[Cite as *Bank of New York v. Grome*, 2010-Ohio-4595.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATE HOLDERS CWALT, INC., ALTERNATIVE LOAN TRUST 2004-33 MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2004-33,	:	APPEAL NO. C-100059 TRIAL NO. A-0808026
Plaintiff-Appellee,	:	*D E C I S I O N.*
vs.	:	
SUSAN GROME,	:	
Defendant-Appellant,	:	
and	:	
CITIBANK SD, N.A., et al.,	:	
Defendants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: September 29, 2010

Reisenfeld & Associates, LPA LLC, Sallie A. Conyers, and *Michael C. Stelle,* for Appellee,

William M. Gustavson, for Appellant.

Please note: This case has been removed from the accelerated calendar.

SYLVIA S. HENDON, Judge.

{¶1} This is an appeal from the trial court's judgment adopting a magistrate's decision in favor of plaintiff-appellee Bank of New York ("the Bank") in a mortgage foreclosure action. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

The Bank Seeks Foreclosure on Grome's Property

{¶2} The Bank filed suit against defendant-appellant Susan Grome, alleging that she had defaulted on her home mortgage loan and that therefore the entire balance of her loan was due. The other defendants in this suit were listed as potential lienholders.

{¶3} The case was initially heard by a magistrate. Aside from Grome, the only other defendant to enter an appearance was the Hyde Park Place Owners' Association ("HPPOA"). The HPPOA answered the Bank's complaint and also filed a cross-claim against Grome, alleging that it held a valid lien on her property in the amount of $2338.34, plus interest, for unpaid owners' association dues.

{¶4} The Bank then moved for summary judgment. Grome opposed the motion on the ground that another bank, the Bank of America, was the real party in interest. Grome also moved for summary judgment on this ground. The magistrate found in favor of the Bank, holding that the Bank had a valid lien on Grome's property in the amount of $181,006.73, plus interest, subject to any tax liability. The magistrate also held that the HPPOA held a junior lien on Grome's property in the amount of $2,338.34, plus interest. And despite the fact that the county treasurer was not a party to the action, the magistrate's decision stated, "[T]he Magistrate finds that the defendant, Hamilton County Treasurer, has filed an answer or

appearance herein * * * [and that] the Treasurer's interest is the first and best lien upon the subject property * * *." The magistrate ordered a sheriff's sale of Grome's property.

{¶5} Grome objected to the magistrate's decision. In part, she claimed that the Bank was not entitled to summary judgment because it had failed to establish itself as the real party in interest. Grome also claimed that she was entitled to summary judgment because she had established that the Bank of America was the real party in interest. Before the trial court ruled on these objections, the HPPOA dismissed its cross-claim against Grome. Grome then filed a second set of objections, challenging the magistrate's finding in favor of the HPPOA as well as the county treasurer. The trial court overruled all of Grome's objections. It adopted the magistrate's decision in its entirety. This appeal followed.

Summary Judgment

{¶6} Grome raises two assignments of error. In her first assignment of error, she claims that the trial court should not have granted summary judgment in favor of the Bank. In her second assignment of error, Grome claims that the trial court should have granted summary judgment in her favor. We address these arguments together.

{¶7} Appellate review of summary judgment is de novo.[1] Summary judgment is appropriate if the moving party establishes (1) that no genuine issue as to any material fact exists, (2) that the movant is entitled to judgment as a matter of

[1] *Chase Manhattan Mtge. Corp. v. Smith*, 1st Dist. No. C-061069, 2007-Ohio-5874, ¶23; cf. *Stephan Bus Enterprises, Inc. v. Lamar Outdoor Advertising Co. of Cincinnati*, 1st Dist. No. C-070373, 2008-Ohio-954, ¶13.

law, and (3) that reasonable minds can reach only one conclusion, and that conclusion is adverse to the opposing party.[2]

Real Party in Interest

{¶8} Grome claims that the Bank failed to establish itself as the real party in interest under Civ.R. 17(A). In a foreclosure action, the real party in interest is the holder of the note and mortgage.[3] Summary judgment is precluded where a genuine issue of material fact remains as to this issue.

{¶9} To establish itself as the real party in interest, the Bank filed with the court copies of documents purporting to assign Grome's note and mortgage to the Bank. It also submitted two separate affidavits of Micall Bachman, vice-president of Countrywide Homes, Inc., a loan-servicing agent. Grome contends that the assignments of the note and mortgage should not have been considered by the trial court. We agree, though for reasons other than those asserted by Grome.

{¶10} Grome argues that the documents purporting to assign her note and mortgage to the Bank were meaningless because the Bank had failed to prove that each vice-president who had signed the documents had the authority to do so. Grome's argument is misplaced. The parties involved in the assignments of the note and mortgage to the Bank were not disputing that the transfer was a valid one. The case law Grome cites applies to contested business transactions. Here, we are concerned with the admissibility of these documents in support of a motion for summary judgment.

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[2] *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146, 524 N.E.2d 881.
[3] See *Smith*, supra, at fn. 1; *Deutsche Bank Natl. Trust Co. v. Cassens*, 10th Dist. No. 09AP-865, 2010-Ohio-2851, ¶8; *Wells Fargo Bank, N.A. v. Stovall*, 8th Dist. No. 91802, 2010-Ohio-236, ¶15.

The Bank's Evidence

{¶11} When ruling on a motion for summary judgment, a court may consider evidence that complies with Civ.R. 56. Civ.R. 56(C) provides that "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact" are properly considered when a court rules on a motion for summary judgment. In regard to affidavits, Civ.R. 56(E) provides that "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." Further, sworn or certified copies of all papers referred to in an affidavit shall be attached to or served with the affidavit. [4]

{¶12} Here, Bachman's first affidavit referred to numerous documents, but the assignments to the Bank were not among them. In Bachmann's second affidavit, he stated that the Bank was the holder of Grome's note and mortgage, but copies of the documents assigning the note and mortgage to the Bank were not attached to his affidavit, as required by Civ.R. 56(E). And even if the documents had been attached, there was nothing in Bachman's affidavit attempting to authenticate them. Copies of the assignments were filed separately without an accompanying affidavit.

{¶13} Unauthenticated materials are inadmissible.[5] Therefore, under Civ.R. 56(E), the trial court should not have considered the assignments. Absent this evidence, the Bank failed to meet its burden to demonstrate that it was the holder of the note and mortgage, and therefore that it was the real party in interest. So the trial court erred by entering summary judgment in favor of the Bank.

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[4] See, also, *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, ¶26.
[5] Evid.R. 901(A); see, also, *U.S. Bank N.A. v. Richards*, 9th Dist. No. 25052, 2010-Ohio-3981.

Grome's Affidavit

{¶14} Next, Grome contends that an affidavit she submitted to the trial court claiming that the Bank of America was her note and mortgage holder entitled her to summary judgment. Grome's affidavit stated that the Bank of America appeared on her mortgage statements and on letterhead referring to her account. She therefore reasoned that the Bank of America owned her note and mortgage. Under Civ.R. 56(E), her affidavit was deficient as well. Grome was not competent to testify regarding who owned her loan. She was not a Bank of America employee, nor did she otherwise establish that she was privy to its business records. She had no personal knowledge of whether the Bank of America held her note and mortgage. Her testimony was speculative and correctly disregarded by the trial court.[6]

{¶15} The trial court did not err when it failed to grant summary judgment in Grome's favor.

The HPPOA and the Treasurer

{¶16} In her first assignment of error, Grome also contends that the trial court should not have entered judgment in favor of the HPPOA. She is correct. We review the trial court's adoption of the magistrate's factual findings for an abuse of discretion.[7]

{¶17} Here, the record indicates that the HPPOA settled with Grome and voluntarily dismissed its claim before the trial court entered judgment. Therefore, the trial court erred when it adopted that portion of the magistrate's decision finding that the HPPOA held a valid lien on Grome's property in the amount of $2,338.34. The trial court also erred by adopting the magistrate's decision to the extent that the

[6] See *Carter v. U-Haul Internatl.*, 10th Dist. No. 09AP-310, 2009-Ohio-5358, ¶10.
[7] *Shah v. Smith*, 181 Ohio App.3d 264, 2009-Ohio-743, 908 N.E.2d 983, ¶7; *In re Estate of Knowlton*, 1st Dist. No. C-050728, 2006-Ohio-4905, ¶43.

decision purported to make factual findings in favor of the county treasurer. The treasurer was not a party to this action.

{¶18} In sum, Grome's first assignment of error is sustained. Her second assignment of error is sustained in part and overruled in part. We reverse the trial court's entry of summary judgment and remand this cause for further proceedings consistent with this decision.

Judgment reversed and cause remanded.

CUNNINGHAM, P.J., and **MALLORY, J.,** concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.