[Cite as *Bank of New York Mellon Trust Co. v. Fox*, 2012-Ohio-6245.]

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

The Bank of New York Mellon Trust Company

Appellee

v.

Melissa Fox, et al.

Appellants

Court of Appeals No. OT-11-046

Trial Court No. 10CV747E

DECISION AND JUDGMENT

Decided: December 31, 2012

* * * * *

David A. Wallace and Joel E. Sechler, for appellee.

Daniel L. McGookey, Kathryn M. Eyster and Lauren McGookey, for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellants, Melissa and Charles Fox, appeal the December 1, 2011 judgment of the Ottawa County Court of Common Pleas which granted appellee Bank of New York Mellon Trust Company's ("BONY") motion for summary judgment

and denied appellants' motion to dismiss in a foreclosure action. Because we find that no issues of fact remain, we affirm.

{¶ 2} In July 2005, appellants executed a promissory note and mortgage in favor of WMC Mortgage Corp. to secure their purchase of a residence in Port Clinton, Ohio. The note was endorsed by WMC to Residential Funding Corporation. Residential Funding endorsed the note over to JP Morgan Chase Bank, as trustee. BONY is the successor trustee to JP Morgan. In 2009, appellants executed a loan modification regarding their residence with GMAC Mortgage LLC., the servicing agent.

{¶ 3} In June 2010, appellants defaulted on the note. On October 22, 2010, BONY filed a complaint in foreclosure against appellants. The complaint stated that BONY, as holder of the note secured by a mortgage and by reason of appellants' default on the note, was entitled to foreclose on the mortgage. BONY claimed that all conditions precedent had been satisfied and attached a certified copy of the original note.

{¶ 4} On November 17, 2010, appellants filed their answer and set forth several affirmative defenses including issues relative to standing. On May 17, 2011, appellants filed a motion to dismiss BONY's complaint pursuant to Civ.R. 12(B)(6). Appellants argued that because the complaint alleged only that BONY is the holder of the mortgage obligation and not the owner, the complaint was defective on its face. Appellants contended that the adoption of the Uniform Commercial Code ("U.C.C.") in Ohio, which included the concept of the holder having the ability to enforce negotiable instruments,

did not displace the long-standing Ohio requirement that proof of ownership is required to establish standing to foreclose on a mortgage. BONY opposed the motion.

{¶ 5} On July 28, 2011, BONY filed its motion for summary judgment and supporting affidavit. BONY argued that it was the holder of the note, appellants were in default on the note which contained an acceleration provision, and that appellants' affirmative defenses lacked merit.

{¶ 6} On December 1, 2011, the trial court granted BONY's motion for summary judgment and denied appellants' motion to dismiss. The court found that as the holder of the note and mortgage, BONY demonstrated that it was the real party in interest and was entitled to judgment. On December 21, 2011, the foreclosure decree was filed. This appeal followed.

{¶ 7} Appellants now raise the following assignment of error:

> The trial court erred in denying Fox's Motion to Dismiss and granting Bank of New York Mellon's Motion for Summary Judgment and in holding Bank of New York Mellon is the owner and holder of Fox's Note and Mortgage.

{¶ 8} At the outset we note that this court shall employ a de novo standard in reviewing the grant of a motion for summary judgment. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). The trial court's judgment is not afforded any deference, and this court applies the same test, set forth in Civ.R. 56(C), as the trial court. Civ.R. 56(C) provides that before summary judgment

may be granted, it must be determined that no genuine issue as to any material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, it appears from the evidence that reasonable minds can come but to one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Turner v. Turner*, 67 Ohio St.3d 337, 617 N.E.2d 1123 (1993). Likewise, appellate review of the grant or denial of a motion to dismiss is de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

{¶ 9} In appellants' assignment of error, they first argue that BONY's right to foreclose required not only demonstrating that it had the right to judgment on the note, it was also required to show that it was entitled to foreclose on the mortgage. In other words, the bank must show that the mortgagee has defaulted on the note and then must demonstrate whether the mortgagee's right of redemption should be foreclosed. *See PHH Mtge. Corp. v. Barker*, 190 Ohio App.3d. 71, 2010-Ohio-5061, 940 N.E.2d 662 (3d Dist.).

{¶ 10} In *Barker*, relied upon by appellants, the homeowners missed a few mortgage payments, but notified the bank as soon as possible. After leaving several voicemails, they went to the bank and were given a name in "loss mitigation" to contact. *Id.* at ¶ 3. After contacting this individual, the loss prevention program was explained and the homeowners were informed that they would be sent a loss prevention packet in the mail. After receiving the packet and completing the required materials, they were told

they would be informed as to whether they qualified for a program to avoid foreclosure. *Id.* at ¶ 5.

{¶ 11} Shortly after, a letter came notifying the homeowners that they were in default, they received a coupon book which listed a higher monthly payment and a new due date. *Id.* at ¶ 9. The homeowners believed that the mortgage had been "reset." Thereafter, despite making several payments, they were notified that the bank was foreclosing on the mortgage based on their default on the note. Some of the payments were returned.

{¶ 12} Affirming the trial court's decision to reinstate the mortgage, the Third Appellate District agreed that the bank had made several "material representations" regarding their willingness to aid the homeowners in avoiding foreclosure. *Id.* at ¶ 33.

{¶ 13} In the present action, unlike *Barker*, appellants have not alleged that BONY misrepresented the status of their repayment or that they cured the default and foreclosure was still pursued. Appellants admitted that they were in default on the note; the note contained an acceleration clause. Thus, we cannot say that the foreclosure was inequitable in this case.

{¶ 14} Appellants next contend that in order to foreclose on the property, BONY was required to demonstrate that it was the owner of the underlying obligation. Initially

we note that Ohio's version of the U.C.C. governs who may enforce a note.[1] R.C. 1303.31(B) provides that a "person entitled to enforce" a negotiable instrument includes:

> (1) The holder of the instrument;
>
> (2) A nonholder in possession of the instrument who has the rights of a holder;
>
> (3) A person not in possession of the instrument who is entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

{¶ 15} R.C. 1301.01 defines a "holder" as: "[i]f the instrument is payable to bearer, a person who is in possession of the instrument" or "[i]f the instrument is payable to an identified person, the identified person when in possession of the instrument."

This court has addressed and rejected the argument that the real party in interest must be both the holder and owner in multiple decisions. In *U.S. Bank, N.A. v. Coffey*, 6th Dist. No. E-11-026, 2012-Ohio-721, we noted that R.C. 1303.31(B) specifically states that a nonowner, even in wrongful possession, may be entitled to enforce an instrument. *Id.* at ¶ 15-19. *See CitiMortgage, Inc. v. Shippel*, 6th Dist. No. E-11-041, 2012-Ohio-3511; *Chase Home Fin., LLC v. Yost*, 6th Dist. No. E-12-004, 2012-Ohio-5322. Thus, we find that BONY was only required to demonstrate that it was the holder of the note.

[1] We note that R.C. 1301.01 through 1301.21 was repealed in 2011 and renumbered. Because the 2011 enactment applies only to transactions entered into on or after June 29, 2011, we will refer to the prior code sections.

{¶ 16} Appellants next argue that BONY failed to establish that it was the holder of the note. Specifically, appellants contend that the bare allegations in the complaint and the note attached to the complaint, containing no endorsements, were insufficient to demonstrate that BONY was the holder of the note. However, in its affidavit in support of its motion for summary judgment BONY representative, Ricky Narramore, as GMAC servicing agent for BONY, stated that in making the affidavit he personally reviewed the loan documents which were kept in the ordinary course of business. Narramore stated that BONY was the holder of the note and mortgage and that the mortgage was in default. Attached to the affidavit were copies of the note which show endorsements from WMC Mortgage Corp. to Residential Funding Corporation and from Residential Funding Corporation to JP Morgan Chase Bank. The affidavit further stated that BONY is the successor trustee to JP Morgan Chase Bank.

{¶ 17} Appellants further argue that the assignment of the mortgage to BONY fails to support its contention that it is the holder of the note. Specifically, appellants contend that because the assignment was not affixed to the note it could not be effectively negotiated. Conversely, BONY asserts that its *possession* of the note, coupled with its status as successor trustee, establishes the right to enforcement.

{¶ 18} Upon review, we agree that BONY established it was the holder of the note, appellants were in default of the note, and that BONY was entitled to foreclose on the mortgage. Accordingly, because no issues of fact remain, the court did not err in

granting BONY's motion for summary judgment and denying appellants' motion to dismiss. Appellants' assignment of error is not well-taken.

{¶ 19} On consideration whereof, we find that substantial justice was done the parties complaining and the judgment of the Ottawa County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellants are ordered to pay the costs of this appeal.

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, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE