[Cite as *HSBC Mtge. Servs., Inc. v. Edmon*, 2012-Ohio-4990.]

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

HSBC Mortgage Services, Inc.	Court of Appeals No. E-11-046
Appellee	Trial Court No. 2010-CV-0194
v.	
Dannie Edmon, et al.	**DECISION AND JUDGMENT**
Appellant	Decided: October 26, 2012

* * * * *

Jason A. Whitacre and Laura C. Infante, for appellee.

Daniel L. McGookey and Lauren McGookey, for appellant.

* * * * *

YARBROUGH, J.

I. Summary

{¶ 1} Appellant, Dannie Edmon, appeals the judgment of the Court of Common Pleas of Erie County which awarded summary judgment pursuant to Civ.R. 56(B) to appellee, HSBC Mortgage Services, Inc. ("HSBC"). For the following reasons, we reverse.

Factual and Procedural Background

{¶ 2} On March 8, 2010, HSBC filed a complaint in foreclosure against Edmon. In its complaint, HSBC alleged that Edmon defaulted on a note initially executed in favor of Accredited Home Lenders, Inc. HSBC further alleged that Edmon defaulted on the mortgage which secured the note, and owed $148,951.44 plus interest at the rate of 5.25 percent per annum from August 1, 2009. Attached to the complaint were copies of the note, the mortgage, and a mortgage assignment. The mortgage assignment was assigned by Mortgage Electronic Registrations Systems Inc., as nominee for Accredited Home Lenders, Inc. to HSBC Mortgage Services, Inc. and was recorded on February 22, 2010.

{¶ 3} On April 9, 2010, Edmon filed an answer. In addition to the answer, Edmon filed a counterclaim, which was eventually dismissed. On November 24, 2010, HSBC filed a motion for summary judgment. Attached to its motion for summary judgment, HSBC submitted the affidavit of one of its employees, Maria Vadney ("Vadney"). In this affidavit, Vadney averred that: (1) she is an employee of HSBC in the capacity of a loan servicing agent, (2) HSBC is the "owner in possession" of the promissory note and mortgage, "true and accurate copies of which were attached to [HSBC's] Complaint as Exhibits thereto," (3) HSBC acquired the note on February 1, 2010, prior to the execution of the mortgage assignment, (4) HSBC has exercised the option contained in the "mortgage note," and (5) Vadney has personal knowledge of Edmon's account, the account is under her supervision, and Edmon is in default on the note and mortgage and owes $148,951.44, together with interest at the rate of 5.25 percent per year from

August 1, 2009. Attached to the Vadney affidavit was a copy of the mortgage assignment indicating that it was recorded with the Erie County Recorder on February 22, 2010. Copies of the note and mortgage, while referenced, were not attached to the affidavit.

{¶ 4} The trial court awarded summary judgment to HSBC in a judgment journalized on May 17, 2011. Much contention between the parties existed on the issue of whether Vadney's affidavit served to authenticate the promissory note. In so awarding summary judgment to HSBC, the trial court made the following finding:

> The original Note is retained at Plaintiff's office in De Pew [sic], New York [Depo.pp.20-21]. Ms. Vadney requested the original Note from Phil LaGrossa, the manager of the De Pew [sic], New York office, who sent the original Note to Ms. Vadney [Depo. Pp 25-26]. Ms. Vadney then sent the original Note to Plaintiff's counsel in Ohio. This Court finds it immaterial regarding Ms. Vadney's not seeing the original Note when she made the affidavit given her testimony on March 11, 2011. She knew the original was in Plaintiff's custody. She has a file copy in the file she reviewed and the original Note was in the De Pew [sic], New York office where they are retained.

{¶ 5} This appeal followed.

Assignment of Error

{¶ 6} Appellant asserts the following sole assignment of error:

> The trial court erred in granting HSBC's Motion for Summary Judgment and in holding HSBC is the owner and holder of Mr. Edmon's Note and Mortgage.

II. Analysis

Standard of Review

{¶ 7} When reviewing a trial court's award of summary judgment, the appellate court conducts a de novo review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment will be granted when there are no genuine issues 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.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978).

{¶ 8} On a motion for summary judgment, the moving party has the burden of demonstrating that no genuine issue of material fact exists. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). The moving party must point to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* at 292-293. Pursuant to Civ.R. 56(C), the evidence to be considered is limited to the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action * * *." Nevertheless, the trial court

may consider a type of document not expressly mentioned in Civ.R. 56(C) if such document is accompanied by a personal certification that it is genuine or is incorporated by reference in a properly framed affidavit pursuant to Civ.R. 56(E). *See Bowmer v. Dettelbach*, 109 Ohio App.3d 680, 684, 672 N.E.2d 1081 (6th Dist.1996). The burden then shifts to the nonmoving party to provide evidence showing that a genuine issue of material fact does exist. *Dresher* at 293; Civ.R. 56(E).

{¶ 9} To properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials showing: (1) The movant is the holder of the note and mortgage, or is a party entitled to enforce the instrument; (2) if the mover is not the original mortgagee, the chain of assignments and transfers; (3) the mortgager is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due. *Wachovia Bank v. Jackson*, 5th Dist. No. 2010-CA-00291, 2011-Ohio-3202, ¶ 40-45.

{¶ 10} HSBC submits that the Vadney affidavit which referenced the note and mortgage, and the attached mortgage assignment, are sufficient to support its motion for summary judgment. However, after reviewing the record, we find that the trial court erred by awarding summary judgment to HSBC because HSBC was unable to properly authenticate the promissory note, and HSBC failed to demonstrate that it has satisfied any conditions precedent.

The Vadney Affidavit

{¶ 11} In determining the sufficiency of Vadney's affidavit, we turn to the requirements set forth by Civ.R. 56(E), which states that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. *Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit*." (Emphasis added.) The latter requirement is satisfied by a statement in the affidavit declaring that the copies of the documents submitted are true and accurate reproductions of the originals. *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 467, 423 N.E.2d 105 (1981).

{¶ 12} In his motion in opposition to HSBC's motion for summary judgment, Edmon argued that Vadney was not competent to testify to or verify the promissory note attached to her affidavit. Edmon does not argue that, on its face, the affidavit is insufficient to establish Vadney's personal knowledge of the note. Rather, Edmon argues that based upon Vadney's testimony at a later deposition, Vadney's affidavit was not based on personal knowledge. We agree.

{¶ 13} In her affidavit, Vadney averred that she has personal knowledge over Edmon's account and that the promissory note attached to the complaint is a true and accurate copy of the original. Unless controverted by other evidence, a specific averment that an affidavit is made upon personal knowledge of the affiant satisfies the Civ.R. 56(E) requirement that the affiant must be competent to testify to the matters stated.

Seminatore at paragraph two of the syllabus. Furthermore, verification of documents attached to an affidavit supporting or opposing a motion for summary judgment, as required by Civ.R. 56(E), is satisfied by an appropriate averment in the affidavit itself, for example, "such copies are true copies and reproductions." *Id.* at paragraph three of the syllabus.

{¶ 14} We initially note that neither the promissory note nor the mortgage were attached to Vadney's affidavit. However, Vadney did attest that the copies of the note and mortgage attached to the complaint were true and accurate copies. The Ninth District has held that Civ.R. 56(E) is satisfied if the "affidavit[ ] state[s] that it was made upon personal knowledge of the affiant and reference[s] * * * documents filed with the complaint." *Charter One Mtge. Corp. v. Keselica*, 9th Dist. No. 04CA008426, 2004-Ohio-4333, ¶ 14 (holding that an affidavit complied with Civ.R. 56(E) because it stated that "the affiant is a servicing agent for Charter One, that in such position [affiant] has custody of and is familiar with the account of [mortgager], and that the note and mortgage attached to the complaint are accurate copies of the original instruments"). *Huntington Natl. Bank v. Conservatory Assoc. LLC*, 9th Dist. No. 10CA0096-M, 2011-Ohio-3249, ¶ 4 (holding that affidavit satisfied Civ.R. 56(E) where affiant "asserted that he has personal knowledge of Huntington's books and records as they pertain to [mortgager] and that the loan documents attached to Huntington's complaint are true, accurate, and complete copies of the loan documents at issue"). Therefore, HSBC satisfied its initial burden in Vadney's affidavit when she averred, "[HSBC] is the owner

in possession of the promissory note and mortgage, true and accurate copies of which were attached to the Plaintiff's Complaint as Exhibits thereto[.]"

{¶ 15} Nevertheless, in his memorandum in opposition to HSBC's motion for summary judgment, Edmon asserted that Vadney had never physically observed the original promissory note, and instead, when creating her affidavit, Vadney relied upon a scanned document in an online record, which was scanned from HSBC's New York office. As evidence in support of this assertion, Edmon filed a transcript pursuant to Civ.R. 30(E), from Vadney's deposition held on March 11, 2011.

{¶ 16} In the deposition Vadney averred, "All our original documents are kept in our Depew office." When explaining the process of how she requests "original" documents, Vadney explained, "All I know is when I need an original document for one of our attorneys, I will request it, and it gets scanned and over-nighted to me, but at any one time I could pull up a copy of every original document that's in that customer's folder off of my system." Furthermore, in response to a question regarding the handling of notes in HSBC's Depew office, Vadney replied, "They scan it. They upload them into our system to make sure we have copies of anything that's received in Depew, New York. All their originals are kept and bar coded under the customer's account." From the preceding testimony it would appear that Vadney's affidavit is corroborated by her depositional testimony. However, even though Vadney averred that as a loan servicing agent for HSBC, she has personal knowledge of Edmon's account, and that true and accurate copies of the promissory note and mortgage were attached to the complaint,

Edmon met his reciprocal burden of demonstrating that a genuine issue of material fact exists by showing that Vadney did not review the original promissory note when swearing that the copy filed with the complaint is a true and accurate copy of the original. In fact, Vadney relied on a copy of the note scanned into HSBC's database by the manager in the Depew, New York office:

> [Edmon's attorney]: Despite the fact that you signed an affidavit in this case in support of motion for summary judgment, by your own testimony you never laid eyes on the original note until just a month ago, is that right?
>
> [Vadney]: Sir, what I said, I don't need the original to do my job. Every document, every original, that we have on Mr. Edmon we have uploaded on our system. I have a copy of all the documents. *I did not have the original at the time*. I have all copies of all the originals that are in his file. (Emphasis added.)

{¶ 17} Furthermore, a review of the entire transcript indicates that Vadney is unfamiliar with the processes of the Depew, New York office where the original promissory note was stored and retrieved. The following testimony reveals Vadney's lack of familiarity with the Depew office's processes:

> [Vadney]: I'm in foreclosure. I have a different set of processes [than those of the manager at the Depew, New York office]. Mine pertains all to the account. Anything with original documents and how they get it

that has nothing to do with me. That – They have a process up in Depew, New York on how they handle - - store all their processes. I'm not there. I do not know what their process is.

{¶ 18} In further demonstration that Vadney is unfamiliar with the processes of the New York office, her testimony is as follows:

[Vadney]: The manager at our Depew office is Phil LaGrossa

[Edmon's attorney]: What is his name?

[Vadney]: LaGrossa

* * *

[Edmon's attorney]: Okay who gave [the original promissory note] to him: Who retrieved it from the vault?

[Vadney]: Sir, my job is foreclosure. I don't know what his processes are. I'm not going to answer for what he does there.

[Edmon's attorney]: Okay. When –

[Vadney]: I can't answer what he does.

{¶ 19} Vadney was unable to compare her copy of the note to the original when she swore in her affidavit that she did so. Thus, Vadney, having not actually compared the copy to the original document, and being unfamiliar with the processes in HSBC's New York office, is unable to swear to the note as required by Civ.R. 56(E).

{¶ 20} We note that the Fifth District, in *Deutsche Bank Natl. Trust Co. v. Hansen*, 5th Dist. No. 2010 CA 00001, 2011-Ohio-1223, ¶ 15, has held that an affidavit in support

of summary judgment in a foreclosure case satisfied Civ.R. 56(E) based upon an affiant's later depositional testimony. In *Hansen*, the court determined that the affiant's later depositional testimony was sufficient to demonstrate that, based on the business practices of the affiant's organization, the affiant had personal knowledge of whether the copy the affiant received was a true and accurate copy. The *Hansen* court determined that the affiant verified the original with the custodian and could distinguish that the document was a copy from the original by how the copy was marked by the custodian—regardless of the fact that the affiant did not personally see the original promissory note, make the copy, or watch the copy being made.

{¶ 21} In this case, Vadney's testimony was oftentimes confusing about whether she received an original document, or a copy of an original document. For example, Vadney stated, "All I know is when I need an original document for one of our attorneys, I will request it, and it gets scanned and over-nighted to me, but at any one time I could pull up a copy of every original document that's in that customer's folder off my system." It is unclear whether Vadney receives a "scanned" copy as an "original," or whether a bar code on the original document is scanned and then the original mailed.

{¶ 22} HSBC argues that Vadney's testimony is sufficient for the promissory note to be admitted as a business record. However, before application of Evid.R. 803(6), and prior to admission of a business record, the record must also be properly identified or authenticated, "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). "This low threshold standard does not

require *conclusive* proof of authenticity, but only sufficient foundational evidence for the trier of fact to conclude that the document is what its proponent claims it to be." (Emphasis sic.) *State v. Easter*, 75 Ohio App.3d 22, 25, 598 N.E.2d 845 (4th Dist.1991), *citing* 1 Weissenberger, Ohio Evidence (1991) 4-5, Section 901.2; Giannelli, Ohio Evidence Manual (1990) 6, Section 901.01. Therefore, we must initially query whether the promissory note was properly authenticated.

{¶ 23} Evid.R. 901(B)(1) provides that authentication can occur by "[t]estimony of [a] witness with knowledge." To authenticate the promissory note, HSBC presented the Vadney affidavit, in which Vadney testified that she has "personal knowledge" of Edmon's account and that the promissory note is a true and accurate copy of the original. However, Edmon has successfully raised an issue of fact regarding whether Vadney was "a witness with knowledge" and whether the documents are true and accurate copies. In her deposition, Vadney testified that she did not know who scanned the note into her computer system, nor did she know how such information was collected and compiled. In order to properly authenticate business records, a witness must "testify as to the regularity and reliability of the business activity involved in the creation of the record." *State v. Hirtzinger*, 124 Ohio App.3d 40, 49, 705 N.E.2d 395 (2d Dist.1997). Because Vadney was unfamiliar with the processes performed by the Depew office, we conclude that the court erred in admitting the promissory note as evidence for consideration in HSBC's motion for summary judgment.

{¶ 24} Accordingly, there remains a genuine issue of material fact as to the authenticity of the promissory note filed with HSBC's motion for summary judgment.

HSBC Unable to Prove Status as Note Holder

{¶ 25} HSBC was required to prove that it is the current holder of the note and mortgage in order to establish itself as the real party in interest. *See Deutsche Bank Natl. Trust Co. v. Greene,* 6th Dist. No. E-10-006, 2011-Ohio-1976, ¶ 13. The failure to prove itself as the real party in interest creates a genuine issue of material fact that precludes summary judgment. *First Union Natl. Bank v. Hufford,* 146 Ohio App.3d 673, 679-680, 767 N.E.2d 1206 (3d Dist.2001).

{¶ 26} Ohio's version of the Uniform Commercial Code governs who may enforce a note. R.C. 1301.01 et seq. Article 3 of the UCC governs the creation, transfer and enforceability of negotiable instruments, including promissory notes secured by mortgages on real estate. *Fed. Land Bank of Louisville v. Taggart,* 31 Ohio St.3d 8, 10, 508 N.E.2d 152 (1987).[1] An allonge is attached to the note with the following blank endorsement,[2] "PAY TO THE ORDER OF: _____ WITHOUT RECOURSE //s JS

[1] R.C. 1301.01 was repealed by Am.H.B. No. 9, 2011 Ohio Laws File 9, effective June 29, 2011. That act amended the provisions of R.C. 1301.01 and renumbered that section so that it now appears at R.C. 1301.201. Because R.C. 1301.201 only applies to transactions entered on or after June 29, 2011, we apply R.C. 1301.01 to this appeal.

[2] R.C. 1303.25(B) states: "'Blank indorsement' means an instrument that is made by the holder of the instrument and that is not a special indorsement. When an instrument is indorsed in blank, the instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed."

Rohrschieb, Assistant Secretary, Accredited Home Lenders, Inc., A California Corporation." Because the note is payable to bearer, negotiation of the note would be accomplished by transfer of possession alone. R.C. 1303.21(B). HSBC claims that it is holder in possession of bearer paper.[3] However, because the note was not properly authenticated, its contents are excluded. Accordingly, HSBC cannot establish that it is the note holder.

HSBC is the Mortgage Holder

{¶ 27} Furthermore, after reviewing the submitted evidence, we find that the mortgage assignment attached to the affidavit constitutes proper evidentiary material to demonstrate HSBC's status as the mortgage holder.[4] Vadney's affidavit states that HSBC "purchased, acquired and/or otherwise obtained possession of the note and mortgage before February 1, 2010, and prior to the execution of the Assignment of Mortgage evidencing the transfer of record." Because the mortgage assignment is a notarized document, extrinsic evidence of its authenticity is not required pursuant to

[3] Under R.C. 1301.01, "holder" means either of the following: "(a) if the instrument is payable to bearer, a person who is in *possession* of the instrument; "(b) if the instrument is payable to an identified person, the identified person when in possession of the instrument." (Emphasis added.)

[4] "'Holder of the mortgage' means the holder of the mortgage as disclosed by the records of the recorder or recorders of the county or counties in which the mortgaged premises are situated." R.C. 5301.232(E)(3).

Evid.R. 902(8).[5] The mortgage assignment indicates that HSBC is the current assignee, and that it was recorded in the office of the Erie County Recorder on February 22, 2010. Thus, HSBC sufficiently established its status as the mortgage holder.

{¶ 28} Edmon argues that the mortgage assignment is fraudulent because it was executed by an individual named Shelene Strauss ("Strauss"), a purported employee of HSBC. Edmon argues that Strauss does not have the capacity to sign the assignment. Specifically, Edmon argues that "* * * Ms. Strauss is a known employee of [HSBC], yet signed on behalf of MERS to [HSBC], [therefore] a serious question exists as to whether Strauss had the legal capacity to sign this Assignment."

{¶ 29} In support of his position, Edmon's attorney submitted an affidavit with an attached Facebook account screenshot, which he alleges belongs to Strauss. This purported Facebook account indicates that Strauss's employer is HSBC.

{¶ 30} However, the Facebook screenshot is not admissible because there is no testimony that Edmon's attorney has personal knowledge of Strauss's Facebook account. Evid.R. 803(6); *see also Hirtzinger*, 124 Ohio App.3d at 49, 705 N.E.2d 395. Accordingly, this screen snapshot of Strauss's purported Facebook account is not proper

[5] Pursuant to Evid.R. 902(8)**,** "[d]ocuments accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments" do not require "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility * * *."

evidentiary material for consideration in Edmon's motion in opposition to HSBC's motion for summary judgment.

{¶ 31} HSBC alternatively argues that it is entitled to enforce the promissory note by virtue of its status as the mortgage holder. In support of its position, HSBC cites our previous decision in *Greene*, 6th Dist. No. E-10-006, 2011-Ohio-1976. Because the facts of this case are dissimilar to those in *Greene*, we cannot conclude that as a mortgage holder, HSBC is entitled to enforce the promissory note. In *Greene*, we held that "the assignment of the mortgage, in conjunction *with interlocking references in the mortgage and note*, transferred the note as well." (Emphasis added.) *Id*. at ¶ 15. In *Greene*, both the mortgage and note were properly before the court as evidence for consideration of Deutsche Bank's motion for summary judgment. As previously discussed, in this case, the promissory note has not been properly authenticated, and we cannot rely on the references to the mortgage within the promissory note to conclude that an equitable assignment of the note occurred.

The Loan Account

{¶ 32} Vadney also swears that Edmon's account is in default, and Edmon owes a principal balance of $148,951.44 with interest at the rate of 5.25 percent per annum from August 1, 2009. Vadney states that she is an employee of HSBC in the capacity of a loan servicing agent, has "examined and has personal knowledge" of Edmon's account, and the account is under her supervision. Edmon has not presented any evidence to create a genuine issue that his account is in default or that a different amount is due. Thus, we

find that Vadney has affirmatively shown, pursuant to Civ.R. 56(E), that she is competent to testify to Edmon's account.

Conditions Precedent

{¶ 33} We find that HSBC has not met its initial burden to establish that any conditions precedent have been satisfied. Civ.R. 9(C) provides, "In 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."

{¶ 34} Paragraph 22 of the mortgage provides in pertinent part as follows:

> 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 or 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. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, costs of title evidence.

{¶ 35} Accordingly, prior to accelerating the balance due on a promissory note and filing an action to foreclose a mortgage, HSBC was required to give Edmon notice of his default and an opportunity to cure the default. Paragraph 15 of mortgage, which is titled "Notices," additionally provides,

> 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.

{¶ 36} In its complaint, HSBC pleaded "that the conditions precedent [in the mortgage] have been satisfied * * *." Edmon generally denied this allegation. Thus, it would appear that because Edmon failed to deny the performance or occurrence of any conditions precedent specifically and with particularity, the effect would be that they are

deemed admitted. However, we need not address whether Edmon admitted this allegation because "a party seeking summary judgment always bears the initial responsibility of informing the [trial] court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Dresher,* 75 Ohio St.3d at 288, 662 N.E.2d 264, *quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

{¶ 37} With respect to the record before the trial court, HSBC pointed only to Vadney's affidavit in support of its motion for summary judgment and not to any purported admissions in Edmon's answer. In her affidavit, Vadney did not address the issue of whether HSBC satisfied the conditions precedent in Edmon's mortgage. Therefore, HSBC failed to meet its initial *Dresher* burden of pointing to portions of the record that show the absence of a genuine issue of material fact that the conditions precedent have been satisfied. *See Dresher* at 292-293, 662 N.E.2d 264.

Equitable Considerations

{¶ 38} Finally, Edmon asserts an argument that equitable considerations preclude judgment in HSBC's favor. However, appellants did not raise these arguments in the trial court and has waived them for purposes of appeal. It is a fundamental rule of appellate procedure that a reviewing court will not consider as error any issue that a party failed to bring to the trial court's attention. *Schade v. Carnegie Body Co.,* 70 Ohio St.2d 207, 210,

436 N.E.2d 1001 (1982); *Stores Realty Co. v. Cleveland*, 41 Ohio St.2d 41, 43, 322 N.E.2d 629 (1975).

{¶ 39} Because the promissory note is not admissible as evidence, HSBC has not established itself as a real party in interest entitled to enforce the promissory note and foreclose on Edmon's property. Furthermore, HSBC did not point to evidence sufficient to demonstrate satisfaction of conditions precedent. Thus, the trial court erred in awarding summary judgment to HSBC. Accordingly, Edmon's assignment of error is well-taken.

III. Conclusion

{¶ 40} Wherefore, we find that substantial justice was not done. The judgment of the trial court granting HSBC's motion for summary judgment is reversed and the case is remanded for proceedings consistent with this decision.

{¶ 41} HSBC shall pay the costs of this appeal pursuant to App.R. 24.

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.

Arlene Singer, P.J.

_____
JUDGE

Thomas J. Osowik, J.

_____
JUDGE

Stephen A. Yarbrough, 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:
http://www.sconet.state.oh.us/rod/newpdf/?source=6.