

[Cite as *CitiMortgage, Inc. v. Evans*, 2015-Ohio-1384.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
No. 101882

---

**CITIMORTGAGE, INC.**

PLAINTIFF-APPELLEE

vs.

**IRENE EVANS, ET AL.**

DEFENDANTS-APPELLEES

**[APPEAL BY SUSAN M. GRAY,**

**DEFENDANT-APPELLANT]**

---

**JUDGMENT:**  
**AFFIRMED**

---

Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-13-811674

**BEFORE:** McCormack, J., E.A. Gallagher, P.J., and E.T. Gallagher, J.

**RELEASED AND JOURNALIZED:** April 9, 2015

**FOR APPELLANT**

Thomas C. Loepp, Esq.  
1865 Arndale Rd., Suite B  
Stow, OH 44224

Susan M. Gray, pro se  
Ohio Savings Bank Building  
22255 Center Ridge Road, Ste. 210  
Rocky River, OH 44116

**ATTORNEYS FOR APPELLEES****For Citimortgage, Inc.**

Barbara A. Borgman  
602 Main Street  
Suite 500  
Cincinnati, OH 45202

Harry W. Cappel  
John C. Greiner  
Graydon Head & Ritchey L.L.P.  
1900 Fifth Third Center  
511 Walnut Street  
Cincinnati, OH 45202

Joshua J. Epling  
Laurito & Laurito L.L.C.  
7550 Paragon Road  
Dayton, OH 45459

**For Citifinancial, Inc.**

Citifinancial, Inc.  
c/o Corporation System, Statutory Agent  
1300 East Ninth Street  
Cleveland, OH 44114

**For Cuyahoga County Clerk of Courts**

Timothy J. McGinty  
Cuyahoga County Prosecuting Attorney  
By: Kelli Kay Perk  
1200 Ontario Street  
Justice Center, 8th Floor  
Cleveland, OH 44113

**For Mark Evans, et al.**

Lee R. Kravitz  
4508 State Road  
Cleveland, OH 44109

**For Fairview Hospital**

Fairview Hospital  
c/o CT Corporation System  
1300 East Ninth Street  
Cleveland, OH 44114

**For Lakeside Villages of Olmsted Township**

Shannon M. McCormick  
Kaman & Cusimano, L.L.C.  
50 Public Square  
2000 Terminal Tower  
Cleveland, OH 44113

**For Ohio Department of Taxation**

Christine Kurilic  
150 East Gay Street, 21st Floor  
Columbus, OH 43215

**For United States of America**

Kent W. Penhallurick  
U.S. Attorney's Office  
Carl B. Stokes U.S. Courthouse  
801 W. Superior Ave., Suite 400  
Cleveland, OH 44113

TIM McCORMACK, J.:

{¶1} Defendant-appellant, Susan Gray, appeals from a judgment of the Cuyahoga County Court of Common Pleas court that granted summary judgment in favor of CitiMortgage, Inc. in a foreclosure action. For the following reasons, we affirm.

I

{¶2} In 2002, Irene and Mark A. Evans executed a promissory note payable to ABN AMRO Group, Inc. (hereafter “ABN”) for the amount of \$300,700. The loan was secured by a mortgage on a residential property in Olmsted Falls.

{¶3} Three years later, in 2005, the Evanses stopped making payments on the loan.<sup>1</sup> In 2006, ABN filed a foreclosure action against the Evanses. While the case was pending, in 2007, ABN merged with CitiMortgage.

{¶4} In defending against the foreclosure, the Evanses submitted evidence that Freddie Mac purchased the loan from ABN in 2002 and therefore ABN was not the “owner” of the loan when the complaint was filed. ABN ultimately dismissed the case without prejudice in 2010.<sup>2</sup>

---

<sup>1</sup>The Evanses subsequently filed a Chapter 7 bankruptcy and ultimately received a Chapter 7 discharge.

<sup>2</sup>The prior foreclosure case was the subject of three appeals to this court. *See ABN AMRO Mtge. Group, Inc. v. Evans*, 8th Dist. Cuyahoga No. 90499, 2008-Ohio-4223, *ABN AMRO Mtge. Group, Inc. v. Evans*, 8th Dist. Cuyahoga No. 96120, 2011-Ohio-5654, and *ABN AMRO Mtge. Group, Inc. v. Evans*, 8th Dist. Cuyahoga No. 98777, 2013-Ohio-1557.

{¶5} After ABN dismissed the case, in 2011, the Evanses executed a mortgage for \$74,045.85 in favor of Susan Gray, the attorney who represented them in that foreclosure action.

{¶6} In 2013, CitiMortgage filed the instant foreclosure case. CitiMortgage alleged that (1) it was the holder of the subject note and mortgage, (2) the Evanses were in default, (3) all conditions precedent have been met, and (4) \$266,383.52 plus interest at 6.375% per annum from November 2005 was due on the note.

{¶7} While the note attached to the previous case contained no indorsement, the note attached to the instant complaint contained a blank indorsement executed by ABN.

{¶8} Subsequently, CitiMortgage moved for summary judgment and filed an affidavit from a vice president of CitiMortgage in support of its motion.

{¶9} Gray, as the holder of a junior mortgage, opposed CitiMortgage's summary judgment.<sup>3</sup> She also moved for a partial summary judgment seeking a dismissal of the complaint, claiming CitiMortgage lacked standing to foreclose. Gray alleged that CitiMortgage was neither the holder nor the owner of the note because the loan was sold to Freddie Mae. Gray also claimed the note attached to the instant complaint was inaccurate, pointing out the note attached to the prior complaint did not have an indorsement while the note attached to the instant complaint contained a blank indorsement from ABN. Moreover, Gray questioned the validity of the blank indorsement by ABN because CitiMortgage produced the note with the ABN indorsement

---

<sup>3</sup>The Evanses did not file a brief opposing CitiMortgage's motion for summary judgment.

only after ABN merged with CitiMortgage and ceased to exist. Gray also argued CitiMortgage had not submitted evidence showing it was in possession of the note.

{¶10} Addressing each of the issues raised, the magistrate issued a decision finding that CitiMortgage had the right to enforce the note and mortgage. The court adopted the magistrate's decision, granting CitiMortgage's motion for summary judgment and denied Gray's motion for partial summary judgment. Gray appealed the trial court's judgment to this court.

## II

{¶11} On appeal, Gray raises two assignments of error for our review. She argues the trial court erred in granting summary judgment in favor of CitiMortgage and also erred in not granting partial summary judgment in her favor. We address these claims together.

{¶12} We review the trial court's judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶13} Summary judgment is appropriate when: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party. Civ.R. 56(C).

{¶14} Once a moving party satisfies its burden, the nonmoving party may not rest upon the mere allegations or denials of the moving party's pleadings, rather, it has a

reciprocal burden of setting forth specific facts demonstrating that there is a genuine triable issue. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449, 663 N.E.2d 639 (1996).

{¶15} A motion for summary judgment in a foreclosure action must be supported by 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 bank 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. *Bank of Am., N.A. v. Sweeney*, 8th Dist. Cuyahoga No. 100154, 2014-Ohio-1241, ¶ 8.

{¶16} In a foreclosure action, the current holder of the note and mortgage is the real party in interest. *Wells Fargo Bank v. Stovall*, 8th Dist. Cuyahoga No. 91802, 2010-Ohio-236. Under R.C. 1303.31, a “holder” is entitled to enforce an instrument. Notably, a person may be a “person entitled to enforce” an instrument even though the person is not the “owner” of the instrument. *U.S. Bank, N.A. v. Coffey*, 6th Dist. Erie No. E-11-026, 2012-Ohio-721, ¶ 20 (“because a promissory note is transferred through the process of negotiation, ownership is not a requirement for enforcement of the note”). As defined in R.C. 1301.201(B)(21)(a), a “holder” includes a person in possession of a negotiable instrument that is payable to bearer. Pursuant to R.C. 1303.25(B), when an instrument is indorsed in blank, the instrument becomes payable to bearer and may be negotiated by transfer of possession alone.



### III.

{¶17} The issue presented in this appeal is whether the evidence presented by CitiMortgage entitled it to summary judgment regarding its right to enforce the note. CitiMortgage argues that it is the holder of the note by virtue of its possession of the note indorsed in blank.

{¶18} To prove it is holder of the note, CitiMortgage submitted an affidavit by Adam Millay, a Document Control Vice President of CitiMortgage. He averred that he made the statements based upon his personal knowledge obtained from a personal review of the business records for the subject loan and from his personal knowledge about CitiMortgage's operation regarding the maintenance and retrieval of records in its record keeping systems. Millay averred that loan account records are made at or near the time of occurrence of each event affecting the account by persons with knowledge of the event and those records are maintained in the course of ordinary business activity.

{¶19} Millay also averred that the business records relating to the Evanses loan that he reviewed included the note, mortgage, and CitiMortgage's electronic servicing system. He specifically averred that CitiMortgage's records contain a note executed by the Evanses in the amount of \$300,700 secured by the Olmsted Falls real property, that CitiMortgage "holds the Note" and is the servicer for the loan. Attached to Millay's affidavit was a copy of the note indorsed in blank by ABN. Millay stated that the attached copy of the note was a true and accurate copy of the note as it appeared in CitiMortgage's business records.

{¶20} Under Civ.R. 56(E), affidavits supporting a motion for summary judgment must be made on personal knowledge. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, ¶ 26. “Personal knowledge” is “knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said. *Id.*

{¶21} Our review of Millay’s affidavit shows the affidavit was sufficiently based on personal knowledge for Civ.R. 56(E) purposes. *See Bank of Am., N.A. v. Pate*, 8th Dist. Cuyahoga No. 100157, 2014-Ohio-1078, ¶ 16; *see also Wells Fargo Bank v. Smith*, 12th Dist. Brown No. CA2012-04-006, 2013-Ohio-855, ¶ 6 (absent evidence to the contrary, an affiant’s statement that his affidavit is based on personal knowledge will suffice to meet the requirement of Civ.R. 56(E)).

{¶22} Gray argues Millay’s affidavit is insufficient to prove it is a holder of the note. Her argument is based on Millay’s statement that, based on his review of the records regarding the subject loan, CitiMortgage “holds” the note. Gray claims that Millay was required to expressly state that CitiMortgage possessed the original note. The trial court rejected this contention, and so do we.

{¶23} First, a person who “holds” a note includes one in possession of the note that is payable to bearer. R.C. 1301.201(B)(21)(a). Therefore, a person who holds a note necessarily possesses the note. The affiant’s use of the word “holds” instead of “possesses” does not render the affidavit fatally deficient, especially given the fact that

the affiant also stated that CitiMortgage's records "contains" the note executed by the Evanses.

{¶24} Second, the plaintiff in a foreclosure case is not required to present testimony specifically stating it holds the original note in order to prove its right to enforce the note. *Bank of Am., N.A. v. Merlo*, 11th Dist. Trumbull No. 2012-T-0103, 2013-Ohio-5266, ¶ 18. The Eleventh District explained that when the affiant did not qualify the statement by saying the bank only had possession of a copy of the note, the affiant was referring to the actual note itself, i.e., the original, rather than a copy of it. *Id.*

{¶25} While Millay averred that CitiMortgage was the holder of the note, Gray submitted no evidence to the contrary, other than alleging that Freddie Mac, not CitiMortgage, was the owner of the note, pointing to evidence showing that the loan was sold to Freddie Mac in 2002. As we note above, a person is entitled to enforce a note even though the party seeking to enforce a note is not the owner of the note. *Coffey, supra*. See also *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 58. CitiMortgage, as the current holder of the note, had the right to enforce the note.

{¶26} Finally, the fact there were two different copies of the note — the note submitted in the prior foreclosure case did not have an indorsement while the note submitted in the instant case was indorsed in blank by ABN — does not refute the holder status of CitiMortgage. As the trial court observed, if the blank indorsement was proper, CitiMortgage, as one in possession of a note indorsed in blank, was the holder and

entitled to enforce. If, on the other hand, the note was not indorsed (either because it had no indorsement or the blank indorsement by ABN was somehow defective), CitiMortgage would still be entitled to enforce the note, because it was the successor by merger to the original payee ABN. *Bank of Am., N.A. v. Harris*, 8th Dist. Cuyahoga No. 99272, 2013-Ohio-5749, ¶ 18 (after merger, the merged company has the ability to enforce a contract as if the merged company had stepped in the shoes of the absorbed company and no further action is necessary to become a real party in interest).

{¶27} CitiMortgage has presented evidence showing the lack of a genuine issue of material fact regarding its entitlement to enforce the note. Furthermore, CitiMortgage, as the successor to the original mortgagee ABN, was entitled to enforce the mortgage. *Harris, supra*. The undisputed evidence shows the amount of \$266,383.52 plus interest was due on the note. Gray has not created a genuine issue of material fact precluding a finding of CitiMortgage's entitlement to foreclose.

{¶28} The judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

---

TIM McCORMACK, JUDGE

EILEEN A. GALLAGHER, P.J., and  
EILEEN T. GALLAGHER, J., CONCUR