[Cite as *U.S. Bank, N.A. v. Coffey*, 2012-Ohio-721.]

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

U.S. Bank, N.A.

Appellant

v.

Amelia L. Coffey, et al.

Appellee

Court of Appeals No. E-11-026

Trial Court No. 2010-CV-0531

DECISION AND JUDGMENT

Decided: February 24, 2012

* * * * *

Kimberlee S. Rohr, for appellant.

Daniel McGookey, Kathryn M. Eyster, and Lauren McGookey, for appellee.

* * * * *

YARBROUGH, J.

I. INTRODUCTION

{¶ 1} Appellant U.S. Bank appeals the judgment of the Erie County Court of Common Pleas which dismissed appellant's complaint without prejudice and also denied

its motion for summary judgment. For the reasons set forth below, we reverse in part, affirm in part and remand the case to the trial court for further proceedings.

A. Facts and Procedural Background

{¶ 2} On February 28, 2007, appellee Amelia Coffey executed a note in the amount of $62,026 payable to the American Eagle Mortgage Corporation ("American Eagle") at a rate of 5.75 percent. To secure the note, Coffey also executed a mortgage in the amount of $62,026 to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for American Eagle for a property located in Sandusky, Ohio. The mortgage was recorded on February 28, 2007, in the office of the Erie County Recorder. The transfer of the mortgage from MERS to U.S. Bank was executed on June 28, 2010, and subsequently recorded on July 6, 2010. The note and mortgage identify the loan as a federally insured loan subject to the regulations of the United States Department of Housing and Urban Development.

{¶ 3} On June 30, 2010, U.S. Bank filed a complaint in foreclosure against Coffey based on Coffey's payment default under the terms of the note and mortgage. In its complaint, U.S. Bank pleaded that it was the holder of both the note and the mortgage, but only attached a copy of the original mortgage document. This document did not indicate that U.S. Bank was the current assignee of the mortgage. Eventually, on July 19, 2010, U.S. Bank filed a "notice of filing of note" to which a copy of the note was attached. The note in question was originally given to American Eagle and contained a specific indorsement to U.S. Bank. Thereafter, U.S. Bank indorsed the note in blank. On

August 17, 2010, U.S. Bank filed a "notice of filing the assignment of mortgage," to which a copy of the mortgage assignment from MERS to U.S. Bank was attached.

{¶ 4} Coffey eventually filed an answer on September 2, 2010, asserting a general denial, nine affirmative defenses, a jury demand, and a motion to dismiss. On October 5, 2010, U.S. Bank filed a motion for summary judgment, which included an affidavit of Kim Stewart, the assistant vice president of U.S. Bank. In her affidavit, Stewart asserted that as the assistant vice president she "has the custody of the accounts of said company, including the account of Amelia L. Coffey aka Amelia Coffey, defendant herein." Stewart also asserted that U.S. Bank "is the holder of the note and mortgage which are the subject of the within foreclosure action."

{¶ 5} On January 25, 2011, Coffey filed a "motion to dismiss or, in the alternative, motion for summary judgment" and a memorandum in opposition to U.S. Bank's motion for summary judgment. Her motion alleged that U.S. Bank's complaint must be dismissed because U.S. Bank did not allege that it "owned" the note and mortgage. Coffey did not otherwise produce any evidence in support of her motion for summary judgment.

{¶ 6} In response, on February 11, 2011, U.S. Bank filed a reply in support of its motion for summary judgment and in opposition to Coffey's motion to dismiss. On March 2, 2011, the trial court granted Coffey's "motion to dismiss or, in the alternative, motion for summary judgment." The judgment stated that U.S. Bank failed to "* * *

allege in its complaint that it is the owner and holder of the subject note." (Emphasis sic.) This appeal followed.

B. Assignments of Error

{¶ 7} U.S. Bank raises two assignments of error:

> Assignment of Error No. 1: The trial court erred by granting Coffey's Motion to Dismiss, or in the alternative, Motion for Summary Judgment, based on U.S. Bank's failure to allege in its Complaint that it is the owner of the subject Note.
>
> Assignment of Error No. 2: The trial court erred by denying U.S. Bank's Motion for Summary Judgment where U.S. Bank sufficiently established that it was entitled to a judgment and decree in foreclosure as the holder of the subject note.

II. ANALYSIS

A. Coffey's Motion to Dismiss

{¶ 8} We must initially determine whether the trial court dismissed U.S. Bank's complaint pursuant to Civ.R. 12(B)(6), or rather awarded summary judgment in favor of Coffey. In its judgment entry, the trial court stated, "Wherefore, it is hereby ORDERED, ADJUDGED, and DECREED that [Coffey's] Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, is GRANTED * * *." Despite this ambiguity, the trial court specifically dismissed appellant's complaint without prejudice, stating, "[T]he above referenced matter is DISMISSED without prejudice." In addition, the trial court

based its decision on the fact that appellant failed to allege in its complaint that it is the owner and holder of the subject note. Because the trial court limited its decision to those facts contained in the complaint, we will review the trial court's judgment as an award of a Civ.R. 12(B)(6)[1] motion to dismiss, and not an award of summary judgment. *See Estate of Sherman v. Millhon*, 104 Ohio App.3d 614, 617, 662 N.E.2d 1098 (10th Dist.1995) (a trial court may consider only the statements and facts contained in the pleadings and may not consider or rely on evidence outside the complaint when resolving a Civ.R. 12(B)(6) motion to dismiss).

{¶ 9} As the trial court's judgment was a dismissal without prejudice as described by Civ.R. 41(B)(3)[2], we must address an issue not raised by the parties. Generally, a dismissal without prejudice constitutes "an adjudication otherwise than on the merits" with no res judicata bar to refiling the suit. *Thomas v. Freeman*, 79 Ohio St.3d 221, 225, 680 N.E.2d 997 (1997), fn. 2. The reason for this is that a dismissal without prejudice places the parties in the same position they were in before they filed the action. *Johnson v. H & M Auto Serv.*, 10th Dist. No. 07AP-123, 2007-Ohio-5794, ¶ 7. Nevertheless, in

[1] Civ.R. 12(B)(6) provides, "When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56."

[2] Civ.R. 41(B)(3) provides: A dismissal under division (B) of this rule and any dismissal not provided for in this rule, except as provided in division (B)(4) of this rule, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies.

Natl. City Commercial Capital Corp. v. AAAA at Your Serv., Inc., 114 Ohio St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663, ¶ 8, the Ohio Supreme Court determined that a dismissal without prejudice may be a final judgment "if the cause has been disposed of and there is nothing left for the determination of the trial court." Similarly, an order is final and appealable when it "affects a substantial right in an action that in effect determines the action and prevents a judgment[.]" R.C. 2505.02(B)(1). Thus, we must determine whether the trial court's dismissal of U.S. Bank's complaint constitutes a final and appealable order. We find that it does.

{¶ 10} Although the trial court dismissed U.S. Bank's complaint without prejudice, it has already determined that U.S. Bank cannot refile its complaint unless it avers and demonstrates that U.S. Bank is both the holder and owner of the note. As will be discussed, U.S. Bank is not required to make such a showing. Therefore, even though U.S. Bank's complaint was dismissed without prejudice, the trial court's judgment effectively precludes U.S. Bank from refiling its complaint and constitutes a final and appealable order reviewable on appeal.

{¶ 11} We review an order granting a Civ.R. 12(B)(6) motion to dismiss de novo. *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). In our review, we must accept the factual allegations in the complaint as true and make all reasonable

inferences in favor of the non-moving party. *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717, 816 N.E.2d 1061, ¶ 11. The motion should be granted when it is beyond doubt from the complaint that the plaintiff cannot prove a set of facts entitling him to recover. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11, citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.

{¶ 12} In her motion to dismiss, Coffey argued that U.S. Bank failed to establish itself as the real party in interest entitled to enforce the note and foreclose on the mortgage. Coffey pointed out that U.S. Bank failed to attach a copy of the note to its complaint and also failed to attach an assignment indicating its interest in the mortgage. Therefore, she concludes that U.S. Bank lacked standing to sue because it was not a holder and "owner" of the note, and accordingly not a real party in interest.

{¶ 13} Capacity to sue or be sued is an issue properly raised by a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim for which relief can be granted. *See Washington Mut. Bank v. Beatley*, 10th Dist. No. 06-AP-1189, 2008-Ohio-1679, ¶ 10. Civ.R. 17(A) requires that "a civil action must be prosecuted by the real party in interest," that is, by a party who can discharge the claim upon which the action is instituted or is the party who has a real interest in the subject matter of that action. *Discover Bank v. Brockmeier*, 12th Dist. No. CA2006-057-078, 2007-Ohio-1552, ¶ 7. If an individual or one in a representative capacity does not have a real interest in the subject matter of the action, that party lacks the standing to invoke the jurisdiction of the court. *State ex rel.*

Dallman v. Court of Common Pleas, Franklin County, 35 Ohio St.2d 176, 298 N.E.2d 515 (1973), syllabus. In foreclosure actions, the real party in interest is the person entitled to enforce the note and mortgage. *Wachovia Bank of Delaware v. Jackson*, 5th Dist. No. 2010-CA-00291, 2011-Ohio-3202, ¶ 17. *See also Deutsche Bank Natl. Trust Co. v. Greene*, 6th Dist. No. E-10-006, 2011-Ohio-1976, ¶ 13 (holding that in a foreclosure action, the real party in interest is the current holder of the note and mortgage).

{¶ 14} Applying Civ.R. 17(A), this court has rejected the proposition that a mortgagee must prove that it is the holder of a note or mortgage on the exact date that the complaint in foreclosure is filed. *See Countrywide Home Loans, Inc. v. Montgomery*, 6th Dist. No. L-09-1169, 2010-Ohio-693, ¶ 13-14, (holding that an assignee that was a holder of a mortgage prior to the date foreclosure action was commenced against mortgagor, was real party in interest, and possessed standing to institute foreclosure action, even though proof of assignment was not provided until after date of filing). *See also Residential Funding Co., L.L.C. v. Thorne*, 6th Dist. No. L-09-1324, 2010-Ohio-4271, ¶ 31 (holding that where a copy of a note is not attached to a complaint in foreclosure at the time of filing, an attached copy of the note to a motion for summary judgment and an affidavit in support are sufficient to prove mortgagee's standing as a real party in interest).

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

{¶ 16} A "person entitled to enforce" an instrument means any of the following persons: (1) The holder of the instrument, (2) A non-holder in possession of the instrument who has the rights of the holder, (3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 1303.38 or division (D) of section 1303.58 of the Revised Code. R.C. 1303.31.

{¶ 17} More specifically, 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.)

{¶ 18} In its complaint, U.S. Bank pleaded, "Plaintiff is the holder of a note, a copy of which is unavailable." Despite Coffey's assertion, U.S. Bank was not additionally required to plead that it was the "owner" of the note and mortgage in its

[3] 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.

complaint. Official Comment 1 to U.C.C. 2-203 gives the following example in regards to ownership rights of a negotiable instrument:

> Ownership rights in instruments may be determined by principles of the law of property, independent of Article 3, which do not depend upon whether the instrument was transferred under Section 3-203. Moreover, *a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument*. For example, suppose X is the owner and holder of an instrument payable to X. X sells the instrument to Y but is unable to deliver immediate possession to Y. Instead, X signs a document conveying all of X's right, title, and interest in the instrument to Y. Although the document may be effective to give Y a claim to ownership of the instrument, Y is not a person entitled to enforce the instrument until Y obtains possession of the instrument. No transfer of the instrument occurs under Section 3-203(a) until it is delivered to Y. (Emphasis added.)

{¶ 19} As indicated by the previous example, an assertion of ownership rights does not indicate that a plaintiff is entitled to enforce an instrument. Conversely, "[a] person may be 'entitled to enforce' [an] instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument." R.C. 1303.31(B).

{¶ 20} In support of her position, Coffey directs our attention to an unreported Florida trial court case. In *BAC Home Loan Servicing v. Stentz*, Fla. 6th Cir. Civ. Div. J4

No. 51-2009-CA-7656-ES (Dec. 1, 2010), the trial court held that "[p]laintiff must specifically plead and identify both the owner and holder of the note and mortgage. It is not enough for Plaintiff to only plead that it holds the note and mortgage * * *. Plaintiff must ultimately prove ownership as well." We find no support for this proposition in Ohio law. Nevertheless, we understand Coffey's confusion. For example, in *U.S. Bank v. Richards*, 189 Ohio App.3d 276, 2010-Ohio-3981, 938 N.E. 2d 74, ¶ 13 (9th Dist.), the Ninth District Court of Appeals initially reiterated, "'In foreclosure actions, the real party in interest is the current holder of the note and mortgage.'" (Citations omitted.) In finding that U.S. Bank failed to have the promissory note admitted into evidence in support of its motion for summary judgment, and that the mortgage assignment did not occur until after the complaint was filed, the court eventually held that "U.S. Bank failed to establish for purposes of summary judgment that it was the owner and holder of the note and mortgage * * *." *Id*. at ¶ 20. It appears that the Ninth District Court of Appeals used the word "owner" to signify that U.S. Bank was not the assignee of the mortgage at the time the complaint was filed. *See also U.S. Bank v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032, ¶ 32, 49, 54 (7th Dist.) (using the words "holder" and "owner" interchangeably). Nevertheless, because a promissory note is transferred through the process of negotiation, ownership is not a requirement for enforcement of the note. *See* R.C. 1303.31(B).

{¶ 21} Here, U.S. Bank pleaded that it is the *holder* of the note which is secured by the mortgage at issue thereby indicating U.S. Bank's interest in the mortgage. Under

the rules of notice pleading, Civ.R. 8(A)(1) requires only "a short and plain statement of the claim showing that the party is entitled to relief." *See also Holzman v. Fifth Third Bank, N.A.*, 1st Dist. No. C-980546, 1999 WL 252715, *1 (Apr. 30, 1999). Because a plaintiff can easily satisfy the standard for pleading under Civ.R. 8(A), few claims are subject to dismissal. *Id*. In this case, U.S. Bank asserted in its complaint that: (1) it is the holder of a note, (2) Coffey is in default under the terms of the note and currently owes $60,154.96, together with interest at a rate of 5.75 percent, (3) the note is secured by the mortgage attached to the complaint, and (4) U.S. Bank is entitled to have the mortgage foreclosed. Because a holder is a person entitled to enforce an instrument, U.S. Bank satisfied the pleading requirements of Civ.R. 8(A). Thus, the allegations in the complaint were sufficient to show that U.S. Bank is entitled to relief. Therefore, we find that the trial court erred by dismissing U.S. Bank's claim pursuant to Civ.R. 12(B)(6).

{¶ 22} Accordingly, U.S. Bank's first assignment of error is well-taken.

B. U.S. Bank's Motion for Summary Judgment

{¶ 23} Ordinarily, a trial court's order denying appellant's motion for summary judgment is not a final appealable order. *State ex rel. Overmeyer v. Walinski*, 8 Ohio St.2d 23, 23, 222 N.E.2d 312 (1966). However, "a trial court's denial of a motion for summary judgment is reviewable on appeal by the movant from a subsequent adverse final judgment." *Balson v. Dodds*, 62 Ohio St.2d 287, 289, 405 N.E.2d 293 (1980). *See also Sagenich v. Erie Ins. Group*, 11th Dist. No. 2003-T-0144, 2003-Ohio-6767, ¶ 3 (the denial of a motion for summary judgment is always reviewable on appeal following a

subsequent final judgment). In this case, subsequent to the trial court's denial of U.S. Bank's motion for summary judgment, the trial court involuntarily dismissed U.S. Bank's complaint. As discussed in U.S. Bank's first assignment of error, that dismissal amounted to an adverse final judgment. Because U.S. Bank is appealing the trial court's dismissal order, this court has jurisdiction to review the denial of U.S. Bank's motion for summary judgment.

{¶ 24} When reviewing a trial court's summary judgment decision, 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).

{¶ 25} 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. The evidence permitted 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 * * *." Civ.R. 56(C). The burden then shifts to the

nonmoving party to provide evidence showing that a genuine issue of material fact does exist. *Dresher* at 293. *See also* Civ.R. 56(E).

{¶ 26} In order 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. *Jackson*, 5th Dist. No. 2010-CA-00291, 2011-Ohio-3202, at ¶ 40-45.

{¶ 27} U.S. Bank 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 Greene*, 6th Dist. No. E-10-006, 2011-Ohio-1976, at ¶ 13. This is necessarily so because 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).

{¶ 28} Attached to its motion for summary judgment, U.S. Bank submitted the Stewart affidavit. In this affidavit, Stewart averred that: (1) she has custody of the accounts of U.S. Bank, including Coffey's account, (2) the records of the accounts of the company are compiled at or near the time of occurrence of each event by persons with knowledge of said events, (3) the records are kept in the course of U.S. Bank's regularly conducted business activity, and (4) it is the regular practice to keep such records related

to the business activity. Stewart also asserted that U.S. Bank is the "holder of the note and mortgage which are the subject of the within foreclosure action" and "[t]rue and accurate reproductions of the originals as they exist in Plaintiff's files are attached hereto as Exhibits 'A' and 'B.'" Also incorporated and attached to Stewart's affidavit as "Exhibit C" was a copy of the mortgage assignment to U.S. Bank. Stewart concluded that there has been a default in payment of the note and mortgage, the account is "due for the July 1, 2009 payment and all subsequent payments," and that U.S. Bank has "elected to accelerate the entire balance due." U.S. Bank submits that the Stewart affidavit, along with the attached documents were sufficient to prove that U.S. Bank is a real party in interest.

{¶ 29} In determining the sufficiency of Stewart'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." Furthermore, the affidavit must be notarized. *Jackson,* 5th Dist. No. 2010-CA-00291, 2011-Ohio-3202, at ¶ 50.

{¶ 30} After reviewing the submitted evidence, we find that the assignment of mortgage submitted as "Exhibit C" does not constitute proper evidentiary material upon which the court can rely in determining that U.S. Bank has standing to foreclose on the note and mortgage. Stewart's affidavit states, "A copy of the Assignment, which

accounts for documented evidence that [U.S. Bank] is the holder of the note and mortgage which are the subject of the within foreclosure action, is attached hereto as 'Exhibit C.'" Stewart does not state that the assignment is being kept in U.S. Bank's records, or that she has personal knowledge of the assignment.[4] Furthermore, the assignment of mortgage is not a certified copy, nor does Stewart swear that it is a true copy of the original. Thus, Stewart's affidavit does not comport with the requirements of Civ.R. 56(E).

{¶ 31} Nevertheless, "whenever a promissory note is secured by a mortgage, the note constitutes the evidence of the debt and the mortgage is mere incident to the obligation." *Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032, ¶ 52, citing *Edgar v. Haines*, 109 Ohio St. 159, 164, 141 N.E. 837 (1923). Thus, a transfer of a note secured by a mortgage also acts as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered. *Kuck v. Sommers*, 59 Ohio Law Abs. 400, 100 N.E.2d 68, 75 (3d Dist.1950). Also, "'[s]ubsection (g) [of U.C.C. 9-203] codifies the common law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien.'" *Marcino* at ¶ 53, quoting Official Comment 9 to U.C.C. 9-203. Under these circumstances, we must determine whether U.S. Bank is entitled to enforce the note against Coffey, and thereafter assert its right to foreclose on the mortgage.

[4] We note that Kim Stewart also executed the mortgage assignment as the "Vice President of MERS," in which case Stewart's personal knowledge of the mortgage assignment could be implied.

{¶ 32} Based upon the evidentiary materials presented for U.S. Bank's motion for summary judgment, it is apparent that the note was transferred to U.S. Bank. "An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." R.C. 1303.22(A). The transfer of an instrument vests in the transferee any right of the transferor to enforce the instrument. R.C. 1303.22(B).

{¶ 33} "Negotiation" is a particular type of transfer. Specifically, "negotiation" means "a voluntary or involuntary transfer of possession of an instrument by a person other than the issuer to a person who by the transfer becomes the holder of the instrument." R.C. 1303.21(A). "Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone." R.C. 1303.21(B).

{¶ 34} In this case, the note contains the following two indorsements: (1) "PAY TO THE ORDER OF U.S. BANK N.A. WITHOUT RECOURSE. THIS 28th DAY OF February[5] [ILLEGIBLE SIGNATURE] [by] THE AMERICAN EAGLE MORTGAGE

[5] Coffey argues that this indorsement is invalid because the year is not included. Coffey cites to no authority to support her proposition. Our own review of R.C. 1303.25 and R.C. 1303.08, the code sections governing special indorsements, reveals that there is no requirement for a date to be included in a special indorsement. *See also Alves v. Baldaia*, 14 Ohio App.3d 187, 189, 470 N.E.2d 459, 14 O.B.R. 205, 39 UCC Rep.Serv. 1362 (6th Dist.1984) (holding that the language "Pay to the order of Keith R. Alves" constituted a special indorsement).

CORP. DAVID A. BERRY, SR. VICE PRESIDENT/CFO"; and (2) "PAY TO THE ORDER OF _____ WITHOUT RECOURSE [by] U.S. BANK N.A." This indorsement was signed on behalf of U.S. bank by "Teresa Bulver, Vice President."

{¶ 35} 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." Because the note is payable to bearer, negotiation of the note is accomplished by transfer of possession alone. R.C. 1303.21(B).

{¶ 36} In her affidavit, Stewart specifically states, "True and accurate reproductions of the originals as they exist in Plaintiff's files are attached hereto as Exhibits 'A' and 'B.'" The note is attached as "Exhibit A." Under this description, U.S. Bank is a holder of the note and mortgage because it is able to demonstrate possession of the note which secures the mortgage. *See also Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032, at ¶ 51 (finding this exact language sufficient to evince actual possession of a note in the form of bearer paper). As a holder, U.S. Bank is a person entitled to enforce the note. *See* R.C. 1303.31(A)(1).

{¶ 37} However, we find that U.S. Bank has not sufficiently established that any conditions precedent have been satisfied. Civ.R. 9(C) provides: "[i]n 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." In *Lewis v. Wal-Mart, Inc.*, 10th Dist. No. 93AP-121, 1993 WL 310411, *3 (Aug. 12, 1993), the court explained:

> Where a cause of action is contingent upon the satisfaction of some condition precedent, Civ.R. 9(C) requires the plaintiff to plead that the condition has been satisfied, and permits the plaintiff to aver generally that any conditions precedent to recovery have been satisfied, rather than requiring plaintiff to detail specifically how each condition precedent has been satisfied. In contrast to the liberal pleading standard for a party alleging the satisfaction of conditions precedent, a party denying performance or occurrence of a condition precedent must do so specifically and with particularity. Civ.R. 9(C). A general denial of performance of conditions precedent is not sufficient to place performance of a condition precedent in issue. * * * The effect of the failure to deny conditions precedent in the manner provided by Civ.R. 9(C) is that they are deemed admitted.

{¶ 38} "Where, however, a cause of action is contingent upon the satisfaction of some condition precedent, and the plaintiff fails to allege, even generally, that the condition has been satisfied, '[a] defending party may raise the defense of failure to state a claim upon which relief can be granted as late as the trial on the merits * * *." *MERS,*

Inc. v. Vascik, 6th Dist. No. L-09-1129, 2010-Ohio-4707, ¶ 17, quoting *Natl. City Mtge. Co. v. Richards*, 182 Ohio App.3d 534, 2009-Ohio-2556, ¶ 24 (10th Dist.).

{¶ 39} In its complaint, U.S. Bank pleaded that "plaintiff has complied with all conditions precedent[.]" Coffey's singular general denial stated, "Defendants deny the allegations set forth in Plaintiff's Complaint." Thus, it would appear that because Coffey failed to deny the performance or occurrence of any conditions precedent specifically and with particularity, the effect would be that they are deemed admitted.

{¶ 40} Nevertheless, we note that,

> "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).

"[T]he the burden on the moving party may be discharged by 'showing'-that is, pointing out to the [trial] court-that there is an absence" of a genuine issue of material fact. *Dresher* at 289-290, quoting *Celotex* at 325. Thus, because U.S. Bank made no mention of possible admissions in the pleadings in its motion for summary judgment, the question of whether the purported general denial constituted an admission by Coffey is not before us. With respect to the record

before the trial court, U.S. Bank pointed only to Stewart's affidavit. In her affidavit, Stewart did not address the issue of whether U.S. Bank satisfied all conditions precedent accordance with the mortgage agreement. Thus, U.S. Bank 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. *Dresher* at 292-293.

{¶ 41} Furthermore, our de novo review reveals that U.S. Bank has also failed to prove that there is no genuine issue of material fact as to the amount of principal and interest due. In its complaint, U.S. Bank pleaded that Coffey owes "$60,154.16, together with interest at the rate of 5.7500% per year from June 1, 2009 * * *." Coffey generally denied this allegation. In its motion for summary judgment, U.S. Bank was required to support its motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). The affidavit of Stewart failed to assert the amount of principal and interest due to Coffey's default. Thus, U.S. Bank again failed to meet its initial burden of pointing to portions of the record that demonstrate an absence of a genuine issue of material fact.

{¶ 42} Because there remain genuine issues of material fact, U.S. Bank is not entitled to summary judgment as a matter of law.

{¶ 43} Accordingly, U.S. Bank's second assignment of error is not well-taken.

III. CONCLUSION

{¶ 44} In conclusion, we reverse judgment of the Erie Court of Common Pleas which dismissed U.S. Bank's complaint but affirm the trial court's judgment denying

U.S. Bank's motion for summary judgment. The case is remanded to the trial court for further proceedings.

{¶ 45} U.S. Bank and Coffey are ordered to pay one-half the costs of this appeal pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

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

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE