[Cite as *PNC Bank, N.A. v. Wagner,* 2015-Ohio-851.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

PNC BANK, NATIONAL ASSOCIATION	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff - Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	
THEODORE A. WAGNER, ET AL.	:	Case No. 2014CA00122
	:	
	:	
Defendants - Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of Common Pleas, Case No. 2013-CV-03202

JUDGMENT: Affirmed

DATE OF JUDGMENT: March 6, 2015

APPEARANCES:

For Plaintiff-Appellee

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Baldwin, J.

{¶1} Defendants-appellants Theodore and Christine Wagner appeal from the June 3, 2014 Judgment Entry of the Stark County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

{¶2} In 2005, appellants borrowed $97,750.00 from First Franklin a Division of National City Bank of Indiana. Appellant Theodore Wagner signed a note on or about December 16, 2005 promising to repay the loan. The note was endorsed by First Franklin a Division of National City Bank of Indiana to First Franklin Financial Corporation and then was endorsed by First Franklin Financial Corporation in blank. On December 16, 2005, both appellants signed a mortgage encumbering specified real property as security for repayment of the loan. The mortgage designated Mortgage Electronic Registration Systems, Inc. ("MERS") as the mortgagee and as the nominee for First Franklin a Division of Nat. City Bank of IN.

{¶3} On November 15, 2013, MERS, as nominee for First Franklin a Division of National City Bank of Indiana assigned the mortgage to appellee PNC Bank. The assignment was recorded on December 3, 2013. On December 16, 2013, appellee filed a Complaint in Foreclosure against appellants, alleging that they were in default under the terms of the note and mortgage. Appellants filed an answer to the complaint on January 14, 2014.

{¶4} Thereafter, on April 29, 2014, appellee filed a Motion for Summary Judgment against appellants. The motion was supported by the affidavit of Leanna Johnstun, a Document Control Officer at Select Portfolio Servicing, Inc, the servicing agent for appellee. Appellants filed a brief in opposition to the Motion for Summary

Judgment on May 13, 2014 that was supported by the affidavit of appellant Theodore Wagner. Appellee filed a reply brief on May 30, 2014.

{¶5} Pursuant to a Judgment Entry filed on June 3, 2014, the trial court granted appellee's Motion for Summary Judgment.

{¶6} Appellants now raise the following assignments of error on appeal:

{¶7} THE TRIAL COURT ERRED WHEN IT AWARDED SUMMARY JUDGMENT TO PLAINTIFF-APPELLEE WHEN PLAINTIFF-APPELLEE (1) FAILED TO DEMONSTRATE THAT IT HAD STANDING TO BRING THE FORECLOSURE ACTION AND BY (2) FAILING TO PROVIDE EVIDENCE IN THE RECORD THAT THE PLAINTIFF-APPELLEE IS OR WAS THE HOLDER OF THE PROMISSORY NOTE AT THE TIME IT FILED THE COMPLAINT FOR FORECLOSURE.

{¶8} THE TRIAL COURT ERRED WHEN IT AWARDED SUMMARY JUDGMENT TO PLAINTIFF-APPELLEE WHEN THE RECORD DEMONSTRATES THE EXISTENCE OF MATERIAL ISSUES OF FACTS (SIC) AS TO THE DEFAULT OF THE NOTE.

I, II

{¶9} Appellants, in their two assignments of error, argue that the trial court erred in granting summary judgment in favor of appellants. We disagree.

{¶10} We refer to Civil Rule 56(C) in reviewing a Motion for Summary Judgment which provides, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that

> there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed mostly strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

{¶11} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts. *Hounshell v. Am. States Ins. Co.,* 67 Ohio St.2d 427, 424 N.E.2d 311 (1981). The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning–Ferris Inds. of Ohio, Inc.,* 15 Ohio St.3d 321, 474 N.E.2d 271 (1984). A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.,* 135 Ohio App.3d 301, 733 N.E.2d 1186 (6th Dist.1999).

{¶12} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court.

Wedding Party, Inc., 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). This means we review the matter de novo. *Doe v. Shaffer,* 90 Ohio St.3d 388, 2000–Ohio–186, 738 N.E.2d 1243.

{¶13} 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).

{¶14} Appellants argue, in part, that appellee lacked standing because it failed to establish that it was the holder of the note at the time the complaint was filed on December 16, 2013. Appellants cite to a case out of the Ninth District which is not controlling and is not the law in this District. Rather, as this Court noted in *Huntington Nat'l Bank v. Priest*, 5th Dist. Delaware No. 13 CAE 06 0049, 2014-Ohio-356 at paragraph 38:

> In a foreclosure action, the current holder of the note and mortgage is the real party in interest. *Wells Fargo Bank, N.A. v. Stovall,* 8th Dist. Cuyahoga No. 91802, 2010–Ohio–236, ¶ 15, citing *Chase Manhattan Mtge. Corp. v. Smith,* 1st Dist. Hamilton No. C–061069, 2007–Ohio–5874. Further, "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).

{¶15} Clearly, at the time the time the complaint was filed on December 16, 2013 in this case, appellee was the holder of the mortgage. Appellee was assigned the mortgage on November 15, 2013 and the mortgage assignment was recorded on December 3, 2013, which is before the complaint was filed. We concur with appellee that this is sufficient to establish standing under *Schwartzwald.*

{¶16} We further find that even if appellee was not in possession of the note at the time the complaint was filed, the assignment of the mortgage is sufficient to transfer both the note and the mortgage because the documents evidence the parties' intent to keep the instruments together. In *Bank of New York v. Dobbs,* 5th Dist. Knox No. 2009–CA–000002, 2009–Ohio–4742, we held that the assignment of a mortgage, without an express transfer of the note, is sufficient to transfer both the mortgage and the note if the record indicates the parties intended to transfer both the note and the mortgage.

{¶17} This case is analogous to the *Dobbs* case as the record indicates the parties intended to transfer both the note and the mortgage. The note states, "In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed ('Security Instrument") dated the same date as this Note,

protects the Note Holder from possible losses that might result if I do not keep the promises which I make in this Note." The mortgage, signed and December 16, 2005, provides, "This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions, and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note ."

{¶18} The note refers to the mortgage and the mortgage refers to the note. Thus, we find a clear intent by the parties to keep the note and mortgage together rather than transferring the mortgage alone. Since the mortgage assignment was recorded on December 3, 2013, prior to the filing of the complaint on December 16, 2013, the note was effectively transferred on that date. Appellee, therefore, had standing under the note as well.

{¶19} Appellants further argue that appellee failed to put forth Civ.R. 56(E) evidence that it had the right to enforce the note. Appellants specifically contend that the affidavit of Leanna Johnstun did not comply with such rule because the "Loan Records" sworn to and certified in such affidavit were never attached to the affidavit or part of the record. However, the mortgage, the assignment of the mortgage and the note, which are all part of the "Loan Records", were all attached to the affidavit and authenticated by Johnstun based on her personal knowledge. Moreover, Johnstun, in her affidavit, stated that appellee was "the holder and owner" of the note. A mere assertion of personal knowledge satisfies Civil Rule 56(E) if the nature of the facts in the affidavit combined with the identity of the affiant creates a reasonable inference that the affiant has personal knowledge of the facts in the affidavit. *JPMorgan Chase v. Snedeker,* 5th Dist. Licking No. 13–CA–98, 2014–Ohio–1593.

{¶20} In her affidavit, Johnstun stated that she was a Document Control Officer at Select Portfolio Servicing, Inc, the servicer for appellee, and that Select Portfolio maintains a computer database of acts, transactions, payments, communications, escrow account activity, disbursements, events, and analyses with respect to the mortgage loans which Select Portfolio services. Further, she stated that she has access to the loan records maintained with respect to the subject loan and, based upon those records, she is personally familiar with the subject loan and is authorized to make this certification. Johnstun also stated that in her capacity as Document Control Officer, she has access to the loan records relating to the mortgage loans that are maintained in the normal course of business and that the statements she makes in the affidavit are based upon her review of the loan records relating to appellants' mortgage loan and from her own personal knowledge. We find that her affidavit meets the requirements of Civ.R. 56(E) and established appellee's right to enforce the note.

{¶21} Appellants, in their second assignment of error, argue that the trial court erred in granting summary judgment in favor of appellee because there remain genuine issues of material fact relating to the alleged default of the note. Appellants note that Theodore Wagner, in the affidavit attached to appellants' brief in opposition to the Motion for Summary Judgment, alleged that appellee, though its loan servicer, had "clearly and unreasonably charged [appellants] Eight Hundred Thirty Two and 00/100 Dollars ($832.00) per month for hazard insurance on the premises even though Defendant-Appellant provided Appellee and the loan servicers with proof of insurance."

{¶22} Leanna Johnstun, in her affidavit, stated in paragraph 4 that appellants had failed to make the payment due on May 1, 2013 and "all payments due thereafter." There is nothing in Theodore Wagner's affidavit stating otherwise. Nor is there anything

relating the insurance issues to the failure to make the monthly payments. We concur with appellee that the insurance issues raised in his affidavit did not create a genuine issue of material fact as to whether or not appellants defaulted.

{¶23} Appellants' two assignments of error are, therefore, overruled.

{¶24} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Baldwin, J.

Wise, P.J. and

Delaney, J. concur.