[Cite as *U.S. Bank, N.A. v. McGinn*, 2013-Ohio-8.]

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

U.S. Bank, N.A., as Trustee	Court of Appeals No. S-12-004
Appellee	Trial Court No. 08 CV 602
v.	
Ronald W. McGinn, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: January 4, 2013

* * * * *

David A. Wallace and Joel E. Sechler, for appellee.

Daniel L. McGookey, Kathryn M. Eyster and Lauren McGookey, for appellants.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Sandusky County Court of Common Pleas, granting summary judgment in favor of appellee, U.S. Bank, N.A. ("U.S.

Bank"). Because appellants demonstrated the existence of a genuine issue of material fact, we reverse.

A. Facts and Procedural Background

{¶ 2} On June 22, 2005, appellants, Ronald and Tina McGinn, purchased a home in Clyde, Ohio. In order to do so, appellants received a loan from Intervale Mortgage Corporation. The note evidencing the loan was executed solely by Ronald, but the mortgage securing the debt was executed by both Ronald and Tina.

{¶ 3} In March 2007, Tina lost her job. Consequently, appellants were unable to make the required monthly payments in April, May, and June 2007. Instead, appellants attempted to secure a loan modification through Homecoming Financial, the servicer of the loan. In addition, Ronald applied for, and was awarded, a loan through his retirement plan in the amount of $5,251.02, which he paid to Homecoming Financial on July 2, 2007. Assuming the payment would bring the loan current through September, appellants did not make another monthly payment until October 2007.

{¶ 4} In December 2007, appellants began a trial loan modification. The trial loan modification required appellants to make monthly payments of $1,063.10 on December 20, 2007, January 20, 2008, and February 20, 2008. Although appellants ultimately made the required payments, they were late in making those payments each month.

{¶ 5} Despite the payments made pursuant to the trial loan modification, appellants received a notice of foreclosure sometime in March or April 2008. In addition, appellants were notified that their loan modification was denied.

{¶ 6} U.S. Bank filed its complaint in foreclosure on May 30, 2008. In its complaint, U.S. Bank alleges that it is the holder and owner of the note and mortgage. Copies of the note and mortgage are attached to the complaint. The copy of the note that is attached to the complaint contains two endorsements. The first endorsement is from Intervale to Decision One Mortgage Company. The second endorsement is a blank endorsement from Decision One.

{¶ 7} The copy of the mortgage that is attached to the complaint names Intervale as the mortgagee. U.S. Bank did not attach an assignment of the mortgage to the complaint.

{¶ 8} On December 6, 2011, U.S. Bank filed its motion for summary judgment. U.S. Bank attached a copy of the note to the motion, in which the blank endorsement was signed over to Residential Funding Corporation, who then executed a third endorsement, endorsing the note over to U.S. Bank. In addition, U.S. Bank attached an assignment of the mortgage to its motion for summary judgment. The attached assignment was executed on June 12, 2008, twelve days after the complaint was filed.

{¶ 9} On January 5, 2012, the trial court granted U.S. Bank's motion for summary judgment, concluding that U.S. Bank's evidence in the form of affidavits, deposition testimony, and exhibits, demonstrated that no genuine issues of material fact existed. It is from this judgment that appellants timely appeal.

B. Assignment of Error

{¶ 10} Appellants assign the following error for our review:

> The trial court erred in granting U.S. Bank's Motion for Summary Judgment and in holding U.S. Bank has standing and is entitled to enforce the Note and Mortgage.

II. Standard of Review

{¶ 11} We review summary judgment rulings de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989); *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).

{¶ 12} On a motion for summary judgment, the moving party has the burden of demonstrating that no genuine issue of material fact exists. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). The moving party must point to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* at 292-293. Pursuant to Civ.R. 56(C), the evidence to be considered is limited to the "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written

stipulations of fact, if any, timely filed in the action * * *." Nevertheless, the trial court may consider a type of document not expressly mentioned in Civ.R. 56(C) if such document is accompanied by a personal certification that it is genuine or is incorporated by reference in a properly framed affidavit pursuant to Civ.R. 56(E). *See Bowmer v. Dettelbach*, 109 Ohio App.3d 680, 684, 672 N.E.2d 1081 (6th Dist.1996). The burden then shifts to the nonmoving party to provide evidence showing that a genuine issue of material fact does exist. *Dresher* at 293; Civ.R. 56(E).

{¶ 13} 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 mover 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. *Wachovia Bank v. Jackson*, 5th Dist. No. 2010-CA-00291, 2011-Ohio-3202, ¶ 40-45.

III. Analysis

{¶ 14} In their sole assignment of error, appellants argue that the trial court erred in granting summary judgment since U.S. Bank lacked standing. Specifically, appellants argue that U.S. Bank "was not and is not the owner of the Note and Mortgage and did not establish that it was entitled to act on behalf of the owner." Further, appellants assert that U.S. Bank failed to demonstrate that it was the holder of the note at the time the complaint was filed.

{¶ 15} Ohio's version of the Uniform Commercial Code ("U.C.C.") governs who may enforce a note. R.C. 1301.01 et seq. Article 3 of the U.C.C. governs the creation, transfer and enforceability of negotiable instruments, including promissory notes secured by mortgages on real estate. *Fed. Land Bank of Louisville v. Taggart*, 31 Ohio St.3d 8, 10, 508 N.E.2d 152 (1987).

{¶ 16} The threshold requirement of standing depends upon whether the plaintiff has a real interest in the subject matter of the action. *State ex rel. Dallman v. Court of Common Pleas, Franklin Cty.*, 35 Ohio St.2d 176, 298 N.E.2d 515 (1973), syllabus. In a foreclosure action, the holder of the note and mortgage is the real party in interest. *Deutsche Bank Natl. Trust Co. v. Greene*, 6th Dist. No. E-10-006, 2011-Ohio-1976, ¶ 13. *See also* R.C. 1303.31 (the holder of an instrument is a "person entitled to enforce" the instrument).

{¶ 17} A holder of the note and mortgage "[is] not additionally required to plead that it [is] the 'owner' of the note and mortgage in its complaint." *U.S. Bank, N.A. v. Coffey*, 6th Dist. No. E-11-026, 2012-Ohio-721, ¶ 18. Therefore, the standing issue centers on whether the plaintiff was the *holder* of the note and mortgage on the date the complaint was filed.

{¶ 18} R.C. 1301.201(a) defines a holder of a negotiable instrument as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession."

{¶ 19} In U.S. Bank's memorandum in support of its motion for summary judgment, U.S. Bank stated that it was the holder of the note and mortgage on the date the complaint was filed. To support this statement, U.S. Bank attached an affidavit of Peter Knapp, a senior litigation analyst for GMAC Mortgage, LLC, the servicer of appellants' loan. In his affidavit, Knapp stated that he had reviewed the note and the mortgage. Further, he stated that the note and mortgage attached to the motion for summary judgment are true and accurate copies of the original note and mortgage. In addition, Knapp stated that "[t]he original Note and Mortgage * * * were in the possession of U.S. Bank * * * at the time the foreclosure complaint in this case was filed."

{¶ 20} Nonetheless, appellants argue that a genuine issue of material fact exists regarding U.S. Bank's standing. First, appellants argue that "[t]he assignment of the mortgage does not support U.S. Bank's contention that it is the holder." Pursuant to the Ohio Supreme Court's recent holding in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, --- N.E.2d ----, 2012-Ohio-5017, whether a party has standing is a question that must be resolved by looking at the circumstances as of the date the complaint was filed. *Id.* at ¶ 24-25. Obtaining an interest in the note and mortgage after the commencement of the action cannot cure a lack of standing. *Id.* at ¶ 26. Here, the assignment of the mortgage was not executed until after the complaint was filed. Accordingly, it cannot form the basis for U.S. Bank's standing.

{¶ 21} While it is true that the assignment of the mortgage lends no support to U.S. Bank's standing argument, the fact that the mortgage was assigned after the filing of

the complaint is not necessarily fatal to U.S. Bank's foreclosure action. In *Aurora Loan Services, LLC v. Louis*, 6th Dist. No. L-10-1289, 2012-Ohio-384, we stated that "a transfer of an obligation secured by a mortgage also acts as an equitable assignment of the mortgage." *Id.* at ¶ 34, citing *Kuck v. Sommers*, 59 Ohio Law Abs. 400, 100 N.E.2d 68, 75 (3d Dist.1950). Therefore, U.S. Bank need not prove that the mortgage was assigned prior to its filing of the complaint. Rather, U.S. Bank can establish its standing by demonstrating that the note was transferred prior to the date the complaint was filed.

{¶ 22} In the alternative, appellants make another argument, which draws our attention to the inconsistency between the copy of the note that was attached to the complaint and the copy of the note that was attached to U.S. Bank's motion for summary judgment. Appellants argued in the trial court, as they do here, that the inconsistency creates a genuine issue of material fact. Specifically, appellants contend that the additional special endorsement on the second copy of the note calls into question whether U.S. Bank was in possession of the note at the time the complaint was filed, since the copy it attached to the complaint did not include the additional special endorsement.

{¶ 23} In response, U.S. Bank points to a second affidavit made by Knapp, which U.S. Bank attached to its reply brief. In Knapp's second affidavit, he explains the reason for the difference between the two copies of the note, and states:

> Based on the circumstances of this case and my personal knowledge of how foreclosure counsel obtain copies of notes, earlier versions of the notes, not identical to the actual original Note held in the custodial vault, are in

> GMACM's computer system and are sometime[s] printed out and inadvertently attached to foreclosure complaints. I believe that is what happened with the copy of the Note which was attached to the Complaint in this case, and is the reason the Note attached to the Complaint was not a copy of the actual original Note.

{¶ 24} U.S. Bank argues that Knapp's second affidavit resolves any issue concerning the difference in the original note and the copy that was attached to the complaint. However, the language of that affidavit is indecisive. Rather than providing a definitive explanation for the additional endorsements on the original note, Knapp states that he *believes* that the wrong copy of the complaint was inadvertently attached to the foreclosure complaint. However, Civ.R. 56(E) requires personal knowledge. Indeed, *believing* something to be true is different that *knowing* something is true.

{¶ 25} While it may be true that U.S. Bank met its initial burden of demonstrating that no genuine issue of material fact existed, appellants responded by showing that a genuine issue of material fact did exist by pointing to the inconsistency in the two notes. The difference in the two notes calls into question whether U.S. Bank actually possessed the original note prior to filing the complaint. If U.S. Bank did not, it was not a holder and, thus, lacked standing to bring the foreclosure action in the first place. Construing the evidence in a light most favorable to appellants, we conclude that the trial court erred when it granted U.S. Bank's motion for summary judgment. Accordingly, appellants' assignment of error is well-taken.

IV. Conclusion

{¶ 26} Having found appellants' assignment of error well-taken, we hereby reverse the judgment of the Sandusky County Court of Common Pleas, and remand this matter for further proceedings consistent with this decision. Costs are assessed to U.S. Bank in accordance with 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. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE