

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Countrywide Home Loan Servicing, L.P., :  
Plaintiff-Appellee, :  
v. : No. 09AP-819  
(C.P.C. No. 08CVE-12-17523)  
James D. Thomas, Jr. et al., : (REGULAR CALENDAR)  
Defendants-Appellants. :

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D E C I S I O N

Rendered on June 30, 2010

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*Lerner, Sampson & Rothfuss, LPA, and Adam R. Fogelman,*  
for appellee.

*James D. Thomas, Jr.,* pro se.

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APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, James D. Thomas, Jr. ("appellant"), appeals from a decision of the Franklin County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, Ocwen Loan Servicing, LLS ("Ocwen")<sup>1</sup> in the foreclosure action against him.

{¶2} On or about October 31, 2005, appellant executed and delivered a note and mortgage with America's Wholesale Lender. The note and mortgage were filed on November 5, 2005. Countrywide Home Loan Servicing, L.P. ("Countrywide"), filed its

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<sup>1</sup> Ocwen was substituted as a party-plaintiff in this case pursuant to the trial court's May 4, 2009 entry.

complaint in foreclosure on December 10, 2008, stating that it held the note executed by appellant. The complaint indicated that a copy of the note was not attached to the complaint because it was "not available." The mortgage was attached to the complaint and named America's Wholesaler Lender as the lender and contained a blank endorsement to Countrywide Home Loans, Inc., a New York Corporation, d.b.a. America's Wholesale Lender. The complaint also alleged default under a promissory note and demanded enforcement of the mortgage. On May 4, 2009, the trial court granted Countrywide's motion to substitute Ocwen as a party-plaintiff based on the assignment of the note and mortgage from Countrywide to Ocwen that occurred on March 24, 2009.

{¶3} On May 21, 2009, Ocwen filed a motion for summary judgment with supporting affidavits arguing there was no genuine issue of material fact that appellant was in default under the terms and conditions of the note and mortgage held by Ocwen. Responses were filed, and on July 31, 2009, the trial court granted summary judgment in favor of Ocwen. This appeal followed, and appellant brings the following assignment of error<sup>2</sup> for our review:

Whether the trial court erred in granting summary judgment to the substitute plaintiff as the original plaintiff lacked standing to file the complaint?

{¶4} This matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the

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<sup>2</sup> Although appellant titles this as an "Issue," we deem this to be his assignment of error.

motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. *Id.*

{¶5} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Bard v. Society Natl. Bank, nka KeyBank* (Sept. 10, 1998), 10th Dist. No. 97APE11-1497. Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant in the trial court are found to support it, even if the trial court failed to consider those grounds. See *Dresher*, *supra*; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶6} In his single assignment of error, appellant contends Countrywide was not the real party in interest at the time it filed its complaint in foreclosure, and, therefore, the trial court lacked subject-matter jurisdiction over this cause of action. For the reasons that follow, we do not find appellant's arguments persuasive.

{¶7} The complaint filed by Countrywide stated that it currently owned the note that was the subject of the action. Though the note was not attached, the mortgage naming America's Wholesale Lender as the lender and containing a blank endorsement to Countrywide, dba America's Wholesale Lender, was attached to the complaint. After

the complaint was filed, Ocwen was substituted for Countrywide as a party-plaintiff based on an assignment of the note and mortgage from Countrywide to Ocwen dated March 24, 2009. The affidavit filed in support of Ocwen's motion for summary judgment stated that Ocwen was the holder of the subject note and mortgage. A supplemental "Affidavit As To Real Party In Interest" of Kevin M. Jackson, custodian of the books and records maintained by Ocwen, was filed on July 23, 2009. This affidavit stated that Countrywide obtained the authority to hold the note, and the mortgage securing the same, on or about November 4, 2005. The affidavit further indicated that while Mortgage Electronic Registration Systems, Inc. ("MERS"), the nominee for America's Wholesale Lender, executed an assignment of mortgage from it to Countrywide on December 11, 2008, this assignment was "merely an administrative function to update the public records, as all legal and equitable interest in the loan & mortgage was passed to [Countrywide] prior to December 10, 2008." (July 23, 2009 affidavit, 2.)

{¶8} Appellant does not dispute that Ocwen was the holder and owner of the note and mortgage at the time Ocwen filed for summary judgment. Rather, appellant contends that when Countrywide filed its complaint on December 10, 2008, it was not the real party in interest and lacked capacity to sue on the note and mortgage because MERS had not yet assigned the same to Countrywide.

{¶9} Indeed, Civ.R. 17(A) states:

Every action shall be prosecuted in the name of the real party in interest. \* \* \* No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect

as if the action had been commenced in the name of the real party in interest

{¶10} Appellant relies on *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092, wherein the Eighth District Court of Appeals held that Wells Fargo Bank lacked standing to bring a foreclosure action because it owned neither the note nor the mortgage at the time it filed its foreclosure action. Here, however, Ocwen established that Countrywide did hold the note at the time it filed the instant complaint. Further, the Fifth District Court of Appeals has considered and upheld judgments against debtors in scenarios analogous to ours. In *U.S. Bank Natl. Assn. v. Bayless*, 5th Dist. No. 09 CAE 01 004, 2009-Ohio-6115, discretionary appeal not allowed by 124 Ohio St.3d 1509, 2010-Ohio-799, the debtor executed a promissory note and a mortgage to secure the note on November 10, 1998, with Northwest Bank. After default, on February 28, 2008, U.S. Bank filed a complaint in foreclosure alleging that it was the holder of the note; however, Wells Fargo, the prior holder of both the note and mortgage (via a merger with Northwest Bank), did not formally assign and transfer the note and mortgage to U.S. Bank until April 14, 2008. The debtor filed a motion to dismiss based on standing, and U.S. Bank filed a motion for summary judgment. The trial court granted summary judgment in favor of U.S. Bank, and the court of appeals affirmed. The *Bayless* court stated:

In *Wachovia Bank, N.A. v. Cipriano*, Guernsey App. No. 09CA007, 2009 Ohio 5470, ¶38, we emphasized: "Pursuant to Civ.R. 17(A), the real party of interest shall 'prosecute' the claim. The rule does not state 'file' the claim." We thus rejected Cipriano's argument in that case that the trial court had lacked jurisdiction because Wachovia was not the holder or owner of the note and mortgage at the time of the filing of the complaint. *Id.* at ¶40. We rejected a similar "real party in interest" argument in *LaSalle Bank Natl. Assn. v. Street*, Licking App. No. 08 CA 60, 2009 Ohio 1855, ¶28.

Id. at ¶22. Therefore, in *Bayless*, because U.S. Bank filed notice of the assignment of the note and mortgage prior to the trial court's granting of summary judgment, the court found there was no evidence contradicting U.S. Bank's ownership, and summary judgment was appropriate.

{¶11} Likewise, in *Deutsche Bank Natl. Trust Co. v. Pagani*, 5th Dist. No. 09CA000013, 2009-Ohio-5665, the debtor argued Deutsche Bank was not the real party in interest because Deutsche Bank filed its foreclosure complaint on July 15, 2008, despite the fact the assignment of the note and mortgage from Ameriquest Mortgage Co. did not occur until July 23, 2008, eight days later. Relying on *Taylor* and *Street*, supra, the *Pagani* court found that when Deutsche Bank filed its motion for summary judgment, it provided sufficient evidence via affidavit that it was the current holder of the note and mortgage, and, because the debtors failed to meet their reciprocal burden under Civ.R. 56, the debtors failed to establish a genuine issue of material fact existed, the court held that summary judgment in favor of Deutsche Bank was appropriate. See also *U.S. Bank Natl. Assn. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178 (holding the negotiation of a note operates as an equitable assignment of the mortgage even though the mortgage is not assigned or delivered). Here, it is undisputed that Countrywide was the holder of the note at the time it filed the instant action. It is further undisputed that Ocwen was the holder of the note and mortgage at the time it filed for summary judgment. Thus, under *Bayless*, even if Countrywide did not formally hold the note, which it did, and mortgage at the time it filed its complaint, because Ocwen undisputedly established it was the holder of the note and mortgage at the time it filed for summary judgment and appellant

produced no evidence to create a genuine issue of material fact as to this issue, summary judgment in favor of Ocwen was appropriate. Accordingly, we overrule appellant's assignment of error.

{¶12} Having overruled appellant's single assignment of error, the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Judgment affirmed.*

TYACK, P.J., and SADLER, J., concur.

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