

[Cite as *Huntington Natl. Bank v. Cade*, 2016-Ohio-4705.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103674

HUNTINGTON NATIONAL BANK

PLAINTIFF-APPELLEE

vs.

JAMES A. CADE, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-09-704010

BEFORE: McCormack, J., Kilbane, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: June 30, 2016

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TIM McCORMACK, J.:

{¶1} The Huntington National Bank (“Huntington” hereafter) filed a foreclosure action against James Cade and his wife Ann Munro. The trial court granted summary judgment in favor of Huntington. For the following reasons, we affirm the trial court’s judgment.

Background

{¶2} In 2003, James Cade and Ann Munro executed a note in the amount of \$320,654 in favor of Real Estate Mortgage Corporation. A specific endorsement from Real Estate Mortgage Corporation to Huntington was affixed to the note. At the same time Cade and Munro executed the note, they also executed a mortgage on their property to secure the note. In 2008, Real Estate Mortgage Corporation assigned the mortgage to Huntington.

{¶3} Cade and Munro defaulted on the loan, owing \$335,834, plus interest. In September 2009, Huntington filed a complaint for foreclosure. This foreclosure matter has a long procedural history because a condominium owners’ association was also named as a defendant due to the association fees owed by Cade and Munro. Huntington eventually filed a motion for summary judgment.

{¶4} Huntington attached an affidavit from an employee, Clair L. Turk, to its motion for summary judgment. The bank employee averred that as part of the regular performance of her job functions, she is familiar with and has access to Huntington’s business records for the purpose of servicing mortgage loans. She explained the bank’s

process for collection and maintenance of its business records. She stated that she has personally examined the business records maintained by the bank in connection with the subject loan. She authenticated the note, mortgage, and mortgage assignment attached to her affidavit, stating they were true copies of the electronically stored duplicates of the original note, mortgage, and mortgage assignment. She acknowledged, however, that the original note is lost.

{¶5} The magistrate issued a decision granting summary judgment in favor of Huntington. No objections to the magistrate’s decision were filed, and the trial court adopted the magistrate’s decision. Cade and Munro (collectively “Cade” hereafter) now appeal. The two assignments of error are related, and we address them together. They state:

1. The trial court erred in finding that Plaintiff-Appellee Huntington National Bank established its standing to commence the instant foreclosure action.
2. The trial court erred in rendering judgment against Defendants-Appellants James A. Cade and Ann Munro without making the findings required by R.C. 1303.38(B).

Analysis

{¶6} We review the trial court’s decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). 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).

{¶7} Once a moving party satisfies its burden under Civ.R. 56(C), 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).

{¶8} A motion for summary judgment in a foreclosure action must be supported by evidentiary quality materials establishing that: (1) 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. *See, e.g., Deutsche Bank Natl. Trust Co. v. Najjar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 17; *Bank of Am., N.A. v. Sweeney*, 8th Dist. Cuyahoga No. 100154, 2014-Ohio-1241, ¶ 8.

{¶9} Cade claims the granting of summary judgment in favor of Huntington was improper, yet the record reflects no objections were made to the magistrate's decision, as required by Civ.R. 53(D)(3)(a). Consequently Cade waived all but "plain error." *Huntington Natl. Bank v. Blount*, 8th Dist. Cuyahoga No. 98514, 2013-Ohio-3128. *See also Third Fed. S.&L. v. McCulloch*, 8th Dist. Cuyahoga No. 97525, 2012-Ohio-1956, ¶ 13 (mortgagors did not file objections to magistrate's decision granting summary

judgment in favor of mortgagee bank and therefore waived any claimed error). Cade does not claim “plain error” on appeal and, therefore, waives any claims now raised. Even if we were to consider the merits, we would find no error in the trial court’s judgment.

{¶10} Cade argues that because Huntington was not in possession of the original note, Huntington failed to establish standing to enforce the note.

{¶11} Pursuant to R.C. 1303.31(A), a holder of a note (i.e., a person in possession of a note who is identified by name in the note or endorsement, or a person in possession of a note payable to bearer) is entitled to enforce a note. When a note is lost, R.C. 1303.38 creates an exception for establishing a right to enforce the note when certain conditions are met. R.C. 1303.38(A) states:

A person not in possession of an instrument is entitled to enforce the instrument if all of the following apply:

- (1) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred.
- (2) The loss of possession was not the result of a transfer by the person or a lawful seizure.
- (3) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

{¶12} Here, the bank employee’s affidavit averred that the original note is lost and she was unable to locate it despite a diligent search of the records. She further averred that Huntington was in possession of the note and entitled to enforce it when loss of

possession occurred and that the loss of possession was not the result of a transfer by Huntington or a lawful seizure. The affiant employee affirmatively stated she possessed personal knowledge of the facts and matters recited in the affidavit due to her job functions.

{¶13} Ohio law recognizes that personal knowledge may be inferred from the contents of an affidavit. See *Bush v. Dictaphone Corp.*, 10th Dist. Franklin No. 00AP1117, 2003-Ohio-883, ¶ 73. “There is no requirement that an affiant explain the basis for his or her personal knowledge where personal knowledge can be reasonably inferred based on the affiant’s position and other facts contained in the affidavit.” *Nationstar Mtge., L.L.C. v. Wagener*, 8th Dist. Cuyahoga No. 101280, 2015-Ohio-1289, ¶ 26. A specific averment by an affiant that the affidavit is made on personal knowledge is sufficient to satisfy the requirement of Civ.R. 54(E) unless controverted by other evidence. *Charter One Mtge. Corp. v. Keselica*, 9th Dist. Lorain No. 04CA008426, 2004-Ohio-4333.

{¶14} Thus, Huntington produced sufficient evidence of its right to enforce the note under R.C. 1303.38, which shifted the burden to Cade to set forth specific facts demonstrating that there would be a genuine issue of material fact for trial. Cade supplied no rebuttal evidence by affidavit or as otherwise provided by Civ.R. 56 in response that would have contradicted the information supplied in Turk’s affidavit or shown any issue of material fact in dispute. Because Huntington’s evidence was not rebutted, the magistrate made the specific findings that (1) the note was lost prior to the

foreclosure filing, (2) Huntington had possession of the note and was entitled to enforce the note when it lost possession, and (3) the loss of possession of the note was neither a result of a transfer of the note by Huntington nor a lawful seizure of the note by another entity.

{¶15} Cade failed to file objections to the magistrate's decision and therefore waived any errors. Even if the claims were properly presented, we would have concluded that the trial court properly granted summary judgment in favor of Huntington.

The first and second assignments of error are without merit.

{¶16} Judgment 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

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR