

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

Countrywide Home Loans, Inc.

Court of Appeals No. L-09-1169

Appellee

Trial Court No. CI08-2809

v.

Robert E. Montgomery, et al.

DECISION AND JUDGMENT

Appellant

Decided: February 26, 2010

* * * * *

Eric T. Deighton, for appellee.

Jenelda E. Witcher, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} In this appeal from a judgment of the Lucas County Court of Common Pleas, we are asked to address the following assignments of error:

{¶ 2} "1. The Plaintiff was not the real party in interest in the lawsuit filed in the trial court and therefore lacked standing to bring suit at the time the suit was filed against

the defendant. In failing to establish that the Plaintiff was the real party in interest, the Plaintiff therefore was not legally entitled to bring the suit against appellant."

{¶ 3} "2. The Lucas County Common Pleas Court erred when it granted summary judgment to Countrywide Home Loans, Inc., since at the time of filing the Complaint Countrywide lacked standing given that they were not legally the real party in interest entitled to bring the suit against the Defendant. The court therefore lacked jurisdiction over the case brought by a party who was not the real party in interest at the time of filing suit."

{¶ 4} In 2004, appellant, Robert E. Montgomery, purchased property located in Toledo, Lucas County, Ohio. He borrowed \$175,000 from Keybank National Association ("Keybank") in order to buy that property and, on February 11, 2004, signed a mortgage agreeing to repay this debt to Keybank.

{¶ 5} On March 14, 2008, appellee, Countrywide Home Loans, Inc. ("Countrywide") filed a foreclosure action in the trial court in which it asserted that:

- (1) appellant was in default on the mortgage that was held by Keybank; and
- (2) Countrywide was "the creditor to whom the debt was owed." Among others, Keybank was also named as a defendant. Attached to the complaint was the original mortgage and a second document captioned "Note." This second document also contained the terms of the mortgage and was signed by appellant. The ensuing language was added at the end of this note: "Pay to the order of Countrywide Document Custody

Services, a division of Treasury Bank, N.A. without recourse this 23rd day of February, 2004. Keybank National Association."

{¶ 6} Appellant filed an answer and a counterclaim. As part of the proceedings below, First American Title Insurance compiled a preliminary and a final Judicial Report. The final report contains the following statement:

{¶ 7} "1. Said Mortgage was assigned to COUNTRYWIDE HOME LOANS, INC., 7105 CORPORATE DRIVE, PTX-B-209, PLANO, TX 75024 BY SEPARATE INSTRUMENT dated March 14, 2008, filed for record April 16, 2008 at 9:10 a.m. and recorded in INSTRUMENT NO. 20080416-0018897 of Lucas County records."

{¶ 8} On February 6, 2009, Countrywide filed a motion for summary judgment. Appellee's requests for admissions are attached to the motion for summary judgment. In those requests, appellant admitted that Countrywide is the holder of the mortgage on his property and that Countrywide is the assignee of Keybank. In addition, the affidavit of Ely Harless, the vice president of Countrywide is also attached to the motion for summary judgment. In the affidavit, Harless avers that Countrywide is the holder of appellant's mortgage and note.

{¶ 9} Montgomery never filed a memorandum in opposition to this motion. Consequently, on March 2, 2009, the common pleas court granted Countrywide's motion for summary judgment¹. Nonetheless, on March 27, 2009, appellant filed a motion to

¹Because the claims of other parties, e.g., Keybank, were not yet resolved by the trial court, the judge added the requisite Civ.R. 54(B) language, to wit, "no just cause for

vacate the trial court's judgment for lack of subject matter jurisdiction. Appellant maintained that as of the date that Countrywide initiated its foreclosure action, it failed to establish that it was the real party in interest as required by Civ.R. 17(A). Montgomery therefore claimed that Countrywide lacked standing to bring the instant action. Appellee filed a memorandum in opposition. On May 19, 2009, the trial court denied appellant's motion, and appellant timely filed the instant appeal.

{¶ 10} Because appellant's assignments of error are intertwined, we shall consider them together. In order to grant a motion for summary judgment, a trial court must determine that: (1) there is no genuine issue as to a material fact; (2) the moving party is entitled to summary judgment; and (3) it appears from the evidence, which is construed in the favor of the nonmoving party, that reasonable minds can come to but one conclusion and that conclusion is adverse to that party. Civ.R. 56(C). Our review of a lower court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105.

{¶ 11} Civ.R. 17(A) requires that "a civil action must be prosecuted by the real party in interest, that is, by a party who can discharge the claim upon which the action is instituted or is the party who has a real interest in the subject matter of that action."

Discover Bank v. Brockmeier, 12th Dist. No. 2006-057-078, 2007-Ohio-1552, ¶ 7

(Citation omitted.). If an individual or one in a representative capacity does not have a

delay," in order to render the grant of summary judgment to Countrywide a final, appealable order.

real interest in the subject matter of the action, that party lacks the standing to invoke the jurisdiction of the court. *State ex rel Dallman v. Court of Common Pleas* (1973), 35 Ohio St.2d 176, syllabus.

{¶ 12} 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, ¶ 24 (A bank that was not the mortgagee when its foreclosure action was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage.); *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092 (holding that the plaintiff must prove that it owned the note and the mortgage on the date that its complaint in foreclosure was filed).

{¶ 13} Appellant interprets both *Byrd* and *Jordan* as standing for the proposition that a mortgagee must prove that it is the holder of a mortgage on the exact date that the complaint in foreclosure is filed. For the following reason, we disagree. In *Byrd*, Wells Fargo Bank admitted that it was not the holder of the mortgage at the time that it commenced its foreclosure action. *Id.* at ¶ 13. The same is true in *Jordan* wherein Wells Fargo Bank was assigned the mortgage three weeks after it commenced its foreclosure action. *Id.* at ¶ 25. Nothing in either of these decisions indicates proof that a mortgage was assigned to the mortgagee prior to or at the time of the filing of the foreclosure action cannot be offered after the filing of said action. Accord, *Wells Fargo Bank, N.A. v.*

Stovall, supra at ¶ 16 (An assignment of the mortgage to Wells Fargo Bank, N.A. was attached to the bank's motion for summary judgment. The date of the assignment showed that it was made prior to the commencement of the foreclosure action thereby demonstrating that the bank was the real party in interest.).

{¶ 14} As applied to the case before us, uncontradicted evidence, as set forth infra, was offered to establish that appellee was the holder of appellant's mortgage on March 14, 2008, the date that this foreclosure action was commenced. Accordingly, no genuine issue of material fact exists on the question of whether Countrywide is the real party in interest and possessed standing to institute this action. Therefore, the trial court did not err in granting summary judgment to Countrywide. Appellant's first and second assignments of error are found not well-taken.

{¶ 15} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

JUDGMENT AFFIRMED.

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

Countrywide Home Loans, Inc.
v. Montgomery
C.A. No. L-09-1169

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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