

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SECRETARY OF VETERANS AFFAIRS

Plaintiff-Appellant

-vs-

TRISH SHAFFER

Defendant-Appellee

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. John W. Wise, J.

Hon. Craig R. Baldwin, J.

Case No. 14 CA 61

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 12 CV 1029

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

June 8, 2015

APPEARANCES:

For Plaintiff-Appellant

MATTHEW J. RICHARDSON
MANLEY DEAS KOCHALSKI
Post Office Box 165028
Columbus, Ohio 43216-5028

For Defendant-Appellee

WILLIAM C. FITHIAN, III
111 North Main Street
Mansfield, Ohio 44902

Wise, J.

{¶1} Appellant Secretary of Veterans Affairs appeals from the decision of the Court of Common Pleas, Richland County, denying a money judgment on its foreclosure complaint and denying it a decree in foreclosure.

STATEMENT OF THE FACTS AND CASE

{¶2} This case arises from a residential foreclosure action filed in Richland County, Ohio. The relevant facts are as follows:

{¶3} On March 30, 1979, Ronald and Sharon Pence (the "Pences") gave a mortgage to Hartzler Mortgage in the amount of \$35,000 on the property. The mortgage expressly states that its covenants "shall bind ... the respective heirs, executors, administrators, successors and assigns of the parties hereto." One of the covenants of the mortgage is that the "Grantor" of the mortgage "will promptly pay the principal and interest on the indebtedness evidenced by the said note, at the times and in the manner therein provided." Further, under the mortgage, the term "Grantee" "shall include any payee of the indebtedness hereby secured or any transferee thereof whether by operation of law or otherwise."

{¶4} On March 29, 1982, the Pences sold the property to Mark Campbell ("Campbell"). The deed from the Pences to Campbell indicated that Campbell had assumed the indebtedness on the property as his own.

{¶5} On October 30, 1986, Campbell sold the property to Shaffer and her then-husband Richard Shaffer (the "Shaffers"). As with the deed from the Pences to Campbell, the deed from Campbell to the Shaffers indicated that the Shaffers had assumed the indebtedness on the property as their own, and that the Secretary would

be indemnified upon a default on the mortgage loan indebtedness. The deed indicated that payments should be made to Chemical Bank. Subsequently, when they divorced, Richard Shaffer quitclaimed his interest in the property to Shaffer.

{¶6} On June 5, 1979, Hartzler assigned its mortgage to the State Teachers Retirement Board of Ohio.

{¶7} On July 12, 1998, the State Teachers Retirement Board of Ohio assigned the mortgage to Lasalle Bank.

{¶8} On December 7, 1999, Lasalle Bank assigned the mortgage to Chase Mortgage Company.

{¶9} On April 18, 2001, Chase Mortgage Company assigned the mortgage to the Secretary, and the Secretary continues to hold the mortgage.

{¶10} On August 29, 2012, the Secretary filed a foreclosure complaint against Shaffer and other parties who held an interest in the property. The Secretary sought judgment against Shaffer in the amount of \$32,110.00 at the rate of 9.5% from December 1, 2000. Attached to the complaint were copies of the mortgage and all assignments of the mortgage. The Secretary did not attach a copy of the relevant promissory note but pleaded that "[a] copy of the note cannot be located at this time."

{¶11} On October 3, 2012, Shaffer filed an answer to the complaint and counterclaim. Shaffer denied all allegations in the Secretary's complaint and alleged, in support of her counterclaim, that the Secretary had failed to respond to a qualified written request Shaffer had allegedly sent to the Secretary under the federal Real Estate Settlement Procedures Act ("RESPA") at 12 U.S.C. 2601 *et seq.* In support of her RESPA claim, Shaffer alleged that the Secretary had been the servicer of the

mortgage loan since the inception of the mortgage. However, Shaffer did not attach copies of her alleged qualified written request to her pleading. Shaffer also alleged that the Secretary had falsely reported that Shaffer was in default on her mortgage loan and asserted a claim under the federal Fair Credit Reporting Act ("FCRA") at 15 U.S.C. 1681 *et seq.* Shaffer did not attach any documentation to her counterclaim to indicate that the Secretary had taken any such action.

{¶12} Shaffer filed a motion for judgment on the pleadings against the Secretary, arguing that the Secretary lacked standing to file suit. Shaffer also argued that Chase Mortgage Company, which had filed a prior foreclosure action against Shaffer that was subsequently dismissed without prejudice in October 2000, had "waived" its right to foreclose on Shaffer and further that the alleged waiver bound the Secretary. Finally, Shaffer argued that the complaint was barred by the statute of limitations on grounds that the default had occurred in 1986, not 2000 as alleged by the Secretary.

{¶13} The Secretary filed a brief in opposition to Shaffer's motion for judgment on the pleadings.

{¶14} On February 28, 2013, the trial court denied Shaffer's motion.

{¶15} The parties then engaged in discovery, including the Secretary's deposition of Shaffer.

{¶16} Both the Secretary and Shaffer filed motions for summary judgment. The Secretary sought summary judgment on its complaint and Shaffer's counterclaim, and Shaffer sought summary judgment on the Secretary's complaint.

{¶17} Shaffer argued that she owed no obligation whatsoever to the Secretary on grounds that the Secretary could not produce a promissory note under which she was obligated to pay the mortgage loan.

{¶18} Shaffer conceded that the Secretary was entitled to summary judgment on her counterclaim, and the trial court granted summary judgment to the Secretary on Shaffer's counterclaims.

{¶19} However, the trial court denied both parties their respective summary judgment motions on the Secretary's complaint. In its opinion denying both summary judgment motions, the trial court found that Shaffer had indeed assumed the indebtedness as consideration for purchasing the property, denying her summary judgment motion, but went on to find that the Secretary had not produced a payment history in order to establish the amount due and owing on the mortgage loan.

{¶20} On August 30, 2013, the trial court conducted a trial. Shaffer did not appear for the trial, nor did she produce any witnesses or evidence at the trial. Residential Credit Solutions, Inc. ("Residential"), the current servicer for the Shaffer's loan, appeared on behalf of the Secretary. Residential produced an employee to testify as to the status and details of the loan. Additionally, the Secretary produced certified copies of recorded documents, such as the relevant deed transfers, mortgage, and assignments of mortgage, all of which were admitted into evidence. Additionally, because she did not appear at trial, the Secretary read into the trial court record Shaffer's testimony from her deposition.

{¶21} At deposition, Shaffer had testified that when she purchased the property with her then husband, he and she "took over or did something with the loan that was

existing on the property." Additionally, at deposition, Shaffer had authenticated a copy of an answer that she and her ex-husband had filed in response to the foreclosure Complaint previously filed against them by Chase Mortgage Company. In the answer Shaffer filed with her ex-husband, Shaffer admitted that she had assumed the mortgage obligation existing on the property at the time she purchased the property. A certified copy of Shaffer's answer was admitted into evidence at trial. Shaffer further testified that she could not produce any documents to indicate that she or her ex-husband had ever made a payment on the mortgage loan which she admitted that she had assumed when she purchased the property.

{¶22} At trial, the Secretary also called Justin Laubscher ("Laubscher") of Residential, who testified extensively on direct, cross, re-direct and re-cross. (T. at 22-62). Laubscher testified that he was a law clerk at Residential whose job duties included reviewing loan documents to testify in foreclosure proceedings. (T. at 23). He testified as to the status of the loan and relevant business records that were held in Residential's recordkeeping system. (T. at 24-30). He testified that Residential had been transferred the servicing rights to Shaffer's mortgage loan in August, 2012 from Bank of America. (T. at 23). Laubscher further testified that when the servicing rights to Shaffer's loan were transferred to Residential, Residential had performed an audit regarding the accuracy of the records regarding Shaffer's loan. (T. at 45).

{¶23} Laubscher authenticated business records to indicate that the principal balance on the loan was \$32,110.00 and that no payments had been made between January 1, 2001, and August 30, 2013, including a payoff statement indicating that the total amount due and owing on the loan was \$72,974.08, including principal

(\$32,110.00), interest (\$38,880.76), and escrow items (\$1768.82), among charges for property inspections (\$214.50). Over the objection of Shaffer's counsel, the trial court admitted the business records of Residential indicating the total amount due and owing. (T. at 62).

{¶24} All records reflecting the deed transfers, the mortgage and assignments thereof, and Residential's loan records, were admitted into evidence.

{¶25} Shaffer produced no evidence.

{¶26} On April 28, 2014, the trial court ordered a post-trial hearing on the issue of the unpaid principal balance and set same for May 28, 2014.

{¶27} On May 21, 2014, prior to the hearing, Shaffer filed a brief regarding the issue of the unpaid principal balance. In her brief, Shaffer argued that the lack of payment history in the Secretary's case in chief denied the Secretary the right to foreclose Shaffer's equity right of redemption. More specifically, Shaffer admitted that she did not know "how much her ex-husband paid of his 9-year obligation". Shaffer further claimed that the exact amount due and owing had not been established. Finally, Shaffer claimed that the Secretary had not proved damages by a preponderance of the evidence.

