[Cite as *Bank of Am., N.A. v. Hafford*, 2014-Ohio-739.]

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

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

Appellee

v.

Roger W. Hafford, et al.

Appellants

Court of Appeals No. S-13-021

Trial Court No. 11CV860

DECISION AND JUDGMENT

Decided: February 28, 2014

* * * * *

Bill L. Purtell, for appellee.

Roger W. Hafford, pro se.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} In this foreclosure action, appellant, Roger Hafford, appeals from the judgment of the Sandusky County Court of Common Pleas, which granted summary judgment in favor of appellee, Bank of America. We affirm.

A. Factual and Procedural Background

{¶ 2} In 2003, appellant borrowed money from KeyBank to purchase his home. To do so, he executed a note payable to KeyBank, which was secured by a mortgage that listed Mortgage Electronic Registration Systems, Inc. ("MERS") as the mortgagee.

{¶ 3} On June 2, 2003, KeyBank indorsed the note to Countrywide Home Loans, Inc. ("Countrywide"). At some point thereafter, Countrywide indorsed the note in blank. Effective April 27, 2009, Countrywide changed its name to BAC Home Loans Servicing, LP ("BAC"). On July 31, 2009, MERS assigned the mortgage to BAC Home Loans Servicing, L.P. fka Countrywide Home Loans Servicing, L.P. The assignment was recorded on August 7, 2009. BAC merged with Bank of America on July 1, 2011.

{¶ 4} On August 3, 2011, Bank of America filed its complaint in foreclosure, alleging that appellant had defaulted on the terms of the note. Attached to the complaint were copies of the original note with all of the subsequent indorsements, the original mortgage, the assignment of the mortgage, and the filings evidencing the name change from Countrywide to BAC and the merger of BAC and Bank of America.

{¶ 5} Appellant filed an answer in which he raised several affirmative defenses, including that Bank of America is not a real party in interest. After discovery, Bank of America moved for summary judgment. Attached to the motion for summary judgment was an affidavit from an assistant vice president that averred that Bank of America was in possession of the note and held the note at the time of the filing of the foreclosure

complaint. In addition, the affiant included and authenticated the documents that were attached to Bank of America's complaint. Appellant filed an opposition to the motion for summary judgment. On May 30, 2013, the trial court journalized its entry granting summary judgment in favor of Bank of America.

B. Assignment of Error

{¶ 6} Appellant has timely appealed, raising one assignment of error for our review:

> THE TRIAL COURT ERRED BY FAILING TO DISMISS THE CASE WHEN THE FORECLOSURE PLAINTIFF DID NOT SHOW STANDING TO SUE AT THE TIME THE COMPLAINT WAS FILED.

II. Analysis

{¶ 7} We review summary judgment decisions 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).

{¶ 8} In his assignment of error, appellant cites the recent Ohio Supreme Court decision in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-

Ohio-5017, 979 N.E.2d 1214, for the proposition that "standing is to be determined as of the commencement of suit." *Id.* at ¶ 24, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-571, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), fn. 5. Appellant interprets this rule as requiring the foreclosure plaintiff to prove, at the time of filing the complaint, the fact that it has standing to sue.

{¶ 9} In support of his interpretation, appellant relies on several decisions from the Ninth District. In *Wells Fargo Bank, N.A. v. Burrows*, 9th Dist. Summit No. 26326, 2012-Ohio-5995, the defendants borrowed money from World Savings Bank to purchase their home. When the defendants defaulted on their loan, Wells Fargo brought the foreclosure action. *Id.* at ¶ 3. In the complaint, Wells Fargo identified itself as the "successor by merger to Wachovia Bank." *Id.* at ¶ 14. It further alleged that the note and mortgage had been assigned to it as evidenced by an assignment of mortgage attached to the complaint. However, no assignment was attached. *Id.* The trial court, nevertheless, granted summary judgment in favor of Wells Fargo based on an affidavit attached to its motion. *Id.* at ¶ 13.

{¶ 10} On appeal, the Ninth District reversed, and remanded for the cause to be dismissed. The court determined that because the note and mortgage identified World Savings Bank as the lender, and because Wells Fargo did not allege that it was a successor to the note and mortgage due to a merger and name change, "[n]othing in [the] complaint would suggest that [Wells Fargo] had standing to pursue the foreclosure claim." *Id.* ¶ 14. The court held that pursuant to *Schwartzwald*, "[Wells Fargo] was

required to demonstrate that it had standing to invoke the jurisdiction at the time the complaint was filed, and it failed to do so in the complaint and the documents attached thereto." *Id.* at ¶ 15.

{¶ 11} Similarly, in *Wells Fargo Bank, N.A. v. Horn*, 9th Dist. Lorain No. 12CA010230, 2013-Ohio-2374, the Ninth District reversed the trial court's award of summary judgment, and ordered the complaint dismissed without prejudice. In that case, the original lender was Norwest Mortgage, Inc. *Id.* at ¶ 2. Wells Fargo initiated the foreclosure complaint, and identified itself as the "successor by merger to Wells Fargo Home Mortgage, Inc. fka Norwest Mortgage, Inc." *Id.* at ¶ 12. However, no documents evidencing a merger or name change were attached to the complaint. *Id.* Wells Fargo later attached those documents to its motion for summary judgment. *Id.* ¶ 13. Still, the Ninth District, relying on *Schwartzwald* and *Burrows*, held that Wells Fargo "was required to demonstrate that it had standing to invoke the jurisdiction at the time the complaint was filed, and it failed to do so in the complaint and the documents attached thereto." *Id.*

{¶ 12} In the present case, appellant argues that summary judgment is inappropriate because a genuine issue of material fact exists regarding whether Bank of America is the party in interest. Specifically, appellant argues that the documents attached to the complaint do not prove that Bank of America is the holder and party entitled to enforce the note and mortgage because it failed to also attach an affidavit authenticating those documents. Appellant concludes that because the documents

attached to the complaint were not "proper evidentiary material," Bank of America could not prove at the time of the complaint that it was the party in interest. We disagree with appellant's line of reasoning.

{¶ 13} A plain reading of *Schwartzwald* reveals that the focus of the decision centered on *what* needed to be proven, not *when*. The question presented was "whether a lack of standing at the commencement of a foreclosure action filed in a common pleas court may be cured by obtaining an assignment of a note and mortgage sufficient to establish standing prior to the entry of judgment." *Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214 at ¶ 19. In resolving this question, *Schwartzwald* held that a plaintiff in a foreclosure action must in fact possess standing at the time the complaint is filed, and cannot later gain standing through a subsequent assignment of the note and mortgage. *Id.* at ¶ 41-42.

{¶ 14} Notably, while a foreclosure plaintiff must allege sufficient facts in its complaint to demonstrate that it has standing, *Schwartzwald* does not stand for the proposition that a foreclosure plaintiff must definitively prove in its complaint that it has standing. Indeed, such a requirement would run counter to our established system of justice. *See York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144-145, 573 N.E.2d 1063 (1991) ("Under [the Ohio Rules of Civil Procedure], a plaintiff is not required to prove his or her case at the pleading stage."). Therefore, appellant's argument, that Bank of America was required to include, in its complaint, an affidavit authenticating the documents, is without merit.

{¶ 15} Furthermore, here, unlike in *Burrows* and *Horn*, Bank of America alleged that it was the holder of the note and that the note was secured by a mortgage. In addition, Bank of America attached all of the required and relevant documentation establishing its interest in the note and mortgage. *See* Civ.R. 10(D)(1) ("When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading."); *Beneficial Mtge. of Ohio v. Jacobs*, 2d Dist. Clark No. 01CA0080, 2002-Ohio-3162, ¶ 10 ("[Civ.R. 10(D)] requires copies of the mortgage deeds and notes to be attached to complaints in foreclosure.") Therefore, Bank of America sufficiently alleged in its complaint that it was the real party in interest, a fact which it proved with un-contradicted evidence in its motion for summary judgment.

{¶ 16} Accordingly, appellant's assignment of error is not well-taken.

{¶ 17} III. Conclusion

{¶ 18} For the foregoing reasons, the judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is 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

Stephen A. Yarbrough, P.J. _______________________________
JUDGE

James D. Jensen, J.
CONCUR. _______________________________
JUDGE

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