IN THE SUPREME COURT OF OHIO

ORIGINAL

COUNTRYWIDE HOME LOANS, INC.	:	CASE NO. 10-0634
Plaintiff-Appellee,	:	On Appeal from the Lucas County Court of Appeals, Sixth Appellate District
vs.	:	
ROBERT E. MONTGOMERY	:	Court of Appeals Case No. L-09-1169
Defendants-Appellant.	:	

Appellee's Memorandum in Response to Memorandum in Support of Jurisdiction of Appellant Robert E. Montgomery

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I. This Case is Not a Case of Substantial Constitutional Question or One of Great Public Interest

This case does not involve a substantial constitutional question, nor does it involve a matter of public or great general interest. This matter merely involves one of the thousand's of cases filed each year in Ohio, in which a foreclosure defendant (such as Appellant Robert E. Montgomery) grasps at any possible means of preventing the sale of the house which was the collateral for his defaulted loan. At its basic level, this case rehashes the longstanding case law regarding the burden of proof necessary to prevail on summary judgment. The decision of the Sixth District Court of Appeals does not in any way threaten Ohio citizens who may find themselves as a party defendant in a foreclosure action. Rather, the decision properly states that when a trial court has uncontradicted evidence before it establishing that the Plaintiff is the real party in interest, then no genuine issue of material fact exists as to that possible defense.

The Sixth District Court of Appeals properly applied Ohio law and found that in order for a foreclosure Plaintiff to obtain judgment, it must demonstrate, prior to judgment, that it holds the mortgage or was assigned the mortgage prior to the date of the commencement of the foreclosure action. There is no requirement in Ohio that documentary evidence of the assignment of mortgage be produced at the time the initial Complaint is filed. The Sixth District Court of Appeals decision simply states that, since Countrywide provided proof of the mortgage assignment prior to judgment, that the real party in interest issue was resolved.

The Appellant, Robert E. Montgomery (hereinafter "Montgomery") hopes that the sheer number of foreclosure cases that are being filed in ever increasing numbers in these difficult economic times justifies this Honorable Court's review of the Sixth District Court of Appeals well reasoned opinion. To the contrary, the Sixth District Court of Appeals decision is not at odds with Ohio procedural rules dealing with summary judgment, real party in interest or UCC

requirements for the enforcement of an instrument. The Sixth District Court of Appeals' decision upholds longstanding Ohio law that allows for a prophylactic use of summary judgment to steer some cases to conclusion with out the need for a trial where there is no genuine issue of fact in controversy.

The Sixth District Court of Appeals made a de novo review of the trial court's grant of summary judgment and made the following findings:

1.) Plaintiff-Appellee, Countrywide Home Loans Inc. ("Countrywide") filed a foreclosure action on March 14, 2008
2.) Attached to the Complaint was the original mortgage and a Note made out to KeyBank National Association with additional language added at the end of the note stating "Pay to the Order of Countrywide Document Custody Services, a division of Treasury Bank, N.A. KeyBank National Association."
3.) KeyBank National Association was made a defendant to this case and did not assert an interest in the Note claimed to be held by Countrywide.
4.) The Mortgage was assigned to Countrywide prior to the time the foreclosure was filed.
5.) In response to requests for admissions, Montgomery admitted that Countrywide is the holder of the mortgage.
6.) In response to requests for admissions, Montgomery admitted that Countrywide is the assignee of Keybank's interest in the Note.
7.) In the uncontradicted affidavit of Ely Harless, the vice president of Countrywide, he avers that Countrywide is the holder of the Note and Mortgage.
8.) Montgomery never filed a memorandum in opposition to summary judgment.
9.) The uncontradicted evidence establishes that Countrywide was the real party in interest and therefore the trial court did not err in granting summary judgment.

This is a case where Montgomery gave admissions in Countrywide's favor as to the issue on appeal at the trial court level; did not object to any of Countrywide's evidence; and, filed no contradictory evidence in opposition to Plaintiff's Motion for Summary Judgment. Any ruling resulting from this case would provide a very narrow standard for other Ohio cases as the facts of this case are uncontradicted and fairly lopsided in Countrywide's favor.

II. Response to Argument in Support of Proposition of Law

Proposition of Law No.1: Plaintiff-Appellee demonstrated to the trial court that it was the holder of the mortgage and had a right to enforce the note.

Montgomery would have this Honorable Court believe that the Sixth District Court of Appeals failed to address whether Countrywide was the holder of the Note at the time the Complaint was filed. Quite simply, there is no evidence in the record to support Montgomery's naked allegation that "Countrywide was not the holder of the Note at the time the Complaint was filed". In fact the Sixth District Court of Appeals reviewed the evidence regarding Countrywide's relationship to the subject Note and found as follows:

1.) Attached to Countrywide's Complaint was the Note made out to KeyBank National Association with additional language added at the end of the note stating "Pay to the Order of Countrywide Document Custody Services, a division of Treasury Bank, N.A. KeyBank National Association."
2.) KeyBank National Association was made a defendant to this case and did not assert an interest in the Note claimed to be held by Countrywide.
3.) In response to requests for admissions, Montgomery admitted that Countrywide is the assignee of Keybank's interest in the Note.
4.) In the uncontradicted affidavit of Ely Harless, the vice president of Countrywide avers that Countrywide is the holder of the Note.

Montgomery believes that the case of *All American Finance Company v. Pugh Shows, Inc.* (1986), (5th Dist.) 30 Ohio St.3d 130 is dispositive of this matter. But the case of *All American Finance Company* actually deals with how persons who have notes transferred to them go about acquiring holder in due course standing in order to allow them to avoid certain claims and defenses that could be asserted against the original holder of the note. The case of All American Finance Company does not deal with how parties obtain either simple holder status with regards to a Note or how parties obtain the right to enforce a Note.

Ohio's Uniform Commercial Code allows greater latitude in who can enforce an instrument, such as a Note, than Montgomery lets on. Ohio Revised Code 1303.31 details who can enforce an instrument:

> Ohio Revised Code 1303.31 Person entitled to enforce instrument
> (A) "Person entitled to enforce" an instrument means any of the following persons:
>
> > (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 pursuant to Section 1303.38 or division (D) of section 1303.58 of the Revised Code.
>
> (B) A person pay be a "person entitled to enforce" the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

There is no evidence that Countrywide is not the holder of the Note. Instead, as shown above there is ample evidence before the court that Countrywide is the holder of the Note. But even if this fact were not established in the trial court, Countrywide could still enforce the note as a nonholder not in possession of the note but still entitled to enforce it pursuant to Ohio Revise Code 1303.31(A)(3) along with 1302.38(A)(2).[1] And there is ample evidence that, at minimum, Countrywide has possession of the Note. A copy of the Note is attached to the Complaint and Countrywide's Vice President has testified that he inspected the original and compared it to the copy attached to the Complaint, so Countrywide must have had possession of the Note. As assignee of the mortgage, it is clear that Countrywide has the rights of a holder of the Note. And

[1] Also see *Bank of New York v. Dobbs* (2009 Ohio App. 5 Dist.) 2009 WL 2894601 for a fascinating decision in support of the proposition that an assignment of the mortgage implies an assignment of the note so long as there is not evidence indicating an intent by the parties to separate the note from the mortgage.

Countrywide is in possession of the Note. Therefore Countrywide is entitled to enforce the Note pursuant to Ohio Revised Code 1303.31(A)(2).

Proposition of Law No. 2: Plaintiff-Appellee demonstrated to the trial court that it was the real party in interest.

Ohio Rule of Civil Procedure 17 (A) states in pertinent part that "[e]very action shall be prosecuted in the name of the real party in interest." In order to ascertain the real party in interest, a court must ask, "Who would be entitled to damages?" *Young v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1993), 88 Ohio App.3d 12, citing to *Nuco Plastics, Inc.* (1991), 76 Ohio App.3d 137. In a standard foreclosure action, the party holding the mortgage would clearly be the real party in interest. *Kramer v. Millott* (1994 Ohio App. 6 Dist.), 1994 WL 518173. The purpose behind the real party in interest requirement is to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party in interest on the same matter. *Shealy v. Cambell* (1985), 20 Ohio St.3d 23, 24.

Here, Countrywide is the real party in interest and was at the time the Foreclosure Action was filed. Montgomery was provided with every opportunity to obtain evidence and assert defenses against Countrywide, the only party who could bring an action against him on the Mortgage. And the original holder of the Note, KeyBank National Association, was made a defendant to this case and did not assert an interest in the Note. And Montgomery admitted at the trial court level that Countrywide was the assignee of Keybank's interest in the Note, although Montgomery now claims, at the appellate court level, that there is some distinction between Countrywide Document Custody Services and Plaintiff-Appellee, Countrywide Home Loans Inc.

But the uncontradicted affidavit of Ely Harless, Vice President of Countrywide makes clear that Countrywide holds the Note.

Montgomery makes much out of two recent appellate court decisions out of the 1st and 8th districts, which hold that, in a foreclosure action, a bank that was not the holder of a note or mortgage when the suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the note or mortgage. *Wells Fargo Bank, N.A. v. Byrd* 178 Ohio App.3d 285; *Wells Fargo Bank, N.A. v. Jordan* 8th Dist. No. 91675, 2009-Ohio-1092. But other appellate courts have declined to follow these decisions and at least one appellate court has ruled that a bank that had filed a foreclosure action could cure a real-party-in-interest problem by subsequently obtaining the mortgage. *Bank of New York v. Stuart,* 9th Dist. No. 06CA008953, 2007-Ohio-1483. But even if this Court were to follow the *Byrd* and *Jordan* decisions, it must still find that Countrywide had standing to invoke the jurisdiction of the trial court because Countrywide, as the assigned mortgagee, had a real interest in the subject matter of the action at the time the Foreclosure Action was filed.

The theory behind the *Byrd* and *Jordan* decisions is that a person lacking any right or interest to protect may not invoke the jurisdiction of a court. *Wells Fargo Bank, N.A. v. Byrd* 178 Ohio App.3d 285; *Wells Fargo Bank, N.A. v. Jordan* 8th Dist. No. 91675, 2009-Ohio-1092. citing to *Northland Ins. Co. v. Illuminating Co.,* 11th Dist. Nos. 2002-A-0058, 2002-A-0066, 2004-Ohio-1529. But a party has standing to invoke the jurisdiction of the court when: (1) they have some real interest in the subject matter of the action; or, (2) they have the ability to discharge the claim on which the suit is brought; or, (3) they possess the right to be enforced. *Wells Fargo Bank, N.A. v. Byrd* 178 Ohio App.3d 285 citing to *Discover Bank v. Brockmeier,* 12th Dist. No. CA 2006-057-078, 2007-Ohio-1552. Countrywide did have a right or interest in the subject property (the mortgage) and a right to enforce it at the time the Foreclosure Action was filed. As such, Countrywide properly demonstrated to the trial court that it is the real party

in interest to this case.

III. CONCLUSION

As there were no genuine issues of material facts in controversy before the trial court, it had little choice but to grant summary judgment. Likewise, the Sixth District Court of Appeals, upon its de novo review of the un-objected and un-contradicted evidence, sent up from the trial court, could not overturn the trial court's decision. Montgomery's failure to set forth contradictory evidence or object to Countrywide's evidence or even respond to Countrywide's Motion for Summary Judgment makes it easy for the trial court and the Sixth District Court of Appeals to determine that summary judgment in Countrywide's favor is appropriate. The decisions of the trial court and the Sixth District Court of Appeals do not raise any substantial constitutional question nor do they create any great public or general interest. Rather the decisions affirm the basic maxim familiar to any litigator that a party who slumbers on his defenses and fails to object to evidence and fails to respond to summary judgment is likely to lose.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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