

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

U.S. Bank, National Association, as
Trustee for RASC 2006-EMX7

Appellee

Court of Appeals Nos. WD-12-031

Trial Court Nos. 2011CV0580

v.

Brian S. Armstrong and Amy J.
Armstrong, et al.

Appellants

DECISION AND JUDGMENT

Decided: May 24, 2013

* * * * *

Scott A. King and Nicholas W. Myles, for appellee.

George C. Rogers, for appellants.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a summary judgment granted to appellee by the Wood County Court of Common Pleas on appellee's complaint in foreclosure. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} On June 23, 2006, appellants Brian and Amy Armstrong (“the Armstrongs”) executed an adjustable rate balloon note for the original amount of \$232,000 payable to Mortgage Lenders Network USA, Inc. As evidenced by the allonge attached to the note, Mortgage Lenders then indorsed the note to EMAX Financial Group, LLC. On July 20, 2006, EMAX indorsed the note to Residential Funding Corporation. Residential Funding then indorsed the note to U.S. Bank. It is undisputed that U.S. Bank is in possession of the original note.

{¶ 3} The note was secured by a mortgage on the property in Haskins, Ohio, to Mortgage Electronic Registration Systems, Inc. (“MERS”), acting as nominee for Mortgage Lenders, its successors, and assigns, as security for payment on the note. On April 4, 2008, MERS executed an assignment of mortgage to U.S. Bank, Trustee, which was recorded in the Wood County Recorder’s Office on April 14, 2008. The mortgage was subsequently assigned to U.S. Bank, Trustee for RASC 2006-EMX7, on May 9, 2011.

{¶ 4} Following a payment default under the note and mortgage, the Armstrongs entered into a Loan Modification Agreement on December 3, 2008, with Wells Fargo Bank, N.A. as the mortgage loan servicer for U.S. Bank. The Armstrongs then defaulted in the payment of their obligations under the note and modification agreement. On March 6, 2011, U.S. Bank sent the Armstrongs a notice of default. On July 8, 2011, two months after the mortgage was assigned to U.S. Bank, it filed a complaint in foreclosure.

{¶ 5} On July 29, 2011, the Armstrongs moved to dismiss the complaint. The Armstrongs asserted that U.S. Bank was not the holder of the mortgage or the loan modification and therefore lacked standing to pursue the foreclosure. The trial court denied the motion to dismiss, finding that dismissal was inappropriate because it was unable to conclude that U.S. Bank could not prove a set of facts entitling it to recover.

{¶ 6} On March 13, 2012, the Armstrongs filed a motion for summary judgment. The Armstrongs again sought dismissal of the complaint for lack of standing. On April 20, 2012, U.S. Bank filed a memorandum in opposition and a cross-motion for summary judgment, supported by the affidavit of Megan Thompson, a vice president of loan documentation for Wells Fargo, servicing agent for U.S. Bank. After considering the parties' various arguments, all of which stem from the core issue of whether U.S. Bank had standing to enforce the note and foreclose on the mortgage, the trial court found that the affidavit of Megan Thompson established that there is no genuine issue of material fact as to the note and mortgage and that U.S. Bank was entitled to summary judgment on the note and foreclosure of the mortgage.

{¶ 7} The Armstrongs set forth three assignments of error:

I. The trial court erred in its decision of September 20, 2011, in denying the Armstrong motion to dismiss the complaint for U.S. Bank's lack of standing.

II. The trial court erred in the order journalized June 5, 2012, denying the Armstrong motion for summary judgment.

III. The trial court erred in its order of June 5, 2012, granting summary judgment and final judgment to U.S. Bank, NA, as trustee.

{¶ 8} In support of their first assignment of error, the Armstrongs assert that the complaint and attached exhibits demonstrate that U.S. Bank is not entitled to an entry of judgment on the pleading. The Armstrongs appear to argue that the copy of the loan modification agreement attached to the complaint shows that the lender is a different entity. The Armstrongs state that to have standing, a plaintiff must show that it was the owner or holder of the note and mortgage on the date the complaint was filed.

{¶ 9} In reaching a decision on a motion to dismiss, courts accept as true the factual allegations in the complaint 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. U.S. Bank attached several documents to its complaint, including the note executed by the Armstrongs in favor of MLN, in support of their assertions that MLN indorsed the note to Emax, that Emax indorsed the note to Residential Funding Corporation, and that Residential Funding Corporation indorsed the note to U.S. Bank.

{¶ 10} The trial court, as stated above, denied the motion to dismiss because it concluded that the documents attached to the complaint demonstrated that U.S. Bank had standing to enforce the note and foreclose the mortgage. Having reviewed the factual allegations in the complaint and the documents attached thereto, we find that dismissal would have been inappropriate. The Assignment of Mortgage provided by U.S. Bank shows that the mortgage was transferred to U.S. Bank on May 9, 2011, and recorded

three days later, thereby establishing that the bank had standing at the time the complaint was filed on July 8, 2011. *See Fed Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E. 2d 1214. Accordingly, the Armstrongs' first assignment of error is not well-taken.

{¶ 11} The Armstrongs' second and third assignments of error will be considered together as both present arguments as to the trial court's decision on the parties' motions for summary judgment.

{¶ 12} 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, 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, 375 N.E.2d 46 (1978).

{¶ 13} The Armstrongs first argue that the loan modification destroyed the original note as a negotiable instrument. We disagree. The loan modification did not change the negotiability of the note. The modification changed the principal, interest rate and maturity date of the original note. Despite being modified, the note was still payable to its holder and provided for a definite date of repayment. The note as modified involved no other undertakings aside from security for its repayment. The loan modification, attached to U.S. Bank's motion for summary judgment, stated on page one

that the agreement “amends and supplements (1) the Mortgage, Deed of Trust * * * and (2) the Note bearing the same date as, and secured by, the security instrument, which covers the real and personal property described in the Security Instrument * * * [.]” It also provides at page three that “[a]ll covenants, agreements, stipulations, and conditions in the Note and Security Instrument shall be and remain in full force and effect, except as herein modified[.]”

{¶ 14} The Armstrongs also argue that U.S. Bank cannot be a party to the loan modification agreement because U.S. Bank is not mentioned anywhere in the body of the document. Armstrongs assert that the document shows America’s Servicing Company, d/b/a Wells Fargo Bank, N.A., as the lender, which they assert indicates that U.S. Bank is not a party. To the contrary, Megan Thompson, in her affidavit attached to U.S. Bank’s motion for summary judgment, states that Wells Fargo Bank is the mortgage loan servicer for U.S. Bank; as such, Wells Fargo Bank, N.A. has authority to enter into loan modification agreements on behalf of U.S. Bank. U.S. Bank remained the lender even after the loan modification agreement was executed. The loan modification amended the note; the note remained the document that created the Armstrongs’ obligation. This argument is without merit.

{¶ 15} The Armstrongs also argue that the loan modification was not valid because it was executed by Wells Fargo as the servicer for U.S. Bank using a fictitious name – America’s Servicing Company – that was not registered with the Ohio Secretary of State. The Armstrongs provide no authority for this argument. The note was

executed on behalf of U.S. Bank by its agent Wells Fargo. Further, Wells Fargo dba America's Servicing Company is not the plaintiff in this action and its standing is irrelevant. Also, U.S. Bank is a national bank and therefore is not required to register with the Ohio Secretary of State. *See Deutsche Bank National Trust Co. v. Ingle*, 8th Dist. No. 92487, 2009-Ohio-3886 (holding that a national bank acting as trustee is not required to comply with licensing requirements).

{¶ 16} Additionally, the Armstrongs challenge the mortgage assignments to U.S. Bank. It should be noted that the Armstrongs lack standing to challenge the assignments of mortgage. Ohio's system for recording mortgages and assignments of mortgages governs the priority of disputes between competing creditors, not disputes between the mortgagor and mortgagee. *Wead v. Kutz*, 161 Ohio App.3d 580, 2005-Ohio-2921, 831 N.E.2d 482, ¶ 24 (12th Dist.). Finally, even if there were a problem with the assignments of mortgage, it does not affect U.S. Bank's standing to enforce the note and mortgage. Whenever a note is secured by a mortgage, the note constitutes the evidence of the debt and the mortgage is a mere incident to the obligation. Therefore, the negotiation of the note operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered. *U.S. Bank, N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032, ¶ 52 (7th Dist.).

{¶ 17} Based on the foregoing, this court finds that the trial court did not err by denying the Armstrongs' motion for summary judgment and granting summary judgment

in favor of U.S. Bank. Accordingly, the Armstrongs' second and third assignments of error are not well-taken.

{¶ 18} On consideration whereof, the judgments of the Wood County Court of Common Pleas are affirmed. Costs of this appeal are assessed to appellants pursuant to 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.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

<p>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.</p>
