[Cite as *U.S. Bank, Natl. Assn. v. Zokle*, 2014-Ohio-636.]

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

U.S. Bank, National Association, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2006-CH1

Appellee

v.

Mark J. Zokle, et al.

Appellants

Court of Appeals No. E-13-033

Trial Court No. 2012 CV 0624

DECISION AND JUDGMENT

Decided: February 21, 2014

* * * * *

David A. Wallace and Karen M. Cadieux, for appellee.

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

* * * * *

JENSEN, J.

{¶ 1} Defendants-appellants, Mark J. Zokle ("Zokle") and his wife, Christina Zokle (collectively referred to as "the Zokles"), appeal the March 28, 2013 judgment of the Erie County Court of Common Pleas denying their motion for an extension of time to

respond to plaintiff's motion for summary judgment; the April 10, 2013 judgment denying their motion to reconsider their amended motion for an extension of time; the April 24, 2013 judgment denying their motion for leave to file a memorandum in opposition to plaintiff's motion for summary judgment; and the April 24, 2013 judgment granting summary judgment in favor of plaintiff-appellee, U.S. Bank, National Association, as Trustee for J.P. Morgan Mortgage Acquisition Trust 2006-CH1 ("U.S. Bank" or "the bank"). For the reasons that follow, we find the Zokles' assignment of error well-taken, in part, and not well-taken, in part. We reverse the order of the trial court granting summary judgment to U.S. Bank and remand the matter to the trial court for further proceedings.

I. Factual Background

{¶ 2} On February 16, 2006, Zokle executed an adjustable rate promissory note in the amount of $637,500 in favor of Chase Bank USA, N.A. ("Chase"). As security for the note, Zokle granted to Chase a mortgage on the property located at 4214 Walnut Creek Lane in Sandusky, Ohio. The mortgage was recorded with the Erie County recorder's office on February 22, 2006. Zokle defaulted on his payment obligations beginning with the payment due December 1, 2008. On January 22, 2009, Chase assigned the mortgage to U.S. Bank and transferred to U.S. Bank its rights in both the mortgage and the note. U.S. Bank sent Zokle a breach letter dated May 4, 2012, notifying him that he was in material default for failure to make payments under the note and informing him of the amount required to bring the loan current. Zokle remained in

breach and U.S. Bank filed a complaint in foreclosure against Zokle and his wife on August 15, 2012. The Zokles answered on September 12, 2012.

{¶ 3} U.S. Bank moved for summary judgment on February 21, 2013. Under Erie County Loc.R. 4.01, the Zokles had 14 days—until March 7, 2013—by which to file a response to the motion. Instead of responding to the motion, their counsel, the McGookey Law Offices, moved to withdraw as counsel, citing irreconcilable differences with its clients, and sought an extension of time until May 11, 2013, for the Zokles to file a response to U.S. Bank's motion for summary judgment. These motions were filed on March 7, 2013. On March 12, 2013, the trial court granted the motion to withdraw. A week later, on March 19, 2013, the McGookey firm filed a "notice of withdrawal" of its motion to withdraw as counsel. It also filed an amended motion for extension of time to respond to the summary judgment motion, once again requesting a May 11, 2013 deadline. It asserted that this extension was needed in order to conduct a Civ.R. 30(B)(5) deposition.

{¶ 4} The court denied the Zokles' motion for an extension of time in an entry dated March 28, 2013. The Zokles moved the court to reconsider its decision, but the court denied that motion as well on April 10, 2013. On April 19, 2013, they filed a motion for leave to file a memorandum in opposition to U.S. Bank's motion for summary judgment. That same day, the magistrate recommended to the trial court that U.S. Bank's motion for summary judgment be granted. The trial court adopted the magistrate's

recommendation and entered a decree of foreclosure on April 24, 2013. It also denied the Zokles' motion for leave to file an opposition brief.

{¶ 5} The Zokles appeal from the court's March 28, April 10, and April 24, 2013 rulings. They assign the following error:

> The trial court erred in denying an extension to respond to US [sic] Bank's Motion for Summary Judgment, denying reconsideration, and leave to file the opposition to said Motion for Summary Judgment. The trial court further erred in granting US [sic] Bank's Motion for Summary Judgment.

II. Standard of Review

{¶ 6} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless*

v. Willis Day Warehousing Co., 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 7} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

III. Analysis

{¶ 8} 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 movant is not the original mortgagee, the chain of assignments and transfers; (3) the

mortgager is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due. *Bank of New York Mellon v. Matthews*, 6th Dist. Fulton No. F-12-008, 2013-Ohio-1707, ¶ 13.

{¶ 9} The Zokles argue that U.S. Bank failed to meet its burden establishing that it is the holder of the note and mortgage and that it met all conditions precedent before filing the foreclosure action. They claim that the affidavit attached to U.S. Bank's motion for summary judgment was insufficient and that foreclosure is not the proper remedy in this action. Finally, they claim that the trial court erred by denying their motions requesting additional time to oppose U.S. Bank's motion.

A. The Motions for Extension of Time

{¶ 10} We first address the Zokles' claim that the trial court erred in denying their requests to file an opposition brief beyond the 14 days permitted under the local rules. Although they do not elaborate on this issue in their appellate brief, in the lower court they claimed that the extension of time was needed, first, because of counsel's earlier withdrawal from the case, and, second, because they needed to conduct a Civ.R.30(B)(5) deposition that they believed would expose "serious flaws" in U.S. Bank's case.

{¶ 11} The appellate rules require appellants to include in their brief "[a]n argument containing the contentions of the appellant[s] with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." App.R. 16(A)(7). The court may disregard an assignment of error presented for review if

appellants fail to argue the assignment separately in their brief. *Beek v. United Ohio Ins. Co.*, 147 Ohio App.3d 302, 304, 770 N.E.2d 596 (6th Dist.2001), *cause dismissed*, 95 Ohio St.3d 1481, 2002-Ohio-2496, 769 N.E.2d 398. Although not supported by argument in their appellate brief, we will nevertheless briefly address this aspect of the Zokles' assignment of error.

{¶ 12} Under Civ.R. 6(B), a trial court may in its discretion grant an extension of time to file papers with the court if requested by a party before the original deadline for doing so expires. A trial court's decision to grant or deny an extension of time will not be disturbed absent an abuse of discretion. *Cook v. Toledo Hosp.*, 169 Ohio App.3d 180, 2006-Ohio-5278, 862 N.E.2d 181, ¶ 41 (6th Dist.). An abuse of discretion connotes that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 13} Here we cannot say that the trial court abused its discretion in denying the Zokles' request for an additional two months to respond to the bank's motion, especially given the fact that they failed to employ the proper procedures for requesting time to conduct additional discovery. Civ.R. 56(F) permits a party opposing summary judgment to seek a continuance to pursue further discovery in order to develop its opposition to the motion, however, the opposing party must submit an affidavit stating the reasons justifying the request for extension. *Cook* at ¶ 42. A court may not grant an extension under Civ.R. 56(F) when no affidavit is presented in support of the motion. *Id.*

{¶ 14} The Zokles failed to provide an affidavit in support of their motion for extension. They also failed to explain in what way additional discovery would aid in developing their opposition to U.S. Bank's motion for summary judgment. The motion was, therefore, not in compliance with Civ.R. 56(F) and was properly denied. *See, e.g., Vilardo v. Sheets*, 12th Dist. Clermont No. CA2005-09-091, 2006-Ohio-3473, ¶ 29-30 (finding no abuse of discretion in trial court's denial of motion for extension of time where extension was sought to obtain counsel and to conduct further discovery, but was not supported with the required affidavit).

B. U.S. Bank as Holder of the Note and Mortgage

{¶ 15} We next address the Zokles' argument that U.S. Bank failed to establish that it was the holder of the note and mortgage.

{¶ 16} Under R.C. 1303.31(A), the "holder" of a negotiable instrument is a "[p]erson entitled to enforce" the instrument. A "holder" includes a person who is in possession of an instrument payable to bearer. R.C. 1301.01(T)(1)(a), renumbered as R.C. 1301.201(B)(21)(a). "When an instrument is indorsed in blank, the instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." R.C. 1303.25(B).

