[Cite as *Deutsche Bank Natl. Trust Co. v. Gardner*, 2017-Ohio-2761.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104924

DEUTSCHE BANK NATIONAL TRUST COMPANY

PLAINTIFF-APPELLEE

vs.

AMY L. GARDNER, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-817890

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

RELEASED AND JOURNALIZED: May 11, 2017

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TIM McCORMACK, J.:

{¶1} Defendant-appellant Amy L. Gardner appeals from a judgment of the Cuyahoga County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee Deutsche Bank in this foreclosure action. For the following reasons, we affirm.

{¶2} On June 2, 2005, Gardner borrowed $239,000 from First Franklin, a division of National City Bank of Indiana, to purchase a house located in Shaker Heights, Ohio. She signed a 30-year adjustable-rate note and a mortgage on the real property to secure repayment of the loan. Subsequently, the note was specifically endorsed by First Franklin to First Franklin Financial Corporation, which then endorsed the note in blank. In 2006, First Franklin assigned the mortgage to First Franklin Financial Corporation. In 2008, First Franklin Financial Corporation assigned the mortgage to Deutsche Bank.

{¶3} Gardner defaulted on the loan in 2009. On November 25, 2013, Deutsche Bank filed a foreclosure complaint against Gardner and her unknown spouse, if any. Gardner owed a principal balance of $248,430 plus interest at 6.25% from May 1, 2009.

{¶4} On August 30, 2015, Gardner sent a letter to Deutsche Bank rescinding the note and mortgage, claiming a right to do so under the Truth in Lending Act ("TILA"). On October 9, 2015, Gardner filed a counterclaim asserting Deutsche Bank violated the Fair Debt Collection Practices Act ("FDCPA"), the Ohio Consumer Sales Practices Act ("CPSA"), TILA, the Real Estate Settlement Procedures Act ("RESPA"), and the Equal Credit Opportunity Act ("ECOA"). Gardner also asserted negligence, breach of fiduciary duties, fraud, breach of contract, and unjust enrichment against Deutsche Bank, based on her allegation that Deutsche Bank did not have standing and was not entitled to enforce the note.

{¶5} Deutsche Bank moved for summary judgment on its foreclosure complaint and Gardner's counterclaim. On August 3, 2016, a magistrate issued a decision granting the bank's motion for summary judgment. The decision included the advisement that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion unless the party timely and specifically objected to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

{¶6} On August 9, 2016, the trial court adopted the magistrate's decision and entered a judgment and decree in foreclosure against Gardner. Notably, despite the Civ.R. 53(D)(3)(b) language contained in the magistrate's decision, Gardner did not file an objection to the magistrate's decision.[1] On September 7, 2016, Gardner filed the instant appeal.

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[1]The docket reflects that on January 8, 2016, Deutsche Bank filed a motion for summary

{¶7} On appeal, Gardner claimed the trial court erred in granting summary judgment in favor of Deutsche Bank. She presents three assignments of error for our review: the first assignment of error concerns the summary judgment regarding Deutsche Bank's foreclosure complaint; the second concerns her counterclaim based on a purported right to rescind the loan under TILA; and the third concerns her FDCPA and CSPA claims, and her claims of breach of contract, breach of fiduciary duty, and fraud.

{¶8} 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).

{¶9} 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) that if the plaintiff bank is not the original mortgagee, the chain of assignments and transfers; (3) that the

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judgment on its foreclosure complaint and on Gardner's counterclaim. At the same time, the bank also filed a motion for default judgment against the unknown spouse of Gardner. On March 31, 2016, the magistrate granted the default judgment. Gardner, apparently misconstruing the default judgment as entered against her, filed an objection to the magistrate's decision. On April 27, 2016, the court issued an order, noting Gardner's objection was untimely and advising Gardner that the motion for default judgment concerned only the non-answering party (unknown spouse). On August 3, 2016, the magistrate granted summary judgment in favor of the bank. Gardner did not file an objection.

mortgagor is in default; (4) that all conditions precedent have been met; and (5) the amount of principal and interest due. *See Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 17.

{¶10} Here, Deutsche Bank submitted an affidavit from Sherry Benight, Document Control Officer of Select Portfolio Servicing Inc. ("SPS"), the loan servicer for Deutsche Bank. Benight averred that as part of her job duties she has reviewed SPS's business records relating to Gardner's loan. In particular, she reviewed a copy of the subject note showing the specific endorsement and the endorsement in blank, as well as copies of the assignments of mortgage. Her review of the documents showed that Deutsche Bank was in possession of the note when the complaint was filed and the bank remained in possession of the note, and that the bank was the assignee of the mortgage when the foreclosure complaint was filed. She stated a true and accurate copy of the note, as well as a true and accurate copy of the mortgage assignments were attached to her affidavit.

{¶11} The courts have allowed a representative of a bank's loan servicer to establish that a plaintiff bank holds the note at issue. *U.S. Bank, N.A. v. Zokle*, 6th Dist. Erie No. E-13-033, 2014-Ohio-636, ¶ 24, citing *Everbank v. Vanarnhem*, 3d Dist. Union No. 14-13-02, 2013-Ohio-3872, ¶ 39. Here, Benight's affidavit established Deutsche Bank was the holder of the note at the time the complaint was filed. *See, e.g., Nationstar Mtge., L.L.C. v. Wagener*, 8th Dist. Cuyahoga No. 101280, 2015-Ohio-1289, ¶ 51 (the plaintiff bank, by virtue of its possession of the original note endorsed in blank,

was the holder of the note). By virtue of its holder status, Deutsche Bank had standing to sue and is entitled to enforce the note. *CitiMortgage, Inc. v. Patterson*, 2012-Ohio-5894, 984 N.E.2d 392 (8th Dist.); *Najar*, *supra*, at ¶ 62.

{¶12} In addition, the evidence showed Deutsche Bank was the current assignee of the mortgage and had the right to enforce it. The evidence also showed that Gardner was in default under the terms of the note and mortgage; that Deutsche Bank satisfied the condition precedent to commence the foreclosure action by sending the notice of default to Gardner prior to its filing; and that Deutsche Bank established the amount of principal and interest owed. The magistrate and the court trial appropriately determined that no genuine issue as to any material fact existed regarding the foreclosure complaint.

{¶13} Gardner claims the granting of summary judgment in favor of Deutsche Bank was improper; yet the record reflects no objections were made to the magistrate's decision, as required by Civ.R. 53(D). Civ.R. 53(D) imposes an affirmative duty on parties to submit timely objections to the trial court and identify any error of fact or law in the magistrate's decision. *Hameed v. Rhoades*, 8th Dist. Cuyahoga No. 94267, 2010-Ohio-4894, ¶ 14. Specifically, Civ.R. 53(D)(3)(b)(i) provides that a party may file objections to a magistrate's decision within 14 days after the decision is filed. Civ.R. 53(D)(3)(b)(iv) states that, "except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion." By failing to object to the magistrate's decision, Gardner has waived all but plain error. *Huntington Natl. Bank v. Blount*, 8th Dist. Cuyahoga No. 98514, 2013-Ohio-3128.

{¶14} The Supreme Court of Ohio has cautioned that, in civil cases, the "plain error" doctrine will only apply in the "extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997), syllabus.

{¶15} Although we review an appeal from summary judgment de novo, our review of this case is limited to "plain error," because Gardner failed to object the magistrate's decision. *Blount* at ¶ 10. On appeal, however, Gardner does not assert or demonstrate any "plain error" on the face of the magistrate's decision, nor raise any arguments relating to the fairness, legitimacy, or reputation of the judicial process, and therefore, she waives all claims raised in the appeal. *PHH Mtge. Corp. v. Santiago*, 10th Dist. Franklin No. 11AP-562, 2012-Ohio-942, ¶ 10.

{¶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.

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TIM McCORMACK, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
LARRY A. JONES, SR., J., CONCUR