[Cite as *Deutsche Bank Natl. Trust v. Yevtich*, 2017-Ohio-7111.]

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

Deutsche Bank National Trust	Court of Appeals No. F-16-004
Appellee	Trial Court No. 15CV000039
v.	
Matthew O. Yevtich, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: August 4, 2017

* * * * *

Kimberly Y. Smith Rivera, for appellee.

Daniel L. McGookey, for appellants.

* * * * *

JENSEN, P.J.

{¶ 1} Matthew O. and Kathi R. Yevtich appeal the March 28, 2016 judgment of the Fulton County Court of Common Pleas which granted summary judgment in favor of Deutsche Bank National Trust Company, as Trustee for Harborview Mortgage Loan Trust 2006-8, Mortgage Loan Pass-Through Certificates, Series 2006-8 ("Deutsche

Bank"), on its foreclosure complaint. Because we agree that no genuine issues of fact remain, we affirm.

{¶ 2} On February 15, 2006, Matthew Yevtich executed a promissory note in favor of BankUnited, FSB, in the principal amount of $257,000 ("note"). To secure payment of the note, Matthew and his wife, Kathi, executed a mortgage against 700 Greenview Avenue, Delta, Ohio, in favor of BankUnited ("mortgage").

{¶ 3} In September 2009, OneWest Bank, FSB, filed a complaint in foreclosure against the Yevtiches. In its complaint, OneWest alleged that the Yevtiches were in default, that it had accelerated the balance due and owing, and that as owner of the note and mortgage, it was entitled to judgment. OneWest indicated, however, that at the time the complaint was filed the original note could not immediately be found. On October 1, 2009, OneWest filed a "Notice of Filing of Promissory Note." Attached to the notice was a copy of the note.

{¶ 4} On January 13, 2010, the Federal Deposit Insurance Corporation as receiver for BankUnited, assigned the note and mortgage to OneWest ("FDIC assignment"). The FDIC assignment was filed with the Fulton County Recorder on January 21, 2010.

{¶ 5} Shortly thereafter, OneWest moved for summary judgment. The motion was supported by the affidavit of OneWest employee Chamagne Williams. Williams averred that OneWest "acquired and/or otherwise obtained possession of the note and mortgage" before it filed its complaint in foreclosure. A copy of the FDIC assignment was attached to Williams' affidavit.

{¶ 6} The Yevtiches filed a memorandum in opposition, asserting OneWest was without standing to enforce the note and foreclose on the mortgage. In reply, OneWest filed the affidavit of OneWest employee Brian Burnett. Burnett averred that OneWest was the "owner in possession of the complete copy of the promissory note and mortgage." A copy of the note was attached to Burnett's affidavit. The note included an undated allonge executed by Jan Jenkins, attorney in fact for the Federal Deposit Insurance Corporation, and endorsed to OneWest ("FDIC allonge").

{¶ 7} The trial court granted OneWest's motion for summary judgment. The Yevtiches filed Civ.R. 60(B) and 12(B)(1) motions. Both were denied by the trial court. The Yevtiches appealed.

{¶ 8} In *OneWest Bank v. Yevtich*, 6th Dist. Fulton No. F-11-021, 2012-Ohio-6246, we reversed the trial court's judgment. Citing *Fed. Home Loan Mtge. Corp. v.* S*chwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 28, we held that at the time OneWest filed its complaint, it was without standing to invoke the subject-matter jurisdiction of the trial court. *OneWest Bank* at ¶ 7. We further found that the trial court erred in failing to grant Yevtiches' Civ.R. 12(B)(1) motion. *OneWest Bank* at ¶ 8. We dismissed the action, without prejudice. *Id*. at ¶ 9.

{¶ 9} This action commenced on February 23, 2015, with Deutsche Bank's filing of a complaint in foreclosure against the Yevtiches. Notably, the note attached to the complaint as exhibit A included an allonge, but it was not the same allonge presented to

the trial court in the OneWest foreclosure. Rather, the undated allonge was signed by an assistant vice president of BankUnited and endorsed in blank ("Bank United allonge").

{¶ 10} The Yevtiches filed an answer denying the allegations of the complaint and asserting numerous affirmative defenses, including lack of standing.

{¶ 11} On November 12, 2015, Deutsche Bank filed a motion for summary judgment asserting that it was entitled to judgment and a decree of foreclosure as a matter of law. In support of its motion, Deutsche Bank filed the affidavit of Sean Bishop, a contract management coordinator for Ocwen Loan Servicing, LLC, as Servicer for Deutsche Bank.[1] In his affidavit, Bishop avers that Deutsche Bank "is the holder of the promissory note and mortgage at issue in this proceeding." A copy of the note was attached to Bishop's affidavit. No allonges were affixed to the note.

{¶ 12} On December 23, 2015, Deutsche Bank filed what it captioned, "PLAINTIFF'S NOTICE OF FILING AMENDED EXHIBIT 'A' TO ITS COMPLAINT." Without requesting leave to amend its complaint, Deutsche Bank notified the court and the parties to the action that it was amending exhibit A to its complaint with what it referred to as a "copy of the complete promissory note and allonges." Amended exhibit A included (1) the BankUnited allonge endorsed in blank, (2) the FDIC allonge endorsed to OneWest; and (3) an undated allonge, endorsed in

[1] On December 23, 2015, Deutsche Bank moved to have Bishop's affidavit filed under seal because the exhibits attached to the affidavit contained personal loan information and social security numbers. The trial court granted the motion the following day.

blank, executed on behalf of OneWest Bank, FSB, by its attorney in fact Ocwen Loan Servicing, LLC (OneWest allonge).

{¶ 13} On January 12, 2016, Deutsche Bank filed the affidavit of Jesse Rosenthal, contract management coordinator for Ocwen Loan Servicing, as Servicer of Deutsche Bank. The Rosenthal affidavit included a copy of the note identical to the copy of the note included in amended exhibit A.

{¶ 14} On February 1, 2016, Deutsche Bank filed the affidavit of Rachel Valli, a "document custodian" employed by the law offices of trial counsel for Deutsche Bank. Valli averred that on or about July 14, 2015, the original promissory note was placed in a secure cabinet at the law office. She further averred:

> I am able to testify that the original note remains in the secured cabinet at the Law Offices * * *, that I have personally pulled the note from the cabinet and compared the original with the copy attached hereto as Exhibit A and the attached copy is a true and accurate copy of the note in the cabinet.

Exhibit A to Valli's affidavit is identical to amended exhibit A.

{¶ 15} On March 4, 2016, the Yevtiches filed a memorandum in opposition to the motion for summary judgment. The memorandum was supported by the January 27, 2016 telephonic deposition of Blaine R. Shadle, a senior loan analyst at Ocwen, the loan servicer. Deutsche Bank filed a reply to the opposition on March 18, 2016.

{¶ 16} On March 28, 2016, the trial court granted Deutsche Bank's motion for summary judgment. The Yevtiches now appeal asserting one assignment of error for our review:

> The trial court erred in granting Deutsche Bank's Motion for Summary Judgment.

{¶ 17} "Summary judgment is a procedural device to terminate litigation and to avoid a formal trial where there is nothing to try." *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1, 2, 433 N.E.2d 615 (1982). When reviewing a trial court's decision regarding a motion for summary judgment, an appellate court conducts a de novo review. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 (2000). Pursuant to Civ.R. 56, summary judgment is appropriate when: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence most strongly in favor of the non-moving party, reasonable minds can come to only one conclusion, which is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). The movant bears the initial burden of showing that no genuine issues of material fact exist. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988).

{¶ 18} In order to meet this initial burden, the movant must identify those portions of the record properly before the court pursuant to Civ.R. 56(C) that demonstrate the absence of any genuine issues of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the movant provides the court with evidence supporting

its claim that no genuine issues of material fact exist, then the non-moving party bears the reciprocal burden to establish, as set forth in Civ.R. 56(E), specific facts showing genuine issues for trial. *Id.* at 293. The non-moving party "may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial" to satisfy this reciprocal burden. *Chaney v. Clark County Agric. Soc.*, 90 Ohio App.3d 421, 424, 629 N.E.2d 513 (2d Dist. 1993), citing Civ.R. 56(E), and *Jackson v. Alert Fire & Safety Equip., Inc.*, 58 Ohio St.3d 48, 51, 567 N.E.2d 1027 (1991).

{¶ 19} In their first argument under their sole assignment of error, the Yevtiches contend that because the note filed in the OneWest foreclosure action is not identical to the note filed in the instant case, questions of material fact remain as to Deutsche Bank's standing as the real party in interest. The Yevtiches argue that because the trial court granted summary judgment in the OneWest foreclosure, the law of the case doctrine requires this court to construe the note proffered in that case as a true and accurate copy of the note at that period of time. We find no merit in this argument.

{¶ 20} The law of the case doctrine provides that "the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Dorsey v. Dorsey*, 2d Dist. Montgomery No. 27338, 2017-Ohio-5826, ¶ 59, quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984).

{¶ 21} In *OneWest Bank*, 2012-Ohio-6246, we found that OneWest was without subject-matter jurisdiction to file its foreclosure complaint. *Id.* at ¶ 7. We further found that the trial court erred by failing to grant the Yevtiches' Civ.R. 12(B)(1) motion to dismiss. *Id.* at ¶ 8. Because a Civ.R. 12(B)(1) dismissal is procedural in nature, it is not a dismissal on the merits. Thus, the law of the case doctrine does not apply. The note filed in *OneWest* is of no consequence to the matter before us today.

