[Cite as *Deutsche Bank Natl. Trust Co. v. Traxler*, 2010-Ohio-3940.]

STATE OF OHIO))ss: COUNTY OF LORAIN)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
DEUTSCHE BANK NATIONAL TRUST COMPANY Appellee v. THOMAS C. TRAXLER, et al. Appellants	C.A. No. 09CA009739 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. CV-08-155929

DECISION AND JOURNAL ENTRY

Dated: August 23, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellants, Thomas and Christine Traxler ("the Traxlers"), appeal from the judgment of the Lorain County Court of Common Pleas, granting summary judgment in favor of Plaintiff-Appellee, Deutsche Bank National Trust ("Deutsche"). This Court affirms.

I

{¶2} On June 29, 2006, Thomas Traxler signed an adjustable rate balloon note to borrow $87,456 from Wilmington Finance, Inc. ("Wilmington Finance"). The same day, the Traxlers agreed to secure the note with a mortgage deed. Both the Traxlers signed the mortgage deed and an adjustable rate balloon rider, promising their North Ridgeville residence as security for the note with Wilmington Finance. The mortgage deed listed Mortgage Electronic Registration Systems, Inc. ("MERS") as the mortgagee on the deed and the nominee for Wilmington Finance. In August 2007, the Traxlers defaulted on their note.

{¶3} On March 21, 2008, Deutsche filed a complaint in foreclosure against the Traxlers, the Lorain County treasurer, and MERS. Deutsche alleged that it was the holder of Thomas Traxlers' note and the Traxlers' mortgage deed, but did not attach any evidence of an assignment to its complaint. Deutsche later filed a motion for summary judgment. The Traxlers filed a memorandum in opposition to summary judgment as well as a motion to dismiss for lack of standing. On October 23, 2009, the trial court granted Deutsche's motion for summary judgment and ordered it to submit a journal entry reflecting the court's ruling. The Traxlers sought to appeal from the court's order, but this Court dismissed their appeal because the order was not final and appealable. See *Deutsche Bank Natl. Trust Co. v. Traxler, et al.* (Dec. 17, 2009), Case No. 09CA009714. The trial court issued a second order, granting judgment in favor of Deutsche and ordering foreclosure.

{¶4} The Traxlers now appeal from the trial court's judgment and raise three assignments of error for our review. We consolidate the assignments of error as the Traxlers do so in the body of their brief.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND DENYING APPELLANTS' MOTION TO DISMISS SINCE APPELLEE IS NOT THE REAL PARTY IN INTEREST."

Assignment of Error Number Two

"THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND DENYING APPELLANTS' MOTION TO DISMISS SINCE APPELLEE LACKED STANDING TO BRING THE CAUSE OF ACTION."

Assignment of Error Number Three

> "THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND DENYING APPELLANTS' MOTION TO DISMISS SINCE APPELLEE DID NOT STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED."

{¶5} In their assignments of error, the Traxlers argue that the trial court erred by granting Deutsche's motion for summary judgment and by denying their own motion to dismiss. Specifically, they argue that Deutsche lacked standing to file and to maintain a suit against them because it never offered proof that it was the holder of Thomas Traxler's note and the Traxlers' mortgage deed. We disagree.

{¶6} A determination that Deutsche was entitled to summary judgment as the holder of the note and mortgage at issue will be dispositive of the Traxlers' argument that the court should have dismissed this matter for Deutsche's lack of standing. Therefore, we begin with the Traxlers' argument that the court erred by granting Deutsche's motion for summary judgment.

{¶7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶8} Pursuant to Civ.R. 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." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶9} Deutsche relied upon the following items in support of its motion for summary judgment: (1) copies of the original note, mortgage deed, and rider that the Traxlers signed; (2) the Traxlers' payment history; (3) the notice of default sent to the Traxlers; (4) an assignment of mortgage, executed on March 18, 2008 and recorded on March 26, 2008, from MERS, as the nominee for Wilmington Finance, to Deutsche; and (5) an affidavit from Reza Samadian, a litigation specialist for BAC Home Loans Servicing, LP ("BAC"), the loan servicer for Deutsche. Samadian's affidavit incorporated all of the foregoing items by reference. In his affidavit, Samadian averred that Deutsche was the holder and owner of both the original note and mortgage deed and that Deutsche had elected to collect upon the note in light of the Traxlers' default.

{¶10} After the Traxlers' filed their combined memorandum in opposition and motion to dismiss, Deutsche filed two additional items in support of its motion. The first item was another affidavit from Samadian. In the affidavit, Samadian specified that the note Thomas Traxler

signed in favor of Wilmington Finance included an allonge,[1] indorsed in blank. The second item was a copy of the original note that Thomas Traxler signed, including a prepayment rider to the note and an allonge indorsed in blank. Samadian incorporated the note and allonge by reference in his second affidavit.

{¶11} First, the Traxlers argue that Deutsche was not entitled to judgment because Deutsche lacked standing to file suit against them. The Traxlers rely upon case law from other districts to argue that before Deutsche could file suit it had to be the owner and holder of the note and mortgage at issue. See *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092, at ¶20-26 (dismissing suit for lack of standing after concluding that plaintiff bank, who was not assigned the mortgage at issue until after filing suit, was not the real party in interest at the time of filing); *Wells Fargo Bank, N.A. v. Byrd*, 1st Dist. Nos. C-070889 & C-070890, 2008-Ohio-4603, at ¶15-16 (concluding that to have standing a bank must have an interest in a mortgage before filing suit). This Court has held, however, that a bank need not possess a valid assignment at the time of filing suit so long as the bank procures the assignment in sufficient time to apprise the litigants and the court that the bank is the real party in interest. *Bank of New York v. Stuart*, 9th Dist. No. 06CA008953, 2007-Ohio-1483, at ¶12. The Traxlers do not set forth any argument as to why this Court should abandon its own timely precedent. See App.R. 16(A)(7). Based on *Stuart*, Deutsch did not have to present proof of assignment at the time that it filed suit. *Stuart* at ¶12.

[1] An allonge is "[a] slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." Black's Law Dictionary (8th Ed. 2004) 83.

{¶12} Second, the Traxlers argue that, even if Deutsche could wait to present proof of ownership until after it filed suit, Deutsche never proved it was the owner and holder of the note and the mortgage deed at issue. We address each instrument in turn.

The June 29, 2006 Adjustable Rate Balloon Note

{¶13} In its motion for summary judgment, Deutsche produced an affidavit from Samadian and a copy of the note Thomas Traxler signed on June 29, 2006. The copy of the June 29, 2006 note did not contain a prepayment rider to the note or an allonge. Instead, it included a copy of another note that Thomas Traxler signed the same day for a different amount. Samadian incorporated the June 29, 2006 note by reference in his affidavit and averred that Deutsche had possession of the original note. He further averred that the copy of the note attached to Deutsche's motion was a true and accurate copy and that Deutsche was the owner and holder of the note. After the Traxlers filed their memorandum in opposition, Deutsche filed a second affidavit from Samadian. In his second affidavit, Samadian explained that when he attached a copy of Thomas Traxler's June 29, 2006 note to his original affidavit, he inadvertently attached a second note that Thomas Traxler signed that same day. Samadian's second affidavit verified that the copy of the June 29, 2006 note, with its prepayment rider to the note and its affixed allonge, was the true and accurate copy of the note that Thomas Traxler signed on June 29, 2006. The affixed allonge indicated that it was executed by Thomas Traxler on behalf of Wilmington Finance and contained a blank space in the field marked "[p]ay to the order of."

{¶14} The Traxlers assert that Wilmington Finance is still the owner and holder of Thomas Traxler's note because there is no evidence that Wilmington Finance ever indorsed the note in favor of Deutsche. The Traxlers are incorrect in their assertion. Wilmington Finance did not have to indorse Thomas Traxler's note over to Deutsche because it surrendered physical

possession of the note, which contained a blank indorsement. See R.C. 1303.25(A)-(B) (providing that an instrument is indorsed in blank if it does not identify the person to whom it is made payable). "When an instrument is indorsed in blank, the instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." R.C. 1303.25(B). Deutsche produced Thomas Traxler's note, an affixed allonge with a blank indorsement, and an affidavit that indicated Deutsche had physical possession of Traxler's note. Therefore, Deutsche produced evidence that it was the owner and holder of Thomas Traxler's note. R.C. 1303.25(B). See, also, R.C. 1301.01(E) ("'Bearer' means the person in possession of an instrument[.]").

{¶15} The Traxlers insist that Deutsche could not rely upon the allonge affixed to Thomas Traxler's note to prove ownership. They argue that Deutsche never produced the allonge when it filed its complaint. Yet, Deutsche was not required to produce such evidence at the outset of the litigation. *Stuart* at ¶12. Nor does it matter that Deutsche did not produce the allonge when it first filed for summary judgment. Deutsche inadvertently filed an incomplete copy of Thomas Traxler's note when it first moved for summary judgment. It corrected its error in its reply to the Traxler's memorandum in opposition and incorporated a true and accurate copy of the note and allonge through Samadian's second affidavit. The Traxlers have not pointed this Court to any law in contravention of the procedure that Deutsche employed to correct its error. See App.R. 16(A)(7). Instead, the Traxlers argue that Deutsche's own Pooling and Service Agreement: (1) forbids the use of an allonge when a note contains enough space for further indorsement; and (2) requires that an allonge be signed by an authorized officer.

{¶16} We need not consider the Traxlers' last attack upon the allonge because Deutsche's Pooling and Service Agreement is not properly before this Court. The record reflects

that the Traxlers only sought to introduce a copy of Deutsche's Pooling and Service Agreement in a motion to permit the filing of a response to Deutsche's final reply brief in support of its motion for summary judgment. Because the trial court never granted the Traxlers further leave to reply, this Court presumes the motion was denied. *George Ford Const., Inc. v. Hissong*, 9th Dist. No. 22756, 2006-Ohio-919, at ¶12 ("[I]f a trial court fails to rule on a pending motion prior to entering judgment, it will be presumed on appeal that the motion in question was implicitly denied."). This Court will not consider the Traxlers' reply and its appended exhibit on appeal as the Traxlers were never granted leave to file these items so as to make them a part of the record.

{¶17} In sum, Deutsche presented evidence establishing itself as the owner and holder of the note that Thomas Traxler signed. The Traxlers did not rebut Deutsche's evidence so as to create a genuine issue of material fact for trial with regard to the note. Therefore, the record supports the conclusion that Deutsche is the owner and holder of Thomas Traxler's note.

The Mortgage Deed

{¶18} To evidence the assignment of the Traxlers' mortgage deed, Deutsche produced a copy of an assignment from MERS to Deutsche as well as Samadian's affidavit, indicating that: (1) MERS (as a nominee for Wilmington Finance) assigned the mortgage to Deutsche; and (2) Deutsche is the owner and holder of the mortgage. A MERS representative signed the assignment of mortgage on March 18, 2008, and the assignment was recorded on March 26, 2008.

{¶19} The Traxlers argue that MERS lacked authority to assign their mortgage to Deutsche. According to the Traxlers, MERS' status as a nominee only gave it the authority to enforce the mortgage. They argue that Wilmington Finance alone had the power to assign their

deed. The Fifth District considered this same argument in *Bank of New York v. Dobbs*, 5th Dist. No. 2009-CA-000002, 2009-Ohio-4742, at ¶26-36. That court held the following:

> "Courts have generally stated the debt is the promissory note, and the mortgage is the only evidence of the debt and the security offered. *** Section 5.4 of the Restatement III, Property (Mortgages) discusses transfers of the obligations secured by a mortgage and transfers of the mortgage itself by the original mortgagee to a successor, or a chain of successors. Such transfers occur in what is commonly termed the 'secondary mortgage market', as distinct from the 'primary mortgage market' in which the mortgage loans are originated by lenders and executed by borrowers.
>
> "The Restatement asserts as its essential premise [] that it is nearly always sensible to keep the mortgage and the right of enforcement of the obligation it secures in the hands of the same party. This is because in a practical sense separating the mortgage from the underlying obligation destroys the efficacy of the mortgage, and the note becomes unsecured. The Restatement concedes on rare occasions a mortgagee will disassociate the obligation from the mortgage, but courts should reach this result only upon evidence that the parties to the transfer agreed. Far more commonly, the intent is to keep the rights combined, and ideally the parties would do so explicitly. The Restatement suggests that with fair frequency mortgagees fail to document their transfers so carefully. Thus, the Restatement proposes that transfer of the obligation also transfers the mortgage and vice versa. Section 5.4(b) suggests '[e]xcept as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.' Thus, the obligation follows the mortgage if the record indicates the parties so intended.
>
> "In Ohio it has been held that transfer of the note implies transfer of the mortgage. *** 'Where a note secured by a mortgage is transferred so as to vest the legal title to the note in the transferee, such transfer operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered.'" (Internal citations omitted.) *Dobbs* at ¶26-30.

Further, beyond equitable assignment, several other courts have recognized MERS' authority to assign a mortgage when designated as both a nominee and mortgagee. See *BAC Home Loans Servicing, L.P. v. Hall*, 12th Dist. No. CA2009-10-135, 2010-Ohio-3472, at ¶5-25 (concluding that BAC was entitled to judgment as the real party in interest where MERS, as a nominee, assigned the mortgage at issue to BAC); *Countrywide Home Loans Servicing, L.P. v. Shifflet*, 3d Dist. No. 9-09-31, 2010-Ohio-1266, at ¶9-17 (concluding that Countrywide was entitled to

judgment as the real party in interest where MERS, as a nominee, assigned the mortgage to Countrywide); *Deutsche Bank Natl. Trust Co. v. Ingle*, 8th Dist. No. 92487, 2009-Ohio-3886, at ¶4-18 (concluding Deutsche was entitled to judgment as the real party in interest where MERS, as a nominee, assigned a mortgage deed to Deutsche).

{¶20} The Traxlers' mortgage deed designated MERS as both the nominee for Wilmington Finance and the mortgagee of their deed. Additionally, the deed specified that it was given to secure the note Thomas Traxler signed for $87,456, which was properly negotiated to Deutsche. Deutsche produced evidence that Thomas Traxler defaulted on the note, thereby giving the holder of the note the right to foreclose upon the Traxlers' property. It also produced a copy of an assignment of the deed from MERS as well as evidence that Deutsche was in physical possession of both the deed and the note it secured. Thus, Deutsche met its *Dresher* burden. The Traxlers did not produce any Civ.R. 56 evidence to rebut Deutsche's evidence. Instead, they argued that MERS' assignment was invalid as a matter of law. Even assuming that MERS did not have the authority to assign the mortgage, however, we agree with the Fifth District's logic in *Dobbs* and conclude that the proper transfer of the promissory note, which the mortgage secured, amounted to an equitable assignment of the mortgage. See *Dobbs* at ¶26-30. This conclusion fits with the physical transfer of the note and mortgage to Deutsche.

{¶21} Based on the evidence in the record, Deutsche demonstrated that it is the owner and holder of both the note upon which the Traxlers defaulted and the mortgage securing the note. Thus, the trial court did not err by granting summary judgment in favor of Deutsche. Because the court properly awarded Deutsche summary judgment, it also did not err by denying the Traxlers' motion to dismiss Deutsche's suit for lack of standing. The Traxlers' assignments of error are overruled.

III

{¶22} The Traxlers' assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
MOORE, J.
CONCUR

APPEARANCES:

HAROLD L. WILLIAMS, Attorney at Law, for Appellants.

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