{¶ 17} The note at issue was endorsed in blank. A copy of it was attached to U.S. Bank's complaint, as was a copy of an executed assignment of mortgage, which transferred the mortgage from Chase to U.S. Bank. In support of its summary judgment motion, the copies of the note and mortgage were also attached as an exhibit to the

affidavit of Michael Brown, Vice-President of JP Morgan Chase Bank, the bank's loan servicer. The Zokles contend that Brown's affidavit was insufficient to establish that U.S. Bank was the holder of the note, and they contend that the assignment of mortgage was not signed, notarized, or dated.

{¶ 18} Despite the Zokles' claim to the contrary, the assignment of mortgage was signed, notarized, and dated. It was signed by Catherine Cooley, Vice-President of Chase, and notarized by Shirin Shahidi on January 22, 2009. Thus to the extent that the Zokles argue that "[t]he Assignment of Mortgage did not contain a signature or notary, and was not dated," we disagree.

{¶ 19} We now turn to the Zokles' argument that Brown's affidavit was insufficient to establish that U.S. Bank was the holder of the note.

{¶ 20} As previously indicated, the note at issue was endorsed in blank. Under R.C. 1303.25(B), an instrument that is endorsed in blank is payable to the bearer of the instrument; in other words, it is payable to the person or entity in possession of the instrument. Without possession of the note, U.S. Bank cannot negotiate it.

{¶ 21} To evidence that U.S. Bank was the holder of the note, the bank submitted the Brown affidavit. His affidavit indicates that he is employed by U.S. Bank's loan servicer and, as such, is able to review the business records relating to the Zokles' loan. He specifically averred that he had reviewed the bank's records, that he had personal knowledge of how the records were kept, that the records were kept in the ordinary course of regularly-conducted business activity, and that the note and mortgage attached

to the affidavit were true and accurate copies. He also provided information about the date of default, and the sums owed as a result of that default. "Unless controverted by other evidence, a specific averment that an affidavit is made upon personal knowledge of the affiant satisfies the Civ.R. 56(E) requirement that the affiant must be competent to testify to the matters stated." *HSBC Mtge. Servs., Inc. v. Edmon*, 6th Dist. Erie No. E-11-046, 2012-Ohio-4990, ¶ 13. Additionally, verification of documents attached to an affidavit in support of a motion for summary judgment may be accomplished by an appropriate averment in the affidavit that the documents are, for example, "true and correct copies." *Id.*

{¶ 22} In the absence of admissible evidence to the contrary, Brown's affidavit was sufficient to establish both that the copies of the note and mortgage assignment are true and accurate copies and the amount of principal and interest due on the account. *See, e.g., U.S. Bank, N.A. v. Higgins*, 2d Dist. Montgomery No. 24963, 2012-Ohio-4086 (finding copy of assignment sufficient where affiant alleged that it was a true and accurate copy of the original). Brown's assertions relating to U.S. Bank's possession of the note does, however, give us pause.

{¶ 23} U.S. Bank contends in its brief that "Mr. Brown unequivocally stated that U.S. Bank 'is in possession of the original Note and was in possession of [sic] prior to and at the time of filing the Complaint in this action.'" This is not exactly what Brown's affidavit says. What Brown's affidavit says is that "Plaintiff, *directly or through its agent*, 'is in possession of the original Note.'" (Emphasis added.)

{¶ 24} Courts have in many cases allowed a representative of a bank's loan servicer to establish that the bank holds the note at issue. *See, e.g., Everbank v. Vanarnheim*, 3d Dist. Union No. 14-13-02, 2013-Ohio-3872, ¶ 39 (accepting as sufficient affidavit from vice-president of bank's loan servicer averring that the bank was in possession of original promissory note). Courts have also found a bank to be a holder of a note even though a loan servicing agency maintained physical possession of the original on the bank's behalf. *See, e.g., U.S. Bank, N.A. v. Gray*, 10th Dist. Franklin No. 12AP-953, 2013-Ohio-3340, ¶ 25-30 (finding possession of original note by servicing agent, not plaintiff-bank, did not deprive the bank of status as holder).

{¶ 25} In the present case, we disagree with the bank that Brown's affidavit contained an "unequivocal" averment that U.S. Bank is in possession of the original note. We actually find it difficult to distill from Brown's affidavit whether he, in fact, knows the precise location of the original note. However, because the Zokles have failed to produce evidence to contradict Brown's averment that the bank or one of its authorized agents possesses the original note, we find that they have failed to create a genuine issue of material fact that U.S. Bank was not the holder of the note.

C. Establishing Conditions Precedent

{¶ 26} We next turn to the Zokles' claim that U.S. Bank failed to establish that it met all conditions precedent before filing this foreclosure action, an essential element of its claim.

{¶ 27} U.S. Bank alleged in its complaint that it met all conditions precedent. The Zokles denied this allegation in their answer. On summary judgment, however, the bank made no allegations and provided no admissible evidence that it met all conditions precedent.

{¶ 28} In *U.S. Bank v. Coffey*, 6th Dist. Erie No. E-11-026, 2012-Ohio-721, we recognized that where "a cause of action is contingent upon the satisfaction of some condition precedent, and the plaintiff fails to allege, even generally, that the condition has been satisfied, '[a] defending party may raise the defense of failure to state a claim upon which relief can be granted as late as the trial on the merits * * *.'" (Citations omitted.) *Id.* at ¶ 38.

{¶ 29} In *Coffey*, U.S. Bank pleaded that it had complied with all conditions precedent, and Coffey failed to deny this allegation with particularity in his answer. The bank, in its motion for summary judgment, claimed that it met all conditions precedent, but the affidavit that it submitted in support of its motion for summary judgment contained no averment to that effect. We explained that "a party seeking summary judgment always bears the initial responsibility of informing the [trial] court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact as to all essential elements of the claim. *Id.* at ¶ 40, quoting *Dresher v. Burt*, 75 Ohio St.3d 280, 288, 662

N.E.2d 264 (1996). Because evidence as to this element was missing, we found that U.S. Bank failed to meet its initial burden under *Dresher*.

{¶ 30} We must reach the same conclusion here. U.S. Bank in its motion for summary judgment did not allege that it met all conditions precedent prior to filing its complaint in foreclosure. Brown's affidavit also failed to address this element. U.S. Bank, therefore, did not meet its initial burden and we must reverse the trial court's grant of summary judgment in its favor.

D. Foreclosure as the Appropriate Remedy

{¶ 31} Finally, the Zokles argue that the equitable remedy of foreclosure is not appropriate in this case because the harm to the Zokles in losing their home far outweighs the interests of U.S. Bank, which they describe as a multi-billion dollar corporation. Not having filed an opposition brief, they did not argue this in the trial court and are precluded from raising the argument for the first time on appeal. *Hanley v. DaimlerChrysler Corp.*, 158 Ohio App.3d 261, 2004-Ohio-4279, 814 N.E.2d 1245, ¶ 23 (6th Dist.). Nevertheless, we have rejected this argument in other cases. *See, e.g.*, *Genoa Banking Co. v. Bergman*, 6th Dist. Ottawa No. OT-12-038, 2013-Ohio-3054, ¶ 11 (finding that it was not inequitable to allow lender to enforce its right to foreclose where borrowers failed to pay their loan obligation). In this case, the uncontroverted evidence indicates that the Zokles defaulted on their payment obligations beginning with the payment due December 1, 2008. The Zokles presented no evidence that foreclosure would be inequitable in this case.

IV. Conclusion

{¶ 32} Because U.S. Bank failed to satisfy its initial burden of establishing that no genuine issue of material fact exists as to each element of its claim, we reverse the April 24, 2013 judgment of the Erie County Court of Common Pleas granting summary judgment in its favor. However, we affirm the March 28, 2013 judgment of the Erie County Court of Common Pleas denying the Zokles' motion for extension of time to respond to plaintiff's motion for summary judgment, the April 10, 2013 judgment denying the Zokles' motion to reconsider their motion for extension, and the April 24, 2013 judgment denying the Zokles' motion for leave to file a memorandum in opposition to U.S. Bank's motion for summary judgment. We remand this matter to the trial court for further proceedings consistent with this decision. The costs of this appeal are assessed to appellee pursuant to App.R. 24.

Judgment reversed, in part,
and affirmed, in part.

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

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE