[Cite as *Aurora Loan Servs., L.L.C. v. Louis*, 2012-Ohio-384.]

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

Aurora Loan Services, LLC

Appellee

v.

Dion T. Louis, et al.

Appellant

Court of Appeals No. L-10-1289

Trial Court No. CI0200905312

DECISION AND JUDGMENT

Decided: February 3, 2012

* * * * *

Darryl E. Gormley, for appellee.

Brandon S. Cohen, for appellant.

* * * * *

YARBROUGH, J.

I. INTRODUCTION

{¶ 1} Appellant Dion T. Louis appeals from a judgment of the Lucas County Court of Common Pleas, which granted summary judgment in favor of appellee, Aurora Loan Services, LLC ("Aurora"), and denied appellant's cross-motion for summary judgment. Thereafter, the trial court entered a judgment and decree of foreclosure and ordered the property sold. For the reasons that follow, we reverse.

A. Facts and Procedural History

{¶ 2} On April 16, 1999, appellant entered into a contract with Mayflower d.b.a. Republic Bancorp Mortgage, Inc. to purchase a property located in Toledo, Ohio. Appellant signed a note that contained a promise to pay $33,750 plus interest at the rate of 10.825 percent per annum. In exchange, Mayflower received a mortgage against the property as security for repayment of the note. The mortgage was later assigned to Mayflower d.b.a. Union Mortgage Services, and the assignment was recorded on October 13, 1999. Sometime after 1999, Aurora began to service the loan and appellant made his monthly payments to it.

{¶ 3} In early 2009, appellant stopped making payments on the loan. Aurora contends that appellant's default enabled them to exercise an "option" clause contained in the note and mortgage to accelerate the debt. On July 6, 2009, Aurora filed an action for repayment of the note and foreclosure on the mortgage. Aurora attached copies of the note and mortgage to its complaint. Both the note and mortgage were endorsed by and made payable to Mayflower. There was no mention of Aurora on either document. In addition, Aurora requested that the trial court declare it a real party in interest as the holder of the note and mortgage. Aurora also submitted a preliminary judicial report which revealed that the assignment of the mortgage from Mayflower to Aurora was not recorded, and an attempted recording on January 13, 2006, revealed that the chain of title was defective.

{¶ 4} On September 22, 2009, appellant answered the complaint and raised six affirmative defenses, including that Aurora failed to state a claim upon which relief could be granted.

{¶ 5} On December 7, 2009, Aurora filed a motion for summary judgment in which it included an affidavit submitted by Cheryl Marchant, the vice president of Aurora. The affidavit states that Aurora exercised the "option" contained in the mortgage and note which were attached to the pleadings and had accelerated and called due the entire principal balance. The affidavit also declares that Marchant was authorized to make the affidavit and that she possessed personal knowledge of all of the facts therein.

{¶ 6} On December 28, 2009, appellant moved for summary judgment and filed a memorandum in opposition to Aurora's motion for summary judgment based on the contention that Aurora lacked standing as a real party in interest. Appellant argued that Aurora's first affidavit omitted the chain of title issues and did not address the issue of an assignment from Mayflower to Aurora. In response, on January 29, 2010, Aurora filed a brief in opposition to appellant's motion for summary judgment, stating that Mayflower had intended to assign the mortgage to Aurora but the assignment was lost or unrecorded.

{¶ 7} Attached to its brief in opposition to appellant's motion for summary judgment is an affidavit by Theodore Schultz, the assistant vice president of Aurora, as to the lost assignment of the mortgage. This second affidavit states that "[t]he Original Lender assigned its right, title and interest in the note to Mayflower * * * [w]hereas Mayflower assigned its right, title and interest in the note to Aurora." The affidavit goes

on to state that "[t]he original assignment of the Open-end Mortgage between Mayflower DBA Union Mortgage Services and Aurora Loan Services has been lost and or was not recorded." The affidavit does not assert that Schultz had personal knowledge of the matters stated in the affidavit, nor does it provide the circumstances by which Schultz may have gained personal knowledge of the assignment. Since Mayflower is now out of business, Schultz asserts that a replacement assignment to confirm that it is the proper holder of the mortgage is unattainable. Schultz further asserts that Aurora is the holder of the promissory note in question.

{¶ 8} After considering the motions and affidavits, the trial court granted summary judgment in favor of Aurora on August 30, 2010, in the amount of $30,472.27 plus interest on the principal amount at the rate of 10.825 percent per annum from January 1, 2009. In addition, the court found that Aurora had a valid lien and ordered the foreclosure of the property. The trial court reasoned that Aurora established its prima facie case when it submitted the affidavits as evidence. In so determining this, the trial court found that the burden shifted to appellant to show the existence of a genuine issue of material fact pursuant to Civ.R. 56(C). The trial court concluded that appellant "fail[ed] to bring any [additional] evidence under Civ.R. 56(C) to show a genuine issue of material fact" and denied appellant's cross-motion for summary judgment.

B. Assignments of Error

{¶ 9} Appellant now appeals, asserting the following assignment of error:

> The trial court erred in granting plaintiff-appellee's motion for summary judgment because it failed to demonstrate that it is entitled to judgment as a matter of law; the unrefuted Civ.R. 56 Evidence demonstrates, at the least, that a genuine issue of material fact exists as to whether plaintiff appellee is the equitable party in interest.

II. ANALYSIS

A. Standard of Review

{¶ 10} 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, 66-67, 375 N.E.2d 46 (1978).

{¶ 11} 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).

B. Summary judgment improper

1. No demonstration that Aurora is the note holder

{¶ 12} In foreclosure actions, the real party in interest is the current holder of the note and mortgage. *See, e.g., Deutsche Bank Natl. Trust Co. v. Greene*, 6th Dist. No. E-10-006, 2011-Ohio-1976, ¶ 13. 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 brought * * * [or] is the party who, by substantive law, possesses the right to be enforced." (Citations omitted.) *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 Cty.*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973), syllabus.

{¶ 13} In its complaint, Aurora alleged that it is the current holder of the note and mortgage. Nevertheless, the mortgage was not recorded and the title search revealed that the chain of title is deficient. In fact, Aurora admitted this in its complaint and asked the trial court for a declaratory judgment to establish that it is the holder of the note and

mortgage. The only evidence submitted in support of Aurora's motion for summary judgment were the Marchant and Schultz affidavits.

{¶ 14} In determining the sufficiency of these affidavits, we turn to the requirements set forth by Civ.R. 56.

{¶ 15} Pursuant to Civ.R. 56(C),

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.

{¶ 16} Further, Civ.R. 56(E) provides:

> Supporting and opposing 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.)

{¶ 17} Marchant does not assert or aver to any facts which support a finding that Aurora is the holder of the note or mortgage at issue. In fact, the note filed with her affidavit shows the following endorsement: "PAY WITHOUT RECOURSE TO THE

ORDER OF: LIFE BANK BY: [ILLEGIBLE SIGNATURE] TIMOTHY A MERRITT, BRANCH MANAGER FOR MAYFLOWER D.B.A. UNION MORTGAGE SERVICES." There is no explanation of any facts to illustrate how Aurora became the holder of the note. Rather, Marchant's testimony is that "Aurora Loan Services, LLC has exercised the option contained in the note and mortgage and has accelerated and called due the entire principal balance due thereon." This statement fails to establish Aurora as a real party in interest.

{¶ 18} Next, we turn to the Schultz affidavit and find that it is deficient in establishing Aurora's status as a holder of the note and mortgage for three reasons.

{¶ 19} First, the Schultz affidavit states that: (1) "Aurora Loan Services LLC is the holder ('Holder') of the following described promissory note (the 'Note'): * * * Loan No: 0115933855 * * * Borrowers: Dion T. Louis, an unmarried man * * * Property address: 280 Knower St., Toledo, OH 43609 * * * Amount: $33,750.00;" and (2) "Mayflower DBA Union Mortgage Services assigned its right, title and interest in the note to Aurora." A sworn or certified copy of the note was not attached or served with this affidavit as required by Civ.R. 56(E).

{¶ 20} Second, there is no explanation as to how Schultz came to know this information or whether he personally presided over appellant's account. We note,

> [t]he [affiant] need not have firsthand knowledge of the transaction, but must demonstrate [that] the [affiant] is sufficiently familiar with the operation of the business and with the

> circumstances of the record's preparation, maintenance and retrieval, such that the witness can reasonably testify on the basis of this knowledge that the record is what it purports to be * * *. *Wachovia Bank of Delaware, N.A. v. Jackson*, 5th Dist. No. 2010-CA-00291, 2011-Ohio-3202, ¶ 36, citing *State v. Patton*, 3d Dist. No. 1-91-12, 1992 WL 42806 (Mar. 5, 1992).

{¶ 21} Moreover, Schultz's position as assistant vice president of Aurora does not create a presumption that he had personal knowledge of the assignment from Mayflower to Aurora. For example, in *TPI Asset Mgt. v. Conrad-Eiford*, 193 Ohio App.3d 38, 2011-Ohio-1405, 950 N.E.2d 1018, ¶ 21, the affiant stated that "from my own personal knowledge the following facts are true as I verily believe, and * * * I am competent to testify to same." The *TPI* court held that, regardless of the affiant's position in the bank as team leader, the affidavits failed to demonstrate the particular basis on which the affiants gained their understanding of the facts. *Id*. at ¶ 23. Because the Schultz affidavit does not demonstrate that Schultz had personal knowledge of the assignment to Aurora, it does not meet the requirements for affidavits set forth in Civ.R. 56(E).

{¶ 22} Third, Schultz asserted that Aurora is the holder of the note, but failed to set forth any facts in support of this legal conclusion. Affidavits filed in support of summary judgment containing "inferences and bald assertions" rather than a "clear statement or documentation" proving that the original holder of the note and mortgage transferred its interest to Aurora are not sufficient to support a finding that Aurora is the

holder of the note and mortgage. *See First Union Natl. Bank v. Hufford*, 146 Ohio App.3d 673, 678, 767 N.E.2d 1206 (2001) (inferences and bald assertions are insufficient evidence of a transfer of a note and mortgage). Furthermore, Schultz stated, "Mayflower DBA Union Mortgage Services assigned its right, title and interest in the note to Aurora Loan Services." This statement is contradictory to the endorsement contained on the note which indicates that Mayflower d.b.a. Union Mortgage Services assigned the note to Life Bank.

{¶ 23} Ohio's version of the Uniform Commercial Code governs who may enforce a note. R.C. 1301.01 *et seq.*[1] 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).

{¶ 24} Under the code, 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. 1301.31.

{¶ 25} More specifically, under former R.C. 1301.01, "holder" means either of the following:

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[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.

{¶ 26} "(a) if the instrument is payable to bearer, a person who is in *possession* of the instrument;

{¶ 27} "(b) if the instrument is payable to an identified person, the identified person when in possession of the instrument." (Emphasis added.)

{¶ 28} Schultz failed to assert any facts indicating that Aurora is entitled to enforce the instrument. On the face of the note, it is impossible for Aurora to be a "holder" as defined by former R.C. 1301.01. The instrument is not bearer paper, and Aurora is not an identified person on the instrument. Thus, Aurora has failed to meet its *Dresher* burden of establishing that it is the current note holder.

2. No demonstration that Aurora is the mortgage holder

{¶ 29} "'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).

{¶ 30} In support of Aurora's motion for summary judgment, Schultz, in his affidavit, stated: "The Loan is secured by an Open-end Mortgage dated 4/16/1999 Book 99 1465 at Page B11 Instrument 24635 in the County of Lucas, State of Ohio." We note that a certified copy of the mortgage assignment was not attached to the Schultz affidavit as required by Civ.R. 56(E). Furthermore, in regards to the mortgage assignments, the preliminary judicial report filed on July 6, 2009, indicates that the mortgage was initially given to Mayflower d.b.a. Republic Bancorp Mortgage Inc., filed April 21, 1999, in File No. 99 1465B11 of the Lucas County Records. Thereafter, the mortgage was assigned to

Mayflower d.b.a. Union Mortgage Services, and filed October 13, 1999, in File No. 99 3915C12 of the Lucas County Records.

