[Cite as *Wells Fargo Bank, N.A. v. Todt,* 2011-Ohio-1376.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95558

**WELLS FARGO BANK, N.A.,
AS TRUSTEE**

PLAINTIFF-APPELLEE

vs.

PATRICK TODT, ET AL.

DEFENDANTS

(Appeal By David Todt)

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-668596

BEFORE: Sweeney, J., Kilbane, A.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 24, 2011

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JAMES J. SWEENEY, J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records, and briefs of counsel.

{¶ 2} Appellant, David Todt, an intervening party in the foreclosure action instituted by appellee, Wells Fargo Bank, N.A. ("Wells Fargo"), against defendant, Patrick Todt, appeals the grant of summary judgment in favor of Wells Fargo. Appellant argues there are unresolved genuine issues that make summary judgment inappropriate. We disagree.

{¶ 3} On April 27, 2005, through a valid power of attorney ("POA"), Judith N. Baishnab, appellant's daughter, executed a quitclaim deed on appellant's behalf transferring ownership of a home and property to appellant's son, Patrick. On May 10, 2005, Patrick executed a note in the amount of $150,000, which was secured by a mortgage on this property to W.M.C. Mortgage Corporation ("WMC"). WMC assigned the mortgage to Wells Fargo on September 19, 2007, and Wells Fargo continues to be the holder of the note and mortgage. Approximately one year after the loan was obtained, Patrick defaulted. Wells Fargo instituted a foreclosure action on August 22, 2008.

{¶ 4} After various default proceedings and motions for leave to plead, appellant was granted leave to intervene and filed an answer claiming that Wells Fargo did not hold a valid mortgage on the property. Appellant alleged that the power of attorney that granted Judith the power to transfer title of the property to Patrick was not recorded in the county recorder's office as required by R.C. 1337.04. Therefore, appellant argued, the deed did not transfer the property to Patrick, and he had no authority to mortgage the premises.

{¶ 5} Wells Fargo submitted a motion for summary judgment, which was opposed by appellant. On June 8, 2010, the trial court granted Wells Fargo's motion, finding that Patrick was the owner of the property and that the mortgage was valid and enforceable despite the fact that the power of attorney had not been recorded. Appellant timely appealed.

Law and Analysis

{¶ 6} In appellant's sole assigned error, he argues that "[t]he trial court erred and abused its discretion when it granted summary judgment to appellee because Ohio Revised Code §1337.04 requires a recording of a power of attorney for the conveyance of an interest in real estate. Where a power of attorney has not been recorded, a deed signed in conjunction with such power of attorney is not effective as a valid conveyance."

{¶ 7} Although appellant claims that the trial court abused its discretion, we note that the proper standard for reviewing a grant of summary judgment is de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ.R. 56(C). "The reviewing court evaluates the record * * * in a light most favorable to the nonmoving party. * * * [T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul* (1990), 71 Ohio App.3d 46, 50, 593 N.E.2d 24.

{¶ 8} Appellant rests his argument on the proposition that compliance with R.C. 1337.04 must be strictly followed or a conveyance of real property accomplished in accordance with an otherwise valid power of attorney will have no effect. This section states, "[a] power of attorney for the conveyance, mortgage, or lease of an interest in real property must be recorded in the office of the county recorder of the county in which such property is situated, previous to the recording of a deed, mortgage, or lease by virtue of such power of attorney."

{¶ 9} The only modern Ohio state case that offers guidance is *Henry v. BancOhio Natl. Bank of Columbus* (1991), 74 Ohio App.3d 209, 212, 598 N.E.2d 766. In this case, the Tenth District held that "[t]here is no question that the statute would be mandatory as it would obtain to third parties not

privy to the proceedings since the primary purpose of the recording statute is to provide notice to third parties of the utilization of a power of attorney in the execution of a lien on the premises. Obviously, the need for notice is not required when the party seeking to invoke the sanctions implied from R.C. 1337.04 is the sole beneficiary of the protections afforded by that statute. Although R.C. 1337.04 previously cited and found to be mandatory by the trial court is relied upon by the plaintiff, there is no question that the mortgage in this case was for the sole benefit of the plaintiff. *As between the parties*, the mortgage is valid and enforceable. The recording statute, R.C. 1337.04, was not enacted for the benefit of mortgagors, but for the protection of third persons who might acquire legal interests in the property. (Emphasis sic.) *Fosdick v. Barr* (1854), 3 Ohio St. 471; *Van Thorniley v. Peters* (1875), 26 Ohio St. 471."

{¶ 10} A similar result was reached in *Diehl v. Stine* (1886), 1 Ohio C.D. 287, 1 Ohio C.C. 515, where the circuit court found that even though a POA was not recorded, the purchaser of the property demonstrated its existence and held "the deed, executed in pursuance thereof, was such a deed as conveyed the title to this property * * *." Id. at 3. The court found that, as between the parties, the deed was valid even though the POA was not recorded.

{¶ 11} "Ohio case law holds that where a power of attorney is executed as required by law, neither of the parties executing it nor their heirs can defeat the title by proof that the power of attorney is not recorded." *Imperial House Motel of Canton, Ltd., v. Trident Fin. Corp. (In re Parke Imperial Canton, Ltd.)* (May 29, 1997), U.S. Bankruptcy Court, N.D. Ohio, No. 93-61004, citing *Lithograph Bldg. Co. v. Watt* (1917), 96 Ohio St. 74, 81, 117 N.E. 25; *Henry,* supra, at 212.

{¶ 12} In an action to quiet title involving a mining claim before the Colorado Supreme Court, that court held that an unrecorded power of attorney, which was required to be recorded at the time of conveyance, did not defeat transfer of title where evidence demonstrated that the grantee under the deed subject to the unrecorded POA satisfied the intent of the parties and was in exclusive possession and otherwise exercised all the incidents of ownership. *Mulford v. Rowland* (1909), 45 Colo. 172, 100 P. 603. That court determined the original grantee held title superior to a later claimant who had asserted that the previous deed failed to transfer title based on the unrecorded POA. The original grantee was able to demonstrate the existence of a valid POA sufficient to pass title.

{¶ 13} Here, there is sufficient evidence that appellant executed a valid POA appointing his daughter as his attorney-in-fact. She then, at his direction, transferred the property to his son, Patrick. Appellant does not

deny this was so or that the POA was validly executed. Having transferred his property to his son via a validly executed POA, appellant cannot now complain that the transfer was void because the POA was not recorded. *Imperial House* at 6. The trial court properly found, as a matter of law, that Wells Fargo had a valid mortgage on the property because appellant had transferred the property to Patrick in 2005.

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.

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, A.J., and
SEAN C. GALLAGHER, J., CONCUR