[Cite as *Bank One, N.A. v. Demmler,* 2009-Ohio-3848.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BANK ONE, N.A.	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
KARL A. DEMMLER	:	Case No. 08CAE100057
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 04CVE09633
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 3, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
BENJAMIN D. CARNAHAN 4805 Montgomery Road Suite 320 Norwood, OH 45212	KARL A. DEMMLER, PRO SE c/o The Nyce Law Office 545 East Town Street Columbus, OH 43215

Farmer, P.J.

{¶1} On September 17, 2004, appellee, Bank One, N.A., filed a complaint against appellant, Karl Demmler, and others, seeking foreclosure of a recorded mortgage deed and judgment on the unpaid balance of a promissory note. On December 3, 2004, appellant filed an answer and counterclaim. Both parties filed motions for summary judgment. A hearing was held on November 14, 2006. By findings and opinion filed January 19, 2007, the trial court granted summary judgment in favor of appellee. Pursuant to an agreed entry filed April 11, 2008, the parties submitted briefs on the issue of damages. By finding and final judgment entry filed September 3 and 10, 2008, respectively, the trial court awarded appellee as against appellant $520,688.84 plus interest and costs.

{¶2} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶3} "THAT THE PROMISSORY NOTE, WHICH IS BOTH THE OBJECT AND SUBJECT OF THE FORECLOSURE ACTION, IS A NEGOTIABLE INSTRUMENT UNDER OHIO REVISED CODE SECTION 13.13(A)(B) AND (D)."

II

{¶4} "THAT THE PLAINTIFF BANK ONE NA IS THE OWNER, HOLDER AND IS IN POSSESSION AND CONTROL OF THE PROMISSORY NOTE THAT IS THE SUBJECT AND OBJECT OF THE FORECLOSURE ACTION. THAT EVIDENCE SHOWS THAT THE PAYMENTS ON THE NOTE ARE PAST DUE. THAT THE PROMISSORY NOTE IS LOST AND THAT ITS DISAPPEARANCE HAS BEEN

SATISFACTORILY EXPLAINED. THAT DEFENDANT'S RIGHTS MAY BE ADEQUATELY PROTECTED SHOULD THE ORIGINAL SUBSEQUENTLY BE FOUND. THAT ANGELO LOZANO'S AFFIDAVIT WAS ADMISSIBLE AS EVIDENCE TO ESTABLISH LOST PROMISSORY NOTE."

III

{¶5} "THAT DEFENDANT'S POSITION IS KNOWN AS 'VAPOR THEORY' AND IS NOT A VIABLE BASIS FOR SUCH A CLAIM. SEE THE FRANCIS KENNY FAMILY V. WORLD SAVINGS BANK, FSB (2005), CASE NO C-04-03724 CITED BY THE PLAINTIFF."

IV

{¶6} "THAT THE SECURITY AGREEMENT IS NOT RESCINDED UNDER TITLE 12, PART 226 (REGULATION Z), SUBPART C – CLOSED-END CREDIT § 226.23(a), (h), (i) AND (ii) AND VOIDABLE UNDER RESTATEMENT OF THE LAW SECOND, CONTRACTS § 164(1) AND (2) FOR MISREPRESENTATION AND FRAUD."

I

{¶7} Appellant claims the promissory note was not a negotiable instrument pursuant to R.C. 1313.05(A), (B), and (D) because it is a security pursuant to R.C. 1707.01. We disagree.

{¶8} R.C. 1303.03 defines a "negotiable instrument" as "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order." It must meet the following requirements:

{¶9} "(1) It is payable to bearer or to order at the time it is issued or first comes into possession of a holder.

{¶10} "(2) It is payable on demand or at a definite time.

{¶11} "(3) It does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain any of the following:

{¶12} "(a) An undertaking or power to give, maintain, or protect collateral to secure payment;

{¶13} "(b) An authorization or power to the holder to confess judgment or realize on or dispose of collateral;

{¶14} "(c) A waiver of the benefit of any law intended for the advantage or protection of an obligor."

{¶15} Despite the clear applicability of this statute to the subject promissory note, appellant's argument also fails because R.C. 1707.01(B) exempts real estate transactions from security legislation.

{¶16} Appellant further argues the promissory note had a twelve month maturity date. The December 1, 1998 adjustable rate note specifically states the maturity date is well beyond twelve months:

{¶17} "3. PAYMENTS:

{¶18} "(A) Time and Place of Payments

{¶19} "I will pay principal and interest by making payments every month.

{¶20} "I will make my monthly payments on the first day of each month beginning on February 1st 1999. I will make these payments every month until I have

paid all of the principal and interest and any other charges described below that I may owe under this Note. My monthly payments will be applied to interest before principal. If, on December 01, 2028, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the 'Maturity Date.'

{¶21} "I will make my monthly payments at 132 E. Washington Street, Suite 302 Indianapolis, IN 46204 or at a different place if required by the Note Holder."

{¶22} In *Washer v. Tontar* (1934), 128 Ohio St. 111, 113, the Supreme Court of Ohio noted the following:

{¶23} "It is pertinent at the outset to call attention to the principle that the promissory note is the primary evidence of the debt and that the mortgage on the real estate in question is merely the security for the payment of the note. The obligation of the maker of the note is the full amount found to be due thereon. The fact that there is security therefor takes away no right or remedy of the holder of the note, nor does it affect the liability of the maker of the note."

{¶24} We find the note evidencing the debt is a negotiable instrument which by its very nature is fully transferable to another lending institution.

{¶25} Assignment of Error I is denied.

II

{¶26} Appellant claims appellee was not the proper party in interest to prosecute the foreclosure action. We disagree.

{¶27} Appellant challenges appellee's failure to provide the original promissory note. As evidenced by the Delaware County Recorder's Office, the mortgage and note

were filed in Vol. 1063, p. 160. The assignment of mortgage and note assigned to appellee was also recorded.

{¶28} Evid.R. 803 governs exceptions to the hearsay rule. Subsection (8) states the following:

{¶29} "**(8) Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness."

{¶30} Angela Lozano, officer of Washington Mutual Bank, servicing agent for appellee, filed an affidavit in support of appellee's motion for summary judgment wherein she set forth the chain of possession as follows:

{¶31} "That Affiant is an officer of WASHINGTON MUTUAL BANK, Servicing Agent for BANK ONE, N. A., the holder of the Promissory Note and Mortgage Deed executed on December 1, 1998 by Karl A. Demmler in favor Bank One, N.A., which Promissory Note and Mortgage Deed were ultimately assigned to BANK ONE, N.A. Affiant further states that WASHINGTON MUTUAL BANK has been servicing agent of the Promissory Note and Mortgage Deed as aforesaid. Affiant further states that the aforesaid Promissory Note was made by Karl A. Demmler on December 1, 1998 in the sum of $350,000.00, in favor of Banc One Mortgage Corporation. Affiant further states that they have personal knowledge of the history of said loan.

{¶32} "***

{¶33} "Affiant further states that, as a result of unintentional mishandling of documents, the whereabouts of the original Promissory Note is unknown, although the original document was last in the possession of WASHINGTON MUTUAL BANK."

{¶34} "21 O. Jur. 2d 277, Evidence, Section 259, states: Where proof is to be made of some fact which is recorded in a writing, the best evidence of the contents of the writing consists in the actual production of the document itself. And the general rule is that secondary evidence of the contents of a written instrument cannot be admitted until the nonproduction of the original has been satisfactorily accounted for." *Smith v. Andres* (June 28, 1978), Hamilton App. No. C-77297, fn. 1.

{¶35} "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio." Evid.R. 1002. "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Evid.R. 1003.

{¶36} In addition, R.C. 1303.38 states:

{¶37} "(A) A person not in possession of an instrument is entitled to enforce the instrument if all of the following apply:

{¶38} "(1) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred.

{¶39} "(2) The loss of possession was not the result of a transfer by the person or a lawful seizure.

{¶40} "(3) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process."

{¶41} Appellant's own admissions (¶2 of answer and ¶1 and 2 of counterclaim) and his failure to refute the Lozano affidavit lend credence to the trial court's acceptance of the affidavit and the validity of Washington Mutual as the proper party in interest.

{¶42} Assignment of Error II is denied.

III

{¶43} Appellant claims he presented a viable defense to the underlying foreclosure action. We disagree.

{¶44} In his defense, appellant argues the "vapor money" theory. In *Demmler vs. Bank One NA* (S.D.Ohio 2006), Case No. 2:05-CV-322, the United States District Court specifically rejected appellant's theory:

{¶45} "Plaintiff alleges that the promissory note he executed is the equivalent of 'money' that he gave to the bank. He contends that Bank One took his 'money,' *i.e.,* the promissory note, deposited it into its own account without his permission, listed it as an 'asset' on its ledger entries, and then essentially lent his own money back to him. He contends that Bank One did not actually have the funds available to lend to him, but instead 'created' the money through its bookkeeping procedures. He further argues that because Bank One was never at risk, and provided no consideration, the promissory

note is void *ab initio,* and Defendants' attempts to foreclose on the mortgage are therefore unlawful.

{¶46} "Plaintiff offers no authority for this patently ludicrous argument. Similar arguments have been rejected by federal courts across the country. *See Frances Kenny Family Trust v. World Savings Bank,* No. C04-03724 WHA, 2005 WL 106792 (N.D.Cal. Jan.19, 2005)(sanctioning plaintiffs and rejecting their 'vapor money' theory); *Carrington v. Federal Nat'l Mortgage Ass'n,* No. 05-cv-73429-DT, 2005 WL 3216226, at *3 (E.D.Mich. Nov.29, 2005)(finding 'fundamentally absurd and obviously frivolous' plaintiff's claim that the lender unlawfully 'created money' through its ledger entries); *United States v. Schiefen,* 926 F.Supp. 877, 880-81 (D.S.D.1995)(rejecting arguments that there was insufficient consideration to secure the promissory note, and that lender had 'created money' by means of a bookkeeping entry); *Thiel v. First Fed. Savings & Loan Ass'n of Marion,* 646 F.Supp. 592 (N.D.Ind.1986)(rejecting claims that lender had violated RICO and the National Bank Act by issuing loan check in exchange for promissory note, and imposing sanctions on plaintiffs for bringing frivolous action); *Rene v. Citibank,* 32 F.Supp.2d 539, 544-45 (E.D.N.Y.1999)(rejecting claims that because lender did not have sufficient funds in its vault to make the loan, and merely 'transferred some book entries,' the lender had created illegal tender)."

{¶47} In *Grava v. Parkman Twp*., 73 Ohio St.3d 379, 1995-Ohio-331, syllabus, the Supreme Court of Ohio explained res judicata as "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action."

{¶48} We find this argument was clearly resolved in the federal case and an appeal was never taken; therefore, the issue was properly dismissed sub judice.

{¶49} Assignment of Error III is denied.

IV

{¶50} Appellant claims the trial court erred in not finding that he had properly rescinded the mortgage loan transaction. We disagree.

{¶51} Appellant argues he rescinded the mortgage loan transaction in 2006. The original note closed in 1998. The three year statute of limitations bars the purported recession. See, Section 1635, Title 15, U.S.Code.

{¶52} Further, in his answer and counterclaim, appellant did not make a prayer for recession, nor did he assign it as an affirmative defense.

{¶53} Assignment of Error IV is denied.

{¶54} The judgment of the Court of Common Pleas of Delaware County, Ohio is hereby affirmed.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

s/ Sheila G. Farmer_____

s/ John W. Wise_____

_s/ Patricia A. Delaney_____

SGF/jbp 0709 JUDGES

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

BANK ONE, N.A.	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
KARL A. DEMMLER	:	
Defendant-Appellant	:	CASE NO. 08CAE100057

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio is affirmed. Costs to appellant.

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JUDGES