{¶ 31} The report goes on to state:

> Attempted assignment of mortgage to First Union National Bank as Trustee of the Amortizing Residential Collateral Mortgage Trust 2000-BC1, (by Life Bank), by separate instrument dated April 18, 2001 and filed April 18, 2001 in File No. 01 4794 E01 of Lucas County Records. There is no assignment of mortgage to Life Bank.
>
> Attempted assignment of mortgage to Aurora Loan Services LLC FKA Aurora Loan Services Inc., (by Pacific Premier Bank, FSB, FKA Life Bank, FSB or Life Bank), by separate instrument dated January 13, 2006 and filed March 6, 2006 in file No. 20060306-0013641 of Lucas County Records. *The chain of mortgage assignment is defective*. (Emphasis added.)

{¶ 32} Thus, the record reflects that Aurora is unable to establish that there is no genuine issue of material fact as to whether it is the current holder of the mortgage, given the chain of assignments and transfers of the mortgage.

{¶ 33} Furthermore, courts have been reluctant to rely on affidavits as a basis for granting summary judgment in foreclosure actions where there is an absence of supporting evidence or circumstances. In *DLJ Mtge. Capital, Inc. v. Parsons*, 7th Dist. No. 07-MA-17, 2008-Ohio-1177, ¶ 17, the Seventh District Court of Appeals stated that

summary judgment could not be granted for the mortgagee where there was no evidence of an assignment of the note and mortgage besides an affidavit by an employee. Although the employee presided over Parson's account, the affidavit was deemed insufficient to support a motion for summary judgment because it failed to mention "how, when, or whether appellee was assigned the mortgage and note." *Id.* Similarly, in *First Union*, 146 Ohio App.3d at 679, 767 N.E.2d 1206, the Third District Court of Appeals declined to grant summary judgment based exclusively on an affidavit where there was no evidence of an assignment to the mortgagee. The court stated that "though inferences could have been drawn from [the affidavit], inferences are inappropriate, insufficient support for summary judgment and are contradictory to the fundamental mandate that evidence be construed most strongly in favor of the nonmoving party." *Id*. However, where other evidence of a transfer exists, such as a valid transfer of one instrument as evidence of the other, courts have relied on affidavits to confirm such facts. *See, e.g.*, *Greene*, 6th Dist. No. E-10-006, 2011-Ohio-1976, at ¶ 15. In *Greene*, we held that the assignment of the mortgage, in conjunction with interlocking references in the mortgage and the note, transferred the note as well. We cannot find the same here. As in *DLJ Mtge.* and *First Union*, the affidavits in this case were the only evidence that a transfer of the note and mortgage occurred. As discussed, these affidavits fail to establish Aurora as the holder of either the note or the mortgage.

{¶ 34} We note that appellant also argues in his first assignment of error that, "[u]nder statute of frauds principles, Plaintiff-Appellee's would have to show a signed

'option' or 'assignment' from Lender – Mortgage Holder – to be the real party in interest against Louis." To support his argument, appellant claims that "without a signed document expressly granting Aurora an assignment in the mortgage to Louis' property – the trial court cannot grant summary judgment based solely on Aurora's (self-serving) affidavit." However, it has been a longstanding rule in Ohio that 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. *U.S. Bank Natl. Assn. v. 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 an obligation 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. Thus, there is no requirement that a signed assignment of a mortgage be contained in the record. Finally, both instruments that Aurora seeks to enforce were signed by appellant and an option in the mortgage enables the holder to accelerate the debt upon default. Therefore, we do not believe that the statute of frauds argument is pertinent to this appeal.

{¶ 35} In sum, Aurora submitted affidavits that fail to demonstrate that Aurora is the holder of the note or mortgage. Therefore, we hold that Aurora has failed to satisfy

its initial burden of demonstrating that no genuine issue of material fact exists as to whether it is the real party in interest, and thus, summary judgment is inappropriate.

{¶ 36} Accordingly, appellant's first assignment of error is well-taken.

III. CONCLUSION

{¶ 37} Because a genuine issue of material fact exists as to whether Aurora is a real party in interest, the judgment of the Lucas County Court of Common Pleas is reversed and this case is remanded to the trial court for further proceedings. Pursuant to App.R. 24, appellee is ordered to pay costs of this appeal.

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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE