[Cite as *U.S. Bank Natl. Assn. v. Mitchell*, 2012-Ohio-3732.]

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

U.S. Bank National Association, as Trustee for the Structured Asset Investment Loan Trust, 2005-4

Appellee

v.

Peggy J. Mitchell, et al.

Appellants

Court of Appeals No. S-10-043

Trial Court No. 08CV534

DECISION AND JUDGMENT

Decided: August 17, 2012

* * * * *

Darryl E. Gormley, for appellee.

Peggy J. Mitchell and Scott W. Mitchell, pro se.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the August 25, 2010 judgment of the Sandusky County Court of Common Pleas which granted the motion for summary judgment for foreclosure filed by appellee, U.S. Bank National Association ("U.S. Bank"), against appellants, Peggy J. Mitchell and Scott W. Mitchell. For the reasons that follow, we affirm the decision of the trial court.

{¶ 2} In this case, U.S. Bank filed a complaint for foreclosure on May 9, 2008, against appellants, alleging that it was the holder of a promissory note and mortgage deed with appellants. Attached to the complaint, as Exhibit A, was a copy of an adjustable rate note ("the note"), dated January 12, 2005, between Home Improvement Acceptance Corp. ("HIAC"), the original lender, and appellants, in the amount of $150,050, concerning a house in Fremont, Ohio. Attached to the note was an allonge ("Allonge 1") which transferred the note from HIAC to Option One Mortgage Corporation ("Option One"). Allonge 1 was signed by Melissa Metzger as "Asst. Treasurer." Allonge 1 was not dated, nor notarized.

{¶ 3} Also attached to the complaint, as Exhibit B, was a copy of an open-end mortgage ("the mortgage") between HIAC and appellants which evidenced the borrower's debt of $150,050 on the note. The mortgage was signed by appellants, notarized, and dated January 12, 2005. The mortgage also had an adjustable rate rider which allowed for changes in the note's interest rate and monthly payment, the rider was signed by appellants, but not notarized. The mortgage was recorded with Sandusky County on January 21, 2005. Also attached to the complaint and mortgage was an "Assignment of Mortgage" ("Assignment 1") between HIAC and Option One that was signed by Melissa Metzger, as "Asst. Treasurer," witnessed, notarized, and dated January 26, 2007. Assignment 1 was recorded with Sandusky County on February 13, 2007.

{¶ 4} There was no assignment of the mortgage between Option One and U.S. Bank attached to the complaint. However, on May 29, 2008, U.S. Bank filed a "Notice of Filing Assignment of Mortgage," and attached a document assigning the mortgage from Option One to U.S. Bank ("Assignment 2"). Assignment 2 was signed by Christina Allen, as "VP," witnessed, notarized, and dated May 9, 2008, the date the complaint in this case was filed. On May 16, 2008, Assignment 2 was recorded with Sandusky County.

{¶ 5} Appellants generally denied U.S. Bank's complaint. On March 26, 2009, U.S. Bank filed a motion for summary judgment. Attached to U.S. Bank's motion was (1) the original note between HIAC and appellants, (2) Allonge 1 wherein HIAC transferred the note to Option One, (3) the original mortgage between HIAC and appellants, (4) the adjustable rate rider, (5) Assignment 1, which assigned the mortgage from HIAC to Option One, (6) Assignment 2, which assigned the mortgage from Option One to U.S. Bank, (7) an affidavit by Cindi Ellis, as "Assistant Secretary" of American Home Mortgage Services, Inc. ("AHMSI"), the servicing agent for U.S. Bank, and (8) an accounting of the loan activity, including interest and principal paid, late fees, and principal balance due. Ms. Ellis' affidavit is pertinent to the issue of whether U.S. Bank established, for purposes of summary judgment, that it was holder of the note and mortgage at the time of the filing of the complaint and, therefore, entitled to foreclose against appellants. Ms. Ellis' affidavit stated the following:

1. I am a(n) Assistant Secretary of American Home Mortgage Servicing Inc., Servicing Agent for U.S. Bank National Association, as Trustee for the Structured Asset Investment Loan Trust, 2005-4, and I am duly authorized to make this Affidavit. I have personal knowledge of all of the facts contained in this affidavit and I am competent to testify to the matters stated herein.

2. U.S. Bank National Association, as Trustee for the Structured Asset Investment Loan Trust, 2005-4 is a corporation authorized to do business in the State of Ohio.

3. The copies of the note and mortgage attached to Plaintiff's pleadings are true and accurate copies of the original instruments.

4. U.S. Bank National Association, as Trustee for the Structured Asset Investment Loan Trust, 2005-4 has exercised the option contained in the note and mortgage and has accelerated and called due the entire principal balance due thereon.

5. I have examined and have personal knowledge of the loan account of Peggy J. Mitchell; there is presently due a principal balance of $144,620.68 with interest thereon at the rate of 9.7% per annum from November 1, 2007; this account has been and remains in default.

{¶ 6} On June 23, 2010, U.S. Bank filed a reply brief in support of its motion for summary judgment. Attached to the reply brief was the note, Allonge 1, and a second

allonge transferring the note from Option One to U.S. Bank ("Allonge 2"). Allonge 2 was signed by Ammie Lee, as "Assistant Secretary." Allonge 2 was not dated, nor notarized. U.S. Bank's reply brief contained an additional affidavit, signed by Amy Kline, as "Assignment & Allonge Specialist" with the law firm of Reimer, Arnovitz, Chernek & Jeffrey Co., L.P.A. Ms. Kline attested that she was duly authorized to make the affidavit, and stated

> 2. That the copies of the promissory note and both allonges attached to *Plaintiff's Reply to Defendant's Memorandum In Opposition* to [sic] herein are true and accurate copies of the original instruments that I reviewed from the original loan file.
>
> 4. (*sic*)[1] That our law firm has authority from our client and servicer for the subject loan, American Home Mortgage Servicing, Inc. to convert blank indorsements to special indorsements.
>
> 5. That the original note was indorsed from Home Improvement Acceptance Corp. to Option One Corp. and the same original allonge was in the loan file.
>
> 6. That the loan file also contained the original second allonge from Option One Mortgage Corp. with an indorsement in blank.[2]

[1] Paragraph number three is omitted from the affidavit.

[2] R.C. 1303.25(B) states: "'Blank indorsement' means an instrument that is made by the holder of the instrument and that is not a special indorsement. When an instrument is

7. That I, per authority from our client entered the name of the Plaintiff to convert it to a special indorsement.[3]

{¶ 7} U.S. Bank was awarded summary judgment and, on appeal, appellants raise the following sole assignment of error:

> The trial court erred in granting plaintiff/appellee summary judgment in that plaintiff/appellee failed to prove it was the owner or holder of Defendants/Appellants' note, and therefore that it had standing to bring and maintain this foreclosure action. (References to the record omitted.)

{¶ 8} In reviewing a motion for summary judgment, an appellate court must apply the same standard of law as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (1989). This review is done by an appellate court de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), and requires the court to independently examine the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, to decide, without deference to the trial court's determination, whether there is a genuine issue as to any material fact and if

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indorsed in blank, the instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed."

[3] There is no copy in the record of an allonge indorsed in blank transferring Option One's rights. Rather, Allonge 2 transfers Option One's rights directly to U.S. Bank and is in the record.

the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). As such, summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 9} The moving party 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 fact as to an essential element of one or more of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Once this burden has been satisfied, the non-moving party has the burden, as set forth at Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.*

{¶ 10} To properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials showing: (1) The movant is the holder of the note and mortgage, or is a party entitled to enforce the instrument; (2) if the mover is not the original mortgagee, the chain of assignments and transfers; (3) the mortgager is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due. *Wachovia Bank v. Jackson,* 5th Dist. No. 2010-CA-00291, 2011-Ohio-3202, ¶ 40-45.

{¶ 11} On appeal, appellants argue that genuine issues of material fact exist which preclude the trial court from granting U.S. Bank's motion for summary judgment. First, appellants argue that U.S. Bank failed to establish that it is the real party in interest

because it alleged that it was the "holder," but not the "owner" of appellants' note. Additionally, appellants assert that Allonge 1, attached to the complaint, between HIAC and Option One was undated and not notarized, and that there was no instrument, allonge or endorsement evidencing negotiation of the note from Option One to U.S. Bank attached to the complaint.

{¶ 12} Second, appellants argue that U.S. Bank failed to establish that, at the time of the filing of the complaint, it had been assigned the mortgage. Appellants assert that Assignment 2, between Option One and U.S. Bank, was not dated until May 9, 2008, the same day the complaint was filed, and was not recorded until May 29, 2008, after the filing of the complaint. Appellants also assert that Assignment 2 did not effectively "negotiate" the note pursuant to R.C. 1303.24 because there was no indorsement on the instrument itself, nor was there any supporting document (allonge) affixed to the instrument.

{¶ 13} Third, appellants argue that Ms. Ellis' affidavit, which was attached to U.S. Bank's motion for summary judgment, failed to state that U.S. Bank had physical possession of the original note and, therefore, failed to establish that U.S. Bank was a "holder" of the note. Additionally, appellants assert that Ms. Ellis' affidavit failed to comply with Civ.R. 56(E) because, even if she had personal knowledge of the matters to which she attested, she failed to state that she was qualified or competent to testify to the matters set forth in the affidavit. Finally, appellants assert that Ms. Ellis executed foreclosure documents on behalf of a number of different entities and, therefore, "it is

highly likely that she did not have personal knowledge of the facts she attest[ed] to, or that she had the requisite authority to make the statements that were made in her Affidavit."

{¶ 14} Civ.R. 17(A) requires that a civil action "shall be prosecuted in the name of the real party in interest." As this court has previously held, "[i]n 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.) *Countrywide Home Loans v. Montgomery*, 6th Dist. No. L-09-1169, 2010-Ohio-693, ¶ 12. Ohio's version of the Uniform Commercial Code governs who may enforce a note. *See* R.C. 1301.01 et seq.[4] "Under the code, a 'person entitled to enforce' an instrument means any of the following persons: (1) The holder of the instrument, (2) A non-holder in possession of the instrument who has the rights of the holder, (3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 1303.38 or division (D) of section 1303.58 of the Revised Code." *Aurora Loan Servs., L.L.C. v. Louis*, 6th Dist. No. L-10-1289, 2012-Ohio-384, ¶ 24, and R.C. 1303.31. A "holder" means either of the following:

> (a) If the instrument is payable to bearer, a person who is in possession of the instrument;

[4] R.C. 1301.01 was repealed by Am.H.B. No. 9, 2011 Ohio Laws File 9, effective June 29, 2011, and renumbered as R.C. 1301.201. Because R.C. 1301.201 only applies to transactions entered on or after June 29, 2011, we apply former R.C. 1301.01 to this appeal.

(b) If the instrument is payable to an identified person, the identified person when in possession of the instrument. Former R.C. 1301.01(T)(1).

{¶ 15} Transfer of instrument occurs "when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." R.C. 1303.22(A). "Unless otherwise agreed, if an instrument is transferred for value the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made by the transferor." R.C. 1303.22(C). An "indorsement" means a signature that alone or accompanied by other words is made on an instrument to negotiate the instrument. R.C. 1303.24(A)(1)(a). "For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument." R.C. 1303.24(A)(2). A paper affixed to an instrument is called an "allonge" and becomes an extension or a part of the instrument. *Society Natl. Bank v. Security Fed. Savings and Loan* , 71 Ohio St.3d 321, 326, 643 N.E.2d 1090 (1994).

{¶ 16} In this case, U.S. Bank pleaded that it was the holder of the note, which is secured by the mortgage at issue, thereby indicating U.S. Bank's interest in the mortgage. *See U.S. Bank v. Coffey*, 6th Dist. No. E-11-026, 2012-Ohio-721, ¶ 14. Despite appellants' assertion, U.S. Bank was not additionally required to plead that it was the "owner" of the note and mortgage in its complaint. *Id.* at ¶ 18. An assertion of ownership rights does not indicate entitlement to enforce an instrument, nor does a lack of ownership necessarily prevent a person from being entitled to enforce an instrument.

Id. at ¶ 19, and R.C. 1303.31(B). "[B]ecause a promissory note is transferred through the process of negotiation,[5] ownership is not a requirement for enforcement of the note." *Id.* at ¶ 20, citing R.C. 1303.31(B).

{¶ 17} U.S. Bank was not the original mortgagee and, therefore, was required to establish the chain of assignments and transfers to demonstrate that it was the holder of the note and mortgage, and the party entitled to enforce the instrument, i.e., the real party in interest. *See Jackson*, 2011-Ohio-3202, at ¶ 40-42. An entity must prove that it was the holder of the note and mortgage on the date that the complaint in foreclosure was filed, otherwise summary judgment is inappropriate. *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092, ¶ 23. Additionally, "in a foreclosure action, a bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage," *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722, ¶ 16.

{¶ 18} The holdings in *Jordan* and *Byrd*, however, do not require that "a mortgagee must prove that it is the holder of a mortgage on the exact date that the complaint in foreclosure is filed." *Montgomery*, 6th Dist. No. L-09-1169, 2010-Ohio-693, at ¶ 13. Rather, this court has held that a mortgagee can offer proof after the filing

[5] "'Negotiation' means a voluntary or involuntary transfer of possession of an instrument by a person other than the issuer to a person who by the transfer becomes the holder of the instrument." R.C. 1303.21(A). However, under R.C. 1303.21(B), if the note is payable to an identified person, "negotiation requires transfer of possession of the instrument and its indorsement by the holder."

of the foreclosure action to establish that the mortgage was assigned to the mortgagee prior to or at the time of the filing of the foreclosure action. *Id. Accord Wells Fargo Bank, N.A. v. Stovall*, 8th Dist. No. 91802, 2010-Ohio-236, ¶ 16. (An assignment of the mortgage to Wells Fargo Bank, N.A., dated prior to the filing of the complaint, was attached to the bank's motion for summary judgment, thereby demonstrating that the bank was the real party in interest at the time the foreclosure was filed.)

{¶ 19} In this case, U.S. Bank attached the original mortgage and note, and affixed the chain of indorsements, assignments and allonges, indicating that both were negotiated and transferred to U.S. Bank, to its motion for summary judgment and reply brief for summary judgment. The note and mortgage both refer to one another and, thus, we find a clear intent by the parties to keep the note and mortgage together. *See Bank of New York v. Dobbs*, 5th Dist. No. 2009-CA-000002, 2009-Ohio-4742, ¶ 36. Because the mortgage assignments are notarized documents, extrinsic evidence of their authenticity is not required pursuant to Evid.R. 902(8).[6] Accordingly, we conclude the chain of assignments between HIAC, Option One, and U.S. Bank was not broken. U.S. Bank, however, also supplied affidavits of Cindi Ellis and Amy Kline, both of whom attested that, based upon their personal knowledge, the attached copies were true and accurate copies of the original instruments. We find that the affidavits satisfied the requirements of Civ.R.

[6] Pursuant to Evid.R. 902(8), "[d]ocuments accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments" do not require "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility * * *."

56(E) as to personal knowledge, authenticity of the instruments, and possession of the original documents by U.S. Bank. *See State ex rel. Corrigan v. Seminatore,* 66 Ohio St.2d 459, 423 N.E.2d 105 (1981), paragraphs two and three of the syllabus.

{¶ 20} Upon review of the evidentiary materials contained in the record, we find that the note and mortgage were negotiated to U.S. Bank on or before the date that the complaint in foreclosure was filed. Assignment 2, transferring the mortgage from Option One to U.S. Bank was not recorded with Sandusky County until after the complaint was filed. We find, however, that an unrecorded assignment on the date of the complaint is valid, except as to subsequent bona fide purchasers for value. *Argent Mtge. Co., L.L.C. v. Phillips*, 9th Dist. No. 24979, 2010-Ohio-5826, ¶ 11, citing *Wead v. Lutz*, 161 Ohio App.3d 580, 2005-Ohio-2921, ¶ 18-19 and R.C. 5301.25. *See also ABN Amro Mtg. Group, Inc. v. Jackson* (2005), 159 Ohio App.3d 551, 2005-Ohio-297, 824 N.E.2d 600, ¶ 16 (stating that an unrecorded mortgage is valid between the mortgagor and mortgagee, but as to others, it takes effect at the time it is placed upon the record). Accordingly, we find that U.S. Bank was the holder of the instruments at the time the complaint was filed and was the real party in interest entitled to enforce the note and foreclose upon the mortgage.

{¶ 21} Cindi Ellis attested that she had personal knowledge of the loan account, attached to her affidavit, that the note was in default, and that a principal balance of $144,620.68, with interest thereon at the rate of 9.7 percent per annum from November 1, 2007, was presently due. Additionally, we have reviewed the instruments and find that

no conditions precedent were contained therein. Accordingly, we find that there exist no genuine issues of material fact and U.S. Bank is entitled to judgment as a matter of law. *See Jackson*, 2011-Ohio-3202, at ¶ 40-45. Appellants' sole assignment of error is therefore found not well-taken.

{¶ 22} On consideration whereof, the court finds substantial justice has been done the party complaining and the judgment of the Sandusky County Court of Common Pleas is affirmed. Appellants are ordered to pay the 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

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE