[Cite as *Bank of New York Mellon v. Matthews*, 2013-Ohio-1707.]

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

Bank of New York Mellon	Court of Appeals No. F-12-008
Appellee	Trial Court No. 10CV000241
v.	
Scott F. Matthews, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: April 26, 2013

* * * * *

David A. Wallace, for appellee.

Daniel P. McQuade and Shawn M. Jones, for appellants.

* * * * *

JENSEN, J.

{¶ 1} This is an appeal from a judgment of the Fulton County Court of Common Pleas, granting summary judgment in favor of appellee and denying appellants' motion to compel. For the foregoing reasons, we affirm.

I.

{¶ 2} In November 2004, appellants Scott and Lisa Matthews purchased a home located at 720 North Glenwood Avenue in Wauseon, Ohio. To finance their purchase, appellant Scott Matthews borrowed $290,000 from Encore Credit Corporation and agreed to repay the loan in a promissory note he signed on November 5, 2004. The note called for a monthly payment amount of $2,229.85. The repayment obligations were secured by a mortgage executed by appellants Scott and Lisa Matthews on November 5, 2004.

{¶ 3} In August 2009, appellants defaulted on the payment obligations set forth in the note and mortgage. On September 2, 2009, appellee sent appellants a notice of default and a notice of intent to accelerate the note.

{¶ 4} On July 26, 2010, appellee filed a complaint in foreclosure against appellants. In the complaint, appellee asserted that it was the holder and owner of the note and mortgage. Appellee attached three exhibits to the complaint. Exhibit A is the promissory note between Scott Matthews and the lender, Encore Credit Corporation. The last page of the note provides, in part:

> **Allonge to Deed of Trust/Mortgage Note**
>
> For good and valuable consideration * * * the Assignor does by these presents hereby transfers and set over unto the Assignee * * * all of the rights, title and interest of said Assignor therein, which was transferred on or before the 24th day of December 2009.

For value received, Encore Credit Corp. hereby transfers, endorses and assigns to The Bank of New York Mellon FKA The Bank of New York as Successor in Interest to JPMorgan Chase Bank, N.A., as Trustee for IXIS 2005-HE2, the within Mortgage Note and Deed of Trust securing the same, so far as the same pertains to said Mortgage Note **WITHOUT RECORSE**.

Encore Credit Corp.

BY: Illegible Signature

Sandra Williams

Assistant Vice President

{¶ 5} On September 29, 2011, over a year after the case was filed, appellee was granted leave to substitute exhibit A. The substituted note included an indorsement. It states,

PAY TO THE ORDER OF _____

WITHOUT RECOURSE

ENCORE CREDIT CORP.,

A CALIFORNIA CORPORATION

[Illegible Signature]

JESSIE JONES

SR. SHIPPING ANALYST

{¶ 6} The record does not indicate when the note was indorsed or when appellee came into its possession. Exhibit B to the complaint is the mortgage between appellants

and Encore. Lastly, exhibit C is a mortgage assignment from Encore to appellee. It states,

> This ASSIGNMENT OF MORTGAGE is made and entered into as of the 24th day of December, 2009, from Mortgage Electronic Registration Systems, Inc. acting solely as nominee for Encore Credit Corp. * * * to The Bank of New York Mellon FKY The Bank of New York as Successor in Interest to JPMorgan Chase Bank N.A., as Trustee for IXIS 2005-HE2 * * *.
>
> This Assignment is made without recourse, representation or warranty.
>
> Dated: APR 20, 2010
>
> **Mortgage Electronic Registration Systems, Inc., acting as nominee for Encore Credit Corp.**
>
> By: [Illegible Signature]
>
> Name: Sandra Williams
>
> Title: Assistant Vice President

{¶ 7} The "Assignment of Mortgage" was notarized on April 20, 2010, and recorded at the county recorder's office on April 29, 2010.

{¶ 8} On December 1, 2011, appellee moved for summary judgment, arguing that it had established a prima facie case of foreclosure and that it was entitled to judgment as a matter of law. On January 17, 2012, appellants filed a motion to dismiss and a motion to compel production of information regarding appellee's "status as holder of the note

and the chain of assignments and transfers." Appellants argued that without such discovery they could not properly oppose the motion for summary judgment. On February 15, 2011, appellants opposed the motion for summary judgment arguing that appellee lacked standing because it failed to show that it was the holder of the note when the complaint was filed. On May 3, 2012, the trial court granted appellee's motion for summary judgment and denied appellants' motion to dismiss. It did not expressly rule on appellants' motion to compel. This appeal timely followed.

{¶ 9} Appellants assign the following errors for our review:

I. THE TRIAL COURT ERRED BY NOT GRANTING APPELLANTS' MOTION TO COMPEL AND THEREBY ALLOWING DISCOVERY OF DOCUMENTS RELEVANT TO THE ISSUE OF APPELLEE'S RIGHT TO ENFORCE THE NOTE.

II. THE TRIAL COURT ERRED BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

{¶ 10} First, we note that appellants have not alleged error with regard to the trial court's denial of their motion to dismiss. We begin with appellants' second assignment of error. Appellants argue that appellee lacked standing to bring this suit because there is no evidence that it possessed both the note and mortgage when the complaint was filed.

{¶ 11} Recently, the Supreme Court of Ohio instructed that standing to sue in the foreclosure arena must be determined at the commencement of the suit. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214.

Thus, if a party seeking to foreclose a mortgage fails to establish "an interest in the note *or* mortgage at the time it filed suit, it [has] no standing to invoke the jurisdiction of the common pleas court." *Id*. at ¶ 28. (Emphasis added.) In this case, the assignment of the mortgage was file-stamped and notarized on April 20, 2010 and then recorded on April 29, 2010. Appellee filed suit nearly three months later, on July 26, 2010. Thus, appellee held the mortgage prior to the commencement of the action and had standing to sue.

{¶ 12} Next, we address whether the trial court erred in granting appellee's motion for summary judgment. 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). The party moving for summary judgment bears the initial burden of identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996). The burden then shifts to the non-moving party to submit or point to some evidentiary material showing that there is a

genuine issue for trial. *Henkle v. Henkle*, 75 Ohio App.3d 732, 735, 600 N.E.2d 791 (12th Dist.1991).

{¶ 13} 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. *U.S. Bank, N.A. v. Coffee*, 6th Dist. No. E-11-026, 2012-Ohio-721, ¶ 26.

{¶ 14} Ohio's version of the Uniform Commercial Code ("U.C.C.") governs who may enforce a note. R.C. 1301.01 et seq.[1] 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). A "person entitled to enforce" an instrument includes "the holder of the instrument." R.C. 1303.31. A "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." R.C. 1301.01.

[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.

{¶ 15} Appellants argue that there is doubt as to whether appellee was in possession of the promissory note when the suit was filed. We find that any uncertainty as to the date appellee came into possession of the note is irrelevant for the reason that the assignment of *the mortgage* was sufficient to transfer both the mortgage and the note to appellee. This court has adopted the reasoning set forth in the Restatement of the Law 3d, Property-Mortgages, Section 5.4(b) at 380 (1997), which provides, "Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the [note] the mortgage secures unless the parties to the transfer agree otherwise." *See, e.g., Mtge. Electronic Registration Sys., Inc. v. Vascik*, 6th Dist. No. L-09-1129, 2010-Ohio-4707, ¶ 25 ("Where the note refers to the mortgage and the mortgage, in turn, refers to the note, the clear intent of the parties is to keep the note and the mortgage together so that a transfer of a mortgage, necessarily includes the transfer of the note.") *and Deutsche Bank Nat. Trust Co. v. Greene*, 6th Dist. No. E-10-006, 2011-Ohio-1976, ¶ 15 ("[T]he assignment of the mortgage, in conjunction with interlocking references in the mortgage and the note, transferred the note as well.")

{¶ 16} In this case, the language of the note and mortgage evoke a clear intent to remain together. Indeed, the mortgage reads, in relevant part,

> This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications on the Note; and (ii) the performance of Borrowers covenants and agreements under this Security Instrument and the Note. * * *

{¶ 17} Likewise, the promissory note provides,

> This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note.

{¶ 18} The interlocking references of the two instruments demonstrate a clear intention of the original parties to keep the mortgage and the note together. Therefore, we find that the assignment of the mortgage transferred the note as well.

{¶ 19} In support of its motion for summary judgment, appellee filed an affidavit from Jodi A. Zook, who was authorized on behalf of appellee as an officer of Bank of America, N.A., the servicer of the loan at issue. Appellants challenge the Zook affidavit with regard to their standing argument. Given our finding that standing was established through the assignment of the mortgage, we need not address that argument. We do find, however, that the Zook affidavit is sufficient to establish the other prima facie elements of appellee's foreclosure case. Indeed, appellants do not challenge appellee's evidence that they were in default or the amount owed. Likewise, appellants do not challenge the notification and acceleration procedures used by appellee.

{¶ 20} In sum, we find that appellee established the prima facie elements of its foreclosure case, and appellants did not set forth any specific facts demonstrating a

genuine issue of material fact. The trial court's grant of summary judgment to appellee was proper. Appellants' second assignment of error is without merit and found not well-taken.

{¶ 21} In their first assignment of error, appellants argue that the trial court should have compelled appellee to produce documents which "may show the transfer or delivery date of the Note to the Bank and the chain of transfers of the Note and assignments of the Mortgage." The standard of review for a motion to compel is an abuse of discretion. *Svoboda v. Clear Channel Communications, Inc.*, 156 Ohio App.3d 307, 2004-Ohio-894, 805 N.E.2d 559, ¶ 9 (6th Dist.). "Abuse of discretion" suggests more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 22} First, we note that appellants did not seek the protections of Civ.R. 56(F) when arguing against summary judgment. Civ.R. 56(F) is invoked when a party opposing a motion for summary judgment files a motion, supported by affidavit, that explains that he cannot adequately oppose the motion because he cannot demonstrate sufficient facts to create a material issue, and that the court should therefore refuse to entertain the motion, or should grant him a continuance to permit him to marshal the necessary Civ.R. 56(C) evidence to justify his opposition to the motion. *See State ex rel. Coulverson v. Ohio Adult Parole Auth.*, 62 Ohio St.3d 12, 14, 577 N.E.2d 352 (1991), and *Stegawski v. Cleveland Anesthesia Group, Inc.*, 37 Ohio App.3d 78, 86-87, 523

N.E.2d 902 (8th Dist.1987). The non-moving party must seek relief under Civ.R. 56(F) or forfeit his or her right to challenge the adequacy of discovery upon appeal. *Id*. at 86-87.

{¶ 23} Here, because appellants failed to avail themselves of the remedy contained in Civ.R. 56(F), they are precluded from challenging the discovery orders on appeal or from asserting that the trial court prematurely granted summary judgment prior to the completion of full discovery. Accordingly, we find that this issue has not been preserved for review. *Id.* at 87.

{¶ 24} Moreover, we have already found that appellee established itself as the holder of both the note and mortgage when the case was filed. As a result, appellants' discovery requests regarding the validity or timeliness of the indorsement of the note and assignment of the mortgage are irrelevant. Appellants do not argue that there may be additional evidence they could obtain in discovery that would be pertinent to any other procedural or substantive issue in this case. In sum, we cannot say that the trial court acted unreasonably, arbitrarily or unconscionably in failing to grant appellee's motion to compel. Appellants' first assignment of error is found not well-taken.

{¶ 25} Having found appellants' assignments of error not well-taken, we hereby affirm the judgment of Fulton County Court of Common Pleas. Costs are assessed to appellants in accordance with 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.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE