[Cite as *Midwest Business Capital v. RFS Pyramid Mgt.*, 2011-Ohio-6214.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

MIDWEST BUSINESS CAPITAL, A DIVISION OF UNITED MIDWEST SAVINGS BANK,	:	**O P I N I O N**
Plaintiff,	:	**CASE NO. 2011-T-0030**
- vs -	:	
RFS PYRAMID MANAGEMENT, LLC, et al.,	:	
Defendant-Appellant,	:	
PNC BANK, NATIONAL ASSOCIATION, SUCCESSOR TO NATIONAL CITY BANK,	:	
Defendant-Appellee.		

Civil Appeal from the Court of Common Pleas, Case No. 2009 CV 2259.

Judgment: Affirmed.

Mark E. Bumstead, Letson, Griffith, Woodall, Lavelle & Rosenberg Co., 108 Main Avenue, S.W., 6th Floor, P.O. Box 151, Warren, OH 44481-0151; and *James J. Crisan*, Martin F. White Co., L.P.A., 156 Park Avenue, N.E., P.O. Box 1150, Warren, OH 44482-1150 (For Defendant-Appellant).

Robert B. Trattner and *Michelle L. DiBartolo*, Thomas, Trattner & Malone, LLC, One South Main Street, 2nd Floor, Akron, OH 44308 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, RFS Pyramid Management, LLC ("RFS"), appeals from the judgment entered by the Trumbull County Court of Common Pleas granting appellee,

PNC Bank, National Association, successor to National City Bank, summary judgment. For the reasons discussed below, we affirm.

{¶2} On August 24, 2009, Midwest Business Capital, A Division of Midwest Savings Bank ("Midwest"), filed a complaint for foreclosure against various defendants, including RFS and National City Bank ("NCB"). The complaint sought to foreclose on a mortgage and assignment of rents on property purportedly secured by a promissory note issued by another party, Fortran Graphics, Inc., after Fortran allegedly defaulted on the note. RFS was named as a defendant in its capacity as the owner of the property secured by the mortgage, while NCB was named as a defendant due to apparent separate liens it held against the real property at issue. Each party duly filed an answer to the complaint.

{¶3} On September 21, 2010, NCB filed a motion for leave to file an amended answer, a counterclaim against Midwest, and a cross-claim against RFS. NCB's request was granted. The counterclaim and cross-claim requested the trial court to declare that NCB's interest in two separate loan agreements entered into with RFS had priority over any interest alleged by Midwest. First, NCB alleged RFS executed and delivered to NCB and its successors a promissory note, dated October 15, 2003, in the principal amount of $320,000 together with interest on the unpaid balance, until paid in full, with interest accruing at a variable rate of NCB's cost of funds plus 2.5 percent. The $320,000 note was secured by an open-end mortgage against certain real property in Warren, Ohio, and an "Assignment of Rents" against that property.

{¶4} The second loan, an open-end business credit line and security agreement, was entered between RFS and NCB on January 9, 2004. The initial line of

credit was $20,000 and required RFS to be liable for all advances, finance charges, and other amounts charged to the account, together with interest. The credit line further provided that "*** this Mortgage shall be binding upon and inure to the benefit of the parties, their successors and assigns." This note was also secured by an open-end mortgage on the Warren, Ohio property. NCB submitted documentation in support of its counterclaim and cross-claim, and petitioned the court for a judgment of foreclosure on each mortgage against RFS.

{¶5} On November 30, 2010, after Midwest and RFS filed their respective answers, PNC Bank, National Association ("PNC"), successor to NCB, filed a motion for summary judgment. In its motion, PNC argued there was no genuine issue of material fact to be litigated regarding RFS' breach of the terms and conditions of the mortgages over which it, as successor to NCB, had a priority interest. In support, PNC attached the affidavit of its "Credit Policy Officer," Debra Coleman. In her affidavit, Coleman set forth the terms and conditions of each mortgage and noted the principal amount, accrued interest, and late fees due on each loan. Coleman also attested to the specific balance amounts that remained unpaid on the date the affidavit was filed. Coleman's affidavit, however, inaccurately stated that RFS executed and delivered the notes and agreements to PNC, not NCB.

{¶6} On January 21, 2011, RFS filed a memorandum in opposition to PNC's motion for summary judgment. In its memorandum, RFS did not specifically contest the allegations of default on the subject loans. Rather, it asserted there were issues of fact that remained to be litigated because Coleman's affidavit contained multiple statements which were false. RFS maintained that Coleman's averments stating that RFS entered

into the loan agreements with PNC were fundamentally wrong. RFS pointed out the agreements were "plainly between RFS and National City Bank." As a result, any argument premised upon the existence of agreements between RFS and PNC are erroneous and unreliable. RFS further asserted that NCB, not PNC, was the holder of the mortgage and therefore the real party in interest. Because PNC was not mentioned on the mortgages and a "stranger to [the] litigation," RFS concluded PNC's motion for summary judgment must be denied.

{¶7} On February 2, 2011, PNC filed a response to RFS' memorandum in opposition to which it attached an additional affidavit of Debra Coleman. In this affidavit, Coleman, a "Credit Policy Officer" for PNC and former officer of NCB, averred, in relevant part:

{¶8} "Prior to December 31, 2008, National City Bank was a wholly owned subsidiary of National City Corporation.

{¶9} "Effective December 31, 2008, National City Corporation merged with and into The PNC Financial Services Group, Inc., and National City Bank became a wholly owned subsidiary of The PNC Financial Services Group, Inc.

{¶10} "Effective as of November 6, 2009, pursuant to approval granted by the United States Office of the Comptroller of the Currency ***, National City Bank was merged with and into PNC Bank, National Association."

{¶11} Attached to Coleman's affidavit was independent documentation from the Secretary of PNC Bank certifying the merger as well as a correspondence with the Comptroller of the Currency Administrator of National Banks acknowledging the merger.

{¶12} On February 11, 2011, RFS then filed a surreply memorandum arguing that, irrespective of the merger, PNC had not been formally substituted in the matter and therefore lacked standing to file pleadings or motions in the underlying litigation. In support, RFS cited Civ.R. 17(A), which provides that "[e]very action shall be prosecuted in the name of the real party in interest ***." RFS argued that even if PNC is the real party in interest in the case, it never took appropriate action to substitute itself as a party and could not unilaterally do so. Because NCB does not exist and PNC is not a proper party to the litigation, RFS concluded the trial court should dismiss the complaint. If, however, the court declined to dismiss the matter, RFS contended there were still material issues of fact to be litigated because PNC failed to demonstrate that it actually acquired the subject mortgages during the merger.

{¶13} On February 14, 2011, the trial court entered summary judgment in PNC's favor. After reviewing the record, the court made the following ruling:

{¶14} "This Court specifically finds that Defendant PNC is the real party in interest in this action and that there is no genuine issue of material fact that the Defendant RFS Pyramid Management, LLC is in default on it[s] obligation, that its position as holder of liens is first and best after costs of this case and taxes, and that the Defendant PNC is therefore entitled to Judgment as a matter of law on *** its cross-claim against the Defendant Pyramid Management."

{¶15} The trial court therefore ordered PNC, as successor to NCB, to prepare and submit a judgment decree in foreclosure on the subject property. The order was prepared and filed, and an order of sale was subsequently entered. Upon RFS' motion,

the trial court entered a stay of execution of the judgment pending the resolution of this appeal. RFS asserts the following assignment of error for our consideration:

{¶16} "The trial court committed prejudicial error by granting summary judgment to 'PNC Bank, National Association, Successor to National City Bank' and ordering that entity to file a Decree of Foreclosure."

{¶17} Under its sole assignment of error, RFS first asserts the trial court erred in allowing PNC to file a motion for summary judgment where PNC was never properly made a party to the proceedings. We do not agree.

{¶18} In this case, Coleman's second affidavit demonstrated that at the time the proceedings commenced, in August 2009, NCB was a wholly-owned subsidiary of PNC Financial Services Group, Inc. On November 6, 2009, several months *after* the proceedings had commenced, NCB merged with PNC Bank, National Association. On that date, NCB ceased to independently exist and any assets or liabilities it had at the time of the merger became those of PNC. According to the pleadings and other supportive documentation, the mortgages that were the subject of NCB's counterclaim and cross-claim belonged to NCB at the inception of the litigation. On November 6, 2009, by virtue of the merger, the record indicates NCB's interest in these loans transferred to PNC, NCB's successor in interest.

{¶19} Civ.R. 17(A) requires that every civil action "be prosecuted in the name of the real party in interest." A "real party in interest" has been defined as any individual or entity who has a real interest in the subject matter of the litigation and not a mere interest in the action itself, i.e., "one who is *directly* benefited or injured by the outcome of the case." (Emphasis sic.) *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24; see,

also, *Sutton Funding, LLC v. Herres*, 188 Ohio App.3d 686, 695, 2010-Ohio-3645. Where the action has not been initiated or pursued by the real party in interest, Civ.R. 17(A) provides:

{¶20} "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

{¶21} As indicated above, NCB entered the underlying litigation as the real party in interest but, after the merger, PNC, as the successor in interest, became the legally interested party. In its memorandum in opposition to PNC's motion for summary judgment, RFS objected to PNC's appearance in the litigation, arguing NCB, not PNC was the real party in interest. PNC countered by filing Coleman's second affidavit which attested to NCB's formal merger with PNC. RFS continued its objection, however, asserting that PNC lacked standing to file pleadings in the litigation as it failed to formally substitute itself for NCB. RFS reasserts its arguments on appeal.

{¶22} Civ.R. 25(C) governs the substitution of parties in the event of a transfer of interest and provides that "*** 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."

{¶23} Because Civ.R. 25(C) provides that the proceedings *may be* continued by or against the original party, "[t]he rule does not require that a substitution of parties be made." *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 71. Rather, the decision to

substitute a party or parties is a matter within the trial court's discretion. *Mtge. Electronic Registration Sys., Inc. v. Vascik*, 6th Dist. No. L-09-1129, 2010-Ohio-4707, at ¶35; see, also, *Centennial Equities Corp. v. Wizard Group, Inc*., (Mar. 17, 1994), 8th Dist. No. 64898, 1994 Ohio App. LEXIS 1088, *10; *Alrichs v. Tri-Tex Corp.* (1987), 41 Ohio App.3d 207, 210. If a court determines a transfer of interest has occurred, it may substitute parties pursuant to Civ.R. 25(C). See, e.g., *Dater v. Charles H. Dater Found., Inc.*, 166 Ohio App.3d 839, 2006-Ohio-2479, at ¶11.

{¶24} A review of the record demonstrates that no independent motion was filed seeking the court to direct PNC be substituted. In its response to RFS' memorandum in opposition to its motion for summary judgment, however, PNC did set forth competent evidence, via Coleman's second affidavit, to demonstrate such a transfer occurred via the merger. These averments, in conjunction with the mortgage documents attached to NCB's counterclaim and cross-claim, which were referred to in Coleman's first affidavit, demonstrate that PNC, as NCB's successor, was entitled to enforce the agreements. The issue of whether a transfer of interest from NCB to PNC had occurred was consequently before the court. And, in its February 14, 2011 judgment entry, the trial court determined that PNC was "the real party in interest" in the action.

{¶25} Given the interplay between Civ.R. 17(A) and Civ.R. 25(C), we hold the court did not abuse its discretion in recognizing PNC as a party in the proceedings. RFS' argument that PNC failed to take appropriate action to substitute itself as a party is therefore not well taken.

{¶26} RFS next asserts that the trial court erred when it entered summary judgment in PNC's favor because the counterclaim and cross-claim was filed after

November 6, 2009, the date it technically "ceased to exist." To the extent PNC was the successor in interest to the subject loans, RFS maintains it should have filed the pleadings. In RFS' view, PNC's failure to file the claims creates a genuine issue of material fact regarding who is the holder of the mortgages and who has standing to bring the foreclosure action. We do not agree.

{¶27} As discussed above, where a transfer of interest occurs, Civ.R. 25(C) permits an action "*** to be continued by *** the original party." Simply because NCB was no longer in existence at the time the counterclaim and cross-claim was filed neither invalidates those pleadings nor suggests PNC lacked standing to file pleadings to show it was the real party in interest. In other words, the fact that PNC was not immediately substituted at the time the interest transferred had no effect on the litigation. The trial court ultimately held PNC was the real party in interest which, pursuant to our holding supra, acted to substitute PNC by operation of Civ.R. 25(C).[1] RFS' argument is without merit.

{¶28} Finally, RFS asserts that if this court holds that PNC properly appeared in the proceedings, it nevertheless failed to carry its burden entitling it to summary

1. RFS cites *Wells Fargo Bank, Natl. Assn. v. Byrd*, 178 Ohio App.3d 285 and *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092 in support of its argument that PNC lacked standing. These cases, however, are distinguishable from the instant matter. In *Byrd*, the mortgagee, Wells Fargo, filed the foreclosure action against mortgagors. The note and mortgage, however, named a different party as the original lender. When Wells Fargo sought summary judgment, it attached an assignment of the note and mortgage from the named lender to the mortgagee. The assignment, however, was dated more than one month after the complaint had been filed. The trial court did not adopt the magistrate's ruling in favor of the mortgagee. Instead, it dismissed the case. The First Appellate District determined that dismissal of the foreclosure action was proper because the mortgagee was not a real party in interest when it filed the action pursuant to Civ.R. 17(A) and it could not cure the defect by producing the after-acquired interest. In *Jordan*, the court was faced with the same factual scenario and, citing *Byrd*, determined Wells Fargo lacked standing to initiate the proceedings. In this case, however, PNC did not bring the initial foreclosure action. NCB was the real party in interest at the time the suit was commenced and, after the interest transferred, PNC submitted adequate, competent evidence to demonstrate such. PNC did not appear in the litigation until the interest had transferred and therefore had standing to proceed.

judgment. RFS maintains that although Coleman's affidavits demonstrate NCB merged with PNC, there is no evidence demonstrating that PNC acquired the RFS mortgages and notes as a result of the merger. We do not agree.

{¶29} "An award of summary judgment is proper where (1) there is no genuine issue of material fact remaining to be litigated; (2) the movant is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence in favor of the non-movant, that conclusion favors the moving party. Civ.R. 56(C)[.]" *Kalan v. Fox*, 187 Ohio App.3d 687, 690, 2010-Ohio-2951.

{¶30} Upon filing a motion pursuant to Civ.R. 56, the movant has the initial burden of providing the trial court a foundation for the motion and is required to specifically identify portions of the record demonstrating the absence of genuine issues of material fact relating to the non-movant's position. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. If the movant meets its initial burden, the burden then shifts to the non-movant to provide specific facts that would establish a genuine issue for trial. Id. With respect to evidential quality, the movant cannot discharge its initial burden under Civ.R. 56 simply by making a blank assertion that the non-movant has no evidence to prove its case, but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C). *Dresher*, supra. Similarly, the non-movant may not rest on conclusory allegations or denials contained in the pleadings; rather, he or she must submit evidentiary material sufficient to create a genuine dispute over material facts at issue. Civ.R. 56(E); see, also, *Dresher*, supra.

{¶31} A reviewing court must follow the same standard used by the trial court. "In the parlance of appellate law, we review an award of summary judgment de novo." *Kalan*, supra, citing *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671.

{¶32} As stated in the factual recitation, each agreement included a provision entitling NCB's successor in interest to enforce their respective terms against the borrower. The promissory note obligating RFS as a mortgagor on the $320,000 mortgage provided:

{¶33} "SUCCESSOR INTERESTS. The terms of this Note shall be binding upon Borrower, and upon Borrower's heirs, personal representatives, successors and assigns, and shall inure to the benefit of Lender *and its successors* and assigns." (Emphasis added.)

{¶34} Furthermore, the $20,000 open-end mortgage provided:

{¶35} "Successors and Assigns. *** [T]his Mortgage shall be binding upon and inure to the benefit of the parties, their successors and assigns. ***"

{¶36} It is undisputed that NCB, the original holder of the mortgages, merged with PNC and, as a result, became NCB's successor. We recognize that Coleman's initial affidavit inaccurately stated the note and mortgages were executed and delivered to PNC, *not* NCB. PNC's reply memorandum and Coleman's second affidavit, however, were sufficient to demonstrate that PNC acquired the subject mortgages as a successor in interest as a matter of law. In other words, PNC met its initial burden demonstrating there was no *genuine* issue of material fact to be litigated regarding PNC's status as

successor in interest to NCB's assets and, by implication, the current holder of the mortgages.

{¶37} Pursuant to *Dresher*, supra, therefore, the burden shifted to RFS to set forth specific facts that would create a genuine issue for trial. RFS, however, failed to allege any such facts. RFS did not take issue with the allegations of default nor did it allege the mortgages had been sold to a different mortgagee prior to NCB's merger with PNC. By failing to set forth facts tending to show that PNC, as NCB's successor, was not entitled to enforce the mortgages against it, we hold RFS failed to establish a genuine issue of material fact to be litigated relating to its obligations on the subject mortgages.

{¶38} RFS' assignment of error is without merit.

{¶39} For the reasons set forth in this opinion, the judgment of the Trumbull County Court of Common Pleas is hereby affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.