**[Cite as *Wright-Patt Credit Union, Inc. v. Byington*, 2013-Ohio-3963.]**

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

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| Wright-Patt Credit Union, Inc. | Court of Appeals No. E-12-002 |
| Appellee | Trial Court No. 2010-CV-0843 |
| v. | |
| Jeffrey Byington, et al. | **DECISION AND JUDGMENT** |
| Appellants | Decided: September 13, 2013 |

* * * * *

Jason A. Whitacre and Ashley E. Mueller, for appellee.

Jeffrey Byington, Patricia Jensen and Kenneth Jensen, pro se.

* * * * *

**PIETRYKOWSKI, J.**

**{¶ 1}** This is an appeal from a judgment of the Erie County Court of Common Pleas which granted summary judgment to plaintiff-appellee, Wright-Patt Credit Union, Inc., in its foreclosure action against defendants-appellants, Jeffrey Byington, Patricia

Jensen and Kenneth Jensen. Appellants now challenge that judgment through the following assignment of error:

> The trial court erred to the prejudice of the defendants-appellants in granting the plaintiff's motion for summary judgment.

**{¶ 2}** The facts of this case are as follows. On June 10, 2008, appellants borrowed $80,000 from Vacationland Federal Credit Union ("VFCU") for the purchase of property located at 1114 Ging Street, in Sandusky, Ohio. Appellants executed a promissory note for that amount in favor of VFCU and secured the note with a mortgage on the premises, also in favor of VFCU. Contemporaneously with the execution of the note and mortgage, VFCU executed an assignment of deed of trust/real estate mortgage, which transferred to appellee all of its interest in the mortgage, including the "notes and obligations therein described, the money due and to become due thereon with interest, [and] all rights accrued or to accrue under such Deed of Trust/ Real Estate Mortgage." The mortgage was recorded with the Erie County Recorder on June 10, 2008. The assignment was recorded on June 12, 2008.

**{¶ 3}** On October 18, 2010, appellee filed a complaint in foreclosure against appellants. The complaint alleged that appellee was due under the terms of the promissory note $79,204.01, plus interest of 8.5 percent per year from October 1, 2009, that appellants were in default in payment of the note and the mortgage securing the same, and that appellee has declared the debt immediately due and payable. In its complaint, appellee stated that in reviewing its files it could not find the note or a copy

thereof but that it would continue to search for the note. Appellee did attach to the complaint copies of the mortgage and the assignment of mortgage. Appellee asserted that the conditions in the mortgage had been broken by reason of appellants' default, that the conditions precedent had been satisfied, and that appellee was entitled to a foreclosure of the mortgage. Appellee demanded judgment against appellants in the amount of $79,204.01, plus interest, late charges, sums advanced for taxes and insurance, and all other expenditures recoverable under the note, mortgage, and Ohio law, foreclosure of the mortgage, and sale of the property.

**{¶ 4}** On November 23, 2010, appellee filed a copy of the promissory note in the court below. Along with the note, appellee filed a copy of an allonge, which purports to transfer the note from VFCU to appellee and appears to be dated June 10, 2008.

**{¶ 5}** In filing their answer, appellants generally denied all of the allegations in the complaint, except to admit that they had an interest in the property. In addition, they raised a number of affirmative defenses, including that appellee lacked standing to file the action and that appellee was not a holder in due course of the mortgage loan obligation and had no right to enforce the same.

**{¶ 6}** On June 17, 2011, appellee filed a motion for summary judgment. In support of its motion, appellee filed a copy of the mortgage assignment and the affidavit of Matthew Feeney, an employee of Cenlar, F.S.B., the loan servicing agent for appellee. Feeney's affidavit reads in its entirety:

1. That affiant is an employee of Cenlar, F.S.B, loan servicing agent for Plaintiff, and is duly authorized to make this Affidavit.

2. That Plaintiff is entitled to enforce the promissory note and mortgage, copies of which as executed at origination are referenced in Plaintiff's Complaint;

3. Plaintiff further states that it has exercised the option contained in said mortgage note and has accelerated and called due the entire principal balance due thereon;

4. That Affiant has examined and has personal knowledge of the loan account of Defendant(s), Jeffrey Byington and Kenneth Jensen; that there is presently due on said loan the unpaid principal balance of $79,204.01 with interest accruing thereon at the rate of 8.5% per annum from October 1, 2009; and that said account has been and remains in default;

5. That in the regular performance of my job functions; [sic] Affiant is familiar with business records maintained by Cenlar, F.S.B. for the purpose of servicing mortgage loans. These records (which include data compilations, electronically imaged documents, and others) are made at or near the time by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records, and are kept in the course of business activity conducted regularly by Cenlar, F.S.B. It is the

regular practice of the mortgage servicing business of Cenlar, F.S.B. to make these records. In connection with making this Affidavit, I have personally examined these business records reflecting data and information as of the date of the signing of this affidavit;

6. That Affiant understands and acknowledges that this Affidavit is made under penalty of perjury.

**{¶ 7}** In their memorandum in opposition, appellants asserted that appellee had failed to provide credible, consistent, non-hearsay evidence that it was the holder of the promissory note and entitled to enforce it. Appellants further contested the validity and quality of the Feeney affidavit. Appellants argued that many of the statements set forth in the affidavit were not based on Feeney's personal knowledge and that Feeney never attested that appellant was the holder or owner of the note. Because the affidavit failed to support appellee's case, appellants asserted appellee was not entitled to summary judgment. Appellants further asserted that appellee was not entitled to summary judgment because it had not met all of the conditions precedent before filing suit. Appellants based this argument on HUD regulations governing FHA-insured loans which require creditors to provide homeowners with a face-to-face meeting prior to initiating foreclosure proceedings. Finally, appellants asserted that a genuine issue of material fact remained as to the actual owner of the note and mortgage. Appellants supported this contention with a screen-shot copy of a document retrieved through an internet search of

the Fannie Mae Loan Lookup tool purporting to show that Fannie Mae owns the loan in question.

**{¶ 8}** On December 5, 2011, the lower court filed its entry granting appellee summary judgment on its complaint in foreclosure. In their sole assignment of error, appellants contest that judgment. Appellants assert that genuine issues of material fact remain regarding whether appellee is the holder of the note and mortgage and thus is the real party in interest. Appellants further assert that because appellee never offered appellants a face-to-face interview prior to filing the foreclosure action, it is not entitled to judgment as a matter of law.

**{¶ 9}** Appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996). However, once the movant supports his or her motion with appropriate

evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

**{¶ 10}** To properly 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 mortgagor 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. Coffey*, 6th Dist. Erie No. E-11-026, 2012-Ohio-721, ¶ 26, citing *Wachovia Bank of Delaware v. Jackson*, 5th Dist. Stark No. 2010-CA-00291, 2011-Ohio-3202, ¶ 40-45.

**{¶ 11}** Ohio's version of the Uniform Commercial Code governs who may enforce negotiable instruments, including promissory notes secured by mortgages on real estate. *See* R.C. 1301.01 et seq.[1] A "person entitled to enforce" an instrument includes "the holder of the instrument." R.C. 1303.31(A)(1). Contrary to appellant's assertion, a holder of a note and mortgage "[is] not additionally required to plead that it [i]s the 'owner' of the note and mortgage in its complaint." *Coffey* at ¶ 18. A plaintiff is

[1] R.C. 1301.01 et seq. were repealed by Am.H.B. No. 9, 2011 Ohio Laws File 9, effective June 29, 2011, and renumbered as 1301.201 et seq. Because R.C. 1301.201 et seq. only apply to transactions entered on or after June 29, 2011, we apply former R.C. 1301.01 et seq. to this appeal.

required to prove that it is the current holder of the note and mortgage in order to establish that it is the real party in interest (i.e. has standing), and a plaintiff's failure to prove that it is the real party in interest creates a genuine issue of material fact that precludes summary judgment. *HSBC Mtge. Servs., Inc. v. Edmon*, 6th Dist. Erie No. E-11-046, 2012-Ohio-4990, ¶ 25.

**{¶ 12}** The standing issue centers on whether the plaintiff was the holder of the note and mortgage on the date the complaint was filed. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214. A "holder" of an instrument means either of the following:

> (a) If the instrument is payable to bearer, a person who is in possession of the instrument;
>
> (b) If the instrument is payable to an identified person, the identified person when in possession of the instrument. R.C. 1301.01(T)(1).

**{¶ 13}** Transfer of an instrument occurs "when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." R.C. 1303.22(A).

**{¶ 14}** Again, to properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials on the elements stated above. In the proceeding below, appellee submitted the Feeney affidavit in support of its summary judgment motion. Civ.R. 56(E) provides that affidavits in support of a summary judgment motion

> 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. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit.

The latter requirement is satisfied by a statement in the affidavit declaring that the copies of the documents submitted are true and accurate reproductions of the originals. *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 467, 423 N.E.2d 105 (1981). Similarly, this court has held that a plaintiff in a foreclosure action satisfies this initial burden when it has submitted the affidavit of an individual with personal knowledge who attests that the plaintiff "is the owner in possession of the promissory note and mortgage, true and accurate copies of which were attached to the Plaintiff's Complaint as Exhibits thereto[.]" *HSBC*, *supra*, at ¶ 14.

**{¶ 15}** In the present case, sworn or certified copies of the note and mortgage were not attached to the Feeney affidavit. More significantly, Feeney did not attest that appellee had possession of the documents, or that true and accurate copies of the documents were attached to appellee's complaint. Indeed, although Feeney attests that he has examined and has personal knowledge of the loan *accounts* of appellants, he does not state that he has ever seen the original promissory note and mortgage, or copies thereof.

**{¶ 16}** Appellee asserts, and the lower court held, that based on our decision in *Deutsche Bank Natl. Trust Co. v. Greene*, 6th Dist. Erie No. E-10-006, 2011-Ohio-1976,

appellee had standing to file the foreclosure action. In that case, we held that an assignment of a mortgage, in conjunction with interlocking references in the mortgage and note, transferred the note as well and established the plaintiff in that case as the real party in interest. *Id.* at ¶ 15. The facts of that case, however, vary markedly from those in this case because the plaintiff in *Greene* supported its summary judgment motion with copies of the note, mortgage, assignment and business records showing the default. Accompanying those documents was the affidavit of a bank officer who had personal knowledge that the documents were accurate copies of the originals and that the records submitted were kept in the ordinary course of business. The affidavit submitted in this case does not meet that standard.

**{¶ 17}** Accordingly, because appellee failed to present the court with evidentiary-quality material in support of its assertion that it was the current holder of the note and mortgage at issue, a genuine issue of material fact remains regarding whether appellee has standing in this foreclosure action and the lower court erred in granting appellee summary judgment. Given this conclusion, we need not address appellants' argument that appellee failed to meet the conditions precedent before filing suit. The sole assignment of error is well-taken.

**{¶ 18}** On consideration whereof, the court finds that substantial justice has not been done the parties complaining and the judgment of the Erie County Court of Common Pleas is reversed. This case is remanded to that court for further proceedings

consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

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

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE

_____
JUDGE