

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

PNC Bank, N.A.

Court of Appeals No. L-12-1335

Appellee

Trial Court No. CI0201201747

v.

Vinod K. Bhandari, et al.

DECISION AND JUDGMENT

Appellants

Decided: June 14, 2013

* * * * *

Charles F. Allbery III, Canice J. Fogarty and Anastasia K. Hanson,
for appellee.

George R. Smith, Jr., for appellants.

* * * * *

JENSEN, J.

{¶ 1} This is an appeal in a foreclosure action in which the Lucas County Court of Common Pleas granted summary judgment in favor of the lender-appellee. We affirm.

{¶ 2} This foreclosure action involves a vacant lot, known as “Lot 5” on Tremore Way in Holland, Ohio. On October 1, 2004, appellants, Vinod and Madhu Bhandari,

purchased the lot and executed a promissory note in the amount of \$154,000 in favor of National City Mortgage Co. As security for the note, appellants executed a real estate mortgage on that same date which was recorded with the Lucas County Recorder. The terms of the note called for “interest only” payments until the maturity date of November 1, 2009, when the principal was to become due in a so-called “balloon payment.” The maturity date was extended until November 1, 2011. Appellants defaulted on the loan on October 1, 2011, and no principal payments were ever made.

{¶ 3} Appellee, PNC Bank, N.A., filed a complaint in foreclosure on February 15, 2012. With the complaint, appellee also filed an affidavit and supporting documents certifying that PNC Bank, N.A. was the holder of appellants’ note and mortgage by virtue of its merger and acquisition of National City Bank on November 6, 2009.

{¶ 4} PNC filed for summary judgment on May 4, 2012. With leave of court, appellants opposed the motion on September 24, 2012. On October 23, 2012, the trial court entered a decree of foreclosure, finding the amount owed to appellee to be \$152,149.58, plus interest at the annual rate of 3.75 percent. Appellants timely appealed to this court on November 21, 2012.

{¶ 5} Appellants raise one assignment of error for our review:

The Trial Court erred in granting summary judgment without considering, evaluating and addressing equitable facts and circumstances in defense of a real estate foreclosure action.

{¶ 6} Since filing their appeal, appellants also questioned the trial court’s subject matter jurisdiction over the action, arguing that PNC Bank did not establish that it was the successor in interest to National City Bank at the time the action was filed. We address appellants’ jurisdictional argument first and then their assignment of error.

{¶ 7} Recently, the Supreme Court of Ohio instructed that standing to sue in the foreclosure arena must be determined at the commencement of the suit. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214. Thus, if a party seeking to foreclose a mortgage fails to establish “an interest in the note or mortgage at the time it filed suit, it [has] no standing to invoke the jurisdiction of the common pleas court.” *Id.* at ¶ 28.

{¶ 8} Appellants claim, “The record is completely devoid of evidence that PNC was the holder of the note or had possession of the note or was otherwise entitled to enforce the note **at the time this action was filed.**” (Emphasis in original.) As noted by PNC, however, merger documents establishing the bank as the holder of the note and mortgage were filed contemporaneously with the complaint. Appellants do not dispute the validity of those documents, but instead appear to be unaware of their existence. PNC clearly had standing to sue.

{¶ 9} Next, we address whether PNC established a case for foreclosure and whether the trial court erred in granting PNC’s motion for summary judgment. We review summary judgment rulings de novo, applying the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under

Civ.R. 56(C), summary judgment is appropriate where (1) no genuine issue as to any material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). The party moving for summary judgment bears the initial burden of identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996). The burden then shifts to the non-moving party to submit or point to some evidentiary material showing that there is a genuine issue for trial. *Henkle v. Henkle*, 75 Ohio App.3d 732, 735, 600 N.E.2d 791 (12th Dist.1991).

{¶ 10} To support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials showing: (1) The movant is the holder of the note and mortgage, or is a party entitled to enforce the instrument; (2) if the movant is not the original mortgagee, the chain of assignments and transfers; (3) the mortgager is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due. *U.S. Bank, N.A. v. Coffee*, 6th Dist. No. E-11-026, 2012-Ohio-721, ¶ 26.

{¶ 11} In this case, appellants concede that the elements of foreclosure were met. Instead, they argue that the trial court erred by not “considering, evaluating and addressing equitable facts and circumstances * * *.”

{¶ 12} As this court has often said,

[A] foreclosure action is equitable in nature and, thus, the simple assertion of the elements of foreclosure does not require, as a matter of law, the remedy of foreclosure. As an equitable action, a foreclosure action should be reviewed for abuse of discretion. Abuse of discretion connotes more than an error of law or judgment; rather, it implies an unreasonable, arbitrary or unconscionable attitude. (Citations omitted.) *First Nat'l Bank of Am. v. Pendergrass*, 6th Dist. Case No. E-08-048, 2009-Ohio-3208, ¶ 22-23.

{¶ 13} Here it cannot be said that the trial court failed to consider equitable evidence, but simply that there is a complete absence of any such evidence. That is, there is no evidence that appellants made any payments on the loan since October 2011. Likewise, there is no evidence that PNC waived its right to act upon that default by, for example, accepting late payments or negotiating with appellants so as to avoid foreclosure. Importantly, there is also no evidence of any material misrepresentation by PNC that would warrant disrupting the terms of the contract between the parties. In short, based upon the clear language of the note and the circumstances of this case, we see no abuse of discretion by the trial court in considering and rejecting appellants' equitable argument.

{¶ 14} Further, we find that appellee established the prima facie elements of its foreclosure case, and appellants did not set forth any specific facts demonstrating a

genuine issue of material fact. The trial court's grant of summary judgment to appellee was proper. Appellants' assignment of error is without merit.

{¶ 15} Having found appellants' assignment of error not well-taken, we hereby affirm the judgment of Lucas County Court of Common Pleas. Costs are assessed to appellants in accordance with App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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