

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

U.S. Bank, N.A.

Court of Appeals No. E-11-059

Appellant

Trial Court No. 2010CV0299

v.

Johnnie A. Turner, et al.

DECISION AND JUDGMENT

Appellee

Decided: July 27, 2012

* * * * *

Peter J. Vance, Kimberlee S. Rohr, and Jesse M. Kanitz, for appellant.

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

* * * * *

YARBROUGH, J.

Summary

{¶ 1} Appellant, U.S. Bank, N.A. (“U.S. Bank”), appeals from a judgment of the Erie County Court of Common Pleas in which the trial court dismissed its complaint in foreclosure. For the reasons that follow, we reverse.

Facts and Procedural Background

{¶ 2} On April 14, 2010, U.S. Bank filed a complaint in foreclosure against appellee, Johnnie Turner, along with various other defendants with an interest in a property located in Sandusky, Ohio. The complaint alleged that U.S. Bank is the holder of a note, appellee defaulted on the note and the mortgage securing the note, and that appellee owes to U.S. Bank \$68,660.23, together with interest at the rate of 5.25 percent per year from May 1, 2009. U.S. Bank further alleged that all conditions precedent have been satisfied and attached a copy of the mortgage to the complaint. U.S. Bank prayed that the court find appellee in default on the note, recognize the mortgage as a first lien on the property, foreclose on the mortgage, and order the property sold. The attached mortgage, signed by appellee on June 20, 2004, was made in favor of Cummings Mortgage Service, Inc. A mortgage assignment, recorded on June 30, 2004, and attached to the complaint, as “Exhibit B,” shows that Cummings Mortgage Service, Inc., assigned the mortgage to Mortgage Electronic Registration Systems, Inc. (“MERS”), as nominee for U.S. Bank. A second mortgage assignment, attached to the complaint as “Exhibit C,” was not recorded, but purports to indicate a mortgage assignment from MERS as nominee for U.S. Bank to U.S. Bank, N.A. The copy of this assignment indicates that it was notarized on March 24, 2010.

{¶ 3} On June 18, 2010, appellee filed an answer and counterclaim. In his answer, appellee stated the following affirmative defense, “10. Plaintiff filed this action with full knowledge that it is not the real owner and holder of Defendant’s mortgage loan

obligation. Plaintiff's said conduct then constitutes 'frivolous conduct,' subjecting it to appropriate sanctions, including costs and attorney's fees."

{¶ 4} In his counterclaim, appellee set forth a claim for malicious prosecution and additionally alleged that U.S. Bank violated the Fair Debt Collections Practices Act and committed "civil conspiracy" against appellee. As a result of these alleged violations, appellee sought a declaratory judgment, injunctive relief, punitive damages, compensatory damages, interest, costs, and attorney fees.

{¶ 5} On June 21, 2010, U.S. Bank filed a "notice of filing note with endorsement." Attached to this filing was a copy of the note executed in favor of Cummings Mortgage Service, Inc. and signed by appellee. The note also contained the following endorsement: "Pay to the order of US Bank NA Without recourse on this 30th day of June, 2004 Authorized by Cummings Mortgage Service Inc., Dan Cummings, Cummings Mortgage Service Inc., Dan Cummings President."

{¶ 6} U.S. Bank replied to appellee's counterclaim on August 16, 2010. Eventually, on March 25, 2011, appellee filed a motion to dismiss pursuant to Civ.R. 12(B)(6) in which he argued that U.S. Bank must "allege and prove not only that it is the 'holder' of the promissory note, but also the 'owner' thereof." In support of this proposition, appellee cited to an unreported Florida trial court decision, *BAC Home Loan Servicing v. Stentz*, Fla. 6th Cir. Civ. Div. J4 No. 51-2009-CA-7656-ES (Dec. 1, 2010). U.S. Bank opposed this motion. Nevertheless, the trial court, in a three-line decision journalized on May 17, 2011, dismissed U.S. Bank's claim without prejudice, stating:

“Upon Defendant’s Motion to Dismiss, and for good cause shown; It is hereby ORDERED, ADJUDGED, and DECREED that Defendant’s Motion is GRANTED and that the above referenced matter is DISMISSED without prejudice.”

{¶ 7} On July 6, 2011, appellee filed a motion to dismiss his counterclaim without prejudice and the trial court dismissed appellee’s counterclaim without prejudice in a decision journalized on July 8, 2011.

{¶ 8} This appeal followed.

Assignment of Error

{¶ 9} U.S. Bank asserts the following assignment of error:

The trial court erred by granting Turner’s Motion to Dismiss based on U.S. Bank’s failure to allege in its Complaint that it is the “owner” of the subject note.

Analysis

{¶ 10} When reviewing a trial court’s grant of a Civ.R. 12(B)(6) motion to dismiss, our review is de novo. *Perrysburg Twp. v. City of Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. “A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint.” *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). In our review, we must accept the factual allegations in the complaint as true and make all reasonable inferences in favor of the non-moving party. *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717, 816 N.E.2d 1061,

¶ 11. The motion to dismiss should be granted when it is beyond doubt from the complaint that the plaintiff cannot prove a set of facts entitling him to recover. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11, citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.

{¶ 11} In his motion to dismiss, appellee argued that U.S. Bank failed to establish itself as the real party in interest entitled to enforce the note and foreclose on the mortgage. Specifically, appellee argued that U.S. Bank failed to attach a copy of the note to its complaint. Therefore, appellee concludes that U.S. Bank lacked standing to sue because it was not the holder and “owner” of the note, and accordingly not a real party in interest.

{¶ 12} The facts set forth in this case are almost identical to the facts set forth in the case of *U.S. Bank, N.A. v. Coffey*, 6th Dist. No. E-11-026, 2012-Ohio-721, with the exception that a mortgage assignment was not attached to U.S. Bank’s complaint filed in *Coffey*. *Coffey* at ¶ 3. In *Coffey*, relying on R.C. 1303.31(B), we determined that *ownership* of a note is not a requirement for its enforcement. Thus, in foreclosure actions, the real party in interest is the person entitled to enforce the note and mortgage. *Coffey* at ¶ 13, citing *Wachovia Bank of Delaware v. Jackson*, 5th Dist. No. 2010-CA-00291, 2011-Ohio-1976, ¶ 17. Therefore, we concluded that by pleading inter alia that it was the *holder* of a note secured by a mortgage, U.S. Bank satisfied the pleading requirements of Civ.R. 8(A) for its foreclosure claim. *Coffey* at ¶ 21. Accordingly, we

determined that the trial court erred in granting Coffey's Civ.R.12(B)(6) motion for "failure to state a claim." *Id.*

{¶ 13} In the present case, U.S. Bank alleged in its complaint that (1) it is the holder of a note, a copy of which was unavailable at the time the complaint was filed,¹ (2) appellee defaulted under the terms of the note and currently owes \$68,660.23, together with interest at the rate of 5.25 percent, (3) the note is secured by the mortgage attached to the complaint, and (4) U.S. Bank is entitled to have the mortgage foreclosed. Therefore, the allegations in the complaint, if true, are sufficient to show that U.S. Bank is entitled to relief. Accordingly, we find that the trial court erred by dismissing U.S. Bank's claim pursuant to Civ.R. 12(B)(6).

{¶ 14} Accordingly, U.S. Bank's assignment of error is well-taken.

Conclusion

{¶ 15} The judgment of the Erie County Court of Common Pleas dismissing U.S. Bank's claim is reversed and the case is remanded for further proceedings. Appellee is ordered to pay the costs of this appeal pursuant to Civ.R. 24.

Judgment reversed.

¹ Civ.R. 10(D)(1) states, "If the account or written instrument is not attached, the reason for the omission must be stated in the pleading."

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.