[Cite as *Countrywide Home Loan Servicing, L.L.P. v. Heck*, 2011-Ohio-147.]

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

Countrywide Home Loans Servicing, L.P.	Court of Appeals No. OT-10-011
Appellee	Trial Court No. 09 CV 95 E
v.	
Charles A. Heck and Patricia A. Heck	**DECISION AND JUDGMENT**
Appellants	Decided: January 14, 2011

* * * * *

Stacy L. Hart, for appellee.

Ron Nisch, for appellants.

* * * * *

SINGER, J.

{¶ 1} Appellants appeal a summary judgment and decree of foreclosure entered in the Ottawa County Court of Common Pleas. For the reasons that follow, we affirm.

{¶ 2} Appellants are Charles A. and Patricia A. Heck, owners of real property in Port Clinton, Ohio. On March 27, 2007, appellants executed a note in the amount of

$290,250, secured by a mortgage on their Port Clinton property. The lender was America's Wholesale Lender. The mortgage was subsequently assigned to appellee, Countrywide Home Loan Servicing, L.P. n/k/a. BAC Home Loans Servicing, L.P.

{¶ 3} On February 26, 2009, appellee instituted a foreclosure proceeding in the trial court. In its complaint, appellee alleged that appellants were in default of the terms of the note, on which there was an outstanding balance of $286, 713.76, plus interest. Appellee sought a judgment on the note, foreclosure of the mortgage and sale of the property. On July 9, 2009, appellants answered the complaint, setting forth a general denial of the allegations and various affirmative defenses, including fraud in the inducement. On October 23, 2009, appellee moved for summary judgment supported by the loan documents, mortgage and the affidavit of appellee's assistant vice president who averred to appellants' delinquency in payment.

{¶ 4} Appellants responded with a memorandum in opposition, supported by the affidavit of Patricia Heck. According to Patricia Heck, in 2007, when appellants were solicited by Midwest Financial and Mortgage Services to obtain a loan, appellant husband was retired and appellant wife was unemployed. The couple had a household income of $1,600 monthly. Nevertheless, Patricia Heck averred, without appellants' knowledge, someone at Midwest entered a monthly income of $5,500 for the couple on the Uniform Residential Loan application that the couple submitted. This false submission, appellants argue, constitutes fraud in the inducement of the loan by the broker and, since the broker presumably provided the correct information to the original

lender, by the original lender. Appellants also assert violation of the Ohio Mortgage Broker Act and the Ohio Consumer Sales Practices Act.

{¶ 5} Appellee responded that, while the affidavit of Patricia Heck may make out some kind of misdeed by the original broker or the original lender, neither the original broker nor lender has been joined as a party to this action. No such misdeed is even alleged of appellee. Moreover, appellants have not disputed, indeed they have admitted, that the loan is in default for want of payment.

{¶ 6} On these submissions, the trial court granted appellee a summary judgment of foreclosure. From this judgment, appellants now bring this appeal. Appellants set forth the following single assignment of error:

{¶ 7} "The March 2, 2010 Decision of the Trial Court Granting Appellee's Motion for Summary Judgment, was Contrary to Law and the Provisions of Civ.R. 56(C), as there were Factual Disputes as to Appellant's [sic] Asserted Defenses Which did Not Entitle Appellee to Judgment as a Matter of Law."

{¶ 8} On review, appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts*. (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 9} "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed

most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C).

{¶ 10} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleading, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery* (1984), 11 Ohio St.3d 75, 79. A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301, 304; *Needham v. Provident Bank* (1996), 110 Ohio App.3d 817, 826, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶ 11} Accepting as true the facts alleged in Patricia Heck's affidavit, the question becomes whether such facts are material so as to defeat or impair appellee's claim. Appellee insists that it is a holder in due course and, therefore, not affected by claims of impropriety that appellants may have against third parties.

{¶ 12} One who takes an instrument as a holder in due course, with certain exceptions, is immune to defenses and free of claims of recoupment or title that prior parties might assert. 2 White and Summers, Uniform Commercial Code (5 Ed. 2008) 168. R.C. 1303.32(A) (UCC 3-302) provides that one is a holder in due course if:

{¶ 13} "(1) The instrument when issued or negotiated to the holder does not bear evidence of forgery or alteration that is so apparent, or is not otherwise so irregular or incomplete as to call into question its authenticity [and]

{¶ 14} "(2) The holder took the instrument under all of the following circumstances:

{¶ 15} "(a) For value;

{¶ 16} "(b) In good faith;

{¶ 17} "(c) Without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series;

{¶ 18} "(d) Without notice that the instrument contains an unauthorized signature or has been altered;

{¶ 19} "(e) Without notice of any claim to the instrument as described in [R.C.1303.36];

{¶ 20} "(f) Without notice that any party has a defense or claim in recoupment described [R.C. 1303.35(A)]."

{¶ 21} There is no claim that appellee obtained the note other than for value and in good faith. R.C. 1303.36 (UCC 3-308) concerns the validity of signatures and is not at issue here. Appellants do suggest that appellee's compliance with R.C. 1303.32(A)(1)(c) is lacking because the date of assignment of the note was only a few weeks before suit on

the default was instituted. Appellants insist that it is reasonable to believe that appellee must have known that the note was overdue when it was obtained.

{¶ 22} Appellee insists that it acquired the note and mortgage in the ordinary course of business and there is nothing of record to the contrary. Moreover, appellee insists, the date an assignment is executed is not indicative of when the loan was acquired.

We are somewhat skeptical of appellee's proposition of law concerning the significance of the date of execution of an assignment, but that point is not dispositive here. While the proximity of the date of the assignment and the institution of suit on the note may be cause for further inquiry, absent more it is not sufficient evidence that the assignee had notice of default at the time of assignment. Civ.R. 56(E).

{¶ 23} What remains is the question of whether the facts appellants assert are within that range of defenses that remain viable against a holder in due course. These defenses are articulated in R.C. 1303.35(A) (UCC 3-305):

{¶ 24} "[T]he right to enforce the obligation of a party to pay an instrument is subject to all of the following:

{¶ 25} "(1) A defense of the obligor based on any of the following:

{¶ 26} "(a) Infancy of the obligor to the extent it is a defense to a simple contract;

{¶ 27} "(b) Duress, lack of legal capacity, or illegality of the transaction that, under other law, nullifies the obligation of the obligor;

{¶ 28} "(c) Fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms;

{¶ 29} "(d) Discharge of the obligor in insolvency proceedings. * * *"

{¶ 30} R.C. 1303.35(A)(1)(a) and (d) are clearly inapplicable here. With respect to R.C. 1303.35(A)(1)(b), in argument, appellants suggest that the mortgage broker violated the Ohio Mortgage Broker Act and the Ohio Consumer Sales Practices Act, but fails to articulate in what manner these violations occurred or provide authority that such violations nullify their obligation.

{¶ 31} Appellants repeatedly suggest their application was the result of fraud in the inducement, but fail to inform in what manner they were denied a reasonable opportunity to determine the true character of the document they were signing. The loan application which appears in the record is unsigned. The note, which appellants undisputedly did sign, carries a monthly payment of $1,980.02. Patricia Heck's affidavit, which states appellants' monthly income was $1,600.00, suggest that appellants were aware that their income was inadequate to qualify for the loan at issue. It would seem from the contents of that affidavit that it is equally probable that appellants were at least acquiescent in the mortgage broker's fraudulent inducement of the lender to approve the loan. None of these circumstances suggest events which, pursuant to R.C. 1303.35(A)(1)(c), would absolve appellants from their obligation to repay the debt they incurred. Accordingly, appellee was entitled to judgment as a matter of law and appellants' single assignment of error is not well-taken.

{¶ 32} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is affirmed. It is ordered that appellants pay the court costs of this appeal pursuant to App.R. 24.

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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

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