[Cite as *Bank of Am., N.A. v. Duran*, 2015-Ohio-630.]

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, L.P., fka Countrywide Home Loans Servicing, L.P. Appellee	Court of Appeals No. L-14-1031 Trial Court No. CI0201203667
v.	
Katina L. Duran, et al. Appellants	**DECISION AND JUDGMENT** Decided: February 20, 2015

* * * * *

Eric T. Deighton, for appellee.

George R. Smith, Jr., for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} This is an appeal from two judgments of the Lucas County Court of Common Pleas, one granting summary judgment to appellee, Bank of America, N.A.,

Successor by Merger to BAC Home Loans Servicing, L.P., fka Countrywide Home Loans Servicing, L.P., on its complaint in foreclosure, and the other denying appellant's, Katina Duran, motions for reconsideration and to vacate judgment. For the following reasons, we affirm.

A. Facts and Procedural Background

{¶ 2} The present cause was initiated on June 6, 2012, when appellee filed its complaint against appellant. The complaint alleged that appellee was in possession of, and was the holder of, a note issued by appellant, that appellant was in default for failing to meet the payment terms of the note, that appellee has declared the debt due, and that appellant owes $174,435.26 plus interest and late charges. The complaint also alleged that appellee was the holder of the mortgage securing the note, that appellant has broken the conditions of the mortgage by her default in payment, and that appellee has performed all conditions precedent required to be performed by the mortgage. Attached to the complaint are a copy of the note, mortgage, and assignment of mortgage. The note, which was executed on December 24, 2007, is indorsed in blank by an executive vice president of the original lender, Taylor, Bean and Whitaker Mortgage Corp. ("Taylor Bean"). The mortgage lists Mortgage Electronic Registration Systems, Inc. ("MERS") as the mortgagee. The assignment of mortgage provides that MERS, acting as nominee for Taylor Bean, assigned the note to

> BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, L.P. * * * Its successors and assigns, a certain mortgage deed,

> executed and delivered to [MERS] acting solely as nominee for [Taylor Bean], from [appellant] * * * together with the Promissory Note secured thereby and referred to therein; and all sums of money due and to become due thereon.

The assignment was signed by Serena Harman as an assistant vice president of MERS, and was recorded in Lucas County on March 31, 2010.

{¶ 3} Also filed with the complaint was an affidavit from Nicholas Cardinal, an attorney at the law firm representing appellee. Cardinal averred that he has personal knowledge of the physical case files and computer databases associated with this case. Further, he stated that as material is received or generated it is added to the case file contemporaneously by a person with knowledge and in the ordinary course of business. Finally, Cardinal stated that, in his professional opinion, appellee is the holder of the mortgage and is entitled to enforce the note pursuant to R.C. 1303.31.

{¶ 4} Appellant, pro se, filed her answer on July 3, 2012, in which she denied the allegations in the complaint, and set forth that the complaint fails to state a claim upon which relief can be granted. The answer also indicated that the property is the subject of a federal lawsuit concerning mortgage fraud in the Middle District of Florida United States Bankruptcy Court, and that appellant had initiated an action in the Lucas County Court of Common Pleas against appellee and Cardinal for filing a frivolous lawsuit.

{¶ 5} On August 17, 2012, appellee moved for summary judgment. In support of its motion, appellee submitted the affidavit of Shelley Rae Fazio, one of its officers.

Fazio stated that in her position she has personal knowledge of the procedures for creating appellee's loan records. The procedures are that the records are made at or near the time of occurrence by persons with personal knowledge of the information in the record, the records are kept in the course of appellee's regularly conducted business activities, and it is the regular practice of appellee to make such records. Fazio then averred, based on her personal review of the records, that appellee has possession of the note. Further, she stated that the attached "account information statement" evidences appellant's default and the amount owed.

{¶ 6} On August 20, 2012, appellant filed a document captioned "Relief Demand/Judgment for Defendant." In the document, she claimed that appellee and others have committed various instances of fraud. Several themes are present in this, and subsequent filings, including that the mortgage transfer documents were robosigned, that the transfer of the mortgage was fraudulent because it occurred while the original lender, Taylor Bean, was in bankruptcy, and that her payments were not applied or were stolen by Taylor Bean. In addition to her claims of fraud, appellant demanded discovery from appellee, at times requesting her original loan documents, her servicing agreement, and her entire payment history. Finally, appellant requested a punitive damages award of $1,000,000.

{¶ 7} On October 18, 2012, the trial court stayed the present matter pending disposition of appellant's action against appellee and Cardinal, which appellant referred

to in her answer. That separate action had been removed to federal court. The stay was lifted on May 2, 2013, when the federal court dismissed appellant's action.

{¶ 8} On April 30, 2013, appellant filed a document captioned "DEMAND FOR DISCOVERY To a Fair Defense and Hold off Answering A Non/Evidence Summary Judgment." In this filing, appellant requested numerous documents, including anything relating to the transfer of her mortgage or loan servicing agreement, her mortgage payment history, the W-9's of Harman and Fazio and other proof that they are not robosigners, all documents pertaining to her workout package for the Home Affordable Modification Program ("HAMP"), and proof that appellee is the owner and holder of her mortgage. Appellant intimated that the requested information is related to her arguments that the mortgage instruments are defective, that the mortgage was fraudulently transferred, and that appellee and its attorneys fraudulently had affidavits notarized and filed. She requested 28 days after receipt of the discovery to re-evaluate the evidence and make a defense to appellee's motion for summary judgment.

{¶ 9} Appellee moved for, and was granted, an extension of time until June 25, 2013, to respond to appellant's demand for discovery. On June 25, 2013, appellee filed a notice of service of discovery responses. Also on that day, appellant filed a motion to compel discovery, stating that she had not received a W-9 or other form proving Harman's employment, a deposition regarding Fazio's knowledge of the documents in appellant's file, her original loan documents, a payment history from inception, any

agreements regarding the transfer of her mortgage, her HAMP records, and any proof or chain of title that appellee is the owner and holder of the mortgage.

{¶ 10} On July 11, 2013, appellee filed its opposition to appellant's motion to compel. In its opposition, appellee argued that it did respond to appellant's requests, and if appellant is dissatisfied with appellee's responses, appellant must identify why those responses are inappropriate.

{¶ 11} On July 15, 2013, appellant filed her "RESPONSE To Plaintiff's Counsel Motion To Compel For Discovery/And Other Relief So Triable." In her response, appellant stated that appellee has not disclosed her requested material. In addition, appellant again conveyed the themes that Taylor Bean committed fraud, that appellee's claim to be the holder of the note and mortgage is fraudulent, and that Serena Harman is a robosigner. She concluded by requesting that the trial court dismiss the lawsuit, that appellee be compelled to produce the documents she requested, and that the trial court order appellee to remove the adverse entry on her credit report.

{¶ 12} Attached to appellant's July 15, 2013 filing, among other things, was a notarized affidavit from appellant, in which she stated that she tried to work with appellee to modify the loan, but was denied. Further, she asserted that she has been the victim of fraud throughout the proceedings, and that appellee has no rights to enforce the loan. Also attached to the filing was a letter from herself to a representative of appellee, dated February 5, 2010, in which she stated that appellee approved her for a mortgage work out, cashed her first check, and then denied her when she tried to make the next month's

payment. With the letter was a cancelled check for $716.93 made out to Bank of America. In addition, appellant attached an apparent court copy of a "Certificate of Assistant Secretary of Bank of America," that listed Serena Harman as an assistant vice president of appellee.

{¶ 13} On August 19, 2013, appellant filed "A Supplemental Memorandum in Support of my Motion For Discovery Evidence." In the supplemental memorandum, appellant propounded 33 inquiries to which she would like appellee to respond. The inquiries focused on the same themes of fraudulent transfer of the mortgage, the transfer as it relates to Taylor Bean's bankruptcy case, the legitimacy of Harman and Fazio, and a request for all documents associated with her loan, including documents pertaining to her attempt to modify the loan.

{¶ 14} Appellant attached two documents to the supplemental memorandum. The first was a MERS Milestones Report, which showed that the beneficial rights to the loan were transferred from Taylor Bean to Ginnie Mae on February 4, 2008. It also showed that Ginnie Mae became the servicer on August 18, 2009, that Bank of America became the subservicer on October 23, 2009, and that the servicing of the loan was transferred to a non-MERS member on October 27, 2011.

{¶ 15} The second document was an affidavit from appellant in which she described the history of the loan and her attempts to have it modified. She stated that when she closed on the loan in 2007, she was told that she would be charged an extra point in interest, but that in one year she could refinance to a lower rate. She contacted

Taylor Bean in November 2008 to refinance, and was told that she had to be behind on her payments and had to have a hardship to qualify for the Making Home Affordable program. She also mentioned that her escrow account was incorrect, which caused her to request to have the escrow account removed so that she could pay her insurance and taxes directly. Taylor Bean denied this request. After several attempts at sending in her financial information, she demanded her statement. She averred that her statement was incorrect and did not reflect payments she made. She stated,

> When I did get my statement it was incorrect, and my escrow account was in the negative. I may have fallen behind three – four months, but I was told I was in a forbearance and it wouldn't effect my credit, and wait a little while longer, I was told that the stimulas money was coming. Again, I phoned in and was on hold times for hours, finally I demanded to know why my payments didn't show on the statement and why my escrow was negative, and was told they put my payments toward my negative escrow account.

{¶ 16} Appellant further stated that Taylor Bean was shut down in August 2009. Around that time, appellant received a call from Balboa Insurance Company, which represented itself as a subsidiary of appellee. Balboa offered that it would help appellant refinance through the Save the Dream program. Appellant stated that, after another round of sending in financial documents, she did not hear from appellee until she called on October 15, 2009. At that time, one of appellee's representatives told appellant that

her trial application had been approved, but that appellant had failed to make the initial payment. Appellant pleaded with the representative, arguing that she never received anything in the mail, and the representative relented and allowed appellant to make an estimated payment of $700.00. After a few weeks, appellant called back to make another payment. This time, appellant was told that she should not have been offered a trial plan and the bank would not work anything out for her. Appellant stated that she ultimately was successful in getting her $700.00 back.

{¶ 17} On October 15, 2013, appellee served its responses to the discovery requests made in appellant's supplemental memorandum.

{¶ 18} On October 22, 2013, appellant filed a "Request For Time To Amend My Answer, Take Depositions, and Continue Discovery Where Good Cause Exists for Admissions." In this filing, appellant asked for additional time to complete her discovery, to depose Harman and Fazio, and to amend her answer based on the uncovered facts. Appellant stated that appellee sent several papers, including a notice of intent to accelerate and a payment history from Taylor Bean with no loan number or account numbers. She contended that the payment history "clearly does not match the records of my payment history from my discovery requests from the US Bankruptcy Court over Taylor Bean and Whitaker Mortgage Corporation." Further, she stated that her complete disclosures were missing and were not sent to her. Appellant then included approximately 40 requests for admission relative to appellee's responses to appellant's 33 inquiries that were contained in her August 19, 2013 supplemental memorandum. In

addition, appellant made numerous requests for all of the paperwork associated with the transfer of her loan, including the MERS Milestone Report, verification of change in servicers notifications, and all custodial agreements related to the note or mortgage. Finally, appellant requested documentation regarding all of the escrow analyses conducted relative to the loan, her complete loan file, including all disclosures, correspondence, and emails, and the contact information of every entity that was associated with her loan.

{¶ 19} Appellant attached a number of documents to the October 22, 2013 request for time, one of which was a letter explaining why appellant received $2,000 as a result of an agreement between federal banking regulators and appellee in connection with an enforcement action related to deficient mortgage servicing and foreclosure processes ("National Mortgage Settlement").

{¶ 20} On November 6, 2013, appellee responded to appellant's request for time. It argued that it complied with the civil rules in responding to appellant's discovery requests, and that appellant had failed to designate any errors in the objections it made in its responses. Further, appellee noted that appellant failed to comply with Civ.R. 56(F) when applying for additional time to respond to the motion for summary judgment. Appellee, therefore, requested that the trial court deny appellant's request for time and motion to amend her answer, and rule on the pending motion for summary judgment.

{¶ 21} Appellant replied on November 14, 2013, asking the court to "accept my Affidavit in Rule 56 (f) and amend my answer since discovery is not complete."

Appellant stated that she is having an attorney review the case, and that proceeding pro se is difficult as she is also involved in the bankruptcy case in Florida. Appellant again mentioned that appellee had not answered her requests and had not provided "very important documents," one of which she specifically stated was the "Servicing Disclosure Form" from her loan.

{¶ 22} At the same time, on November 14, 2013, appellant also filed a motion for judicial notice. In her motion, appellant again raised the same arguments that Harman is a robosigner who has signed on behalf of Taylor Bean, MERS, and appellee, that the transfer of the mortgage to appellee was fraudulent because it occurred during Taylor Bean's bankruptcy and without approval by the bankruptcy court, and that appellee has not proven that it is the holder of the note and mortgage. The only new document attached to the motion for judicial notice was an affidavit from Barbara Borgmann, who was the attorney for BAC Home Loans Servicing, L.P. fka Countrywide Home Loans Servicing, LP, stating that BAC Home Loans Servicing is the holder of the note and mortgage and is the real party in interest. The Borgmann affidavit was filed in the initial foreclosure case against appellant that was eventually dismissed and refiled as the current action with appellee as the plaintiff.

{¶ 23} On January 23, 2014, the trial court entered its judgment granting summary judgment in favor of appellee, and denying all of appellant's pending motions. First, the trial court addressed appellant's discovery demands, and determined that appellee properly complied with the civil rules by serving its responses on appellant, and that

appellant was not entitled to a motion to compel because she failed to comply with Civ.R. 37(E). Next, the trial court determined that appellant was not entitled to a delay of judgment for the purpose of obtaining more discovery because she did not submit a proper Civ.R. 56(F) affidavit. The court then held that appellee had presented evidentiary quality material supporting all of the elements required to establish a party's entitlement to foreclosure, and that appellant had failed to provide any evidentiary quality material that would create a genuine issue of material fact as to any of those elements. Accordingly, the trial court held that appellee was entitled to judgment as a matter of law.

{¶ 24} On February 18, 2014, appellant, now represented by counsel, filed a motion to vacate the trial court's judgment and for reconsideration. In her motion, appellant argued that the trial court lacked jurisdiction over the action because appellee had not proven that it had standing. In particular, appellant contended that the assignment of the mortgage is void because MERS independently had no interest in the note or mortgage, and Taylor Bean had no authority to transfer the mortgage while it was in bankruptcy. Further, appellant contended that appellee had submitted no evidence showing that appellee was the successor by merger to BAC Home Loans Servicing. Thus, the fact that the mortgage was assigned to BAC Home Loans Servicing does not automatically imbue appellee with standing. Finally, appellant argued that appellee did not submit any evidence showing that it complied with the conditions precedent before filing for foreclosure. Specifically, appellant pointed out that appellee did not show that

it complied with the HUD regulations or with the requirements from the "National Mortgage Settlement" entered into between appellee, the United States Attorney General, and the Ohio Attorney General.

{¶ 25} Appellant appealed the trial court's entry granting summary judgment. We then remanded the case for the trial court to consider appellant's motion to vacate the judgment. On May 30, 2014, the trial court entered its judgment denying appellant's motion to vacate. The court reasoned that appellant's motion for reconsideration must be denied because the court had no authority to reconsider its January 23, 2014 judgment, which was a final judgment. The court further reasoned that appellant's motion to vacate must be denied because the court had subject matter jurisdiction to consider the action, and because appellee demonstrated that it had standing to pursue the action. In reaching its conclusion, the trial court determined that appellee provided evidence that it possessed the note, which was indorsed in blank, that appellee established it had standing by attaching a copy of the note, mortgage, and assignment of mortgage to the complaint, and that appellant failed to present any operative facts challenging those documents. In addition, the trial court noted that appellant had no standing to challenge the assignment of the mortgage. Finally, although appellant did not seek relief under Civ.R. 60(B), the trial court reasoned that appellant was not entitled to such relief because she had not satisfied the "meritorious defense" element in that she did not dispute that she was in default of the terms of the note and mortgage.

{¶ 26} Thereafter, appellant moved to amend her notice of appeal to include the trial court's May 30, 2014 judgment, which we granted.

B. Assignments of Error

{¶ 27} Appellant presents four assignments of error for our review:

1. The trial court erred in granting summary judgment to Bank of America, N.A. ("BANA") on its foreclosure complaint as BANA failed to prove it had standing to bring the action and failed to submit admissible Rule 56 evidence establishing performance of conditions precedent.

2. The trial court abused its discretion in granting summary judgment without first giving Duran an opportunity to complete discovery.

3. The trial court erred in finding MERS had the capacity to transfer either the note or the mortgage during the pendency of its principal's bankruptcy absent proof that the transfer was authorized by the bankruptcy trustee.

4. The trial court erred in denying defendant's motion to vacate as plaintiff failed to affirmatively establish its standing to enforce the note and mortgage which rendered the judgment of the trial court void for lack of subject matter jurisdiction.

II. Analysis

{¶ 28} For ease of discussion, we will address appellant's assignments of error out of order, beginning with her second assignment of error.

A. Discovery Requests

{¶ 29} As her second assignment of error, appellant states that the trial court abused its discretion when it granted summary judgment without affording appellant additional time to complete discovery. However, in support of her assignment of error, appellant presents the separate argument that the trial court should have required appellee to file its discovery responses with the court, pursuant to Civ.R. 5(D), thereby allowing the court to rule on the merits of the discovery dispute. In particular, appellant asserts the trial court should have required appellee to produce a complete account history, merger documents, documents referencing the transfer of the note, HAMP application records, and a notice of default and right to reinstate. In the interests of justice, we will address both arguments.

{¶ 30} In general, "[i]n discovery practices, the trial court has a discretionary power not a ministerial duty." *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 592, 664 N.E.2d 1272 (1996), quoting *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 57, 295 N.E.2d 659 (1973). "Thus, the standard of review of a trial court's decision in a discovery matter is whether the court abused its discretion." *Id.* Specifically, as it relates to a motion to continue for the purpose of completing discovery, we have stated, "A court's decision regarding a Civ.R. 56(F) motion for a continuance is reviewed under an abuse of discretion standard." *Johannsen v. Ward*, 6th Dist. Huron No. H-09-028, 2010-Ohio-4203, ¶ 70.

{¶ 31} Regarding appellant's argument as stated in her assignment of error, we note that Civ.R. 56(F) provides,

> Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

Appellee correctly points out that under Civ.R. 56(F), the party must submit an affidavit stating the reasons justifying the request for an extension. "A court may not grant an extension under Civ.R. 56(F) when no affidavit is presented in support of the motion." *U.S. Bank, Natl. Assn. v. Zokle*, 6th Dist. Erie No. E-13-033, 2014-Ohio-636, ¶ 13, citing *Cook v. Toledo Hosp.*, 169 Ohio App.3d 180, 2006-Ohio-5278, 862 N.E.2d 181, ¶ 42 (6th Dist.). Here, appellant did not submit an affidavit in support of her motion for a continuance to complete discovery. Therefore, we hold that the trial court did not abuse its discretion in denying the motion.

{¶ 32} Likewise, we hold that the trial court did not abuse its discretion when it did not sua sponte order appellee to file its discovery responses. Civ.R. 5(D) provides,

> All documents, after the original complaint, required to be served upon a party shall be filed with the court within three days after service, but depositions upon oral examination, interrogatories, requests for documents,

> requests for admission, and answers and responses thereto shall not be filed unless on order of the court or for use as evidence or for consideration of a motion in the proceeding.

In this case, appellant filed her discovery requests with the court, but not on order of the court or for use as evidence or for consideration of a motion. We decline to hold that appellant's lack of adherence to the civil rules obligates the trial court to require appellee to file its responses, such that the court's failure to do so constitutes an abuse of discretion.

{¶ 33} Accordingly, finding no merit to appellant's arguments, we find appellant's second assignment of error not well-taken.

B. Summary Judgment

{¶ 34} Appellant's first and third assignments of error are both directed to appellee's entitlement to summary judgment. Thus, we will address them together.

{¶ 35} 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). "When a motion for

summary judgment is made and supported as provided in this rule, an adverse 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).

{¶ 36} In order to properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials demonstrating: (1) that it is the holder of the note, which is secured by a mortgage, or that it is otherwise entitled to enforce the instrument; (2) that the mortgagor is in default; (3) that all conditions precedent have been met; and (4) the amount of the principal and interest due. *Fed. Natl. Mtge. Assn. v. Brunner*, 2013-Ohio-128, 986 N.E.2d 565, ¶ 10 (6th Dist.); *U.S. Bank, N.A. v. Coffey*, 6th Dist. Erie No. E-11-026, 2012-Ohio-721, ¶ 26.

{¶ 37} In her first assignment of error, appellant contends that summary judgment was improper because appellee lacked standing to foreclose, failed to prove that it satisfied all of the conditions precedent to foreclosure, and failed to prove the amount due.

1. Standing

{¶ 38} We will address the standing argument first. In support of her argument, appellant asserts that Cardinal's affidavit is insufficient to prove standing because it simply gives his "professional opinion" that appellee was the holder of the mortgage. Appellant also argues that Fazio's affidavit is inadmissible because it is not based on personal knowledge since she did not state that she was familiar with the practices of

BAC Home Loans Servicing or Taylor Bean. In addition, appellant contends that Fazio's statement that appellee "has" possession of the note is not sufficient to prove that appellee "had" possession when it filed the complaint. Finally, appellant submits that appellee lacks standing, or that a genuine issue of material fact exists as to standing, because MERS, acting as nominee for Taylor Bean, assigned the note to appellee while Taylor Bean was in bankruptcy and without the bankruptcy trustee's authorization. Appellant also contends that the MERS Milestones report contradicts appellee's claim to be the holder because it shows a transfer of appellant's loan to a non-MERS member on October 27, 2011. These two issues involving the transfer from MERS are also the sole subjects of appellant's third assignment of error.

{¶ 39} In order to have standing to sue, appellee must establish that it is the person entitled to enforce the note and mortgage. *Coffey* at ¶ 13; *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 28 (plaintiff must "establish an interest in the note or mortgage"). Under R.C. 1303.31(A), a "holder" is a person entitled to enforce an instrument. Notably, "[a] person may be a 'person entitled to enforce' the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument." R.C. 1303.31(B). R.C. 1301.201(B)(21) provides that "holder" includes "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." "Bearer," in turn, means "a person in possession of a negotiable

instrument, negotiable tangible document of title, or certified security that is payable to bearer or indorsed in blank." R.C. 1301.201(B)(5).

{¶ 40} Here, the note is indorsed in blank. Fazio testified in her affidavit that appellee has possession of the note. Thus, appellee has demonstrated that it is the holder and party entitled to enforce the note. In reaching this conclusion, we are not moved by appellant's argument that Fazio's use of the word "has" is insufficient to demonstrate that appellee "had" possession at the time it filed the complaint in light of the fact that a copy of the note was attached to the complaint.

{¶ 41} Turning to the mortgage, we note that it was assigned by MERS, as nominee for Taylor Bean, to BAC Home Loans Servicing. We find somewhat troubling the fact that, although appellee claims to be the successor in interest to BAC Home Loans Servicing through merger, appellee has submitted no affidavit or other documentation to verify this merger. Thus, on the basis of the assignment of mortgage alone, we cannot conclude that appellee is the party entitled to enforce the mortgage. Furthermore, we agree with appellant that Cardinal's affidavit is insufficient to prove that appellee is the holder of the mortgage as it merely contains a legal conclusion.

{¶ 42} Nevertheless, we have held that "a transfer of a note secured by a mortgage also acts as an equitable assignment of the mortgage." *Coffey* at ¶ 31. The issue then becomes whether the note was transferred. "An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." R.C. 1303.22(A). Further,

"[t]ransfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument." R.C. 1303.22(B). Here, the transfer of the note was a negotiation, which is "a voluntary or involuntary transfer of possession of an instrument by a person other than the issuer to a person who by the transfer becomes the holder of the instrument." R.C. 1303.21(A). "If an instrument is payable to bearer, it may be negotiated by transfer of possession alone." R.C. 1303.21(B). In this case, the note was indorsed in blank by Taylor Bean, and possession of the note was transferred to appellee. Therefore, we hold that the note was transferred, thereby equitably assigning to appellee the right to also enforce the mortgage.

{¶ 43} Appellant next argues that even if the note and mortgage were transferred to appellee, such transfer was improper because it occurred while Taylor Bean was in litigation and without the approval of the bankruptcy trustee. However, we have repeatedly held that a mortgagor is not a party to the assignment of mortgage, and thus lacks standing to challenge the assignment. *E.g., Bank of New York Mellon v. Huth*, 6th Dist. Lucas Nos. L-12-1241, L-12-1283, 2014-Ohio-4860, ¶ 25. Consequently, we need not address appellant's argument that the loan was improperly assigned to appellee.

{¶ 44} Lastly, appellant asserts that a genuine issue of material fact exists relative to appellee's claim of standing because the MERS Milestone Report shows that the beneficial rights in the loan were transferred from Taylor Bean to Ginnie Mae on February 4, 2008, prior to Taylor Bean assigning the mortgage to appellee on March 31,

2010. Further, the MERS Milestone Report shows that the servicing of the loan was transferred from Ginnie Mae, for whom appellee was a sub-servicer, to a Non-MERS member. However, we reject appellant's arguments that are based on the MERS Milestone Report because that report does not comply with the standards of Civ.R. 56.

{¶ 45} Civ.R. 56(C) provides, in part,

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule.

Here, the MERS Milestone Report does not fall into any of the Civ.R. 56(C) categories. "Where the copy of a document falls outside [Civ.R. 56(C)], the correct method for introducing it is to incorporate them by reference into a properly framed affidavit." *Carlton v. Davisson*, 104 Ohio App.3d 636, 646-647, 662 N.E.2d 1112 (6th Dist.1995), citing *Martin v. Cent. Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990). In this case, the MERS Milestone Report was attached to appellant's "Supplemental Memorandum in Support of my Motion for Discovery Evidence." Even if we assume that appellant's supplemental memorandum constituted an affidavit, and that

appellant properly incorporated the MERS Milestone Report, which she did not,[1] appellant's assertion based on the MERS Milestone Report would still not meet the standard required by Civ.R. 56.

{¶ 46} Under Civ.R. 56(E), "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." "'Personal knowledge' is defined as 'knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay.'" *Carlton* at 646, quoting *Brannon v. Rinzler*, 77 Ohio App.3d 749, 756, 603 N.E.2d 1049 (2d Dist.1991). Here, appellant has not demonstrated any personal knowledge regarding the transfer of her mortgage between banks, but rather is relying on the hearsay information contained in the MERS Milestone Report. Therefore, the MERS Milestones Report is not a proper subject of consideration on appellee's motion for summary judgment.

{¶ 47} Furthermore, even if we did consider the MERS Milestone Report, we do not find that it creates a genuine issue of *material* fact pertaining to appellee's entitlement

[1] "The requirement of Civ.R. 56(E) that sworn or certified copies of all papers referred to in the affidavit be attached is satisfied by attaching the papers to the affidavit, coupled with a statement therein that such copies are true copies and reproductions." *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 467, 423 N.E.2d 105 (1981). Here, appellant made no such statement that the MERS Milestone Report was a true and accurate copy.

to enforce the mortgage, as we have held that the transfer of the note constitutes an equitable assignment of the mortgage. Therefore, we find that appellee has standing to enforce the note and mortgage.

2. Conditions Precedent

{¶ 48} Having disposed of appellant's arguments related to standing, we now turn to her argument that appellee failed to satisfy all of the conditions precedent prior to foreclosure. Specifically, appellant asserts on appeal that appellee failed to prove that it complied with all of the Department of Housing and Urban Development ("HUD") regulations, failed to provide proof that it served a notice of default upon appellant, and failed to prove that it complied with the "National Mortgage Settlement" requirements.

{¶ 49} Notably, in its complaint, appellee stated that "it has performed all of the conditions precedent required to be performed by it." We have held that a general averment that all conditions precedent have been performed is sufficient. *Coffey*, 6th Dist. Erie No. E-11-026, 2012-Ohio-721 at ¶ 37. However, "[i]n contrast to the liberal pleading standard for a party alleging the satisfaction of conditions precedent, a party denying performance or occurrence of a condition precedent must do so specifically and with particularity." *Id.*, quoting *Lewis v. Wal-Mart, Inc.*, 10th Dist. Franklin No. 93AP-121, 1993 WL 310411, *3 (Aug. 12, 1993); *see also* Civ.R. 9(C) ("In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity."). "The effect of the

failure to deny conditions precedent in the manner provided by Civ.R. 9(C) is that they are deemed admitted." *Id.* Here, in her answer, appellant generally denied appellee's averment that it satisfied the conditions precedent. Thus, because she failed to deny the performance with specificity or particularity, the satisfaction of the conditions precedent is deemed admitted, and no genuine issue of material fact exists on this subject.

3. Amount Owed

{¶ 50} As a final argument as to why summary judgment was improper, appellant contends that appellee failed to prove the amount due. She notes that the account statement attached to Fazio's affidavit does not show a history of her payments since the inception of the loan. Notwithstanding appellant's argument, we recognize that Ohio courts "have consistently 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." *Natl. City Bank v. TAB Holdings, Ltd.*, 6th Dist. Erie No. E-10-060, 2011-Ohio-3715, ¶ 12. In Fazio's affidavit she states that she has personally reviewed appellant's account, and that the amount owed is as stated on the attached account statement. The attached account statement identifies that there is an outstanding unpaid principal balance of $174,435.26. Appellant, although she loosely states that Taylor Bean misapplied or failed to apply some payments, has failed to provide any evidence that she owes a different amount.

Thus, we find that appellee has sufficiently demonstrated the amount owed on the loan, and no genuine issue exists as to this amount.

4. Summary

{¶ 51} Therefore, having found that no genuine issue of material fact exists concerning whether appellee is the holder of the note, whether appellant is in default, the satisfaction of the conditions precedent, or the amount due, we hold that summary judgment in favor of appellee was appropriate.

{¶ 52} Accordingly, appellant's first and third assignments of error are not well-taken.

C. Motion to Vacate

{¶ 53} As her fourth, and final, assignment of error, appellant argues that the trial court erred when it denied her motion to vacate the January 23, 2014 judgment.

{¶ 54} First, appellant contends that the trial court lacked subject matter jurisdiction over the case because appellee did not have standing to enforce the note and mortgage. Thus, she concludes that the judgment should have been vacated. The Ohio Supreme Court has recently addressed this issue and held that "[A] court of common pleas that has subject-matter jurisdiction over an action does not lose that jurisdiction merely because a party to the action lacks standing." *Bank of America, N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 17. Applying that rule here, any alleged lack of standing on the part of appellee would not cause the trial court to lose its subject-matter jurisdiction over the foreclosure action. *See id.* at ¶ 23 ("Bank of

America's alleged lack of standing to initiate a foreclosure action against the Kuchtas would have no effect on the subject-matter jurisdiction of the Medina County Court of Common Pleas over the foreclosure action."). Therefore, appellant's argument that the judgment should be vacated for this reason is without merit.

{¶ 55} Alternatively, appellant challenges the trial court's determination that she did not provide any operative facts demonstrating her entitlement to relief under Civ.R. 60(B).[2] Appellant contends that in reaching its determination the court wrongly assumed that appellant had a burden to affirmatively demonstrate that appellee lacked standing, and wrongly ignored the MERS Milestone Report, the conflicting affidavits in the two foreclosure actions against appellant, and the documents pertaining to Taylor Bean's assignment of the mortgage during its bankruptcy.

{¶ 56} We review the denial of a Civ.R. 60(B) motion for an abuse of discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987). An abuse of discretion connotes that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). In order to prevail on a Civ.R. 60(B) motion, the movant must demonstrate that:

> (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable

[2] Notably, in her reply in support of her motion to vacate, appellant specifically states that her motion "did not seek relief from judgment under Rule 60(B) but has directly attacked the judgment as void for lack of subject matter jurisdiction."

> time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 150-151, 351 N.E.2d 113 (1976).

"If any of these three requirements is not met, the motion should be overruled." *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988).

{¶ 57} Setting aside the fact that appellant has made no attempt to show that she is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5), we find that appellant's stated arguments do not demonstrate a meritorious defense. We have already determined that appellee satisfied its burden to demonstrate its standing to initiate the foreclosure proceeding, and that the MERS Milestone Report did not create a genuine issue of material fact in that regard. Similarly, we have determined that appellant lacks standing to challenge the assignment of mortgage from Taylor Bean to appellee. Appellant's remaining argument is that the Borgmann affidavit submitted on behalf of BAC Home Loans Servicing in the initial foreclosure action somehow conflicts with Fazio's affidavit filed in this action. Appellant does not explain the conflict, and we fail to see it. On March 19, 2010, Borgmann stated that BAC Home Loans Servicing is "the owner and holder of the note and mortgage." On August 27, 2012, Fazio stated that appellee, the successor by merger to BAC Home Loans Servicing, has possession of the note. Because both affidavits can be simultaneously true, we cannot say that the affidavits are in conflict. Thus, this issue fails to create a meritorious defense. Therefore,

because appellant has failed to demonstrate a meritorious defense to the foreclosure action, we hold that the trial court did not abuse its discretion when it denied her motion to vacate.

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

III. Conclusion

{¶ 59} For the foregoing reasons, the judgment of the Lucas 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

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE