NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

WELLS FARGO BANK, N.A., D/B/A AMERICAS SERVICING COMPANY Appellee v. CHRIS HIPWELL Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2592 EDA 2013

Appeal from the Order Entered on August 21, 2013
In the Court of Common Pleas of Montgomery County
Civil Division at No.: No. 2011-11858

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and WECHT, J.

MEMORANDUM BY WECHT, J.: **FILED JULY 09, 2014**

Chris Hipwell appeals the order granting summary judgment in favor of Wells Fargo Bank, N.A., d/b/a/ America's Servicing Company ("Wells Fargo"). We affirm.

On December 9, 2004, Hipwell, through her agent-in-fact Brian Hipwell, executed a Mortgage and Promissory Note in the principal sum of $158,400. The Mortgage granted Mortgage Electronic Registration Systems, Inc. ("MERS"),[1] as a Nominee for Bryn Mawr Trust Company ("Bryn Mawr"),

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[1] MERS was created by an industry trade group for the purpose of tracking the assignments of the beneficial ownership of mortgages in the public recording system. ***See In re Condemnation by Penna. Turnpike Comm'n of Prop. Located in Londonderry Twp., Dauphin County***, slip op. at 2, 72 A.3d 329 (Pa. Cmwlth. 2013) (table), *appeal denied*, 87 A.3d 321 (Pa. 2014). MERS, as nominee for the lender, remains the nominal holder of the mortgage unless the note is subsequently transferred on the
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a security interest in the residential property located at 448 New Elm Street, Conshohocken, Pennsylvania (the "Property"). On December 14, 2004, the Mortgage was recorded in Montgomery County, Mortgage Book No. 169, page 228.

On December 10, 2010, MERS, as Nominee for Bryn Mawr, assigned the Mortgage to Wells Fargo. On December 20, 2010, that assignment was recorded in Montgomery County, Mortgage Book No. 12987, page 01254. On May 4, 2012, Wells Fargo filed an *in rem* complaint in mortgage foreclosure. The complaint averred that Hipwell, as mortgagor, had defaulted on her obligations under the Note and Mortgage by failing to make the payment due on June 1, 2010, and in each month thereafter. The complaint alleged damages in default consisting of accelerated payments, interest, late charges, and other fees totaling $178,982.21. Complaint in Mortgage Foreclosure at 4 (unnumbered).

On July 16, 2012, Hipwell filed an Answer and Motion to Dismiss. On August 2, 2012, Wells Fargo filed a Preliminary Objection to Hipwell's Answer and Motion to Dismiss, arguing that Hipwell's pleading was procedurally improper. Specifically, Wells Fargo asserted that a motion to dismiss is not a valid pleading in response to a complaint for which an answer has been filed. ***See*** Pa.R.C.P. 1017(a) (listing pleadings acceptable in response to a

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secondary market to a non-MERS member, at which point the mortgage is assigned to the non-member. ***Id.*** at 12 n.10.

civil complaint). On October 16, 2012, the trial court sustained Wells Fargo's Preliminary Objection and dismissed Hipwell's Motion to Dismiss with prejudice.

On February 11, 2013, Wells Fargo filed a motion for summary judgment. Wells Fargo attached to that motion a copy of the original Note, indorsed in blank.[2] ***See*** Motion for Summary Judgment, exh. A1. Also attached to Wells Fargo's motion for summary judgment was an affidavit from Wells Fargo's Vice President of Loan Documentation, Tammy Lockhart. Lockhart's affidavit averred that "[Wells Fargo] directly or through an agent has possession of the Promissory Note." ***Id.***, exh. B.

On March 6, 2013, Hipwell filed a memorandum in opposition to Wells Fargo's motion for summary judgment. Therein, Hipwell averred that Wells Fargo lacked standing because it "failed to submit any evidence that establishes that MERS either held the []Note or was given the authority to assign the Note." Memorandum in Opposition to Summary Judgment at 5. Hipwell did not challenge the authenticity of the Note, Wells Fargo's

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[2] A blank indorsement is any indorsement made by the holder of an instrument that does not identify a person to whom the instrument is payable. ***See*** 13 Pa.C.S. § 3205(b). "When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed," *i.e.*, indorsed to a specific party. ***Id.*** A "special indorsement" is one that "identifies a person to whom it makes the instrument payable." Upon such an indorsement, the instrument "becomes payable to the identified person and may be negotiated only by the indorsement of that person." 13 Pa.C.S. § 3205(a).

assertion that it was in possession of the Note, or that the note was indorsed in blank.

On August 23, 2013, the trial court granted Wells Fargo's motion for summary judgment. On September 5, 2013, Hipwell filed a notice of appeal. On September 11, 2013, the trial court ordered Hipwell to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Hipwell timely complied. On November 8, 2013, the trial court issued an opinion pursuant to Pa.R.A.P. 1925(a).

Hipwell presents the following six assertions of trial court error:

1. The trial court failed to delineate the required proof to foreclose on the subject property (*i.e.* the underlying note controls).
2. The trial court failed to find that MERS lacked the power to transfer the note to Wells Fargo.
3. The trial court failed to find that Wells Fargo lacked standing to proceed.
4. The trial court failed to require Wells Fargo to produce the original note.
5. The trial court failed to find that the note and mortgage were impermissibly split.
6. The trial court failed to find that there are genuine issues of material fact in this matter.

Brief for Hipwell at 3 (minor modifications for clarity).[3]

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[3] Although Hipwell identifies six questions for our review, she does not divide her argument into six corresponding sections. Our Rules of Appellate Procedure require that the argument section be "divided into as many parts as there are questions to be argued." Pa.R.A.P. 2119(a). Nevertheless, we
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Our standard of review of a trial court's order granting summary judgment is well-settled:

> A reviewing court may disturb the order of the trial court only where it is established that the court committed an error of law or abused its discretion. As with all questions of law, our review is plenary.
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> In evaluating the trial court's decision to enter summary judgment, we focus on the legal standard articulated in the summary judgment rule. Pa.R.C.P. 1035.2. The rule states that where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law, summary judgment may be entered. Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which it bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law. Lastly, we will 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.

JP Morgan Chase Bank, N.A. v. Murray, 63 A.3d 1258, 1261–62 (Pa. Super. 2013) (quoting ***Murphy v. Duquesne Univ. of the Holy Ghost***, 777 A.2d 418, 429 (Pa. 2001)).

In ***Murray***, we held that a note that secures a mortgage is a negotiable instrument governed by Pennsylvania's Uniform Commercial Code ("PUCC").[4] ***Id.*** at 1265. Section 3104 of the PUCC provides as follows:

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will exercise our discretion to overlook this procedural error because it does not impede our review. ***See*** Pa.R.A.P. 105(a), 2101.

[4] ***See*** 13 Pa.C.S. §§ 1101, *et seq*.

> "[N]egotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:
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> 1. is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
> 2. is payable on demand or at a definite time; and
> 3. does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain:
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> (i) an undertaking or power to give, maintain or protect collateral to secure payment;
>
> (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral; or
>
> (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

13 Pa.C.S. § 3104. A holder in due course of a negotiable instrument is defined as the holder of an instrument if "the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity." ***Id.*** § 3302. "When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." ***Id.*** § 3205(b).

> A note is payable to the bearer if it:
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> 1. states that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;
> 2. does not state a payee; or
> 3. states that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.

Id. § 3109(a).

Instantly, Hipwell challenges the Note's alleged chain of assignments and Wells Fargo's standing to enforce it. All of Hipwell's contentions relate to the trial court's conclusion that no genuine issues of material fact existed as to Wells Fargo's standing to seek foreclosure. Accordingly, we combine all of Hipwell's claims for ease of disposition.

Hipwell principally argues that one cannot trace an unbroken chain of ownership of the Note from MERS to Wells Fargo.[5] Specifically, Hipwell contends that "[t]here was no evidence before the [trial] court to show a proper assignment of the Note." Brief for Hipwell at 15. Hipwell's argument further posits that our holding in ***Murray*** supports her contention that Wells Fargo lacks standing to foreclose because it failed to "demonstrate that the chain of title has not been broken." Brief for Hipwell at 14. We disagree.

Hipwell misunderstands our decision in ***Murray***, in which we rejected outright a mortgagor's challenge to the chain of title associated with a note that allegedly was indorsed in blank. In ***Murray***, we held that a note secured by a mortgage is a negotiable instrument governed by the PUCC, and that any alleged defects in the chain of assignments to the purported mortgagee were immaterial to the right of a mortgagee to enforce the note. 63 A.3d at 1265-66. In her memorandum in opposition to summary

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[5] Hipwell does not take issue with the Mortgage's chain of assignments.

judgment, Hipwell argued that summary disposition was inappropriate because Wells Fargo failed to present evidence that MERS had the authority to assign the Note to Wells Fargo. However, based upon our holding in ***Murray***, no such evidence was required. Accordingly, Hipwell's contentions relating to the chain of possession by which Wells Fargo came to hold the Note are irrelevant.

Critically, Hipwell did not materially dispute Wells Fargo's actual possession of the Note, nor did she challenge the authenticity of the Note attached to Wells Fargo's motion for summary judgment.[6] The certified record in this case demonstrates that Hipwell executed the Note in favor of Bryn Mawr. Motion for Summary Judgment, exh. A1. Bryn Mawr subsequently indorsed the Note to the order of Aurora Financial Group, Inc. ("Aurora"). Thereafter, Aurora indorsed the Note in blank, rendering it a bearer instrument pursuant to the PUCC.[7] Wells Fargo attached a copy of

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[6] Hipwell's brief refers to the trial court's failure to view "the original Note." Brief for Hipwell at 2. To the extent that Hipwell seeks to challenge Wells Fargo's actual possession of the Note (as opposed to the chain of assignments by which Wells Fargo came to possess the Note), her claim is waived because she did not raise an objection before the trial court. ***See Irwin Union Nat'l Bank & Trust Co. v. Famous***, 4 A.3d 1099, 1104 (Pa. Super. 2010) ("It is well settled that issues not raised below cannot be advanced for the first time in a [Rule] 1925(b) statement or on appeal."); Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

[7] ***See*** 13 Pa.C.S. §§ 3205(b) ("When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone . . . ."), 3301 ("A person may be a person entitled to enforce the

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the Note to its motion for summary judgment. Also attached to Wells Fargo's motion for summary judgment was an affidavit from Wells Fargo's Vice President of Loan Documentation, Tammy Lockhart. Therein, Lockhart averred that "[Wells Fargo] directly or through an agent has possession of the Promissory Note." ***Id.***, exh. B. Hipwell did not dispute any of this evidence. Accordingly, the trial court correctly determined that there were no disputed material facts regarding Wells Fargo's actual possession of the Note.

Finally, we turn to Hipwell's assertion that the trial court "failed to find that the Note and Mortgage were impermissibly split." Brief for Hipwell at 3. Hipwell's argument on this point is largely a restatement of her earlier claims, with the additional proclamation that, because "the MERS system splits the Note from the Mortgage, the two instruments became, in essence, legal nullities." ***Id.*** at 13. Hipwell cites no binding legal authority in support of her assertion that a mortgagee lacks standing to foreclose absent a showing that the Mortgage and Note traveled identical paths.[8] Moreover,

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instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.").

[8] In support of her "impermissible splitting" theory, Hipwell cites ***Carpenter v. Longan*** for the proposition that "[t]he note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." 83 U.S. 271, 274 (1872). Hipwell's reliance upon this language, however, is misplaced. In ***Carpenter***, the United States
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Hipwell's argument on this point is patently at odds with our case law and the PUCC. ***See Murray***, 63 A.3d at 1266 ("[W]e find Murray's challenges to the chain of possession by which Appellee came to hold the Note immaterial to its enforceability . . . ."); 13 Pa.C.S. § 3205(b) ("When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.").

Assuming, *arguendo*, that Hipwell makes a cogent legal argument on this point, her argument is based upon no more than the bald averments of her memorandum in opposition to summary judgment. Throughout the litigation, Wells Fargo has maintained only that it possesses the original Note. Yet, Hipwell's contention is based upon her unsubstantiated belief that MERS assigned the note to Wells Fargo. ***See*** Memorandum in Opposition to Summary Judgment at 2 ("The crucial issue, therefore, is whether the 'nominee,' [MERS], had the power to transfer any rights to [Wells Fargo] regarding the applicable Note in this matter."). Such a conclusory assertion of law does not establish a genuine issue of material fact. ***See Ertel v. Patriot-News Co.***, 674 A.2d 1038, 1042 (Pa. 1996) (holding that a non-moving party "may not avoid summary judgment by resting upon the mere allegations or denials of his pleading" (internal quotation marks and modifications omitted)).

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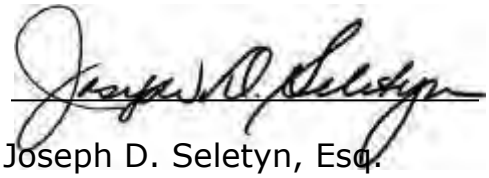
Supreme Court was addressing Colorado Territorial law and federal common law, neither of which bears upon the case *sub judice*.

Hipwell failed to adduce evidence sufficient to avoid entry of summary judgment on behalf of Wells Fargo, and the trial court neither erred as a matter of law nor abused its discretion in granting Wells Fargo's motion for summary judgment.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/9/2014