

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

HSBC Bank USA, N.A.

Court of Appeals No. L-14-1155

Appellee

Trial Court No. CI0201303974

v.

Mark A. Takats and
Janelle T. Takats, et al.

DECISION AND JUDGMENT

Appellants

Decided: July 31, 2015

* * * * *

Cynthia M. Fischer, for appellee.

Mark A. Takats, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal of a June 27, 2014 judgment of the Lucas County Court of Common Pleas granting the motion for summary judgment of appellee, HSBC Bank USA, N.A. (“HSBC Bank”), in its action for foreclosure and for reformation of mortgage against appellants, Mark A. Takats and Janelle T. Takats.¹

¹ It is noted that Janelle T. Takats signed the notice of appeal, but did not sign appellants’ brief. For clarity, the parties will be collectively referred to as appellants.

The Case

{¶ 2} On August 5, 2013, HSBC Bank filed a complaint in foreclosure and for reformation of mortgage against appellants. With respect to the action in foreclosure, the complaint alleged (1) that HSBC Bank was in possession of and entitled to enforce a note executed by appellants, (2) that appellants defaulted under the terms of the note, and (3) that HSBC Bank had performed all conditions precedent to acceleration and had accelerated the balance due on the note. HSBC Bank alleged that the sum of \$290,772.91 was due it on the note.

{¶ 3} HSBC Bank alleged that exhibits A, B, and C, attached to the complaint, were copies of the loan note (indorsed in blank), the mortgage securing the note, and the assignment of the mortgage to it. HSBC Bank alleged that appellants had broken the conditions of the mortgage and HSBC Bank was entitled to have the mortgage foreclosed.

{¶ 4} With respect to reformation of the mortgage, Count 3 of the complaint alleged that as a result of a scrivener's error and mutual mistake of fact between the parties to the mortgage, the granting clause in the mortgage executed by appellants did not contain marital status. In Count 3 of the complaint, HSBC Bank sought to have the "mortgage reformed to properly state 'Mark A. Takats and Janelle T. Takats, Husband and Wife' in the Granting Clause" of the mortgage.

{¶ 5} Appellants filed their answer to the complaint on August 23, 2013. Subsequently HSBC filed an amended complaint adding LVNV as a necessary party.

{¶ 6} HSBC filed its motion for summary judgment on February 14, 2014.

Appellants filed a timely appeal to this court of the June 27, 2014 judgment granting the motion.

Assignment of Error

{¶ 7} App.R. 16(A)(3) requires appellants to include in their appellate brief “[a] statement of the assignments of error presented for review, with reference to the place in the record where such error is reflected.” Appellants have not complied with the rule. Appellants failed to present assignments in their brief. To the extent appellants have raised legal arguments, they have not referenced their arguments to places in the record pertinent to those issues.

{¶ 8} Appellee argues that appellants’ brief should be stricken for non-compliance with App.R. 16(A) and (D). App.R. 16(D) also requires references to the record: “[i]f reference is made to evidence, the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.”

{¶ 9} We acknowledge that this court has recognized that pro se litigants are “required to follow the same rules and procedures as attorneys.” *State v. Mills*, 6th Dist. Erie No. E-13-074, 2015-Ohio-393, ¶ 6. Nevertheless, “a court may afford pro se litigations reasonable leeway in the construction of pleadings in order to reach the merits of the action.” *Id.*, citing *Citimortgage, Inc. v. Bumphus*, 197 Ohio App.3d 68,

2011-Ohio-4858, 966 N.E.2d 278, ¶ 31 (6th Dist.). Despite procedural deficiencies in appellants' brief, we will address the merits of the appeal in the interest of justice.

{¶ 10} Appellants raise in their brief a series of arguments challenging the grant of summary judgment in the foreclosure action. Appellants have not challenged the grant of summary judgment with respect to the action for reformation of the mortgage.

Accordingly, the court will treat appellants' brief as asserting a single assignment of error—that the trial court erred in granting summary judgment in HSBC Bank's action for judgment on the note and foreclosure.

Summary Judgment

{¶ 11} The standard of review on motions for summary judgment is de novo; that is, an appellate court applies the same standard in determining whether summary judgment should be granted as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶ 12} Under Civ.R. 56, to prevail on a motion for summary judgment the moving party must demonstrate:

(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, 66, 375 N.E.2d 46 (1978).

{¶ 13} The party moving for summary judgment bears the burden of showing that no genuine issue of fact exists. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996); *Harless* at 66. “If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden” under Civ.R. 56(E). *Dresher* at 293. That burden is to set forth “specific facts” showing that there is a genuine issue of fact for trial. *Id.*; Civ.R. 56(E).

{¶ 14} For a successful motion for summary judgment in an action for foreclosure, 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. *U.S. Bank, N.A. v. Coffey*, 6th Dist. Erie No. E-11-026, 2012-Ohio-721, ¶ 26.” *PNC Bank, N.A. v. Bhandari*, 6th Dist. Lucas No. L-12-1335, 2013-Ohio-2477, ¶ 10.

{¶ 15} Appellants have raised a series of arguments challenging the grant of summary judgment. We consider first, appellants’ contention that the affidavit of Jeffrey Davis, submitted by HSBC Bank in support of its motion is not based on personal knowledge and that HSBC Bank failed to establish a clear chain of title on the note.

{¶ 16} Jeffrey Davis testified in his affidavit that he is a vice president and assistant secretary of the Administrative Services Division of HSBC Mortgage Services, Inc., the loan servicer on the Mark A. Takats loan. In the affidavit, Davis provides a business records foundation under Evid.R. 803(6) for loan documents and records attached as exhibits to his affidavit.

{¶ 17} Davis states that through the regular performance of his job functions at HSBC Mortgage Services, he has personal knowledge of the manner in which their business records are created and maintained. He states that the records are “(a) made at or near the time of the occurrence of the matters set forth by, or from information provided by, persons with knowledge of the activity and transactions reflect in such records, and (b) kept as a regular practice and in the ordinary course of business conducted by the Servicer.” Davis states in his affidavit that attached as exhibits to his affidavit are such business records received by the loan servicer in the ordinary course of business. Attached as composite exhibit “B” to the Davis affidavit and submitted as business records of HSBC are:

(1) The August 26, 2004 Note executed by Mark A. Takats (“Borrower”) to Accredited Home Lenders, Inc., (“Lender”) in the amount of \$299,250. Under the heading “Allonge to Note,” is an indorsement of the note in blank, by John R. Elfring, Assistant Secretary, Accredited Home Lenders, Inc.

(2) The Mortgage executed by Mark A. Takats and Janelle T. Takats (“Borrower”) on August 26, 2004 with respect to \$299,250 owing Accredited Home Lenders, Inc. (“Lender”). MERS (Mortgage Electronic Registration Systems, Inc.) is identified in the document as the mortgagee under the instrument “solely as a nominee for Lender and Lender’s successors and assigns.” The document includes a file stamp dated September 1, 2004, with reference number 20040901-0072035 by Sue Rioux, Lucas County Recorder.

(3) And data sheets setting forth the amount due on the loan.

{¶ 18} Davis identifies exhibit “A” to the affidavit as the demand letter and notice of default under the mortgage that were mailed to Mark A. Takats on May 16, 2013. The exhibit contains a “notice of breach under the terms of the note and mortgage” and “notice of the right to cure default.”

{¶ 19} We conclude, absent evidence to the contrary, that the Davis affidavit demonstrated that Davis is competent to lay the foundation for admissibility of the loan records as business record under Evid.R. 803(6). *See State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 171; *The Bank of New York Mellon v. Lewis*, 6th Dist. Erie No. E-13-051, 2014-Ohio-5599, ¶ 13-14. As set forth in the affidavits, he has a working knowledge of the specific record-keeping system that produced the loan records and is able to vouch from personal knowledge of the record-keeping system that the records were kept in the regular course of business. *See Lewis* at ¶ 15.

{¶ 20} The business records demonstrate that appellee through its loan servicer is in possession of the promissory note, indorsed in blank, and therefore demonstrate that it is a holder of the note and entitled to enforce it:

“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). A “bearer” is the person or entity in possession of an instrument. *See* R.C. 1301.01(E). *Deutsche Bank Natl. Trust Co. v. Moore*, 6th Dist. Erie No. E-11-081, 2012-Ohio-5549, ¶ 7.

{¶ 21} HSBC Bank also filed with the trial court an affidavit of Jeffrey W. Kordecki. Kordecki states in his affidavit that he also is a vice president and assistant secretary of the Administrative Services Division of HSBC Mortgage Services, Inc. The Kordecki affidavit includes the same foundational language with respect to business records as contained in the Davis affidavit. Based upon business records maintained by HSBC Mortgage Services in the ordinary course of business, Kordecki states:

On August 26, 2004 Mark A. Takats executed a promissory note (“Note”) and the same date Mark A. Takats and Janelle T. Takats executed the related mortgage (“Mortgage) for the property located at 8704 Nebraska Avenue, Toledo, Ohio 43617. At the time of the filing of the complaint, and continuously since, Servicer as agent for Plaintiff has been in possession of the Note. The Note bears a blank indorsement.

{¶ 22} We conclude that appellee met its burden under Civ.R. 56 of demonstrating there exists no dispute of material fact on the chain of title to the note. The undisputed evidence on the motion for summary judgment was that HSBC Bank is in possession of the Mark A. Takats note and that the note was indorsed in blank.

{¶ 23} With respect to the mortgage, the undisputed evidence on the motion for summary judgment was that the note was secured by a mortgage. “[A] transfer of a note secured by a mortgage * * * acts as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered.” *Coffey*, 6th Dist. Erie No. E-11-026, 2012-Ohio-721, at ¶ 31; *JPMorgan Chase Bank, N.A. v. Salazar*, 6th Dist. Lucas No. L-13-1038, 2014-Ohio-1002, ¶ 13. Although not authenticated in Davis’ affidavit, appellee attached a copy of a claimed assignment of the mortgage to it as an exhibit to its complaint.

{¶ 24} We conclude that appellee presented competent evidence under Evid.R. 803(6) demonstrating that there is no dispute of material fact that it is holder of the note and assignee of the mortgage on the note. We find appellants’ challenge to the admissibility of the Davis affidavit and contention that appellee failed to establish a clear chain of title on the note without merit.

{¶ 25} Appellants challenge the trial court judgment based upon the fact that Janelle T. Takats was not obligated under the note. The loan was to Mark A. Takats alone. Both Mark A. Takats and Janelle T. Takats executed the mortgage. We agree with appellants’ contention that Janelle T. Takats is not obligated under the note.

However, the trial court entered judgment on the note against Mark A. Takats alone.

Both parties executed the mortgage as security for performance of obligations under the note. The trial court properly ordered foreclosure against the real property subject to the mortgage for payment of the judgment on the note.

{¶ 26} Appellants contend that a break in the chain of title of the note occurred and rendered the debt unsecured. As we have determined that the undisputed evidence on the motion for summary judgment demonstrated that appellee is the holder of the note and equitable assignee of the mortgage, we find appellants' argument to be without merit.

{¶ 27} Appellants argue that appellee is not a holder in due course. However, whether appellee is a holder in due course is not in issue in this appeal. Appellants have not contended that they have any claims or defenses against the original lender, Accredited Home Lenders, Inc., against obligations owing under the note.

{¶ 28} We also find appellants' contention that appellee suffered no financial loss to be without merit. The Davis affidavit states that the business records on the loan establish an amount of \$290,772.91, plus interest at the rate of 6.800 percent per year from February 1, 2013, plus costs, advances, and other charges as allowed by law are due and owing under the loan. The evidence on the balance owing on the loan was not disputed.

{¶ 29} We conclude that HSBC Bank met its burden under Civ.R. 56 to demonstrate that there is no dispute of material fact and that, construing the evidence most favorably to appellants, reasonable minds can come to but one conclusion, that

HSBC Bank is entitled to judgment against Mark A. Takats on the note in the amount awarded by the trial court and foreclosure against the property subject to the mortgage as security for the debt. We also find that appellants failed to meet their reciprocal burden of presenting competent evidence under Civ.R. 56(E) setting forth specific facts showing that there is a genuine issue of fact for trial.

{¶ 30} We find appellants' assignment of error not well-taken.

{¶ 31} We affirm the judgment of the Lucas County Court of Common Pleas and order appellants 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

James D. Jensen, J.

CONCUR.

JUDGE

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| <p>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.</p> |
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