

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105880

HSBC MORTGAGE SERVICES, INC.

PLAINTIFF-APPELLEE

vs.

MITCHELL BARNEY, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-841594

BEFORE: S. Gallagher, J., Boyle, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: April 19, 2018



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SEAN C. GALLAGHER, J.:

{¶1} Mitchell Barney, proceeding pro se, appeals the decree of foreclosure entered upon a motion for summary judgment in favor of U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust ("U.S. Bank"). We affirm.

{¶2} Barney executed a note and mortgage dated March 25, 2006, that contained his promise to pay \$226,100 plus interest and encumbered his residential property. The original holder and mortgagee was Intervale Mortgage Corporation, which assigned the note to Decision One Mortgage Company, L.L.C. Decision One endorsed the note in blank. Intervale Mortgage assigned the mortgage to HSBC Mortgage Services. In 2014, Barney defaulted. HSBC alleged to have been in possession of the note and mortgage and filed the foreclosure action. The note and mortgage were then assigned to U.S. Bank from HSBC during the course of the underlying proceedings. U.S. Bank was substituted as the real party plaintiff in HSBC's stead and presented the note endorsed in blank along with the assignment. Barney did not object or assign error to the substitution.

{¶3} Summary judgment may be granted if there is no genuine issue of material fact; the moving party is entitled to judgment as a matter of law; and viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Marusa v. Erie Ins. Co.*, 136 Ohio St.3d 118, 2013-Ohio-1957,

991 N.E.2d 232, ¶ 7. In a foreclosure action, the moving party must present “evidentiary quality materials” establishing (1) 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) the mortgagor is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due. *HSBC Bank USA, N.A. v. Surrarer*, 8th Dist. Cuyahoga No. 100039, 2013-Ohio-5594, ¶ 16, citing *United States Bank, N.A. v. Adams*, 6th Dist. Erie No. E-11-070, 2012-Ohio-6253, ¶ 10.

{¶4} Barney has not provided a recitation of facts, but claims in his first and second assignments of error that the trial court erred in granting summary judgment because U.S. Bank and HSBC, its predecessor in interest at the time of filing the complaint in foreclosure, lacked standing to enforce the note and mortgage. According to Barney, “[O]n March 6, 2015 when the within complaint was filed, the Assignment of Mortgage/Deed of Trust document **did not exist** on behalf of HSBC or U.S. Bank.” (Emphasis sic.) It is not clear if Barney is basing his standing argument on the note or the mortgage, which are two separate and distinct instruments. *Deutsche Bank Natl. Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243, ¶ 22.¹ It appears that Barney’s argument

¹In the alternative, Barney contends that “a genuine issue of material fact also remains as to the status of HSBC, at all relevant times from 2013 to 2017, and whether it had the relational ability to render the contractual notice as a condition precedent to foreclosure and effectively bind U.S. Bank.” That argument is not supported with any facts from the record or any case law, and therefore, it will not be addressed.

is based on the belief that HSBC and U.S. Bank lacked standing because the assignment documentation effectuating the transaction between the two entities did not exist until after HSBC filed the foreclosure action.

{¶5} “[S]tanding depends on whether the claimant has a sufficient personal stake in the litigation to obtain a judicial resolution of the controversy.” *Id.* at ¶ 20, citing *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 21. In order “to establish standing generally, a claimant must show it ‘suffered (1) an injury that is (2) fairly traceable to the defendant’s allegedly unlawful conduct, and (3) likely to be redressed by the requested relief.’” *Id.*, quoting *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22. Thus, under R.C. 1303.31, a promissory note may be enforced by the holder, a nonholder in possession, or a person entitled to enforce a lost or dishonored instrument. *Id.* at ¶ 22. In addition, a mortgagee has standing to enforce a mortgage that “is for the exclusive benefit of the mortgagee and those claiming under him.” *Id.* at ¶ 23, quoting *Phelps’ Lessee v. Butler*, 2 Ohio 224, 226 (1826).

{¶6} In the original complaint, HSBC alleged it was entitled to prosecute the foreclosure action as the holder of the note endorsed in blank and after having been assigned an interest in the mortgage. HSBC’s interests were then assigned to U.S. Bank during the course of the foreclosure action. U.S. Bank

was substituted as the real party plaintiff without objection and presented the note endorsed in blank received as a result of the assignment, demonstrating HSBC had been in possession of the note. Barney has not presented evidence to contradict those claims, and the documentary evidence supports HSBC and U.S. Bank's possession of the note at all necessary times. U.S. Bank has established it had standing to maintain and HSBC had standing to commence the foreclosure action. The first and second assignments of error are overruled.

{¶7} In the third assignment of error, Barney claims the trial court erred in finding that defendant lacked standing to challenge the assignment of the mortgage. In light of the undisputed facts that U.S. Bank was in possession of the note endorsed in blank at the time it was substituted as the real party plaintiff and HSBC was in possession of the same note at the time it filed the foreclosure action, Barney lacks standing to contest the assignments of the mortgage.

{¶8} This court has continually maintained that a mortgagor lacks standing to challenge an assignment of a mortgage if the mortgagor is neither a party to nor a third-party beneficiary of the assignment. *Bayview Loan Servicing, L.L.C. v. St. Cyr*, 8th Dist. Cuyahoga No. 104655, 2017-Ohio-2758, ¶ 40, citing *Bank of New York Mellon v. Froimson*, 8th Dist. Cuyahoga No. 99443, 2013-Ohio-5574, ¶ 17. This is so because even with allegations of an improper assignment of a mortgage, under Ohio law, the mortgage follows the

note it secures. *Id.* at ¶ 41, citing *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 65. In Ohio, it has been a longstanding maxim that “the negotiation of a note operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered.” *HSBC Bank USA, N.A. v. Thompson*, 2d Dist. Montgomery No. 23761, 2010-Ohio-4158, ¶ 80, quoting *U.S. Bank N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032, ¶ 52 (7th Dist.). Barney lacks standing to contest the assignments of the mortgage.

{¶9} Even so, Barney has failed to identify anything in the record demonstrating a genuine issue of material fact regarding whether U.S. Bank was properly assigned its interest in the mortgage. On this point, Barney interchangeably uses the terms “note” and “mortgage” when discussing any assignments in an effort to invalidate the chain of assignments. For instance, Barney contends that the *note* was endorsed in blank by Decision One Mortgage Company, and therefore, HSBC could not have been assigned the *mortgage* from Intervale Mortgage Corporation. *See, e.g., U.S. Bank Natl. Assn. v. Franko*, 8th Dist. Cuyahoga No. 105832, 2018-Ohio-687, ¶ 15 (overruling a similar argument). We cannot conclude that there are issues of fact with respect to the assignments in light of the arguments presented. App.R. 16(A)(7). The third assignment of error is overruled.

{¶10} In the fourth and final assignment of error, Barney claims that U.S. Bank's evidence, in the form of an affidavit, was deficient as a matter of law. According to Barney, the affidavit attached to U.S. Bank's motion for summary judgment "represents a recitation of boot-strapped hearsay^[2] that is facially insufficient to support summary judgment" because the affidavit is not based on personal knowledge.

{¶11} For the purposes of an affidavit, "[p]ersonal knowledge" has been defined as 'knowledge gained through firsthand observation or experience, as distinguished from a belief based upon what someone else has said.' *JPMorgan Chase Bank v. Stevens*, 8th Dist. Cuyahoga No. 104835, 2017-Ohio-7165, ¶ 32, quoting *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707. "[W]here an affiant attests that he or she has personal knowledge of the transaction, 'this fact cannot be disputed absent evidence to the contrary.'" *Id.*, quoting *Household Realty Corp. v. Henes*, 8th

² Barney is misusing the term "bootstrapping" in this evidentiary context. Traditionally, the "bootstrapping rule" precluded the state from presenting evidence of a conspiracy by admitting statements of a coconspirator that established the conspiracy, under rationale that such statements were not hearsay because they were attributable to the defendant through being uttered by a coconspirator. *Bourjaily v. United States*, 483 U.S. 171, 177, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). In order for the statements to be considered nonhearsay, the state was required to prove that they were uttered by a coconspirator, and thus, permitting such a practice would allow the hearsay to make itself admissible as nonhearsay. To prevent this, the Court required independent proof of the conspiracy as a foundation to introducing the statements as nonhearsay. The "rule" was not codified in the Federal Rules of Evidence. *Id.* Nevertheless, none of this is relevant to a civil action in which the plaintiff seeks summary judgment based on affidavits submitted under Civ.R. 56(E).

Dist. Cuyahoga No. 85916, 2007-Ohio-5846, ¶ 12-13. And, “[t]here is no requirement that an affiant explain the basis for his personal knowledge where his personal knowledge can be reasonably inferred based on the affiant’s position and other facts contained in the affidavit.” *Id.* at ¶ 34, quoting *Nationstar Mtge., L.L.C. v. Perry*, 8th Dist. Cuyahoga No. 99497, 2013-Ohio-5024, ¶ 15.

{¶12} Barney claims that the affidavit attached to U.S. Bank’s motion for summary judgment is conclusory and made without reference to how the affiant obtained her knowledge. According to Barney, that affidavit must be disregarded. Nothing demonstrates that the affiant lacked personal knowledge. When challenging an affiant’s personal knowledge, the opposing party must present or identify evidence to contradict the challenged statement; courts do not review credibility determinations under Civ.R. 56.

{¶13} In *Deutsche Bank Natl. Trust Co. v. Triplett*, 8th Dist. Cuyahoga No. 94924, 2011-Ohio-478, ¶ 16, for example, there was evidence that the plaintiff executed the assignment of the mortgage after filing the lawsuit, and thus lacked standing — the assignment was recorded after the lawsuit was filed. *Id.* The affiant averred that it had been assigned the mortgage before filing the foreclosure action. The court concluded this disparity demonstrated that the verified statement was insufficient to demonstrate standing. *Id.* In this case, Barney has not presented any evidence contradicting the affidavit for the

purpose of calling into question the verified statements therein. The fourth assignment of error is overruled.

{¶14} The decree of foreclosure is affirmed.

It is ordered that appellee recover from 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.

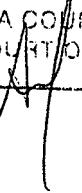


SEAN C. GALLAGHER, JUDGE

MARY J. BOYLE, P.J., and
ANITA LASTER MAYS, J., CONCUR

FILED AND JOURNALIZED
PER APP.R. 22(C)

APR 19 2018

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