered interest rate. The restated note was secured by a mortgage in favor of BAC Home Loans Servicing, L.P. ("BAC Servicing") and its successors and assigns. In 2014, the restated note and mortgage were assigned to Bank of America, N.A. ("Bank of America"), the successor by merger to BAC Servicing.

**{¶4}** In July 2014, Bank of America filed a foreclosure complaint against Allen and Smith, alleging note acceleration due to missed payments, and that the remaining balance of $167,051.87 was now due. Later in 2014, Bank of America filed a motion for default judgment. Allen appeared at the default hearing, and the motion was held in abeyance. The trial court referred the matter to mediation, and in March 2015, the trial court noted that the parties had reached an agreement that included a loan modification. However, on August 14, 2015, Bank of America advised the court that Allen defaulted on the modification plan and that it intended to proceed with foreclosure.

**{¶5}** On September 1, 2015, Bank of America filed a motion to substitute assignee Selene Finance, L.P. ("Selene") as the plaintiff herein. The trial court granted the motion the next day. The following month, the matter was again referred to mediation. By September 2016, however, the matter remained unresolved, and the magistrate granted Selene's motion for default judgment, noting that Allen and Wallace had still not answered the complaint. The magistrate further found that Selene had standing from a blank endorsement to the restated note that was incorporated within the complaint. The magistrate also concluded that the loan modification had not been recorded, but was a valid and enforceable equitable lien against the property.

**{¶6}** On November 1, 2016, the report of the land appraisers valued the property at $125,000. In January 2017, the property was sold at a sheriff's sale, and the trial court approved and confirmed the sale to Selene. Allen now appeals.

**Case Caption**

**{¶7}** In her first assigned error, Allen argues that the trial court's order confirming the sheriff's sale is "invalid on its face" because it contains the name of the original plaintiff, Bank of America, in the caption, rather than the new plaintiff, Selene, contrary to Civ.R. 25(C).

**{¶8}** We review an order confirming a judicial foreclosure sale for an abuse of discretion. *Wells Fargo Bank, N.A. v. McGowan*, 8th Dist. Cuyahoga No. 101779, 2015-Ohio-1544, ¶ 9, citing *Ohio Sav. Bank v. Ambrose*, 56 Ohio St.3d 53, 563 N.E.2d 1388 (1990).

**{¶9}** Civ.R. 25(C) provides in relevant part:

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. * * *

**{¶10}** However, in *Green v. Banks*, 8th Dist. Cuyahoga No. 53909, 1988 Ohio App. LEXIS 1638 (April 21, 1988), this court held that a counterclaim was improperly dismissed due to an omission in the caption and stated that, under the Rules of Civil Procedure, the names appearing in the caption of the case do not determine who are the parties to the suit. *Id*., citing *Gibbs v. Lemley*, 33 Ohio App.2d 220, 293 N.E.2d 324 (4th Dist.1972). The *Green* court explained:

> "[T]he caption of an action is only the handle to identify it and ordinarily the determination of whether or not a defendant is properly in the case hinges upon the allegations in the body of the complaint and not upon his inclusion in the caption."

*Id.*, quoting *Hoffman v. Nalden*, 268 F.2d 280, 304 (9th Cir.1959). *Accord Deutsche Bank Natl. Trust Co. v. Taylor*, 9th Dist. Summit No. 28069, 2016-Ohio-7090.

**{¶11}** Similarly, in *Bank of Am. N.A. v. Miller*, 7th Dist. Carroll No. 13 CA 894, 2014-Ohio-2932, the court held that "Bank of America's reference in the caption of its complaint to its predecessors was superfluous and, given Ohio's liberal notice pleading rules, cannot be said to render the complaint defective." *Id.* at ¶ 23.

**{¶12}** In accordance with the foregoing, the orders issued in the name of Bank of America were not facially invalid. *Accord Sprouse v. Miller*, 4th Dist. Lawrence No. 07CA32, 2008-Ohio-4384, ¶ 21. In any event, there is no indication in the record that Allen lacked reasonable notice of the court's rulings or was otherwise prejudiced following the substitution of Selene.

**{¶13}** The first assigned error is without merit.

**Appraisal**

**{¶14}** Allen next asserts that the trial court erred in confirming the judicial foreclosure sale because the value listed in the appraiser's report was $17,300 lower than the county auditor's appraised value.

**{¶15}** In the event that the owner of the property subject to a court-ordered sheriff sale is dissatisfied with an appraisal made under R.C. 2319.17, that party must object prior to the sale. *CitiMortgage, Inc. v. Hoge*, 8th Dist. Cuyahoga No. 98597, 2013-Ohio-698, ¶ 10. In this matter, Allen did not contest the appraisal report prior to

the sale. Therefore, we may review only for plain error. *Wells Fargo Home Mtge. v. Hee Sook Chun,* 8th Dist. Cuyahoga No. 101722, 2015-Ohio-1827, ¶ 8.

**{¶16}** In determining whether plain error occurred herein, we note that in *Deutsche Bank Natl. Co. v. Caldwell*, 8th Dist. Cuyahoga No. 100594, 2014-Ohio-2982, this court concluded that the trial court did not abuse its discretion in confirming a judicial foreclosure sale even though the appraised value was less than the taxable value as determined by the county auditor. This court explained:

> Real property is assessed every six years with adjustments every three years if required. R.C. 5715.33. Finally, an appraised value for foreclosure purposes takes into account the forced nature of the sale. This is, in part, the reason foreclosure sales are not a reliable indicator of the true value of real property. *See Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 127 Ohio St.3d 63, 2010-Ohio-4907, 936 N.E.2d 489.

*Id*. at ¶ 25.

**{¶17}** Herein, we assume without deciding the validity of higher taxable value determined by the county auditor. However, given the forced nature of the sale, and the lack of record from the hearing, we are unable to conclude that the trial court committed plain error in accepting the appraisal report and confirming the judicial foreclosure sale.

**{¶18}** The second assigned error is without merit.

**Lack of Compliance with 24 C.F.R. 203.604**

**{¶19}** In the third assigned error, Allen argues that because the mortgage incorporated United States Department of Housing and Urban Development ("HUD") regulations, under 24 C.F.R. 203.604(b), Bank of America was required to conduct a face-to-face interview with her before filing the foreclosure action.

**{¶20}** As an initial matter, we note that Allen did not appeal the order of foreclosure, so she has waived the foreclosure-related issues such as failure to comply with HUD regulations governing conditions precedent to a foreclosure proceeding. *Caldwell* at ¶ 18 ("The only arguments properly before this court [on an appeal from a confirmation of sale] are those related to the procedures employed in the sale and whether the court abused its discretion in confirming the sale."). Therefore, this issue is barred by res judicata. *Bank of Am., N.A. v. Kuchta,* 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 16 (res judicata bars collateral attack against the judgment in foreclosure that was never appealed).

**{¶21}** In any event, as this court noted in *Bank of Am., N.A. v. Michko*, 8th Dist. Cuyahoga No. 101513, 2015-Ohio-3137, where the bank's foreclosure complaint alleged that it "has complied with all conditions precedent as set forth in the note and mortgage," it was "sufficient under Civ.R. 9(C) to shift the burden to [the property owner] to identify 'specifically and with particularity' any conditions precedent with which Bank of America had allegedly failed to comply in her answer. Civ.R. 9(C)." *Id*. at ¶ 20; *Bank of Am., N.A. v. Calloway*, 8th Dist. Cuyahoga No. 103622, 2016-Ohio-7959, ¶ 20. Where the homeowner fails to do so, satisfaction of these conditions precedent is deemed

admitted. *Id*. at ¶ 20, citing *Bank of Am., N.A. v. Duran*, 6th Dist. Lucas No. L-14-1031, 2015-Ohio-630, ¶ 48-49.

**{¶22}** Bank of America's complaint alleged that it "has complied with all conditions precedent as set forth in the note and mortgage," so the burden shifted to Allen to identify in her answer the failure of any conditions precedent. Allen did not file an answer herein, but she argues that *Michko* is distinguishable from this matter because she obtained a loan modification after the complaint was filed and *Michko* involved pre-complaint compliance with 24 C.F.R. 203.604. We find this to be a distinction without a difference since the complaint in this matter likewise alleged that "all conditions precedent in said notes have been satisfied," and Allen at no point in the proceedings below asserted "specifically and with particularity" the conditions precedent which were not met herein. Therefore, like the property owner in *Michko*, Allen failed to "put [Bank of America's] compliance with the federal regulations * * * at issue in the case." Accordingly, we conclude that this assigned error lacks merit. *Accord Calloway* at ¶ 19.

**{¶23}** The third assigned error lacks merit.

**<u>Confirmation of Sale to Purchase using Post Office Box Address</u>**

**{¶24}** For her fourth assigned error, Allen argues that the trial court erred in confirming the judicial sale where the purchaser, Selene's bidder form listed a post office box as its address, in violation of R.C. 2329.271.

**{¶25}** Under R.C. 2329.271,

> (ii) If the purchaser is an entity, the information shall include the entity's legal name, trade name if different from its legal name, state and date of formation, active status with the office of the secretary of state, mailing address, telephone number, financial transaction device information, the name of an individual contact person for the entity, and the contact person's title, mailing address, which shall not be a post office box, electronic mail address, and telephone number.

**{¶26}** Where the required purchaser information is clearly within the record, the trial court is within its discretion to conclude that the sale was made in conformity to the law, and to confirm the sale. *Citimortgage, Inc. v. Haverkamp*, 12th Dist. Clermont No. CA2010-11-089, 2011-Ohio-2099, ¶ 16.

**{¶27}** In this matter, the required purchaser information is clearly discernable within the record because Selene provided the court with a street address in Simi Valley, California, and not merely a post office box. Therefore, we cannot say the trial court abused its discretion in finding that the sale was made "in conformity to the law and orders of [the] Court," or that the trial court abused its discretion in confirming the sale.

**{¶28}** The fourth assigned error lacks merit.

**{¶29}** Judgment is affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

TIM McCORMACK, P.J., and
EILEEN T. GALLAGHER, J., CONCUR