[Cite as *Ditech Fin., L.L.C. v. McCurry*, 2017-Ohio-7170.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105005

DITECH FINANCIAL L.L.C., F.K.A. GREEN TREE SERVICING L.L.C.

PLAINTIFF-APPELLEE

vs.

MICHAEL MCCURRY, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-854104

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

RELEASED AND JOURNALIZED: August 10, 2017

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MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Michael McCurry ("McCurry"), appeals the trial court's judgment granting summary judgment in favor of plaintiff-appellee Ditech Financial L.L.C. ("Ditech"), denying McCurry's motion to dismiss, and decree of foreclosure. For the reasons set forth below, we affirm.

{¶2} In November 2015, Ditech f.k.a. Green Tree Servicing L.L.C., filed a foreclosure complaint against McCurry. In its complaint, Ditech alleged that it was the owner and holder of a note and mortgage executed by McCurry and McCurry was in default on the note. Ditech sought to foreclose on the property and sought to recover the unpaid balance on the note in the amount of $196,389.83. Copies of the note and mortgage were attached to the complaint. Ditech moved for summary judgment in July 2016. In response, McCurry filed a brief in opposition and a motion to dismiss. In August 2016, the trial court issued a decision denying McCurry's motion to dismiss and granting Ditech's motion for summary judgment. The trial court also ordered the foreclosure and sale of the property. Subsequently, a sheriff's sale was scheduled for October 31, 2016.

{¶3} In the interim, McCurry filed his notice of appeal with this court on September 26, 2016. That same day, McCurry also filed a motion to stay the proceedings with the trial court. The trial court denied this motion on October 3, 2016. Then on October 12, 2016, McCurry filed a motion to stay execution of the judgment

with this court. This court granted the motion on November 1, 2017, pending McCurry posting a bond. However, the property was sold at the sheriff's sale on October 31, 2016, and the trial court confirmed the sale of the property on November 28, 2016. Furthermore, a review of the record reveals that McCurry never posted the bond.

{¶4} McCurry now appeals, raising the following two assignments of error, which shall be discussed together.

Assignment of Error One

> Reviewing [Ditech's] motion for summary judgment de novo, the record is clear and convincing that the trial court erred to the prejudice of [McCurry] by granting [Ditech's] motion for summary judgment and denying [McCurry's] motion to dismiss in favor of [Ditech].

Assignment of Error Two

> The trial court erred to the prejudice of [McCurry] by granting [Ditech's] motion for summary judgment and denying [McCurry's] motion to dismiss based upon the presence of genuine issues of material fact regarding [Ditech's] failure to provide sufficient evidence of entitlement to foreclosure and/or damages.

{¶5} We initially note that Ditech contends that McCurry's appeal is moot because the property has been sold and McCurry failed to obtain a stay. This court has previously dismissed appeals as moot when the order of confirmation of the sheriff's sale is appealed, the property has been sold, and the appellant never sought a stay. *Wells Fargo Bank, N.A. v. Cuevas*, 8th Dist. Cuyahoga No. 99921, 2014-Ohio-498; *Third Fed. Sav. & Loans Assn. of Cleveland v. Rains*, 8th Dist. Cuyahoga No. 98592, 2012-Ohio-5708; *Equibank v. Rivera*, 8th Dist. Cuyahoga No. 72224, 1998 Ohio App. LEXIS 185 (Jan. 22,

1998)._ In the instant case, however, the judgment of foreclosure has been appealed, not the confirmation of the sheriff's sale. In this situation, we have found that

> [i]f the order of foreclosure were appealed, the appeal may not be moot, even though the sale had been confirmed. *See MIF Realty L.P. v. K.E.J. Corp.*, 1995 Ohio App. LEXIS 2082 (May 19, 1995), Wood App. No. 94WD059, unreported. R.C. 2329.45 provides that if the judgment of foreclosure is reversed, the purchaser retains title and the creditor must pay restitution to the debtor. If the judgment of foreclosure was void then the sale must be set aside. *Heatherstone Homeowners Assn. v. Conrad* (1983), 10 Ohio Misc.2d 18, 461 N.E.2d 35.

Equibank at *3-*4.

{¶6} Based on the foregoing, we do not find McCurry's appeal is moot, and we next address the merits of his assigned errors.

Summary Judgment

{¶7} McCurry first argues that the trial court erred when it granted summary judgment in favor of Ditech because the documents it submitted along with the affidavit of Diana D'Addona ("D'Addona"), Assistant Vice President of Ditech, failed to demonstrate that Ditech had standing to invoke the jurisdiction of the trial court and, therefore, it was not the real party in interest. Specifically, he claims D'Addona's affidavit lacked the required credibility and substantiation and failed to sufficiently establish that Ditech is the true holder of the note.

{¶8} We review an appeal from summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equip. Co.*, 124 Ohio App.3d 581, 585, 706 N.E.2d 860 (8th Dist.1998). In *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367,

369-370, 1998-Ohio-389, 696 N.E.2d 201, the Ohio Supreme Court set forth the appropriate test as follows:

> Pursuant to Civ.R. 56, 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) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264.

{¶9} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

{¶10} In the instant case, Ditech submitted several documents demonstrating that it had standing to invoke the trial court's jurisdiction, including D'Addona's affidavit. In her affidavit, D'Addona avers that she is Assistant Vice President of Ditech, and that she has personal knowledge of the contents of her affidavit. She further avers that she is the custodian of the business records involving McCurry's loan, knows how those business records are created and maintained, and she reviewed those business records in order to testify in the affidavit.

{¶11} Under Civ.R. 56(E), affidavits supporting a motion for summary judgment must be made on personal knowledge. "'Personal knowledge' is 'knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.'" *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, ¶ 26, quoting *Black's Law Dictionary* 875 (7th Ed.Rev.1999). The foregoing averments by D'Addona demonstrate that the affidavit was sufficiently based on personal knowledge for purposes of Civ.R. 56(E). *See CitiMortgage, Inc. v. Evans*, 8th Dist. Cuyahoga No. 101882, 2015-Ohio-1384, ¶ 21.

{¶12} D'Addona further averred that Ditech is and was, prior to the filing of the complaint, in possession of the note and the assignee of the mortgage. Ditech attached to its complaint a copy of the note, with the original lender listed as Freedom Mortgage Corporation. The note was indorsed to Irwin Mortgage Corporation, which indorsed the note in blank.

{¶13} The Ohio Supreme Court addressed the issue of standing in a foreclosure action in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214. In *Schwartzwald*, the court found that a plaintiff must have standing at the time it files the complaint in order to invoke the jurisdiction of the court. *Id.* at ¶ 41-42. A party has standing in a foreclosure case, when, at the time it files its complaint, "it either (1) has had a mortgage assigned or (2) is the holder of the note." *Bank of Am., N.A. v. Calloway*, 8th Dist. Cuyahoga No. 103622, 2016-Ohio-7959, ¶ 13, citing *CitiMortgage, Inc. v. Patterson*, 2012-Ohio-5894, 984 N.E.2d 392, ¶ 21 (8th Dist.), citing *Schwartzwald*.

{¶14} Under R.C. 1303.25(B), a "[b]lank indorsement" means an instrument that is made by the holder of the instrument and that is not a special indorsement. When an instrument is indorsed in blank, the instrument becomes payable to the bearer and may be negotiated by transfer of possession alone until specially indorsed._

{¶15} R.C. 1301.201(B)(21)(a) provides that a "holder" is a "person in possession of a negotiable instrument that is payable * * * to bearer[.]" Ditech had possession of the note, which was payable to the bearer. Therefore, Ditech was the current holder of the note and was entitled to enforce it at the time of the filing of its complaint.

{¶16} Furthermore, Ditech attached the mortgage and an assignment of the mortgage to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Freedom Mortgage Company and then assigned to Everhome Mortgage Company and then later assigned to Green Tree Servicing L.L.C. Ditech attached a copy of a

certificate of merger from the office of the secretary _of state of Delaware, stating that Green Tree Servicing L.L.C. merged into Ditech._

{¶17} We recognize that when a merger between two companies occurs, one of those companies ceases to exist. "[A] merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises, and powers of the former. Of necessity, the absorbed company ceases to exist as a separate business entity." *Morris v. Invest. Life Ins. Co.*, 27 Ohio St.2d 26, 31, 272 N.E.2d 105 (1971). "[T]he absorbed company becomes a part of the resulting company following merger [and] the merged company has the ability to enforce * * * agreements as if the resulting company had stepped in the shoes of the absorbed company." *Acordia of Ohio, L.L.C. v. Fishel*, 133 Ohio St.3d 356, 2012-Ohio-4648, 978 N.E.2d 823, ¶ 7. Once "'an existing bank takes the place of another bank after a merger, no further action is necessary' to become a real party in interest." *Harris*, 8th Dist. Cuyahoga No. 99272, 2013-Ohio-5749, at ¶ 18, quoting *Huntington Natl. Bank v. Hoffer*, 2d Dist. Greene No. 2010-CA-31, 2011-Ohio-242, ¶ 15._

{¶18} Based on the foregoing, we find that D'Addona's affidavit was sufficient, and Ditech established that it was the real party in interest at the time it filed the foreclosure complaint against McCurry. As a result, Ditech had standing to bring the action.

{¶19} McCurry next argues the trial court erred when it granted Ditech's motion for summary judgment and denied his motion to dismiss because Ditech failed to submit credible "payment history."

{¶20} In support of its motion for summary judgment, Ditech produced the loan payment history and evidence of late fees by attaching those documents and incorporating them through D'Addona's affidavit. In her affidavit, D'Addona testified as to the amount due on the note, based upon her review of the relevant business records relating to McCurry's loan. As we stated in *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 40,

> [t]here is no requirement that a plaintiff provide a complete "payment history" in order to establish its entitlement to summary judgment in a foreclosure action. [The affidavit of the vice president of the bank's loan servicer] and supporting documents were sufficient to meet [the bank's] burden of establishing the amount due on the note. *See, e.g., Cent. Mtge. Co. v. Elia*, 9th Dist. No. 25505, 2011-Ohio-3188, ¶ 7 ("'An affidavit stating [a] loan is in default, is sufficient for purposes of Civ.R. 56, in the absence of evidence controverting those averments.'"), quoting [*Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶14].

Likewise in the instant case, D'Addona's affidavit sufficiently authenticated the loan documents submitted in support of Ditech's motion for summary judgment, and Ditech satisfied its burden of establishing the amount due on the note.

{¶21} Therefore, the first and second assignments of error are overruled.

{¶22} 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
MELODY J. STEWART, J., CONCUR