

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

Bank of America, N.A., successor
by merger to BAC Home Loans
Servicing, LP

Court of Appeals No. L-13-1035

Trial Court No. CI0201106052

Appellee

v.

Jennifer A. Hizer aka
Jennifer Ann Hizer, et al.

DECISION AND JUDGMENT

Appellants

Decided: October 18, 2013

* * * * *

Jason A. Whitacre and T. Jeffrey Tumlin, for appellee.

George C. Rogers, for appellants.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that granted summary judgment in favor of appellee Bank of America, N.A. in a foreclosure action filed by the bank after appellants Jennifer and Brian Hizer defaulted in

payment on a note and mortgage held by the bank. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} On July 6, 2007, appellants executed a promissory note in favor of America's Wholesale Lender for \$312,170 and executed a mortgage in favor of Mortgage Electronic Registration Systems, Inc. ("MERS") acting solely as nominee for America's Wholesale Lender. The mortgage was recorded in Lucas County on July 9, 2007. On October 11, 2011, the mortgage was assigned from MERS, as nominee for Countrywide Home Loans, Inc., dba America's Wholesale Lender, to Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP, fka Countrywide Home Loans LP.

{¶ 3} On October 18, 2011, Bank of America, N.A., filed a complaint for payment on the note, alleging that appellants had defaulted on the note by failing to make payments since September 2009. On December 13, 2011, Brian Hizer filed an answer and sought to be dismissed as a party-defendant. On January 13, 2012, Jennifer Hizer filed, through counsel, an answer and counterclaim. On July 18, 2012, counsel for Jennifer sought to amend the Hizers' pleadings so as to reflect his representation of both Brian and Jennifer. Counsel's request was granted on July 24, 2012. This led to a finding by the trial court on August 1, 2012, that Brian's motion to be dismissed as a party-defendant was moot.

{¶ 4} Bank of America filed its motion for summary judgment on August 31, 2012, with leave of court. In response, appellants filed a motion to strike the affidavit of

Yasamin P. Mehn, one of appellee's vice presidents, which appellee had submitted in support of its motion for summary judgment. In support of their motion to strike, appellants asserted that appellee failed to answer an interrogatory requesting the names of officers and employees knowledgeable regarding the Hizer mortgage and failed to produce an officer for deposition after the bank was noticed. Appellants claim that because of those failures the bank should not be permitted to support its motion for summary judgment with Mehn's affidavit.

{¶ 5} Appellants also filed a memorandum in opposition to summary judgment in which they asserted again that Mehn's affidavit should be stricken and argued that appellee "should be required to present live witnesses and officers and authentic documents at trial and be subject to * * * cross-examination." Appellants further asserted that Mehn's affidavit was otherwise insufficient to support summary judgment because it did not establish that she was a records custodian.

{¶ 6} On October 22, 2012, the trial court denied the motion to strike and ruled on the motion for summary judgment. In ruling on summary judgment, the trial court essentially granted appellee's motion as it related to the complaint but denied the motion as to appellants' counterclaim, leaving the remaining issues to be resolved at trial. On October 23, 2012, however, the day before the matter was set for trial, appellants represented to the trial court that they intended to voluntarily dismiss the counterclaim; they did so on October 26, 2012. On December 3, 2012, the trial court journalized a judgment entry and decree of foreclosure in execution of its October 22, 2012 order.

{¶ 7} Appellants set forth the following assignments of error:

{¶ 8} “Assignment of Error No. I

{¶ 9} “The trial Court erred in denying Defendants/Appellants’ Motion to Strike the Affidavit of Appellee’s Vice President submitted after the Appellee failed to answer an interrogatory for it to identify officers and employees knowledgeable of the Hizer mortgage, and also failed to produce an officer upon noticed deposition.

{¶ 10} “Assignment of error No. II

{¶ 11} “The Trial Court erred in granting Appellee’s Motion for Summary Judgment.”

{¶ 12} In support of their first assignment of error, appellants assert that Mehn’s affidavit should have been stricken because they were not able to depose her regarding her “conclusory statements.” Appellants argue that the “uncross-examined” affidavit should not have been considered by the trial court and that striking the affidavit would be an appropriate sanction for appellee’s failure to appear for deposition or meaningfully respond to discovery.

{¶ 13} Appellants allege they sent a deposition notice to one of appellee’s attorneys by email on August 21, 2012, setting a deposition for August 27, 2012, the last day of the time allowed for discovery. When appellee did not respond, appellants’ counsel served a written notice of deposition to take place on August 27. Appellee did not appear. Appellants claimed it would be an abuse of procedural due process to allow

appellee to utilize the deposition of an officer undisclosed prior to discovery cut-off who was therefore “uncross-examinable.”

{¶ 14} The record reflects that appellee represented in the trial court that it received appellants’ initial discovery requests on July 23, 2012, and responded to the same on August 27, 2012. On August 28, 2012, one day past the discovery/dispositive motion deadline, appellee was granted leave to file its motion for summary judgment; included with the motion was Mehn’s affidavit in support of appellee’s claims. Mehn rendered testimony based on her personal knowledge of appellee’s record creation processes and her own review of the records as custodian of the bank’s business records. Mehn stated that appellee is the assignee of the note and mortgage in question and has possession of the note directly or through an agent. Mehn also testified that appellants had defaulted on the note by failing to make payments since October 2009. Attached to Mehn’s affidavit were the note executed between appellants and Countrywide Home Loans, the mortgage executed between appellants and MERS as nominee for Countrywide, the assignment of mortgage from Countrywide to appellee, appellants’ account information statement, and appellee’s Notice of Intent to Accelerate which was sent to appellants on January 27, 2011.

{¶ 15} On September 18, 2012, appellants filed their opposition to summary judgment and their motion to strike Mehn’s affidavit. In denying the motion to strike, the trial court noted that its docket reflected no indication of discovery problems or other irregularities prior to September 18, 2012, when appellants filed their motion to strike.

The court further noted that this discovery matter was first brought to the court's attention five weeks before the trial date and three weeks after the discovery deadline. The record reflects that appellants' exhibit as to its notice of deposition bears no file stamp and the court's docket does not reflect that it was filed with the court other than as an exhibit attached to the motion to strike.

{¶ 16} A trial court has discretion to either grant or deny a motion to strike. *State ex rel. Mora v. Wilkinson*, 105 Ohio St.3d 272, 2005-Ohio-1509, 824 N.E.2d 1000. The trial court's decision will not be overturned absent an abuse of discretion. *Id.*

{¶ 17} In their motion to strike, appellants do not articulate a compelling explanation as to why Mehn's deposition was necessary in order to avoid prejudice to their defense, merely stating that the affidavit was insufficient to establish Mehn as the proper records custodian.

{¶ 18} Based on the foregoing, we find that appellants have not shown prejudice resulting from their inability to depose Mehn and, accordingly, the trial court did not abuse its discretion by denying their motion to strike the affidavit.

{¶ 19} Appellants' first assignment of error is not well-taken.

{¶ 20} In support of their second assignment of error, appellants again raise the issue of Mehn's affidavit, asserting that Bank of America's sole proof of ownership of the note and mortgage is the "uncross-examinable" affidavit, which raises an issue of fact precluding summary judgment. Appellants assert that appellee failed to comply with its obligation to produce requested documents, respond to interrogatories and appear for

deposition. Appellants also claim that the note, mortgage and other documents do not support the ownership of the note and mortgage by appellee.

{¶ 21} 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).

{¶ 22} This court has already addressed and resolved the issue of Mehn's affidavit, finding that the trial court did not abuse its discretion by denying the motion to strike; accordingly, their argument within this assignment of error relative to the affidavit is without merit. Appellants further challenge appellee's standing to bring this foreclosure action. First, as to appellant's complaints regarding discovery irregularities, we note that there is no reflection in the record that appellants brought discovery concerns or problems to the attention of the trial court. Appellants did not raise any discovery issues until after appellant had filed its motion for summary judgment and the discovery deadline had passed. Next, we note that the record contains an assignment of mortgage from MERS, as Countrywide's nominee, to Bank of America on October 11, 2011. The assignment was recorded on October 24, 2011. Those items were properly authenticated by way of Mehn's affidavit. Appellants have not denied executing the note

and mortgage, nor have they suggested that the documents offered by appellee are not authentic. Appellants have not produced any evidence to dispute the apparent assignment from Countrywide to Bank of America. We therefore conclude that appellant Bank of America is the holder of the note and mortgage. Finally, we note that Ohio courts, including this one, have held that a mortgage borrower is not a party to an assignment of mortgage and therefore lacks standing to challenge the assignment. *See Bank of New York Mellon Trust Co. v. Unger*, 8th Dist. Cuyahoga No. 97315, 2012-Ohio-1950; *Chase Home Fin. v. Heft*, 3d Dist. Logan Nos. 8-10-14, 8-11-16, 2012-Ohio-876.

{¶ 23} Based on the foregoing, we find that the trial court did not err by granting summary judgment in favor of appellee and, accordingly, appellants' second assignment of error is not well-taken.

{¶ 24} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellants pursuant to App.R. 24.

Judgment affirmed.

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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

Thomas J. Osowik, 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:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.