[Cite as *U.S. Bank Natl. Assn. v. Lavelle*, 2015-Ohio-1307.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101729

U.S. BANK NATIONAL ASSOCIATION, ETC.

PLAINTIFF-APPELLEE

vs.

MARY L. LAVELLE, ET AL.

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-800578

BEFORE: Celebrezze, A.J., Keough, J., and Kilbane, J.

RELEASED AND JOURNALIZED: April 2, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Defendant-appellant, Mary Lavelle, et al., ("Mary") appeals from the judgment of the trial court granting summary judgment in favor of U.S. Bank National Association, as Trustee for Ownit Mortgage Loan Trust, Mortgage Loan Asset Backed Certificates, Series 2006-3 ("U.S. Bank"). After careful review of the record and relevant case law, we reverse the judgment of the trial court and remand for proceedings consistent with this opinion.

I. Procedural History

{¶2} On January 13, 2006, Daniel Lavelle, husband of Mary, individually executed a promissory note to Ownit Mortgage Solutions, Inc. ("Ownit"), or its transferee, in the amount of $199,500. As security for the note, Daniel and Mary executed a mortgage in favor of Ownit on the property located at 26784 Fairfax Lane, North Olmsted, Ohio. On January 24, 2006, the mortgage was recorded in the Cuyahoga County Recorder's Office.

{¶3} Subsequently, the note was specially indorsed to LaSalle Bank National Association, as trustee for Ownit Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series, 2006-3 ("LaSalle Bank").

{¶4} On February 16, 2007, LaSalle Bank filed a foreclosure action ("First Complaint") against Mary and Daniel following default and acceleration of the debt. The complaint alleged that $198,722.20 was due and owing with interest at the rate of 8.25%

per annum from August 1, 2006. While the First Complaint was pending, LaSalle Bank and Daniel entered into a Loan Modification Agreement, which amended and supplemented the terms of the original note and mortgage. The Loan Modification Agreement listed the new amount payable as $224,052.95. On September 20, 2007, the First Complaint was voluntarily dismissed by LaSalle Bank without prejudice.

{¶5} On April 10, 2008, MERS, as nominee for Ownit, executed an assignment of the mortgage to LaSalle Bank. On April 23, 2008, the assignment of the mortgage was recorded in the Cuyahoga County Recorder's Office.

{¶6} On December 9, 2008, Daniel passed away.

{¶7} On March 4, 2010, LaSalle Bank, filed a complaint for foreclosure ("Second Complaint"). The Second Complaint alleged default with a principal sum of $223,705.87 plus interest at a rate of 8% per annum from and after November 1, 2007. On March 30, 2011, the case was voluntarily dismissed by LaSalle Bank without prejudice.

{¶8} By allonge dated May 31, 2012, possession of the note was transferred by special indorsement to U.S. Bank from "U.S. Bank National Association, as successor trustee to Bank of America, National Association, as successor by merger to LaSalle Bank National Association, as trustee for Ownit, Mortgage Loan Asset-Backed Certificates, Series 2006-3."

{¶9} On January 31, 2013, U.S. Bank filed the instant foreclosure action. The complaint alleges default with the principal sum of $223,705.87 plus interest at the rate of

8% per annum from and after November 1, 2007. On March 15, 2013, Mary filed her answer, affirmative defenses, and counterclaims. Mary's counterclaims alleged frivolous conduct and fraud. On April 12, 2013, U.S. Bank filed a motion to dismiss Mary's counterclaims. On June 12, 2013, the trial court granted the motion and dismissed Mary's counterclaims with prejudice.

{¶10} On November 20, 2013, an assignment of the mortgage to U.S. Bank was recorded in the Cuyahoga County Recorder's Office.

{¶11} On January 8, 2014, Mary filed a motion for summary judgment arguing that U.S. Bank's claims were barred by the "double dismissal" rule under Civ.R. 41. U.S. Bank filed its brief in opposition on February 14, 2014. Mary's motion for summary judgment was denied on March 3, 2014. The court held that the "double dismissal" rule did not apply to the instant case because Daniel agreed to the Loan Modification Agreement that changed the terms of the original note and mortgage. Therefore, the Second Complaint was not based on the same note and mortgage involved in the First Complaint. The court explained, "the double dismissal rule only applies where all claims in the complaint arise from the same note, the same mortgage, and the same default and the note and mortgage have not been amended."

{¶12} On February 14, 2014, U.S. Bank filed a motion for summary judgment. Mary filed her brief in opposition on March 24, 2014. On
May 6, 2014, the magistrate granted summary judgment in favor of U.S. Bank. On June 24, 2014, the trial court adopted the magistrate's decision.

{¶13} Mary now brings this timely appeal, raising three assignments of error for review:

> I. The trial court erred in granting U.S. Bank's motion for summary judgment.
>
> II. The court's holding that "the note's contents are exactly the same in the 2010 note and the Note in this case" is contrary to fact and an abuse of discretion.
>
> III. The trial court erred when it overruled appellant's motion for summary judgment.

II. Law and Analysis

A. Standard of Review

{¶14} Pursuant to Civ.R. 56, summary judgment is appropriate when (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion and that conclusion is adverse to the nonmoving party.

{¶15} When moving for summary judgment, the moving party carries the initial burden of setting forth specific facts that demonstrate its entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996 Ohio 107, 662 N.E.2d 264 (1996). If the moving party fails to meet this burden, summary judgment is not appropriate; if the moving party meets this burden, summary judgment is appropriate only if the nonmoving party fails to establish the existence of a genuine issue of material fact. *Id*. at 293.

{¶16} To properly support a motion for summary judgment in a foreclosure action, a plaintiff must present "evidentiary-quality materials" establishing: (1) that the plaintiff is the holder of the note and mortgage or is a party entitled to enforce the instrument; (2) if the plaintiff is not the original mortgagee, the chain of assignments and transfers; (3) that the mortgagor is in default; (4) that all conditions precedent have been met; and (5) the amount of principal and interest due. *HSBC Bank USA, N.A. v. Surrarrer*, 8th Dist. Cuyahoga No. 100039, 2013-Ohio-5594, ¶ 16, citing *U.S. Bank, N.A. v. Adams*, 6th Dist. Erie No. E-11-070, 2012-Ohio-6253, ¶ 10.

B. Inconsistent Notes

{¶17} In her first assignment of error, Mary argues the trial court erred in granting summary judgment in favor of U.S. Bank where "U.S. Bank failed to present evidentiary quality materials establishing the chain of assignments and transfers and that it is the holder of the note or is a party entitled to enforce the instrument." Mary contends the special indorsement to LaSalle Bank on the note attached to the Second Complaint is inconsistent with the special indorsement to LaSalle Bank located on the note attached to the instant foreclosure complaint. Mary submits that the inconsistencies between the copies of the original note create an issue of material fact that must be resolved at trial.

{¶18} On review, it is evident that the Second Complaint filed by LaSalle Bank had attached to it a three-page-document purporting to be a copy of the original note signed by Daniel on January 13, 2006. On the bottom of the third page, just below Daniel's signature, was an assignment of the note by way of special indorsement to

LaSalle Bank. The indorsement was signed by Carmen Logan, "Funder on behalf of Ownit."

{¶19} Similarly, attached to U.S. Bank's complaint and motion for summary judgment in the instant case is a document also purporting to be a copy of the original note signed by Daniel on January 13, 2006. However, unlike the note attached to the Second Complaint, the exhibit consists of four pages and the assignment of the note by way of special indorsement to LaSalle Bank is contained on the fourth page. The indorsement is signed by Julie Linde, "Closer on behalf of Ownit." The third page of that document does not have the indorsement to LaSalle that was signed by Carmen Logan on behalf of Ownit.

{¶20} In arguing that the variances between the copies of the note are immaterial, U.S. Bank relies on this court's decision in *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, where we stated, "[t]he mere fact that there were two different copies of the note in the record — one with indorsements and one without — does not mandate a finding that one of those notes was 'unauthentic' or otherwise preclude summary judgment." *Id.* at ¶ 59.

{¶21} Worth noting, however, is the fact that this court did not find an issue of material fact in *Najar* because the foreclosing bank was able to reasonably explain, via affidavit, that the inconsistences between the note produced in the complaint and the note attached to its motion for summary judgment resulted from the bank's own clerical error, i.e. the bank mistakenly attached an outdated copy of the note, that was made before the

indorsement existed, to its complaint. In the case at hand, no such explanation for the inconsistent notes has been produced. Unlike the scenario presented in *Najar*, this is not a case where an old version of the note was accidently included in the record and could be easily explained as a clerical error. *See Wells Fargo Bank, N.A. v. Hammond*, 8th Dist. Cuyahoga No. 100141, 2014-Ohio-5270. Nor is this a case where the inconsistencies in the notes existed because additional indorsements had been made after the case had been filed. *See Chase Home Fin., LLC v. Dunlap*, 4th Dist. Ross No. 13CA3409, 2014-Ohio-3484. Instead, this case involves an undated special indorsement alleged to have been made on the "original note" prior to the filing of the Second Complaint in 2010, that has simply disappeared on the note submitted in the instant case. There has been no explanation for the inconsistent versions of the note or the disappearance of the special indorsement signed by Carmen Logan.

{¶22} We recognize the trial court and U.S. Bank's position that, looking at the instant foreclosure action in a vacuum, there is no "inconsistent note scenario" because there has only been one note presented. However, in our view, ignoring or disregarding the contradicting note attached to the Second Complaint in 2010 would be unjust and would ask this court to turn a blind eye to the actions of financial institutions who have an obligation to conform with acceptable business practices and establish an unbroken chain of assignments prior to instituting a foreclosure action. Accordingly, this court will not ignore evidence that we believe effectively rebuts U.S. Bank's burden of proof under Civ.R. 56(C).

{¶23} There is no dispute, the record contains a subsequent special indorsement by way of allonge to U.S. Bank. However, due to the inconsistent and undated special indorsements from Ownit to LaSalle, this court is unable to effectively determine the chain of assignments and ultimately the legitimacy of the assignment of the note to U.S. Bank. Ordinarily, the original note does not need to be produced in order to grant summary judgment. However, as applied to the circumstances of this case, without production of the original note, we have no ability to conclusively determine which version of the note is in fact a true and accurate copy of the original Note. Evid.R. 1003 ("A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."). Accordingly, we find genuine issues of material fact that cannot be resolved via summary judgment.

{¶24} Mary's first assignment of error is sustained. Based on our disposition of Mary's first assignment of error, her remaining assignments of error are moot.

III. Conclusion

{¶25} The trial court erred in granting summary judgment in favor of U.S. Bank. U.S. Bank has submitted two inconsistent notes that have each, at different times, purported to be true and accurate copies of the original note signed by Daniel Lavelle on January 13, 2006. Because Mary has adequately rebutted U.S. Bank's burden to establish the chain of assignments and transfers, we conclude that genuine issues of material fact remain.

{¶26} Judgment reversed and remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee 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.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

KATHLEEN ANN KEOUGH, J., and
MARY EILEEN KILBANE, J., CONCUR
KEY WORDS:
#101729 *U.S. National Bank v Mary Lavelle, et al*

Foreclosure; trust; note; mortgage; inconsistent; summary judgment' Civ. R. 56; holder; chain of assignments. The trial court erred in granting summary judgment in favor of foreclosing party where the bank has submitted two inconsistent notes and has not provided an explanation for the inconsistency. The bank did not establish the chain of assignments and transfers.