[Cite as *Bank of Am. v. Nummi*, 2014-Ohio-4315.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP fka COUNTRYWIDE HOME LOANS SERVICING, LP,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-L-011**
- vs -	:	
BOBBI JO NUMMI, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 13 CF 000925.

Judgment: Affirmed.

Bryan T. Kostura and *James W. Sandy*, McGlinchey Stafford, PLLC, 25550 Chagrin Boulevard, Suite 406, Cleveland, OH 44122-4640 (For Plaintiff-Appellee).

Brian K. Duncan and *Bryan D. Thomas*, Duncan Law Group, LLC, 600 South High Street, Suite 100, Columbus, OH 43215 (For Defendants-Appellants).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants, Bobbi Jo Nummi and Kevin M. Nummi, appeal the January 2, 2014 judgment of the Lake County Court of Common Pleas granting summary judgment and issuing a decree of foreclosure in favor of appellee, Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP. For the reasons that follow, we affirm the decision of the trial court.

{¶2} In 2008, appellants took title to property at 319 West Main Street in Madison, Ohio. Appellants signed a promissory note in favor of Security Atlantic Mortgage Co., Inc. The note was assigned to Countrywide Bank, FSB and then endorsed to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP ("BAC Home Loans"). Subsequent to the execution of the note, Ms. Nummi executed an "Amended and Restated Note," which increased the principal due on the note to $237,012.07, plus interest at a rate of 4.625% per annum. The amended note was assigned to Bank of America, N.A.

{¶3} Appellants also granted a mortgage on the property to Security Atlantic Mortgage Co., Inc. The mortgage was assigned to BAC Home Loans. Bank of America is the successor by merger to BAC Home Loans. The record contains a certificate of this merger from the Ohio Secretary of State. The record also contains a copy of Ms. Nummi's loan modification agreement with BAC Home Loans, which increased the principal balance secured by the mortgage as due on the amended note to $237,012.07.

{¶4} Appellee filed a complaint for foreclosure on April 30, 2013, alleging that it is the holder of the note which is secured by the mortgage. Appellee attached all the aforementioned documents to the complaint.

{¶5} Appellee sought summary judgment. In support of its motion, appellee submitted the affidavit of Tiona LaRayne Reynolds, Assistant Vice President of Bank of America. The affidavit avers that she has access to appellee's business records and that she has reviewed the records related to appellants' account. Ms. Reynolds states that she has personally reviewed the records and made the affidavit from the review of

the business records and from her personal knowledge of how the records are created and maintained. The affidavit states that Bank of America, successor by merger to BAC Home Loans, has "possession of the promissory note and held the note at the time of filing the foreclosure complaint" and that the loan balance had been accelerated. Ms. Reynolds avers that the documents she reviewed "are true and correct copies." Ms. Reynolds states that the principal sum owed is $227,929.72, plus interest at 4.625% per annum from August 1, 2012. Ms. Reynolds provided a breakdown of the advanced costs.

{¶6} Appellants filed a memorandum in opposition to appellee's motion for summary judgment without the support of an affidavit or any other evidentiary material. Appellants, however, maintained that Ms. Reynolds' affidavit was insufficient and that appellee did not have standing to bring the instant action.

{¶7} The trial court granted appellee's motion for summary judgment.

{¶8} Appellants filed a timely notice of appeal and assert the following assignment of error for our review:

{¶9} "The trial court abused its discretion by granting plaintiff's motion for summary judgment because there were issues of fact and plaintiff was not entitled to judgment as a matter of law."

{¶10} We review a trial court's decision on a motion for summary judgment de novo. *Fed. Home Loan Mtge. Corp. v. Zuga*, 11th Dist. Trumbull No. 2012-T-0038, 2013-Ohio-2838, ¶13. Under Civil Rule 56(C), summary judgment is proper if:

> (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party 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 such evidence most strongly in

> favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Id. at ¶10-11, citing *Temple v. Wean United, Inc*., 50 Ohio St.2d 317, 327 (1977).

{¶11} The moving party bears the initial burden to demonstrate from the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, that there is no genuine issue of material fact to be resolved in the case. *Id*. at ¶12, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). To properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials showing: (1) the movant is the holder of the note and mortgage, or is a party entitled to enforce it; (2) if the movant is not the original mortgagee, the chain of assignments and transfers; (3) the mortgager is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due. *Wachovia Bank v. Jackson*, 5th Dist. Stark No. 2010-CA-00291, 2011-Ohio-3203, ¶40-45. With regard to the first requirement, the movant must establish it was the holder or entitled to enforce the note as of the time the complaint was filed. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶3. "If this initial burden is met, the nonmoving party then bears the reciprocal burden to set forth specific facts which prove there remains a genuine issue to be litigated, pursuant to Civ.R. 56(E)." *Zuga, supra*, at ¶12.

{¶12} First, appellants maintain there is a genuine issue of material fact as to whether appellee was a holder in due course. The note and mortgage, which are in evidence, depict the assignments to appellee. Further, these assignments occurred prior to the filing of the complaint. *See Schwartzwald*, *supra*; *see also* R.C. 5301.32. The holder of an instrument is a "person entitled to enforce" the instrument under R.C.

1303.31. R.C. 1301.201(B)(21)(a) defines a holder of a negotiable instrument, in pertinent part, as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession[.]" The evidence also established that appellee was in possession of the note and entitled to enforce it at the time the complaint was filed. *See CitiMortage, Inc. v. Patterson*, 8th Dist. Cuyahoga No. 98360, 2012-Ohio-5894, ¶21 (stating the holder of note has standing to foreclose). "[S]tanding is a jurisdictional requirement which must be met before a common pleas court can proceed." *Fed. Home Loan Mtge. Corp. v. Koch*, 11th Dist. Geauga No. 2012-G-3084, 2013-Ohio-4423, ¶24, citing *Schwartzwald* at ¶22. The mortgage lender must demonstrate an interest in either the mortgage or promissory note to establish standing; this interest must exist at the time the foreclosure complaint was filed in the trial court. *Koch* at ¶24, citing *Schwartzwald* at ¶25-27.

{¶13} Based on the record, appellee was the holder of both the note and mortgage at the time of filing the complaint and, therefore, had standing to foreclose.

{¶14} Next, appellants make the conclusory statement that Ms. Reynolds' affidavit failed to comply with the Ohio Rules of Evidence. Yet, appellants do not buttress this contention with reference to any rule, citation, or case law.

{¶15} Pursuant to Civ.R. 56(E), affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." "Copies of all papers referred to in the affidavit are acceptable if the affidavit indicated that the copies submitted are true and accurate reproductions of the originals." *Zuga, supra*, at ¶15.

{¶16} Here, Ms. Reynolds averred that she had personal knowledge of the statements made in the affidavit; that she had access to the business records of appellee; and that she reviewed appellants' records, which were maintained by appellee in the course of its regularly-conducted business activities and made at or near the time of the event. The affidavit incorporated by reference the documentation attached to appellee's complaint. The affidavit also referenced the amount due, as well as the advances made by appellee. We find that Ms. Reynolds' affidavit is sufficient for the trial court to have determined that she had personal knowledge.

{¶17} Next, appellants contend they were not provided proper notice of their default. Appellants' contentions are not supported by the record. In the complaint, appellee made a general allegation that it had complied with all conditions precedent for foreclosure. "Where prior notice of default and/or acceleration is required by a provision in a note or mortgage instrument, the provision of notice is a condition precedent subject to Civ.R. 9(C)." *First. Fin. Bank v. Doellman*, 12th Dist. Butler No. CA2006-02-029, 2007-Ohio-222, ¶20. In this case, by stating generally that it had complied with all conditions precedent, appellee met the requirements of Civ.R. 9(C). This is sufficient under Civ.R. 9(C) to shift the burden to appellants to assert failure to provide notice of acceleration.

{¶18} "A general denial of performance of conditions precedent is not sufficient to place performance of a condition precedent in issue. The effect of the failure to deny conditions precedent in the manner provided by Civ.R. 9(C) is that they are deemed admitted." *Doellman*, *supra*, at ¶20.

{¶19} In their answer, appellants did not allege that they did not receive notice of default or that the notice was not properly sent prior to the acceleration of the loan. *See* Civ.R. 9(C) ("A denial of performance or occurrence shall be made specifically and with particularity."). Because appellants failed to state with specificity which conditions precedent appellee did not satisfy prior to filing the instant foreclosure complaint, appellants are barred from later challenging this issue either in their memorandum in opposition to appellee's motion for summary judgment or on appeal. *See Satterfield v. Adams Cty. Ohio Valley Sch. Dist.*, 4th Dist. Adams No. 95CA611, 1996 Ohio App. LEXIS 4897 (Nov. 6, 1996), *5.

{¶20} Finally, appellants argue that appellee assumed the risk because it had knowledge of the default status of the note and mortgage at the time of the assignment. We disagree.

{¶21} The Third Appellate District has rejected the application of the assumption of risk defense in a foreclosure proceeding:

> Determining whether the assumption of risk doctrine applies in a foreclosure action is an issue of law. The [defendants] fail to cite any authority applying the assumption of risk doctrine in a foreclosure action, and a review of Ohio case law yields no support for this assertion. Because the [defendants] fail to support their argument with authority as required by App.R. 16(A)(7), we decline to address it. App.R. 12(A)(2). We summarily note, however, that the assumption of the risk doctrine is primarily, if not exclusively, a defense against a claim of negligence. Therefore, we find that without authority in support of their argument, the assumption of the risk doctrine is not a defense in a foreclosure action.

Flagstar Bank, FSB. v. Richison, 3d Dist. Union No. 14-12-01, 2012-Ohio-3198, ¶18. *See also HSBC Mtge. Serv., Inc. v. Frazier*, 5th Dist. Delaware No. 13 CAE 10 0076, 2014-Ohio-2155, ¶17-18.

{¶22} Appellants in this case, just as in *Richison*, fail to cite to any authority applying the assumption of risk doctrine to a foreclosure action, and we do not find any case law to support this contention.

{¶23} As discussed above, appellee provided all the evidentiary material necessary to satisfy the foregoing criteria. At this point, the burden shifted to appellants to set forth specific facts demonstrating that a *genuine* issue of material fact remained to be litigated. Appellants, however, failed to meet its reciprocal burden by submitting evidence that would create a genuine issue of material fact for trial. Therefore, we conclude the trial court did not err in ruling that appellee was entitled to summary judgment as a matter of law.

{¶24} Appellants' assignment of error is without merit.

{¶25} For the reasons discussed in this opinion, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.