{¶ 22} Alternatively, the Yevtiches assert that the inconsistency between the note attached to the complaint in this case as exhibit A and the note filed with the court on December 23, 2015, as amended exhibit A creates a genuine issue of material fact. We disagree.

{¶ 23} While we recognize that Deutsche Bank failed to properly move to amend its complaint to substitute exhibit A with amended exhibit A, as required by Civ.R. 15(A), no party objected to the December 23, 2015 notice of filing. Thus, all but plain error has been waived. The appellants have failed to assert a plain error argument. Thus, we decline to address the same.

{¶ 24} Amended exhibit A replaced the exhibit A initially attached to the complaint. Because of the substitution, there is only one copy of the note before this court for consideration. We find no merit in the Yevtiches' argument that the existence of a second version of the note creates a genuine issue of material fact. The first argument under the Yevtiches' sole assignment of error is not well-taken.

{¶ 25} In their second argument under their sole assignment of error, the Yevtiches assert that Deutsche Bank failed to show that it is has possession of the note. We disagree.

{¶ 26} In her affidavit, Valli, a custodian of business records at trial counsel's law office, testified that "the original note remains in the secured cabinet * * * and I have personally pulled the note from the cabinet and compared the original with the copy attached" to amended exhibit A. Valli concluded that amended exhibit A is a "true and accurate copy of the note in the cabinet." Appellants introduced no Civ.R. 56(C) evidence to contradict Valli's sworn statement. Therefore, the Yevtiches' second argument under their sole assignment of error is not well-taken.

{¶ 27} In their third argument under their sole assignment of error, the Yevtiches assert that Deutsche Bank "did not present evidentiary-quality material showing * * * that all the conditions precedent have been met." Specifically, appellants assert that the "right to cure" letter sent prior to the first foreclosure is inadmissible as hearsay in this matter because "there is no statement in the affidavits that the affiant is familiar with the business records of the servicer who sent the letter." We disagree.

{¶ 28} To qualify for the business-records exception to the hearsay rule, "the record must be one recorded regularly in a regularly conducted activity; a person with knowledge of the act or event recorded must have made the record; it must have been recorded at or near the time of the act or event recorded, and the party who seeks to introduce the record must lay a foundation through testimony of the record custodian or

another qualified witness." *Wilmington Trust N.A. v. Boydston*, 8th Dist. Cuyahoga No. 105009, 2017- Ohio-5816, ¶ 19. *See also* Evid.R. 803(6).

{¶ 29} In his affidavit, Rosenthal, a contract management coordinator for the loan servicer, testified that as part of his job duties, he was familiar with the records relating to the mortgage, the records were made at or near the time by or from information transmitted from a person with knowledge of the transactions, the records were made and kept in the ordinary course of business, that he had personal knowledge of the manner in which the records were created, and that he had personally reviewed the records. Rosenthal also authenticated the documents.

{¶ 30} Rosenthal testified that the business records relating to the servicing of the mortgage included an August 5, 2009 letter from Indymac Mortgage Services notifying Matthew Yevtich that the mortgage loan was in default and of his right to cure the default. Upon review of the letter, we find that Indymac specifically notified Matthew Yevtich that in order to cure the default, he was required to submit $4,544.52 to Indymac on or before September 6, 2009.

{¶ 31} We find that the proper business records foundation was laid. We further find that the right to cure letter sent to Matthew Yevtich on August 5, 2009, satisfied the requirement that the Yevtiches receive a notice of default and intent to accelerate. The Yevtiches presented no contradictory evidence stating that they did not receive the notice. Thus, we find no merit in appellants' third argument under their sole assignment of error.

{¶ 32} In their fourth argument under their sole assignment of error, appellants assert that Deutsche Bank failed to prove the amount due and owing under the note. We disagree.

{¶ 33} As an employee of the servicer, Rosenthal averred that according to the business records relating to the servicing of the mortgage loan, the "last payment received was applied to the May, 2009 payment" and the appellants are "in default for failing to tender the required monthly payments when due." Rosenthal indicated that the loan was accelerated according to the terms of the note and mortgage, and that "there is due on the Loan a principal balance of $276,594.73, together with interest at the rate of 4.625% per year from May 1, 2009, or as otherwise adjusted pursuant to the terms of the Note." The Yevtiches have presented no evidence to the contrary. Thus, we find no merit in the Yevtiches' fourth argument under their sole assignment of error.

{¶ 34} Based on the foregoing, we find that no genuine issue of fact remains, and that the property was properly foreclosed upon. Appellant's assignment of error is not well-taken.

{¶ 35} On consideration whereof, we find that substantial justice was done the parties complaining and that the judgment of the Fulton County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellants are ordered to pay the costs of this appeal.

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.

Arlene Singer, J. _____

JUDGE

Thomas J. Osowik, J. _____

JUDGE

James D. Jensen, P.J. _____
CONCUR.

JUDGE