

[Cite as *Deutsche Bank Natl. Trust Co. v. Gardner* , 2010-Ohio-663.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92916

DEUTSCHE BANK NATIONAL TRUST CO.

PLAINTIFF-APPELLEE

vs.

THERASA Y. GARDNER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-580968

BEFORE: Gallagher, A.J., Blackmon, J., and Boyle, J.

RELEASED: February 25, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant, Therasa Y. Gardner, appeals the judgment of the Cuyahoga County Court of Common Pleas that granted a foreclosure and money judgment in favor of appellee, Deutsche Bank National Trust Company (“Deutsche Bank”). For the reasons stated herein, we affirm.

{¶ 2} Deutsche Bank filed a complaint for money, foreclosure, and other equitable relief against Gardner on January 5, 2006. Deutsche Bank alleged that it is the owner and holder of a promissory note and mortgage executed by Gardner and that Gardner was in default on the note. Deutsche Bank sought to foreclose on the property and sought to recover the unpaid balance on the note in the amount of \$113,208.89. Copies of the note and mortgage were attached to the complaint.

{¶ 3} Gardner filed an answer with general denials. She set forth several affirmative defenses, none of which raised the issue of standing. She also filed a counterclaim, in which she alleged that she did not receive various disclosures under the Truth in Lending Act.

{¶ 4} The matter proceeded to a bench trial. Deutsche Bank offered the testimony of Robert Padilla, the servicer of Gardner’s loan. He offered testimony concerning various documents, including the note, mortgage, and the assignment of the mortgage. The note and mortgage were issued by Argent Mortgage Company, LLC (“Argent”) and were executed by Gardner in

September 2003. The assignment of the mortgage from Argent to Deutsche Bank was executed on December 9, 2005. These documents were admitted to the record over a hearsay objection. After the documents were admitted, Gardner made a motion for a directed verdict, claiming that there was no evidence that Deutsche Bank owned the loan. The trial court denied the motion.

{¶ 5} The trial court ultimately granted judgment in favor of Deutsche Bank on the complaint and the counterclaim. Gardner filed this appeal. She has raised four assignments of error for our review. We begin by addressing her third and fourth assignments of error, which provide as follows:

{¶ 6} “[3.] The trial court erred in admitting plaintiff’s exhibits 24 and 53 documents as business records factual evidence.”

{¶ 7} “[4.] The trial court erred in admitting appellee’s exhibit 53, a copy of an assignment from Argent to Deutsche Bank, without a foundation being laid pursuant to Evid.R. 803(6).”

{¶ 8} The admission of evidence lies within the broad discretion of the trial court. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 239, 2005-Ohio-4787, 834 N.E.2d 323. A reviewing court will uphold an evidentiary decision absent an abuse of discretion that has affected the substantial rights of the adverse party or is inconsistent with substantial justice. *Id.*

{¶ 9} Initially, we recognize that the record on appeal was supplemented with the full transcript. A review of the transcript reflects that Gardner did not object to the testimony of Padilla, the servicer of Gardner's loan, at the time his testimony concerning the documents was elicited. Gardner only objected to the loan documents when they were offered for admission into evidence.

{¶ 10} We find that even if there was an error with the admission of the documents, the testimony offered by Padilla presented the facts necessary for the trial court to find that Deutsche Bank was the owner and holder of the mortgage and the note. Gardner did not object to this testimony on either foundational or hearsay grounds. As the servicer of Gardner's loan, Padilla was certainly qualified to testify regarding the content of the documents in Gardner's file, with which he was personally familiar. See *Norwest Bank Minnesota, N.A. v. Saunders*, Erie App. No. E-03-007, 2004-Ohio-6883.

{¶ 11} Insofar as no objection was raised to Padilla's testimony, we find an absence of plain error. Further, Gardner waived her right to raise errors concerning Padilla's testimony for the first time on appeal. See *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43, 322 N.E.2d 629.

{¶ 12} A review of the record reflects that Gardner signed the note and the mortgage. The testimony of Padilla established that he was involved with the servicing of Gardner's loan, that he received a complete copy of the

origination file, and that he needed a copy of the note, mortgage and assignment to properly service the file. He further testified that there was an assignment transferring the mortgage to Deutsche Bank and that a copy of the assignment was kept in the servicing file and that it “shows the transfer [of] rights between lenders and now Deutsche actually owns the note mortgage.” Gardner was provided with the opportunity to cross-examine Padilla regarding the documents, and she points to no evidence in the record to establish that the documents are not valid.

{¶ 13} Upon our review, we find that the admission of the documents in question is not inconsistent with substantial justice and did not affect the substantial rights of Gardner. Accordingly, we do not find the trial court committed an abuse of discretion with respect to their admission. Gardner’s third and fourth assignments of error are overruled.

{¶ 14} Gardner’s first and second assignments of error provide as follows:

{¶ 15} “[1.] The trial court erred in finding appellee Deutsche Bank owner of appellant’s promissory note and mortgage.”

{¶ 16} “[2.] The trial court erred in finding Argent Mortgage transferred the note and mortgage to Deutsche.”

{¶ 17} Initially, we recognize that Gardner did not raise the issue of standing as an affirmative defense and did not dispute the assignment of the

note and mortgage from Argent to Deutsche Bank. As such, she waived the issue and is precluded from raising it on appeal. See *First Horizon Home Loan Corp. v. Roberts*, Cuyahoga App. No. 92367, 2010-Ohio-60.

{¶ 18} However, insofar as Gardner challenges whether Deutsche Bank established that it had the right to enforce the note, we shall consider this issue. The real party in interest in a foreclosure action is the current holder of the note and mortgage. *Deutsche Bank Natl. Trust Co. v. Ingle*, Cuyahoga App. No. 92487, 2009-Ohio-3886. Gardner argues that Deutsche Bank failed to offer evidence that Argent lawfully transferred possession of the note in accordance with R.C. 1303.22 and related provisions.

{¶ 19} The record herein shows that the mortgage was assigned to Deutsche Bank on December 9, 2005. The assignment purports to transfer and assign all “right, title and interest in the mortgage and the note secured thereby.” Gardner claims that under Ohio law, a note cannot be transferred by assignment and that an endorsement on the note was required.

{¶ 20} In this case, the note does not reflect an endorsement by the transferor, Argent. In the absence thereof, Gardner states that there was no evidence that Deutsche Bank was a “holder” of the note with a right to enforce the note and an entitlement to payment thereon.

{¶ 21} We recognize that a promissory note, as a negotiable instrument, is freely transferable and provides the holder with the right to demand money

or bring suit to recover money on the note. See R.C. 1303.22(A) and 1303.31.

“Under Ohio law, the right to enforce a note cannot be assigned-instead, the note must be negotiated in accord with Ohio’s version of the Uniform Commercial Code. See Ohio Rev.Code § 1301.01 et seq. and § 1303.01 et seq.; see also U.C.C. Article 3. An attempt to assign a note creates a claim to ownership, but does not transfer the right to enforce the note.” *In re Wells* (N.D. Ohio 2009), 407 B.R. 873.

{¶ 22} In this case, an unendorsed copy of the note was offered. Therefore, the note itself was insufficient to show that Deutsche Bank was a “holder” of the note. However, the court could consider extrinsic evidence in the record to determine whether Argent transferred the note to Deutsche Bank. See *F.D.I.C. v. Cutler* (Conn.Super.,1997), 18 Conn.L.Rptr. 640. Here the assignment of the note and mortgage to Deutsche Bank, together with the servicing of the documents on behalf of Deutsche Bank, demonstrated that Argent transferred and assigned to Deutsche Bank all of its rights and privileges to the note. Also, Padilla testified that Deutsche Bank was the holder of the note and mortgage. Upon this record, the trial court could properly conclude that Deutsche Bank was the holder of the note with the right to enforce payment thereon. We further recognize that this issue was not raised in the trial court.

{¶ 23} Accordingly, Gardner’s first and second assignments of error are

overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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, ADMINISTRATIVE JUDGE

PATRICIA ANN BLACKMON, J., and
MARY J. BOYLE, J., CONCUR