

IN THE SUPREME COURT OF OHIO

HSBC Mortgage Services, Inc.,)
) Case No. 2018-0780
)
Substitute Plaintiff -Appellee,) On Appeal from the Cuyahoga County Court
) of Appeals 8th Appellate District
)
vs.)
) Court of Appeals
) Case No.: CA-17-105880
Mitchell Barney, et al.,)
) Lower Common Pleas
) Case No.: CV-15-841594
Defendants - Appellants.)
)
)
_____)

APPELLEE’S MEMORANDUM IN OPPOSITION TO JURISDICTION

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I. THIS CASE DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

This is a Mortgage Foreclosure action in which Substitute Plaintiff-Appellee (“Appellee”), U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust (“U.S. Bank”) prevailed on summary judgment and obtained a judgment in foreclosure against the mortgagor/defendant, Appellant Mitchell Barney (“Appellant”). Appellant argument before the 8th District Court of Appeals failed and, now, asks this Court to review his assertion that U.S. Bank and its predecessor in interest HSBC Mortgage Services, Inc. lacked standing to enforce the note and mortgage. Additionally, Appellant improperly raises for the first time Federal Consumer Acts as a proposition of law despite not raising this issue in the Trial Court or in the 8th District Court of Appeals. For a number of reasons, this case and the propositions of law advanced by Appellant do not warrant this Court's attention.

As an initial matter, on February 20, 2013, this Court declined to accept jurisdiction to address the very question ostensibly presented in this appeal, whether defendants to a foreclosure action can challenge an assignment to which they are not a party. In the case of *SF6Mercury REO Investments Trust Series 2008-1 c/o Vericrest Financial, Inc. v. Locke*, Case no. 2012-1926. Similarly, this Court declined to accept jurisdiction in the case of *JPMorgan Chase Bank, N.A. v. Raymond E. Romine*, Case No. 2013-1763. Since that time, nothing about the public interest or the state of the law in Ohio has changed that would justify this Court coming to a different conclusion now. Further, among the various appellate districts, Ohio courts uniformly and correctly have held that a non-party to a mortgage assignment has no legal standing to challenge or enforce it against a party to the putative assignment. There is no need for this Court to address

a question that has been answered consistently and correctly by all Ohio courts that have considered it.

Instead, Appellant suggests that Cuyahoga County adopt the Certificate of Readiness procedure enacted by Summit County Local Rule 11.01, or the Northern District of Ohio's Fifth Amended General Order No. 2006-16, alleging disparate impact and disparate treatment in Cuyahoga County as a result of not implementing similar procedures. However, even if Cuyahoga County required a Certificate of Readiness or Affidavit, the facts of this case would remain unchanged, and the Foreclosure judgment would remain the proper disposition of the Courts.

Moreover, this Court should not address the proposition of law in question, since Appellant was, in fact, given the opportunity to litigate the validity of the assignments in the trial court below. Indeed, the 8th District's opinion affirming the decision of the trial court was supported by the undisputed factual record, wherein it was established Appellant's arguments as to the validity of the assignments of mortgage were without merit. The question of standing to challenge the putative assignment is, therefore, a moot point. That is, Appellant was given the opportunity to develop a factual record to support his contention, but he failed to do so. Thus, even if he had standing to challenge an assignment to which he is not a party, an answer to a legal question presented can have no bearing on the outcome of this case, and this is not a proper subject of review by this Court. That U.S. Bank established below its own holder status with respect to the Note, thereby conferring standing upon it independently of the Mortgage.

Finally, even if Appellant had properly placed the issue for review before this Court, the idiosyncratic facts of this case-specifically, would render a decision by this Court of exceedingly narrow and limited application. While acknowledging that the issue presented is "largely factual

and dependent on the nature of each individual case," Appellant's attempt to generalize the proposition of law in order to render it of greater public or general interest ignores the reality that, if this Court were to accept jurisdiction, its review would be limited to very specific facts and legal questions posed by Appellant's defense. Apart from that defense being without any merit, it is not of any particular public or general interest, even in the specific context of foreclosure litigation.

II. STATEMENT OF THE CASE AND FACTS

This matter stems from foreclosure proceedings before the Cuyahoga County Court of Common Pleas ("Trial Court"), where a judgment entry adopting the Magistrate's Decision granting Substitute Plaintiff/Appellant's ("U.S. Bank") Motion for Summary Judgment was filed on May 10, 2017.

Appellant Mitchell Barney ("Appellant") is the maker of a promissory note dated March 25, 2006 ("Note"), which contained an unconditional promise to repay \$226,100.00 plus interest at a rate of 8.59% per annum to the order of Intervale Mortgage Corporation ("Original Lender"). (Compl. at Ex. A; Affidavit at ¶¶ 5-6, Ex. A-1.) That same day, as security for the Note, Appellant executed a Mortgage granting Mortgage Electronic Registration Systems ("MERS"), as nominee for Original Lender, its successors and assigns, the first and best lien on the real property located at 2485 Newbury Drive, Cleveland Heights, Ohio 44118 (the "Property"). (Compl. at Ex. B; Affidavit at ¶¶ 5-6, Ex. A-2.) The Note was endorsed from Original Lender to Decision One Mortgage Company, LLC; Decision One Mortgage Company, LLC then subsequently indorsed the Note in blank. (Compl. at Ex. A; Affidavit at ¶¶ 5-6, Ex. A-1, pg. 3.) Additionally, the Mortgage was assigned and recorded from MERS as nominee for

Original Lender to Original Plaintiff HSBC (“HSBC”) prior to the commencement of filing the Complaint for Foreclosure. (Compl. at Ex. C; Affidavit at ¶ 6; Ex. A-3.)

On September 16, 2014, HSBC caused a Notice of Right to Cure Default (“Notice of Default”) to be sent to Appellant at the Property. (Affidavit at ¶ 9; Ex. A-5.) Appellant did not remit funds to cure the default in accordance with the Notice of Default, and HSBC exercised its right to accelerate the loan and initiate foreclosure proceedings. (Affidavit at ¶ 7.)

HSBC filed its Complaint for Foreclosure in the Trial Court on March 6, 2015. After the filing of the Complaint, the Note was later negotiated and the Mortgage assigned to Substitute Plaintiff U.S. Bank (“Appellee”) as evidenced by the Assignment of Mortgage from HSBC to U.S. Bank as well as U.S. Bank’s averment of possession in the Affidavit in Support of its Motion for Summary Judgment (“Affidavit”). (Affidavit at ¶ 6, Ex. A-4.) Appellant did not oppose the Motion to Substitute Plaintiff. The Trial Court Ordered that Appellee be substituted as Plaintiff on September 9, 2015. After obtaining leave of court, Appellant, through counsel, filed his Answer on November 13, 2015. Appellant’s Answer was a general denial and raised some affirmative defenses.

This matter was referred to mediation on December 23, 2015. After Appellant decided not to accept a loan workout arrangement from Appellee, the matter was released from mediation on July 11, 2016. Substitute Plaintiff/Appellee filed its Motion for Summary Judgment on December 5, 2016. After the parties fully briefed the Motion for Summary Judgment, a Magistrate’s Decision was issued on March 30, 2017 granting Substitute Plaintiff/Appellee’s Motion for Summary Judgment and finding that Defendant’s arguments as to standing lacked merit due to a failure to put forth any evidence supporting his contention that the Note endorsements or the Assignments of Mortgage were invalid.

Appellant filed his Objections to the Magistrate’s Decision on April 12, 2017. Substitute Plaintiff/Appellee filed its Reply to Defendant’s Objection to the Magistrate’s Decision on April 20, 2017, and Appellant filed his Reply Brief in Support to his Objection to the Magistrate’s Decision on April 24, 2017. After consideration of the briefs, the Objections to the Magistrate’s Decision were ultimately overruled and the Judgment Entry adopting the Magistrate’s Decision was filed on May 10, 2017 by Judge John J. Russo. The instant appeal followed.

Appellant Mitchell Barney (“Appellant”) filed a Notice of Appeal with the 8th District Court of Appeals on June 9, 2017, alleging four Assignments of Error: 1) The Trial Court erred in granting Appellee Summary Judgment when there was a genuine issue of material fact that both the Original Plaintiff and the Substitute Plaintiff lacked standing when the Complaint was filed; 2) the Trial Court erred in holding that the evidence submitted by Plaintiff-Appellee’s Affidavits satisfied Rule 56(E) of the Ohio Rules of Civil Procedure; 3) the Trial Court erred in finding that Defendant lacked standing to challenge the Assignment documents in support of Summary Judgment, and; 4) the Trial Court erred in granting Appellee Summary Judgment where the Substitute Plaintiff’s Affidavit is deficient as a matter of law. Appellant then waived oral argument. After fully briefing the Appeal, the 8th District Court of Appeals affirmed the decision of the lower court on April 19, 2018. Appellant, under the auspice of being pro se, then filed a Notice of Appeal and Memorandum in Support of Jurisdiction with the Ohio Supreme Court on June 4, 2018, and a Notice of Amended Certificates of Service on June 7, 2018.

III. BRIEF ARGUMENTS IN RESPONSE TO PROPOSITIONS OF LAW

1. **Appellants' Proposition of Law No. 1: MORTGAGE AND ASSIGNMENT** transactions must be effected by the owner of the mortgage and note and by entities having an ownership interest or beneficial interest [in] the real estate in order to pass title. Therefore, having neither, a nominee of the owner may not pass title to an assignee.

In signing the subject Mortgage the Appellants agreed to the following:

TRANSFER OF RIGHTS IN PROPERTY

This security instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. **For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS** the following described property located in the County of Cuyahoga:

(Complaint Ex. B, pg. 2, emphasis added). Further, the Appellant agreed that:

TOGETHER WITH all improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additional shall also be covered by this Security Instrument as the "Property." **Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests including but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.**

(Complaint Ex. B, pg. 4, emphasis added). Courts routinely cite the language in the security instrument when dismissing claims that MERS is not the mortgagee or beneficiary. See *Edelstein v. Bank of N.Y. Mellon*, 286 P.3d 249, 259 (Nev. 2012), which found that "Similarly here, the deed of trust's text, as plainly written, repeatedly designated MERS as the beneficiary, and we thus conclude that MERS is the proper beneficiary." "Designating MERS as the beneficiary in its representative capacity as nominee of Lehman Brothers and its successors and assigns was

legally no different from designating Lehman Brothers and its successors and assigns as the beneficiary. . . . Therefore, having MERS the named beneficiary as nominee for the lender conforms to the requirements of a deed of trust under Idaho law.” *Edwards v. Mortgage Elec. Registration Sys., Inc.*, 300 P.3d 43, 49 (Idaho 2013); “[T]he mortgage signed by the parties indicated that MERS was the mortgagee, and MERS satisfied the statutory definition of a mortgagee, which goes beyond just note holders to also encompass ‘any person designated or authorized to act on behalf of such holder.’”. *Mortgage Elec. Registration Sys., Inc. v. Barnes*, 406 Ill. App. 3d 1, 7, 940 N.E.2d 118 (2010); “MERS was the beneficiary under the deed of trust because, as a legally operative document, the deed of trust designated MERS as the beneficiary. Given this designation, MERS’s status was not reasonably subject to dispute.” *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 266 (2011) overruled in part by *Yvanova v. New Century Mortgage Corp.*, 62 Cal. 4th 919, 938-939 (2016)

Here, Appellant is seeking to advance a theory which proposes that because MERS held the security interest as nominee mortgagee of record while the note is negotiated and held by other parties, that MERS thereby lacks any authority to assign the Lender’s interest to which they are a nominee mortgagee of record. However, Appellant’s rationale is fatally flawed.

[A] [m]ortgage may not be enforced except by a person having the right to enforce the obligation **or one acting on behalf of such person**. As mentioned, in general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation. For example, assume that the original mortgagee transfers the mortgage alone to A and the promissory note that it secures to B. Since the obligation is not enforceable by A, A can never suffer a default and hence cannot foreclose the mortgage. B, as holder of the note, can suffer a default. However, in the absence of some additional facts creating authority in A to enforce the mortgage for B, B cannot cause the mortgage to be foreclosed since B does not own the mortgage.

The result is changed if A has authority from B to enforce the mortgage on B’s behalf. For example, A may be a trustee or agent of B with responsibility to enforce the mortgage at B’s direction. A’s enforcement of the mortgage in these

circumstances is proper The trust or agency relationship may arise from the terms of the assignment, from a separate agreement, or from other circumstances. Courts should be vigorous in seeking to find such a relationship, since the result is otherwise likely to be a windfall for the mortgagor and the frustration of B's expectation of security.

Restatement (Third) of Property, § 5.4 cmt. e (emphasis added). Additionally, the Restatement (Third) of Agency (2006) makes clear that an agent may act on behalf of both a disclosed principal (the original lender) and a later unidentified principal (the lender's successors and assigns). Restatement (Third) of Agency § 1.04.

The Language contained in the Mortgage at issue herein, agreed to and signed by the Appellant, clearly give MERS the authority to act as an agent, or nominee, on behalf of the Original Lender, its successors or assigns, which includes subsequent holders of the Note. When HSBC initially filed the underlying foreclosure action, attached to its Complaint were: 1) a true and accurate copy of the Note containing a blank indorsement; 2) a true and accurate copy of the properly recorded Mortgage; 3) a true and accurate copy of the properly recorded assignment of Mortgage from Mortgage Electronic Registration Systems, Inc. as nominee for Intervale Mortgage Corporation "its successors and assigns" to HSBC Mortgage Services, Inc. The assignment of Mortgage to HSBC, recorded on January 22, 2015, followed the Appellant's default in mortgage payments, due for July 1, 2014, and preceded the filing of the foreclosure on March 6, 2015. At the time of the filing of the foreclosure Complaint, HSBC was both in possession of the original Note, containing the blank indorsement, and was the recorded assignee of the Mortgage, which conferred standing on HSBC to bring said action. Following the filing of the foreclosure action, HSBC negotiated and transferred the Original blank indorsed Note to U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust ("U.S. Bank"), and properly recorded and assignment of Mortgage from HSBC to U.S. Bank on August 14, 2015. Following

the recordation of the assignment of mortgage from HSBC to U.S. Bank, HSBC properly moved to substitute U.S. Bank as Plaintiff in the foreclosure action. Despite Appellant's broad allegations of illegality and concealment, the chain of assignments of Mortgage and possession of the Original blank indorsed Note is simple, and Appellants attempts to obfuscate that fact with other transactions entered into by the Appellant are without merit and unrelated to the case at hand.

A. Appellants Cite Incorrect Authority to Assign Mortgage

Appellants then proceed to claim under this proposition of law that O.R.C. 5301.252(A), (B), and (D) is the proper statute under which an assignment of Mortgage is to be performed. However, "Under R.C. § 5301.252(B)(3), an affidavit may state facts relating to "[t]he happening of any condition or event that may create or terminate an estate or interest * * *." Here, the Affidavit provides notice that the two previous assignments of mortgage were done in error, and thus, clearly relate to the happening of an event that may create or terminate an interest in land. Therefore, they relate to a matter set forth in R.C. § 5301.252(B)." *HSBC Bank, USA v. Maust*, (5th Dist.), 2014-Ohio-3170, 2014 WL 3556450, ¶50. It is unclear if Appellant is claiming that Appellee's assignments of Mortgage, or acknowledgments therein are insufficient or should be affidavit form, or if Appellee's affidavits filed in the Trial Court attesting to the assignments of Mortgage are being challenged. Regardless, neither HSBC nor U.S. Bank invoked R.C. 5301.252 as it was not required to correct a mistake in the record, or otherwise create or terminate an estate or interest, as only a transfer of the pre-existing mortgage interest was required.

Rather, "[t]he Revised Code specifically provides for the assignment of mortgages by either writing the assignment on the original mortgage, writing the assignment upon the margin

of the record of the original mortgage, or by executing a separate instrument of assignment. R.C. 5301.31; 5301.32. The assignment of the mortgage “shall transfer not only the lien of the mortgage but also all interest in the land described in the mortgage.” R.C. 5301.31. *Wead v. Lutz*, 12th Dist. No. CA2004-12-022, 161 Ohio App.3d 580, 2005-Ohio-2921, 831 N.E.2d 482, ¶ 17. In this matter, the assignments of Mortgage were recorded pursuant to R.C. 5301.32, or by separate instrument:

A mortgage may be assigned or partially released by a separate instrument of assignment or partial release, acknowledged as provided by section 5301.01 of the Revised Code. The separate instrument of assignment or partial release shall be recorded in the county recorder's official records. The county recorder shall be entitled to charge the fee for that recording as provided by section 317.32 of the Revised Code for recording deeds. **The signature of a person on the assignment or partial release may be a facsimile of that person's signature. A facsimile of a signature on an assignment or partial release is equivalent to and constitutes the written signature of the person for all requirements regarding mortgage assignments or partial releases.**

In a county in which the county recorder has determined to use the microfilm process as provided by section 9.01 of the Revised Code, the county recorder may require that all assignments and partial releases of mortgages be by separate instruments. The original instrument bearing the proper endorsement may be used as the separate instrument.

An assignment of a mortgage shall contain the then current mailing address of the assignee.

R.C. 5301.32 (emphasis added). To this end, the two assignments of Mortgage at issues herein are in compliance with R.C. 5301.32 (See, Appellee’s MSJ Affidavit, Ex. A-3, and Ex. A-4). Both assignments were properly recorded with the county’s recorder’s office in which the property is located, both identify the borrower, the property address, the original mortgage loan amount and instrument number, and both include the current mailing address for the assignee of the mortgage.

Therefore, there are no issues with the authority or execution of the assignments of Mortgage at issue herein either as a legal or factual matter, and therefore jurisdiction should be denied and this appeal dismissed.

2. **Appellants' Proposition Of Law No. 2:** FEDERAL CONSUMER ACTS protecting homeowners contain mandatory areas of compliance for lenders in the area of foreclosure.

The Appellant now raises for the first time, in his Jurisdictional Brief, arguments related to compliance with the Fair Debt Collections Practices Act (“FDCPA”), Truth in Lending Act (“TILA”), the Real Estate Settlement Procedures Act (“RESPA”), “Dual Tracking” (which refers to 12 C.F.R. 1024.41(f)-(g) under RESPA), as well as disputes over sufficiently replying to Discovery Requests, and Qualified Written Requests (collectively referred to herein as “Federal Consumer Acts”) as means of bolstering his assertions against the Appellee. However, the Ohio Supreme Court has held that “we have long recognized, in civil as well as criminal cases, that failure to timely advise a trial court of possible error, by objection or otherwise, results in a waiver of the issue for purposes of appeal.” *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121, 679 N.E.2d 1099. A review of the Appellant’s filings in the Cuyahoga County Common Pleas, Case No. CV-15-841594: Appellant’s Answer, Appellant’s Brief in Opposition to Appellee’s Motion for Summary Judgment, Appellant’s Brief in Opposition to Appellee’s Supplemental Motion for Summary Judgment, Appellant’s Objection to the Magistrate’s Decision, Appellant’s Reply Brief in Support to his Objection to the Magistrate’s Decision, and the briefs filed in the 8th District Case No. CA-17-105880 do not contain any arguments regarding compliance with Federal Consumer Act. Accordingly, Appellant’s attempt to raise said

issues within his Jurisdictional Brief is improper as any objections of defenses should have been timely raised in the trial court, and as a result of failing to do so these issues have been waived.

IV. CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Honorable Court deny this discretionary appeal for failure to raise an issue of substantial public or general interest and failure to raise a substantial constitutional question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was sent by regular U.S. Mail on June 18, 2018, to the following:

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