

[Cite as *Bank of Am., N.A. v. Adams*, 2015-Ohio-675.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101056

BANK OF AMERICA, N.A.

PLAINTIFF-APPELLEE

vs.

DENISE L. ADAMS, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-12-793439

BEFORE: E.T. Gallagher, J., S. Gallagher, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: February 26, 2015

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Denise L. Adams (“Adams”), appeals the trial court’s order granting summary judgment in favor of plaintiff-appellee, MRF Ohio One, L.L.C. (“MRF”) on its foreclosure claim. She raises three assignments of error for our review:

1. The court erred in finding there was no issue of material fact as to the ownership of the promissory note and mortgage thus denying Ms. Adams due process.
2. The court erred in finding there was no issue of material fact and denied Ms. Adams due process when it failed to inquire upon plaintiff as to the validity of signatures of supporting documents.
3. The court erred when it determined there was no issue of material fact and denied Ms. Adams due process by not requiring plaintiff to submit history of payments.

We find no merit to the appeal and affirm the trial court’s judgment.

I. Facts and Procedural History

{¶2} In August 2008, Adams purchased a home in South Euclid, Ohio. To finance the purchase, Adams executed a promissory note payable to United Wholesale Mortgage (“United Wholesale”) in the amount of \$109,998. As security for the note, Adams executed a mortgage on the property located at 3843 Covington Road, South Euclid, Ohio. In October 2012, Bank of America, N.A. (“BANA”), filed a complaint in foreclosure against Adams, alleging she defaulted on the note by failing to make regular monthly payments. BANA attached copies of both the note and mortgage to the complaint.

{¶3} After BANA filed the complaint in foreclosure, MRF became the holder of the note and was substituted as the party plaintiff. Adams filed two pro se motions to dismiss that were denied. MRF filed a motion for summary judgment on the foreclosure claim. The trial court

granted the motion and entered a decree of foreclosure. Adams now appeals and raises three assignments of error.

II. Law and Analysis

A. Standard of Review

{¶4} We review an appeal from summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). The party moving for summary judgment bears the burden of demonstrating the absence of any genuine issue of material fact as to the essential elements of the case with evidence of the type listed in Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Summary judgment is appropriate when, after construing the evidence in a light most favorable to the party against whom the motion is made, (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made. Civ.R. 56(C); *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998).

{¶5} To prevail on a motion for summary judgment in a foreclosure action, the plaintiff must prove:

(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.

Deutsche Bank Natl. Trust Co. v. Najar, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 17; *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 20.

B. Standing

{¶6} In the first assignment of error, Adams argues that pursuant to *Schwartzwald*, BANA did not have standing to file a complaint in foreclosure against her. Adams contends there was insufficient evidence to establish that BANA was the real party in interest in either the promissory note or the mortgage on her home when it filed suit because the chain of assignments on these instruments from the original lender to BANA is “unclear.”

{¶7} A party commencing litigation must have standing to sue in order to invoke the jurisdiction of the common pleas court. *Schwartzwald* at ¶ 20. To have standing, a plaintiff must have a personal stake in the outcome of the controversy and have suffered some concrete injury that is capable of resolution by the court. *Tate v. Garfield Hts.*, 8th Dist. Cuyahoga No. 99099, 2013-Ohio-2204, ¶ 12; *Middletown v. Ferguson*, 25 Ohio St.3d 71, 75, 495 N.E.2d 380 (1986). Thus, lack of standing at the commencement of the lawsuit cannot be cured through an assignment prior to judgment; “[t]he lack of standing at the commencement of a foreclosure action requires dismissal of the complaint.” *Schwartzwald* at ¶ 37-40.

{¶8} Prior to *Schwartzwald*, 134 Ohio St.3d 13, 979 N.E.2d 1214, this court held that in order to have standing in a foreclosure action, the plaintiff must establish that “it owned the note *and* the mortgage when the complaint was filed.” (Emphasis added.) *Wells Fargo Bank v. Jordan*, 8th Dist. Cuyahoga No. 91675, 2009-Ohio-1092, ¶ 23. In *Schwartzwald*, the court concluded that the lender did not have standing to invoke the jurisdiction of the common pleas court because “it failed to establish an interest in the note *or* mortgage at the time it filed suit.” (Emphasis added.) *Schwartzwald* at ¶ 28. This statement implies that having an interest in either the note or the mortgage at the time the complaint is filed is sufficient to establish standing. However, the court did not expressly state that a plaintiff seeking foreclosure can establish standing by proving an interest in one or the other; it simply found that the lender in

that case had neither.

{¶9} The ambiguity inherent in the *Schwartzwald* court’s conclusion has caused a conflict among Ohio appellate districts.¹ Pursuant to *Schwartzwald*, the Tenth Appellate District held that, in order to have standing to commence a foreclosure action, the plaintiff must prove it was both the holder of the note and had an interest in the mortgage on the date it filed the complaint. *FV-I, Inc. v. Lackey*, 10th Dist. Franklin No. 13AP-983, 2014-Ohio-4944.

{¶10} In *CitiMortgage, Inc. v. Patterson*, 8th Dist. Cuyahoga No. 98360, 2012-Ohio-5894, 984 N.E.2d 392, we relied on *Schwartzwald* and held that a plaintiff seeking foreclosure “may establish its interest in the suit, and therefore have standing to invoke the jurisdiction of the court when, at the time it files its complaint of foreclosure, it either (1) has had a mortgage assigned *or* (2) is the holder of the note.” (Emphasis sic.) *Id.* at ¶ 21. Therefore, until the Ohio Supreme Court resolves this conflict, we are bound by this court’s precedent and hold that BANA had standing to commence this foreclosure action against Adams if it was either the holder of the note or had an interest in the mortgage at the time it filed the complaint. *Id.* See also *U.S. Bank Natl. Assn. v. Perry*, 8th Dist. Cuyahoga No. 99608, 2013-Ohio-3914, ¶ 9 (following *Patterson*.)

{¶11} In any event, in most cases the mortgage follows the note. Section 5.4(b) of Restatement of Law 3d, Property and Mortgages (1997) 380, states that the assignment of a mortgage, in conjunction with interlocking references in the mortgage and the note, transfers the note as well as well as the mortgage. See also *Bank of N.Y. v. Dobbs*, 5th Dist Knox No. 2009-CA-002, 2009-Ohio-4742, ¶ 17-41, *appeal not allowed*, 124 Ohio St.3d

¹ This issue has been certified to the Ohio Supreme Court for resolution. See *SRMOF 2009-1 Trust v. Lewis*, 138 Ohio St.3d 1492, 2014-Ohio-2021, 8 N.E.3d 962.

1444, 2010-Ohio-188, 920 N.E.2d 374 (holding that the assignment of the mortgage, without the express transfer of the note, is sufficient to transfer both the note and mortgage if the record indicates that the parties intended to transfer both the note and mortgage).

{¶12} Adams contends the chain of assignments from the original holder of the promissory note and mortgage is unclear, and that therefore BANA cannot establish that it was the holder of either the note or the mortgage when it filed suit. MRF, on the other hand, contends it had standing and is entitled to enforce the note because BANA was the holder of the note at the time it filed the complaint.² MRF also contends BANA had an interest in the mortgage at the time the complaint was filed.

{¶13} Pursuant to R.C. 2329.191, a petitioner seeking the sale of property in foreclosure must file a preliminary and final judicial report describing all the liens on the property. The judicial reports must be submitted on “a form that is approved by the department of insurance that is prepared and issued by a duly licensed title insurance agent on behalf of a licensed title insurance company or by a title insurance company that is authorized by the department of insurance to transact business in this state.” R.C. 2329.191(B). “[T]he purpose of the preliminary report is to establish the state of the record title to the underlying property as of the date of the initiation of the action.” *Fed. Home Mtge. Corp. v. Koch*, 11th Dist. Geauga No. 2012-G-3084, 2013-Ohio-4423, ¶ 31.

{¶14} The note in this case indicates the original lender, United Wholesale Mortgage, extended a loan to Adams for the purchase of the South Euclid property on August 27, 2008. The mortgage indicates that, at the time Adams executed the note, she simultaneously executed a

² No one disputes that MRF would be entitled to prosecute BANA’s claims as a substitute plaintiff after it acquired BANA’s alleged interest in Adams’s note. Adams only disputes whether BANA had standing to initiate this foreclosure action.

mortgage granting MERS, as nominee for United Wholesale Mortgage, a security interest in the property. According to the preliminary judicial report filed with the court, MERS assigned the mortgage to BANA by separate instrument dated September 27, 2011. This assignment was filed in the Cuyahoga County Recorder's Office under Instrument Number AFN 201110110387 on October 11, 2011.

{¶15} The final judicial report, also filed with the court, shows that on September 26, 2012, another assignment of mortgage was filed in the Cuyahoga County Recorder's Office under Instrument Number AFN 201210050705. The record shows that this second assignment was actually a "corrective assignment" filed to correct "missing nominee language on the assignment recorded on 10/11/11 Instr.# 201110110387." Both the original and corrective assignments indicate that MERS, as nominee for United Wholesale Mortgage, assigned the mortgage on Adams's home to BANA in October 2011.

{¶16} Further, BANA's loan servicer also provided an affidavit in which she attested that she had personal knowledge of Adams's loan based on her personal review of Adams's loan records, and that Adams defaulted on the loan by failing to make payments due for September 1, 2010. The affiant further averred that BANA had possession of the promissory note at the time it filed the complaint.

{¶17} As previously stated, BANA filed the complaint in this case, and MRF was later substituted as the party plaintiff after BANA transferred and assigned the note and mortgage to MRF. Therefore, the record clearly shows the chain of assignments from the original lender, United Wholesale Mortgage, to BANA, who commenced this foreclosure action. Moreover, both the original assignment, which was recorded in October 2011, and the corrective assignment, which was recorded in September 2012, were recorded before BANA filed its

complaint on October 12, 2012. And since the plaintiff in a foreclosure action need only establish either that it was the holder of the note or had an interest in the mortgage at the time the complaint was filed, we find that BANA, as the assignee of the mortgage, had standing to bring this foreclosure action against Adams when it filed its complaint.

{¶18} The first assignment of error is overruled.

Validity of Signatures

{¶19} In the second assignment of error, Adams argues she was denied due process of law because the court based the judgment in foreclosure on unverified signatures. She contends that because the signatures on the note and mortgage assignments were not verified, there was insufficient evidence upon which the court could render judgment.

{¶20} However, R.C. 1303.36 provides that signatures to an instrument are presumed genuine and authorized, absent evidence to the contrary. In other words, the signatures on negotiable instruments are presumed valid unless the defendant specifically denies their validity in his or her answer. *Dryden v. Dryden*, 86 Ohio App.3d 707, 621 N.E.2d 1216 (4th Dist.1993); *Bates & Springer, Inc. v. Stallworth*, 56 Ohio App.2d 223; 382 N.E.2d 1179 (8th Dist.1978). See also *Wells Fargo Bank, N.A. v. Goebel*, 2d Dist. Montgomery No. 25745, 2014-Ohio-472, ¶ 11. There was no evidence to rebut the presumptive validity of the signatures on the note and mortgage assignments in this case.

{¶21} Moreover, as previously explained, the judicial reports confirm that valid assignments of the mortgage were made and duly recorded. Therefore, verification of the signatures on those documents was unnecessary.

{¶22} The second assignment of error is overruled.

C. History of Payments

{¶23} In the third assignment of error, Adams contends the judgment in foreclosure violated her right to due process of law because the court did not require BANA or MRF to submit a history of Adams's mortgage payments. She also argues that BANA and MRF failed to produce any documentation showing that they are licensed to conduct business in Ohio.

{¶24} Due process requires both notice and an opportunity to be heard. *In re Thompkins*, 115 Ohio St.3d 409, 2007-Ohio-5238, 875 N.E.2d 582, ¶ 13. “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.*, quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

{¶25} Adams contends her right to due process was violated because the judgment in foreclosure was entered without evidence of her payment history. The court granted the judgment in foreclosure on MRF's motion for summary judgment. The record shows that Adams received notice of the motion for summary judgment and had an opportunity to respond to the motion. Moreover, MRF submitted an affidavit in support of its motion for summary judgment in which the affiant verified an attachment titled “Account Information Statement.” This “Account Information Statement” shows the amount Adams owed on the note from the date of default on September 1, 2010. The statement also showed the total amount of unpaid principal, the interest accrued, and the amount of payments missed since the date of default, as well as the escrow payments for property taxes, filing fees, and court costs. The record clearly establishes that Adams had notice of the foreclosure claim against her and had an opportunity to defend against that claim. Therefore, we find no due process violation.

{¶26} Finally, Adams’s argument that neither BANA nor MRF had a license to conduct business in Ohio is also without merit. “In general, foreign corporations must be licensed to do business in the state of Ohio if they ‘transact business in this state.’” *Bosl v. First Fin. Statement Fund I*, 8th Dist. Cuyahoga No. 95464, 2011-Ohio-1938, ¶ 16, quoting *First Merit Bank v. Washington Square Ent.*, 8th Dist. Cuyahoga No. 88798, 2007-Ohio-3920, ¶ 11; R.C. 1703.03. R.C. 1703.29(A) provides that “‘a foreign corporation that ‘should have obtained’ a license to do business in Ohio may not ‘maintain any action in any court until it has obtained such license to do business.’” *Bosl* at ¶ 16, quoting *First Merit* at ¶ 11; R.C. 1703.29(A).

{¶27} A foreign corporation is “‘transacting business” within the state when it is “‘engaged in carrying on and transacting * * * some substantial part of its ordinary or customary business, usually continuous in the sense that it may be distinguished from merely casual, sporadic, or occasional transactions and isolated acts.’” *Bosl* at ¶ 18, quoting *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 21.

{¶28} However, R.C. 1703.031(A) exempts federally chartered banks from the licensing requirements of R.C. 1703.01 to 1703.31. *Citibank, NA v. Eckmeyer*, 11th Dist. Portage No. 2008-P-0069, 2009-Ohio-2435, ¶ 27. Further, “‘business activities of national banks are controlled by the National Bank Act, 12 U.S.C. 1 et seq., and regulations promulgated thereunder by the Office of the Comptroller of the Currency (OCC).” *Id.*, quoting *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 6, 127 S.Ct. 1559, 167 L.Ed.2d 389 (2007).

{¶29} Additionally, the Supremacy Clause of the U.S. Constitution provides that the “Laws of the United States * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary

notwithstanding.” U.S. Constitution, Article VI, cl. 2. Thus, federal laws preempt state laws in certain circumstances, such as when Congress expressly preempts state law by explicit statutory language. *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 530-531 (1st Cir.2007).

{¶30} 12 U.S.C.S. 24 of the National Bank Act, 12 U.S.C.S. 1 et seq., allows national banks to sue in any court of law and equity, as fully as a natural person. R.C. 1703.29(A), which requires foreign corporations to obtain licenses from the Ohio Secretary of State in order to file suit in Ohio, would violate a federally chartered bank’s right to sue in any court and appear in Ohio courts to collect debts as fully as a natural person. *Eckmeyer* at ¶ 29. Therefore, under the facts and circumstances of this case, application of R.C. 1703.29(A) is preempted by federal law, and neither BANA nor MRF were required to obtain state licenses to collect Adams’s mortgage debt in Ohio.

{¶31} The third assignment of error is overruled.

III. Conclusion

{¶32} The trial court properly awarded a judgment in foreclosure against Adams where the evidence showed that BANA was the assignee of the mortgage when it filed its complaint. In the absence of a denial, the trial court could presume the validity of Adams’s signatures on the note and mortgage. And since MRF submitted evidence of Adams’s payment history, including her default, and federal law permits banks to sue mortgagors to collect debts on mortgages, the judgment in foreclosure did not violate Adams’s constitutional right to due process.

{¶33} Judgment affirmed.

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 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.

EILEEN T. GALLAGHER, JUDGE

SEAN C. GALLAGHER, P.J., and
MELODY J. STEWART, J., CONCUR