[Cite as *Deutsche Bank Natl. Trust Co. v. Greene*, 2011-Ohio-1976.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Deutsche Bank National Trust Company, as Trustee for Fremont Home Loan Trust 2006-1	Court of Appeals No. E-10-006
	Trial Court No. 2008 CV 0263
Appellee	
v.	
Kurt Greene, et al.	**DECISION AND JUDGMENT**
Appellant	Decided: April 22, 2011

* * * * *

Scott A. King and Terry W. Posey, Jr., for appellee.

Daniel L. McGookey and Richard B. Hardy, III, for appellant.

* * * * *

SINGER, J.

{¶1} Appellant brings this accelerated appeal from a summary judgment issued by the Erie County Court of Common Pleas in a foreclosure proceeding.

{¶2} On December 28, 2005, appellant, Kurt Greene, executed a note in favor of Fremont Investment & Loan, promising to repay a $105,480 loan over a 30 year period. Securing the loan was a mortgage on certain real property in Castalia, Ohio, to the Mortgage Electronic Registration Systems, Inc. ("MERS"), "a separate corporation that is acting solely as nominee for [Fremont Investment & Loan and its] successors and assigns."

{¶3} The agreement further states that the "[b]orrower understands and agrees that MERS holds only legal title to the interests granted by the Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for [Fremont Investment & Loan's] successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property * * *." The mortgage was recorded on January 4, 2006. On February 23, 2007, an assignment of the mortgage and promissory note from MERS to appellee, Deutsche Bank National Trust Company, as trustee for Fremont Home Loan Trust 2006-1, was recorded.

{¶4} On March 11, 2008, appellee instituted the foreclosure action that underlies this appeal.[1] Appellee alleged that appellant was in default of the terms of the loan. Appellee sought judgment on the loan, foreclosure of the mortgage and sale of the property. Attached to appellee's complaint were copies of the note, the mortgage and the

[1]Appellee named as defendants, appellant, his unknown spouse, the Erie County Treasurer, MERS and the Ohio Department of Taxation.

assignment of the mortgage. Appellant answered with a general denial of appellee's allegations.

{¶5} On June 18, 2008, appellee moved for summary judgment, but later withdrew the motion when the parties appeared to reach an agreement. On November 25, 2009, appellee renewed its motion for summary judgment. In support of the motion, appellee attached the note, mortgage, assignment and business records showing default. Accompanying these documents was the affidavit of a Wells Fargo Bank officer (as servicing agent for appellee) who attested that the documents were accurate copies of the originals and that the records submitted were kept in the ordinary course of business. When appellant failed to respond, the trial court granted the motion and issued a decree of foreclosure.

{¶6} Appellant's counsel insists that he never received a copy of appellee's renewed motion. When he received the court's judgment, he filed a motion to vacate or for relief from judgment. These motions were still pending when, three days later, he instituted this appeal. Appellant sets forth a single assignment of error, asserting that the trial court erred in granting appellee summary judgment because it failed to prove it had standing to bring the claim.

{¶7} Appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶8} "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleading, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery* (1984), 11 Ohio St.3d 75, 79. When an opposing party fails to respond to a summary judgment motion, summary judgment, if appropriate, is to be entered against that party. *U.S. Bank v. Detweiler*, 5th Dist. No. 2010CA00064, 2010-Ohio-6408, ¶ 16; Civ.R. 56(E).

{¶9} Although appellant did not respond to appellee's summary judgment motion, he insists appellee was not entitled to judgment as a matter of law because it failed to establish that it had standing to bring the action. According to appellant, although MERS was named as the nominee for Fremont Investment & Loan in the mortgage, it was never named in any capacity on the note appellant signed. Thus, appellant argues, on the face of the transaction documents, appellee failed to show standing.

{¶10} The note names only Fremont Investment as lender and promisee and makes no mention of MERS or any other entity. Appellant insists that, consequently, MERS never had any interest in the note and, as a result, had no interest to assign to appellee. Since appellee derives its interest in the suit solely through the assignment from MERS, appellant maintains that it is not a real party in interest and lacked standing to invoke the jurisdiction of the court.

{¶11} As we noted in *Countrywide Home Loans v. Montgomery*, 6th Dist. No. L-09-1169, 2010-Ohio-693, ¶ 11, 12:

{¶12} "Civ.R. 17(A) requires that 'a civil action must be prosecuted by the real party in interest, that is, by a party who can discharge the claim upon which the action is instituted or is the party who has a real interest in the subject matter of that action.' If an individual or one in a representative capacity does not have a real interest in the subject matter of the action, that party lacks the standing to invoke the jurisdiction of the court.

{¶13} "In a foreclosure action, the entity that is '[t]he current holder of the note and mortgage is the real party in interest,' and, thus, has the standing to raise the court's jurisdiction." (Citations omitted.)

{¶14} There is some dispute as to whether an assertion that a party lacks standing is an objection that must be timely raised or is waived. See *First Union Nat'l Bank v. Hufford* (2001), 146 Ohio App.3d 673, 677-678. We need not reach this issue.

{¶15} Rather, we conclude that the assignment of the mortgage, in conjunction with interlocking references in the mortgage and the note, transferred the note as well. See Restatement of the Law 3d, Property – Mortgages (1997) 380, Section 5.4(b); *Bank of N.Y. v. Dobbs*, 5th Dist No. 2009-CA-002, 2009-Ohio-4742, ¶ 17-41, appeal not allowed, 124 Ohio St.3d 1444, 2010-Ohio-188. Indeed, as appellee points out, the *Dobbs* case is virtually identical to this one, save the name of the plaintiff.

{¶16} Accordingly, appellant's sole assignment of error is found not well-taken.

{¶17} On consideration whereof, the judgment of the Erie County Court of Common Pleas is affirmed. It is ordered that appellant pay court costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____

JUDGE

Arlene Singer, J. _____

JUDGE

Stephen A. Yarbrough, J. ___
CONCUR.

JUDGE