

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NEW YORK COMMUNITY BANK	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
ANDREW TOMIC, ET AL.	:	Case No. 2014 AP 12 0053
	:	
Defendants-Appellants	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 2014 CF 04 0251

JUDGMENT: Affirmed

DATE OF JUDGMENT: July 7, 2015

APPEARANCES:

For Plaintiff-Appellee

PHILLIP BARRAGATE
ASHLYN HEIDER
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Suite 320
Norwood, OH 45212

For Defendant-Appellant

SAM THOMAS, III
1510 East 191th Street
Euclid, OH 44117

For Tuscarawas County Treasurer

ROBERT R. STEPHENSON II
206 West High Avenue
New Philadelphia, OH 44663

Farmer, J.

{¶1} On April 25, 2014, appellee, New York Community Bank, filed a foreclosure complaint against appellant, Andrew Tomic, for money due and owing on a mortgage secured by a note. Appellee filed an amended complaint on August 21, 2014.

{¶2} On October 21, 2014, appellee filed a motion for summary judgment, claiming genuine issues of material fact did not exist. By judgment entry filed November 10, 2014, the trial court granted the motion and ordered foreclosure. The judgment entry was sent out on November 13, 2014.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "REVIEWING APPELLEE'S MOTION FOR SUMMARY JUDGMENT *DE NOVO*, THE RECORD IS CLEAR AND CONVINCING THAT THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY GRANTING THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT IN FAVOR OF THE APPELLEE."

II

{¶5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY GRANTING THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT BASED UPON THE PRESENCE OF GENUINE ISSUES OF MATERIAL FACT REGARDING THE APPELLEE-PLAINTIFF'S FAILURE TO ESTABLISH SATISFACTION OF ALL CONDITIONS PRECEDENT TO INSTITUTE THE FORECLOSURE ACTION."

III

{¶6} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY GRANTING THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT BASED UPON THE PRESENCE OF GENUINE ISSUES OF MATERIAL FACT REGARDING THE APPELLEE-PLAINTIFF'S FAILURE TO PROVIDE SUFFICIENT EVIDENCE OF ENTITLEMENT TO FORECLOSURE AND/OR DAMAGES."

IV

{¶7} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY GRANTING THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE APPELLANT'S COUNTERCLAIMS BASED UPON THE PRESENCE OF GENUINE ISSUES OF MATERIAL FACTS."

{¶8} At the outset, we note appellee filed a motion to dismiss the appeal, claiming an untimely filing. We have reviewed the dates and find the appeal to have been timely filed. Said motion is denied.

I, II, III, IV

{¶9} Appellant claims the trial court erred in granting summary judgment to appellee as appellee failed to establish it was the real party in interest, failed to establish satisfaction of all conditions precedent for a default including notice of acceleration, and failed to present sufficient credible evidence of default and damages. Appellant also claims the trial court erred in dismissing his counterclaim. We disagree.

{¶10} Summary Judgment motions are to be resolved in light of the dictates of 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:

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.

{¶11} 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.*, 30 Ohio St.3d 35 (1987).

{¶12} Appellant's arguments are briefly described in his November 10, 2014 response to the summary judgment motion as follows:

The Plaintiff has not set forth any meaning (sic) facts other to make the general allegation that it is the "holder" and the assignments and/or Allonge are enforceable to pass interests and rights to the Plaintiff. However, the Plaintiff has not met the Civil Rule 56 burden to summary

judgment on all claims. Accordingly, the Plaintiff's Motion for Summary Judgment should be denied and allow the matter to be tried on the merits.

{¶13} Appellant argues the pleadings and affidavit filed by appellee are insufficient to establish that appellee had standing and was the real party in interest, citing in support *Federal Home Loan Mortgage Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 41, wherein the Supreme Court of Ohio held:

It is fundamental that a party commencing litigation must have standing to sue in order to present a justiciable controversy and invoke the jurisdiction of the common pleas court. Civ.R. 17(A) does not change this principle, and a lack of standing at the outset of litigation cannot be cured by receipt of an assignment of the claim or by substitution of the real party in interest.

{¶14} Appellant also challenges the sufficiency of the affidavit and exhibits presented to establish notice, default, and damages.

{¶15} Civ.R. 17(A) governs real party in interest and states the following:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue

in his name as such representative without joining with him the party for whose benefit the action is brought. When a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of this state. 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.

{¶16} The original note and the Allonge to the Note attached to the complaint, the amended complaint, and the summary judgment motion demonstrate the original note was made to Home Mortgage Assured Corporation which was indorsed to Federal Home Loan Bank of Cincinnati, then to Ohio Savings Bank, and finally to appellee.

{¶17} R.C. 1303.22(B) states the following:

Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a direct or indirect transfer from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

{¶18} R.C. 1303.31(A)(1) states a "person entitled to enforce" an instrument includes the holder of the instrument.

{¶19} We find appellee sufficiently established that it was the holder of the note by demonstrating physical possession of the note and a valid indorsement to appellee on the note with the words "pay to the order of," thereby fulfilling the mandates of R.C. 1303.24 which governs "Indorsement."

{¶20} We do not find any genuine issues of material fact to exist to refute that appellee is the real party in interest.

{¶21} As explained by this court in *Bank of Mellon v. Blake*, 5th Dist. Stark No. 2014CA00171, 2015-Ohio-2119, ¶ 21:

The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim. *Drescher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996). Once the moving party meets its initial burden, the burden shifts to the nonmoving party to set forth specific facts demonstrating a genuine issue of material fact does exist. *Id.* The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary materials showing a genuine dispute over material facts. *Henkle v. Henkle*, 75 Ohio App.3d 732, 600 N.E.2d 791 (12th Dist.1991).

{¶22} Appellant did not file any evidentiary quality exhibits or affidavits to challenge appellee's motion for summary judgment. Appellee attached the affidavit of La´Somanic Lawson as well as exhibits to its motion. From our review of the affidavit and exhibits, we find sufficient and credible evidence to support the claims of the complaint, including notice, default, and damages due.

{¶23} As for the dismissal of the counterclaim, the record does not show that a counterclaim was ever filed. From our review of appellant's "Affirmative Defenses" raised in his October 14, 2014 answer to the amended complaint, we find they are identical to the issues raised in his November 10, 2014 response to the summary judgment motion.

{¶24} Upon review, we find the trial court did not err in granting summary judgment to appellee.

{¶25} Assignments of Error I, II, III and IV are denied.

{¶26} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby affirmed.

By Farmer, J.

Wise concur, and

Hoffman, P.J. concurs in part and dissents in part.

Hoffman, P.J., concurring in part and dissenting in part

{¶27} I concur in the majority's analysis and disposition of all four of Appellant's assignments of error.

{¶28} However, I respectfully dissent from the majority's determination the appeal was timely filed. I would grant Appellee's motion to dismiss the appeal.

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NEW YORK COMMUNITY BANK	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
ANDREW TOMIC, ET AL.	:	
	:	
Defendants-Appellants	:	CASE NO. 2014 AP 12 0053

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio is affirmed. Costs to appellant Andrew Tomic.