{¶28} The Secretary filed its response on May 28, 2014, wherein it argued in its brief that it had satisfied its burden to produce evidence as to the amount of damages Laubscher's testimony and the exhibits admitted into evidence. The Secretary cited the trial court to the case of *Allied Erecting & Dismantling Co., Inc. v. Youngstown*, 151 Ohio App.3d 16, 2002-Ohio-5179, describing its applicable burden. The Secretary further disagreed with Shaffer that the Secretary was required to produce a payment

history, and cited a case from this Court stating that only the amount due and owing was required to be produced in order for a lender to meet its burden to establish damages in a foreclosure action. See *Wachovia Bank v. Jackson*, 5th Dist. No. 2010-CA-00291, 2011-Ohio-3202. The Secretary further cited a case from the Eighth District Court of Appeals to hold that a complete payment history was not required to obtain summary judgment in a foreclosure proceeding. See *Deutsche Bank Nat'l Trust Co. v. Najjar*, 8th Dist. No. 98502, 2013-Ohio-1657.

{¶29} On May 28, 2014, the trial court held a hearing on the issue of whether the Secretary had established its damages. Counsel for the Secretary made arguments consistent with those in the Secretary's brief. Counsel for Shaffer stated that he had issued a subpoena to Bank of America and moved to introduce new documents into evidence. The documents that counsel for Shaffer had acquired, like the Secretary's evidence at trial, indicated that the principal balance of Shaffer's loan was \$32,110.00. Unlike the trial in this matter, Shaffer appeared at the post-judgment hearing and moved to introduce new evidence that she had "just found ... in the last three weeks" regarding the amount due and owing on her mortgage loan. The trial court refused to admit these documents into evidence.

{¶30} Subsequently, the trial court magistrate issued a decision granting judgment to Shaffer. The magistrate's decision included findings of fact and conclusions of law. The magistrate found facts consistent with those the Secretary introduced as to the deeds, the mortgage, and assignments of mortgage. The magistrate acknowledged the principal balance stated in the deeds transferring the property first from the Pences to Campbell (\$34,306.80) and second from Campbell to

Shaffer and her ex-husband (\$32,746.20). The magistrate further acknowledged that the deed from Campbell to Shaffer indicated that the "Shaffers as grantees jointly and severally assume the obligations of the grantor (Campbell) 'under the terms of the instruments creating the loan to indemnify the Veterans Administration to the extent of any claim payment arising from guaranty or insurance of the indebtedness above mentioned.' " The magistrate further found that Shaffer "has not made a payment on the home loan since December 1, 2000." Finally, the magistrate found that he had "set a further hearing after the bench trial in this case to provide the plaintiff an opportunity to provide further evidence as to the amount of the principal balance on this loan, but the plaintiff chose to stand on the evidence adduced at the bench trial."

{¶31} Regarding conclusions of law, the magistrate found that the Secretary could not enforce the indebtedness Shaffer had assumed on grounds that the Secretary could not produce the original promissory note. The magistrate further found that the Secretary had not met its burden to establish its damages on grounds that the Secretary had not produced a payment history for the mortgage loan. The magistrate did not cite authority for the applicable evidentiary burden but stated that it "should be" no lower than that for an action on account under Rule 10(D). Finally, the magistrate found that it would be inequitable to permit the Secretary to foreclose, on the grounds that Shaffer would not be able to determine the amount necessary to redeem the property.

{¶32} The Secretary objected to the magistrate's decision arguing that the magistrate had committed errors of law. The Secretary made three arguments. First, the Secretary argued that Shaffer's assumption of the indebtedness as consideration

for her purchase of the property enabled the Secretary to enforce the indebtedness against her under Ohio law, regardless of whether the Secretary had produced the original promissory note at trial. Second, the Secretary argued that it had produced uncontradicted evidence admitted by the trial court sufficient to establish its damages under Ohio law. Third, the Secretary argued that even if it could not enforce the note, it could nevertheless enforce its mortgage on the property under Ohio law. Finally, as to the Secretary's right to enforce the mortgage, it argued that the only equitable issue that applied under Ohio law was whether Shaffer could demonstrate that she could redeem the property with additional time, which Shaffer did not establish.

{¶33} The trial court affirmed the magistrate's decision, deciding that the Secretary had not established its damages with a payment history. In contrast to its original holding in its opinion denying the summary judgment motions of the parties, the trial court changed its position and expressed skepticism that Shaffer had assumed the mortgage loan indebtedness at all, specifically on grounds that she had not signed the deed from Campbell to her and her ex-husband.

{¶34} Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶35} "I. THE TRIAL COURT ERRED IN DENYING THE SECRETARY A MONEY JUDGMENT ON ITS FORECLOSURE COMPLAINT WHEN THE BORROWER ASSUMED EXISTING MORTGAGE LOAN INDEBTEDNESS AT THE TIME SHE PURCHASED THE MORTGAGED PROPERTY AND THEN FAILED TO REPAY IT.

{¶36} "II. THE TRIAL COURT ERRED IN DENYING THE SECRETARY A DECREE IN FORECLOSURE OF THE MORTGAGE ON THE PROPERTY WHEN THE BORROWER WAS A SUCCESSOR TO THE ORIGINAL MORTGAGOR AND FAILED TO MAKE PAYMENTS UNDER THE MORTGAGE."

I., II.

{¶37} In its two Assignments of Error, Appellant argues that the trial court erred in denying it any relief on its foreclosure complaint. We agree.

{¶38} The trial court in the case *sub judice*, held that Appellant failed to prove "by a preponderance of the evidence that it was the person entitled to enforce the note pursuant to R.C. 1303.31 and 1303.38" or that "\$32,110 was the balance of principal owed to the plaintiff." (Magistrate's Decision on Bench Trial, June 17, 2014, at 5).

{¶39} In contrast to determinations of fact which are accorded considerable deference, questions of law are examined by this Court *de novo*. *Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 108, 110, 12 O.O.3d 115, 116, 388 N.E.2d 1370, 1372–1373. The determination of whether Appellant is entitled to enforce the mortgage is a question of law. We therefore review the trial court's judgment *de novo*. See *Bank of Am., N.A. v. Pasqualone*, 10th Dist. Franklin No. 13AP–87, 2013-Ohio-5795 (determining whether a plaintiff is the person entitled to enforce a note is a legal determination). A *de novo* review requires an independent review of the lower court's decision, without deference to that court's conclusions of law. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153.

{¶40} Here, the trial court found that Appellant could not enforce the mortgage loan debt because no evidence was offered "about whether the note was lost or any

explanation as to its whereabouts”. (Magistrate’s Decision on Bench Trial, June 17, 2014, at 6).

{¶41} “A party may establish its interest in the suit, and therefore have standing to invoke the jurisdiction of the court when, at the time it files its complaint of foreclosure, it *either* (1) has had a mortgage assigned or (2) is the holder of the note.” *CitiMortgage, Inc. v. Patterson*, 8th Dist. Cuyahoga No. 98360, 2012–Ohio–5894, ¶ 21, citing *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012–Ohio–5017, 979 N.E.2d 1214. (Emphasis added).

{¶42} In this case, Appellant is claiming an interest in the mortgage debt through assumptions contained in the terms of the deed transfers and is seeking to recover judgment on the mortgage it obtained through assignment, not the original promissory note.

{¶43} Upon review, we find that Appellant demonstrated that it is the current mortgagee of record and that it is the real party in interest in the foreclosure action.

{¶44} Appellant produced a copy of the deed from the Pencses (the original mortgagee) to Campbell and a copy of the deed from Campbell to the Shaffers. Each of these deeds states that the property is being transferred from the grantor(s) to the grantee(s) subject to a mortgage, “which the Grantee(s) hereby jointly and severally assume and agree to pay as part of the consideration.” The deeds also specifically state the monetary value of the unpaid principal balance of the mortgage being assumed by the grantee. The unpaid balance amount of the mortgage listed on the deed from Campbell to the Shaffers was \$32,746.20.

{¶45} Evidence was also presented as to the loan assignments from Hartzler Mortgage (the original mortgagor) to STRS, from STRS to LaSalle Bank, from LaSalle Bank to Chase Mortgage Company, and finally from Chase Mortgage to Appellant, Secretary of Veterans' Affairs.

{¶46} When a purchaser assumes a mortgage, under the most common view, the mortgagee is a third-party beneficiary of the contract between mortgagor and purchaser. Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* 319 (3d ed. 1993); 4 *Corbin on Contracts* § 796 at 146 (1951); John D. Calamari & Joseph M. Perillo, *The Law of Contracts* 703 (3d ed. 1987). A mortgagee may recover, as a third-party beneficiary of the assumption agreement, from a purchaser who assumed the mortgage. *Cleveland Trust Co. v. Elbrecht*, 137 Ohio St. 358, 30 N.E.2d 433, 435-36 (1940); *Restatement (Second) of Contracts*, § 304 & illus. 2 (1981); 2 *Williston on Contracts* § 382 at 1024 (3d ed. 1959).

{¶47} Here, as the assignee of the mortgage, the Secretary of Veterans Affairs is in the shoes of the previous mortgagees. *EMC Mtge. Corp. v. Jenkins*, 164 Ohio App.3d 240, 2005-Ohio-5799, 841 N.E.2d 855, at ¶ 20; *Cleveland Trust Co. v. Elbrecht* (1940), 137 Ohio St. 358, 360, 30 N.E.2d 433.

{¶48} As the agreement to pay the debt in this case was contained in the deed, the note was not relevant to the instant litigation, and Appellant was not required to produce it or provide an explanation as to why it could not produce same. We therefore find the trial court erred in holding that Appellant was required to produce evidence concerning the promissory note in this matter.

{¶49} We further find the trial court erred in finding that Appellant was required to produce a payment history in order to be entitled to money judgment and in concluding that it would be inequitable to grant Appellant a decree in foreclosure in this case.

{¶50} The trial court in this case made findings that “no payments were made from January 1, 2001 to August 30, 2013.” Appellant therefore established that the mortgage loan was in default.

{¶51} At trial, Appellant produced evidence as to the total principal balance due and owing, as well as a breakdown of the principal, interest, and fees for escrow and property inspections. The deeds also stated the principal loan amounts at the time the mortgages were assumed the respective buyers of the property.

{¶52} There is no requirement that a plaintiff provide a complete “payment history” in order to establish its entitlement to summary judgment in a foreclosure action. *Deutsche Bank Natl. Trust Co. v. Najar*, Eighth Dist. Cuyahoga App. 98502, 2013 –Ohio-1657. See also, *Bank of New York Mellon v. Putman*, Twelfth Dist. Butler App. CA2012-12-267, 2014-Ohio-1796.

{¶53} Damages in breach of contract cases must be proven with “reasonable certainty.” *Textron Fin. Corp.*, 115 Ohio App.3d at 144, 684 N.E.2d 1261. However, damages are not uncertain merely because they cannot be calculated with absolute exactness; it is sufficient if the evidence affords a reasonable basis for computing damages, even if the result is only an approximation. *TJX Cos., Inc. v. Hall*, 183 Ohio App.3d 236, 916 N.E.2d 862, 2009–Ohio–3372, ¶ 32 (8th Dist.). It is uncertainty as to the *existence* of damages rather than uncertainty as to their *amount* which precludes

recovery. *Accurate Die Casting Co. v. Cleveland*, 2 Ohio App.3d 386, 391, 442 N.E.2d 459 (8th Dist.1981).

{¶54} Finally, we find the trial court erred in concluding that it would be inequitable to grant Appellant a decree in foreclosure in this case.

{¶55} Under foreclosure law, mortgagors have an equitable right of redemption, which allows the mortgagor to pay the balance due and redeem the property. A homeowner's equity of redemption is foreclosed when a decree of foreclosure is issued, although courts typically provide a three-day grace period following the decree to exercise the equity of redemption. *Hausman v. Dayton*, 73 Ohio St.3d 671, 676, 653 N.E.2d 1190, 1995–Ohio–277.

{¶56} In *Bank of New York v. Dobbs*, 5th Dist. Knox App. 2009-CA-00002, 2009 - Ohio-4742, this Court found a lender and borrower both have equitable rights in a foreclosure action, and a trial court's task in weighing the equities is to determine whether a borrower should be given more time in which to redeem the property. *Id.* at 50. In *Dobbs*, this Court noted, “weighing the equities should not involve rewriting the mortgage contract for the parties.” *Id.* This Court explained, although trial courts have occasionally considered other aspects of equity in deciding a foreclosure action, Appellants had not come forward with evidence legally sufficient to create a genuine issue of material fact as to whether there were equitable considerations which would affect the trial court's decision on the foreclosure action. *Id.* at 52. *See also, First Knox Nat’l Bank v. Peterson*, 5th Dist. Knox App. 08CA28, 2009-Ohio-5096.

{¶57} We find the rationale set forth in *Dobbs* is applicable herein. Prior to the filing of the foreclosure action and during the subsequent proceedings, Appellee

Shaffer was never current with her mortgage payments. In fact, the trial court found that she had failed to make any payments on the mortgage loan. There is no evidence that Appellee ever attempted or desired to exercise her equity right of redemption.

{¶58} Appellant's Assignments of Error are overruled.

{¶59} For the forgoing reasons, the judgment of the Richland County Court of Common Pleas is reversed and this matter is remanded for further proceedings consistent with the law and this opinion.

By: Wise, J.

Gwin, P. J., and

Baldwin, J., concur.

JWW/d 0518

