[Cite as *Bank of Am., N.A. v. Kenney*, 2015-Ohio-2485.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

BANK OF AMERICA, N.A., GREEN TREE SERVICING, LLC,	:	APPEAL NO. C-140484 TRIAL NO. A-1302477
Plaintiff-Appellee,	:	*O P I N I O N.*
vs.	:	
BRIAN D. KENNEY,	:	
Defendant-Appellant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 24, 2015

Mike L. Wiery and *Rachel M. Kuhn,* for Plaintiff-Appellee,

Brian D. Kenney, pro se.

Please note: this case has been removed from the accelerated calendar.

DEWINE, Judge.

{¶1} This is an appeal by a borrower from a summary judgment in a foreclosure action. The case presents the following question: must a plaintiff in a foreclosure action that has demonstrated that it is the holder of the promissory note and an assignee of the mortgage also demonstrate that it is in physical possession of the mortgage? Answering the question in the negative, we uphold the trial court's judgment of foreclosure.

I. Background

{¶2} Brian and Melissa Kenney bought a house in 2009. The purchase was financed through a loan from Bank of America. Brian executed a note ("the Note") by which he promised to repay the loan. The Note was secured by a mortgage ("the Mortgage") executed by Brian and Melissa.

{¶3} Mr. Kenney defaulted in December of 2012 by failing to make payments. Bank of America sued to foreclose on the property in 2013. While the action was pending, Bank of America transferred its interest by assigning the mortgage and transferring physical possession of the original note to Green Tree Servicing, LLC, ("Green Tree"). The trial court granted a motion filed by Bank of America to substitute Green Tree as the real party in interest pursuant to Civ.R. 17. Subsequently, the court granted summary judgment in Green Tree's favor.

II. Standing

{¶4} In a single assignment of error, Mr. Kenney argues that Green Tree lacks standing because "it does not have possession, custody or control of the original mortgage."

{¶5} In support of its motion for summary judgment, Green Tree produced an affidavit from an employee that averred, among other things, that she had reviewed copies of the Note and Mortgage that were maintained as part of Green Tree's business records, that Green Tree was in possession of the original Note, that Mr. Kenney was in default under the terms of the Note and Mortgage, and that the default had not been cured. Copies of the Note, Mortgage, and an Assignment of Mortgage from Bank of America to Green Tree, all of which the affiant averred to be true and accurate, were attached to the affidavit. Green Tree also submitted an affidavit from an attorney who had reviewed "the title work and Hamilton County Records" and averred that Green Tree was the record holder of the Note and Mortgage.

{¶6} Mr. Kenney did not dispute that he had not paid what he owed under the Note. Rather, his only argument in opposition to summary judgment was that Green Tree did not possess the original mortgage. He supported this argument by citing to Green Tree's statement in response to a written interrogatory that "it is not in physical possession of any original documents signed by Brian D. Kenney on June 4, 2009, except for the Original Note at issue herein."

{¶7} We may quickly dispose of the claim that Green Tree lacks standing because it has not produced the original mortgage. Standing goes to the question of whether a party possesses "some real interest in the subject matter of the action." *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 22, quoting *State ex rel. Dallman v. Court of Common Pleas,*

Franklin Cty., 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973). In a foreclosure action, a party has standing when it has an interest in the note or mortgage. Here, there is no question that Green Tree has an interest in both the Note and Mortgage—the record demonstrates that Green Tree is a holder of the Note and has received an assignment of the Mortgage. Thus, Green Tree has an interest in the subject matter of the litigation that is sufficient to confer standing.

{¶8} Mr. Kenney also suggests that standing is lacking because Bank of America assigned the Mortgage and Note to Green Tree while the litigation was ongoing. He cites to *Schwartzwald* in support of his argument. But the problem in *Schwartzwald* was that the plaintiff did not acquire an interest in the note or mortgage until after the complaint was filed. *Schwartzwald* at ¶ 17, 28. Conversely, in this case, the foreclosure suit was filed by Bank of America, who held the original Note and original Mortgage, and, therefore, had standing. *See Losantiville Holdings, LLC v. Kashanian*, 1st Dist. Hamilton No. C-110865, 2012-Ohio-3435, ¶ 17-18. After the filing, Bank of America transferred the Note and assigned the Mortgage to Green Tree. Once Bank of America's interests were transferred to Green Tree, Green Tree was properly substituted as a party.

III. No Requirement of Physical Possession of Mortgage

{¶9} While Mr. Kenney couches his argument in terms of standing, what he really seems to be arguing is that Green Tree cannot enforce the Note because it has not demonstrated that it is in physical possession of the Mortgage.

{¶10} It is true that a party seeking to enforce a mortgage note generally must demonstrate physical possession of the note. A note is a negotiable instrument under Ohio's version of the UCC. *See* R.C. 1303.03. Thus to enforce a note, one must demonstrate that he is either (1) a holder of the note—i.e. in physical possession of a note

payable to himself or to bearer, (2) a nonholder in physical possession of the note, or (3) that he is entitled to enforce a lost, stolen, or destroyed note. R.C. 1303.31 and 1301.201(21). Here, Green Tree was a holder of the Note—the Note was endorsed in blank and in the possession of Green Tree. Thus, it was entitled to enforce the Note.

{¶11} A mortgage, unlike a note, is not a negotiable instrument. *See* R.C. 1303.03. Thus, there is no UCC requirement that one who has received a valid assignment of a mortgage demonstrate actual physical possession of the mortgage itself in order to enforce the security interest provided by the mortgage.

{¶12} Ohio courts have allowed a party to foreclose on property where the party has demonstrated that it is the holder of the note and has received an assignment of the mortgage. *See, e.g., BAC Home Loans Servicing, L.P. v. Haas*, 3d Dist. Marion No. 9-13-40, 2014-Ohio-438, ¶ 28; *Nationstar Mtge., L.L.C. v. Grund*, 11th Dist. Ashtabula No. 2014-A-0024, 2014-Ohio-5612, ¶ 21. Further, it has been held that the "transfer of a note secured by a mortgage also acts as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered." *U.S. Bank, N.A. v. Coffey*, 6th Dist. Erie No. E-11-026, 2012-Ohio-721, ¶ 31.

{¶13} In support of his argument, Mr. Kenney relies solely on some language he culls from a case out of the Kansas Supreme Court. *See Landmark Natl. Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158, 167 (2009). The language he cites explains that if the mortgage and note are held by independent entities, it would be impossible for the holder of the note to foreclose unless the holder of the mortgage was the agent for the note holder. *Id.* at 167. Be that as it may, such a situation is not present here. The evidence in the record is uncontroverted that Green Tree is the holder of the Note and has been assigned the Mortgage.

V. Conclusion

{¶14} Green Tree demonstrated that it was the holder of the Note and the assignee of the Mortgage. As a consequence, it was entitled to enforce its rights through foreclosure. The sole assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

CUNNINGHAM, P.J., and **MOCK, J.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.