

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

Genoa Banking Company

Court of Appeals No. OT-12-038

Appellee

Trial Court No. 12-CV-026E

v.

John F. Bergman, et al.

DECISION AND JUDGMENT

Appellants

Decided: July 12, 2013

* * * * *

Alan R. McKean and Martin D. Carrigan, for appellee.

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

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} In this foreclosure action, appellants, John and Kathryn Bergman, appeal from the judgment of the Ottawa County Court of Common Pleas, which granted

summary judgment in favor of appellee, Genoa Banking Company (“Genoa”). We affirm.

A. Facts and Procedural Background

{¶ 2} On January 17, 2012, Genoa initiated foreclosure proceedings against appellants, alleging that appellants were in default of their note and mortgage for failure to pay. Attached to the complaint was a copy of the original note and mortgage, naming Genoa as the lender and mortgagee and appellants as the borrowers and mortgagors. The note and mortgage have never been transferred or assigned.

{¶ 3} Genoa moved for summary judgment on July 18, 2012. In support of its motion, Genoa attached the affidavit of Joseph Baun, an assistant vice president. In his affidavit, Baun testified that he had reviewed the file and was personally familiar with its contents and with appellants. Baun stated that the loan was executed on December 21, 2009, and was evidenced by the note, a true and accurate copy of which was attached to the complaint and to the affidavit. Baun further testified that appellants have been in default of the note since November 16, 2011, that Genoa has exercised its option to accelerate the balance due on the note, that Genoa has sent a notice of default and demand for payment to appellants, and that appellants have not made full payment of the arrearage as required by the note. Baun testified that, as of January 11, 2012, the amount due on the note was \$256,502.46 plus interest and late charges. In addition, Baun stated that the note was secured by a mortgage, a true and accurate copy of which was attached to the complaint and to the affidavit, that Genoa is the holder of the mortgage, that the

conditions of the mortgage have been broken by appellants, and that notice has been sent to appellants, thereby entitling Genoa to foreclose on the mortgage.

{¶ 4} Finally, Baun testified that a second loan existed, evidenced by another note that was attached to the complaint and affidavit. He further testified that the second note was in default, and that the amount due, as of January 11, 2012, was \$827.89 plus interest and late charges.

{¶ 5} Pursuant to a local court rule, the matter was scheduled for a non-oral hearing on the motion. Notably, no actual hearing was to take place. Instead, the non-oral hearing date is designated as the date on which the motion becomes decisional. Appellants, having not yet filed an opposition to the motion for summary judgment, moved to continue the non-oral hearing until October 11, 2012, effectively seeking an extension of time to file their opposition for purposes of conducting additional discovery. The trial court granted the motion.

{¶ 6} Thereafter, appellants again moved to extend their time to respond to the motion for summary judgment, and concurrently moved to refer the case to mediation. The trial court granted their motion, ordering the non-oral hearing on the motion for summary judgment to be stayed pending resolution of mediation. On November 5, 2012, the mediator's report was filed, indicating that mediation was completed unsuccessfully.

{¶ 7} On November 15, 2012, the trial court determined that since mediation had been completed, the motion for summary judgment was decisional. The court proceeded to grant Genoa's motion, and a judgment and decree of foreclosure was entered in

Genoa's favor. Appellants never filed an opposition to the motion for summary judgment.

{¶ 8} Subsequently, appellants filed a Civ.R. 60(B) motion for relief from the judgment and decree of foreclosure. Genoa filed its opposition, and appellants replied. However, the trial court has not ruled on the Civ.R. 60(B) motion because, on the same day they filed their reply in support of their Civ.R. 60(B) motion, appellants initiated the present appeal of the November 15, 2012 judgment and decree of foreclosure.

B. Assignment of Error

{¶ 9} Appellants now assign one error for our review:

The trial court erred in granting Genoa Banking's Motion for Summary Judgment.

II. Analysis

{¶ 10} We review appeals from an award of summary judgment 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). Applying Civ.R. 56(C), summary judgment is appropriate where (1) there is no genuine issue as to any material fact, (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 in the light most favorable to the non-moving party, that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 11} As an initial matter, appellants contend that foreclosure is an inequitable remedy in this case. In particular, appellants argue that the potential loss they face if foreclosure is granted is greater than the potential loss facing Genoa if foreclosure is denied. Regardless of whether that is true, under the specific facts of this case, we do not think it is inequitable to allow Genoa to enforce its rights where appellants have failed to pay their loan obligation.

{¶ 12} The remaining issue we must decide, then, is whether summary judgment is appropriate based on the pleadings and the evidence submitted in support of Genoa's unopposed motion. We hold that it is.

{¶ 13} As we have previously recognized,

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 mortgagor 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. Coffey*, 6th Dist. No.

E-11-026, 2012-Ohio-721, ¶ 26.

{¶ 14} Here, Baun's affidavit, which he asserts was made on personal knowledge, satisfies all of the required elements: Genoa is the holder and party entitled to enforce the note and mortgage as the original lender and mortgagee; appellants are in default of the

note for failure to pay; Genoa sent the required notice to appellants before foreclosing; and the amount due is \$256,502.46 plus interest and late charges on the first note, and \$827.89 plus interest and late charges on the second note.

{¶ 15} Appellants, however, argue that the affidavit is deficient. Citing *Aurora Loan Servs., L.L.C. v. Louis*, 6th Dist. No. L-10-1289, 2012-Ohio-384, appellants contend the affidavit does not set forth additional facts in support of the legal conclusion that Genoa is the proper party to foreclose. They argue that even though Genoa is the original lender, the affidavit must state the location of the note and who has had custody of the note since its origination. We find that appellants' reliance on *Louis* is misplaced. In *Louis*, we held that an affidavit asserting that Aurora Loan Services was a holder of the note and mortgage was insufficient where the note was not attached to the affidavit, the affidavit was made by an assistant vice president without personal knowledge, and where the indorsements on the note itself contradicted the assertion. *Id.* at ¶ 18-22. Here, in contrast, the note and mortgage were attached, the affiant did have personal knowledge, and the party seeking to enforce the instruments was the original lender and mortgagee. Compare *U.S. Bank, N.A. v. Adams*, 6th Dist. No. E-11-070, 2012-Ohio-6253, ¶ 16-18 (bank's status as a holder is established where a note that is indorsed in blank is attached to the complaint and to an affidavit from a default litigation specialist stating that the bank is the holder and owner.) Therefore, Genoa has satisfied its initial burden of establishing that it is the holder and party entitled to enforce the note and mortgage.

{¶ 16} Appellants also argue that the affidavit is deficient because it does not provide any documentary evidence establishing the amount owed. However,

In determining the propriety of summary judgment in foreclosure actions, courts have consistently held that an averment of outstanding indebtedness made in the affidavit of a bank loan officer with personal knowledge of the debtor's account is sufficient to establish the amount due and owing on the note, unless the debtor refutes the averred indebtedness with evidence that a different amount is owed. *Natl. City Bank v. TAB Holdings, Ltd.*, 6th Dist. No. E-10-060, 2011-Ohio-3715, ¶ 12.

Thus, Baun's affidavit, which states the balance due on the notes, satisfies Genoa's initial burden to establish the amount owed.

{¶ 17} Because Genoa has provided evidentiary-quality materials demonstrating that it is entitled to summary judgment, the burden now shifts to appellants to put forth "specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). Here, appellants have not opposed the motion for summary judgment and have set forth no facts establishing a genuine issue for trial. Therefore, Genoa is entitled to summary judgment in its favor.

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

III. Conclusion

{¶ 19} For the foregoing reasons, the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellants are ordered to pay the 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

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

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:
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