

ORIGINAL

IN THE SUPREME COURT OF OHIO

BANK OF AMERICA, N.A.

*

CASE NO. 14-1629

Appellee

*

On Appeal from the Warren
County Court of Appeals, 12th
District Appellate District Case
Nos. CA 2014-01-018

-vs-

*

JEFFREY JACKSON, et al.

*

Appellant.

*

MEMORANDUM IN SUPPORT OF JURISDICTION

Andrew M. Engel (0047371)
Kendo, Alexander, Cooper & Engel LLP
7925 Paragon Road
Centerville, OH 45459
(937) 433-4090
Fax (937) 433-1510
aengel@kacelawllp.com

John B. Kopf, III (0075060)
Thompson Hine LLP
41 S. High St., 17th Fl.
Columbus, OH 43215
(614) 469-3200
Fax (614) 469-3361
john.kopf@thompsonhine.com

Attorney for Appellant Jeffrey and
Shelly Jackson

Attorney for Appellee Nationstar
Mortgage LLC

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AN EXPLANATION OF WHY THIS CASE IS OF GREAT GENERAL INTEREST

This case is of great general interest for three distinct reasons. First, this case involves an issue of law that is currently pending before this Court. Second, the case involves evidentiary issues that, although not uncommon in years past, are now all too common in foreclosure cases and consumer collection cases across the state. The expansion of the secondary market for consumer debt, and the frequent transfer of servicing rights for residential mortgages, present new evidentiary issues which the Courts of this state are struggling to address. Third, this case presents an issue that is unique to the area of negotiable instruments – the right of a defendant to inspect a negotiable instrument being enforced against him..

The Jacksons' first proposition of law is currently pending before the Court in *SRMOF Trust 2009-1 v. Lewis*, Case No. 2014-0485. In *Lewis*, the Court accepted a conflict certified by the Twelfth District Court of Appeals on the following question:

In order to establish standing in a foreclosure action and invoke the jurisdiction of the common pleas court, must a plaintiff establish at the time complaint for foreclosure is filed that it has an interest in both the note and mortgage, or is it sufficient if the plaintiff demonstrates an interest in either the note or the mortgage?

The Court's decision in *Lewis* conflicts with the decision of the Ninth District Court of Appeals in *BAC Home Loan Serv. v. McFerren*, 2013-Ohio-3228, 9th Dist. No. 26384. Because one of the legal issues presented in this case is currently before the Court, the Jacksons submit that this case is of great general interest.

Second, the case presents several related issues regarding the standard for affidavits in summary judgment proceedings. Over the past few years, Ohio's Courts of Appeals have taken disparate approaches to the requirements of an affidavit under

Civ.R. 56(E). Some of the issues relates to the personal knowledge of the affiant. *Compare Wells Fargo Bank, N.A. v. Smith*, 12th Dist. Brown, No. CA12-04-006, 2013-Ohio-0855, ¶39. (“Generally, “a mere assertion of personal knowledge satisfies the personal knowledge requirement of Civ.R. 56(E) . . .”) *with TPI Asset Mgt. v. Conrad-Eiford*, 2nd Dist. Clark No. 10CA0044, 193 Ohio App.3d 38, 2011-Ohio-1405, ¶22 (“The affiant Hunter’s statement that “ I am authorized on behalf of Chase Bank USA, N.A. to make this affidavit” is insufficient to demonstrate that he has any personal knowledge of the facts that the affidavit contains.”). Other issues relate to document authentication. *Compare Bank of America, N.A. v. Loya*, 9th Dist. Summit No. CA26973, 2014-Ohio-2750, ¶14 (“Having reviewed the business records attached to Ms. Littlejohn’s affidavit, we cannot conclude that a review of the records would have allowed her to attest to the fact that Bank of America was in possession of Mr. Loya’s note at the time it filed suit against him.”) *with Bank of America, N.A. v. Jackson*, 12th Dist. Warren No. CA2014-01-018, 2014-Ohio-2480, ¶14 (“Weir averred that she had personal knowledge of the documentation associated with Jackson’s loan, and that she further gained personal knowledge of the related issues by reviewing several documents, which were attached to her affidavit.”). These drastically different standards create confusion for litigants and judges alike. Depending on the appellate district a litigant is in, very different rules regarding affidavit testimony apply. The need for uniformity in the application of the Rules of Evidence and Rules of Civil Procedure make this case one of great general interest.

Finally, this case highlights an aspect of negotiable instruments that Ohio courts have only recently started to explore. As the Court is aware, the promissory notes used in most residential mortgage loans are “negotiable instruments” under Revised Code

Chapter 1303, a part of the Uniform Commercial Code as adopted in Ohio. Unlike other contracts, a negotiable instrument can only be enforced by a limited class of persons defined by statute. And for the most part, such a person must, at a minimum, possess the original instrument. Further, the entitlement to enforce the instrument is often governed by the endorsements found on the face of the original instrument. Thus, the obligation of an issuer of a negotiable instrument, i.e. who that issuer must pay, is controlled solely by the possession of, and endorsements on, the original note itself. This case presents the issue of whether an Ohio homeowner is entitled to inspect the negotiable instrument he is being sued on to ensure that the party suing is actually the person entitled to collect on the note and discharge the issuers obligations under it. This issue implicates not only the merits of the claim itself, but also matters of standing. For these reasons, the case is of great general interest.

STATEMENT OF THE CASE AND THE FACTS

This appeal is from the grant of summary judgment in a residential foreclosure matter.

The Complaint

Bank of America ("BANA") filed this foreclosure action in August 2011. In its Complaint, BANA claimed it was the holder of the note, but it did not attach a copy of the Promissory Note to its Complaint. Instead, it stated that "a copy [of the note] is unavailable at the present time."

Summary Judgment

Later, when BANA filed its motion for summary judgment, it supported the motion with the affidavit of Katherine Weir, an officer of BANA. Ms. Weir did not give the court

any information regarding her job duties. Rather, she stated merely that all of the information she provided was derived from her review of BANA's records. The trial court expressly found that Ms. Weir's "personal knowledge" was limited to that information she learned from her review of her employer's business records.

Attached to the affidavit were copies of the following:

1. An Account Information Statement which is not identified with an exhibit letter.
2. Exhibit A – A copy of the Note. The copy has been obviously digitally imaged. Running up the left margin of the document of the copy are the words "*To license contact www.imagemaker.com.*" The imaged copy of the note bears an endorsement in blank.
3. Exhibit B – A copy of the Mortgage. It too has the "*www.imagemaker.com*" reference.
4. Exhibit C – A copy of a letter entitled Notice of Intent to Accelerate. The Notice is from BAC Home Loan Servicing LP, not from BANA. It, too, has the "*www.imagemaker.com*" reference on it.
5. Exhibit D – A copy of unlabeled accounting records, again generated from "*www.imagemaker.com.*"

None of the documents attached to Ms. Weir's affidavit are identified by name, description, or exhibit letter. Rather, Ms. Weir used a shotgun approach, testifying that all of the records attached to her affidavit were true and accurate copies from BANA's records.

Ms. Weir went on to testify that "Bank of America, N.A. has possession of the note." She did not, however, identify the note she was referring to. Nor did she offer any testimony regarding when BANA obtained possession of the note. She also testified that "[t]he indebtedness has been accelerated."

The Defense

In opposition to BANA's summary judgment motion, the Jacksons submitted their

own affidavits. Those affidavits offered evidence that their loan had been owned by Federal Home Loan Mortgage Corporation - Freddie Mac. They also filed a motion to strike the affidavit of Ms. Weir, challenging her personal knowledge and much of her testimony. Finally, the Jacksons moved the trial court for an order requiring BANA to produce the original promissory note in open court for inspection.

The Trial Court's Decisions

The trial court overruled the Jacksons' motion to strike and their motion to produce the note, and granted BANA's motion for summary judgment. In overruling the motion to strike the Weir affidavit, the trial court did, however, determine that the affiant did not have any personal knowledge of the Jacksons' loan. Rather, it concluded that:

By reviewing the business records, Ms. Weir has had firsthand observation of the records. Her firsthand observations of the records have established her personal knowledge of the business records.

From this limited "personal knowledge," the trial court accepted without question Ms. Weir's testimony that BANA had possession of the note, even though none of the records attached to the affidavit reference the whereabouts of the note.

In overruling the Jackson's Motion To Produce The Note, the trial court merely concluded that Evid. R. 1003 permits the introduction of a copy. It held that the Jacksons failed to raise a question regarding the authenticity of the copy submitted by BANA through Ms. Weirs' affidavit and failed to prove any unfair circumstance that would bar BANA's reliance on a mere copy.

The trial court then granted summary judgment finding that the Jacksons' affidavits and their arguments about the inferences drawn from the evidence submitted by BANA did not give rise to a genuine issue of material fact. Thus, the trial court

granted judgment to a plaintiff that did not possess even a copy of the note when suit was filed, and the copy of the note it relied on in moving for summary judgment was an obvious internet reprint. It further permitted an employee of BANA to authenticate, with no foundational evidence whatsoever, a letter purportedly printed and mailed by a third party with whom she had no stated relationship.

The Court of Appeals's Decision

The Court of Appeals affirmed the trial court in all respects. *Bank of America v. Jackson*, 2014-Ohio-2480. It found that Ms. Weir's affidavit was unobjectionable because of its incantation of personal knowledge. *Id.* ¶¶13-15. It did not reconcile the limited basis for her personal knowledge with her testimony as to matters wholly outside of that personal knowledge.

As for the motion to produce the note, the Court of Appeals found that "the Jacksons did not raise a genuine question as to the authenticity of the original note." *Id.* ¶23. This despite the Jacksons' arguments that:

- a. BANA did not possess a copy of the note when it filed suit;
- b. the only authenticated version of the note is an obvious internet reprint;
- c. that version of the note bears an endorsement in blank, rendering it bearer paper; and
- d. Freddie Mac claimed ownership of the instrument.

The Court went on to note that there was no need to produce the original note because:

The note filed with Bank of America's "NOTICE OF FILING NOTE" is a copy of the note, while the copy attached to Weir's affidavit was "imaged," meaning that it was printed from a digital storage database. The imaged note attached to Weir's affidavit is compressed in size and also contains wording on the side of the pages, "to license contact: www.imgmaker.com." The copy of the note filed by Bank of America on

February 10, 2012, however, is a normal size (uncompressed) and does not contain any reference to the image maker website. Therefore, the record contains a copy of the note in its original format, as well as a second, exact copy of the note as it was imaged.

Id. ¶21, n. 2. But the version of the note attached to the Notice of Filing Of Note referenced by the Court of Appeals was not authenticated. There was no factual basis from which the Court could possibly conclude that the two versions of the note bear any resemblance to the original note.

Finally, the Court of Appeals held that Ms. Weir, an employee of BANA, could authenticate a letter purportedly prepared and mailed by BAC Home Loan Servicing, LLC because: “[t]he notice includes Bank of America's corporate emblem at the top left hand corner of the notice, includes the corporate address for Bank of America, and includes a statement that the notice was generated by Bank of America's servicing company.” *Id.* ¶41. In other words, the Court of Appeals made specific factual findings which were (a) not made by the trial court, and (b) not supported anywhere in the record.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: In order to establish standing in a foreclosure action, a plaintiff must possess, at the institution of the suit, the right to enforce the debt secured by the mortgage.

This proposition of law is currently pending before the Court in *SRMOF Trust 2009-1 v. Lewis*, Case No. 2014-0485. In *Lewis*, the Court accepted a conflict certified by the Twelfth District Court of Appeals on the following question:

In order to establish standing in a foreclosure action and invoke the jurisdiction of the common pleas court, must a plaintiff establish at the time complaint for foreclosure is filed that it has an interest in both the note and mortgage, or is it sufficient if the plaintiff demonstrates an interest in either the note or the mortgage?

The case is in the briefing process. The Jacksons respectfully suggest that the same question of law is present in this case.

This Court long ago held that in a real estate mortgage loan transaction the note represents the debt, and the mortgage is a mere incident to the note. *Kernohan v. Manss*, 53 Ohio St. 118, 133, 41 N.E. 258 (Ohio 1895). And "[b]eing but an incident of the debt, the mortgage remains, until foreclosure or possession taken, in the nature of a chose in action." *Id.* As such, the mortgage "has no determinate value apart from the notes, and, as distinct from them, is not a fit subject of assignment." *Id.* p. 132. The U.S. Supreme Court has gone further and stated that "an assignment of the [mortgage] alone is a nullity." *Carpenter v. Longan*, 83 U.S. 271, 274, 21 L.Ed. 313 (1873).

The Restatement of the Law 3d, Property, Mortgages, Section 5.4(e), at 385 (1996) supports this position. "[I]n general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation" *Id.* Even in *Schwartzwald*, this Court intimated that standing to sue in foreclosure was limited to those who were entitled to enforce the note. *Schwartzwald* ¶27 (citing *Deutsche Bank Natl. Trust v. Brumbaugh*, 2012 OK 3, 270 P.3d 151, ¶ 11 ("If Deutsche Bank became a person entitled to enforce the note as either a holder or nonholder in possession who has the rights of a holder *after the foreclosure action was filed*, then the case may be dismissed without prejudice * * *" [emphasis added])).

This rule makes sense. Foreclosure is a two-step process in Ohio. *First Knox National Bank v. Peterson*, 2009-Ohio-5096, ¶18 (5th Dist. No. 08CA28). Only after the court determines liability on the underlying obligation can it move to the foreclosure of the mortgage. *Id.* See also, *National City Bank v. Skipper*, 2009-Ohio-5940, ¶25 (9th

Dist. No. C.A. 24772). A foreclosure action is really a proceeding to aid in execution of a judgment. *Countrywide Home Loan Servicing v. Nichpor*, 136 Ohio St.3d 55 (2013).

R.C. 1303.31 limits to a few carefully defined classes of persons who may enforce a promissory note. To permit the naked holder of the mortgage, a person who is not permitted by statute to sue on the note itself, to bring suit disturbs this legislatively created scheme. It would permit persons to invoke the jurisdiction of the common pleas court for a remedy even when that remedy can never be granted in the absence of the debt.

Proposition of Law No. 2: Information obtained from an affiant's review of hearsay business records is insufficient to provide the personal knowledge required to satisfy Civ. R. 56(E).

In *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 767 N.E.2d 707, 95 Ohio St.3d 314, 2002-Ohio-2220 (Ohio 2002), this Court stated: "Personal knowledge" is "[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said." *Id.* ¶26. The Sixth District Court of Appeals has stated that "[p]ersonal knowledge has been defined as knowledge of factual truth which does not depend on outside information or hearsay." *Residential Funding Company v. Thorne*, 6th Dist Lucas No. L-09-1324, 2010-Ohio-4271, ¶64. And the Second District has held that "[h]earsay knowledge based on the affiant's review of hearsay business records, for example, is insufficient." *TPI Asset Mgt. v. Conrad-Eiford*, 950 N.E.2d 1018, 193 Ohio App.3d 38, 2011-Ohio-1405, 2nd Dist. No. 10-CA-0044, ¶24 (citing *St. Paul Fire & Marine Ins. Co. v. Ohio Fast Freight, Inc.* (1982), 8 Ohio App.3d 155, 456 N.E.2d 551).

The personal knowledge requirement of Civ.R. 56(E) cannot be cast aside as a matter of convenience. Either an affiant has personal knowledge or she doesn't. There is no basis in Ohio law for someone to claim personal knowledge simply by reading a piece of paper. If so, then every middle school student in the state can claim personal knowledge of the signing of the Declaration of Independence because they read a text book entry about it.

Proposition of Law No. 3: An affiant who claims personal knowledge based solely upon a review of business records may not provide testimony about facts not contained in properly authenticated business records provided to the court in accordance with Civ.R. 56(E).

If an affiant is testifying as to information contained within documents, she must produce to the Court the documents themselves. Civil Rule 56(E) provides very stringent standards for the form and content of affidavits submitted in support of, or opposition to, a motion for summary judgment. The rule provides, in relevant part:

(E) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits 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 court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. * * *

(emphasis added). Therefore, an affidavit used to support summary judgment must have attached to it copies of all papers to which it refers. *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 467, 423 N.E.2d 105 (Ohio 1981); *Estate Plan. Legal Services, P.C. v. Cox*, 2008-Ohio-2258, Warren App. Nos. CA2006-11-140, CA2006-12-141, ¶26. Further, there is no hearsay exception which allows a witness to give testimony of the content of business records based solely on a review of those records. *St. Paul Fire & Marine Ins. Co. v. Ohio Fast Freight, Inc.*, 8 Ohio App.3d 155, syll. ¶1

(Franklin Co. 1985).

The Ninth District considered another Bank of America affidavit in *Bank of America, N.A. v. Loya*, 9th Dist. Summit No. CA26973, 2014-Ohio-2750. It found that an affidavit based on personal review of business records could not permissibly assert facts not contained within the documents produced with the affidavit. And it specifically considered whether a review of records could have provided a basis for the affiant to testify to the possession of the note: "Having reviewed the business records attached to Ms. Littlejohn's affidavit, we cannot conclude that a review of the records would have allowed her to attest to the fact that Bank of America was in possession of Mr. Loya's note at the time it filed suit against him." ¶14.

The holding of the Ninth District is sound. It comports with both the requirements of Civ. R. 56(E) and those of Evid. R. 803.

Proposition of Law No. 4: An affiant may not authenticate a business record of an entity with which she has no affiliation without providing proper foundation for admission of the record.

In *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 767 N.E.2d 707, 95 Ohio St.3d 314, 2002-Ohio-2220 (Ohio 2002), this Court stated:

Civ.R. 56(E) requires that affidavits supporting motions for summary judgment be made on personal knowledge. *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 223, 631 N.E.2d 150. For obvious reasons, this is the same standard as applied to lay witness testimony in a court of law. *Id.*; Evid.R. 602. "Personal knowledge" is "[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said." *Black's Law Dictionary* (7th Ed.Rev.1999) 875. See, also, *Weissenberger's Ohio Evidence* (2002) 213, Section 602.1 ("The subject of a witness's testimony must have been perceived through one or more of the senses of the witness. * * * [A] witness is 'incompetent' to testify to any fact unless he or she possesses firsthand knowledge of that fact.").

A testifying witness must, then, provide the court with sufficient evidence to

establish both the requisite personal knowledge to provide foundation evidence to admit a business record and the actual foundation evidence for the admission of the documents itself. This requires an affiant to first explain why she possesses the requisite knowledge to authenticate a business record. Once the required personal knowledge is established, then the affiant must satisfy the elements of Evid. R. 803(6) to remove the document from operation of the hearsay rule.

In *Wachovia Bank of Delaware, N.A. v. Jackson*, 5th Dist. No. 2010-CA-00291, 2011-Ohio-3202, the Court addressed whether an employee of one company could lay the proper foundation to authenticate the business record of another company. In reversing a grant of summary judgment, the court rejected an affidavit in which the affiant, an employee of an entity other than the plaintiff bank, did not establish that she could have personal knowledge of another company's records or practices. *Id.* ¶28.

This is not to say that such authentication is not possible. But at a minimum, an affiant must provide the Court with some background evidence as to how she has the requisite knowledge to provide proper evidentiary foundation.

Proposition of Law No. 5: In an action to enforce a negotiable instrument, person against whom the instrument is sought to be enforced is entitled to inspect the instrument upon motion to the court.

In Ohio, a negotiable instrument tells its own story. From its face, a person should be able to tell who owes whom. *National City Bank, Dayton v. Ohio National Life Assurance Corp.*, 111 Ohio App.3d 387, 31 (Hamilton Co. 1996). Under the U.C.C., the person entitled to payment is defined as a "person entitled to enforce" the note. R.C. 1303.31. And possession of the note is a critical element to determining holder status or the rights of a holder. *In re Miller*, 666 F.3d 1255, (10th Cir. 2012).

"Possession is an element designed to prevent two or more claimants from qualifying as holders who could take free of the other party's claim of ownership." *Georg v. Metro Fixtures Contractors, Inc.*, 178 P.3d 1209, 1213 (Colo.2008) (citation omitted)." With rare exceptions, those claiming to be holders have physical ownership of the instrument in question." *Id.* (citation omitted). In the case of bearer paper such as the Note, physical possession is essential because it constitutes proof of ownership and a consequent right to payment."

Id. at pp. 1263-64.

Pursuant to R.C. 1303.67(A), only payment to a person entitled to enforce a negotiable instrument discharges the maker's liability on the note. "Subject to division (B) of this section, an instrument is paid to the extent payment is made by or on behalf of a party obliged to pay the instrument and to a person entitled to enforce the instrument." *Id.* Therefore, the issuer of a negotiable instrument will be exposed to double liability on the same debt if they pay someone other than the person entitled to enforce the instrument.

[I]f a maker pays a "person entitled to enforce" the note, the maker's obligations are discharged to the extent of the amount paid. UCC § 3-602(a) [R.C. 1303.67(A)]. Put another way, if a maker makes a payment to a "person entitled to enforce," the obligation is satisfied on a dollar for dollar basis, and the maker never has to pay that amount again. *Id.* See also UCC § 3-602(c) [R.C. 1303.67(A)].

If, however, the maker pays someone other than a "person entitled to enforce"—even if that person physically possesses the note the maker signed—the payment generally has *no* effect on the obligations under the note. The maker still owes the money to the "person entitled to enforce," *Miller & Harrell, supra*, ¶ 6.03[6][b][ii], and, at best, has only an action in restitution to recover the mistaken payment. See UCC § 3-418(b) [R.C. 1303.58(B)].

Bank of America, N.A., v. Pasqualone, 10th Dist. Franklin No. 13AP-87, 2013-Ohio-5795, ¶26 (quoting *In re Veal*, 450 B.R. 897, 910 (9th Cir.BAP 2011)). See also *HSBC Bank USA, N.A. v. Thompson*, 2nd Dist. Montgomery No. 23761, 2010-Ohio-4158, ¶ 71-72, (quoting *Adams v. Madison Realty & Development, Inc.*, 853 F.2d 163, 168 (3d

Cir.1988) (“[F]rom the maker’s standpoint: ‘it becomes essential to establish that the person who demands payment of a negotiable note, or to whom payment is made, is the duly qualified holder. Otherwise, the obligor is exposed to the risk of double payment, or at least to the expense of litigation incurred to prevent duplicative satisfaction of the instrument.’ ”)).

As a practical matter, an inspection of the original note is the only way to determine who is entitled to enforce it. For only through examining the original can any person know for certain who possesses the note and what endorsements appear on its face.

Proposition of Law No. 6: When conducting a de novo review of a grant of summary judgment, a court of appeals may not consider unauthenticated documents not relied upon by the movant to support its motion in the trial court.

On summary judgment, “the moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. *Dresher v. Burt*, 662 N.E.2d 264, 75 Ohio St.3d 280, 293, 1996-Ohio-107 (Ohio 1996). Thus, it is the duty of the movant to identify what evidence in the record it is relying on to support its motion. Thus, it is improper for an appellate court to base its de novo review on matters neither identified by the movant nor considered by the trial court. See *Richardson v. Girl Scouts of North East Ohio*, 10th Dist. Franklin No. 27127, 2014-Ohio-1036, ¶39.

This rule is doubly true regarding matters contained in the record that are not properly unauthenticated. “Unauthenticated documents which are not sworn, certified,

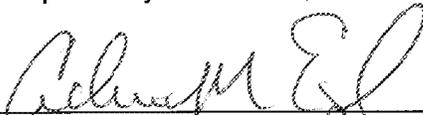
or authenticated by way of affidavit have no evidentiary value and may not be considered by the trial court." *Int'l Brotherhood Of Electrical Workers, Local No. 8 v. Hyder*, 6th Dist. No. WD03067, 04-LW-2785, 2004-Ohio-3460, ¶19 (J. Lanzinger) (citing *Douglass v. Salem Cmty. Hosp.*, 153 Ohio App.3d 350, 360, 2003-Ohio-4006, ¶25; *Citizens Ins. Co. v. Burkes* (1978), 56 Ohio App.2d 88, 95-96; *Sparks v. Erie Cty. Bd. of Commrs.* (Jan. 16, 1998), 6th Dist. No. E-97-007).

If a trial court may not consider unauthenticated documents in deciding summary judgment, neither may a court of appeals do so during its de novo appellate review.

CONCLUSION

For these reasons set forth above, Appellants Jeffrey and Shelley Jackson request that the Court accept jurisdiction over this case and decide the propositions of law contained herein..

Respectfully submitted,

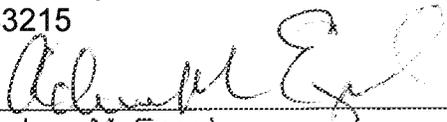


Andrew M. Engel (0047371)
Kendo, Alexander, Cooper & Engel LLP
7925 Paragon Rd.
Centerville, OH 45459
(937) 433-4090
Fax: (937) 433-1510
aengel@kacelawllp.com

Attorneys for Appellants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by ordinary mail this 22nd day of September 2014 upon upon John B. Kopf, III, Esq., **THOMPSON HINE LLP**, 41 South High Street, Suite 1700, Columbus, Ohio 43215



Andrew M. Engel

APPENDIX

JUN 2014

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

COURT OF APPEALS
WARREN COUNTY
FILED

JUN - 9 2014

James L. Spaeth, Clerk
LEBANON OHIO

BANK OF AMERICA, N.A.,

Plaintiff-Appellee,

CASE NO. CA2014-01-018

JUDGMENT ENTRY

- vs -

JEFFREY L. JACKSON a.k.a.
Jeffrey Jackson, et al.,

Defendants-Appellants.

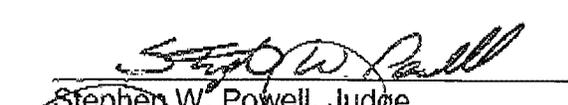
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.



Robert P. Ringland, Presiding Judge



Stephen W. Powell, Judge



Robin N. Piper, Judge

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

BANK OF AMERICA, N.A.,

:

Plaintiff-Appellee,

:

CASE NO. CA2014-01-018

:

OPINION

- vs -

6/9/2014

:

JEFFREY L. JACKSON a.k.a.

:

Jeffrey Jackson, et al.,

:

Defendants-Appellants.

:

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 11 CV 80274

Lerner, Sampson & Rothfuss, Richard Mark Rothfuss II, Adam R. Fogelman, P.O. Box 5480, Cincinnati, Ohio 45201-5480, for plaintiff-appellee

Kendo, Alexander, Cooper & Engel LLP, Andrew M. Engel, 7925 Paragon Road, Centerville, Ohio 45459, for defendants-appellants Jeffrey L. Jackson & Shelly R. Jackson

Nicholas J. Pantel, 221 East Fourth Street, Suite 400, Cincinnati, Ohio 45202, for defendant, United States of America

Matthew Harrison, Lebanon, Ohio 45036, defendant, pro se

David P. Fornshell, Warren County Prosecuting Attorney, Christopher A. Watkins, 500 Justice Drive, Lebanon, Ohio 45036, for defendant, Jim Aumann, Warren County Treasurer

Sherry M. Phillips, 150 East Gay Street, 21st Floor, Columbus, Ohio 43215, for defendant, State of Ohio, Department of Taxation

PIPER, J.

{¶ 1} Defendant-appellant, Jeffrey Jackson, appeals a decision of the Warren County Court of Common Pleas, granting summary judgment in favor of plaintiff-appellee, Bank of America.¹

{¶ 2} Jackson signed a promissory note in 2001 in favor of Bank of America for \$267,500 to refinance existing liens on a property he and his wife purchased in 1998. Jackson and his wife (the Jacksons) granted a mortgage on the property to Bank of America to secure the \$267,500 note. However, the Jacksons stopped making payments on the note, and Bank of America filed a foreclosure action in 2011.

{¶ 3} Within the complaint, Bank of America alleged that the Jacksons failed to make payments on the note as agreed. Bank of America moved for summary judgment, and supported its motion with the affidavit of its officer, Katherine Weir. Weir averred that she was familiar with the records maintained in connection with the Jackson's loan, and that she had personally reviewed the records. Weir averred that the Jacksons stopped making payments in March 2011, and that there was \$230,107.86 due and owing on the note. Attached to Weir's affidavit was an imaged copy of the note signed by Jackson, a copy of the mortgage signed by the Jacksons, a copy of the acceleration notice, as well as copies of the payment records.

{¶ 4} The Jacksons filed a memorandum in opposition to Bank of America's motion for summary judgment, as well as a cross-motion for summary judgment. Therein, the Jacksons challenged Bank of America's standing to bring the foreclosure suit. The Jacksons submitted their own affidavits, which asserted their belief that Freddie Mac, rather than Bank of America, owned the note. The Jacksons submitted two letters they had received in

1. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

November 2012 from Nationstar Mortgage (Nationstar) stating that it was taking over servicing of the Jacksons' mortgage on behalf of Freddie Mac. The Jacksons also moved the court to strike a portion of Weir's affidavit in which she averred that Bank of America possessed the note. The Jacksons also filed a motion to compel Bank of America to produce the original note, rather than the imaged copy that was attached to Weir's affidavit.

{¶ 5} Bank of America later filed a motion to substitute Nationstar as the proper plaintiff, as Nationstar held the Jacksons' note and mortgage after a 2012 assignment from Bank of America. The trial court granted the motion to substitute, granted Bank of America's motion for summary judgment, overruled the Jacksons' motion for summary judgment, overruled the motion to compel production of the original note, and ordered a sheriff's sale of the Jacksons' property. The Jacksons now appeal the trial court's decision, raising the following assignments of error. For ease of discussion, and because they are interrelated, we will address the Jacksons' final two assignments of error together.

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE TRIAL COURT ERRED IN OVERRULING APPELLANTS' MOTION TO STRIKE AFFIDAVIT.

{¶ 8} The Jacksons argue in their first assignment of error that the trial court erred by overruling their motion to strike portions of Weir's affidavit.

{¶ 9} The determination of a motion to strike is within the trial court's broad discretion. *Ireton v. JTD Realty Invests., L.L.C.*, 12th Dist. Clermont No. CA2010-04-023, 2011-Ohio-670, ¶ 19. A court's ruling on a motion to strike will be not reversed on appeal absent an abuse of that discretion. *State ex rel. Ebbing v. Ricketts*, 133 Ohio St.3d 339, 2012-Ohio-4699, ¶ 13. A decision constitutes an abuse of discretion when it is unreasonable, arbitrary, or unconscionable. *Wells Fargo v. Smith*, 12th Dist. Brown No. CA2012-04-006, 2013-Ohio-855.

{¶ 10} According to Civ.R. 56(E), affidavits supporting motions for summary judgment must be made on personal knowledge. Personal knowledge is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay." *Re v. Kessinger*, 12th Dist. Butler No. CA2007-02-044, 2008-Ohio-167, ¶ 32. Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirement of Civ.R. 56(E). *Churchill v. G.M.C.*, 12th Dist. Butler No. CA2002-10-263, 2003-Ohio-4001, ¶ 11. In the absence of a specific statement, personal knowledge may be inferred from the contents of an affidavit. *Wells Fargo*, 2013-Ohio-855 at ¶ 16.

{¶ 11} When considering evidence supporting a motion for summary judgment, a trial court may disregard information in affidavits that is not based on personal knowledge and does not fall under any of the permissible exceptions to the hearsay rule. *Cent. Mtge. Co. v. Bonner*, 12th Dist. Butler No. CA2012-10-204, 2013-Ohio-3876.

{¶ 12} The business records exception is one of numerous exceptions to the hearsay rule. Evid.R. 803(6). To qualify for admission according to Evid.R. 803(6), a business record must manifest four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity, (ii) it must have been entered by a person with knowledge of the act, event or condition, (iii) it must have been recorded at or near the time of the transaction, and (iv) a foundation must be laid by the custodian of the record or by some other qualified witness. *State v. Glenn*, 12th Dist. Butler No. CA2009-01-008, 2009-Ohio-6549, ¶ 17, quoting *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶ 171. Evid.R. 803(6) does not require the affiant to have personal knowledge of the "exact circumstances of preparation and production of the document or of the transaction giving rise to the record." *Cent. Mtge. Co.*, 2013-Ohio-3876 at ¶ 16 quoting *Ohio Receivables, L.L.C. v. Dallariva*, 10th Dist. Franklin No. 11AP-951, 2012-Ohio-3165, ¶ 19.

{¶ 13} The Jacksons argue that portions of Weir's affidavit should have been struck because Weir did not have personal knowledge that Bank of America held the note, did not know where the original note was located, and that Weir did not have personal knowledge regarding the notice of acceleration. However, the record demonstrates that Weir averred that she made her affidavit from "my personal knowledge." The Jacksons have not pointed to any indication in the record to rebut Weir's statement that she made her affidavit based upon her personal knowledge of the matters referenced in her affidavit.

{¶ 14} Even absent the specific statement that her affidavit was based upon her personal knowledge, the contents of the affidavit establish that Weir made her affidavit with personal knowledge of the matters contained therein. As an officer of Bank of America, Weir was in a position to acquire, review, and authenticate that the imaged copy of the note was accurate. Weir averred that she had personal knowledge of the documentation associated with Jackson's loan, and that she further gained personal knowledge of the related issues by reviewing several documents, which were attached to her affidavit. Similarly, the notice of acceleration, also a document generated by Bank of America, was attached to Weir's affidavit and also constitutes a document of which Weir had personal knowledge.

{¶ 15} Moreover, we find that the note, mortgage, notice of acceleration, and documentation of the Jacksons' payment history were admissible, as Weir's affidavit established that the documents were properly authenticated and satisfied all the requirements of the business records exception. Weir averred that she is an officer of Bank of America, that she had personal knowledge of the contents thereof, and that the documents attached were true and correct copies. Weir's affidavit also established that the records were made at or near the time of the occurrence of the matters recorded by persons who had personal knowledge of the information contained therein, that the records were kept in the course of Bank of America's regularly conducted business activities, and that it was

Bank of America's regular practice to make such records.

{¶ 16} Having found that Weir's affidavit was based upon her personal knowledge and made reference to admissible business records, the trial court did not abuse its discretion in overruling the Jacksons' motion to strike. As such, the Jacksons' first assignment of error is overruled.

{¶ 17} Assignment of Error No. 2:

{¶ 18} THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO PRODUCE NOTE FOR INSPECTION.

{¶ 19} The Jacksons argue in their second assignment of error that the trial court erred by overruling their motion to inspect the original note.

{¶ 20} "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Evid.R. 1003.

{¶ 21} When the complaint was first filed, Bank of America attached a copy of the mortgage to the foreclosure complaint, but indicated that the note was not available at that time. However, on February 10, 2012, Bank of America filed a copy of the note. Weir also attached an imaged copy of the note to her affidavit, but the original note was not produced.²

{¶ 22} The Jacksons moved the trial court to compel Bank of America to produce the original note for their inspection in open court. The Jacksons challenged the admission of a copy of the note because they assert that Bank of America is not the proper party in interest unless it can prove that it holds the original note.

2. The note filed with Bank of America's "NOTICE OF FILING NOTE" is a copy of the note, while the copy attached to Weir's affidavit was "imaged," meaning that it was printed from a digital storage database. The imaged note attached to Weir's affidavit is compressed in size and also contains wording on the side of the pages, "to license contact: www.imgmaker.com." The copy of the note filed by Bank of America on February 10, 2012, however, is a normal size (uncompressed) and does not contain any reference to the image maker website. Therefore, the record contains a copy of the note in its original format, as well as a second, exact copy of the note as it was imaged.

{¶ 23} Despite the Jacksons' argument, however, Evid.R. 1003 permits a copy of a document to be admitted into evidence to the same extent as an original unless a genuine question is raised as to the authenticity of the original or it would be unfair to admit the duplicate in lieu of the original. As previously stated, the Jacksons did not raise a genuine question as to the authenticity of the original note. Instead, they suggested that production of the original note would have proved that Bank of America possessed the original. Nor did the Jacksons state in what way admitting the imaged copy would be unfair, other than stating that there was no way to prove that Bank of America possessed the note at the time it filed suit or when it moved for summary judgment without actually producing the original.

{¶ 24} Regardless of the Jacksons' arguments, the imaged copy of the note was admissible. There is no indication in the record that the imaged copy was not an accurate and exact duplication of the authentic original note, nor that it was unfair for the trial court to admit the copy in lieu of the original. While Bank of America did not include the original to prove that it possessed the note at the time it filed the foreclosure complaint, it did not need to.

{¶ 25} According to Ohio law, the "current holder" of a note and mortgage is entitled to bring a foreclosure action against a defaulting mortgagor. *BAC Home Loans Servicing, LP v. Kolenich*, 12th Dist. Butler No. CA2012-01-001, 2012-Ohio-5006, ¶ 38, citing R.C. 1303.31(A). Once Bank of America filed its motion to substitute, the court had evidence that Nationstar was the "current holder" of both the Jacksons' note and mortgage because both the note and mortgage had been assigned to Nationstar from Bank of America on November 8, 2012. Therefore, Bank of America was not required to produce the original note in order to prove that it had the ability to file the foreclosure suit as the Jacksons contend.

{¶ 26} The trial court properly admitted the copy of the note according to Evid.R. 1003, as the Jacksons have failed to raise a genuine issue as to the authenticity of the note or

demonstrate that such admission was unfair. Accordingly, the Jacksons' second assignment of error is overruled.

{¶ 27} Assignment of Error No. 3:

{¶ 28} THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO BANK OF AMERICA.

{¶ 29} Assignment of Error No. 4:

{¶ 30} STANDING TO BRING A SUIT IN FORECLOSURE REQUIRES MORE THAN JUST THE MORTGAGE.

{¶ 31} The Jacksons argue in their final assignments of error that the trial court erred in granting summary judgment in favor of Bank of America because Bank of America did not have standing to pursue foreclosure.

{¶ 32} This court's review of a trial court's ruling on a summary judgment motion is de novo. *Lindsay P. v. Towne Properties Asset Mgt. Co., Ltd.*, 12th Dist. Butler No. CA2012-11-215, 2013-Ohio-4124. Civ.R.56 sets forth the summary judgment standard and requires that (1) there be no genuine issues of material fact to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to only one conclusion being adverse to the nonmoving party. *Slowey v. Midland Acres, Inc.*, 12th Dist. Fayette No. CA2007-08-030, 2008-Ohio-3077, ¶ 8. The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64 (1978).

{¶ 33} The nonmoving party "may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing the existence of a genuine triable issue." *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385 (1996). A dispute of fact can be considered "material" if it affects the outcome of the litigation. *Myers v. Jamar Enterprises*, 12th Dist. Clermont No. CA2001-06-056, 2001 WL

1567352,*2 (Dec. 10, 2001). A dispute of fact can be considered "genuine" if it is supported by substantial evidence that exceeds the allegations in the complaint. *Id.*

{¶ 34} R.C. 1303.31(A) identifies three 'persons' entitled to enforce an instrument: "(1) [t]he holder of the instrument; (2) a nonholder in possession of the instrument who has the rights of a holder; and (3) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to [R.C. 1303.38] or [R.C. 1303.58(D)]." As stated in R.C. 1303.31(B), "a person may 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."

{¶ 35} As previously referenced, "the current holder of the note and mortgage is entitled to bring a foreclosure action against a defaulting mortgagor even if the current holder is not the owner of the note and mortgage." *BAC Home Loans Servicing, LP v. Kolenich*, 12th Dist. Butler No. CA2012-01-001, 2012-Ohio-5006, ¶ 38, citing R.C. 1303.31(A). A "holder" is "a person in possession of a note that is payable either to bearer or to an identified person." *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 51, citing *Self Help Ventures Fund v. Jones*, 11th Dist. Ashtabula No. 2012-A-0014, 2013-Ohio-868, ¶ 33.

{¶ 36} Regarding the Jacksons' standing argument, the record is clear that Bank of America, and Nationstar through its substitution, was the proper party to bring the foreclosure action, as it held both the Jacksons' note and mortgage. While the Jacksons asserted that Bank of America did not have standing because Freddie Mac claimed ownership of the loan, the record indicates that Bank of America/Nationstar possessed the note and mortgage regardless of who serviced the loan.

{¶ 37} While the Jacksons asserted their belief that Freddie Mac was the owner of the note and mortgage, the Jacksons averred that they were trying to modify the loan with and through Bank of America, and never indicated that they were in contact with Freddie Mac

regarding the loan or a possible modification. Nor did the Jacksons produce any evidence to suggest that Bank of America/Nationstar did not hold the note and mortgage, and Freddie Mac was never made a party to the suit. Instead, all of the relevant documentation, including the note, mortgage, payment history, notice of acceleration, and notice of assignment all indicate that Bank of America/Nationstar held the note and mortgage, rather than Freddie Mac.

{¶ 38} Nor does the fact that the note was admitted into evidence as a duplicate rather than the original establish that Bank of America/Nationstar did not have standing. As previously discussed within the Jacksons' second assignment of error, there was no dispute raised that the original note was not authentic, that the copy was unfairly prejudicial, or that the filed copy did not constitute an exact copy of the authentic original note Jackson signed in favor of Bank of America.

{¶ 39} Regarding summary judgment, the Jacksons argue that the trial court erred in granting summary judgment because (1) a genuine issue of fact existed regarding who held proper authority to enforce the note, and (2) because acceleration was not proper. Regarding standing, we have already established that Bank of America, and therefore Nationstar by substitution, was the proper party to bring the foreclosure action. Given that Bank of America/Nationstar held the note and mortgage, there were no genuine issues of material fact that required further litigation, and summary judgment was appropriate.

{¶ 40} The Jackson's other argument regarding the way in which the loan was accelerated also failed to raise a genuine issue of material fact. Instead, the record indicates that Bank of America provided the Jacksons with notice of the acceleration, and that the Jacksons' debt had been accelerated. Weir averred that the notice of acceleration was a true and correct copy of the one provided to the Jacksons and that the Jacksons' "indebtedness has been accelerated."

{¶ 41} While the Jacksons also argue that Bank of America did not create the notice of acceleration, the record indicates otherwise. The notice includes Bank of America's corporate emblem at the top left hand corner of the notice, includes the corporate address for Bank of America, and includes a statement that the notice was generated by Bank of America's servicing company. Therefore, the Jacksons were well-aware that the acceleration notice was created by Bank of America, and that Bank of America was accelerating the debt. As such, the Jacksons did not raise a genuine issue of material fact regarding the acceleration that required further litigation.

{¶ 42} Other than their challenge to the summary judgment decision, the Jacksons also argue that the trial court's order was not final because the trial court did not specify the amount of damages. The trial court's entry found Bank of America's lien to be "valid" and the "first" lien, and awarded "the sum of \$230,107.86 with interest at the rate of 6.5000 percent per annum from February 1, 2011, and as may be adjusted pursuant to the terms of the note, together with advances for taxes, insurance, and otherwise expended, plus costs." The Jacksons argue that the trial court's judgment was not final because it did not specify the specific amount of damages in regard to the taxes, insurance, and other costs.

{¶ 43} The Ohio Supreme Court has recently settled a district split regarding whether a trial court's foreclosure order is final and appealable when that judgment does not order specific damages in regard to fees associated with the foreclosed property. *Citimortgage, Inc. v. Roznowski*, Slip Opinion No. 2014-Ohio-1984. In *Citimortgage*, the court held that "a judgment decree in foreclosure that includes as part of the recoverable damages amounts advanced by the mortgagee for inspections, appraisals, property protection, and maintenance but does not include specific itemization of those amounts in the judgment is a final, appealable order pursuant to R.C. 2505.02(B)(1)." *Id.* at ¶ 19. Therefore, and despite the trial court not assigning specific dollar amounts to its award of taxes, insurance, and other

costs, the court's order was final and appealable.

{¶ 44} Having found that Bank of America/Nationstar had standing, that summary judgment was proper, and that the trial court's order was final and appealable, the Jacksons' third and fourth assignments of error are overruled.

{¶ 45} Judgment affirmed.

RINGLAND, P.J., and S. POWELL, J., concur.

IN THE COURT OF APPEALS OF WARREN COUNTY, OHIO

COURT APPEALS
WARREN COUNTY
FILED

BANK OF AMERICA, NA

CASE NO. CA2014-01-018
REGULAR CALENDAR

Plaintiff-Appellee,

AUG - 7 2014

vs.

James L. Spaeth, Clerk
LEBANON, OHIO

ENTRY DENYING MOTIONS
TO RECONSIDER AND
CERTIFY CONFLICT

JEFFREY L. JACKSON, et al., :

Defendant-Appellant. :

The above cause is before the court pursuant to a motion to reconsider and a motion to certify conflicts, both filed by counsel for appellants, Jeffrey L. and Shelly R. Jackson ("the Jacksons"), on June 19, 2014. Also before the court is a notice of supplemental authority filed by counsel for appellants on July 7, 2014.

Jeffrey Jackson signed a promissory note in 2001 in favor of Bank of America for \$267,500 to refinance existing liens on property purchased during 1998. Both appellants granted a mortgage on the property to Bank of America to secure the note. However, Jeffrey Jackson stopped making payments on the note and Bank of America filed a foreclosure action in 2011.

Bank of America filed a motion for summary judgment supported by the affidavit of its officer, Katherine Weir. Weir averred that she was familiar with the records maintained in connection with the loan, and that she had personally reviewed the records. Weir stated that Jeffrey Jackson stopped making payments in March 2011, and that there was \$230,107.86 due and owing on the note. Attached to Weir's affidavit was an imaged copy of the note signed by Jeffrey Jackson, a copy of the mortgage signed by the Jacksons, a copy of the acceleration notice, and copies of payment records. Bank of America later filed a motion to substitute Nationstar as the proper plaintiff, as Nationstar held the note and mortgage after a 2012 assignment from Bank of America.

The trial court granted the motion to substitute, granted Bank of America's motion for summary judgment, overruled a motion for summary judgment filed by the Jacksons, overruled a motion to compel production of the original note filed by the Jacksons, overruled a motion to strike a portion of Weir's affidavit in which she averred that Bank of America possessed the note, and ordered a sheriff's sale of the property.

On appeal, the Jacksons argued that the trial court improperly denied the motions to strike Weir's affidavit and compel production of the original note, and erred by granting summary judgment to Bank of America/Nationstar. This court overruled the assignment of error and affirmed the judgment of the trial court.

Application for Reconsideration

When reviewing an application for reconsideration, an appellate court determines whether the application calls the attention of the court to an obvious error in its decision, or raises an issue for consideration which was either not considered at all or was not fully considered by the court when it should have been. *Grabill v. Worthington Industries, Inc.*, 91 Ohio App.3d 469 (10th Dist.1993).

In their application for reconsideration, the Jacksons argue that this court should reconsider its decision because (1) the affidavit supporting Bank of America's motion for summary judgment was based upon hearsay; (2) this court considered improper summary judgment materials; and (3) this court improperly construed the evidence in a light most favorable to Bank of America/Nationstar. However, none of these arguments call the attention of the court to an obvious error, or raise an issue that was not already considered or not fully considered by the court.

Regarding whether the affidavit was based on personal knowledge, the Jacksons are merely re-arguing the same facts they argued in the original appeal. Regarding materials considered when granting summary judgment, Jackson claims this court relied upon an unauthenticated version of the note. However, in the decision, there is a footnote indicating that an imaged copy of the note was attached to Weir's affidavit, and that the record also contained a regular copy of the note as filed by Bank of America on the same day it filed its motion for summary judgment. This court specifically analyzed whether the imaged copy of the note was permissible pursuant to Evid.R. 1003, and found that it was. Regarding the way this court construed the evidence, it did not do so in a light most favorable to Bank of America. Jackson never disputed that he stopped making payments on the note; he only raised issues regarding who held the note and mortgage at the time of foreclosure.

Based upon the foregoing, the application for reconsideration is DENIED.

Motion to Certify

The Jacksons claim that this court's decision is in conflict with five decisions from other courts. First, they claim that this court's decision is in conflict with decisions from the First and Ninth Districts which reversed grants of summary judgment in favor of banks where the affidavits supporting the motions for summary judgment lacked an averment of personal knowledge. These courts essentially found that because the affiants did not specifically state their express job duties, there was no way to establish that the affiants had personal knowledge regarding the averments made in their affidavits. *Deutsche Bank Natl. Trust Co. v. Reynolds*, 9th Dist. Summit No. 27192, 2014-Ohio-2372; *Bank of America v. Smith*, 1st Dist.

Hamilton No. C-130306, 2014-Ohio-2845; *Bank of America v. Loya*, 9th Dist. Summit No. 26973, 2014-Ohio-2750.

The Jacksons also claim that this court's decision is in conflict with a Ninth District case, *Bank of New York Mellon Trust Co. Natl. v. Mihalca*, 9th Dist. Summit No. 25747, 2012-Ohio-567, in which the court held that a court must have affirmative proof that an entity has the note before foreclosure can occur. Finally, the Jacksons claim this court's decision is in conflict with a third district case, *First Union National Bank v. Hufford*, 146 Ohio App.3d 673, 2001-Ohio-2271 (3rd Dist.), in which the court held that a court cannot draw inferences from summary judgment materials.

Ohio Courts of Appeal derive their authority to certify cases to the Ohio Supreme Court from Section 3(B)(4), Article IV of the Ohio Constitution, which states whenever the judges of a court of appeal find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by another court of appeal, the judges shall certify the record of the case to the supreme court for review and final determination. For a conflict to warrant certification, it is not enough that the reasoning expressed in the opinions of the two courts of appeal is inconsistent; the judgments of the two courts must be in conflict. *State v. Hankerson*, 52 Ohio App.3d 73 (1989).

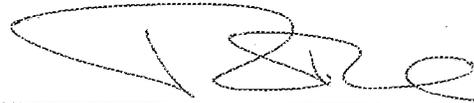
This court's judgment is not in conflict with any of the cases set forth in Jackson's motion to certify. With the respect to the first three cases, while Weir did not specifically state what her exact job duties entailed, her affidavit nonetheless indicates that she had personal knowledge of the attached documents, one of which was the imaged note. While this court did not require Weir to state her job

responsibilities, and our decision may therefore be inconsistent with the recently decided cases from the First and Ninth Districts, inconsistencies are not enough to establish a conflict, *Hankerson*.

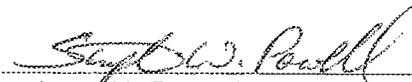
The *Mellon Trust Co.* case is distinguishable because in the present case there was an imaged copy of the note in question in the record. Finally, this court's decision is not in conflict with the *First Union National Bank* case which concerns the drawing of inferences from summary judgment materials. The Jacksons are using the *First Union* case to support their argument that summary judgment was inappropriate in the present case; however, this court's decision was not based upon the same question as the *First Union* case, and each case involves unique facts and circumstances. There is no conflict on a rule of law.

Accordingly, the motion for certification is DENIED.

IT IS SO ORDERED.



Robert P. Ringland, Presiding Judge



Stephen W. Powell, Judge



Robin N. Piper, Judge

COMMON PLEAS COURT
WARREN COUNTY, OHIO
FILED

2013 AUG 14 PM 2:45

JAMES L. SPALIN
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, COUNTY OF WARREN
GENERAL DIVISION

Bank of America, N.A.,
Plaintiff,

: Case No. 11 CV 80274

: Judge Peeler

v.

:

Jeffrey L. Jackson aka Jeffrey
Jackson, et al.,
Defendants.

: ORDER GRANTING
: PLAINTIFF'S MOTION FOR
: SUMMARY JUDGMENT AND
: DENYING DEFENDANTS' CROSS-
: MOTION FOR SUMMARY
: JUDGMENT

This matter came before the court on plaintiff's motion for summary judgment alleging there is no genuine issues as to any material fact and that plaintiff is entitled to a judgment and decree in foreclosure as a matter of law. Defendants Jeffrey Jackson and Shelly Jackson filed a memorandum contra and a cross-motion for summary judgment, arguing that plaintiff is not the holder of the note and attaching the affidavits of Jeffrey Jackson and Shelly Jackson. Plaintiff filed a reply in support of its motion for summary judgment and response to defendants' cross-motion for summary judgment, stating that plaintiff has met its burden and that plaintiff is the real party in interest as the holder of the

note and mortgage. Defendants Jeffrey Jackson and Shelly Jackson filed their reply once again arguing that plaintiff does not have standing.

On December 10, 2001, the mortgage was filed for record in Volume 2374, Page 658 and re-recorded on February 7, 2002, in Volume 2441, Page 307 of the Warren County Recorder's Office. On August 4, 2011, plaintiff filed a complaint in foreclosure against defendants Jeffrey Jackson and Shelly Jackson, alleging that defendants defaulted on payments due under the note and mortgage. Plaintiff alleged that defendants Jeffrey Jackson and Shelly Jackson have broken the conditions of defeasance contained in the mortgage, plaintiff has complied with all conditions precedent, and plaintiff is entitled to have said mortgage foreclosed and judgment in the amount of \$230,107.86 awarded to it.

Defendants Jeffrey Jackson and Shelly Jackson filed their answers denying that plaintiff is the holder of the note and stating that plaintiff's complaint failed to allege that plaintiff is a creditor of Jeffrey Jackson or Shelly Jackson with respect to the note. Defendants also deny that the copy of the mortgage attached to plaintiff's complaint is a true and correct copy of the mortgage. On February 10, 2012, plaintiff Bank of America, N.A. filed its motion for summary judgment, alleging there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment and decree in foreclosure as a matter of law.

Defendants Jeffrey Jackson and Shelly Jackson filed their contra motion and cross-motion for summary judgment, alleging that plaintiff Bank of America, N.A. has not proven that it was the holder of the note when this suit was filed and that plaintiff failed to prove it properly accelerated the note. Defendants Jeffrey Jackson and Shelly Jackson also request the court to allow defendants time to perform discovery. Plaintiff filed a reply in support of its motion for summary judgment and response to defendants' cross-motion for summary

judgment, arguing that it was the holder of the note at filing of the complaint and that it is entitled to summary judgment as a matter of law. Defendants Jeffrey Jackson and Shelly Jackson filed their reply once again alleging that plaintiff did not have standing to file the suit.

Summary judgment is proper under Civ.R. 56 only if “(1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion when viewing evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party.” *Doe v. Shaffer* (2000), 90 Ohio St.3d. 388, 390, 2000-Ohio-0186.

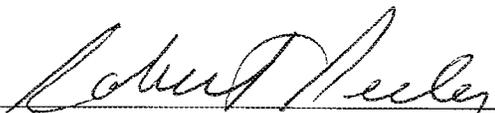
According to *Dresher v. Burt*, “the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.” (1996) 75 Ohio St.3d 280, 296, 1996-Ohio-0107. However, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E), which provides that an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, must set forth specific facts showing that there is a genuine issue for trial. If the nonmoving party does not demonstrate a genuine triable issue, summary judgment shall be entered against that party. *Mitchell v. Mid-Ohio emergency Services, L.L.C.*, 2004 Ohio App. LEXIS 4736 (10th App. Dist. 2004), citing *Jackson v. Alert fire & Safety Equip., Inc.*, 58 Ohio St. 48, 52 (1991).

Plaintiff Bank of America, N.A. has established, by virtue of Katherine Weir's affidavit that it is the holder of the note, the loan is in default under the terms of the note and mortgage, and the default has not been cured. Ms. Weir attached a true and accurate copy of

the original note to her affidavit. In their response, defendants Jeffrey Jackson and Shelly Jackson do not deny that the loan is in default under the terms of the note. They merely allege that Bank of America, N.A. was not the holder of the note at the filing of the suit. However, defendants Jeffrey Jackson and Shelly Jackson both state in their affidavits that they “do not have any evidence as to who actually owns their mortgage loan.”

Further, defendants Jeffrey Jackson and Shelly Jackson state in their response that they have applied for a loan modification with plaintiff. By applying for a loan modification with Bank of America, N.A., defendants Jeffrey Jackson and Shelly Jackson have shown that they did know that Bank of America, N.A. was the holder of the note at the filing of the suit. They have failed to set forth any specific facts that show there is a genuine issue for trial. According to *Mitchell*, if the nonmoving party fails to set forth facts that show there is a genuine issues for trial, summary judgment shall be entered against that party. *Id.* Accordingly, plaintiff Bank of America, N.A.’s motion for summary judgment is granted and defendants Jeffrey Jackson’s and Shelly Jackson’s cross-motion for summary judgment is denied.

It is so ordered.



JUDGE ROBERT W. PEELER

cc: Andrew M. Engel, L.P.A.
Nicholas Pantel, Esq.
Sherry Phillips, Esq.
Richard Mark Rothfuss, II, Esq.
Christopher Watkins, Esq.

COMMON PLEAS COURT
WARREN COUNTY OHIO
FILED

2013 AUG 12 AM 9:44

JAMES L. SPAETH
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, COUNTY OF WARREN
GENERAL DIVISION

Bank of America, N.A., : Case No. 11 CV 80274
Plaintiff, :
 : Judge Peeler
v. :
 :
Jeffrey L. Jackson aka Jeffrey :
Jackson, et al., : ORDER DENYING
Defendants. : DEFENDANTS' MOTION TO
 : STRIKE
 :
 :

This matter came before the court on defendants Jeffrey Jackson's and Shelly Jackson's motion to strike portions of the affidavit of Katherine Weir. Plaintiff Bank of America, N.A. filed a response in opposition to defendants' motion arguing that Ms. Weir's affidavit is not hearsay and is properly admissible. Defendants filed a reply memorandum arguing that Ms. Weir does not have personal knowledge as required by Civ.R. 56(E). Based on the following analysis, defendants Jeffrey Jackson' and Shelly Jackson's motion is overruled.

On February 10, 2012, plaintiff filed an affidavit supporting plaintiff's motion for summary judgment, which was executed by Katherine Weir. On March 25, 2013, defendants Jeffrey Jackson and Shelly Jackson filed their motion requesting that the court strike

paragraph four of Katherine Weir's affidavit, in which Ms. Weir testified that Bank of America, N.A. has possession of the note. Defendants argue that Ms. Weir does not have the personal knowledge to testify to the statement contained in paragraph four of Ms. Weir's affidavit.

Plaintiff Bank of America, N.A. filed its response, stating that, under Evid.R. 901(A), business records are an exception to Civ.R. 56(E)'s hearsay rule. Defendants Jeffrey Jackson and Shelly Jackson filed their reply arguing that Ms. Weir's assertion that Bank of America, N.A. has possession of the note without any explanation of how she obtained that knowledge makes her testimony inadmissible.

Affidavits filed in support of and in opposition to motions for summary judgment are to be made on personal knowledge, are to set forth such facts as would be admissible in evidence, and are to show affirmatively that the affiant is competent to testify to the matters stated therein. Ohio Civ.R. 56(E). A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Ohio Evid.R. 602.

In *John Soliday Fin. Group, LLC v. Pittenger*, the court discussed records of regular conducted activity, more commonly known as the business records exception to the hearsay rule under Evid.R. 803(6). 190 Ohio App.3d 145 at HN 6, 940 N.E.2d 1035 (5th Dist. 2010). The court stated, "The rationale behind Evid.R. 803(6) is that if information is sufficiently trustworthy that a business is willing to rely on it in making business decisions, the courts should be willing to as well." *Id.* The court further explained that in order to properly authenticate business records, "[f]irsthand knowledge of the transaction is not required by the witness providing the foundation; however it must be demonstrated that the witness is

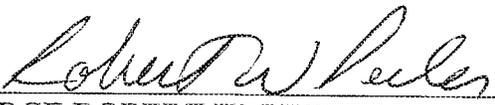
sufficiently familiar with the operation of the business and with the circumstances of the record's preparations, maintenance and retrieval, that he can reasonably testify on the basis of this knowledge that the record is what it purports to be." *Id.* At HN 9. "Personal knowledge" is defined as "knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said." *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 767 N.E.2d 707, 2010-Ohio-2220.

In Katherine Weir's affidavit, Ms. Weir states that she is authorized to sign the affidavit on behalf of plaintiff Bank of America, N.A. as an officer. Ms. Weir further explains that as part of her job responsibilities for Bank of America, N.A., she is familiar with the type of loan records maintained by Bank of America, N.A. The information Ms. Weir provides in her affidavit is from her review of the attached business records and from her personal knowledge of how said records are created and maintained.

While Ms. Weir does not have firsthand knowledge of the transaction in this matter, she is not required to have firsthand knowledge of the transaction in order for her to properly authenticate the records. *John Soliday Fin. Group, LLC v. Pittenger* at 145. Ms. Weir must merely demonstrate that she is familiar with the operations of the business and the transactions of records such as the records in question. By stating in her affidavit that she is authorized to sign the affidavit on behalf of Bank of America, N.A. as an officer and explaining that she is familiar with the type of loan records maintained by Bank of America, N.A. due to the nature of her job responsibilities, Ms. Weir has demonstrated that she is sufficiently familiar with the operations of the business, Bank of America, N.A., and the preparation, maintenance, and retrieval of the type of documents in question.

Katherine Weir stated that she made the affidavit from a review of the business records in question and from her personal knowledge of how said records are created and maintained. By reviewing the business records, Ms. Weir has had firsthand observation of the records. Her firsthand observations of the records have established her personal knowledge of the business records. Therefore, defendants' motion is overruled.

It is so ordered.



JUDGE ROBERT W. PEELER

cc: Andrew M. Engel, L.P.A.
Nicholas Pantel, Esq.
Sherry Phillips, Esq
Richard Mark Rothfuss, II, Esq.
Christopher Watkins, Esq.

COMMON PLEAS COURT
WARREN COUNTY OHIO
FILED

2013 AUG 12 AM 9:45

JAMES L. SPAETH
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, COUNTY OF WARREN
GENERAL DIVISION

Bank of America, N.A., : Case No. 11 CV 80274
Plaintiff, :
v. : Judge Peeler
Jeffrey L. Jackson aka Jeffrey :
Jackson, et al., : ORDER DENYING
Defendants. : DEFENDANTS' MOTION TO
: PRODUCE NOTE

This matter came before the court on defendants Jeffrey Jackson's and Shelly Jackson's motion to produce the original note for inspection by the court, the defendants, and the defendants' counsel. Plaintiff Bank of America, N.A. filed a response in opposition to defendants' motion, arguing that a copy of the note and mortgage is proper for summary judgment and plaintiff does not need to demonstrate ownership of the note pursuant to Evid.R. 1003. Defendants filed a reply memorandum in support of their motion, arguing that under R.C. 1303.31, when a plaintiff is seeking enforcement of a negotiable instrument, such as a note, possession of the note is a requirement. Based on the following analysis, defendants Jeffrey Jackson's and Shelly Jackson's motion is denied.

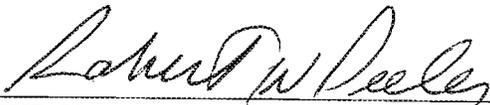
According to Evid.R. 1003, “[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.” In *Marder v. Marder*, the court stated:

“A duplicate is the equivalent of an original, and hence, is the best evidence. Evid.R. 1003. A party opposing the introduction of the duplicate as the best evidence has the burden of proving that there is a genuine question as to the authenticity of the original or that it would be unfair to admit the duplicate. The objection must be something more than a frivolous objection. The decision to admit a duplicate is left to the trial court’s sound discretion, and unless it is apparent from the record that the trial court’s decision is arbitrary or unreasonable, the determination will not be disturbed on appeal.”

12th Dist. No. CA2007-06-069, 2008-Ohio-2500, ¶50.

In the instant case, defendants have failed to raise a genuine question as to the authenticity of the original note or demonstrate the existence of any unfair circumstance. Therefore, defendants’ motion to produce the note for inspection is overruled.

It is so ordered.



JUDGE ROBERT W. PEELER

cc: Andrew M. Engel, L.P.A.
Nicholas Pantel, Esq.
Sherry Phillips, Esq.
Richard Mark Rothfuss, II, Esq.
Christopher Watkins, Esq.