[Cite as *Deutsche Bank Natl. Trust Co. v. Pagani*, 2009-Ohio-5665.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DEUTSCHE BANK NATIONAL TRUST COMPANY	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09CA000013
PAUL A. PAGANI, et al.	:	
	:	
	:	
Defendants-Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Knox County Court of Common Pleas Case No. 08FR007-0426
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	October 23, 2009

APPEARANCES:

For Plaintiff-Appellee:

KEVIN L. WILLIAMS
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Columbus, OH 43216-5028

For Defendants-Appellants:

WILLIAM J. KEPKO
SHERRY M. PHILLIPS
108 E. Vine St.
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Delaney, J.

{¶1} Defendants-Appellants Paul A. and Jodean Pagani appeal the February 4, 2009 Judgment Entry and Decree of Foreclosure issued by the Knox County Court of Common Pleas. Plaintiff-Appellee is Deutsche Bank National Trust Company. For the reasons that follow, we affirm.

STATEMENT OF THE FACTS AND THE CASE

{¶2} On or about December 13, 2005, Appellants executed and delivered a note and mortgage with Ameriquest Mortgage Company.

{¶3} On July 15, 2008, Appellee, Deutsche Bank National Trust Company filed a complaint in foreclosure against Appellants. In its complaint, Appellee stated that it currently owned or serviced the promissory note executed by Appellants. The promissory note was not attached to the complaint because Appellee stated that it had been lost, misplaced, or destroyed. The mortgage identified in the complaint named Ameriquest Mortgage Company as the lender. Appellants filed their answer on August 1, 2008 raising seven affirmative defenses.

{¶4} On August 20, 2008, Appellee filed its Motion for Summary Judgment arguing there was no genuine issue of material fact that Appellants were in default under the terms and conditions of the Note and Mortgage. Appellee attached an affidavit to its motion for summary judgment stating that it was in custody of and maintained the records related to the promissory note and mortgage that was the subject of the foreclosure action. The promissory note and mortgage were attached as exhibits and both listed Ameriquest Mortgage Company as lender.

{¶5} Appellants filed their response on September 15, 2008, arguing Appellee lacked standing to file the complaint in foreclosure and was not the proper party in interest. Appellants referred to Appellee's complaint and motion in summary judgment to argue that Appellee failed to show that it was the real party in interest. Appellee's judicial report, attached to Appellee's complaint, did not show any assignment of the mortgage and note originated by Ameriquest Mortgage Company. Appellants also argued that there was a genuine issue of fact as to whether Ameriquest Mortgage Company engaged in predatory lending practices to secure the terms of the original note and mortgage.

{¶6} With leave of the trial court, Appellants filed an amended answer on October 2, 2008. Their amended answer asserted nine affirmative defenses. The eighth affirmative defense stated that Appellee lacked standing to bring the complaint because Appellee was not the proper party in interest at the time it filed the complaint. Appellant's ninth affirmative defense asserted a claim of fraud and fraud in the inducement, alleging Ameriquest Mortgage Company engaged in predatory lending practices in securing the terms of the original note and mortgage.

{¶7} On October 10, 2008, Appellee filed a notice of filing assignment of mortgage. The attached assignment, labeled Exhibit A, showed that Ameriquest Mortgage Company assigned Appellants' mortgage and note to Appellee on July 23, 2008, eight days after the filing of the complaint.

{¶8} The trial court entered summary judgment in favor of Appellee on February 4, 2009 and issued a decree in foreclosure. It is from this decision Appellants now appeal.

ASSIGNMENTS OF ERROR

{¶9} Appellants raise two assignments of error:

{¶10} "I. THE TRIAL COURT ERRED BY ENTERING JUDGMENT IN THE CASE WHEN IT LACKED SUBJECT MATTER JURISDICTION OVER THE PLAINTIFF'S CAUSES OF ACTION, AS THE ASSIGNMENT OF MORTGAGE RELIED UPON BY PLAINTIFF WAS EXECUTED AND RECORDED AFTER THE COMPLAINT WAS FILED, THUS PLAINTIFF WAS NOT A PROPER PARTY IN INTEREST WITH RESPECT TO THE NOTE AND MORTGAGE AT ISSUE AT THE TIME OF THE FILING OF THE COMPLAINT.

{¶11} "II. THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO PLAINTIFF WITHOUT CONDUCTING A TRIAL ON DEFENDANT'S PREDATORY LENDING AND WAIVER CLAIMS, WHICH RAISED DISPUTED ISSUES OF MATERIAL FACT AND PRECLUDED SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF UNDER RULE 56 OF THE OHIO RULES OF CIVIL PROCEDURE."

STANDARD OF REVIEW

{¶12} We review Appellants' assignments of error pursuant to the standard set forth in Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶13} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is

adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶14} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

I.

{¶15} In Appellants' first assignment of error, they argue Appellee was not the real party in interest at the time Appellee filed their complaint in foreclosure, therefore the trial court lacked subject matter jurisdiction over Appellee's causes of action. We disagree.

{¶16} Appellee filed its complaint on July 15, 2008. The complaint stated that it currently owned the promissory note subject to the action. The promissory note was not attached to the complaint, but the mortgage attached to the complaint indicated that Ameriquest Mortgage Company was the lender. On August 20, 2008, Appellee filed a motion for summary judgment to which Appellee attached an affidavit stating that it was in custody of and maintained the records that related to the note and mortgage. On October 10, 2008, Appellee filed a notice of filing assignment that showed on July 23, 2008, Ameriquest Mortgage Company assigned the note and mortgage to Appellee.

{¶17} Appellants do not dispute that Appellee was the current holder and owner of the note and mortgage at the time Appellee filed its motion for summary judgment.

Appellants argue that on July 15, 2008 when Appellee filed its complaint, Appellee was not the real party in interest and therefore lacked capacity to sue on the note and mortgage because Ameriquest Mortgage Company had not yet assigned the note and mortgage to Appellee. Appellants rely on Civ.R. 17(A) to support their argument that Appellee was not the real party in interest. Civ.R. 17(A) states that:

{¶18} "[e]very 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."

{¶19} This Court has previously addressed the argument raised by Appellants in *Provident Bank v. Taylor*, Delaware App. No. 04CAE05042, 2005-Ohio-2573 and *LaSalle Bank Natl. Assoc. v. Street*, Licking App. No. 08CA60, 2009-Ohio-1855. In both cases, the putative mortgagee filed its complaint in foreclosure before the original lender had assigned the mortgagee the note and mortgage. The mortgagee in each case filed motions for summary judgment, attaching Civ.R. 56 evidence that the mortgagee was the holder and the owner of the note and mortgage. The trial court granted the motions for summary judgment and the matters came to us on appeal both under the argument that the mortgagee was not the real party in interest at the time it filed the complaint.

{¶20} In *Provident Bank* and *LaSalle Bank*, we affirmed the decisions of the trial court to grant summary judgment in favor of the mortgagees. We found that in responding to the mortgagee's motion for summary judgment, the mortgager failed to

provide Civ.R. 56 evidence to create a genuine issue of fact that the mortgagee was not the holder and owner of the mortgage. *LaSalle Bank*, at ¶28.

{¶21} The holders of rights or interest in property are necessary parties to a foreclosure action. *Wells Fargo Bank v. Jordan*, Cuyahoga App. No. 91675, 2009-Ohio-1092, jurisdiction declined (Sept. 20, 2009).

{¶22} In *U.S. Bank v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032, the Seventh District Court of Appeals addressed a similar argument regarding whether a mortgagee was a real party in interest at the time it filed the complaint in foreclosure. The court determined that even though there was evidence that the mortgagee was not an assignee of a note and mortgage, the mortgagee submitted Civ.R. 56 evidence in support of its motion for summary judgment to demonstrate there was no genuine issue of material fact that the mortgagee was the current holder and owner of the note and mortgage. Id. at ¶48-49. "Where a note secured by a mortgage is transferred so as to vest the legal title to the note in the transferee, such transfer operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered." Id. at ¶52; *LaSalle Bank*, 2009-Ohio-1855 at ¶28. Because there was sufficient evidence that the mortgagee was the current owner of the note and mortgage at issue, the court found that the mortgagee was the real party in interest. Id. at ¶54.

{¶23} In the present case, we find that Appellee provided sufficient affidavit evidence to demonstrate that it was the current holder and owner of the note and mortgage. Appellants did not provide Civ.R. 56 evidence to create a genuine issue of material fact that Appellee was not the owner and holder of the note and mortgage. We

follow the authority of *Provident Bank* and *LaSalle Bank* to find that Appellants' argument that Appellee was not the real party in interest to be without merit.

{¶24} Appellants' first assignment of error is overruled.

II.

{¶25} Appellants argue in their second assignment of error that the trial court erred in granting summary judgment in favor of Appellee when there were genuine issues of material fact as to Appellants' claims of predatory lending and waiver. We disagree.

{¶26} Appellants raised the issues of waiver and predatory lending as affirmative defenses in their amended answer filed on October 2, 2008. Appellants first state that Appellee did not provide any Civ.R. 56 evidence to establish there were no genuine issues of material fact as to Appellants' affirmative defenses. We find this to be a misstatement of the law. In *Todd Development Co. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, syllabus, the Ohio Supreme Court held that a plaintiff or counterclaimant moving for summary judgment does not bear the initial burden of addressing the nonmoving party's affirmative defenses. It was Appellants' burden to submit in their response to Appellee's motion for summary judgment evidence that showed a genuine issue of material fact with respect to Appellants' affirmative defenses. Id. at ¶18.

{¶27} Appellants next argue that the Civ.R. 56 evidence provided in support of their response to Appellee's motion for summary judgment create a genuine issue of material fact as to whether Ameriquest Mortgage Company engaged in predatory lending in securing the note and mortgage with Appellants. On September 15, 2008,

Appellants filed their response to Appellee's motion for summary judgment. Appellants supported their argument that a genuine issue of material fact existed with their sworn affidavits; however, the affidavits were not attached to their response to the motion for summary judgment. On September 16, 2008, Appellants filed a Motion for Leave to File Supplemental Materials because Appellants inadvertently omitted their affidavits from the response. The record does not have the affidavits attached to motion for leave to supplement. The trial court granted Appellants' Motion for Leave to File Supplemental Materials on January 28, 2009. The affidavits were not attached to the trial court's judgment entry. In fact, this Court has thoroughly reviewed the trial court record and we find that Appellants' affidavits are not part of the record. It is Appellants' responsibility to provide the reviewing court with a record of the facts, testimony, and evidentiary matters which are necessary to support Appellants' assignments of error. *Volodkevich v. Volodkevich* (1989), 48 Ohio App.3d 313, 314, 549 N.E.2d 1237.

{¶28} Appellants are not required to conclusively demonstrate their case, but to only produce enough evidence to show that there remained a genuine issue of material fact. *Todd Development Co*., at ¶18. Regardless of the absence of Appellants' affidavits, we find that there was no further evidence submitted to allow reasonable minds to come to differing conclusions. Based on the record, we cannot say that Appellants created a genuine issue of material fact as to their claim of predatory lending.

{¶29} Appellants also argue in their brief before this Court that Appellants' affidavits established the existence of an intervening agreement between Appellee and Appellants that invalidated Appellee's right to foreclose. As stated above, the affidavits

are not part of the underlying record. Further, upon review of Appellants' response to Appellee's motion for summary judgment, we find that Appellants did not raise this argument to the trial court; therefore, Appellants cannot raise the issue for the first time on appeal.

{¶30} Appellants' second Assignment of Error is overruled.

{¶31} The judgment of the Knox County Court of Appeals is affirmed.

By: Delaney, J.

Gwin, P.J. and

Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

PAD:kgb

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FIFTH APPELLATE DISTRICT

DEUTSCHE BANK NATIONAL TRUST COMPANY	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
PAUL A. PAGANI, et al.	:	
	:	Case No. 09CA00013
Defendants-Appellants	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Knox County Court of Common Pleas is affirmed. Costs assessed to Appellants.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN