[Cite as *Bank of New York Mellon v. Villalba*, 2014-Ohio-4351.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
THE BANK OF NEW YORK MELLON etc. Appellee v. ENRIQUE VILLALBA, et al. Appellants	C.A. No. 26709 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. cv 2011 08 4229

DECISION AND JOURNAL ENTRY

Dated: September 30, 2014

MOORE, Judge.

{¶1} Defendants Enrique and Michelle Villalba appeal from the judgment of the Summit County Court of Common Pleas. This Court affirms in part, reverses in part, and remands this matter for further proceedings consistent with this opinion.

I.

{¶2} On August 1, 2011, "The Bank of New York Mellon fka the Bank of New York as trustee for the benefit of the certificateholders of the CWABS, Inc., Asset-Backed Certificates, Series 2004-4" ("Bank of New York") filed a complaint for personal judgment against Mr. Villalba on a note that he had executed, and for foreclosure of the property securing the note pursuant to a mortgage that the Villalbas purportedly had signed. Bank of New York also requested reformation of the mortgage to conform to the correct legal description of the property.

{¶3} The Villalbas answered the complaint and filed a counterclaim for declaratory judgment and damages. Thereafter, the Villalbas and Bank of New York each filed motions for

summary judgment. The trial court denied the Villalbas' motion and granted Bank of New York's motion, issuing a judgment entry with reformation. The Villalbas timely appealed, and they now raise two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO [BANK OF NEW YORK] AND DENIED THE MOTION FOR SUMMARY JUDGMENT FILED BY [THE VILLALBAS], SINCE [BANK OF NEW YORK] NOT ONLY ADMITTED THAT IT WAS NOT THE HOLDER OF THE NOTE AND ENTITLED TO ENFORCE SAME AND FURTHER FAILED TO ESTABLISH THAT IT WAS THE HOLDER OF THE NOTE AND ENTITLED TO ENFORCE SAME IN ITS MOTION FOR SUMMARY JUDGMENT.

{¶4} In their first assignment of error, the Villalbas argue that the trial court erred in granting summary judgment in favor of Bank of New York and in denying the Villalbas' motion for summary judgment on Bank of New York's claims for monetary judgment and foreclosure because Bank of New York was not the holder of the note at the time it filed the complaint.

{¶5} We review an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶6} Pursuant to Civ.R. 56(C), summary judgment is proper only if:

> (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977). The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and

pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93 (1996). "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Id.* at 293. If the moving party fulfills this burden, then the burden shifts to the nonmoving party to prove that a genuine issue of material fact exists. *Id.* With these principles in mind, we will separately review the motions for summary judgment filed by Bank of New York and the Villalbas.

Bank of New York's Motion for Summary Judgment

{¶7} In Bank of New York's motion for summary judgment, it maintained that there was no question of material fact as to its claims for judgment on the note and foreclosure. In support, it attached the affidavit of an employee of the loan servicer, who, in part, averred that Bank of New York possessed the note. The Villalbas maintained that the affiant lacked personal knowledge of Bank of New York's possession of the note, and consequently the bank did not demonstrate the absence of a question of its standing to enforce the note and obtain the foreclosure.

{¶8} In regard to standing, in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 41-42, the Ohio Supreme Court determined that a plaintiff in a foreclosure action must have standing at the time it files the complaint in order to invoke the jurisdiction of the court. "It is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action." (Internal quotations and citations omitted.) (Emphasis omitted.) *Id.* at ¶ 22. "The lack of standing at the commencement of a foreclosure action requires dismissal of the complaint; however, that dismissal is not an adjudication on the merits and is therefore without prejudice." *Id.* at ¶ 40.

{¶9} To prove standing in a foreclosure action, a plaintiff generally must hold both the note and the mortgage prior to filing the complaint. *BAC Home Loan Serv. v. McFerren*, 9th Dist. Summit No. 26384, 2013-Ohio-3228, ¶ 7. The holder of a note endorsed in blank is the possessor of the note. *See* R.C. 1301.201(A)(21)(a) and R.C. 1303.10(A)(2). A plaintiff is also entitled to enforce a note where, although it is not the "holder" of a note, it is a "nonholder in possession of the instrument who has the rights of a holder." R.C. 1303.31(A)(2).

{¶10} Here, Bank of New York maintained that it was entitled to enforce the note either as the holder of the note or as a nonholder in possession of the note with rights of a holder pursuant to R.C. 1303.31(A)(1) or (A)(2). In support, it attached the affidavit of Yasamin P. Mehn who identified herself as an Assistant Vice President for Bank of America, N.A. ("BANA"), the servicer of the of the loan. "[A]ffidavits submitted in support of or in opposition to motions for summary judgment '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.'" *Bank of Am., N.A. v. Loya*, 9th Dist. Summit No. 26973, 2014-Ohio-2750, ¶ 12, quoting *Maxum Indemnity Co. v. Selective Ins. Co. of S.C.*, 9th Dist. Wayne No. 11CA0015, 2012-Ohio-2115, ¶ 18, quoting Civ.R. 56(E). "Generally, 'a mere assertion of personal knowledge satisfies the personal knowledge requirement of Civ.R. 56(E) if the nature of the facts in the affidavit combined with the identity of the affiant creates a reasonable inference that the affiant has personal knowledge of the facts in the affidavit.'" *Loya* at ¶ 12, quoting *Bank One, N.A. v. Lytle*, 9th Dist. Lorain No. 04CA008463, 2004-Ohio-6547, ¶ 13. "If particular averments contained in an affidavit suggest that it is unlikely that the affiant has personal knowledge of those facts, [however,] then * * * something more than a conclusory averment that the affiant has knowledge of the facts [is] required." *Loya* at ¶ 12, quoting *Bank*

One v. Swartz, 9th Dist. Lorain No. 03CA008308, 2004-Ohio-1986, ¶ 14. This Court "cannot infer personal knowledge from the averment of personal knowledge alone." *Maxum Indemnity* Co. at ¶ 22.

{¶11} The Villalbas challenged the personal knowledge of Ms. Mehn as to Bank of New York's standing. In her affidavit, Ms. Mehn did not describe her specific job duties, but did aver that "[a]s part of [her] job responsibilities for BANA, [she was] familiar with the type of records maintained by BANA in connection with the Loan." She further averred that she "personally reviewed the attached records, and [she] ma[d]e this affidavit from a review of those business records and from [her] personal knowledge of how said records are created and maintained." Ms. Mehn attested that "[Bank of New York], directly or through an agent, has possession of the promissory Note." She further maintained that Bank of New York "purchased, acquired and/or otherwise obtained possession of the note and mortgage before June 22, 2011[.]"

{¶12} Ms. Mehn also attached a copy of the note to her affidavit. The copy of the note demonstrates that it was originally payable to Sterling National Mortgage Co., Inc. Attached to the note is an allonge dated February 12, 2004, executed by Sterling National Mortgage Co. Inc, assigning the note to Countrywide Document Custody Services a division of Treasury Bank, N.A. There are two undated endorsements on the allonge. One is from Countrywide Document Custody Services, A division of Treasury Bank, NA to Countrywide Home Loans Inc. The other endorsement is in blank from Countrywide Home Loans, Inc. Because the note was endorsed in blank, Bank of New York had to establish its possession of the note to be entitled to enforce the note as a holder under R.C. 1303.31(A)(1). It also was required to establish possession of the note under its alternative theory that it was a party in possession with rights of a holder under

R.C. 1303.31(A)(2). Further, Bank of New York was required to demonstrate that it had possession of the note at the time the complaint was filed: August 1, 2011.

{¶13} First, we note that Ms. Mehn's affidavit on this issue is not the model of clarity, and the imprecise language used seems to indicate that she lacked personal knowledge of Bank of New York's possession of the note. First, she averred that the bank "directly or through an agent" had possession of the note. This language seems to indicate that she was unsure as to the location of the note. Also, her averment that Bank of New York "purchased, acquired and/or otherwise obtained possession of the note and mortgage before June 22, 2011," because it is written in the alternative, does not specifically indicate that she had personal knowledge that Bank of New York had possession of the note on June 22, 2011.

{¶14} Further, Ms. Mehn's affidavit is substantially similar to an affidavit that this Court recently discussed in *Loya*, 2014-Ohio-2750, at ¶ 11-14. There, this Court addressed the issue of personal knowledge of an affiant's nearly identical averments relative to possession of a note. There we reasoned as follows:

> Although [the affiants] identified themselves as assistant vice presidents of Bank of America and both averred that they had familiarity with the "type of records" at issue in this case "[a]s part of [their] job responsibilities," neither of them explained what their job responsibilities actually entailed. *See Bank of New York Mellon Trust Co. Natl. v. Mihalca*, 9th Dist. Summit No. 25747, 2012-Ohio-567, ¶ 17 (affiant's personal knowledge questioned, in part, due to her failure to state how her position made her familiar with the borrower's account records). Even assuming that their affidavits established their personal knowledge of Bank of America's business records, however, both acknowledged that they made their affidavits based on their review of the business records attached to those affidavits.

Loya at ¶ 13. We then reviewed those records that the affiants attached to their affidavits:

> As for [one of the affiants], a copy of [the homeowner's] note was attached to [the affiant's] affidavit, but the note contains an undated, blank endorsement. Because [the homeowner's] note is endorsed in blank, it does not, on its face, establish the entity in possession of it or when that possession occurred. *See U.S. Bank v.*

> *Cooper*, 9th Dist. Medina No. 12CA0084-M, 2014-Ohio-61, ¶ 15; *Deutsche Bank v. Holloway*, 9th Dist. Lorain No. 12CA010331, 2013-Ohio-5194, ¶ 8–9. [The affiant] could not have had personal knowledge of when Bank of America came into possession of the note based strictly on the note itself.

Loya at ¶ 14. *See also Deutsche Bank Natl. Trust Co. v. Reynolds*, 9th Dist. Summit No. 27192, 2014-Ohio-2372, ¶ 13.

{¶15} Just as in *Loya*, here Ms. Mehn averred that her personal knowledge of the matters in her affidavit came from her review of the business records attached to her affidavit. Further, just as in *Loya*, although Ms. Mehn's affidavit, standing alone, could be read to aver that Bank of New York had possession of the note prior to its filing of the complaint, the documents attached to the affidavit do not establish when, if ever, Bank of New York came into possession. We recognize that, also attached to the affidavit, was an "assignment of note and mortgage" dated July 11, 2011, from "Bank of America, N.A. as successor by merger to Countrywide Bank, N.A. f/k/a Countrywide Bank, FSB, f/k/a Countywide Bank, N.A., f/k/a Treasury Bank, N.A." which purported to "assign, transfer and set over" the mortgage and note to Bank of New York.[1] However, this document does not support Ms. Mehn's assertion that Bank of New York had possession of the note prior to June 22, 2011, nor does it demonstrate when, if ever, Bank of New York took actual possession of the note, or if it continued to have possession of the note on August 1, 2011, when it filed the present complaint. Again, Ms. Mehn indicated that her knowledge was based upon the documents attached to her affidavit. It is *the possession of the*

[1] This Court has questioned standing to enforce a mortgage where documentation of mergers supporting the purported assignments of mortgage do not appear in the record. *See JPMorgan Chase Bank, N.A. v. Byrd*, 9th Dist. Summit No. 26571, 2013-Ohio-2076. However, here, the Villalbas set forth in their answer that they "specifically aver[red] that said purported assignor had the authority to assign said mortgage," for each of the mortgage assignments commencing with the original mortgage and concluding with the assignment of the mortgage to Bank of New York.

note that it critical in this case to determine Bank of New York's entitlement to enforce the note under the theories it has advanced to support its standing. *See* R.C. 1303.31(A)(1) or (A)(2).

{¶16} Thus, "[h]aving reviewed the business records attached to Ms. [Mehn's] affidavit, we cannot conclude that a review of the records would have allowed her to attest to the fact that Bank of [New York] was in possession of Mr. [Villalba's] note at the time it filed suit against him." *Loya* at ¶ 14, citing *Maxum Indemnity Co.*, 2012-Ohio-2115, at ¶ 18. Therefore, we conclude that Bank of New York failed to meet its initial *Dresher* burden of establishing the absence of a material fact that it had standing to enforce the note or seek foreclosure. Accordingly, the Villalbas' assignment of error is sustained to this extent.

The Villalbas' Motion for Summary Judgment

{¶17} Also in their first assignment of error, the Villalbas argue that the trial court erred in failing to grant their motion for summary judgment on Bank of New York's claims for monetary judgment.[2]

{¶18} In their motion, the Villalbas argued that the trial court should grant them summary judgment on Bank of New York's claims because Bank of New York failed to timely respond to certain requests for admissions, the responses to which they claimed were due June 26, 2012, but not received until July 24, 2012. The Villalbas argued that these requests for admissions were deemed admitted as a matter of law. Two of these admissions included: (1) that the note at issue was payable to bearer, and (2) that Bank of New York was not in possession of the note. Based upon these admissions, the Villalbas argued that Bank of New York could not

[2] We note that the Villalbas also moved for summary judgment on their counterclaims; however, they have not advanced an argument on appeal that the trial court erred in failing to grant them summary judgment on their counterclaims. Therefore, we limit our review to the propriety of the trial court's failure to grant the Villalbas summary judgment on Bank of New York's claims.

present any set of facts to demonstrate that it was the holder of the note and entitled to money judgment or foreclosure.

{¶19} Bank of New York filed a brief contra summary judgment, maintaining that the Villalbas' attorney had granted Bank of New York "an unequivocal extension to respond to discovery through July 29, 2012," and the defendants' counsel acknowledged receipt of the discovery responses on July 16, 2012. Bank of New York attached a copy of an email exchange as an exhibit to its brief, wherein Bank of New York requested that the discovery deadline be extended to July 29, 2012, and the Villalbas' attorney responded, "[t]hat will be fine." [3]

{¶20} Where a party has requested admissions from another party, Civ.R. 36(A)(1) provides:

> The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service of a printed copy of the request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney.

{¶21} However, Civ.R. 29 provides that "[u]nless the court orders otherwise, the parties may by written stipulation * * * modify the procedures provided by these rules for * * * methods of discovery." We see no reason why the Villalbas' counsel's purported acquiescence to increasing the deadline for responding to discovery would not qualify as a "written stipulation" to modify the deadline for responding to the requests for admissions within the meaning of

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[3] We note that the email was not authenticated and incorporated in an affidavit. *See King v. Rubber City Arches, L.L.C.*, 9th Dist. Summit No. 25498, 2011-Ohio-2240, ¶ 24 ("the trial court may consider a type of document not expressly mentioned in Civ.R. 56(C) if such document is 'incorporated by reference in a properly framed affidavit pursuant to Civ.R. 56(E).'"), citing *Bowmer v. Dettelbach*, 109 Ohio App.3d 680, 684 (6th Dist.1996). However, "[w]here the opposing party fails to object to the admissibility of the evidence under Civ.R. 56, * * * the court may, but need not, consider such evidence when it determines whether summary judgment is appropriate." *Bowmer* at 684. Here, the Villalbas did not object to consideration of the email.

Civ.R. 29. Accordingly, the trial court was correct when it refused to deem the requested matters as admitted. Therefore, we conclude that Bank of New York met its reciprocal *Dresher* burden of establishing the existence of a question of fact as to standing.

{¶22} To the extent that the Villalbas argue that the trial court erred in failing to grant their motion for summary judgment on Bank of New York's claims for judgment on the note and foreclosure, their first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT ERRED WHEN IT REFORMED THE MORTGAGE DEED WHEN THE UNCONTRADICTED AFFIDAVIT OF MICHELLE VILLALBA ESTABLISHED THAT SHE NEVER EXECUTED THE SUBJECT MORTGAGE DEED[.]

{¶23} In their second assignment of error, the Villalbas maintain that the trial court erred in granting summary judgment to Bank of New York on its claim for reformation of the mortgage, as a question of fact remained as to whether Mrs. Villalba signed the mortgage.

{¶24} "Reformation is an equitable remedy whereby a court modifies the instrument which, due to mutual mistake on the part of the original parties to the instruments, does not evince the actual intention of those parties." (Quotation and citation omitted.) *Osborne, Inc. v. Medina Supply Co.*, 9th Dist. Medina Nos. 2918-M, 2926-M, 1999 WL 1260865, *2 (Dec. 22, 1999). A party seeking to reform a deed on the grounds of mutual mistake, must establish proof of the mutual mistake by clear and convincing evidence. *Id.*, citing *Stewart v. Gordon*, 60 Ohio St. 170 (1899), paragraph one of the syllabus.

{¶25} Bank of New York argued in its motion for summary judgment that it was entitled to reformation of the mortgage to correct a scrivener's error. It maintained that there was no genuine issue of material fact that the Villalbas intended to transfer their interest in the property to the initial mortgagee and that reformation would allow the correction of the legal description.

{¶26} The version of R.C. 5301.01 that was in effect at the time the Villalbas' mortgage was executed required that the document be signed by the Villalbas as mortgagors. The statute also required that their signing be acknowledged by a notary public or other designated official. *See* R.C. 5301.01, effective Feb. 1, 2002. On its face, the mortgage deed appears to be validly executed by both Mr. and Mrs. Villalba and acknowledged in front of a notary public in accordance with R.C. 5301.01. Therefore, we conclude that Bank of New York met its initial *Dresher* burden to establish the absence of a genuine issue of material fact as to its reformation claim. The burden then shifted to the Villalbas to point to some evidence to establish that were was a genuine issue of material fact that would preclude summary judgment in favor of Bank of New York. *Id.*

{¶27} In opposition, Mrs. Villalba submitted an affidavit wherein she denied having any "recollection of executing the mortgage deed" and that the signature purporting to be hers on the mortgage was not her signature. Mrs. Villalba averred that, while the notarization of the mortgage demonstrated that the document was signed in Cuyahoga County, she had never traveled to Cuyahoga County until 2009. "[A] debtor's allegation that [s]he never signed a mortgage and that the certificate of acknowledgement is fraudulent is a sufficient defense to an action to enforce the mortgage." (Citations omitted.) *Lasalle Bank N.A. v. Zapata*, 6th Dist. Ottawa No. OT-08-043, 2009-Ohio-3200, ¶ 21.

{¶28} However, Bank of New York maintains that Mrs. Villalba waived any challenge to the validity of her signature, as it was not adequately raised as an affirmative defense in her answer to the foreclosure complaint. Bank of New York further argues that Mrs. Villalba's allegations contained in her counterclaim contradict her affidavit. The Villalbas' counterclaim included the allegations that, "[d]espite the execution of a mortgage deed * * * by both Mr.

Villalba and Mrs. Villalba[,] * * * [the initial mortgagee] did not acquire a security interest * * * as the mortgage deed did not accurately describe the [p]roperty[].” The Villalbas further alleged that “Mr. Villalba is married to Mrs. Villalba who was required to sign the purported mortgage deed solely because of her status as Mr. Villalba’s wife.”

{¶29} This Court notes that the Villalbas’ answer included an affirmative defense that “[Bank of New York’s] interest in the subject premises, if any, was procured by fraud.” We recognize that a party’s affidavit, which contradicts his or her prior testimony, cannot create a genuine issue of material fact absent sufficient explanation for the contradiction. *See Drogell v. Westfield Group*, 9th Dist. Medina No. 11CA0011-M, 2013-Ohio-5262, ¶ 21, citing *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶ 28. We do not, however, construe the Villalbas’ allegations in the counterclaim as an assertion that Mrs. Villalba either did or did not sign the mortgage so as to operate as a contradiction of her affidavit. *See Teagle v. Lint*, 9th Dist. Summit No. 18425, 1998 WL 178461, *4 (Apr. 15, 1998) (“[S]tatements [in pleadings] do not rise to the level of a judicial admission where there is no indication that the statement was intended to dispense with formal proof of material facts.”). We conclude that Mrs. Villalba’s affidavit was sufficient to raise a genuine issue of material fact with regard to Bank of New York’s claim that it was entitled to reformation of the mortgage deed and, hence, summary judgment on its foreclosure action. Accordingly, the trial court erred in granting Bank of New York’s motion for summary judgment on its reformation claim against Mrs. Villalba.

{¶30} However, Mr. Villalba fails to set forth any evidence on his own behalf that raises a genuine issue of material fact on Bank of New York’s summary judgment motion insofar as it concerns the reformation. Unlike Mrs. Villalba, Mr. Villalba does not challenge his signature on the mortgage. Because there was no genuine issue of material fact regarding reformation of the

mortgage with respect to Mr. Villalba, the trial court did not err in granting Bank of New York's motion for summary judgment on its claim for reformation against Mr. Villalba.

{¶31} We sustain the Villalbas' second assignment of error with regard to the trial court's entry of summary judgment on Bank of New York's reformation claim against Mrs. Villalba. We overrule the Villalbas' second assignment of error with regard to the entry of summary judgment on the reformation claim against Mr. Villalba.

III.

{¶32} The Villalbas' first and second assignments of error are each sustained in part and overruled in part. The judgment of the trial court is affirmed in part and reversed in part, and this matter is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

CARLA MOORE
FOR THE COURT

BELFANCE, P. J.
CONCURS.

HENSAL, J.
CONCURRING IN PART, AND DISSENTING IN PART.

{¶33} I agree with the majority's resolution of the second assignment of error. I also agree with its determination on the first assignment of error concerning the Villalbas' motion for summary judgment. I dissent with respect to the remaining arguments in the first assignment of error concerning whether the trial court erred in granting Bank of New York's cross-motion for summary judgment. Specifically, I do not agree that Bank of New York failed to satisfy its initial *Dresher* burden to demonstrate a genuine issue of material fact regarding whether it had possession of the promissory note.

{¶34} I would conclude that Ms. Mehn's affidavit, coupled with the loan documents attached thereto, sufficiently indicated that her averments were based on personal knowledge and established that there was no genuine issue of material fact concerning the issue of whether the Bank of New York possessed the promissory note at the time that the foreclosure case was filed. I would first note that Ms. Mehn was a BANA assistant vice president who was also a records custodian of the subject loan documents. Further, the recorded assignment of the note and mortgage attached to Ms. Mehn's affidavit specifically indicates that both the promissory note and the mortgage were transferred by BANA to Bank of New York in advance of the filing of

the foreclosure complaint. It is important to note that BANA is not just the loan servicer; it is also the entity from which Bank of New York obtained the promissory note and mortgage. This assignment supports Ms. Mehn's contention that Bank of New York was in possession of the promissory note prior to the filing of the complaint. I disagree with the majority that, because the assignment does not indicate the exact date that Bank of New York obtained the promissory note or that it continued to possess the instrument on the exact date that the foreclosure complaint was filed, it rendered Ms. Mehn unable to state based on her personal knowledge that Bank of New York possessed the promissory note.

{¶35} Based on the foregoing, I would conclude that Bank of New York satisfied its initial *Dresher* burden to demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The burden then shifted to the Villalbas to point to some evidence to establish that a genuine issue of material fact still existed that would preclude summary judgment in favor of Bank of New York. *Id*. They failed, however, to point to any evidence to contradict Ms. Mehn's affidavit and attendant documents that established that the Bank of New York was the current holder of the note. The crux of the Villalbas' response was that the Bank of New York did not meet its *Dresher* burden to demonstrate a genuine issue of material fact rather than set forth any compelling evidence on their behalf that Bank of New York did not possess the promissory note.

{¶36} Viewing the evidence in a light most favorable to the Villalbas, I would conclude that the trial court did not err in granting the Bank of New York's motion for summary judgment and overrule their first assignment of error in its entirety.

APPEARANCES:

JAMES R. DOUGLASS, Attorney at Law, for Appellants.

BRETT K. BACON and EMILY C. BARLAGE, Attorneys at Law, for Appellee.