[Cite as *JPMorgan Chase Bank, N.A. v. Salazar*, 2014-Ohio-1002.]

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

JPMorgan Chase Bank, National Association

Appellee

v.

Manuel J. Salazar, Jr. and Angel Salazar, et al.

Appellants

Court of Appeals No. L-13-1038

Trial Court No. CI0201106746

DECISION AND JUDGMENT

Decided: March 7, 0214

* * * * *

Stephen Williger and Nicole Wilson, for appellee.

Douglas Wilkins, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellants, Manuel Salazar, Jr. and Angel Salazar, appeal the February 11, 2013 judgment of the Lucas County Court of Common Pleas which granted summary judgment in favor of appellee, JPMorgan Chase Bank, N.A., in a foreclosure action. Because we agree that appellee was entitled to judgment as a matter of law, we affirm.

{¶ 2} On November 29, 2011, appellee filed its complaint in foreclosure alleging that it was the holder of a note secured by a mortgage executed on August 7, 2003. Copies of the note and mortgage were attached to the complaint. Also attached was a copy of the November 8, 2011 assignment of the mortgage from Flagstar Bank to appellee. The complaint alleged that appellants were in default on the note, appellee accelerated the debt, and the amount due and owing was $76,770.59 plus interest. Appellee further stated that it had complied with all conditions precedent.

{¶ 3} In their answer, appellants admitted that the note and assignment were attached to appellee's complaint. Appellants then asserted the defense of failure to state a claim for relief.

{¶ 4} On May 14, 2012, appellee filed its motion for summary judgment. In support, appellee relied on the complaint and attached documents and the affidavit of JPMorgan employee, Nicole Smiley. In opposition to the motion, appellants argued that there was improper evidence of any assignment of the note from Flagstar to appellee, that appellee is not the holder (or real party in interest) of the note, that Nicole Smiley's affidavit was not based upon personal knowledge, that Smiley failed to explain or provide a payment history, and that the affidavit fails to show that appellee notified appellants of its decision to accelerate the balance owed.

{¶ 5} Supporting their memorandum in opposition, appellants attached the affidavit of Manuel Salazar, Jr., which, notably stated that after sustaining a flood in 2010, due to frozen pipes, a $40,000 insurance check was issued to appellants and

appellee. Appellee disbursed $13,400 of the funds for clean-up. Appellant contended that appellee failed to state how the remaining funds were applied to the mortgage balance.

{¶ 6} In appellee's reply, it asserted that the blank endorsement on the note from Flagstar and the fact that it was the holder of the note, entitled it to enforce the note. As to the mortgage, appellee stated that the assignment of the mortgage was attached to the complaint. Appellee further argued that it was not required to show a payment history to establish its uncontroverted claim that appellants defaulted on the note. As to the Smiley affidavit, appellee noted that she specifically stated that it was made based upon personal knowledge. Finally, appellee contended that appellants waived any argument of failure to comply with conditions precedent to foreclosure based on their failure to raise it as an affirmative defense.

{¶ 7} On February 11, 2013, appellee was granted summary judgment and a foreclosure decree. This appeal followed.

{¶ 8} Appellants now raise the following assignment of error:

{¶ 9} The lower court erred in granting summary judgment to JPMorgan.

{¶ 10} In their sole assignment of error, appellants contend that the trial court erroneously granted appellee's motion for summary judgment. We note that appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial

court's determination. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). Summary judgment will be granted only when there remains no genuine issue 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, 66, 375 N.E.2d 46 (1978). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996). However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 11} In a foreclosure action, to support a motion for summary judgment 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 movant 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. Erie No. E-11-026, 2012-Ohio-721, ¶ 26, citing *Wachovia Bank of Delaware v. Jackson*, 5th Dist. Stark No. 2010-CA-00291, 2011-Ohio-3202, ¶ 40-45.

{¶ 12} The first issue presented is whether appellee demonstrated that it is the real party in interest or the "holder" of the note. A holder is defined in R.C. 1301.01 as "if the instrument is payable to bearer, a person who is in possession of the instrument." Further, "[i]f an instrument is payable to bearer, it may be negotiated by transfer of possession alone." R.C. 1303.21(B). The affidavit of Nicole Smiley states that appellee is the holder of the note; the note is attached to the affidavit and is endorsed in blank. Thus, we find that appellee is the holder of the note and is entitled to its enforcement.

{¶ 13} Appellants further contend that the lack of sworn testimony authenticating the "purported" mortgage assignment raises an issue of material fact. We disagree. This court has held that the transfer of a note secured by a mortgage acts as an equitable assignment of the mortgage. *Coffey* at ¶ 31. Further, although not authenticated in Smiley's affidavit, the mortgage assignment was attached to appellee's complaint as well as the Final Judicial Report filed March 15, 2012.

{¶ 14} Appellants next argue that Smiley's affidavit is deficient because it offers only "conclusory" evidence regarding the monies owed. Ohio courts have 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." (Citations omitted.) *Natl. City Bank v. TAB Holdings, Ltd.* 6th Dist. Erie No. E-10-060, 2011-Ohio-3715, ¶ 12. Appellants have failed to present evidence that they are not in default. Appellant Manuel Salazar did, however, state in his

affidavit that he believed that a credit based upon flood insurance proceeds should be applied to the mortgage balance. First, appellant's affidavit does not state that it was based upon personal knowledge or that, beyond speculation, he had any idea what had been done with the insurance balance. Finally, appellants do not assert that the insurance balance would have been sufficient to cure the default.

{¶ 15} Regarding the conditions precedent, appellee, in its complaint, stated that it had complied with all conditions precedent. This court has specifically held that a general averment that all conditions precedent have been performed is sufficient. *Coffey*, 6th Dist. Erie App. No. E-11-026, 2012-Ohio-721 at ¶ 37. Once the averment is made, a denial of the performance must be made with specificity or it is deemed admitted. *Id.*, quoting *Lewis v. Wal-Mart, Inc.*, 10th Dist. Franklin App. No. 93AP-121 (Aug. 12, 1993.) Appellants failed to deny that the conditions precedent had been performed; thus, the performance was deemed admitted.

{¶ 16} Accordingly, because we conclude that appellee was the holder of the note and mortgage, that appellants were in default on the note, and that appellee complied with all conditions precedent, the trial court did not err in granting summary judgment in favor of appellee. Appellants' assignment of error is not well-taken.

{¶ 17} On consideration whereof, we find that substantial justice was done the parties complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellants are ordered to pay the costs of this appeal.

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, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE