[Cite as *LPP Mtge. Ltd. v. Williams*, 2012-Ohio-3656.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

LPP Mortgage LTD,	:	
Plaintiff-Appellee,	:	
		No. 11AP-1151
v.	:	(C.P.C. No. 09CVE-04-6438)
Brandi C. Williams,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 14, 2012

Manley Deas Kochalski LLC, *Melissa N. Meinhart*, and *Matthew J. Richardson*, for appellee.

Duncan Simonette, Inc., *Brian K. Duncan*, and *Bryan D. Thomas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Defendant-appellant, Brandi C. Williams ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which granted summary judgment and decree of foreclosure in favor of plaintiff-appellee, LPP Mortgage LTD ("appellee"). For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} On April 29, 2009, appellee filed a complaint for foreclosure against appellant. In it, appellee alleged that it was entitled to foreclosure because appellant

was in default on a note and mortgage, which appellee attached to the complaint. Also attached was a copy of an assignment of the original mortgage to appellee. On May 13, 2009, appellant filed a request for foreclosure mediation and extension of time to answer, which the court granted.

{¶ 3} On October 8, 2009, a mediation report was filed, indicating the current status as "Forbearance Agreement." Upon motions filed by appellee, the court subsequently granted continuances of the scheduled trial.

{¶ 4} On July 29, 2010, appellee moved for default judgment against appellant. Appellee contended that mediation between the parties had failed, and appellant had not responded to the complaint.

{¶ 5} On August 5, 2010, the trial court granted default judgment in favor of appellee. In its judgment entry and decree in foreclosure, the court noted that appellant had not filed an answer to appellee's complaint. The clerk ordered a sale of the property.

{¶ 6} On October 27, 2010, through counsel, appellant filed motions to vacate the trial court's August 5, 2010 entry, stay the sheriff's sale, and grant foreclosure mediation and an extension of time to answer. The court granted appellant's motions and referred the matter to mediation again. On June 8, 2011, appellant filed an answer to appellee's complaint.

{¶ 7} On August 23, 2011, appellee moved for summary judgment. In support, appellee submitted the affidavit of Bernadette McDonnell, an executive of appellee. She stated that appellant was in default of a note and mortgage, and appellee was entitled to collect $96,482.23, plus interest and other costs. In response, appellant moved to continue appellee's motion in order to permit discovery. The court denied appellant's request to continue the matter, but allowed appellant time to respond to appellee's motion.

{¶ 8} On November 1, 2011, appellant filed a response to appellee's motion for summary judgment. In it, appellant contended that questions of material fact remained regarding the arrearage, the allocation of payments, and appellee's compliance with state and federal regulations and its obligations under the note and mortgage. More

specifically, appellant contended that appellee had failed to present evidence that it owned the debt, and one signature on the mortgage was not authenticated properly. Appellant submitted no evidence in support of her response.

{¶ 9} On December 2, 2011, the trial court issued a judgment entry and decree of foreclosure in favor of appellee.

II. ASSIGNMENT OF ERROR

{¶ 10} Appellant filed a timely appeal, and she raises the following assignment of error for our review:

> THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING [APPELLEE'S] MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WERE ISSUES OF FACT AND [APPELLEE] WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

III. DISCUSSION

{¶ 11} In her only assignment of error, appellant contends that the trial court erred by granting summary judgment in favor of appellee. We review a summary judgment de novo by independently reviewing the judgment, without deference to the trial court's determination. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994), citing *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711 (4th Dist.1993). We apply the same standard as the trial court and must affirm the judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 12} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the

non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992), citing *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1, 2 (1982).

{¶ 13} When a party moves for summary judgment on the ground that the non-moving party cannot prove its case, the movant "bears the initial responsibility of informing the trial court of the basis for the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If the moving party meets its initial burden, the non-movant must set forth specific facts demonstrating a genuine issue for trial. *Id*. at 293.

{¶ 14} Here, in simplest terms, appellant signed a note by which she promised to pay $98,000 to First NLC Financial Services, LLC ("Lender") for the purpose of purchasing certain property. That note provides that Lender could transfer the note to a " ' Note Holder' " entitled to receive payments under the note. Appellant also signed a mortgage, by which she agreed to pay the debt evidenced by the note and, as security, conveyed her interest in the property to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Lender. In 2008, MERS assigned the mortgage to appellee.

{¶ 15} Although it is undisputed that appellant is in default of the note and mortgage, she raises three issues that, in her view, create factual questions about appellee's ability to enforce the note and mortgage against her. First, appellant states that the 2008 assignment of the original mortgage to appellee refers to an undisclosed purchase agreement. Appellant does not explain why this reference to an undisclosed agreement creates an infirmity in the assignment or how this lack of disclosure caused prejudice to her. The undisputed evidence before the court showed only that the assignment was valid.

{¶ 16} Second, appellant states that she engaged in good-faith negotiations with MGC Mortgage, Inc., the entity that prepared the assignment document, believing that MGC Mortgage was the entity to whom she owed her debt. Again, appellant does not

explain why, even if true, this creates an infirmity in appellee's rights as the holder of the note and mortgage or how the negotiating process was prejudicial to her.

{¶ 17} Finally, appellant states that the mortgage agreement contains an irregularity that calls the authenticity of the agreement into question and precludes appellee from claiming status as a holder in due course. The alleged irregularity arises from the fact that the acknowledgment at the end of the agreement states "State of OH" and "County of FRANKLIN." As appellant notes, however, the acknowledgment was signed and notarized by someone with a stamp indicating the "State of Missouri" and "Cass County," and a handwritten notation states "State of Missouri" and "County of Jackson." We agree with appellant that this acknowledgement appears somewhat irregular, but once again, she fails to cite any precedent for her proposition that this irregularity jeopardizes appellee's entitlement to enforce the terms of the mortgage agreement against her, even if it is true that the irregularity renders the acknowledgement ineffective.

{¶ 18} R.C. 5301.01 prescribes three requirements for a mortgage to be considered validly executed. One of those requirements is that the mortgage must be signed before one of the specified individuals, which include a notary. *See* R.C. 5301.01(A). Despite these requirements, however, in the absence of fraud, Ohio law provides for enforcement of a defectively executed conveyance of an interest in land, at least as against the parties to the conveyance. *See Wells Fargo Fin. Ohio v. Lieb*, 2d Dist. No. 23688, 2011-Ohio-1988, ¶ 18. Specifically with respect to a mortgage, in the absence of fraud, we will enforce the mortgage agreement, despite the defect, in order to effectuate the intentions of the parties. *Id*. This rule applies equally where the original mortgagee assigns the mortgage, i.e., the assigned mortgage is enforceable against the mortgagor, despite an alleged defect in the acknowledgement. *See Lasalle Bank, N.A. v. Zapata*, 184 Ohio App.3d 571, 2009-Ohio-3200, ¶ 21-22 (6th Dist.).

{¶ 19} Here, appellant never argued that she did not sign the mortgage, that she did not intend to sign the mortgage or even that she signed it, but not before a notary. While she asserted the defense of fraud in her answer generally, she failed to state that defense with particularity as Civ.R. 9(C) requires, she presented no evidence to the trial

court to support that defense, and she does not assert or suggest fraud before us now. Accordingly, the mortgage agreement is enforceable against appellant, despite the alleged irregularity in the acknowledgment, even if it were determined to be defective.

{¶ 20} Finally, as to whether appellee is or can be a holder in due course, we note that R.C. 1303.31(A)(1), as part of the uniform commercial code, provides that a "holder" of an instrument is a person entitled to enforce that instrument. In addition, a "holder in due course" enjoys certain rights and protections and, with some exceptions, takes an instrument free from all claims and defenses. *See* R.C. 1303.32; *All Am. Fin. Co. v. Pugh Shows, Inc.*, 30 Ohio St.3d 130, 131 (1987). This court has explained, however, that "[s]tatus as a holder, as opposed to a holder in due course, is not inherently a source of infirmity or limitation upon the right to collect under the terms of the instrument." *Bank One, N.A. v. Barclay*, 10th Dist. No. 03AP-870, 2004-Ohio-2718, ¶ 11. As in that case, appellee, the holder here, did not assert any grounds for enforcement of the note and mortgage that were dependent on its status as a holder in due course. And, although appellant contends that the alleged irregularities in the assignment, mediation process, and acknowledgement preclude appellee from claiming holder-in-due-course status, we have already concluded that none of these alleged irregularities would preclude enforcement of the note and mortgage against appellant under the facts of this case.

{¶ 21} For all these reasons, we conclude that the trial court did not err by granting summary judgment in favor of appellee. Accordingly, we overrule appellant's assignment of error.

IV. CONCLUSION

{¶ 22} Having overruled appellant's single assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.