

[Cite as *Deutsche Bank Natl. Trust Co. v. Ingle*, 2009-Ohio-3886.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92487

DEUTSCHE BANK NATIONAL TRUST COMPANY

PLAINTIFF-APPELLEE

vs.

PATRICIA ANN INGLE, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-656449

BEFORE: Gallagher, P.J., Sweeney, J., and Jones, J.

RELEASED: August 6, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Defendants-appellants, Patricia Ann Ingle and Robert A. Brdar, appeal the judgment of the Cuyahoga County Court of Common Pleas that granted monetary relief as well as a decree of foreclosure to plaintiff-appellee, Deutsche Bank National Trust Co. (“Deutsche Bank”).¹ Appellants also challenge certain ancillary rulings. For the reasons stated herein, we affirm.

{¶ 2} On March 3, 2006, Ingle obtained a purchase money mortgage loan from First Franklin, a division of National City Bank of Indiana (“First Franklin”). In consideration thereof, Ingle executed an adjustable rate note in the amount of \$80,000. She granted the mortgage to Mortgage Electronic Registration System, Inc., d.b.a. MERS, as a nominee for First Franklin. The mortgage was recorded on March 3, 2006. The mortgage was the first lien, after the statutory lien for real estate taxes, upon property located at 27811 Knickerbocker Road, Bay Village, Ohio.

{¶ 3} The note was endorsed twice beneath Ingle’s signature. The first endorsement was by First Franklin to First Franklin Financial Corporation, and the second by First Franklin Corporation in blank. The note was subsequently transferred and sold to Deutsche Bank by the blank endorsement and delivery, and by allonge, by First Franklin.

¹ Nick Brdar, a defendant in the action, is not a party to the appeal.

{¶ 4} On March 1, 2008, MERS, as nominee for First Franklin, executed an assignment of the mortgage to Deutsche Bank. The assignment conveyed the mortgage as well as “all moneys now owing or that may hereafter become due or owing in Respect thereof[.]” Thereafter, the assignment was recorded on April 29, 2008.

{¶ 5} Following the assignment itself, Deutsche Bank filed a complaint in foreclosure on April 10, 2008, against Ingle, Robert Brdar a.k.a. Robert Allen Brdar, and Nick Brdar. The complaint alleged that Ingle was in default under the terms of the note and the mortgage, and claimed a balance due and owing from Ingle in the amount of \$79,639.89, plus interest at the rate of 9.25 percent per annum from December 1, 2007, plus court costs, advances, and other charges. Robert Brdar and Nick Brdar were named in the complaint by virtue of their interest in the property as shown in the preliminary judicial report. The report reflected a second mortgage in the amount of \$20,000 to Robert Brdar and Nick Brdar, which was recorded on March 3, 2006.

{¶ 6} The record reflects that service was perfected upon all defendants. Ingle and Robert Brdar filed a joint answer, motion to dismiss, and counterclaim. The motion to dismiss and counterclaim were opposed by Deutsche Bank. The trial court denied the motion to dismiss and later rendered judgment for Deutsche Bank on the counterclaim.

{¶ 7} Deutsche Bank filed a motion for default judgment with respect to those defendants who had not entered an appearance in the case. In response, Nick Brdar filed a letter disclaiming any interest in the property.

{¶ 8} Deutsche Bank filed a motion for summary judgment and two supporting affidavits. Deutsche Bank also filed a notice of filing note and allonge of note.

{¶ 9} The first supporting affidavit was of Daniel Richard, Assistant Vice President of Home Loan Services, Inc., a servicing agent for Deutsche Bank. He declared that Deutsche Bank was the holder of the note and mortgage that are the subject of this action. He further declared that the note was in default and that Deutsche Bank had elected to accelerate the entire balance due and owing in the amount of \$79,639.89. The second supporting affidavit was of April A. Brown, counsel for Deutsche Bank. She declared that Deutsche Bank was the holder of the note and mortgage, and she also authenticated a recorded assignment of the mortgage.

{¶ 10} None of the defendants filed opposition briefs, affidavits, or other evidence in response to Deutsche Bank's motions.

{¶ 11} A hearing was held on the motion for default judgment before a court magistrate on October 1, 2008. On that date, Deutsche Bank filed an affidavit as to interest rate, establishing that the interest rate on the note

remained unchanged. The court magistrate issued an order granting default judgment to Deutsche Bank against all defaulting parties.

{¶ 12} On October 3, 2008, the magistrate issued a decision granting summary judgment in favor of Deutsche Bank and against Ingle on the note in the sum of \$79,639.89, plus interest at the rate of 9.25 percent per annum from December 1, 2007. The magistrate further declared that the conditions of the mortgage had been broken, thereby entitling Deutsche Bank to foreclose on its lien.

{¶ 13} Ingle and Robert Brdar filed objections to the magistrate's decision that were overruled by the trial court. The trial court adopted the magistrate's decision and granted judgment for Deutsche Bank against Ingle and issued a decree of foreclosure.

{¶ 14} Appellants filed this appeal, raising 16 assignments of error for review. Several of the assignments of error contain no argument and merely cross-reference other assignments of error; several reiterate arguments already raised under the first assignment of error; and several contain nothing more than conclusory assertions. Further, appellants do not cite any evidence, case law, or relevant portions of the record. We may disregard those assignments of error that fail to comply with the appellate rules. See App.R. 12(A)(2). Accordingly, we decline to address assignments of error 2–9, 11, and 13–15. See Appendix. We shall proceed to address the remaining assignments of error.

{¶ 15} Appellants first assignment of error provides as follows: “1. [Appellants] should [have] been granted judgment on their answer(s), counterclaim(s) and accompanying motion(s) to dismiss [Deutsche Bank’s] case.”

{¶ 16} Appellants raise several arguments under this assignment of error.

{¶ 17} First, they claim that Deutsche Bank is a Pennsylvania Corporation and never established standing to sue in Ohio. Our review reflects that Deutsche Bank National Trust Company filed this action acting as a trustee of a securitized loan. Deutsche Bank was not required to comply with the licensing requirements as stated in R.C. 1703.01 through R.C. 1703.31. See *Citibank, NA v. Eckmeyer*, Portage App. No. 2008-P-0069, 2009-Ohio-2435.

{¶ 18} Second, appellants argue that Deutsche Bank lacked standing to bring the action on April 10, 2008. The real party in interest in a foreclosure action is the current holder of the note and mortgage. *Everhome Mtge. Co. v. Rowland*, Franklin App. No. 07AP-615, 2008-Ohio-1282. Although Deutsche Bank did not record the assignment of rights to the mortgage until after the complaint was filed, the record shows that the mortgage was assigned to Deutsche Bank on March 1, 2008. Deutsche Bank also filed an allonge of the note, as well as affidavits verifying that it was the holder of the note and

mortgage. Accordingly, Deutsche Bank was the real party in interest at the time the lawsuit was filed.²

{¶ 19} Third, appellants state that Nick Brdar was an unnecessary party to the lawsuit. Nick Brdar is not a party to this appeal, and appellants have no standing to raise this issue on his behalf. Further, insofar as misjoinder is alleged, Civ.R. 21 clearly states that “misjoinder of parties is not ground for dismissal of an action.”

{¶ 20} Fourth, appellants argue that Deutsche Bank failed to appear for the default hearing and that the attorney who appeared on its behalf was not the attorney of record. Our review shows that the first default hearing of which appellants are complaining was continued. Thus, any error caused by the appearance of substitute counsel for Deutsche Bank was harmless. Further, insofar as the motion for default judgment did not pertain to appellants, they lack standing to raise any issues pertaining thereto.

{¶ 21} Fifth, appellants claim that Robert Brdar’s second mortgage should have been given priority over Deutsche Bank’s lien. Appellants argue that Robert Brdar’s second mortgage should take precedence because Deutsche Bank

² This case is distinguishable from *Wells Fargo Bank, N.A. v. Jordon*, Cuyahoga App. No. 91675, 2009-Ohio-1092, relied upon by appellants at oral argument. In that case, the mortgage was not assigned to Wells Fargo Bank until after the complaint was filed; therefore, Wells Fargo Bank was not a real party in interest on the date the action was brought against Jordon. Here, the mortgage, albeit not yet filed, was assigned to Deutsche Bank before the lawsuit was filed, making Deutsche Bank the real party in interest.

did not file the assignment of rights to the mortgage until April 29, 2008. However, Deutsche Bank obtained its interest in the note and the mortgage by assignment. As an assignee of the note and mortgage, Deutsche Bank stood in the place of its assignor and succeeded to all the rights and remedies of the latter. See *EMC Mtge. Corp. v. Jenkins*, 164 Ohio App.3d 240, 250, 2005-Ohio-5799; *Homecomings Financial Network v. Oliver*, Hamilton App. No. C-020625, 2003-Ohio-2668. Accordingly, Deutsche Bank's lien was superior in priority to the second mortgage of Robert Brdar.

{¶ 22} Sixth, appellants argue that they never received Deutsche Bank's motion for default judgment or its motion for summary judgment. They also state that they never received the magistrate's decision. They apparently claim that service was sent to an address other than the address of the subject property, which was ordered to be the address of record at the time of the default hearing. Both of Deutsche Bank's motions, which were filed prior to the default hearing, contain an attached certificate of service indicating service was made on all parties or their counsel of record by regular U.S. mail. "A presumption of proper service exists when the record reflects that the Civil Rules pertaining to service of process have been followed. This presumption may only be rebutted by producing sufficient evidence, such as an affidavit, that the responding party never received service." (Internal citations and quotations omitted.) *JP Morgan Chase Bank v. Ritchey*, Lake App. No. 2006-L-247, 2007-Ohio-4225. Appellants

never presented any evidence that they failed to actually receive service of the motions. With respect to the magistrate's decision, the record reflects that the clerk's office issued notice of the decision. Also, appellants filed objections to the decision. Accordingly, from the record before us, proper service can be presumed to have occurred.

{¶ 23} Finally, appellants make conclusory assertions that Deutsche Bank failed to prove its case, that the complaint should have been dismissed, and that judgment should have been granted to appellants on their counterclaim.³ We decline to address such unsupported claims.

{¶ 24} Appellants' first assignment of error is overruled.

{¶ 25} Appellants' tenth, twelfth, and sixteenth assignments of error challenge the trial court's decision to grant summary judgment in favor of Deutsche Bank. The assigned errors provide as follows:

{¶ 26} "10. [Appellants] never got a chance to have their issues of material fact and accompanying law heard."

{¶ 27} "12. Because [appellants] never got their day in court, the fact that [Deutsche Bank's] mortgage involved fraud in the inducement was not properly addressed."

³ The counterclaim made the broad assertions that the complaint was "wrongfully, purposely, and fraudulently filed" and that appellants had "endured great emotional pain, stress, and embarrassment and hardship."

{¶ 28} “16. The findings in the magistrate’s decision were incorrect and improper, and said findings were improperly used against [appellants]. * * *”⁴

{¶ 29} Under these assignments of error, appellants complain that an oral hearing was not conducted with respect to the material issues in the case, that they were not permitted to respond to the motion, and that judgment should not have been granted against them.

{¶ 30} This court reviews a trial court’s grant of summary judgment de novo. *Ekstrom v. Cuyahoga Cty. Community College*, 150 Ohio App.3d 169, 2002-Ohio-6228. Before summary judgment may be granted, a court must determine that “(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party.” *State ex rel. Dussell v. Lakewood Police Dept.*, 99 Ohio St.3d 299, 300-301, 2003-Ohio-3652, citing *State ex rel. Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 191, 1996-Ohio-326. The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107. If the movant

⁴ The sixteenth assignment of error also challenges service of the magistrate’s decision. This argument was addressed under the first assignment of error.

meets this burden, summary judgment will be appropriate if the nonmovant fails to establish the existence of a genuine issue of material fact. *Id.* at 293.

{¶ 31} Generally, an oral hearing is not required on a motion for summary judgment. See *Hooten v. Safe Auto Ins. Co.*, 100 Ohio St.3d 8, 2003-Ohio-4829. Further, a trial court need not notify the parties of the date of consideration of a motion for summary judgment or the deadlines for submitting briefs and Civ.R. 56 materials if a local rule of court provides sufficient notice of the hearing date or submission deadlines. *Id.* at 17.

{¶ 32} In this case, the record does not reflect that any party requested an oral hearing on the motion for summary judgment. Pursuant to Loc.R. 11(I) of the Cuyahoga County Common Pleas Court, the court could hear the matter on the briefs and accompanying evidentiary materials without oral argument. Further, the rule provides adequate notice of the submission deadlines for summary judgment motions and opposition briefs.

{¶ 33} Deutsche Bank's motion for summary judgment was filed on July 25, 2008. Deutsche Bank supported the motion with affidavits showing that it was the holder of the note and a valid first mortgage on the property, that the mortgage was in default and the debt had been accelerated, and that there was a balance of \$79,639.89 due and owing with interest thereon. Appellants never filed a brief in opposition to the motion, and despite making appearances in court, they never requested an extension of time to file an opposition brief.

Further, they never provided any evidence in opposition to establish the existence of any material issues of fact. See Civ.R. 56. Also, they offered no proof of their affirmative defenses or counterclaim. Accordingly, Deutsche Bank was entitled to judgment as a matter of law.

{¶ 34} Appellants' tenth, twelfth, and sixteenth assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
LARRY A. JONES, J., CONCUR

APPENDIX

{¶ 35} The assignments of error we decline to address pursuant to App.R. 12(A)(2) include the following:

{¶ 36} “2. [Appellants] and Nick Brdar were improperly joined as defendants. A quit claim deed had given all of Nick Brdar’s rights to Robert A. Brdar. Nick Brdar was an unnecessary party to the lawsuit.”

{¶ 37} “3. [Deutsche Bank] and the court improperly interpreted the use of judicial process and procedure. * * * [Deutsche Bank] had no standing to sue Ingle on April 10, 2008. * * *.”

{¶ 38} “4. [Deutsche Bank] used wrong or improper application of statutory and case law.”

{¶ 39} “5. [Deutsche Bank] and/or the court improperly denied [Robert Brdar’s] and/or Ingle’s right(s), title(s) and interest(s) in the property * * *.”

{¶ 40} “6. [Deutsche Bank] made improper service on [appellants]. * * *.”

{¶ 41} “7. [Deutsche Bank] and the court were both involved with improper motion resolution. * * *.”

{¶ 42} “8. [Deutsche Bank] never showed up for their first default hearing but attorney Susan Mandryk did. * * * [Deutsche Bank] improperly used counsel.”

{¶ 43} “9. Material issues and/or facts were not addressed or decided properly by the court. [Appellants] never got [Deutsche Bank’s] motion for summary judgment. Therefore, [appellants] could not timely answer said motion. Ingle never received the magistrate’s decision. [Deutsche Bank’s] memorandum

in support of [its] reply in support of the magistrate's decision was not legally correct and should be null and void. [Appellants] never got their day in court."

{¶ 44} "11. [Appellants] had liens fully or partially questioned/denied."

{¶ 45} "13. [Deutsche Bank] had no viable case."

{¶ 46} "14. No evidence was allowed to be presented by [appellants]."

{¶ 47} "15. No sale of 27811 Knickerbocker should be granted."