[Cite as *Fidelity Tax, L.L.C. v. Hall*, 2013-Ohio-3165.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Fidelity Tax, LLC,	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-923 (C.P.C. No. 10 CV 15275)
Jeffrey B. Hall,	:	(REGULAR CALENDAR)
Defendant-Appellant,	:	
The Huntington National Bank et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on July 18, 2013

Brunner Quinn, and *Patrick M. Quinn*, for appellant.

Jody Michelle Oster, for appellee The Huntington National Bank.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} In this foreclosure action, defendant-appellant, Jeffrey B. Hall ("appellant"), appeals from a summary judgment granted by the Franklin County Court of Common Pleas in favor of defendant-appellee, The Huntington National Bank ("Huntington"). For the following reasons, we affirm.

{¶ 2} On October 18, 2010, Fidelity Tax, LLC ("Fidelity"), initiated this action by filing a complaint alleging that it had purchased a tax certificate based on non-payment of taxes and that the certificate represented a first lien on property owned by appellant. Fidelity named multiple potential lienholders as defendants, including First National Bank of Zanesville ("First National"). Fidelity asserted that First National possibly had an

interest in the property based on a recorded mortgage in the principal amount of $190,000, which appellant had executed on September 11, 1998, and which named First National as mortgagee.

{¶ 3} On November 26, 2010, Huntington filed an answer to the complaint and asserted a cross-claim against appellant. Huntington asserted that it possessed a valid lien on the property based on the same September 11, 1998 mortgage referenced by Fidelity in the complaint. Huntington alleged that it was successor by merger to Unizan Bank, which was itself successor by merger to First National. Huntington further stated that appellant was in default of the terms, conditions, and obligations contained in the note and that appellant owed it unpaid principal, interest, costs, fees, and expenses. Huntington also sought an order finding that it was entitled to foreclosure of the mortgage.

{¶ 4} Appellant, appearing pro se, answered Fidelity's complaint and subsequently answered Huntington's cross-claim as well. In his answer to Huntington's cross-claim, appellant denied that he was in default of the September 11, 1998 note and asserted that he had a "perfect payment history with defendant Huntington." (Dec. 22, 2011 Answer.)

{¶ 5} On December 16, 2011, Fidelity dismissed its complaint without prejudice.

{¶ 6} Huntington thereafter filed a motion for summary judgment on its cross-claim for foreclosure. Huntington attached to its motion copies of the note and the mortgage. Huntington also attached an affidavit executed by a Huntington vice president, asserting that First National and The United National Bank & Trust Company, Canton, Ohio ("United National"), merged on March 7, 2002, and the resulting bank's title was Unizan Bank; Unizan Bank and Huntington merged in March 2006, and the resulting bank's title was The Huntington National Bank.

{¶ 7} The affidavit further stated that appellant was in default of the note and mortgage as a result of appellant's failure to timely pay real estate taxes, which resulted in the filing of Fidelity's foreclosure action. It stated that Huntington had, pursuant to the terms of the note, accelerated the balance owed on the note and had, on April 27, 2011, demanded payment in full of appellant's remaining obligation. In addition, the affidavit stated that, on January 25, 2012, Huntington had requested that appellant provide

additional financial information and that appellant had failed to do so, which constituted an additional event of default. The affiant stated that, as of February 8, 2012, appellant owed Huntington $91,977.90, plus interest.

{¶ 8} Huntington's affidavit was supported by documentary exhibits, including copies of letters from the federal comptroller of the currency certifying the 2002 and 2006 bank mergers, as well as a copy of Huntington's April 27, 2011 letter to appellant notifying him of the default and acceleration of the outstanding amount and a copy of its January 25, 2012 letter demanding disclosure of additional financial information.

{¶ 9} Appellant appeared in opposition to Huntington's motion for summary judgment. Appellant did not attach any evidentiary materials but, rather, argued that Huntington lacked standing to prosecute its cross-claim as a matter of law because the note was "specially indorsed to a different party." (Apr. 23, 2012 Memorandum in Opposition, 2.) Appellant argued that Huntington was therefore not the current holder of the note and mortgage.

{¶ 10} On September 26, 2012, the trial court granted Huntington's motion for summary judgment and entered a decree of foreclosure. The court found that reasonable minds could only conclude that appellant owed Huntington the sum of $91,977.90 as of February 8, 2012, and that interest continued to accrue on the note, as well as costs, fees and expenses. The court ordered sale of the mortgaged property in the event that appellant did not pay all outstanding sums within three days.

{¶ 11} Appellant appealed the summary judgment entered against him and asserts the following assignment of error:

> The trial court erred in granting cross-claimant Huntington National Bank's motion for summary judgment.

{¶ 12} Appellant contends that Huntington lacks standing in this case because it is not a holder of the note. He further argues that Huntington violated its obligations under the note and mortgage that would allow appellant an opportunity to cure a default. We address each of these arguments separately.

Summary Judgment Review

{¶ 13} Summary judgment is appropriate where "the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to

judgment as a matter of law, and (3) 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." *Capella III, L.L.C. v. Wilcox*, 190 Ohio App.3d 133, 2010-Ohio-4746, ¶ 16, citing *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶ 6. In *Heider v. Ohio Dept. of Transp.*, 10th Dist. No. 12AP-115, 2012-Ohio-3771, ¶ 8, this court stated:

> When determining what is a "genuine issue," the court decides if the evidence presents a sufficient disagreement between the parties' positions. [*Turner v. Turner*, 67 Ohio St.3d 337, 340 (1993).] "[T]he moving party 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 fact on a material element of the non-moving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Once the moving party meets its initial burden, the non-moving party must then produce competent evidence showing that there is a genuine issue for trial. *Id.* Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358–59, 604 N.E.2d 138 (1992).

{¶ 14} Moreover, " 'appellate review of summary-judgment motions is de novo.' " *Geczi v. Lifetime Fitness*, 10th Dist. No. 11AP-950, 2012-Ohio-2948, ¶ 8, quoting *Capella III* at ¶ 16, citing *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548 (2001). "De novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision." (Internal citations omitted.) *Holt v. State*, 10th Dist. No. 10AP-214, 2010-Ohio-6529, ¶ 9. "We stand in the shoes of the trial court and conduct an independent review of the record applying the same summary judgment standard. As such, we must affirm the trial court's judgment if any of the grounds raised by the moving party are found to support it, even if the trial court failed to consider those grounds." *Heider* at ¶ 9.

{¶ 15} Huntington, in seeking an order of foreclosure, was required to "establish execution and delivery of the note and mortgage; valid recording of the mortgage; [that] it is the current holder of the note and mortgage; default; and the amount owed." *Perpetual Fed. Sav. Bank v. TDS2 Prop. Mgt., LLC*, 10th Dist. No. 09AP-285, 2009-Ohio-6774, ¶ 19, citing *Neighborhood Hous. Servs. of Toledo, Inc. v. Brown*, 6th Dist. No. L-08-

1217, 2008-Ohio-6399, ¶ 16. Moreover, in a mortgage foreclosure case, " '[a]n affidavit stating the loan is in default, is sufficient for purposes of Civ.R. 56 in the absence of evidence controverting those averments.' " *Id.* at ¶ 20, quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14; *Deutsche Bank Natl. Trust Co. v. Ingle*, 8th Dist. No. 92487, 2009-Ohio-3886, ¶ 33; and *JP Morgan Chase Bank, N.A. v. Brown*, 2d Dist. No. 21853, 2008-Ohio-200, ¶ 54.

Huntington's Standing

{¶ 16} Appellant asserts that the trial court erred in granting summary judgment to Huntington because a genuine issue exists as to whether Huntington had standing to assert its cross-claim. He argues that Huntington did not accede to holder status through the mergers of First National and Unizan, and Unizan with Huntington, because R.C. 1303.21(B) provides that a negotiable instrument is negotiated only by "transfer of possession of the instrument and its indorsement by the holder." In effect, appellant argues that the record lacks evidence of a valid assignment of the note and mortgage to Huntington and that, in the absence of such evidence, Huntington lacks standing.

{¶ 17} We acknowledge that "[a]n 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." *Bank of New York Mellon v. Watkins*, 10th Dist. No. 11AP-539, 2012-Ohio-4410, ¶ 18, citing *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092, ¶ 23. *See also Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017 (observing that Civ.R. 17(A) requires that every action shall be prosecuted in the name of the real party in interest). But appellant's argument fails in that it rests on the invalid premise that Huntington could only become a legally cognizable holder of the note and mortgage at issue through negotiation. In this case, Huntington acquired standing to assert its cross-claim and became the real party in interest as a result of merger with the predecessor banks—not negotiation or assignment of the note and mortgage to it.

{¶ 18} "[W]hen a merger between two companies occurs, one of those companies ceases to exist: '[A] merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former. Of necessity, the absorbed company ceases to exist as a separate

business entity.' " *Acordia of Ohio, L.L.C. v. Fishel*, 133 Ohio St.3d 345, 2012-Ohio-2297, ¶ 12 ("*Acordia I*), quoting *Morris v. Invest. Life Ins. Co.*, 27 Ohio St.2d 26, 31 (1971). "[T]he absorbed company becomes a part of the resulting company following merger [and] the merged company has the ability to enforce * * * agreements as if the resulting company had stepped in the shoes of the absorbed company." *Acordia of Ohio, L.L.C. v. Fishel*, 133 Ohio St.3d 356, 2012-Ohio-4648, ¶ 7 ("*Acordia II*). Moreover, "in accordance with R.C. 1701.82(A)(3), all assets and property, including employment contracts and agreements, and every interest in the assets and property of each constituent entity transfer through operation of law to the resulting company postmerger." *Acordia II* at ¶ 3. *Accord*, *Self Help Ventures Fund v. Jones*, 11th Dist. No. 2012-A-0014, 2013-Ohio-868, 35-36 (observing that negotiation is a particular type of transfer of an instrument and that a note may be transferred by a method other than negotiation). *See also* R.C. 1303.22(B) (Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument.")

{¶ 19} Similarly, the National Bank Act provides that, where banks merge, "[a]ll rights, franchises, and interests of the individual consolidating banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the consolidated national banking association by virtue of such consolidation without any deed or other transfer." 12 U.S.C. § 215(e).

{¶ 20} In the case before us, Huntington produced letters from the federal comptroller of the currency confirming the merger of the original mortgagee on the note and mortgage (First National) with another bank (United National) to form Unizan Bank, and that Unizan Bank then merged with Huntington, and appellant did not rebut that evidence of merger by affidavit or otherwise. Huntington thereby succeeded to all the rights and obligations of First National under the note and the mortgage appellant had executed. Accordingly, no genuine issue existed as to Huntington's standing to assert the lender's rights under the note and the mortgagee's rights under the mortgage. *See Huntington Natl. Bank v. P.A.B., Inc.*, 10th Dist. No. 81AP-753 (Apr. 13, 1982) ("The certificate of merger issued to the Huntington National Bank by the controller of the currency of the Treasury Department, Department of the United States of America, is a valid document binding upon the parties and no regulatory agencies have challenged the

effectiveness of the merger thus approved and which resulted at the Huntington National Bank.") *Accord Huntington Natl. Bank v. Hoffer*, 2d Dist. No. 2010-CA-31, 2011-Ohio-242, ¶ 15 ("When an existing bank takes the place of another bank after a merger, no further action is necessary. [Citing *Huntington Natl. Bank v. P.A.B., Inc.*] Since Sky Bank merged into Huntington, there was nothing else that Huntington needed to do to become the real party in interest in regards to Hoffer's mortgage."); *Midwest Business Capital v. RFS Pyramid Mgt.*, 11th Dist. No. 2011-T-0030, 2011-Ohio-6214 (recognizing that an affidavit of a bank official testifying as to the merger of two financial entities, accompanied by documentation of the approval of the merger by the comptroller of the currency, sufficed to establish that the successor entity had standing as a successor in interest to assert rights under a mortgage and note originally executed in favor of the predecessor entity).

{¶ 21} Accordingly, appellant's argument that Huntington did not have standing to prosecute its cross-claim lacks merit.

Default/Opportunity to Cure

{¶ 22} In support of its motion for summary judgment, Huntington submitted evidence of what it contended were multiple instances of default, e.g., failure to timely make tax payments when due and the initiation of the foreclosure action by Fidelity. Its evidence included copies of the note and mortgage, an affidavit executed by a bank official asserting that Huntington was the successor in interest to First National through merger, and identifying appellant's events of default; copies of letters from the federal comptroller verifying the two bank mergers, and correspondence between Huntington and appellant.

{¶ 23} Appellant, however, provided no evidence whatsoever in opposing the entry of summary judgment against it. Rather, appellant argued that the facts and evidence submitted by Huntington did not demonstrate that Huntington was entitled to judgment as a matter of law. More specifically, appellant asserts that the trial court erred in granting summary judgment because Huntington's evidence demonstrated the existence of unresolved material facts as to whether Huntington had complied with its obligation under the terms of the note to allow appellant an opportunity to cure his defaults.

{¶ 24} The note provided as follows:

> **DEFAULT.** Borrower will be in default if any of the following happens: * * * Borrower breaks any promise

> Borrower has made to Lender, or *Borrower fails to comply with or to perform when due any other term, obligation, covenant, or condition contained in this Note* * * * [or] (e) *Any creditor tries to take any of Borrower's property* on or in which Lender has a lien or security interest. * * *
>
> *If any default, other than a default in payment, is curable* and if Borrower has not been given a notice of a breach of the same provision of this Note within the preceding twelve (12) months, *it may be cured* (and no event of default will have occurred) *if Borrower, after receiving written notice from Lender demanding cure of such default (A) cures the default within thirty (30 days);* * * *.*
>
> * * *
>
> **ADDITIONAL TERMS & AGREEMENTS.** *Borrower agrees to provide, upon request,* * * * *any financial statements or tax records or information Lender may deem necessary* from time to time during the period of time any loan balance is outstanding or commitment to loan funds is in effect. Borrower warrants that all financial statements and information provided are or will be accurate, correct, current, and complete and that same will be provided within seven (7) calendar days of request.
>
> **ADDITIONAL EVENTS OF DEFAULT.** *In the event that Borrower fails to provide financial information required herein, Borrower will be in default of this loan* and any other loans or agreements with Lender.

(Emphasis added.)

{¶ 25} Similarly, the mortgage provided:

> **TAXES AND LIENS.** * * *
>
> **Payment.** Grantor shall *pay when due (and in all events, prior to delinquency)* all taxes * * * levied against or on account of the Property * * *.
>
> *** * ***

> **DEFAULT.** Each of the following, at the option of Lender, shall constitute an event of default ("Event of Default") under this Mortgage:
>
> * * *
>
> **Default on Other Payments.** Failure of Grantor within the time required by this Mortgage to make any payment for taxes or insurance, * * *.
>
> * * *
>
> **Foreclosure, Forfeiture, etc.** Commencement of foreclosure or forfeiture proceedings, * * * by any creditor of Grantor or by any governmental agency against any of the Property. However, the subsection shall not apply in the event of a good faith dispute by Grantor as to the validity or reasonableness of the claim which is the basis of the foreclosure or forfeituer proceeding, provided that Grantor gives Lender written notice of such claim and furnishes reserves or a surety bond for the claim satisfactory to Lender.
>
> * * *
>
> **Right to Cure.** *If such a failure is curable*, and if Grantor or Borrower has not been given a notice of a breach of the same provision of this Mortgage within the preceeding twelve (12) months, it may be cured (and no Event of Default will have occurred) if Grantor or Borrower, after Lender sends written notice demanding cure of such failure: (a) cures the failure within thirty (30) days; or (b) if the cure requires more than thirty (30) days, immediately initiates steps sufficient to cure the failure and thereafter continues and completes all reasonable and necessary steps sufficient to produce compliance as soon as reasonably practical.

(Emphasis added.)

{¶ 26} Huntington argues that the right-to-cure clauses in the note and the mortgage do not apply, by their express terms, unless the borrower's default or failure is curable. It further argues that it had produced evidence of multiple instances of default, including events of default that were not curable, e.g., failure to timely make tax payments

when due and the initiation of the foreclosure action by Fidelity. Huntington argues that it was not possible for appellant to cure his failure to, for example, timely pay his taxes so as to avoid delinquency. We agree. It would be a useless act to require Huntington to send appellant a notice of his right to cure a default when curing the underlying default would be impossible. The record includes a tax certificate purchased by Fidelity indicating that appellant had accumulated a tax delinquency of $5,298.44 as of September 20, 2007. Clearly, when Fidelity initiated these foreclosure proceedings in 2010, appellant could not have cured his default of failing to *timely* pay taxes so as to avoid delinquency. The mortgage required that appellant "within the time required by this Mortgage * * * make any payment for taxes * * * necessary to prevent filing of or to effect discharge of any lien." (Sept. 11, 1998 Mortgage, 3.) It further provided that appellant "shall pay *when due, (and in all events prior to delinquency*, all taxes." (Emphasis added.) *Id.* Appellant not only failed to timely pay his taxes, but that failure resulted in the auction of a tax certificate based on that delinquency, which Fidelity purchased. Failure to timely pay taxes and experiencing a tax delinquency were clearly identified as defaults in the note. After those events had occurred, appellant could not rewrite events to "cure" the fact that those events had, in fact, occurred. Accordingly, those incidents of default were not curable.

{¶ 27} In short, at least some of the events that constituted default under the note and mortgage were not curable, and the right-to-cure clauses in the note and mortgage do not avail appellant. *Accord*, *Pogue's Garage, LLC v. Regions Bank*, Hamilton Cty. C.P. Ct. No. A1004707 (Aug. 27, 2010) (finding a default on a contractual obligation to complete property upgrades "on or before January 31, 2010" was not curable after the expiration of that date and that lender was therefore not required to give notice and an opportunity to cure a default of that obligation where right-to-cure-clause referenced *curable* defaults).

{¶ 28} Accordingly, we find no merit to appellant's argument that Huntington did not comply with its contractual obligations to give appellant notice of an opportunity to cure his defaults prior to accelerating the loan and seeking foreclosure of the mortgage.

Conclusion

{¶ 29} We conclude that Huntington had standing to prosecute its cross-claim for foreclosure, appellant failed to rebut Huntington's evidence that appellant was in default

of his obligations under the note and mortgage, and Huntington did not breach its contractual obligations to provide appellant an opportunity to cure his default. Accordingly, we overrule appellant's assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and McCORMAC, JJ., concur.

McCORMAC, J., retired, of the Tenth Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).
