

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA**

U.S. BANK TRUST NATIONAL :  
ASSOCIATION, AS TRUSTEE, :  
 :  
Plaintiff-Appellee, :  
 : No. 108344  
v. :  
 :  
DERA J. COLLINS, A.K.A., DERA J. :  
COLLINS-EWING, ET AL., :  
 :  
Defendants-Appellants. :

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JOURNAL ENTRY AND OPINION

**JUDGMENT: AFFIRMED**  
**RELEASED AND JOURNALIZED: October 3, 2019**

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Civil Appeal from the Cuyahoga County Court of Common Pleas  
Case No. CV-17-884785

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*Appearances:*

The Law Office of Sarah A. Okrzynski, L.L.C., Sarah A. Okrzynski, and Pamela S. Petas, *for appellee*.

The Law Office of Barbara Quinn Smith, and Barbara Quinn Smith, *for appellant*.

MARY EILEEN KILBANE, A.J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.App.R. 11.1, the trial court records and briefs of counsel. Defendant-appellant, Dera J. Collins (“Collins”), appeals from the trial court’s

judgment granting foreclosure in favor of plaintiff-appellee, U.S. Bank National Association, as trustee of American Homeowners Preservation Trust Series 2014A (“U.S. Bank”). For the reasons set forth below, we affirm.

{¶ 2} In September 2005, Collins executed a promissory note in the amount of \$125,100 to Accredited Home Lenders. The note was secured by a mortgage on a property located at 19200 Upper Valley Drive in Euclid, Ohio. In October 2005, the mortgage was filed with the Cuyahoga County Recorder. In November 2006, Collins’s personal liability on the note was discharged in Chapter 7 bankruptcy.

{¶ 3} In July 2009, the note and mortgage were transferred and assigned to Deutsche Bank National Trust Company as trustee on behalf of Vericrest Financial, Inc. In October 2009, the assignment was filed with the Cuyahoga County Recorder. In October 2014, the note and mortgage were transferred and assigned to U.S. Bank National Association as trustee on behalf of American Homeowners Preservation Trust Series 2014 A. U.S. Bank filed the assignment with the Cuyahoga County Recorder in the same month.

{¶ 4} In August 2017, U.S. Bank filed a complaint for in rem judgment against Collins on the note and the mortgage securing the note. U.S. Bank alleges that Collins defaulted on the note and mortgage by failing to make the payment due May 1, 2009. U.S. Bank alleges that as a result of Collins’s default, she now owes a principal balance of \$124,399.87, plus interest at the rate of 8.999 percent per year

from April 1, 2009. U.S. Bank further alleges that it is entitled to enforce the note and mortgage.

{¶ 5} In January 2018, Collins filed a motion to dismiss, alleging that U.S. Bank lacked standing to foreclose on the property and that the statute of limitations had expired on the collection of the debt. The trial court denied Collins's motion to dismiss. Thereafter, Collins filed an answer and counterclaim.

{¶ 6} In March 2018, U.S. Bank filed a motion for summary judgment. U.S. Bank attached a copy of the promissory note to Accredited Home Lender, along with copies of allonges indicating the note had been transferred to U.S. Bank. Also attached were copies of the recorded assignments of the mortgage evincing a chain of assignments eventually leading to the assignment of the mortgage to U.S. Bank.

{¶ 7} In addition, U.S. Bank attached the affidavit of Jorge Newberry ("Newberry"), manager of the Administrator for U.S. Bank, as trustee of American Homeowner Preservation Trust Series 2014A. His averments were based on his personal knowledge of the business records of U.S. Bank. Newberry averred that the loan records contained the \$125,100 promissory note and mortgage Collins executed on the subject property and that true and accurate copies of the note and mortgage are attached as Exhibits A and B. Newberry averred that the note and mortgage were transferred and assigned to U.S. Bank and that true and accurate copies of the chain of assignments were attached as Exhibits C, D, and E.

{¶ 8} In April 2018, Collins filed a motion in opposition to summary judgment, arguing that U.S. Bank (1) failed to provide an unbroken chain of title,

(2) failed to prove standing to maintain this action, (3) failed to provide evidence that it possessed the original note, and (4) that the note had been discharged in bankruptcy. Collins also filed a motion in opposition to summary judgment affidavit, a motion in opposition to attorney affidavit, and a motion to enforce UCC Notarial Protest Default and Affidavit.

{¶ 9} In response, U.S. Bank filed a supplemental affidavit of DeAnn Donovan (“Donovan”), manager of American Homeowner Preservation, L.L.C., attesting that U.S. Bank was in possession of the original note prior to commencing the action. Donovan specifically averred that:

Plaintiff’s custodian of record, K.C. Wilson Associates, 23041 Avenida de la Carlota, #230, Laguna Hills, CA 92653 currently has possession of the original Promissory Note. Plaintiff has had continuous possession of the original Promissory Note (through its custodian and at times with former foreclosure counsel) since at least May 2014.

{¶ 10} In November 2018, the magistrate issued a decision granting U.S. Bank’s motion for summary judgment. Collins filed objections to the magistrate’s decision. In February 2019, the trial court overruled Collins’s objections and adopted the magistrate’s decision. The trial court also ordered the foreclosure and sale of the property. Subsequently, a sheriff’s sale was scheduled for June 3, 2019.

{¶ 11} In the interim, on March 25, 2019, Collins filed her notice of appeal with this court. On May 6, 2019, Collins also filed a motion in the trial court to stay the proceedings and to dispense with the supersedeas bond. On May 29, 2019, the trial court granted Collins’s motion and ordered the sheriff to return the order of sale without execution.

**{¶ 12}** Collins now appeals, assigning the following errors for review:

**Assignment of Error No. 1**

The trial court erred in granting summary judgment to U.S. Bank because there is a genuine issue of material fact as to whether U.S. Bank is entitled to enforce the promissory note at issue herein.

**Assignment of Error No. 2**

The trial court erred in failing to dismiss the Complaint on statute of limitations grounds.

**Summary Judgment**

**{¶ 13}** In the first assignment of error, Collins argues the trial court erred in granting summary judgment in favor of U.S. Bank because there is a genuine issue of material fact whether the bank was entitled to enforce the promissory note.

**{¶ 14}** We review an appeal from summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equip. Co.*, 124 Ohio App.3d 581, 585, 706 N.E.2d 860 (8th Dist.1998). In *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201, the Ohio Supreme Court set forth the appropriate test as follows:

Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264.

**{¶ 15}** Once the moving party satisfies its burden, the nonmoving party “may not rest upon the mere allegations or denials of the party’s pleadings, but the party’s response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

**{¶ 16}** A motion for summary judgment in a foreclosure action must be supported by evidentiary materials that establish: (1) that the plaintiff is the holder of the note and mortgage or is a party entitled to enforce the instrument; (2) the relevant chain of assignments and transfers if the plaintiff bank is not the original mortgagee; (3) that the mortgagor is in default; (4) that all conditions precedent have been met; and (5) the amount of principal and interest due. *Citizens Bank, N.A. v. Conway*, 8th Dist. Cuyahoga No. 106316, 2018-Ohio-2229, citing *Deutsche Bank Natl. Trust Co. v. Najjar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 17.

**{¶ 17}** In the instant case, Collins contends U.S. Bank lacked standing because it did not demonstrate that it was in possession of the note, did not demonstrate that it acquired the note through assignment, and did not demonstrate that the allonges were valid. We disagree.

**{¶ 18}** In a foreclosure action, a party has standing when it has either the mortgage assigned to it, or it is the holder of the note that is secured by the mortgage. *Nationstar Mtge., L.L.C. v. Wagener*, 8th Dist. Cuyahoga No. 101280,

2015-Ohio-1289, citing *CitiMortgage, Inc. v. Patterson*, 2012-Ohio-5894, 984 N.E.2d 392, ¶ 21 (8th Dist.) (where plaintiff failed to establish an interest in the note or mortgage at the time it filed its foreclosure action, it had no standing to invoke the jurisdiction of the common pleas court).

{¶ 19} A note secured by a mortgage is a negotiable instrument that is governed by R.C. Chapter 1303. *Wells Fargo Bank, N.A. v. Carver*, 2016-Ohio-589, 60 N.E.3d 473, ¶ 14 (8th Dist.). Under R.C. 1303.31(A), three “persons” are entitled to enforce an instrument: (1) the holder of the instrument; (2) a nonholder in possession of the instrument who has the rights of a holder; and (3) a person not in possession of the instrument who is entitled to enforce the instrument under R.C. 1303.38 or 1303.58(D).

{¶ 20} Here, U.S. Bank attached a copy of the note and its allonges to the complaint and to its motion for summary judgment. Also attached were copies of the recorded assignments of the mortgage, which established a chain of assignments eventually leading to the assignment of the mortgage to U.S. Bank. In addition, to reinforce its standing to file the foreclosure action, U.S. Bank attached the affidavits of Newberry, who averred that his averments were based on his personal knowledge, and of Donovan, who expressly stated U.S. Bank was in possession of the original note prior to the filing of the instant action.

{¶ 21} We find the materials attached to U.S. Bank’s complaint and to its motion for summary judgment establish that it was both the holder of the note and

the assignee of the mortgage at the time this action commenced. As a result, U.S. Bank had standing to bring this foreclosure action.

{¶ 22} Nonetheless, Collins argues that the copy of the note attached to Newberry's affidavit was time stamped as having been filed in a prior foreclosure action against her and as such is insufficient to demonstrate that U.S. Bank possessed the note. Collins also argues that copies of the three separate assignments attached to Newberry's affidavit are largely illegible, thus it is not possible to determine the precise nature of these assignments. In addition, Collins argues the copies of the attached assignments are out of date order, thus it is unclear which allonges the assignments are supposed to match.

{¶ 23} However, the fact that the copy of the note was time stamped as having been filed in a prior foreclosure action U.S. Bank filed against Collins does not negate Donovan's averment that the bank has been in possession of the original since May 2014. At a minimum, producing the same copy of the note used in a prior action, established that U.S. Bank was in possession of the note before this complaint was filed. That the copies of the assignments are largely illegible and out of date order does not negate that the assignments occurred.

{¶ 24} Based on the foregoing, the evidence established that U.S. Bank was both the holder of the note and the assignee of the mortgage at the time it filed its complaint. As a result, U.S. Bank had standing to bring this foreclosure action and the trial court properly granted summary judgment in its favor.

{¶ 25} Accordingly, the first assignment of error is overruled.



### Statute of Limitations

{¶ 26} In the second assignment of error, Collins argues the trial court should have granted her motion to dismiss because the statute of limitations had expired. We disagree.

{¶ 27} R.C. 1303.16(A) provides that “an action to enforce the obligation of a party to pay a note payable at a definite time shall be brought within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.”

{¶ 28} In the instant case, Collins does not dispute that her last payment on the note was April 1, 2009. Thus, Collins defaulted when she failed to make the payment due on May 1, 2009. The record reveals that U.S. Bank filed its first foreclosure action against Collins in March 2015, which was within six years of Collins defaulting on the note and before the statute of limitations had expired.

{¶ 29} On January 28, 2016, the trial court issued a journal entry dismissing U.S. Bank’s complaint, without prejudice, for failing to name all necessary parties. In March 2016, U.S. Bank filed a second foreclosure action against Collins. In May 2017, the trial court issued a journal entry dismissing U.S. Bank’s second complaint, without prejudice, for “failure to comply with previous court order of 01/23/2017 requiring all parties to file a motion for default judgment, etc.” As previously mentioned, U.S. Bank filed the instant action in August 2017.

{¶ 30} After U.S. Bank’s first foreclosure action was dismissed without prejudice, U.S. Bank availed itself of the Ohio Savings Statute, R.C. 2305.19, which

affords a plaintiff a limited period of time to refile a dismissed claim that would otherwise be time barred. The statute provides, in relevant part:

In any action that is commenced or attempted to be commenced, \* \* \* if the plaintiff fails otherwise than upon the merits, the plaintiff \* \* \* may commence a new action within one year after the date of \* \* \* the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.

R.C. 2305.19(A).

{¶ 31} Thus, “[i]n certain instances, [R.C. 2305.19] operates to save timely filed actions by permitting a party to refile its complaint or file a new action \* \* \*’ within one year of a failure otherwise than on the merits.”” *Agaj v. Univ. Hosps. Health Sys.*, 8th Dist. Cuyahoga No. 105988, 2018-Ohio-2193, quoting *Vaught v. Pollack*, 8th Dist. Cuyahoga No. 103819, 2016-Ohio-4963, ¶ 12, quoting *Allegretti v. York*, 8th Dist. Cuyahoga No. 101231, 2014-Ohio-4480, ¶ 15.

{¶ 32} Because U.S. Bank filed the first foreclosure action against Collins prior to the expiration of the statute of limitations and refiled the dismissed complaints within one year of the trial court’s dismissal, its claims were preserved.

{¶ 33} Moreover, based on the property interest created by Collins’s default on the mortgage, U.S. Bank may bring a foreclosure action to cut off the Collins’s right of redemption, determine the existence and extent of the mortgage lien, and have the mortgaged property sold for its satisfaction. *Deutsche Bank Natl. Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243, ¶ 24, citing *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 17; *Hausman v. Dayton*, 73 Ohio St.3d 671, 676, 1995-Ohio-277, 653 N.E.2d 1190; *Carr*

*v. Home Owners Loan Corp.*, 148 Ohio St. 533, 540, 76 N.E.2d 389 (1947). This action is governed by a 21-year limitations period as set forth in R.C. 2305.04. See *Bank of N.Y. Mellon v. Walker*, 8th Dist. Cuyahoga No. 104430, 2017-Ohio-535.

{¶ 34} Based on the foregoing, the trial court properly denied Collins's motion to dismiss the foreclosure complaint.

{¶ 35} Accordingly, the second assignment of error is overruled.

{¶ 36} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

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MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., and  
EILEEN A. GALLAGHER, J., CONCUR