[Cite as *CitiMortgage, Inc. v. Schippel*, 2012-Ohio-3511.]

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

CitiMortgage, Inc. Successor by Merger to ABN AMRO, Mortgage Group, Inc.

Appellee

v.

David Schippel, et al.

Appellants

Court of Appeals No. E-11-041

Trial Court No. 2010 CV 0684

DECISION AND JUDGMENT

Decided: August 3, 2012

* * * * *

Thomas L. Henderson, for appellee.

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

* * * * *

PIETRYKOWKSKI, J.

{¶ 1} This is an appeal from the May 6, 2011 judgment of the Erie County Court of Common Pleas which granted summary judgment in favor of plaintiff-appellee,

CitiMortgage, Inc., in a foreclosure action again defendants-appellants, David and Laura Schippel. Because we find that no genuine issues of fact remain, we affirm.

{¶ 2} The relevant facts are as follows. On August 18, 2010, appellee filed a complaint in foreclosure against appellants. The complaint stated that appellee, as successor by merger with the original lender ABN AMRO Mortgage Group, was the holder of the note secured by a mortgage. The complaint stated that appellants were in default on the note and that appellee had complied with all conditions precedent and was entitled to foreclose on the mortgage. In their answer, appellants asserted several defenses including lack of standing, lack of consideration, unclean hands, appellee's breach of contract, and that appellee was not a good faith assignee of the mortgage loan obligation.

{¶ 3} On December 16, 2010, appellants filed a Civ.R. 12(B)(6) motion to dismiss the complaint. In their motion, appellants argued that appellee's complaint failed to allege that it was the owner of the note and, thus, on its face was deficient. Appellants further argued that appellee was not entitled to relief under the doctrine of unclean hands. Appellants argued that appellee continued to accept payments although it intended to foreclose on the residence.

{¶ 4} Appellee opposed the motion by first noting that the motion was untimely made after appellants filed their answer. Next, appellee argued that the law required only that appellee prove that it was the holder of the note. Finally, appellee argues that the unclean hands argument was not a proper basis for a dismissal of the complaint.

{¶ 5} On March 10, 2011, the motion to dismiss was denied. The trial court first found that the motion was timely made. Addressing the merits the court found that based upon current controlling law, a party seeking to enforce a note need only allege it is the holder of the note; thus, the complaint sufficiently stated a claim for relief.

{¶ 6} In the interim and with leave of court, on February 14, 2011, appellee filed its motion for summary judgment. In its motion, appellee argued that its successor interest in the note was acquired by its 2007 merger with the ABN AMRO Mortgage Group, Inc., the original owner of the 2002 note. Appellee argued that appellants materially defaulted on the note in May 2010. In support of its motion, appellee relied on the affidavit of Cindy Schneider, a business operations analyst for CitiMortgage. Schneider stated "In my job position I have access to and custody of the loan origination files and mortgage loan account records maintained by Citi." The affidavit further stated:

> [T]he loan origination file includes a Promissory Note ("Note") dated September 5, 2002, executed by the Schippels, originally payable to ABN AMRO Mortgage Group, Inc., for the original amount of $126,300.00. The origination file also includes a Mortgage executed by the Schippels and delivered to ABN AMRO Mortgage Group, Inc. The Mortgage encumbers the real property commonly known as 5004 Harris Road, Sandusky, OH 44870 ("Property") and was duly filed for record on September 10, 2002 * * *. True and accurate copies of the Note and

Mortgage as they exist in Citi's loan file are attached as Exhibits "B" and "C" respectively.

{¶ 7} In addition to a copy of the note and the mortgage, attachments to the affidavit included payment records, the notice of default, and the merger documents.

{¶ 8} In their memorandum in opposition, appellants argued that Schneider's affidavit was not proper Civ.R. 56(E) evidence because Schneider's statement that the note was a true and accurate copy conflicted with her deposition testimony. Specifically, at Schneider's deposition appellee presented what was believed to be the original note which differed from the note attached to the complaint and Schneider's affidavit. Appellants further argued that at Schneider's deposition it was discovered that Freddie Mac had an interest in the loan. To support this contention, appellants attached the affidavit of Daniel Edstrom, a securitization analyst, who stated that based on his research appellants' mortgage obligation is in a Freddie Mac trust and their obligation to appellee's predecessor had been paid in full.

{¶ 9} On April 20, 2011, the court filed its judgment entry granting summary judgment to appellee. The court found that based on the documentation presented, appellee proved that the note and mortgage were executed in favor of ABN AMRO and recorded on September 10, 2002, and that appellee merged with ABN AMRO and became the holder of the note. The court further noted that at Schneider's deposition she testified regarding the merger and presented the original promissory note evidencing that appellee is the holder and owner of the note. The court discounted Edstrom's affidavit as

not based on personal knowledge as hearsay. On May 6, 2011, the court entered its judgment entry and decree of foreclosure. This appeal followed.

{¶ 10} Appellants now raise the following assignment of error for our consideration:

> The trial court erred in granting CitiMortgage's motion for summary judgment and in holding CitiMortgage is the owner and holder of Schippels' note and mortgage, and in further holding that Freddie Mac is not the owner of the note and mortgage.

{¶ 11} At the outset we note that this court shall employ a de novo standard in reviewing the grant of a motion for summary judgment. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). The trial court's judgment is not afforded any deference, and this court applies the same test, set forth in Civ.R. 56(C), as the trial court. Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that no genuine issue as to any material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, it appears from the evidence that reasonable minds can come but to one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Turner v. Turner*, 67 Ohio St.3d 337, 617 N.E.2d 1123 (1993).

{¶ 12} Appellants first argue that it was inequitable to foreclose on the mortgage under the facts of this case. Appellants contend that the right to foreclosure has a two-

pronged burden: first, whether the mortgagee has defaulted on the note and second, whether the mortgagee's right of redemption should be foreclosed. Appellants rely on a case where the court determined it equitable to reinstate the homeowners' note and mortgage. *PHH Mtge. Corp. v. Barker*, 190 Ohio App.3d 71, 2010-Ohio-5061, 940 N.E.2d 662 (3d Dist.).

{¶ 13} In *Barker*, the homeowners failed to make a few payments but notified the bank as soon as possible. After leaving several voicemails, they went to the bank and were given a name in "loss mitigation" to contact. *Id.* at ¶ 3. After contacting this individual, the loss prevention program was explained and the homeowners were informed that they would be sent a loss prevention packet in the mail. After receiving the packet and completing the required materials, they were told they would be informed as to whether they qualified for a program to avoid foreclosure. *Id.* at ¶ 5.

{¶ 14} Shortly after, a letter came notifying the homeowners that they were in default, they received a coupon book which listed a higher monthly payment and a new due date. *Id.* at ¶ 9. The homeowners believed that the mortgage had been "reset." Thereafter, despite making several payments, they were notified that the bank was foreclosing on the mortgage based on their default on the note. Some of the payments were returned.

{¶ 15} Affirming the trial court's decision to reinstate the mortgage, the Third Appellate District agreed that the bank had made several "material representations" regarding their willingness to aid the homeowners in avoiding foreclosure. *Id.* at ¶ 33.

{¶ 16} In the present case, unlike *Barker*, appellants neither argue that they actually made up the delinquent payments nor that the bank materially misrepresented the status of the foreclosure proceedings. Appellants simply contend that because their home is their most valuable possession and because the bank would be minimally impacted by the court's denial of their request to foreclose on the property, the equities lie in their favor. We are not persuaded. Certainly, in nearly every foreclosure action the mortgagee in default will bear grievous consequences from a judgment in the mortgagor's favor.

{¶ 17} Appellants next argue that in order to show that it was the real party in interest, appellee was required to show that it was both the holder and owner of the note. Ohio's version of the Uniform Commercial Code governs who may enforce a note. *See* R.C. Chapter 1301 et seq.[1] R.C. 1303.31(B) provides that a "person entitled to enforce" a negotiable instrument includes:

> (1) The holder of the instrument;
>
> (2) A nonholder in possession of the instrument who has the rights of a holder;
>
> (3) A person not in possession of the instrument who is entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

[1] We note that R.C. 1301.01 to .21 were repealed in 2011 and renumbered. Because the 2011 enactment applies only to transactions entered into on or after June 29, 2011, we will refer to the prior code sections.

{¶ 18} R.C. 1301.01 defines a "holder" as: "[i]f the instrument is payable to bearer, a person who is in possession of the instrument" or "[i]f the instrument is payable to an identified person, the identified person when in possession of the instrument."

{¶ 19} Relying on the above provisions, in *U.S. Bank, N.A. v. Coffey*, 6th Dist. No. E-11-026, 2012-Ohio-721, this court specifically rejected the argument that a plaintiff must establish that it is both the holder and owner of the note in order to be considered the real party in interest. We noted that, as quoted above, R.C. 1303.31(B) specifically states that a nonowner, even in wrongful possession, may be entitled to enforce an instrument. *Id.* at ¶ 15-19. Thus, we find that the plaintiff need only demonstrate that it is the holder of the note. (Though, based on the merger agreement between ABN AMRO and appellee, the survivor corporation, appellee is arguably the owner of the note.)

{¶ 20} Appellants next contend that appellee failed to establish it was the holder of the note. Appellants argue that the evidence presented was conflicting and was not sufficient proof of appellee's holder status. Specifically, appellants point to the affidavit of CitiMortgage employee Cindy Schneider which was attached to appellee's motion for summary judgment. In her affidavit, Schneider stated that the origination file contained a promissory note and mortgage executed by appellants on September 5, 2002. Schneider stated that true and accurate copies of the documents contained in the origination file were attached to the affidavit. During her deposition, Schneider was questioned as to why the copy of the note attached to her affidavit did not have the signed endorsement in blank that appeared on the original note that was presented at the deposition. Schneider

explained that the documents are often imaged when they are first received and prior to the endorsement. They are imaged again after the endorsement.

{¶ 21} Appellants' reliance on cases such as *Everhome Mtge. Co. v. Rowland*, 10th Dist. No. 07AP-615, 2008-Ohio-1282, is misplaced. In *Everhome*, the court determined that the plaintiff failed to prove that it was the real party in interest. Plaintiff provided an affidavit of a bank employee which stated that true and accurate copies of the note and mortgage were attached to the complaint. However, the court found that a copy of the note was not provided and the plaintiff failed to prove any evidence as to how it received an interest in the note. *Id.* at ¶ 15.

{¶ 22} In the present case, an original copy of the promissory note was provided during Schneider's deposition. Further, merger documents were produced to show how appellee acquired an interest in the note. Thus, appellee provided sufficient evidence that it was the holder of the note.

{¶ 23} The focus of appellants' final argument is whether Daniel Edstrom's affidavit and attached documents created an issue of fact as to whether appellee had a claim due to his conclusion that no balance remains on appellants' loan. Edstrom, a securitization analyst, stated that based on his experience and in viewing the Freddie Mac Home Loan Mortgage website, appellants' note and mortgage obligation were actually in a Freddie Mac trust. Edstrom provided no documentary support for the claim other than a self-generated spreadsheet. The trial court discounted the materials as hearsay.

{¶ 24} We agree with the trial court that the information advanced by Edstrom was not based upon personal knowledge. *See* Civ.R. 56(E). Edstrom failed to provide any Freddie Mac generated materials evidencing that it, and not appellee, has an interest in appellants' note and mortgage.

{¶ 25} Based on our de novo review of the instant case, we find that no genuine issues remain for trial and that the trial court properly granted appellee's motion for summary judgment. Appellants' assignment of error is not well-taken.

{¶ 26} On consideration whereof, we find that substantial justice was done the parties complaining and the judgment of the Erie County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellants are ordered to pay the costs of this appeal.

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.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE