

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

Nationstar Mortgage, LLC

Court of Appeals No. L-12-1002

Appellee

Trial Court No. CI0201005958

v.

Robert J. Van Cott, et al.

**DECISION AND JUDGMENT**

Appellants

Decided: December 7, 2012

\* \* \* \* \*

Matthew J. Richardson and Holly N. Wolf, for appellee.

Steven M. Burke, for appellants.

\* \* \* \* \*

**PIETRYKOWSKI, J.**

{¶ 1} Appellants, Robert J. VanCott and Julie G. VanCott, appeal the December 5, 2011 judgment of the Lucas County Court of Common Pleas in a foreclosure action brought against them by Nationstar Mortgage, LLC (“Nationstar”), appellee. In the judgment, the trial court granted Nationstar’s motion for summary judgment and overruled appellants’ motion to dismiss.

{¶ 2} The dispute relates to a promissory note and mortgage executed by appellants on December 4, 2006, in favor Gold Star Mortgage Corp. to secure a loan to purchase real property located at 7715 Pope Run Lane in Sylvania, Ohio. Although not a party to the contract, Nationstar filed a foreclosure complaint against appellants on August 23, 2010, alleging that payments due under the terms of the note and mortgage had not been made. Nationstar alleged in the complaint that it was “entitled to enforce the Note pursuant to Section 1303.31 of the Ohio Revised Code, and the Mortgage was given to secure the Note.”

{¶ 3} Nationstar did not attach a copy of either the note or mortgage to its complaint and alleged that the note had been misplaced and could not be located. In their answer, appellants alleged as a defense that Nationstar did not own the note and mortgage.

{¶ 4} On June 24, 2011, Nationstar filed a motion for summary judgment claiming that appellants defaulted on their obligations under the note and mortgage. Appellants opposed the motion asserting that Nationstar lacked standing to bring the foreclosure action. On October 7, 2011, appellants also filed a motion to dismiss the action based upon the claimed lack of standing.

{¶ 5} Appellants appeal the trial court’s judgment granting Nationstar’s motion for summary judgment and overruling appellants’ motion to dismiss.

{¶ 6} Appellants assert two assignments of error on appeal:

1. The trial court erred in applying the doctrine of equitable assignment, because Nationstar did not hold the note prior to filing its complaint.

2. The trial court erred in granting Nationstar's Motion for Summary Judgment because Nationstar was not the real party in interest at the time of judgment, due to a defect in the chain of title.

{¶ 7} The trial court based its decision to grant summary judgment and to overrule the motion to dismiss on two alternative grounds. First, the court held that Nationstar established that it was the owner of the note at the time it filed the complaint and that Nationstar was equitably assigned rights to the mortgage upon its acquisition of the note. Alternatively, citing a line of authority including *Federal Home Loan Mtge. Corp. v. Schwartzwald*, 194 Ohio App.3d 644, 2011-Ohio-2681, 957 N.E.2d 790 (2d Dist.), the court held that for purposes of standing, ownership of the note and mortgage at the time of judgment was sufficient, even if Nationstar lacked an interest in the note and mortgage at the time of filing of the complaint.

{¶ 8} Under their assignments of error, appellants challenge both grounds of the trial court's judgment. Under Assignment of Error No. 1, appellants argue that the trial court erred when it held it was sufficient for purposes of standing if Nationstar became owner of the note and mortgage after the filing of the complaint and before judgment.

{¶ 9} The Ohio Supreme Court resolved this issue in its recent decision on appeal in the *Schwartzwald* case. *Federal Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017. The decision was issued after the parties submitted their briefs in this appeal. The court held in the case that a party bringing an action in foreclosure must establish an interest in the note or mortgage at the time it filed suit for it to have standing to invoke the jurisdiction of the common pleas court in the case. *Id.* at ¶ 28. The court held that lack of standing at the commencement of a foreclosure action cannot be cured by subsequently obtaining an interest in the subject of the litigation. *Id.* at ¶ 39. Under the decision, “lack of standing at the commencement of a foreclosure action requires dismissal of the complaint \* \* \* without prejudice.” *Id.* at ¶ 40.

{¶ 10} We conclude that the trial court erred in granting summary judgment to Nationstar on the grounds that ownership of the note and mortgage at the time of judgment was sufficient to establish standing to bring the foreclosure action.

Accordingly, we find appellants’ Assignment of Error No. 1 well-taken.

{¶ 11} Under Assignment of Error No. 2, appellants argue that the trial court erred in granting summary judgment based upon the finding that the evidence established that Nationstar owned the note at the time it filed the foreclosure complaint and was equitably assigned rights to the mortgage upon acquiring its interest in the note.

### **Summary Judgment**

{¶ 12} The standard of review on motions for summary judgment is de novo; that is, an appellate court applies the same standard in determining whether summary

judgment should be granted as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under Civ.R. 56, to prevail on a motion for summary judgment the moving party must demonstrate:

(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 13} Summary judgment procedure is limited to circumstances where there is no dispute of material fact for trial:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 14} At the time Nationstar filed its motion for summary judgment, it filed the affidavit of Josh Burchfield in support. Exhibits A and B to the affidavit are copies of the

note and mortgage. Burchfield states in the affidavit that Nationstar “is entitled to collect the amount due on the Note and enforce the Mortgage.”

{¶ 15} Appellants argue that the Burchfield affidavit is devoid of facts supporting any claim that Nationstar owned or was the holder of the note, pursuant R.C. 1303.31(A), at the time the complaint was filed. The documents submitted with the affidavit, the note and mortgage, show no evidence of an assignment to Nationstar. A review of the documents themselves shows that the note and mortgage were originally executed in favor of Gold Star Mortgage and endorsed over by the president of Gold Star to Flagstar Bank, FSB in 2006.

{¶ 16} On September 26, 2011, Nationstar supplemented its motion with the filing of the affidavit of Camille Stamp. Stamp states in the affidavit that Nationstar “acquired the Note and all rights to enforce the Note from Flagstar Bank by purchasing the Note from Flagstar Bank, who acquired the Note and all rights to enforce it from Gold Star Mortgage Corp.” Stamp also states that Nationstar “was entitled to enforce the original Note when it filed the Complaint on August 23, 2010.”

{¶ 17} The Stamp affidavit does not state the date of purchase of the note or that the purchase occurred prior to the filing of the complaint. Stamp asserts that Nationstar was entitled to enforce the note at the time it filed the complaint but does not state facts to support the conclusion.

{¶ 18} Also, the documents submitted in support of the motion for summary judgment do not show an assignment of Flagstar’s interest in the note to anyone. The

record includes a record of assignment filed with the Lucas County Recorder evidencing an assignment of the mortgage from Gold Star to Nationstar that was executed on September 3, 2010. The assignment was recorded on September 13, 2010. The complaint was filed on August 23, 2010.

{¶ 19} In our view the conclusory statement in affidavits that Nationstar was entitled to enforce the note at the time the complaint was filed, without more, failed to meet Nationstar's burden on motion for summary judgment to establish the absence of a genuine issue of material fact on whether it owned or was otherwise entitled to enforce the note at the time of filing of the complaint. *See Aurora Loan Services, LLC. v. Louis*, 6th Dist. No. L-10-1289, 2012-Ohio-384, ¶ 33; *DLJ Mtge. Capital, Inc. v. Parsons*, 7th Dist. No. 07-MA-17, 2008-Ohio-1177, ¶ 17; R.C. 1303.31. On these facts it cannot be stated that it is undisputed that Nationstar owned the note or was otherwise entitled to enforce the instrument at the time it filed the foreclosure complaint. We find merit to appellants' contention that the trial court erred by granting Nationstar's motion for summary judgment.

{¶ 20} Appellants also argue that the trial court erred in overruling appellants' motion to dismiss because Nationstar was not a party in interest and therefore lacked standing to file suit. The trial court treated the motion as a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted and applied the analysis set forth by the Ohio Supreme Court in *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 532 N.E.2d 753 (1988) in considering the motion. The standard provides:

In construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. 2A Moore, Federal Practice (1985) 12-63, Paragraph 12.07[2.5]; accord *State, ex rel. Alford v. Willoughby Civil Serv. Comm.* (1979), 58 Ohio St.2d 221, 223, 12 O.O.3d 229, 230, 390 N.E.2d 782, 785. Then, before we may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts warranting a recovery. *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242, 71 O.O.2d 223, 327 N.E.2d 753, syllabus. *Mitchell* at 192.

{¶ 21} We find no error in the trial court's overruling the motion to dismiss.

Treating the allegations of the complaint as true, Nationstar may be able to prove facts establishing an interest in the note or mortgage existing at the time of filing of the foreclosure complaint.

{¶ 22} We find appellants' Assignment of Error No. 2 well-taken with respect to the trial court's judgment awarding summary judgment in favor of Nationstar and not well-taken with respect to the court's overruling appellants' motion to dismiss the foreclosure complaint.

{¶ 23} Because of the existence of a genuine issue of material fact on whether Nationstar had standing to bring the foreclosure action at the time it filed its complaint, we reverse the judgment of the Lucas County Court of Common Pleas to the extent it

granted summary judgment in favor of Nationstar Mortgage, LLC, and remand this case to that court for further proceedings. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

Judgment reversed.

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

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, P.J.  
CONCUR.

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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:  
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