[Cite as *Sovereign Bank v. Flood*, 2013-Ohio-725.]

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

Sovereign Bank	Court of Appeals No. E-11-072
Appellee	Trial Court No. 2009-CV-0050
v.	
Donald J. Flood, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: March 1, 2013

* * * * *

Thomas L. Henderson, for appellee.

Daniel L. McGookey, Kathryn M. Eyster and Lauren McGookey, for appellants.

* * * * *

SINGER, P.J.

{¶ 1} Appellants appeal a judgment of foreclosure issued by the Erie County Court of Common Pleas. Because we conclude that the mortgagee had standing to bring a foreclosure action and the trial court acted within its discretion in ordering foreclosure, we affirm.

{¶ 2} On November 1, 1997, appellants, Donald and Annmarie Flood borrowed $72,450 from Mortgage Lenders Network USA, Inc. Appellants executed a promissory note for these funds and secured the note with a mortgage on their home on Carr Street in Sandusky, Ohio. The note and mortgage eventually passed to appellee, Sovereign Bank, of Reading, Pennsylvania.

{¶ 3} On January 20, 2009, appellee filed a complaint in the trial court alleging that it was holder of the note which was now in default for want of payment. Appellee sought judgment on the note, foreclosure of the mortgage and sale of the property.

{¶ 4} Appellants answered the complaint and filed counterclaims on October 12, 2009. Appellee denied the allegations in the counterclaims and moved for summary judgment. Appellants filed a motion to dismiss pursuant to Civ.R. 12(B)(6), arguing that appellee's complaint failed to state a claim because appellee did not allege that it was both the owner and holder of the note and mortgage. Appellants also argued that the complaint should be dismissed because appellee had "unclean hands."

{¶ 5} The trial court denied appellants' motion to dismiss, concluding that there was no requirement that a plaintiff plead it was both a holder and an owner. The court also found an equitable defense improper in a Civ.R. 12(B)(6) motion.

{¶ 6} The trial court granted appellee's summary judgment motion on the appellants' counterclaims, but denied the motion with respect to the foreclosure. The court noted that appellants failed to present any evidence in support of their counterclaims.

Absent supporting evidence in the face of a motion for summary judgment, appellee was entitled to judgment.

{¶ 7} The court also found that appellants failed to present evidence refuting appellee's proof of appellants' default, that the note had been properly accelerated, proper prior notice of foreclosure had been accomplished or that the amount sought was improper. Nevertheless, the court denied appellee's motion for summary judgment for foreclosure.

{¶ 8} The court found "confusing" internal inconsistencies in the transfer/ assignment of the note and mortgage from its originator to appellee. Concluding that the inconsistencies in the documents were "puzzling, unexplained and [appear] not to be 'on the up and up,'" the court determined that there was a question of fact as to whether appellee possessed a sufficient interest in the note and mortgage to have standing to pursue the foreclosure action.

{¶ 9} The matter proceeded to a bench trial at which appellee produced the original promissory note and presented evidence to the court's satisfaction that it had standing to bring the action. The court rejected appellants' argument that foreclosure would be inequitable. The court noted that appellants failed to present any evidence that they had paid or attempted to make any payments on the loan for two and one-half years.

{¶ 10} The court granted judgment to appellee on the note, ordered the mortgage foreclosed and the property sold. From this judgment of foreclosure, appellants now bring this appeal. Appellants set forth a single assignment of error:

The trial court erred in granting Judgment in Foreclosure to Sovereign Bank, erred in finding Sovereign Bank had standing to bring and prevail on the action, and erred in finding that equity did not bar Sovereign Bank from being granted relief.

I. Standing

{¶ 11} The first issue appellants raise is whether appellee had standing to bring a suit in foreclosure in this matter. Appellants assert that a plaintiff seeking foreclosure must allege in the complaint that it is both the holder and the owner of the note. We have rejected this proposition. *U. S. Bank Natl. Assn. v. Liphart*, 6th Dist. No. E-11-033, 2012-Ohio-1994, ¶ 9.

