

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

U.S. BANK, NATIONAL ASSOCIATION,)	CASE NO. 13 MA 32
)	
PLAINTIFF-APPELLEE,)	
)	
VS.)	OPINION
)	
JENNIFER L. WIGLE, ET AL.,)	
)	
DEFENDANTS-APPELLANTS.)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court
Case No. 12-CV-863

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: June 9, 2015

DEGENARO, J.

{¶1} Jennifer Wigle, appearing pro-se, appeals a March 12, 2013 judgment entry adopting the January 30, 2013 magistrate's decision that denied her motion for summary judgment and granted U.S. Bank National Association's motion for summary judgment. For the reasoning provided below, Jennifer's assignments of error are meritless.

Facts and Procedure

{¶2} On January 23, 2007, Jennifer executed an adjustable-rate promissory note in the amount of \$124,000 made payable to First Franklin Financial Corp. and executed a mortgage in favor of Mortgage Electronic Registration Systems, Inc. (MERS) on the same day. The mortgage provided that it secured the indebtedness created by the promissory note and was recorded with the Mahoning County Recorder on January 31, 2007.

{¶3} On February 5, 2008, MERS assigned the mortgage to LaSalle Bank National Association; the assignment specifically referenced the promissory note, stating: "To Have and To Hold the said Mortgage and Note, and also the said property unto said Assignee forever, subject to the terms contained in said Mortgage and Note." Thereafter, LaSalle assigned the mortgage to U.S. Bank, successor trustee to Bank of America, which was recorded on September 2, 2010.

{¶4} After Jennifer failed to make payments, U.S. Bank declared her to be in default and filed a complaint on March 22, 2012, against her seeking \$121,141.03 plus interest, taxes and insurance. A copy of the mortgage, an assignment of the mortgage from MERS to LaSalle, and an assignment of the mortgage from LaSalle to U.S. Bank were attached to the complaint. Significantly, regarding the note, the complaint stated, "a review of the Plaintiff's file did not produce the Promissory Note or a copy thereof. Plaintiff further states that it will continue to attempt to locate the Promissory Note and will provide it to this court at the earliest opportunity." Jennifer did not file an answer.

{¶5} On July 2, 2012, U.S. Bank filed the promissory note executed on January 23, 2007, with the trial court. The note was signed by Jennifer and contained a blank endorsement.

{¶6} On August 13, 2012, Jennifer filed a "motion to dismiss complaint, quash service of process, or alternative motion to strike complaint," affidavit in support, and "affidavit of filing federal claim of common law lien and writ of attachment." In the motion, Jennifer asserted: (1) U.S. Bank lacked standing; (2) the trial court lacked jurisdiction; (3) insufficiency of process; (4) insufficient service of process; (4) improper venue; (5) defective notice under contract, state, and federal law(s); (6) satisfaction of the alleged debt; and, (7) failure to state a claim for which relief can be granted.

{¶7} In response, on August 22, 2012, U.S. Bank filed to strike Jennifer's motion to dismiss as untimely and meant for purposes of delay. The trial court converted Jennifer's motion to dismiss to a motion for summary judgment pursuant to Civ.R. 56 as it relied on facts that were beyond the scope of the complaint.

{¶8} On October 25, 2012, U.S. Bank filed its own motion for summary judgment arguing that the complaint demonstrated that Jennifer was in default on the note and despite making several appearances she failed to argue any genuine issues of material fact and did not raise any affirmative defenses.

{¶9} On January 30, 2013, the magistrate denied Jennifer's converted motion for summary judgment and granted U.S. Bank's motion for summary judgment. On February 13, 2013, Jennifer filed objections to the magistrate's decision and asserted 22 points, some of which were new arguments and others that were contained in her converted motion for summary judgment. U.S. Bank opposed these objections arguing they were not specific and did not meet any evidentiary burden imposed by the civil rules. Subsequently, the trial court conducted an independent review as to the objected matters and adopted the magistrate's decision.

Personal Jurisdiction

{¶10} As Jennifer's first and fifth assignments of error are interrelated, they will be discussed together:

{¶11} "The trial court abused its discretion when it failed to grant Appellant an evidentiary hearing on her Motion to Dismiss Complaint for lack of personal jurisdiction and *quash* (emphasis sic) service of process."

{¶12} "The trial court erred in granting Summary Judgment because the Appellant was never served with the Plaintiff-Appellee's Motion for Summary

Judgment, therefore, denied an opportunity to be heard, also the trial court failed to provide Appellant 'notice' of a time limit to respond to the Motion for Summary Judgment."

{¶13} In *Litva v. Richmond*, 172 Ohio App.3d 349, 2007-Ohio-3499, 874 N.E.2d 1243, ¶ 10-11 (7th Dist.) this court held:

"Civ.R. 56(C) states that courts are to consider only "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact" when ruling on summary judgment motions. Therefore, Civ.R. 56(C) does not allow for testimony to be presented in a summary judgment hearing. Further, Ohio appellate courts "uniformly agree that a trial court is not required to schedule an oral hearing on every motion for summary judgment."

{¶14} Jennifer cites to Tenth District case law holding that a sworn statement by a defendant asserting the plaintiff failed to serve the defendant warrants at least an evidentiary hearing. *Gupta v. Edgecombe*, 10th Dist. No. 03AP-807, 2004-Ohio-3227, ¶ 13 citing *Wilson's Auto Serv., Inc. v. O'Brien*, 10th Dist. No. 92AP-1406, 1993 WL 54667 (Mar. 4, 1993). Consequently, Jennifer argues that she should have been entitled to an evidentiary hearing after submitting a sworn affidavit averring that she had not been served. However, *Gupta* involved parties appealing the denial of their Civ.R. 60(B) motion, whereas this case involves a motion for summary judgment. Further, though Jennifer failed to file an answer or a response in opposition to summary judgment, her arguments regarding service and jurisdiction were addressed by the magistrate likely because they were raised in Jennifer's Motion to Dismiss (later converted to a motion for summary judgment), and found to be meritless:

"In addition, Defendant, Wigle argues that this Court lacks jurisdiction over her since she was never served with a copy of the complaint. The record herein, however, is diametrically opposed to the Defendant's self-serving statement in her affidavit. A review of the Court's file and docket

indicate that the Defendant, Wigle was served by certified U.S. Mail, return receipt requested."

{¶15} Additionally Jennifer argues that the trial court failed to provide her notice of a time limit to respond to U.S. Bank's Motion for Summary Judgment. This argument fails for two reasons. First, pursuant to judgment entry dated June 20, 2012, the trial court stated that all dispositive motions needed filed by October 15, 2012, and all responses were due by November 1, 2012.

{¶16} Secondly, local court rules provide that "opposition briefs shall be filed no later than fourteen (14) days from the date of filing a motion" unless a leave for extension is requested and granted by the court. Mahoning County Loc.R. 6(A)(2). U.S. Bank filed their motion for summary judgment on October 25, 2012, thus, Jennifer had until November 9, 2012, to file a reply in opposition. She filed nothing. The trial court did not rule on U.S. Bank's motion until November 29, 2012, leaving additional time within which Jennifer could have filed a request for extension or a reply. As both the June 20, 2012 judgment entry and the local rules provided a time limit in which to respond, coupled with the fact that the trial court allowed further time to pass prior to deciding the motion, Jennifer's argument is meritless.

{¶17} As the trial court was not required to schedule an oral hearing on Jennifer's motion and the court and local rules provided a time in which to reply, Jennifer's first and fifth assignments of error are overruled.

Summary Judgment

{¶18} Jennifer's second, third, sixth and eighth assignments involve the granting of summary judgment and as such will be discussed together and taken out of order for ease of analysis. They state respectively:

{¶19} "The trial court erred in granting Summary Judgment; Summary Judgment was improper where there were disputed genuine issues of material fact and the moving party has failed to demonstrate that the appellant has no evidence to support her claims; (sic)"

{¶20} "The trial court erred when it granted summary judgment to Appellee and denying Appellant's Motion to Dismiss where there were unresolved conflicts in the evidence regarding whether plaintiff was a holder of both the note and mortgage; entitled to enforce it through foreclosure and/or had standing to bring and maintain a foreclosure action"

{¶21} "The trial court abused it's (sic) discretion when it entered Summary Judgment against the Defendant-Appellant before resolving all the arguments set forth in Defendant-Appellant's Motion to Dismiss; leaving genuine issues of material facts remaining and making summary judgment improper."

{¶22} "The Court erred in granting Summary Judgment to Plaintiff-Appellee and denying Defendant-Appellant's Motion to Dismiss the Complaint because the Appellee has failed to establish that all conditions precedent have been satisfied."

{¶23} An appellate court reviews a trial court's summary judgment decision de novo, applying the same standard used by the trial court. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, 874 N.E.2d 1155, ¶ 5. A motion for summary judgment is properly granted if the court, upon viewing the evidence in a light most favorable to the party against whom the motion is made, determines that: (1) there are no genuine issues as to any material facts; (2) the movant is entitled to judgment as a matter of law; and (3) the evidence is such that reasonable minds can come to but one conclusion and that conclusion is adverse to the opposing party. Civ.R. 56(C); *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10.

{¶24} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 1996-Ohio-107, 662 N.E.2d 264. The nonmoving party has the reciprocal burden of specificity and cannot rest on the mere allegations or denials in the pleadings. *Id.* at 293.

{¶25} 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 mover 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. *Wachovia Bank of Delaware, N.A. v. Jackson*, 5th Dist. No. 2010-CA-00291, 2011-Ohio-3202, ¶ 40-45.

Standing

{¶26} The Ohio Supreme Court has held that "[w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends on whether the party has alleged * * * a "personal stake in the outcome of the controversy." *Federal Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶21, citing *Cleveland v. Shaker Hts.*, 30 Ohio St.3d 49, 51, 507 N.E.2d 323 (1987). Where a bank fails to establish an interest in the note or mortgage at the time the complaint was filed, it had no standing to invoke the jurisdiction of the common pleas court. *Schwartzwald* at ¶ 28.

{¶27} Jennifer continually argues in her brief that summary judgment was improper because U.S. Bank has not established standing to bring its complaint. She contends that U.S. Bank is not the holder of the note *and* mortgage (emphasis added). Contrary to Jennifer's assertions, U.S. Bank was not required to attach both the note and the mortgage to the complaint:

Schwartzwald does not require the plaintiff to prove standing at the time the foreclosure action is filed. Rather, although the plaintiff in a foreclosure action must have standing at the time suit is commenced, proof of standing may be submitted subsequent to the filing of the complaint.

Wells Fargo Bank, N.A. v. Horn, 2015-Ohio-1484, --- N.E.3d --- ¶1

{¶28} As the magistrate indicated, it is undisputed that U.S. Bank was the assignee of the subject mortgage nearly one and a half years prior to filing the complaint. Though Jennifer makes several statements implicating the validity of the mortgage and the assignments thereof, she filed no answer asserting any defenses,

and provided no Civ.R. 56(C) evidence contrary to U.S. Bank's motion for summary judgment. As such her argument fails as a matter of law.

{¶29} Regarding the note, the magistrate found that U.S. Bank did not file it at the time of filing the complaint, but on July 2, 2012, U.S. Bank filed the adjustable rate note which was executed on January 23, 2007, was signed by Jennifer and contained a blank endorsement. Jennifer argues that the blank endorsement is fatal to U.S. Bank having standing, yet she provides no support for this position and provided no Civ.R. 56(C) evidence to the contrary.

{¶30} Jennifer argues that the affidavit of Kevin Drakeford filed in support of U.S. Bank's motion for summary judgment is based on "hearsay, unsupported legal conclusions and records for which no proper foundation for admission was established." "The affidavits must show: 1) the affiant is competent to testify; 2) the affiant has personal knowledge of the facts, as shown by a statement of the operant facts sufficient for the court to infer the affiant has personal knowledge; 3) the affiant must state he or she was able to compare the copy with the original and verify the copy is accurate, or explain why this cannot be done; and 4) the affidavit must be notarized. Any documents the affidavit refers to must be attached to the affidavit or served with the affidavit." *Wachovia Bank of Delaware, N.A. v. Jackson*, 5th Dist. No. 2010-CA-00291, 2011-Ohio-3202, ¶ 46-51. A review of the Drakeford affidavit demonstrates that these requirements were met.

{¶31} Jennifer further argues that no foundation was laid to admit these documents. "The documentary evidence must be: 1) certified copies of recorded documents; or 2) if business records, must be accompanied by an affidavit attesting that they are business records kept in the regular course of business; 3) the affiant must be familiar with the compiling and retrieval of the records; 4) the affiant must state the records are compiled at or near the occurrence of each event by persons with knowledge of said events; and 5) the records must be authenticated by the custodian of the records or by another witness who has personal knowledge of the records." *Wachovia Bank of Delaware, N.A. v. Jackson*, 5th Dist. No. 2010-CA-00291, 2011-Ohio-3202, ¶ 52-57.

{¶32} The Drakeford affidavit states that the attached documents were business records maintained by Bank of America as servicer for U.S. Bank. Drakeford stated he was familiar and had personal knowledge of the documents attached and they were made at or near the time of the occurrence of the matters. Further, he authenticated the records as true and correct copies. Again Jennifer makes several unsubstantiated arguments implicating the legality of the affidavit, but she provided no caselaw or Civ.R. 56(C) evidence to support her contentions.

{¶33} The promissory note had a blank endorsement. U.S. Bank argues that this demonstrates that they are the holder of the note or in the alternative that they are a non-holder in possession of the instrument who has the rights of the holder. Jennifer argues, once again, that U.S. Bank is not the holder of the note and as such had no standing to foreclose.

{¶34} Citing *Bank of N.Y. vs. Dobbs*, 5th Dist. 2009-CA-4742, 2009-Ohio-4742, the magistrate in the present matter held that a transfer of the mortgage also transfers the obligation the mortgage secures. The magistrate found that there was no evidentiary material to refute that the mortgage in this case was assigned to U.S. Bank and no suggestion that the parties to the subsequent assignments of the mortgage intended it to be disassociated from the note. Indeed a review of the record supports this conclusion. The promissory note had a blank endorsement and U.S. Bank presented evidence that it was in possession of the note. As Jennifer provided no Civ.R. 56(C) evidence to the contrary, U.S. Bank had standing to proceed on the foreclosure and Jennifer's third assignment of error is meritless.

Evidence of Default and Amount Due

{¶35} In support of its motion for summary judgment, U.S. Bank attached an affidavit from Kevin Drakeford and assistant vice president for Bank of America, in its role as servicing agent for U.S. Bank. In his affidavit, Drakeford states that U.S. Bank has possession of the note "directly or through an agent." It is undisputed U.S. Bank was assigned the corresponding mortgage secured by the property. The note and mortgage, both attached to the affidavit, are both signed by Jennifer. The mortgage contains a stamp indicating that it was recorded in the office of the Mahoning County Recorder. Drakeford states that Jennifer defaulted on the note by failing to make the

required payments due for August 1, 2009 and any installment thereafter. The debt was accelerated, and according to Drakeford, Jennifer owes the sum of \$121,141.03 plus interest and other charges.

{¶36} Jennifer does not dispute that she executed a note and mortgage, that the mortgage was properly recorded, nor that U.S. Bank is entitled to accelerate the debt due to default on these instruments. She did not file an answer disputing the default nor did she file a memorandum in opposition to U.S. Bank's motion for summary judgment refuting the claim that she was in default on the note. "An affidavit stating the loan is in default is sufficient for purposes of Civ.R. 56, in the absence of evidence controverting those averments." *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14; *Deutsche Bank Natl. Trust Co. v. Ingle*, 8th Dist. No. 92487, 2009-Ohio-3886, ¶ 33; *JP Morgan Chase Bank, N.A. v. Brown*, 2d Dist. No. 21853, 2008-Ohio-200, ¶ 54.

{¶37} Because Jennifer failed to submit any Civ.R. 56(C) evidence contrary to U.S. Bank's motion for summary judgment, she failed to raise any disputed issue regarding the amount due and whether she was in default.

Conditions Precedent

{¶38} Civ.R. 9(C) provides: "[i]n 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." A review of Jennifer's argument reveals that she seems to be confusing the issue of standing and conditions precedent. Jennifer does not assert what condition precedent she believes to be unsatisfied. U.S. Bank pled that "all conditions precedent have been satisfied." Jennifer did not file an answer, nor did she respond to U.S. Bank's motion for summary judgment. Accordingly as Jennifer failed to deny the satisfaction of conditions precedent, they are deemed admitted and her eighth assignment of error is meritless.

{¶39} As all five elements to properly support a motion for summary judgment in a foreclosure action have been established, Jennifer's second assignment of error alleging that the trial court erred by granting summary judgment to U.S. Bank is also meritless.

{¶40} Additionally, Jennifer argues that the magistrate erred by granting summary judgment before resolving all issues in her motion to dismiss, which was converted to a motion for summary judgment. Jennifer asserts that the issues she raised were not resolved thus precluding summary judgment, specifically: defective summons; "no debt due" and satisfaction of the debt. A review of the magistrate's decision clearly indicates that the magistrate addressed the issues finding no error regarding the summons and that the debt was due and unpaid by Jennifer. As such, Jennifer's sixth assignment of error is meritless.

{¶41} For the aforementioned reasons, Jennifer's second, third, sixth and eighth assignments challenging the granting of summary judgment to U.S. Bank are meritless and are overruled.

Summons

{¶42} Jennifer's fourth of eight assignments of error states:

{¶43} "The trial (sic) court erred because it never addressed the argument that the Summons was defective pursuant to Ohio Rules of Civil Procedure and its contents not in a form prescribed under R.C. section 2703.03, therefore, the court lacked personal jurisdiction over the Appellant and summary judgment was improper."

{¶44} Jennifer argues that the summons was defective in that it did not contain the requisite notice requirements, namely the nature of the relief sought, citing *Baldine v. Klee*, 10 Ohio Misc. 203, 224 N.E.2d 544 (C.P.1965). Jennifer's argument is meritless as the case that she relies on, *Baldine*, was later overruled by the Eleventh District. See *Baldine v. Klee*, 14 Ohio App.2d 181, 186, 237 N.E.2d 905 (11th Dist.1968). Further, R.C. 2703.03 was repealed. Civ.R. 4(B) governs the form of a summons:

The summons shall be signed by the clerk, contain the name and address of the court and the names and addresses of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the times within which these rules or any statutory provision require the defendant to appear and defend, and shall notify the defendant that in case of failure

to do so, judgment by default will be rendered against the defendant for the relief demanded in the complaint.

A copy of the complaint shall be attached to each summons. The plaintiff shall furnish the clerk with sufficient copies.

{¶45} A review of the summons in the present case demonstrates these requirements were met. As such, Jennifer's fourth assignment of error is meritless and is overruled.

FDCPA

{¶46} Jennifer's seventh of eight assignments of error states:

{¶47} "The Court erred when it found that Defendant-Appellant received proper 'notice' under the Fair Debt Collections Practices Act (FDCPA) because there was no FDCPA Notice annexed to the Summons and Complaint as required under the FDCPA and because Improper Notice is an Issue of Personal Jurisdiction; Defendant-Appellant was entitled to an evidentiary hearing before summary judgment could be entered."

{¶48} Jennifer argues that the trial court erred in determining that she was given proper notice under the FDCPA, however, U.S. Bank provided a copy of the initial communication in this case as sent to Jennifer on March 22, 2012 which contained all of the notice requirements under the FDCPA. As such Jennifer's seventh assignment of error is meritless and is overruled.

{¶49} In sum, all of Jennifer's assignments of error are meritless for the reasons stated above. The magistrate properly granted U.S. Bank's motion for summary judgment. The trial judge did not err in adopting the same. Accordingly, the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

Waite, J., concurs.