

[Cite as *Flagstar Bank F.S.B. v. Diehl*, 2010-Ohio-2860.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FLAGSTAR BANK F.S.B.

Plaintiff-Appellee

-vs-

ROBERT E. DIEHL, et al.

Defendants-Appellants

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. 09 COA 034

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 08 CFR 081

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 21, 2010

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellants Robert E. and Harriet R. Diehl appeal the decision of the Court of Common Pleas, Ashland County, which granted summary judgment and an order of foreclosure and sale in favor of Appellee Flagstar Bank, F.S.B. The relevant facts leading to this appeal are as follows.

{¶2} On May 12, 2004, appellants executed a promissory note and mortgage for \$123,500.00, initially payable at an annual interest rate of 4.50%, and then at an adjustable rate commencing June 1, 2007. The mortgage was recorded in Ashland County on May 17, 2004. The subject property is located on Cedar Lane in Cinnamon Lake, Ohio. The original holder was MERS as nominee for Novastar Mortgage.

{¶3} On February 7, 2008, Appellee Flagstar, as assignee, filed a foreclosure complaint in the Ashland County Court of Common Pleas, alleging that appellants had defaulted on the note and mortgage, and seeking judgment of \$123,075.74 plus interest. Appellee also named as defendants M & I Bank and the Ashland County Treasurer. The action was subject for a time to a bankruptcy stay; however, on July 14, 2008, appellants filed an answer denying or denying for lack of knowledge the allegations in the complaint. Appellants also therein alleged that the complaint failed to state a claim for relief, on the grounds that no actual note could be located which would support appellee's allegations.

{¶4} On August 29, 2008, appellee filed a motion for summary judgment.

{¶5} On August 5, 2009, the trial court granted summary judgment in favor of appellee. Furthermore, the court directed appellee to submit a proposed judgment entry. On September 25, 2009, the court issued a judgment entry granting summary judgment

in favor of appellee and effectively ordering a foreclosure and a sale of the subject property.

{¶6} On October 23, 2009, appellants filed a notice of appeal. They herein raise the following sole Assignment of Error:

{¶7} "I. THE COURT ERRED BY GRANTING SUMMARY JUDGMENT TO PLAINTIFF-APPELLEE WHERE THERE WAS NO EVIDENCE OF PLAINTIFF'S RIGHT TO FORECLOSE."

I.

{¶8} In their sole Assignment of Error, Appellants contend the trial court erred in granting summary judgment concerning foreclosure in favor of Appellee Flagstar. We disagree.

{¶9} As an appellate court reviewing summary judgment issues, we must stand in the shoes of the trial court and conduct our review on the same standard and evidence as the trial court. *Porter v. Ward*, Richland App.No. 07 CA 33, 2007-Ohio-5301, ¶ 34, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212.

{¶10} Civ.R. 56(C) provides, in pertinent part:

{¶11} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that

reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * *

{¶12} In the case sub judice, appellee's complaint did not have the promissory note attached, although a copy of the mortgage was attached. The focus of appellant's present argument centers on the sufficiency of the affidavit of Robert R. Stoudemire, a vice president for Flagstar, who averred as follows:

{¶13} "Robert R. Stoudemire, being first duly sworn, deposes and says;

{¶14} "1. That he/she is Vice President of Flagstar Bank, F.S.B., and is duly authorized to make this Affidavit and represents that he/she has personal knowledge of the matters contained herein:

{¶15} "2. That the copy of the mortgage attached to Plaintiff's complaint is a true and accurate copy of the original instrument bearing the signatures of Robert E. Diehl and Harriet R. Diehl;

{¶16} "3. That Plaintiff is the holder of said mortgage deed and the holder of said note;

{¶17} "4. That Plaintiff has exercised the option contained in said mortgage note and has accelerated and called due the entire principal balance due thereon;

{¶18} "5. That he/she has examined the loan account of Robert E. Diehl and Harriet R. Diehl and that said account is under his/her supervision, that there is presently due a principal balance of \$123,075.74 plus interest at the rate of 6.500% per annum from September 1, 2007 until paid, plus late charges and all sums advanced for

the payment of real estate taxes and assessments, insurance premiums and property protection and that said account has been and remains in default.”

{¶19} Evid.R. 1002 states as follows: “To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio.” In addition, Evid.R. 1003 states: “A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.”

{¶20} Appellant directs us to R.C. 1303.38, which states:

{¶21} “(A) A person not in possession of an instrument is entitled to enforce the instrument if all of the following apply:

{¶22} “(1) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred.

{¶23} “(2) The loss of possession was not the result of a transfer by the person or a lawful seizure.

{¶24} “(3) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.”

{¶25} Ohio law recognizes that personal knowledge may be inferred from the contents of an affidavit. See *Bush v. Dictaphone Corp.*, Franklin App.No. 00AP1117, 2003-Ohio-883, ¶ 73, citing *Beneficial Mortgage Co. v. Grover* (June 2, 1983), Seneca

App. No. 13-82-41. Upon review of the complaint and the Stoudemire affidavit, we find appellee sufficiently established that although the original note could not be located, the summary judgment burden must be shifted to appellants to set forth specific facts demonstrating there would be a genuine issue of material fact for trial. See *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429. Cf. *LaSalle Natl. Bank v. Ingle*, Cuyahoga App.No. 87830, 2007-Ohio-77, ¶ 32. However, appellants supplied no evidence in response that would contradict the information supplied in the Stoudemire affidavit or that would show any issue of material fact in dispute.

{¶26} We therefore find that summary judgment in favor of appellee was not erroneous under the facts and circumstances presented.

{¶27} Appellants' sole Assignment of Error is overruled.

{¶28} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Ashland County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE

/S/ W. SCOTT GWIN

/S/ PATRICIA A. DELANEY

JUDGES

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FLAGSTAR BANK F.S.B.

Plaintiff-Appellee

-vs-

ROBERT E. DIEHL, et al.

Defendants-Appellants

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JUDGMENT ENTRY

Case No. 09 COA 034

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Ashland County, Ohio, is affirmed.

Costs assessed to appellants.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ PATRICIA A. DELANEY_____

JUDGES