[Cite as *Mtge. Electronic Registration Sys., Inc. v. Vascik*, 2010-Ohio-4707.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Mortgage Electronic Registration Systems, Inc.

Appellee

v.

Sherry Vascik, et al.

Appellants

Court of Appeals No. L-09-1129

Trial Court No. CI0200506536

DECISION AND JUDGMENT

Decided: September 30, 2010

* * * * *

Darryl E. Gormley, for appellee.

Bertrand R. Puligandla and Vijay Puligandla, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that granted the summary judgment motion of substitute plaintiff-appellee, Household Realty Corporation ("Household"), in a foreclosure action. Defendant-appellant, Sherry Vascik, now challenges that judgment through the following assignments of error:

{¶ 2} "I. In mortgage-foreclosure cases, the real party in interest is the current holder of the note and mortgage. The affiant's testimony does not establish that the note was either transferred or indorsed to Household, and the record contains no evidence that the note was negotiated to it pursuant to the relevant statutes from Ohio's enactment of the U.C.C. Was it error for the trial court to rule that Household established a prima facie case and grant it summary judgment?

{¶ 3} "II. When a motion to substitute parties is tendered timely and in good faith, and there is no apparent reason for denying leave for the substitution, the denial of such leave is an abuse of discretion. MERS moved to have Household substituted as plaintiff almost 18 months after it first could have done so, and only after Vascik showed that MERS did not hold the mortgage. Did the trial court abuse its discretion in allowing the substitution?

{¶ 4} "III. Paragraphs 15, 20 and 22 of the mortgage impose a condition precedent to the filing of suit, namely, the provision of notice of default and intent to accelerate. If a notice was sent, it was done so by ordinary mail only. Vascik denied receiving such a notice, which rebutted the presumption of delivery. Did the trial court commit error in finding no genuine issue of material fact regarding receipt of the notice?"

{¶ 5} The relevant facts of this case are as follows. On November 28, 2005, Mortgage Electronic Registration Systems, Inc. ("MERS"), filed a complaint in foreclosure against Vascik, alleging that it was the owner and holder of a promissory note, secured by a mortgage on a home located at 136 Derbyshire Road, Toledo, Ohio,

and that Vascik was in default for failure to pay on the note since June 17, 2005. On October 6, 2008, MERS filed a motion for an order substituting Household as the plaintiff in the action. MERS asserted that Household was the real party in interest by virtue of an assignment of the mortgage at issue. MERS attached to its motion a photocopy of a document entitled "Corporate Assignment of Mortgage." The assignment is dated April 11, 2007, and was recorded in the Lucas County Recorder's Office on April 20, 2007. The lower court granted the motion and on October 10, 2008, Household filed an amended renewed motion for summary judgment supported by the affidavit of Robert Wright, Household's vice president, and copies of the original note and mortgage, assignment, and letter titled "Notice to Cure and Intent to Accelerate," dated September 29, 2005. Appellant responded by filing a notice of objection to the substitution of plaintiff and a memorandum in opposition to summary judgment, supported by her own affidavit.

{¶ 6} On April 2, 2009, the lower court filed a judgment entry granting Household summary judgment and entering a judgment of foreclosure against appellant in the amount of $104,162.24, plus 7.85 percent interest per annum from June 17, 2005. Appellant now challenges that judgment on appeal.

{¶ 7} We will first address the third assignment of error in which appellant asserts that the lower court erred in granting Household summary judgment because a genuine issue of material fact remained regarding whether she received proper notice of the default and intent to accelerate.

{¶ 8} Appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 294. However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 9} Paragraph 22 of the mortgage agreement entered into between appellant and MERS, Household's predecessor in interest, addresses the issue of acceleration and reads in relevant part:

{¶ 10} "Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument * * *. The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date,

not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default on any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding."

{¶ 11} Accordingly, prior to accelerating the balance due on a promissory note and filing an action to foreclose a mortgage, the mortgagee was required to give appellant notice of her default and an opportunity to cure the default.

{¶ 12} The mortgage agreement further provides in relevant part under paragraph 15, titled "Notices:"

{¶ 13} "All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. * * * The notice address shall be the Property Address unless Borrower has designated a

substitute notice address by notice to Lender. * * * There may be only one designated notice address under this Security Instrument at any one time."

{¶ 14} Attached to its amended renewed motion for summary judgment, filed with the trial court on October 10, 2008, and authenticated by affidavit, is a letter entitled "Notice to Cure and Intent to Accelerate" dated September 29, 2005. It is addressed to appellant at the notice address. The letter indicates that it was sent by U.S. Mail. The notice fully complies with the requirements of the mortgage set forth above. Accordingly, pursuant to the mortgage requirements, the notice is deemed to have been given to appellant on September 29, 2005. Appellant, however, asserts that the "mailbox rule" creates a rebuttable presumption that a letter mailed to the correct address is presumed to have been received in due course. See *Cantrell v. Celotex Corp.* (1995), 105 Ohio App.3d 90, 94. Appellant claims that by way of her affidavit filed in the court below on October 22, 2008, she rebutted the presumption of receipt through her statement that she never received the Notice to Cure and Intent to Accelerate. Accordingly, appellant asserts that a genuine issue of material fact remains regarding whether appellee properly notified her of its intent to accelerate the loan. Appellee counters that because appellant failed to raise the notice issue for over three years following the filing of the complaint, the defense has clearly been waived.

{¶ 15} For the following reason, we find that the defense has not been waived. "Where prior notice of default and/or acceleration is required by a provision in a note or mortgage instrument, the provision of notice is a condition precedent subject to Civ.R.

9(C)." *First Financial Bank v. Doellman*, 12th Dist. No. CA2006-02-029, 2007-Ohio-222, ¶ 20. Civ.R. 9(C) states: "[i]n pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity." In *Lewis v. Wal-Mart, Inc.* (Aug. 12, 1993), 10th Dist. No. 93AP-121, the court explained:

{¶ 16} "Where a cause of action is contingent upon the satisfaction of some condition precedent, Civ.R. 9(C) requires the plaintiff to plead that the condition has been satisfied, and permits the plaintiff to aver generally that any conditions precedent to recovery have been satisfied, rather than requiring plaintiff to detail specifically how each condition precedent has been satisfied. In contrast to the liberal pleading standard for a party alleging the satisfaction of conditions precedent, a party denying performance or occurrence of a condition precedent must do so specifically and with particularity. Civ.R. 9(C). A general denial of performance of conditions precedent is not sufficient to place performance of a condition precedent in issue. * * * The effect of the failure to deny conditions precedent in the manner provided by Civ.R. 9(C) is that they are deemed admitted."

{¶ 17} Where, however, a cause of action is contingent upon the satisfaction of some condition precedent, and the plaintiff fails to allege, even generally, that the condition has been satisfied, "[a] defending party may raise the defense of failure to state a claim upon which relief may be granted as late as the trial on the merits, and the

defense is not waived by failure to assert it in a pleading or motion." *Natl. City Mtge. Co. v. Richards,* 182 Ohio App.3d 534, 2009-Ohio-2556, ¶ 24.

{¶ 18} In the present case, appellee's predecessor in interest failed to allege, even generally, in its complaint that the conditions set forth in the mortgage document had been satisfied. Accordingly, appellant was permitted to counter appellee's motion for summary judgment with her own argument, supported by her affidavit, that she never received the notice of default and never was given an opportunity to cure the default. A genuine issue of material fact therefore remains to be litigated. Namely, whether appellee satisfied the condition precedent before initiating the foreclosure action in the court below. See *Nat's. City Mtge. Co. v. Richards*, supra; *CitiMortgage, Inc. v. Ferguson*, 5th Dist. No. 2006CA00051, 2008-Ohio-556; *First Financial Bank v. Doellman*, supra; *Mtge. Electronic Registration Systems, Inc. v. Akpele,* 9th Dist. No. 21822, 2004-Ohio-3411; *ContiMortgage Corp. v. Childers* (May 4, 2001), 6th Dist. No. L-00-1332 (summary judgment for mortgagee improper where genuine issue of material fact exists as to whether appellants received notice required by mortgage agreement). The third assignment of error is therefore well-taken.

{¶ 19} Although this case is to be remanded to the trial court for further proceedings, we find it necessary to answer a question raised by the first and second assignments of error, namely, who is the real plaintiff in interest in this action. Appellant asserts that the lower court erred in granting MERS' motion to substitute Household as the plaintiff in the action below because Household was not the current hold of the note.

In particular, appellant asserts that there is no evidence that the note in question was properly negotiated to Household through an indorsement and a change of possession. As such, appellant contends, Household was not entitled to enforce the note and the court erred in granting MERS' motion to substitute.

{¶ 20} The document titled "Corporate Assignment of Mortgage" discussed above reads in relevant part:

{¶ 21} "KNOW ALL MEN BY THESE PRESENTS that in consideration of the sum of TEN and NO/100ths DOLLARS and other good and valuable consideration, paid to the above named Assignor [MERS], the receipt and sufficiency of which is hereby acknowledged, the said Assignor hereby assigns unto the above-named Assignee [Household], the said Mortgage together with the Note or other evidence of indebtedness (the "Note"), said Note having an original principal sum of $105,000 with interest, secured thereby, together with all moneys now owing or that may hereafter become due or owing in respect thereof, and the full benefit of all the powers and of all the covenants and provisos therein contained, and the said Assignor hereby grants and conveys unto the said Assignee, the Assignor's beneficial interest under the mortgage.

{¶ 22} "TO HAVE AND TO HOLD the said Mortgage and Note, and also the said property unto the said Assignee forever, subject to the terms contained in said Mortgage and Note."

{¶ 23} The assignment was signed by the vice president of MERS, was notarized and was recorded with the Lucas County Recorder in April 20, 2007. Appellant has not challenged the authenticity of this assignment.

{¶ 24} The promissory note at issue became payable to the order of MERS pursuant to an allonge attached to the note. No one questions the validity of the allonge. R.C. 1303.21(B) provides that " * * * if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder." Because there is no evidence that the note was indorsed by MERS or even physically transferred to Household, appellant contends that Household has no right to demand payment of the note. However, R.C. 1303.31 sets forth a list of persons who are entitled to enforce an instrument, including "[a] nonholder in possession of the instrument who has the rights of a holder." R.C. 1303.31(A)(2). We must therefore determine if Household had the rights of a holder despite the lack of possession and an indorsement on the note.

{¶ 25} In *LaSalle Bank Natl. Assn. v. Street*, 5th Dist. No. 08 CA 60, 2009-Ohio-1855, ¶ 28, citing *Kuck v. Sommers* (1950), 59 Ohio Law Abs 400, the court determined that "[w]here 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." The Ninth District Court of Appeals reached this same conclusion in *Deutsche Bank Natl. Trust Co. v. Traxler*, 9th Dist. No. 09CA009739, 2010-Ohio-3940, ¶ 20. The rationale behind these holdings is

that where a promissory note, i.e. a debt, is secured by a mortgage, the mortgage is the only evidence of the security offered, and so, the two are inextricably linked. *Bank of New York v. Dobbs*, 5th Dist. No. 2009-CA-000002, 2009-Ohio-4742, ¶ 26. In *Dobbs*, the court addressed the converse situation and held where the note refers to the mortgage and the mortgage, in turn, refers to the note, the clear intent of the parties is to keep the note and mortgage together so that a transfer of a mortgage, necessarily includes the transfer of the note. Id. at ¶ 31-36.

{¶ 26} In the present case, the language of the two instruments indicates a clear intention of the original parties to the agreement to keep the mortgage and note together. The mortgage reads in relevant part:

{¶ 27} "This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications on the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successor's and assigns) and to the successors and assigns of MERS the following described property * * * [legal description of property]."

{¶ 28} The mortgage further provides:

{¶ 29} "* * * Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS * * * has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any

action required of Lender, including, but not limited to, releasing and canceling this Security Instrument."

{¶ 30} The promissory note then reads in relevant part:

{¶ 31} "In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the 'Security Instrument'), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises that I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note."

{¶ 32} These provisions of the mortgage and note in this case are identical to the provisions at issue in *Dobbs*. See *Dobbs*, ¶ 32-34.

{¶ 33} We therefore conclude that despite a lack of evidence that MERS physically delivered and indorsed the note to Household, Household acquired the rights of a holder in due course of the note and, therefore, is the proper plaintiff in this action. The first assignment of error is not well-taken to the extent that it challenges the lower court's substitution of Household for MERS. It is well-taken to the extent that it challenges the lower court's grant of summary judgment to Household.

{¶ 34} We further note that Civ.R. 17(A) provides "[e]very action shall be prosecuted in the name of the real party in interest." In a foreclosure action, the entity that is "[t]he current holder of the note and mortgage is the real party in interest," see *Wells Fargo Bank, N.A. v. Stovall*, 8th Dist. No. 91802, 2010-Ohio-236, ¶ 15, and, thus,

has the standing to raise the court's jurisdiction. See, also, *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603.

{¶ 35} In the present case, when MERS filed the foreclosure action on November 28, 2005, it was then the holder of the note and mortgage and was, therefore, at that time the real party in interest. While the action was pending below, however, on April 11, 2007, MERS transferred its interest in the action, i.e. the mortgage and note, to Household through the assignment, which was then recorded with the Lucas County Recorder on April 20, 2007. Civ.R. 25(C) addresses substitution of parties upon the transfer of an interest in the litigation and reads in relevant part: "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." The decision of whether to allow a substitution of parties lies within the trial court's discretion, but "the court may only grant the motion upon a finding of a transfer of interest." *Dater v. Charles H. Dater Foundation, Inc.*, 166 Ohio App.3d 839, 2006-Ohio-2479, ¶ 11, citing *Ahlrichs v. Tri-Tex Corp.* (1987), 41 Ohio App.3d 207, 210.

{¶ 36} In the proceedings below, while the order substituting plaintiff did not expressly state that the order was being granted upon a finding of a transfer of interest, the court did state in its ruling granting Household summary judgment that MERS had transferred its interest by the assignment which was recorded with the Lucas County Recorder, Instrument Number 20070420-0023083. Because it is undisputed that MERS

transferred its interest in the action to Household, the trial court did not abuse its discretion in granting the motion for substitution. The second assignment of error is not well-taken.

{¶ 37} On consideration whereof, the court finds that substantial justice has not been done the party complaining and the judgment of the Lucas County Court of Common Pleas is reversed. This case is remanded to that court for further proceedings consistent with this decision. The parties are ordered to pay their own court costs of this appeal.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE