[Cite as *HSBC Bank, USA Natl. Assn. v. Szasz,* 2017-Ohio-5544.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

HSBC BANK, USA NATIONAL ASSOCIATION, AS TRUSTEE FOR WELLS FARGO ASSET SECURITIES CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AR18

Plaintiff-Appellee

-vs-

STEVEN V. SZASZ, ET AL.

Defendants-Appellants

JUDGES:
Hon. Patricia A. Delaney, P.J.
Hon. William B. Hoffman, J.
Hon. Earle E. Wise, Jr., J.

Case No. 16CAA030012

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Case No. 15-CVE-05-0322
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 20, 2017

APPEARANCES:

For Plaintiff-Appellee

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Hoffman, J.

{¶1} Defendants-Appellants Steven V. Szasz and Sara E. Szasz, Trustee of the Sara E. Szasz Revocable Trust, (Appellants) appeal the February 2, 2016 Judgment Entry entered by the Delaware County Court of Common Pleas granting summary judgment in favor of Plaintiff-appellee HSBC Bank USA, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, on Appellee's complaint in foreclosure.

STATEMENT OF THE CASE[1]

{¶2} On May 22, 2015, HSBC Bank USA, N.A., as Trustee for Wells Fargo Asset Securities Corporation ("HSBC") filed a complaint in foreclosure against real property owned by Appellants.

{¶3} On August 11, 2006, Appellant Steven Szasz executed a promissory note in favor of Wells Fargo Bank, N.A., in the principal amount of $667,037.00. Wells Fargo indorsed the note in blank. To secure payment of the note, Appellant Steven Szasz executed a mortgage against 5539 Salem Drive, Westerville, Ohio, in favor of Wells Fargo. Appellant Sara Szasz also signed the mortgage. The mortgage was recorded, and required payments in accordance with the note. It is undisputed Appellants are in default of the terms of the note.

{¶4} On August 16, 2011, Wells Fargo executed a Corporate Assignment of Mortgage to HSBC as Trustee for the Trust, which assignment was recorded. The assignment included the mortgage, as well as, "all moneys now owing or that may

[1] A full rendition of the underlying facts is unnecessary for our resolution of the appeal.

hereafter become due or owing in respect thereof." Wells Fargo remained the servicer of the note for HSBC since the note was originated, and claims to have maintained possession of the note on behalf of the Trust.

{¶5} Appellants did not make payments under the note as due. A written notice of default was mailed to Appellant Steven Szasz on January 22, 2015, from Wells Fargo, as servicer of the Trust, via first class mail. Appellants did not cure the default, and the full amount due under the note was accelerated.

{¶6} HSBC initiated a complaint for foreclosure, and Appellants filed an answer to the complaint in foreclosure, asserting HSBC failed to comply with all conditions precedent. Specifically, Appellants maintain HSBC failed to send Appellants a notice of default and acceleration as required by the note. Appellants further denied HSBC had possession of the original note, and lacked standing to bring any claims. Appellants asserted counterclaims for violation of the Fair Debt Collections Practices Act, common law fraud and invasion of privacy.

{¶7} On December 9, 2015, HSBC filed a motion for summary judgment as to all claims. Appellants filed a memorandum in opposition to the motion for summary judgment on December 23, 2015. HSBC filed a reply to the opposition on December 30, 2015.

{¶8} Via Judgment Entry of February 2, 2016, the trial court granted HSBC's motion for summary judgment.

{¶9} Appellants appeal, assigning as error,

I. THE TRIAL COURT ERRED WHEN IT GRANTED A JUDGMENT OF FORECLOSURE TO APPELLEE HSBC AS TRUSTEE.

II. THE TRIAL COURT ERRED BY GRANTING A JUDGMENT OF FORECLOSURE WHEN APPELLEE DID NOT DEMONSTRATE COMPLIANCE WITH ALL CONDITIONS PRECEDENT TO FORECLOSURE.

III. THE TRIAL COURT ERRED BY GRANTING JUDGMENT FOR APPELLEE ON APPELLANTS' COUNTERCLAIMS.

I.

{¶10} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. The rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996–Ohio–211:

> Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (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 nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.

{¶11} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.,* 30 Ohio St.3d 35 (1987).

{¶12} As explained by this court in *Leech v. Schumaker,* 5th Dist. Richland No. 15CA56, 2015–Ohio–4444, ¶ 13:

> It is well established the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265(1986). The standard for granting summary judgment is delineated in *Dresher v. Burt* (1996), 75 Ohio St.3d 280 at 293: " * * *a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the

> nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." The record on summary judgment must be viewed in the light most favorable to the opposing party. *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150.

{¶13} We note, there is no dispute Appellants are in default of the terms of the note and mortgage herein. Therefore, Appellee HSBC need only prove it is the person entitled to enforce the note, the note was signed by Appellants and the balance remains unpaid. A person entitled to enforce a note includes a "holder." R.C. 1303.31(A). A "holder" is a person to whom a note is payable or a person in possession of bearer paper. R.C. 1301.201(B)(21)(a) and (b). A note indorsed in blank is bearer paper. R.C. 1303.25(B).

{¶14} The note attached to the motion for summary judgment and the complaint herein demonstrates the note was indorsed in blank. HSBC maintains it had continuous possession of the note, and had possession on the date the complaint was filed.

{¶15} In support of the motion for summary judgment, HSBC attached the Affidavit of Teri L. Townsend. The affidavit avers the testimony is based upon Townsend's personal knowledge as Vice President of Loan Documentation for Wells Fargo Bank, N.A. Townsend attests she personally viewed the records pertaining to the loan of Appellants, which records were kept by Wells Fargo in the ordinary course of business. The affidavit

states, "Wells Fargo indorsed the note in blank. Attached to this Affidavit as Exhibit 1 is a copy (with loan and file numbers redacted) of the Note."

{¶16} Townsend's affidavit states Wells Fargo has been the servicer of the loan since its origination and is currently servicing the loan. The affidavit attached the Assignment of Mortgage from Wells Fargo to HSBC on August 15, 2011. The affiant states Wells Fargo continued to have possession of the note. Townsend attached the business records reflecting possession of the note. Exhibit 4.[2]

{¶17} The trial court's entry granting summary judgment states,

> The Court finds that affiant's statement of operant facts is sufficient for the Court to infer that affiant has personal knowledge. The Court also finds that affiant's statement that she reviewed Wells Fargo's business records, including the note, and that true copies are attached to the affidavit is sufficient to show that affiant was able to compare the copy of the note with the original and verify its accuracy.

{¶18} The trial court concluded the affidavit was sufficient under Ohio law to support the motion for summary judgment.

{¶19} The copies of the note presented by HSBC bear the blank indorsement. However, Appellant submitted the affidavit of Attorney Paul Bellamy averring, prior to the complaint herein, he was provided a copy of the note which contained no indorsement.

[2] The affidavit further attaches the written notice of default sent from Wells Fargo to Appellants on January 22, 2015, via first class mail.

In addition, Appellants maintain the note submitted in the prior 2011 foreclosure action did not have a blank indorsement. We find, the evidence submitted by Appellant merely shows at one time the note did not contain the indorsement. A party establishing an interest in a note need only establish standing at the time the complaint is filed. *Wells Fargo Bank, N.A., v. Dawson*, Stark App. No. 2013CA00095, 2014-Ohio-269. Therefore, we find it sufficient the note attached to the affidavit of Townsend and the note attached to the complaint both are indorsed in blank.

{¶20} Paragraph 7 of the Townsend affidavit reads,

> 7. Wells Fargo has served as the custodian for the Note on behalf of the Trust. On May 22, 2015, and presently, either directly or through an agent, Wells Fargo, had and continues to have possession of the Note. Copies of the business records reflecting possession of the Note are attached as Exhibit 4.

{¶21} A holder of an instrument is entitled to enforce it. R.C. 1303.31(A)(1). In addition a non-holder in possession of the instrument who has the rights of a holder, and a person who is not in possession of the instrument, but who establishes he is entitled to enforce the instrument and it was lost or destroyed, are entitled to enforce the instrument. R.C. 1303.31(A). If the instrument is payable to bearer, the person in possession of the instrument is the holder of the instrument. R.C. 1301.201(B)(21)(a). When an instrument is indorsed in blank, the instrument becomes payable to bearer, and may be negotiated by transfer of possession alone until specifically indorsed. R.C. 1302.25(B).

{¶22} The assignment at issue transfers "the said Mortgage having an original principal sum of $667,037.00 with interest, secured thereby, *with all moneys now owing or that may hereafter become due or owing in respect thereof*, and the full benefit of all the powers and of all the covenants and provisos therein contained." (Emphasis added.) We find HSBC has standing to commence the action based on the transfer of interest in the assignment, and the possession of the note either directly or through an agent.

{¶23} Appellants also assert the Townsend affidavit fails to set forth personal knowledge as to the records of Wells Fargo and the Note herein.

{¶24} Civil Rule 56(E) provides,

> Supporting and opposing 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. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse 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. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

{¶25} Evidence Rule 901(A) provides "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding the matter in question is what its proponent claims." A witness may establish personal knowledge by testifying she is a corporate officer. *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 423 N.E.2d 105.

{¶26} Here, Townsend avers the Note attached to the affidavit is a copy of the Note at issue. Further, Townsend testifies as Vice President Loan Documentation for Wells Fargo, with access to Wells Fargo's business records, including the records of its customers. She swears she personally reviewed the records relative to the loan at issue. The trial court reasonably found Townsend had personal knowledge of the facts in the affidavit. Townsend's affidavit attests she was familiar with the business records in the regular performance of her job responsibilities; the records reflect the activity on the note at issue; the records were kept in the regular course of business activity; and she acquired personal knowledge of the matters in the affidavit by examining the records.

{¶27} Appellants assert the affidavit fails to use the language the note attached to the affidavit is a "true and accurate copy." Civil Rule 56(E). Appellants did not raise this specific argument in the trial court in opposition to HSBC's motion for summary judgment; therefore, the argument is waived.

{¶28} In *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 423 N.E.2d 105 (1981), the Ohio Supreme Court held,

While the form of the affidavit of defendant board chairman submitted in support of the motion for summary judgment leaves much to be desired, it is sufficiently in compliance with Civ.R. 56(E) as to require the adverse party to respond by affidavit or otherwise as provided by Civ.R. 56. The specific allegation in the affidavit that it was made upon personal knowledge is sufficient to meet this requirement of Civ.R. 56(E) and, if the adverse party contends otherwise, an opposing affidavit setting forth the appropriate facts must be submitted. There is an affirmative indication that defendant board chairman was competent to testify as to the matters stated, the affidavit specifically indicating that he was the chairman of the board of mental retardation. The requirement of Civ.R. 56(E) that sworn or certified copies of all papers referred to in the affidavit be attached is satisfied by attaching the papers to the affidavit, coupled with a statement therein that such copies are true copies and reproductions.

An affiant need not explain the attached copy was compared to the original note in order to ensure the bank actually had possession of a note payable to bearer. *Wells Fargo Bank, N.A., v. Hammond,* 8th Dist. No. 100141, 2014-Ohio-5270. In addition, the averment in the affidavit the bank was in possession of the note at the time the complaint was filed is supported by the fact a copy of the note indorsed in blank is attached to the complaint when filed. *Nationstar Mtge, LLC, v. Wagener,* 8th Dist. No. 101280, 2015-Ohio-1289.

{¶29} We find the affidavit sufficient to demonstrate Townsend's personal knowledge.

{¶30} Appellant argues HSBC cannot prove possession of the note as the affidavit states possession either directly or through an agent. Again, we note, Appellants did not raise this argument in opposition to the motion for summary judgment before the trial court; therefore, the argument is waived.

{¶31} The bank does not lose constructive and legal possession of bearer paper merely because it was held by an agent on behalf of the bank. *See, U.S. Bank Natl. Assn. v. Gray*, 10th Dist. No. 12AP-953, 2013-Ohio-3340. Rather, "constructive possession exists when an agent of the owner holds the note on behalf of the owner***consequently, a person is a holder of a negotiable instrument, and entitled to enforce the instrument, when the instrument is in the physical possession of his or her agent. Id.

{¶32} For the reasons set forth above, the first assignment of error is overruled.

II.

{¶33} Appellants assert the acceleration letter, attached to the affidavit of Teri L. Townsend, is invalid because it was allegedly sent after the loan was previously accelerated in the 2011 foreclosure action. The affidavit states on January 22, 2015, a written notice of default from Wells Fargo, as servicer of the Trust, was sent to Appellants by first class mail. Appellants assert a factual dispute exists because the letter was sent after the loan had been accelerated by the 2011 foreclosure complaint.

{¶34} The Note states at 7(C),

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

{¶35} The Mortgage states,

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise.) The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. ***

{¶36} On January 22, 2015, Wells Fargo sent Appellants a notice of default. The letter informs Appellants they are in default for failure to make payments due:

> Unless the payments on your loan can be brought current by February 26, 2015, it will become necessary to require immediate payment in full (also called acceleration) of your Mortgage Note and pursue the remedies provided for in your Mortgage or Deed of Trust, which include foreclosure.
>
> To cure the default you must pay the total delinquency against your account, ***
>
> ***
>
> If funds are not received by the above referenced date, we will proceed with acceleration. Once acceleration has occurred, we may take steps to terminate your ownership in the property by a foreclosure proceeding, which could result in Lender or another person acquiring ownership of the property. If foreclosure is initiated, you have the right to argue that you did keep your promises and agreements under the Mortgage Note and Mortgage, and to present any other defenses you may have.
>
> You have the right to reinstate your Mortgage Note and Mortgage or Deed of Trust after acceleration, and to have enforcement of the Mortgage discontinued and to have the Mortgage Note and Mortgage remain fully effective as if acceleration had never been required.

{¶37} We find no genuine issue of material fact remains as to the notice provided to Appellants. HSBC sent Appellants the letter more than thirty days prior to acceleration, detailing the amount necessary to cure. The default was not cured, satisfying any condition precedent. We find Appellant's argument the acceleration letter is dated after the default and after the dismissal of the 2011 foreclosure complaint immaterial. Appellants were provided with a subsequent opportunity to cure, and there is no dispute the loan remains in default.

{¶38} The second assignment of error is overruled.

III.

{¶39} Appellant maintains the trial court erred in granting summary judgment in favor of HSBC as to their counterclaims. Appellants' counterclaims are based upon Appellants' argument HSBC is not entitled to enforce the note and mortgage. Based upon our analysis and disposition of the first and second assigned errors, we overrule Appellant's third assignment.

{¶40} The judgment of the Delaware County Court of Common Pleas is affirmed.

By: Hoffman, J.

Delaney, P.J. and

Wise, Earle, J. concur