

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

Deutsche Bank National  
Trust Company, etc.

Appellee

Court of Appeals No. F-11-011

Trial Court No. 09CV000295

v.

Ryan E. Pawlowicz, et al.

Appellants

**DECISION AND JUDGMENT**

Decided: October 26, 2012

\* \* \* \* \*

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

Daniel P. McQuade, for appellants.

\* \* \* \* \*

**OSOWIK, J.**

{¶ 1} This is an appeal from a judgment of the Fulton County Court of Common Pleas that granted appellee's motion for summary judgment in an action seeking foreclosure on a residential property owned by appellants Ryan and Marla Pawlowicz after appellants defaulted in payment on a note and mortgage held by appellee Deutsche

Bank National Trust Company (“Deutsche Bank”). For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} Appellants set forth the following assignments of error:

I. The trial court erred by denying appellants’ motion to dismiss.

II. The trial court erred by granting appellee’s motion for summary judgment.

{¶ 3} On March 16, 2005, appellants Ryan and Marla Pawlowicz executed a promissory note and mortgage in favor of Credit Financial Services, LLC, for \$192,000 to finance the purchase of a home located in Fulton County, Ohio. An assignment of mortgage from Credit Financial Services, LLC (“Credit Financial”) to Mortgage Electronic Registration Systems, Inc. (“MERS”) was executed on March 23, 2005, but was not recorded. A copy of the executed assignment is attached to appellee’s amended complaint. On January 15, 2010, another assignment of mortgage, this time from MERS to appellee Deutsche Bank, was executed; it was recorded in Fulton County on January 25, 2010. Copies of the assignment from Credit Financial to MERS as well as the assignment from MERS to Deutsche Bank are attached to the amended complaint.

{¶ 4} Appellee’s complaint in foreclosure was filed on August 21, 2009, and was amended with leave of court on July 28, 2010. Appellants answered the complaint and raised several affirmative defenses. Subsequently, appellants moved to dismiss the complaint on the grounds that the assignment of mortgage to appellee was not executed and recorded until after the complaint had been filed. Appellee responded and the trial

court dismissed the motion, summarily ruling that appellants' argument "cannot be sustained" and ordered that "all proceedings shall proceed per schedule." Thereafter, both parties moved for summary judgment and the trial court determined that appellee was entitled to judgment as a matter of law.

{¶ 5} We note at the outset that appellee asserts that the trial court's decision denying appellants' motion to dismiss was not a final, appealable order and therefore is not subject to appellate review. However, under Ohio case law, when a final judgment has been entered terminating an entire case, all prior interlocutory orders merge into the final judgment and are appealable at that time. *CNT Constr., Inc. v. Bailey*, 8th Dist. No. 96292, 2011-Ohio-4460, *citing Davis v. Galla*, 6th Dist. No. L-08-1149, 2008-Ohio-3501. Therefore, the trial court's decision denying the motion to dismiss is now appealable.

{¶ 6} Because the arguments presented by appellants in support of both of their assignments of error are the same, we will address Assignments of Error Nos. I and II together. Appellants assert in support of both assignments of error that appellee Deutsche Bank did not have standing to bring the foreclosure action because the bank was not the original mortgagee. Appellants also argue that the bank did not support its summary judgment motion with the chain of mortgage assignments and note transfers.

{¶ 7} It is well-established that appellate review of a disputed Civ.R. 12(B)(6) judgment is conducted pursuant to an independent, de novo standard of review.

*Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

“A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint.” *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). Further, it is well-settled that an appellate court also reviews a trial court’s granting of summary judgment de novo, applying the same standard used by the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). Therefore, our review of both assignments of error is de novo.

{¶ 8} This court has held that a plaintiff may enforce a promissory note and its secured mortgage by demonstrating that it is the holder of the note. *Deutsche Bank Natl. Trust Co. v. Greene*, 6th Dist. No. E-10-006, 2011-Ohio-1976, and *Mort. Elec. Registration Sys. v. Vascik*, 6th Dist. No. L-09-1129, 2010-Ohio-4707. In both *Greene* and *Vascik*, this court held that the plaintiff could enforce a promissory note and its secured mortgage by demonstrating that it was the holder of the note. In determining how the plaintiff bank in *Greene* could meet its burden of demonstrating it held the note, this court cited to *Bank of N.Y. v. Dobbs*, 5th Dist. No. 2009-CA-0002, 2009-Ohio-4742, and held that “the assignment of mortgage, in conjunction with interlocking references in the mortgage and the note, transferred the note as well.” *Vascik* at ¶ 25. In *Greene*,

wherein the plaintiff bank attached an assignment of mortgage which pre-dated the date of filing of the underlying complaint, this court found the existence of that assignment sufficient evidence to demonstrate that the note had been transferred to the plaintiff. In *Vascik*, this court applied the *Dobbs* principle regarding interlocking references in the note and mortgage and held that the vested right to enforce the promissory note operated as an equitable assignment of the mortgage. *Vascik*, citing *LaSalle Bank Natl. Assn. v. Street*, 5th Dist. No. 08CA60, 2009-Ohio-1855, and *Deutsche Bank Natl. Trust Co. v. Traxler*, 9th Dist. No. 09CA009739, 2010-Ohio-3940.

{¶ 9} Here, appellee provided the trial court, by way of attachments to its amended complaint, with evidence that it possessed the original promissory note and the mortgage transferred to Deutsche by MERS. Further, appellee supported its motion for summary judgment with the January 21, 2011 affidavit of Kristen Reiger, an employee of OneWest Bank, FSB, the loan servicing agent for appellee. Reiger stated that she had examined and had personal knowledge of the loan account of appellants and that there was presently due on said loan the unpaid principal balance of \$184,437.40 with interest accruing at the rate of 6.375 percent per annum from June 1, 2008. Reiger further stated that in the regular performance of her job she was familiar with business records maintained by OneWest Bank, FSB for the purpose of servicing mortgage loans and, in the course of making her affidavit, she personally examined numerous business records reflecting data and information as of the date of signing the affidavit. She further attested that the Assignment of Mortgage attached to appellee's motion for summary judgment is

a true and accurate copy of the Assignment of Mortgage from MERS to Deutsche Bank executed on January 15, 2010, and recorded as a matter of Fulton County Official Records on January 25, 2010.

{¶ 10} Upon consideration of the foregoing, this court finds that the trial court did not err by denying appellants' motion to dismiss the amended complaint and that appellee Deutsche Bank was entitled to judgment as a matter of law. Accordingly, appellants' first and second assignments of error are not well-taken.

{¶ 11} On consideration whereof, the judgment of the Fulton County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellants 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.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

Stephen A. Yarbrough, J.

JUDGE

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>.