ORIGINAL

IN THE SUPREME COURT OF OHIO
Supreme Court Case No. 2009-1830

Deutsche Bank National Trust Company, as Trustee for First Franklin Mortgage Loan Trust 2006-FF9, Mortgage Pass-Through Certificates Series 2006-FF9,	:	
Appellee,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
v.	:	
Patricia Ann Ingle and Robert A. Brdar,	:	Court of Appeals Case No. 092487
Appellants.	:	

MEMORANDUM OF APPELLEE DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF9, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-FF9 IN RESPONSE TO APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GENERAL INTEREST OR A CASE INVOLVING A SUBSTANTIAL CONSTITUTIONAL QUESTION

The Appellants, Patricia Ingle and Robert Brdar ("Ingle and Brdar") correctly describe this lawsuit as a "house foreclosure case." Notwithstanding the ubiquity of house foreclosure cases, Ingle and Brdar believe the instant case merits this Court's attention, either as a claimed appeal of right based upon a constitutional question or as a discretionary appeal based upon a question of "public or great general interest." They ask this Court for pronouncements on due process, Cuyahoga County practices, Ohio real estate and foreign corporation law, and the mortgage crisis. Unfortunately, this case does not provide a vehicle for curing an ailing economy or relieving Ingle and Brdar of the consequences of broken promises.

Ingle and Brdar initially argue that because this case is a house foreclosure, it automatically is of public or great general interest. See Appellant's Memorandum in Support of Jurisdiction, p. 3. This argument is an oblique attempt to invest this case with a priority it does not deserve, based upon the filing of the suit within the larger context of the national mortgage crisis. This argument fails under a *reductio ad absurdum* analysis: It leads to the untenable conclusion that all cases must be reviewed by this Court because of the difficult times in which they arise.

This Court is ever faithful to its mandate under S.Ct.Prac.R. II and Section 2(B), Article IV, Ohio Constitution, and therefore consistently denies review whenever jurisdictional prerequisites are unsatisfied. See, e.g., *Citibank, N.A. v. Eckmeyer*, 2009 Ohio 5340, 914 N.E.2d 1064, in which this Court denied discretionary review of a Portage County decision, discussed infra, rejecting the argument (also made in this case) that a federally chartered financial institution was barred from filing suit in Ohio because it was not registered as a foreign corporation. In *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94, 540 N.E.2d 1381, this Court

declared the following standard with respect to appeals based upon certified questions: "This court will grant a motion to certify only if there is a substantial constitutional question or a question of public or great general interest.... Novel questions of law or procedure appeal not only to the legal profession but also to the court's collective jurisprudence." The same standard governs appeals under S.Ct.Prac.R. II(A)(2) and (3). There are no novel questions of law or procedure in this case.

Ingle and Brdar allege various missteps by the lower courts, purportedly resulting in a denial of due process, but they do not contend Ohio procedural rules are unconstitutional or that future cases will be wrongly decided because of the precedent established in this case. Their allegation that the lower courts disregarded due process requirements in their case is not equivalent to a claim that the lower courts misinterpreted the rules of civil procedure in a manner that may adversely affect other litigants. As explained in Anderson's Appellate Practice and Procedure in Ohio (2009), § 1.03:

> Except as expressly provided for in *Ohio Constitution Article IV, § 2*, appeal to the Ohio Supreme Court is a matter of grace, not a matter of right. Exceptions to the general rule are appeals in cases originating in the court of appeals, i.e., where the court of appeals exercises original jurisdiction, and death penalty cases. A right of appeal also exists where "substantial" constitutional questions are involved, and where the judgments of appellate districts conflict. However, in these latter cases, the supreme court will decide if the constitutional question is substantial, or if a conflict truly exists.

(citing S.Ct.Prac.R. III, § 6 and *State v. Palider* (1987), 33 Ohio St.3d 68, 514 N.E.2d 873, in which this Court dismissed an appeal *sua sponte* after determining that there was no conflict between two Court of Appeals decisions.) While this case is important to the parties, it is not a matter of concern to Ohio citizenry at large.

Ingle and Brdar already have had the benefit of appellate review; it is not unjust to reject their further entreaties. As this Court observed in *Williamson v. Rubich* (1960), 171 Ohio St.

253, 168 N.E.2d 876, 12 Ohio Op.2d 379, "Section 6, Article IV of the Ohio Constitution, provides that judgments of the Courts of Appeals of this state shall serve as the ultimate final adjudication of all cases except those involving constitutional questions, conflict cases, felony cases, cases in which the Court of Appeals has original jurisdiction, and cases of public or great general interest. Except in these special circumstances, it is abundantly clear that in this jurisdiction, a party to litigation has a right to but one appellate review of his cause. See also Section 2505.29, Revised Code." The allocation of Ohio's judicial resources to a further review of this matter is unwarranted and counterproductive.

STATEMENT OF THE CASE AND FACTS

Patricia Ingle defaulted on her mortgage on December 1, 2007, less than two years after she borrowed $80,000.00 from First Franklin to purchase the property. First Franklin securitized the loan during the intervening period between the date of origination and the date of default, as evidenced by endorsements to the promissory note and an allonge. First Franklin's successor, Deutsche Bank National Trust Company, as Trustee for First Franklin Mortgage Loan Trust 2006-FF9, Mortgage Pass-Through Certificates Series 2006-FF9 ("Deutsche Bank"), instituted this foreclosure action four months after Ingle's default. Deutsche Bank recorded a preexisting Assignment of Mortgage within three weeks of the filing of the foreclosure Complaint, thereby establishing its ownership of the loan as a matter of public record. Deutsche Bank joined Robert Brdar as a defendant to the foreclosure action solely because he holds a second mortgage on the property. Brdar represents himself and Patricia Ingle in this action, although he is not a borrower on Deutsche Bank's loan.

In response to the foreclosure Complaint, Ingle and Brdar filed a joint Answer, Motion to Dismiss, and Counterclaim. The Trial Court overruled the Motion to Dismiss. Deutsche Bank

then filed a Motion for Summary Judgment, together with supporting Affidavits, including an Affidavit attesting to its status as the current holder of the promissory note. Ingle and Brdar did not oppose Deutsche Bank's Motion; however, they objected to the Magistrate's decision recommending summary judgment. The Trial Court subsequently overruled their objections and granted summary judgment to Deutsche Bank on the Complaint and the Counterclaim and issued a Decree of Foreclosure.

Ingle and Brdar appealed to the Eighth District Court of Appeals. They alleged sixteen assignments of error, which are reiterated in their Memorandum in Support of Jurisdiction filed with this Court. After consideration of the briefs and oral arguments, the Court of Appeals affirmed the decision of the Trial Court. The Court of Appeals ruled upon four of the assignments of error and rejected the other twelve on grounds that they were repetitive, conclusory, or unsupported by citations to the record or legal authorities.

Deutsche Bank withdrew the property from foreclosure sale upon the filing of the appeal. Deutsche Bank has refrained from seeking an Order of Sale throughout the appellate process. Ingle has retained possession of the property without interruption and without payment since her default on December 1, 2007. Ingle owes Deutsche Bank $79,639.89, plus interest at the rate of 9.250% per annum from December 1, 2007, plus advances and court costs.

ARGUMENT IN OPPOSITION TO APPELLANTS' PROPOSITION OF LAW

Appellants' Proposition of Law: Appellants should of [*sic*] been granted the relief they prayed for in their original answer and counterclaim at the trial court level and/or the appellate level.

The Appellants' proposition of law is an expression of dissatisfaction with the outcome of the lower court proceedings, but it is not a premise for constitutional analysis or evaluation of matters of widespread concern. There is no controversy beyond an unpaid debt and a lender's

attempt to recover its collateral through the statutorily prescribed process of judicial foreclosure. This case does not involve the Bill or Rights, the balance of power between federal and state governments, or the integrity of the Ohio judicial system. It involves the failure of Patricia Ingle to pay her mortgage and the attempt of Robert Brdar to recover on his second mortgage by preventing Deutsche Bank from recovering on its first.

Ingle and Brdar cite the Ohio foreign corporation statutes [R.C. 1703.31 – 1703.31] and the 6th and 14th Amendments to the United States Constitution as the bases for this appeal; however, they fail to demonstrate the precedential significance of this case within the "legal framework" they posit. See Appellant's Memorandum in Support of Jurisdiction, p. 9. Although they disagree with the lower courts' application of the law to the facts, they do not challenge the legal principles upon which the lower courts' decisions were based.

Ingle and Brdar initially protest Deutsche Bank's recordation of the Assignment of Mortgage after the filing of the foreclosure Complaint. Although issues concerning the standing of secondary market assignees to enforce mortgage loans are the subject of much debate, this case does not provide a platform for expanding the "real party in interest" doctrine. Deutsche Bank's ownership of the loan prior to the foreclosure was well established by the record, which included endorsements and an allonge to the note, and an Assignment of Mortgage, all of which were signed before this case was filed.

The Eighth District's holding in the leading case of *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092, is not implicated in this case. In *Jordan*, the assignment of mortgage did not exist at the commencement of the suit; in the instant case, the Assignment of Mortgage to Deutsche Bank was executed prior to the filing of the foreclosure Complaint, but recorded afterwards. The Eighth District recognized this distinction in its Journal Entry

affirming the Trial Court's decision. See Journal Entry and Opinion No. 92487, Volume 688, pages 800-801 and page 801, n. 2.

Ingle and Brdar further insist that Deutsche Bank should have informed them of its ownership of the loan in advance of suit. Ingle and Brdar presented no evidence to the Trial Court of any prejudice they suffered as a result of their alleged ignorance that Deutsche Bank was the holder of the note; accordingly, the record in this case does not provide the groundwork for new interpretations of existing law. The Ohio Uniform Commercial Code does not require the last endorsee of a negotiable instrument to identify itself to the drawer; moreover, until very recently, federal law required only that a borrower be notified of a transfer of *servicing* of a mortgage loan, not a transfer of *ownership*. Cf. 24 C.F.R. 3500.21 (Regulation X) and Section 131 of the Truth in Lending Act (15 U.S.C. 1641), as amended May 20, 2009. Ingle and Brdar do not allege that they were unfamiliar with the servicing agent or that Ingle was never notified of her default.

Ingle and Brdar also contend that Ingle was not served with a copy of Deutsche Bank's Motion for Summary Judgment. This is a case-specific argument relating to the application of the Ohio Rules of Civil Procedure to this suit; it has no bearing upon Ohio law in general. The Court of Appeals rejected this argument in reliance upon the presumption of proper service created by the Certificate of Service in Deutsche Bank's Motion. Ingle and Brdar presented no evidence of failure of delivery — not even an affidavit — and they filed timely objections to the Magistrate's decision granting summary judgment, thus indicating awareness of the Motion, notwithstanding Ingle's protestations of non-receipt. In light of the record on appeal, the Eighth District appropriately rejected this Assignment of Error. See Journal Entry and Opinion No. 92487, Volume 688, pages 802-803. The Court of Appeals also held that an oral hearing is not

required on a motion for summary judgment, as indicated in Loc.R. 11(1) of Cuyahoga County, General Division, citing this Court's ruling in *Hooten v. Safe Auto Ins. Co.* (2003), 100 Ohio St.3d 8, 2003-Ohio-4829. See Journal Entry and Opinion No. 92487, Volume 688, pages 805. The lower courts did not deviate from the standards of due process so as to justify intervention by this Court in their case management.

As a further predicate for review by this Court, Ingle and Brdar claim Deutsche Bank was barred from filing this foreclosure action because it is not licensed to do business as a foreign corporation in Ohio. They do not claim that Ohio's foreign corporation statutes are unconstitutional; they simply ignore the statutory exception for foreign corporations, such as the Trustee of a securitized loan pool, who do business solely in interstate commerce. The Court of Appeals correctly overruled this Assignment of Error based upon the interstate commerce exception and the doctrine of federal preemption, which exempts federally chartered financial institutions, such as Deutsche Bank, from state licensing and registration requirements. See Journal Entry and Opinion No. 92487, Volume 688, page 800, citing *Citibank, N.A. v. Eckmeyer*, 11th Dist. No. 2008-P-0069, 2009-Ohio-2435. Ingle and Brdar provide no justification for a departure from existing statutory and case law governing access to Ohio courts.

Ingle and Brdar also ask this Court to accept jurisdiction on the basis of a vague claim of mistreatment, as reflected in their statement that "Deutsche was granted all kinds of special orders in the Magistrate's Decision that Deutsche never asked for in any filed document." See Appellant's Memorandum in Support of Jurisdiction, p. 11. It is impossible to discern a constitutional issue or an issue of public or great general interest from a loosely phrased claim of bias in this particular case.

Robert Brdar further contends that his "second mortgage rights were truncated." See Appellant's Memorandum in Support of Jurisdiction, p. 11. He argues that the filing of an Assignment of Mortgage to Deutsche Bank after the recordation of Brdar's second mortgage somehow displaced the priority of the first mortgage. The Court of Appeals rejected this claim on the basis of longstanding principles of Ohio real estate law, under which the assignee of a mortgage stands in the place of the original mortgagee, thus entitling the assignee to assert the priority accorded to the assigned instrument. See Journal Entry and Opinion No. 92487, Volume 688, pages 801-802. Ingle and Brdar furnish no justification for a departure from black letter law.

Ingle and Brdar further protest a brief appearance at a hearing on a motion for default judgment by a substitute attorney for Deutsche Bank. The substitute attorney also is the spouse of a Cuyahoga County Magistrate, who was not assigned to this case. The Court of Appeals rejected this challenge because the motion for default judgment did not pertain to Ingle and Brdar and the hearing was continued. The Court of Appeals concluded that the error, if any, was harmless. See Journal Entry and Opinion No. 92487, Volume 688, pages 801.

As their final argument in support of jurisdiction, Ingle and Brdar allege that "former Cuyahoga county house appraisers have been indicted and plead guilty recently to corruption charges...." See Appellant's Memorandum in Support of Jurisdiction, p. 11. They provide no explanation of how these events are tied to the adjudications in this case. Ingle's property has not been sold pursuant to a minimum bid established through a county appraisal; moreover, this issue was not raised in the lower courts, and it is not the role of this Court to conduct criminal investigations.

CONCLUSION

As is evident from a review of the lengthy recital of facts in the Appellants' Memorandum, every justification for review offered to this Court is particular to this case. See, e.g., *City of Blue Ash v. Kavanagh* (2007), Ohio St.3d 67, 2007 Ohio 1103, 862 N.E.2d 810 (Pfeifer, J., dissenting) ("As a preliminary matter, this case should be dismissed as having been improvidently accepted. It is so fact-specific ... that it does not qualify as a case of 'public or great general interest.'") Ingle and Brdar advance no unique or momentous issues that deserve this Court's attention; accordingly, Deutsche Bank respectfully requests that this Court decline jurisdiction to address this further appeal.

Respectfully submitted:

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CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing Memorandum of Appellee Deutsche Bank National Trust Company, as Trustee for First Franklin Mortgage Loan Trust 2006-FF9, Mortgage Pass-Through Certificates, Series 2006-FF9 in Response to Appellants' Memorandum in Support of Jurisdiction has been served upon each of the following persons by ordinary U.S. mail, postage prepaid, on this 9th day of November, 2009.

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