

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
TRUMBULL COUNTY, OHIO**

U.S. BANK NATIONAL ASSOCIATION, : **OPINION**  
AS TRUSTEE FOR THE REGISTERED  
HOLDERS OF AEGIS ASSET BACKED  
SECURITIES TRUST, MORTGAGE PASS-  
THROUGH CERTIFICATES, SERIES  
2004-2,

Plaintiff-Appellee, : **CASE NO. 2011-T-0002**

- vs - :

GEORGE N. KAFANTARIS, et al., :

Defendants-Appellants. :

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2009 CV 02261.

Judgment: Affirmed.

*Benjamin D. Carnahan*, Shapiro, Van Ess, Phillips & Barragate, L.L.P., 1100 Superior Avenue, Suite 950, Cleveland, OH 44114 and *Phillip Barragate*, Shapiro, Van Ess, Phillips & Barragate, L.L.P., 4805 Montgomery Road., Suite 320, Norwood, OH 45212 (For Plaintiff-Appellee).

*Irene K. Makridis*, 183 West Market Street, Suite 201, Warren, OH 44481 (For Defendants-Appellants).

MARY JANE TRAPP, J.

{¶1} Appellants, George and Maria Kafantaris, appeal from the judgment of the Trumbull County Court of Common Pleas granting appellee, U.S. Bank National Association, as Trustee for the Registered Holders of Aegis Backed Securities Trust,

Mortgage Pass-Through Certificates, Series 2004-2 (“U.S. Bank”), summary judgment and ordering the foreclosure and sheriff sale of the Kafantarises’ home. At the core of their appeal is the assertion that U.S. Bank was not the real party in interest, and therefore did not have standing to bring the foreclosure action. We find that U.S. Bank was, in fact, the real party in interest at the time the complaint was filed and thus had standing. The trial court did not err in granting summary judgment in U.S. Bank’s favor and for the following reasons we affirm the trial court’s judgment.

**{¶2} Substantive Facts and Procedural History**

{¶3} On February 24, 2004, George and Maria Kafantaris executed a mortgage to Mortgage Electronic Registration Systems, Inc. (“MERS”), acting solely as nominee for Aegis Lending Corporation. The mortgage was recorded on March 1, 2004. This mortgage secured a promissory note executed the same day by Mr. Kafantaris to Aegis Lending Corporation. At some time between February 24, 2004 and April 30, 2004, Aegis Lending Corporation transferred the note, via special endorsement, to Aegis Mortgage Corporation. Subsequently, but during the same time period, Aegis Mortgage Corporation transferred the note, via blank endorsement, to U.S. Bank. The endorsements were not dated, but the time frame for the endorsements was provided via the deposition testimony of the loan processor.

{¶4} The Kafantarises defaulted on the loan in March of 2007.

{¶5} On August 2, 2007, MERS, acting solely as nominee for Aegis Lending Corporation, assigned the mortgage to U.S. Bank National Association, Successor in Interest to Wachovia Bank, N.A., as Trustee for the Registered Holders of Aegis Asset

Backed Securities Trust, Mortgage Pass-Through Certifications, Series 2004-2 (“U.S. Bank as Successor to Wachovia”).

{¶6} On January 30, 2009, U.S. Bank as Successor to Wachovia assigned the mortgage to U.S. Bank. Although the assignment document recites in the first paragraph that it was entered into on “May 1, 2004,” the remainder of the document, including the notary attestation, uses the January 30, 2009 date. On August 24, 2009, U.S. Bank brought a complaint for foreclosure in the Trumbull County Court of Common Pleas.

{¶7} The following summary chart may be helpful to the reader:

#### **KAFANTARIS MORTGAGE LOAN TIMELINE**

Feb. 24, 2004	Note to Aegis Lending Corp. executed by George Kafantaris  Mortgage to MERS as nominee of Aegis Lending executed by George and Maria Kafantaris and recorded March 1, 2004
Between Feb. 24, 2004 and April 30, 2004	Aegis Lending endorses note to Aegis Mortgage (documented via Exs. G and H to Plaintiff’s Reply Brief in Support of Summary Judgment)  Time period for the endorsement provided in the deposition transcript of the loan processor filed in the trial court
Between Feb. 24, 2004 and April 30, 2004	Aegis Mortgage endorses note in blank (documented via Exs. G and H to Plaintiff’s Reply Brief in Support of Summary Judgment)  Time period for the endorsement provided in the deposition transcript of the loan processor filed in the trial court
Mar. 1, 2007	Kafantarises default
Aug. 2, 2007	Mortgage assigned by MERS to U.S. Bank, Successor in Interest to Wachovia; note transferred along with it (documented via Ex. C to Plaintiff’s Motion for Summary Judgment)

January 30, 2009	<p>Mortgage assigned by U.S. Bank as Successor in Interest to Wachovia to U.S. Bank Assoc. as trustee for the holders of the Aegis back securities trust (documented via Ex. D to Plaintiff's Motion for Summary Judgment)</p> <p>Assignment was signed and notarized on January 30, 2009 and recorded March 3, 2009, but first paragraph refers to May 1, 2004 as the date on which the assignment was made</p>
Aug. 24, 2009	Complaint is filed

{¶8} The Kafantarises filed a motion to dismiss the complaint on the ground that the plaintiff was not the real party in interest. The attachments to the plaintiff's complaint demonstrated only that a note was given to Aegis Lending Corp., and a mortgage was given to MERS as the nominee of Aegis Lending Corp. In response, U.S. Bank filed a copy of the August 2, 2007 and January 30, 2009 assignments in order to establish which entity held the mortgage as of the date of the filing of the foreclosure complaint. U.S. Bank also filed a copy of the promissory note with the two endorsements shown on the last page of the document.

{¶9} With these documents before it, the trial court denied the motion to dismiss. The Kafantarises filed their answer, U.S. Bank filed a motion for summary judgment, and the Kafantarises were granted an extension of time to respond to the motion for summary judgment, pursuant to Civ.R. 56(F), in order to permit them to conduct discovery. One deposition of a loan servicing company employee was conducted. The record before us reveals no additional discovery was undertaken by either side.

{¶10} The Kafantarises submitted the following evidentiary materials in opposition to the motion for summary judgment: an unauthenticated order from the

state of Florida, Department of Banking and Finance relative to Denise A. Maltby aka Denise A. Flippen<sup>1</sup>; a certified copy of a motion for summary judgment filed in an earlier foreclosure action regarding the subject real property brought by Wachovia Bank; and decisions from a Franklin County Common Pleas Court and the U.S. Bankruptcy Court for the Northern District of Ohio. U.S. Bank's motion for summary judgment was granted, and the Kafantarises timely appealed the trial court's decision, bringing the following assignments of error:

{¶11} “[1.] The lower court erred to the prejudice of the appellants by overruling their motion to dismiss appellee bank's foreclosure action for lack of standing to sue.

{¶12} “[2.] The lower court erred to the prejudice of the appellants by granting appellee's motion for summary judgment in a foreclosure action when the loan documents are of questionable origin, and raise questions of fact on appellee bank's interest in the property.”

**{¶13} Motion to Dismiss**

{¶14} In their first assignment of error, the Kafantarises assert that the trial court erred in not dismissing the foreclosure action because U.S. Bank lacked standing to bring the action.

{¶15} “An appellate court's standard of review for a trial court's actions regarding a motion to dismiss is de novo.” *Bliss v. Chandler*, 11th Dist. No. 2006-G-2742, 2007-Ohio-6161, ¶91, citing *State ex rel. Malloy v. City of Girard*, 11th Dist. No. 2006-T-0019, 2007-Ohio-338, ¶8, citing *Clark v. Alberini* (Dec. 14, 2001), 11th Dist. No. 2001-T-0015, 2001 Ohio App. LEXIS 5665, \*4. The “[d]ismissal of a complaint for failure to state a

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<sup>1</sup> A Denise Flippen signed the two endorsements on the Kafantaris note.

claim upon which relief can be granted is appropriate if, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in [nonmoving party's] favor, it appears beyond doubt that [nonmoving party] can prove no set of facts warranting relief.” Id. at ¶92, quoting *Malloy* at ¶9, citing *Clark v. Connor* (1998), 82 Ohio St.3d 309, 311.

{¶16} In their motion to dismiss the complaint, the Kafantarises alleged that U.S. Bank failed to attach documents to the complaint necessary to establish it as the real party in interest, as required by Civ.R. 10(D). They further asserted they were entitled to relief in the form of dismissal of the complaint as a result of U.S. Bank's failure to comply with Civ.R. 10(D).

{¶17} “The proper procedure for attacking the failure of a plaintiff to attach a copy of a written instrument or to state a valid reason for his failure to attach same is to serve a motion for a definite statement pursuant to Civ.R. 12(E). \*\*\* In the event a party fails to obey the order of the court, the court may strike the pleading to which the motion was directed, or make any other orders as it deems just, which would include involuntary dismissal with prejudice pursuant to Civ.R. 41(B)(1).” *Int'l Language Bank, Inc. v. Law Office of Zukerman, Daiker & Lear*, 11th Dist. Nos. 2007-A-0086 & 2007-A-0087, 2008-Ohio-5940, ¶13, quoting *Point Rental Co. v. Posani* (1976), 52 Ohio App.2d 183, 186.

{¶18} We note that U.S. Bank did not attach to its complaint proof of the mortgage assignation and endorsement of the note; however, the Kafantarises failed “to follow the established practice of challenging this deficiency by filing a motion for a more definite statement” pursuant to Civ.R. 12(E). *Erie Ins. Co., v. DelManzo*, 11th Dist. No.

2009-L-095, 2010-Ohio-1274, fn. 2. Furthermore, upon learning of the defective or incomplete attachments to its complaint, U.S. Bank took immediate action to cure the complaint by filing both an Assignment of Mortgage and Note with Allonge, Demonstrating the Entire Chain of Title, and a Note with Endorsement.

{¶19} Because Civ.R. 10(D) is not an effective means of dismissing a complaint, unless a motion for a more definite statement is first filed pursuant to Civ.R. 12(E), and because U.S. Bank promptly cured the defective or incomplete attachments, dismissal was not appropriate under these circumstances. We find that assignment of error one is without merit.

**{¶20} Motion for Summary Judgment**

{¶21} In their second assignment of error, the Kafantarises assert that the trial court erred in granting summary judgment in favor of U.S. Bank. The Kafantarises argue questions of fact remain as to whether U.S. Bank is the real party in interest and is entitled to the relief sought.

**{¶22} Standard of Review**

{¶23} We review de novo a trial court's order granting summary judgment. *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13, citing *Cole v. Am. Industries and Resources Corp.* (1998), 128 Ohio App.3d 546. "A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law." *Id.*, citing *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829.

{¶24} “Since summary judgment denies the party his or her ‘day in court’ it is not to be viewed lightly as docket control or as a ‘little trial’. The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [(1996), 75 Ohio St.3d 280], the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate, shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112.” *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶40.

**{¶25} No Genuine Issues of Material Fact Were Established by Evidentiary Quality Materials**

{¶26} In their brief in opposition to U.S. Bank's motion for summary judgment, the Kafantarises claimed only one issue of fact: whether U.S. Bank properly held the



note and mortgage. They argued that U.S. Bank was not, in fact, the real party in interest, because, at the time the complaint was filed, U.S. Bank did not attach documentation of its status as the holder of the note and mortgage, and, therefore, was not entitled to relief on the complaint for foreclosure. A careful review of the documentary evidence presented to the trial court reveals otherwise.

{¶27} Before the trial court were the following evidentiary quality documents: 1) a copy of the note executed by Mr. Kafantaris to Aegis Lending, specially endorsed to Aegis Mortgage and subsequently endorsed in blank; 2) the deposition transcript of Gina Johnson, Senior Loan Analyst at Ocwen Loan Servicing, LLC, in which Ms. Johnson testifies that the two endorsements on the note were executed sometime between February 24, 2004 (when the documents were initially executed) and April 30, 2004 (when the documents became effective and Ocwen took control of the mortgage and servicing of the loan); 3) a copy of the original mortgage executed by the Kafantarises to MERS, solely as nominee of Aegis Lending; 4) an assignment of the mortgage by MERS, solely as nominee of Aegis Lending, to U.S. Bank as Successor to Wachovia dated August 2, 2007; and 5) an assignment of the mortgage by U.S. Bank as Successor to Wachovia to U.S. Bank, dated January 30, 2009.

{¶28} From the documents before the trial court, which were not challenged by contrary evidentiary quality materials, it appears that U.S. Bank was the real party in interest before the complaint for foreclosure was filed on August 24, 2009.

{¶29} The Kafantarises cited a number of cases in support of their position that U.S. Bank was not the real party interest and thus lacked standing to bring the foreclosure action. See *In re Wells* (N.D. Ohio 2008), Case No. 08-17639,

Memorandum Opinion; *In re Foreclosure Cases* (N.D. Ohio 2007), Case Nos. 1:07CV2282, et al., 2007 U.S. Dist. LEXIS 84011; *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603; *Wells Fargo v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092; *HSBC Bank USA, N.A. v. Thompson*, 2d Dist. No. 23761, 2010-Ohio-4158. All of these cases, however, are distinguishable from the instant case, because they presented situations where the bank did not hold the note and mortgage at the time of filing the complaint. The defect existing at the time of filing in the above cases could not have been cured, and thus the complaints were properly dismissed. Unlike those cases, U.S. Bank, in this case, merely failed to attach the complete documents evidencing its status as the holder of the note and mortgage at the time the complaint was filed. It was, however, the real party in interest at the time of the filing of the complaint, as demonstrated by the subsequent filing of supporting documents. The cases relied upon by the Kafantarises presented an incurable standing defect, while the case sub judice presented a curable defect, which was promptly and effectively cured.

{¶30} U.S. Bank presented un rebutted evidence of a clear chain of title for both the mortgage and the note, and thus no material questions of fact remained – the Kafantarises raised no issues related to a default in payment or any improprieties surrounding the initial loan transaction or defects in the original paper. As we noted when we denied the Kafantaris’ motion for leave to file an appendix book containing unauthenticated pleadings and discovery documents from other, unrelated foreclosure or foreclosure-related cases, together with newspaper and internet articles relative to foreclosure cases generally, this court is confined to reviewing the trial court record, and the summary judgment rule confines the trial court to consideration of evidentiary quality

material. That requirement cannot be met by those defending a motion for summary judgment by merely quoting in their brief discovery responses from another case, in another state, even if those discovery responses may involve some of the same cast of characters. See Civ.R. 56(C). Therefore, the trial court's grant of summary judgment to U.S. Bank was clearly supported by the unrebutted evidence before it. Assignment of error two is without merit.

{¶31} For the foregoing reasons, the Kafantarises' appeal is without merit and the judgment of the Trumbull County Court of Common Pleas is affirmed.

THOMAS P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.