

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

U.S. Bank, N.A., etc.

Court of Appeals No. E-11-070

Appellee

Trial Court No. 2008-CV-0457

v.

James M. Adams, et al.

DECISION AND JUDGMENT

Appellant

Decided: December 31, 2012

* * * * *

Scott A. King and Terry W. Posey, Jr., for appellee.

John T. Murray, Leslie O. Murray and Michael J. Stewart, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Defendant-appellant, James Adams, appeals the judgment of the Erie County Court of Common Pleas, which granted summary judgment in favor of plaintiff-appellee, U.S. Bank, N.A. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} On August 3, 2005, Adams executed a promissory note, payable to Intervale Mortgage Corporation, in the amount of \$113,600. On the same day, Adams executed a mortgage against property located at 10203 River Road, Huron, Ohio, which listed Intervale as the lender and Mortgage Electronic Registration Services, Inc. (MERS) as Intervale's nominee. The note and the mortgage cross-reference one another.

{¶ 3} At some point after the initial execution of the note, Intervale transferred the note to Decision One Mortgage Company, LLC, using a special indorsement. Thereafter, Decision One indorsed the note in blank, and, on November 1, 2005, the note and mortgage were transferred to U.S. Bank pursuant to a pooling and servicing agreement. Additionally, MERS assigned the mortgage to U.S. Bank on May 15, 2008.

{¶ 4} Later that day, U.S. Bank filed its complaint with the Erie County Court of Common Pleas, seeking judgment under the note and also seeking to foreclose on the mortgage. In its complaint, U.S. Bank asserted that it was the holder of the note and the mortgage. In addition, U.S. Bank attached a copy of the note that included the special indorsement from Intervale to Decision One, and the blank indorsement from Decision One.

{¶ 5} On June 13, 2008, Adams filed his answer, which generally denied U.S. Bank's allegations. The trial court subsequently granted Adams leave to amend his answer. In his amended answer, Adams, acting as a class representative, asserted several

counterclaims surrounding the Fair Debt Collection Practices Act and the Truth-In-Lending Act, and also requested an accounting.

{¶ 6} During the pendency of the foreclosure action, Adams filed for bankruptcy. The bankruptcy proceeding delayed the foreclosure by operation of an automatic stay. After the bankruptcy court granted Adams' discharge, the trial court granted a motion for partial summary judgment filed by U.S. Bank. In granting the motion, the trial court dismissed all of Adams' counterclaims except the request for an accounting. U.S. Bank filed another motion for summary judgment on February 25, 2011, in which it sought a decree in foreclosure and judgment in its favor on Adams' accounting claim. The trial court granted U.S. Bank's motion for summary judgment, and Adams timely appealed.

B. Assignments of Error

{¶ 7} In his appeal, Adams assigns the following errors for our review:

1. The trial court erred by granting Plaintiff-Appellee U.S. Bank, N.A.'s Motion for Summary Judgment on the basis of standing.
2. The trial court erred by dismissing Defendant-Appellant James M. Adams' accounting claim on the basis that the amount due is not germane for in rem judgment.
3. The trial court erred in making findings of fact which have no support in the record:
 - (a) Finding the amount due is \$111,605.27 with interest at 8.14% annually from January 9, 2008.

(b) Finding that the Plaintiff-Appellee U.S. Bank, N.A. is the owner and holder of the subject note and mortgage and did so own and hold both when it filed the complaint.

II. Analysis

I. Standard of Review

{¶ 8} We review summary judgment rulings de novo, applying the same standard as 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). Under Civ.R. 56(C), summary judgment is appropriate where (1) no genuine issue as to any material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 9} 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).

{¶ 10} 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.

II. U.S. Bank's Standing

{¶ 11} In his first assignment of error, Adams argues that U.S. Bank failed to establish that it had standing to bring the foreclosure action. In particular, Adams asserts that a material question of fact existed as to whether U.S. Bank was the holder and owner of the note and mortgage at the time the complaint was filed.

{¶ 12} Ohio's version of the Uniform Commercial Code ("U.C.C.") governs who may enforce a note. R.C. 1301.01 et seq. Article 3 of the U.C.C. 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).

{¶ 13} The threshold requirement of standing depends upon whether the plaintiff has a real interest in the subject matter of the action. *State ex rel. Dallman v. Court of Common Pleas, Franklin Cty.*, 35 Ohio St.2d 176, 298 N.E.2d 515 (1973), syllabus. We have previously stated that the holder of the note and mortgage is the real party in interest in a foreclosure action. *Deutsche Bank Natl. Trust Co. v. Greene*, 6th Dist. No. E-10-006, 2011-Ohio-1976, ¶ 13. Further, the holder of an instrument is a “person entitled to enforce” the instrument under R.C. 1303.31.

{¶ 14} Notably, our recent decision in *U.S. Bank, N.A. v. Coffey*, 6th Dist. No. E-11-026, 2012-Ohio-721, refutes Adams’ position that U.S. Bank was required to demonstrate that it was the holder *and owner* of the note and mortgage. In *Coffey*, we stated that a holder of the note and mortgage “[is] not additionally required to plead that it [is] the ‘owner’ of the note and mortgage in its complaint” in order to survive a motion to dismiss. *Id.*, at ¶ 18. Therefore, the standing issue centers on whether the plaintiff was the holder of the note and mortgage on the date the complaint was filed.

{¶ 15} R.C. 1301.201(a) defines a holder of a negotiable instrument as “[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.”

{¶ 16} Here, U.S. Bank established that it was the holder of the note and mortgage. First, U.S. Bank pleaded in its complaint that it was the holder and owner of

the note, and the holder of the mortgage. Second, U.S. Bank attached an affidavit to its motion for summary judgment, in which the affiant, Susan Rowles, as default litigation specialist for U.S. Bank's servicing agent, stated that U.S. Bank was the holder and owner of the note and mortgage. Rowles also stated that MERS assigned the mortgage to U.S. Bank prior to the date the complaint was filed.

{¶ 17} Copies of the note and mortgage were attached to the complaint and to Rowles' affidavit. In both instances, the note was indorsed in blank. Thus, the note was bearer paper. R.C. 1303.10(A)(2). Accordingly, in order to attain status as a holder, U.S. Bank was required to show that it was in possession of the note. R.C. 1301.201(a).

{¶ 18} U.S. Bank's possession of the note was demonstrated by the attachment of a copy of the note to the complaint and the affidavit, coupled with Rowles' statements concerning U.S. Bank's possession of the note and mortgage in her affidavit. *See Cent. Mtge. Co. v. Elia*, 9th Dist. No. 25505, 2011-Ohio-3188, ¶ 11 (concluding that the mortgage company established possession by attaching a note that was indorsed in blank to the complaint and to an affidavit in support of its motion for summary judgment). In addition, a copy of the recorded assignment of mortgage was attached to Rowles' affidavit. The assignment of mortgage was also attached to the affidavit of Kevin Prieshoff, who stated that he personally signed the assignment on May 15, 2008, at 8:52 a.m., prior to the filing of the complaint. Consequently, the burden shifted to Adams to show the existence of a genuine issue of material fact in order to avoid summary judgment. *Dresher* at 293, 662 N.E.2d 264; Civ.R. 56(E).

{¶ 19} To satisfy his burden, Adams points to a discrepancy between the copy of the note that was attached to the complaint and Rowles' affidavit, and the original note that was produced and examined during Adams' June 3, 2011 deposition of Rowles. During that deposition, Rowles noted that the second indorsement on the original note, a special indorsement made payable to U.S. Bank, was different than the second indorsement (i.e., the blank indorsement) on the copy of the note attached to the complaint and Rowles' affidavit.¹ Thus, Adams contends that a material question of fact exists regarding whether U.S. Bank was a holder because the copy attached to the complaint is substantially different than the original note. We disagree.

{¶ 20} In and of itself, the special indorsement has no effect on the standing question, since Ohio law requires possession as a prerequisite to a party being classified a holder whether the note includes a special indorsement or a blank indorsement. R.C. 1301.201(a). The additional special indorsement does nothing to refute the fact that U.S. Bank was in possession of the note at the time the complaint was filed. That fact was established by U.S. Bank's attachment of a copy of the note to the complaint. After U.S. Bank met its burden of showing that no genuine issue of material fact existed regarding its status as a holder of the note, Adams was required to come forward with evidence that such a question did exist. Adams has provided no such evidence. Consequently, the trial court did not err when it granted U.S. Bank's motion for summary judgment, and Adams' first assignment of error is without merit.

¹ We note that the copy and the original are identical in substance. The only difference between the two is the *additional* special indorsement to U.S. Bank.

III. Adams' Accounting Claim

{¶ 21} In his second assignment of error, Adams argues that the trial court erred when it dismissed his accounting claim. Adams asserts that the trial court's finding that the amount owed is \$111,605.27 with interest at 8.14 percent annually from January 8, 2008, lacks support in the record.

{¶ 22} The trial court determined that there were no genuine issues of material fact with regard to the amount owed and Adams' accounting claim. This determination was supported by the following evidence: (1) Rowles' affidavit; and (2) a mortgage loan history attached to U.S. Bank's motion for summary judgment.

{¶ 23} In Rowles' affidavit, she reiterates the amount owed and states that "[t]here is currently due under the Note and Mortgage a principal balance of \$111,605.27, together with interest at the rate of 8.140% per year from January 8, 2008."

{¶ 24} Along with Rowles' affidavit, U.S. Bank attached a detailed mortgage loan history that shows the history of the loan from November 2, 2005, through February 22, 2011. The mortgage loan history shows that \$111,605.27 is due as of January 8, 2008. Further, it specifies the interest rate at 8.1400 percent.

{¶ 25} In support of his accounting claim, Adams cites to *JPMC Specialty Mtge., LLC v. Lang*, Erie C.P. No. 2009-CV-0702 (July 15, 2011), in which the trial court denied JPMC's motion to dismiss Lang's accounting claim under Civ.R. 12(B)(6). However, in relying on *Lang*, Adams marginalizes the difference between a motion to

dismiss under Civ.R. 12(B)(6) and a motion for summary judgment pursuant to Civ.R. 56.

{¶ 26} The standard for a motion to dismiss has been succinctly stated as follows:

When reviewing a Civ.R. 12(B)(6) motion to dismiss, we must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiff. But “[u]nsupported conclusions of a complaint are not considered admitted * * * and are not sufficient to withstand a motion to dismiss.”

For a defendant to prevail on the motion, it must appear from the face of the complaint that the plaintiff can prove no set of facts that would justify a court in granting relief. (Citations omitted.) *Newman v. Weinman*, 8th Dist. No. 97857, 2012-Ohio-3464, ¶ 9-10.

{¶ 27} Unlike a motion to dismiss under Civ.R. 12(B)(6), a motion for summary judgment allows the court to consider “the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact.” Civ.R. 56(C).

{¶ 28} The difference between a motion to dismiss and a motion for summary judgment distinguishes *Lang* from this case. *Lang*’s answer included a counterclaim for an accounting, which alleged that JPMC demanded amounts in excess of those permitted under the note and mortgage. Since the trial court was required to accept those allegations as true, it follows that JPMC’s motion to dismiss was necessarily denied.

{¶ 29} Here, the trial court was permitted to consider the evidence produced during discovery to determine whether there were any genuine issues of material fact regarding the amount owed. After considering such evidence, the trial court found that there were no such issues of material fact. In light of the difference between a trial court's review of a motion to dismiss and its review of a motion for summary judgment, we find *Lang* distinguishable from the case sub judice.

{¶ 30} Upon our review of the record, we agree with the trial court that there are no genuine issues of material fact concerning the amount Adams owes. U.S. Bank produced sufficient evidence to remove any doubt as to the amount owed. Adams had ample opportunity to refute U.S. Bank's evidence with evidence of his own. He failed to do so. Thus, Adams' second assignment is not well-taken.

{¶ 31} Because the third assignment of error raises the same issues as the first two assignments of error, our resolution of the first two assignments of error resolves the third assignment as well. Accordingly, Adams' third assignment of error is not well-taken.

IV. Conclusion

{¶ 32} Having found Adams' assignments of error not well-taken, we hereby affirm the judgment of the Erie County Court of Common Pleas. Costs are assessed to Adams in accordance with App.R. 24.

Judgment affirmed.

U.S. Bank Natl. Assn.
v. Adams
C.A. No. E-11-070

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

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>.