NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

THE BANK OF NEW YORK MELLON (F/K/A THE BANK OF NEW YORK) ON BEHALF OF CIT MORTGAGE LOAN TRUST 2007-1, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	
DARCY MULHARE AND MARC J. BENETEAU, Appellants	No. 1673 EDA 2012

Appeal from the Order entered May 11, 2012,
in the Court of Common Pleas of Montgomery County,
Civil Division, at No(s): 2010-20409

BEFORE: PANELLA, ALLEN, and PLATT,* JJ.

MEMORANDUM BY ALLEN, J.: Filed: March 18, 2013

Darcy Mulhare and Marc J. Beneteau, ("Appellants"), appeal from the trial court's grant of summary judgment in favor of The Bank of New York Mellon (f/k/a The Bank of New York), on behalf of the CIT Mortgage Loan Trust 2007-1, ("Bank"). We affirm.

We glean the following facts and procedural history from our review of the record. On July 26, 2010, Bank filed a mortgage foreclosure action against Appellants averring that on February 9, 2007, Appellants entered into a mortgage with Mortgage Electronic Registration Systems, Inc., as nominee for Wilmington Finance, Inc., ("Wilmington"). *See* Bank's Complaint, 7/26/10, at 1; Exhibit A. Bank further averred that Wilmington

*Retired Senior Judge assigned to Superior Court.

assigned Appellants' mortgage to Bank, and that "the assignment is in the process of being finalized." *See* Bank's Complaint, 7/26/10, at 2.

The mortgage was secured by Appellants' home located at 1616 Dekalb Street, Norristown, PA. *Id.* Bank averred that "[t]he mortgage is in default because the monthly installments of principal and interest…are due as of January 1, 2009 and have not been paid, and upon failure to make such payments when due, the whole of the principal, together with [other] charges…are immediately due and payable." *Id.* Bank indicated that the "total amount due was $340,018.88," including, *inter alia,* amounts for interest charges and attorney's fees. *Id.* at 3.

On August 26, 2010, Appellants filed an answer to Bank's complaint. *See* Appellants' Answer to [Bank's] Complaint in Mortgage Foreclosure, 8/26/10. Appellants "admitted" Bank's averment that Bank had been assigned the mortgage by Wilmington. *Id.* at 1. Additionally, Appellants averred that "the mortgage is not due as stated" in Bank's mortgage foreclosure action, and "specifically dispute[d] the amounts due and owing as listed in [Bank's] Complaint." *Id.*

On October 12, 2011, Bank moved for summary relief. Bank noted that its assignment from Wilmington had been duly recorded on July 27, 2010, and reiterated that Appellants had defaulted on the mortgage by failing to make monthly mortgage payments since January 1, 2009. Bank's Motion for Summary Judgment, 10/12/11, at 1-2. Bank noted that the total amount due on the mortgage had increased to $363,009.28. *Id.* at 2.

On November 7, 2011, Appellants filed their response to Bank's motion for summary judgment, along with a memorandum in support thereof. Appellants repeatedly indicated that "[Bank] has not established that they are the note holder. Only the holder of the note is entitled to enforce the mortgage." Appellants' Response to Bank's Motion for Summary Judgment, 11/7/11, at 1-3. In its supporting memorandum, Appellants indicated that "the assignment of the mortgage was executed by robo signers with no authority to execute this document." Memorandum of Law in Support of [Appellants'] Response to [Bank's] Motion for Summary Judgment, 11/7/11, at 3. Additionally, Appellants argued that since Bank was not the noteholder of Appellants' debt, Bank lacked standing to foreclose on Appellants' mortgage. *Id.* at 4.

On May 11, 2012, the trial court granted summary relief in Bank's favor. Appellants' timely appeal followed. Both the trial court and Appellants have complied with Pa.R.A.P. 1925.

Appellants present the following issue for our review:

> Whether the lower court erred in granting [Bank's] motion for summary judgment?

Appellants' Brief at 2.

Regarding Appellants' challenge to the entry of summary judgment, we recognize:

> Our scope of review...[of summary judgment orders]...is plenary. We apply the same standard as the trial court, reviewing all the evidence of record to determine whether there

> exists a genuine issue of material fact. We view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law will summary judgment be entered.
>
> Motions for summary judgment necessarily and directly implicate the plaintiff's proof of the elements of his cause of action. Summary judgment is proper if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. Thus a record that supports summary judgment will either (1) show the material facts are undisputed or (2) contain insufficient evidence of facts to make out a *prima facie* cause of action or defense and, therefore, there is no issue to be submitted to the jury. Upon appellate review we are not bound by the trial court's conclusions of law, but may reach our own conclusions. The appellate Court may disturb the trial court's order only upon an error of law or an abuse of discretion.

Chris Falcone, Inc. v. Ins. Co. of the State, 907 A.2d 631, 635 (Pa. Super. 2006) (citation omitted).

Initially we note that Appellants raise new grounds for their contentions that Bank lacked standing to foreclose on Appellants' mortgage due to an invalid assignment from Wilmington. Specifically, Appellants argue for the first time on appeal: 1) that "by providing a true and correct copy of the note in discovery[,] [Bank] is estopped from producing a different version in support of their motion for summary judgment;" 2) that Bank "continues to perpetuate a fraud [on] this court and cause harm to the Appellant[s] in this action through [Bank's] continued misrepresentation"

that Bank is the noteholder; 3) that "[u]nder the guidelines of the UCC, the [Bank] was never a holder in due course"; and 4) that Bank's "request for admissions[,] though deemed admitted[,] strengthen Appellants' case." Appellants' Brief at 14, 20, 21, and 22.

Our review of the record shows that Appellants did not raise any of these grounds in their answer to Bank's complaint, in their response to Bank's motion for summary judgment, nor in their memorandum of law in support thereof. It is well-settled that matters which were not raised before the trial court are deemed waived and are barred from being raised for the first time on appeal. *See* Pa.R.A.P. 302(a); ***see also In re F.C. III,*** 2 A.3d 1201, 1212 (Pa. Super. 2010). Therefore, since Appellants failed to raise the foregoing arguments before the trial court, we decline to reach them now.

As to Appellants' contention that Bank's assignment from Wilmington was invalid, we agree with the trial court's determination that this issue lacks merit. The note provides that Appellants "underst[ood] that [Wilmington] may transfer this Note. [Wilmington] **or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "noteholder."** Appellants' Note, 2/9/07, at 1. Moreover, the mortgage provides:

> This Security Instrument secures to [Wilmington]...the repayment of the Loan...and the performance of Borrower[s'] covenants and agreements under this Security Instrument and the Note. For this purpose, **Borrower[s] [do] hereby mortgage, grant and convey to [Wilmington], and to the**

> **successors and assigns of [Wilmington], [Appellants' property]**.

Appellants' Mortgage, 2/9/07, at 2. Further, Appellants "admitted" that Bank was the legal noteholder in their answer to Bank's complaint. *See* Appellants' Answer to [Bank's] Complaint in Mortgage Foreclosure, 8/26/10, at 1.

Additionally, the trial court observed that in assailing the assignment's validity, "[Appellants] cite news reports regarding 'robo-signing' and other abuses in the mortgage industry in general but make no argument applicable to the validity of the specific Assignment of Mortgage in question in this case." Trial Court Opinion, 5/11/12, at 3. Appellants' argument fails.

> Blind suspicions and unsupported accusations simply do not state a cause of action pursuant to any theory of tort recovery. Even our present liberalized system of pleading requires that the material facts upon which a cause of action is premised be pled with sufficient specificity so as to set forth the prima facie elements of the tort or torts alleged.

Feingold v. Hendrzak, 15 A.3d 937, 942-43 (Pa. Super. 2011) (emphasis and internal citation omitted). Accordingly, if an action cannot lie based on "blind suppositions and unsupported accusations", neither can summary relief in a mortgage foreclosure action be precluded by unfounded claims of wrongdoing by the mortgagor or its assignees.

Thus, as stated by the trial court and evinced by our analysis above, "[c]ontrary to [Appellants'] assertion, [Bank] became the party entitled to enforce the mortgage and the note by means of the Assignment of the

Mortgage and based upon the terms of the mortgage to which [Appellants] agreed." Trial Court Opinion, 5/11/12, at 3. Therefore, as the valid assignee of Appellants' defaulted mortgage, Bank has standing to bring this mortgage foreclosure action. ***Irwin Union Nat. Bank and Trust Co. v. Famous***, 4 A.3d 1099, 1106 (Pa. Super. 2010) ("A party has standing if he is aggrieved, i.e., he can show a substantial, direct, and immediate interest in the outcome.").

In sum, Appellants concede that "Appellants defaulted on their mortgage." Appellants' Brief at 4. Further, Appellants "do not dispute the general facts" involved in this action. *Id.* at 6. We therefore find no material dispute that Appellants have failed to pay their mortgage with Wilmington, which was validly assigned to Bank, and affirm the trial court's grant of summary relief in Bank's favor. ***See New York Guardian Mortg. Corp. v. Dietzel,*** 524 A.2d 951, 952-953 (Pa. Super. 1987) (affirming summary judgment in mortgagee's favor where mortgagor admitted he had failed to make timely payments and had defaulted on mortgage).

Order affirmed.