{¶ 12} With respect to the greater issue of standing, some clarity on this issue has been provided since this matter was argued. In *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, the Supreme Court of Ohio held, at ¶ 22-24, that standing to sue is a jurisdictional requirement which must be determined at the commencement of the suit. 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. If a plaintiff cannot demonstrate standing when the suit is filed, the suit must be dismissed, albeit without prejudice. *Id.* at ¶ 40.

{¶ 13} The journey this note and mortgage traveled to get into appellee's hands is byzantine. The original Mortgage Lenders promissory note is endorsed without recourse

to BankBoston N.A. Attached to the note is an allonge endorsing the note from BankBoston to The First National Bank of Chicago as trustee for BankBoston Home Equity Loan Trust 1998-1 and yet another allonge from Bank of New York Mellon Trust Co., N.A. f/k/a The Bank of New York Trust Co. as successor to JP Morgan Chase Bank, successor by merger to The First National Bank of Chicago, as trustee for the BankBoston Home Equity Loan Trust 1998-1 to Sovereign Bank. The mortgage was assigned, first to BankBoston N.A., then from Bank America, N.A., sbmt Fleet National Bank f/k/a BankBoston to First National Bank of Chicago and then to Sovereign Bank. There are also blank, unsigned and rescinded endorsements and assignments. That the trial court found this perplexing is understandable.

{¶ 14} For *Schwartzwald* purposes, however, the evidence shows that, at the conclusion of these dealings, appellee held both the note and the mortgage at issue. Moreover, appellee held both instruments prior to initiation of the suit. Clearly, appellee had standing to sue.

II. Equity

{¶ 15} The parties argue at length about the very nature of a foreclosure as an equitable action. Appellee after a lengthy account of the history of foreclosures maintains that the only equity in a foreclosure is the "equity of redemption." That is, the right of a mortgagor in default to pay the balance due and redeem the property. Appellee maintains that once default on the note is found and the mortgagor fails to redeem the

property by paying the balance, the court has no course other than to foreclose and order the sale of the property.

{¶ 16} Appellants insist that, in Ohio, foreclosure is a two part proceeding. The first part is the legal determination of whether a creditor is entitled to a judgment on the note. The second part is whether the creditor should be able to foreclose the mortgage and sell the subject property toward satisfaction of the judgment on the note. The former is a legal proceeding, the latter equitable. Appellant directs our attention to *PHH Mtge. v. Barker*, 190 Ohio App.3d 71, 2010-Ohio-5061, 940 N.E.2d 662, ¶ 41 (3d Dist.), a case in which the appeals court affirmed a trial court judgment, ruling that, even though the mortgagor was in default, it would be inequitable to foreclose the mortgage.

{¶ 17} Although this court favors appellants' view, *see, e.g., First Nat'l Bank of Am. v. Pendergrass*, 6th Dist. No. E-08-048, 2009-Ohio-3208, ¶ 22, prevailing on this issue is unavailing to appellants. The decision of whether ultimately to grant or deny a foreclosure rests within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *PHH* at ¶ 35, *Pendergrass* at ¶ 23. "Abuse of discretion" connotes more than an error of law or judgment; rather, it implies an unreasonable, arbitrary or unconscionable attitude. *Buckeye Retirement Co., L.L.C. v. Walling*, 7th Dist. No. 05 MA 119, 2006-Ohio-7059, ¶ 16.

{¶ 18} The trial court in this matter clearly considered the equities and concluded that, irrespective of any misdeeds by the lender(s), appellants had not made any payment on the note for two and one-half years. As a result, the court found that the equities

favored appellee. We cannot say that this determination was arbitrary, unreasonable or unconscionable.

{¶ 19} Accordingly, appellants' sole assignment of error is not well-taken.

{¶ 20} On consideration whereof, the judgment of the Erie County Court of Common Pleas is affirmed. It is ordered that appellants pay the court costs of this appeal 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE