

[Cite as *U.S. Bank Natl. Assn. v. Duvall*, 2015-Ohio-2275.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102156

U. S. BANK NATIONAL ASSOCIATION

PLAINTIFF-APPELLEE

vs.

DONITA DUVALL, ET AL.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-801070

BEFORE: Stewart, J., Celebrezze, A.J., and Blackmon, J.

RELEASED AND JOURNALIZED: June 11, 2015

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MELODY J. STEWART, J.:

{¶1} Appellant Donita Duvall appeals from the judgment of the trial court granting summary judgment and entering a decree of foreclosure in favor of appellee, U.S. Bank National Association (hereinafter, U.S. Bank). On appeal, Duvall argues that U.S. Bank did not present sufficient evidence of standing to support its motion for summary judgment. We disagree and affirm the decision of the trial court.

{¶2} On December 1, 2005, Duvall executed a promissory note in the amount of \$60,000 in favor of lender, American Equity Mortgage, Inc. To secure payment of the note, Duvall also executed a mortgage on property located on Lakeview Road in Cleveland.

{¶3} On May 16, 2014, after Duvall failed to make payments on the note, U.S. Bank filed a complaint in foreclosure against her, alleging that it was the holder of the note and mortgage, that the note was in default, and that the conditions of the mortgage had been broken. The complaint also alleged that the note had been accelerated after Wells Fargo, its servicing agent, had satisfied all conditions precedent to accelerate the note.

{¶4} U.S. Bank evidenced its holder status by attaching copies of the note and mortgage to the complaint. The note contained an allonge endorsing the note from American Equity Mortgage, Inc. to New Century Mortgage Corporation. The allonge also contained an endorsement in blank from New Century Mortgage Corporation. The mortgage attached to the complaint showed an assignment of the mortgage from American Equity Mortgage, Inc. to New Century Mortgage Corporation, which was executed on August 14, 2012. There was a second assignment of the mortgage executed on September 5, 2012, that evidenced an assignment from Century Mortgage Corporation over to U.S. Bank. Both assignments were recorded on September 7, 2012.

{¶5} After a failed attempt at resolving the matter through mediation, U.S. Bank filed a motion for summary judgment on May 16, 2014. The bank included in support of its motion the attached affidavit of Tarra S. Singletary, Vice President of Loan Documentation for Wells Fargo Bank, N.A., the servicing agent for U.S. Bank on the loan in question.

{¶6} In her affidavit, Singletary averred that she was Vice President of Loan Documentation with Wells Fargo Bank, N.A., which acts as servicing agent to U.S. Bank as Trustee for Securitized Asset Backed Receivables L.L.C. Trust 2006-NCI, Mortgage Pass-Through Certificates, Series 2006-NCI. Singletary testified that she was authorized to make the affidavit and competent to testify to the matters contained therein.

{¶7} Singletary went on to explain that in her position as Vice President of Loan Documentation, she was familiar with the business records maintained by Wells Fargo for the purpose of servicing mortgage loans, and that she acquired personal knowledge of the matters regarding Duvall’s foreclosure by examining relevant business records pertaining to her loan. Singletary then testified that at the time of filing the complaint, to the date of the affidavit, U.S. Bank has been in possession of the promissory note “either directly or through an agent,” and that U.S. Bank is “either the original payee of the promissory note or the promissory note had been duly endorsed” over to it. Singletary then averred that payments have not been made as required under the terms of the promissory note and mortgage, and that the account is due and owing in the amount of \$68,612.08, including principle and interest. Singletary also attached to her affidavit a copy of the note and mortgage, including the allonge evidencing the endorsement of the note and the documentation of assignment of the mortgage.

{¶8} After finding the affidavit sufficient to establish that U.S. Bank was entitled to judgment as a matter of law, the court granted its motion for summary judgment.

{¶9} In her sole assignment of error, Duvall¹ argues that the trial court erred in granting summary judgment because there exists a genuine issue of material fact as to whether U.S. Bank was the holder of the note and mortgage, thus having standing to sue in foreclosure.

¹ Although both Latasha Duvall and Leonard Brewer were also named as defendants in the foreclosure action, only Donita Duvall appeals the grant of the motion for summary judgment.

{¶10} Appellate courts review the grant of a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶11} Under Civ.R. 56(C), summary judgment is appropriate where (1) there is no genuine issue of material fact remaining to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) when viewing the evidence in the light most favorable to the nonmoving party, the court can come to but one conclusion which is adverse to the nonmoving party.

{¶12} On summary judgment, the moving party has the initial burden of setting forth specific facts that “demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.” *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the moving party fails to meet this burden, summary judgment is not appropriate; however, if the moving party meets this burden, the burden shifts to the nonmoving party to establish the existence of a genuine issue of material fact.

Wells Fargo Bank, N.A. v. Hammond, 2014-Ohio-5270, 22 N.E.3d 1140, ¶ 18 (8th Dist.), citing *id.* at 293. Once the burden has shifted, mere allegations or denials of the moving party’s pleadings are not sufficient to establish a genuine issue of material fact. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449, 663 N.E.2d 639 (1996).

{¶13} To 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.

{¶14} Affidavits are sufficient evidentiary quality material to support a motion for summary judgment. *See* Civ.R. 56(E). When submitting an affidavit in support of summary judgment it “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.” *Id.*

{¶15} Duvall first contends that Singletary’s affidavit was insufficient to support the motion for summary judgment because her claims, that she has personal knowledge of matters contained within the affidavit, are undermined by the fact that the affidavit did not establish what her job responsibilities entail, and certain statements made within the affidavit created a genuine issue of material fact.

{¶16} First, we note that there is no requirement that Singletary state within her affidavit what her job responsibilities entail. *See* Civ.R. 56(E). Rather, the affidavit must simply establish that she has personal knowledge of the facts she testifies to, and that she is competent to testify. *Id.* A simple statement averring these two criteria is generally sufficient to overcome that burden. *See Merchs. Natl. Bank v. Leslie*, 2d Dist. Clark No. 3072, 1994 Ohio App. LEXIS 159, *4–5, (Jan. 24, 1994), citing *State, ex rel, Corrigan v. Seminatore*, 66 Ohio St.2d 459, 423 N.E.2d 105 (1981). However, in certain cases, a statement that one is competent to testify may not be enough when “particular averments contained in an affidavit suggest that it is unlikely that the affiant has personal knowledge of those facts.” *Merchs. Natl. Bank* at *5.

{¶17} Where statements contained in the affidavit impair the claim to personal knowledge, something more than a conclusory averment that the affiant has personal knowledge and is competent to testify, is necessary. *Id.*

{¶18} On this point, Duvall contends that Singletary’s statements that “at the time of the filing of the complaint, and to date, U.S. Bank directly or through an agent, has been in possession of the promissary note,” and U.S. Bank was “either the original payee of the promissory note or the promissory note has been duly endorsed” over to it, shows that it is unlikely that she does in fact have personal knowledge of the facts in her affidavit. In her brief, Duvall states that “it is frankly elementary that a witness testifying upon her own personal knowledge would have neither the need nor the ability to speculate in the alternative regarding such facts.”

{¶19} While we agree that these statements may seem to undermine Singletary's claim of personal knowledge, whatever speculation these statements might engender is overcome by the fact that Singletary also states in her affidavit that she inspected the business records pertaining to the foreclosure and that her knowledge is based on that inspection. Thus, her affidavit does not simply contain an averment that she has personal knowledge, but also includes an explanation of where, and how, she obtained that knowledge. See *e.g.*, *Merchs. Natl. Bank*, 2d Dist. Clark No. 3072, 1994 Ohio App. LEXIS 159 at *4 (suggesting that personal inspection of the records provides proof of personal knowledge).

{¶20} Next, Duvall argues that even if Singletary did have personal knowledge of the documents through her inspection of the business records, her affidavit is still insufficient to establish U.S. Bank's standing, because the records attached to the affidavit do not contain any information about when U.S. Bank might have come into possession of the note, or whether it is even the current holder of the note. We find no merit to this argument either.

{¶21} The documents attached to Singletary's affidavit establish that New Century assigned the mortgage over to U.S. Bank on September 5, 2012. The documents also establish that this assignment was duly recorded two days later on September 7, 2012. Between the time of the recording and U.S. Bank's filing of the complaint in February 2014, no further assignments were made. This establishes that U.S. Bank, at least at the time of filing the complaint, had an interest in the mortgage. An interest in the mortgage is sufficient to establish standing to sue in foreclosure. *CitiMortgage, Inc. v. Patterson*, 8th Dist. Cuyahoga No. 98360, 2012-Ohio-5894, ¶ 21 (noting that either interest in the note *or* the mortgage is enough for a plaintiff to establish standing to sue in foreclosure at the pleading stage). At the summary judgment phase however, U.S. Bank had the obligation of also showing that it was the holder of the note. Here, U.S. Bank accomplished that obligation by showing the chain of endorsements on the allonge to the note. The chain of endorsements showed that New Century, the holder of the note before U.S. Bank, had endorsed the note in blank, thus making it bearer paper. As bearer paper, whoever is in possession of the note is imputed with holder status. Here, Singletary was able to aver, through her own inspection of the documents, that U.S. Bank was indeed in possession of this note at the time it filed its motion for summary judgment. Therefore this was sufficient evidence that U.S. Bank is the holder of the note, and Duvall has failed to satisfy the burden of establishing a genuine issue of material fact.

{¶22} 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 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.

MELODY J. STEWART, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
PATRICIA A. BLACKMON, J., CONCUR