Reverse Mtge., L.L.C. v. Miller

2024-Ohio-2417 (2024) | Cited 0 times | Ohio Court of Appeals | June 25, 2024

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

Reverse Mortgage Funding, LLC Court of Appeals No. E-23-044

Appellee Trial Court No. 2021-CV-0352

v.

Donald W. Miller, et al. DECISION AND JUDGMENT

Appellant Decided: June 25, 2024

* * * * * Ashley E. Mueller, for Appellee

Daniel L. McGookey, for Appellant.

* * * * * OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas which granted the complaint in foreclosure with reformation, declaratory judgment, and other equitable relief (in rem only) by plaintiff-appellee, Reverse Mortgage Funding, LLC, against defendant-appellant, Donald W. Miller, and codefendants, Rokya Miller, the United States of America, and the Erie County Treasurer. For the reasons set forth below, this court affirms the judgment of the trial court. I. Background

{¶ 2} The following facts are relevant to this appeal. On September 12, 2013, appellant obtained a $742,500 home equity conversion loan, also known as a reverse mortgage loan, from FirstBank and signed an adjustable-rate promissory note promising

to repay the loan (hereafter, the . At the bottom of the last page of the Note is the

following i signed by Dan Barksdale, the reverse mortgage/operations manager of FirstBank.

Attached to

the words

then signature stamped by Brian D. Weiler, with the title of Live

FirstBank and Live Well Financial, Inc. are not parties in this appeal.

{¶ 3} The Note was secured by an adjustable-rate home equity conversion

mortgage, filed in the public record on September 24, 2013, in favor of nonparty

on

real property located at 104 Bay Shore Drive, Sandusky, Erie County, Ohio (hereafter,

the . On January 25, 2017, and corrected on November 22, 2019, an

assignment of mortgage was filed in the public record from MERS, as nominee of

FirstBank, to Live Well Financial, Inc. Then on December 9, 2019, an assignment of

mortgage/deed of trust was filed by Live Well Financial, Inc. to appellee.

{¶ 4} Meanwhile, on June 10, 2019, Live Well Financial, Inc. filed for Chapter 7

bankruptcy protection in Delaware. On October 28, a bankruptcy court order approved the stipulation between the bankruptcy trustee and appellee that retroactively effective to

November 19, 2018, appellee agreed to purchase the rights to service certain mortgages

acquired by or originated by the debtor, Live Well Financial, Inc. In addition, the

bankruptcy court order approved the stipulation that effective since November 8, 2018,

the debtor gave appellee a power of attorney to execute and/or file mortgage assignments,

transfers and related documents in relation to the

loan.

{¶ 5} On September 14, 2021, appellee filed a complaint in foreclosure with

reformation, declaratory judgment, and other equitable relief (in rem only) and alleged,

among other matters, that as of September 8, appellant owed appellee $461,425 plus

interest on the Note due to a breach of its terms since January 28, 2020. Exhibits attached

to the complaint included the Note with the two indorsements, the loan agreement, the

Mortgage, and the mortgage assignments.

{¶ 6} Appellant answered the complaint, as amended, generally denying the

allegations, 1 raised several affirmative defenses, and counterclaimed for quiet title to

declare the Mortgage null and void. Then appellee moved to dismiss the counterclaim,

which appellant opposed. Before the trial court ruled on the pending motion to dismiss,

1 The general denial that appellee had complied with all conditions precedent prior to foreclosing the mortgage is insufficient under Civ.R. 9(C) and is deemed admitted under Civ.R. 8(D). Wells Fargo Bank, N.A. v. Mayo, 2018-Ohio-1432, ¶ 10 (6th Dist.). for lack of

standing and for judgment on his counterclaim, which appellee opposed.

{¶ 7} On June 21, 2022, the trial court granted, with prejudice,

to dismiss the counterclaim for quiet title. Appellant does not appeal this decision. Citing

to Bank of New York Mellon v. Floyd, 2021-Ohio-3736 (8th Dist.) and Buckner v. Bank of

New York, 2014-Ohio-568 (12th Dist.), the trial court determined that where appellant

recorded Mortgage is not per-

action.

{¶ 8} The trial court also

because he raised genuine issues of material fact on his own. Appellant also does not

appeal this decision.

Plaintiff cannot show it has standing (i.e., owns/holds the Note and Mortgage). Defendant

has not argued that he is in default; that all conditions precedent have not been met or the

amount due. . . Here, the issue is whether Plaintiff can show it holds/owns the Note and

Mortg The trial court then

submitted at trial, quoting Wells Fargo Bank, N.A. v. Horn, 2015-Ohio-1484, ¶ 1 (

hold that Schwartzwald does not require the plaintiff to prove standing at the time the

foreclosure action is filed. Rather, although the plaintiff in a foreclosure action must have

standing at the time suit is commenced, proof of standing may be submitted subsequent

to the filing of the complaint.). {¶ 9} The trial court also determined that appellant, i -party [who] lacks

Bank of Am.,

N.A. v. Hizer, 2013-Ohio-4621, ¶ 22 (6th Dist.); Bank of New York Mellon v. Huth, 2014-

Ohio-4860, ¶ 25 (6th Dist.); and Bank of New York Mellon v. Lewis, 2014-Ohio-5599, ¶

52 (6th Dist.). Appellant does not appeal this decision.

{¶ 10} Meanwhile, on May 27, 2022, appellee filed a cross-motion for summary

judgment, which appellant opposed. Citing to U.S. Bank, N.A. v. Coffey, 2012-Ohio-721

(6th Dist.), appellee argued it produced summary-judgment evidence for the foreclosure

action that: (1) it is the holder of the Note and Mortgage or is entitled to enforce the

instrument; (2) although not the original mortgagee, it is the current mortgagee through a

chain of assignments and transfers; (3) the loan/Mortgage is in default by appellant; (4) it

met all conditions precedent to foreclose; and (5) the amount of principle and interest due

and owing is $493,737.84 as of April 15, 2022, plus interest at the adjustable rate

provided for in the Note. The trial court determined that appellant raised a genuine issue

ever saw the original Note when he averred the

copy he saw was a true and accurate copy of the original Note, but at his deposition

admitted never seeing the original, citing HSBC Mtge. Servs., Inc. v. Edmon, 2012-Ohio-

4990, ¶ 16 (6th Dist.). The trial court then partially summary judgment on September 1, because there were genuine issues of material fact

on the first element with respect to producing the original Note and the portion of the

fifth element for the applicable, adjustable interest rate stated in the Note. {¶ 11} Consequently, the trial court granted appellee summary judgment on the

remaining elements, including the chain of Note/Mortgage assignments and transfers

. As

explained October 6 decision on a pending To

clarify, lest there be any misimpressions, the scope of the Trial is very limited to whether

Plaintiff holds the Note/is entitled to enforce the Note and the applicable rate of interest,

since the Note provides same is adjustable. * * * All other elements to obtain Foreclosure

The limited-scope-of-trial reminder is

repeated throughout the record.

{¶ 12} At the bench trial held on October 6, 2022, the magistrate heard testimony

from one witness, admitted six exhibits into evidence, and received post-trial briefing

from the parties.

evidence here is overwhelming; not just a preponderance, that [appellee] owns/holds the

;

applicable interest rate is the 30 day LIBOR Index plus a margin of 2.625 and the payoff

amount as o

decision, which appellee opposed, and on June 14, 2023, the trial court overruled

determined Nov. 22 nd Mag. Decision is both factually and

legally sound . . . [and] is hereby AFFIRMED and ADOPTED by this Court in its entirety

. . . {¶ 13} Thereafter, on June 27, 2023, the trial court entered a judgment in

foreclosure against appellant and in favor of appellee and other co-defendants to be paid

from the proceeds of the sheriff sale of the premises. Appellant timely appealed and sets

forth three assignments of error:

1. The trial court erred in finding that the appellee laid the necessary

foundation for admission of the document it purported to be the

original promissory note.

2. The trial court erred in allowing appellee trial exhibits 17 & 18 into

evidence.

3. The trial court erred in granting partial summary judgment in favor

of appellee finding that it had proven an unbroken chain of

assignments and transfers of the note from the originator to itself.

II. Admission of Evidence

{¶ 14} We will address the first and second assignments of error together because they collectively challenge of three exhibits regarding the Note into evidence at trial: exhibit Nos. 1, 17, and 18. Decisions involving the admissibility of evidence are reviewed under an abuse-of- Estate of Johnson v. Randall Smith, Inc., 2013-Ohio-1507, ¶ 22, citing State v. Hancock, 2006-Ohio-160, ¶ 122. For an abuse of discretion to have occurred, the trial court must have Id. A. Exhibit No. 1

{¶ 15} In support of his first assignment of error, appellant argues that appellee sought to admit into evidence a document purporting to be the original Note, exhibit No. 1, without first laying a proper foundation to do so. Appellant points to the trial transcript to argue that after five simply gave up * * * never coming back with additional evidence. Therefore, by virtue of the record rulings, Appellee completely failed to introduce evidentiary-quality material proving it Citing to Fed. Home Loan Mortg. Corp. v. Schwartzwald, 2012-Ohio-5017, ¶ 27, appellant argues to admit exhibit No. 1 Schwartzwald because appellee lacked standing to commence the foreclosure action.

{¶ 16} contention that summary judgment did not already determine as a matter of law Schwartzwald. The trial was to determine if appellee could produce proof of such standing, i.e., that appellee possessed the original Note at trial.

In the Nov. 22 nd Mag. Decision, the Magistrate held that the scope of

the Trial was limited. That limitation had been set by this Court in its

September 1 st

Judgment Motion. The Nov. 22 nd Mag. Decision correctly stated that the

issues for trial [were] whether Plaintiff held the Note at the time of trial, was entitled to enforce it, and the applicable interest rate (since it was a

variable rate).

The Magistrate was correct in his holding, in that this Court had

previously found there was no genuine issue of material fact regarding

chain of assignments/transfers; that Defendant was in default on the Loan

and there was an amount due. This Court granted Summary Judgment on

those issues via an Entry filed on or about September 1, 2022. In addition to

the September 1, 2022 entry limiting the scope, the parties were again put

on notice of this limited scope by the Magistrate (Tr. P. 7). (Emphasis sic.)

{¶ 17} Further, when appellee moved at trial to admit into evidence a copy of the

original Note, marked as exhibit No. 1, appellant did not object to its

admissibility. This is the exchange at trial between appellant and the magistrate:

Honor, I have no just to be clear, Exhibit 1 is a copy, not the original note, but a copy of

magistrate responded:

[T]he Court will recognize that [exhibit No.] 1 is a copy. That is

what it purports to be. The testimony is that he compared it to the original

note, which was produced here in Court, and the Court did observe it. It

ffered,

think what counsel was trying to do was to have Mr. Kala look at that and

say that what is 1 is a copy of what was the original, which was produced in . . . contesting whether or not it

was the original note.

magistrate then announced,

. . [Exhibit No.] 1 . . .

to that decision. Then, near the end of the trial when

the magistrate reiterated that exhibit No. 1 would be admitted into evidence, appellant did

not object.

{¶ 18} The failure to timely object to the admission of evidence waives all but

plain error on appellate review. Secy. of Veterans Affairs v. Leonhardt, 2015-Ohio-931, ¶

47 (3d Dist.) (in a foreclosure proceeding, no objections renewed at the time exhibits

were proffered for admission waived all but plain error).

plain error in a civil case, an appellant must establish (1) a deviation from a legal rule, (2)

that the error was obvious, and (3) that the error affected the basic fairness, integrity, or

public reputation of the judicial process and therefore challenged the legitimacy of the

State v. Morgan, 2017-Ohio-7565, ¶ 41, citing Goldfuss v.

Davidson, 79 Ohio St.3d 116, 122-123 (1997). We find no plain error in this matter.

{¶ 19} Evid.R. 1002 requires the original document to prove the contents of it,

except as otherwise provided by statute or evidentiary rule. State v. Tibbetts, 92 Ohio

St.3d 146, 159-160 (2001).

loan account based on the records maintained by his employer, Celink, the servicer and

His job responsibilities as Foreclosure Litigation Manager are to manage and access Celink

the Note in its records in the regular co

information about where the original Note is located, also known as the custodian of the

ossession of the

Note since 2018, which is well before the filing of the complaint on September 14, 2021.

[for appellee], which

{¶ 20} Prior to trial, Mr. Kala personally compared the copy of the Note to the

be identical, except for some immaterial redactions on the copy of the Note and an

immaterial pencil mark on the original Note. Appellee then offered the original Note for

Note. Later, the magi

evidence, only a copy of the Note marked as exhibit No. 1

{¶ 21} We find that per , exhibit No. 1 meets the definition of

a duplicate or copy of the Note. State v. Phillips, 2013-Ohio-4525, ¶ 13 (6th Dist.). as the original, or from the same matrix, or by means of photography, including

enlargements and miniatures, or by mechanical or electronic re-recording . . . . Id.

{¶ 22} 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.

Here, appellant inspected the original Note at the trial and did not contest in the record the authenticity of it. Further, appellant never objected to the admission of exhibit No. 1 and did not allege any unfairness with admitting a duplicate in lieu of the original Note.

{¶ 23}

that the duplicate should be excluded. The decision to admit a duplicate is left to the trial court s sound discretion. (Citations omitted.). Tibbetts, 92 Ohio St.3d at 160. Contrary to would be.

Maumee v. Hill, 1988 WL 128298, *1 (6th Dist. Dec. 2, 1988), citing Evid.R. 1001(4) and 1003. Where appellant neither contested the authenticity of the original Note, nor alleged any unfairness with admitting a duplicate in lieu of the original, we will opy of the Note. Id.;

JPMorgan Chase Bank, N.A. v. Swan, 2015-Ohio-1056, ¶ 15 (6th Dist.); Krohn v. Parkins, 2009-Ohio-1536, ¶ 26 (6th Dist.).

{¶ 24} Appellant then argues appellee failed to lay a proper foundation with Mr. Kala, an employee of Celink, for the admission of exhibit No. 1. However, a loan servicing agent and records custodian with personal knowledge may properly authenticate copies of business records kept in the regular course of business operations. HSBC Bank USA, N.A. for Citigroup Mtge. Loan, Tr. Inc., Asset Backed Pass Through Certificates Series 2003-HE4 v. Webb, 2017-Ohio-9285, ¶ 10 (10th Dist.), citing Fannie Mae v. Bilyk, 2015-Ohio-5544, ¶ 8-17 (10th Dist.). Mr. Kala Foreclosure Litigation Manager, need not have firsthand knowledge of the underlying transaction to

lay the foundation for the copy of the Note as a business record of Celink, loan

servicer. Buckeye Terminals, L.L.C. v. Franklin Cnty. Bd. of Revision, 2017-Ohio-7664, ¶

30, citing State Farm Mut. Auto. Ins. Co. v. Anders, 2012-Ohio-824, ¶ 15-16 (10th Dist.).

{¶ 25} Upon review we find no abuse of discretion, and no plain error, by the trial

court when it admitted a duplicate copy of the original Note marked as exhibit No. 1.

{¶ 26} -taken.

B. Exhibit Nos. 17 and 18

{¶ 27} xhibit Nos. 17 and 18,

contained content received from appellee via NetSuite and showed that appellee used

custodian of the original Note since 2018. The trial court

application of the Adoptive Business Rule exception. . . Deutsche Bank only had

possession of the Original Note as a custodian for Plaintiff. Plaintiff legally had {¶ 28} In support of his second assignment of error, appellant argues that exhibit

at the time of filing the complaint, and the trial court erred when admitting them as

adoptive business records hearsay exceptions under the authority of Deutsche Bank Natl.

Tr. Co. v. Boreman, 2020-Ohio-3545 (6th Dist.). Appellant argues the exhibits were not

adoptive business records because Mr. Kala was only an employee of the loan servicer of

appellee, which was not the custodian of the original Note at the time of the complaint

because the custodian was a third party,

is fatally flawed because no employee of appellee testified at trial regarding possession of

the original Note at the time of the complaint.

{¶ 29}

the declarant while testifying at the trial or hearing, offered in evidence to prove the truth

is

not admissible except as otherwise provided by the Constitution of the United States, by

the Constitution of the State of Ohio, by statute enacted by the General Assembly not in

conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules

{¶ 30} However, exceptions to inadmissible hearsay include records of regularly The following are not excluded by the hearsay rule, even though the

declarant is available as a witness: . . .

(6) Records of Regularly Conducted Activity. A memorandum,

report, record, or data compilation, in any form, of acts, events, or

conditions, made at or near the time by, or from information transmitted by,

a person with knowledge, if kept in the course of a regularly conducted

business activity, and if it was the regular practice of that business activity

to make the memorandum, report, record, or data compilation, all as shown

by the testimony of the custodian or other qualified witness or as provided

by [Evid.R. 901(B)(10)], unless the source of information or the method or

circumstances of preparation indicate lack of trustworthiness. The term

association, profession, occupation, and calling of every kind, whether or

not conducted for profit.

{¶ 31} Boreman

for the so-

trial court relied on HSBC Bank, USA N.A. for Wells Fargo Asset Securities Corp. v.

Szasz, 2017-Ohio-5544, ¶ 31 (5th Dist.), citing U.S. Bank N.A. v. Gray, 2013-Ohio-3340,

¶ 25 (10th Dist.). These cases hold that constructive possession of the Note (a negotiable

instrument) by appellee (the owner) exists when an agent of the owner (in this case,

Deutsche Bank) holds the Note on behalf of the owner. Consequently, appellee was the holder of the original Note and was entitled to enforce the original Note when the original

Note was in the physical possession of its agent as of the date the complaint in

foreclosure was filed in 2021. This court agrees. U.S. Bank, N.A. v. Zokle, 2014-Ohio-

636, ¶ 24 (6th Dist.), citing Gray at ¶ 25-30.

{¶ 32} were kept

in the ordinary course, which included a copy of the original Note and the custodial

history of the original Note, both supplied by appellee via NetSuite. Those records are not

hearsay under Evid.R. 803(6). is based on the

assumption that the records, made in the regular course of business by those who have a

competent knowledge of the facts recorded and a self-interest to be served through the

accuracy of the entries made and kept with knowledge that they will be relied upon in a

systematic conduct of such business, are accurate and LaBounty v. Big 3

Automotive, 2019-Ohio-1919, ¶ 52 (6th Dist.), quoting Weis v. Weis, 147 Ohio St. 416,

425-426 (1947). Mr. Kala demonstrated that he possessed a working knowledge of the

specific record-keeping system that produced exhibit Nos. 17 and 18. Id., citing State v.

Davis, 62 Ohio St.3d 326, 342 (1991). Evid.R. 803(6) does not require a witness to have

personal knowledge of the exact circumstances of the production of the document or

Buckeye Terminals,

L.L.C. v. Franklin Cty. Bd. of Revision, 2017-Ohio-7664, ¶ 30, citing State Farm Mut.

Auto. Ins. Co. v. Anders, 2012-Ohio-824, ¶ 15-16 (10th Dist.). {¶ 33} Nevertheless, even when a document constitutes a business record, a court

may still exclude it if the source of information or the method or circumstances of

Id. at ¶ 31, quoting Evid.R. 803(6).

However, there is no evidence in the record that appellant challenged the trustworthiness

of exhibit Nos. 17 and 18. Appellant only challenged Mr. personal knowledge of

them. Even if appellant had challenged their trustworthiness, that challenge goes to the

weight of the evidence, not to their admissibility as business records. Id.

{¶ 34} We also agree with the trial court further determination on June 14, 2023,

citing R.C. 1303.25(B) and U.S. Bank, N.A. v. Adams, 2012-Ohio-6253 (6th Dist.):

that the Original Note was presented in open court to the Magistrate.

#1), and found it to be not only a copy of the original Note, but also that the

virtue it was endorsed 2 in blank.

Thereby giving Plaintiff whom possessed it the right to enforce it. The

law in Ohio on the issue of Bearer paper and enforcement rights is also

clear.

{¶ 35}

Because the note is payable to bearer, negotiation of the note is accomplished by transfer

2 We note that e in the record which is defined by R.C. 1303.24(A)(1). of possession alone. Coffey, 2012-Ohio-721, at ¶ 35, quoting R.C. 1303.25(B); U.S.

Bank, N.A. v. Mitchell, 2012-Ohio-3732, ¶ 6, fn. 2 (6th Dist.). Here, the holder, appellee,

is entitled to enforce the instrument, where an undated, blank allonge is a valid slip of

paper attached to, and becomes a part of, the negotiable instrument when the original

paper is full. U.S. Bank N.A. as Tr. of Holders of J.P. Morgan Mtge. Acquisition Tr.

2006-CH2 v. Hill, 2018-Ohio-4532, ¶ 24 (6th Dist.), citing R.C. 1303.25(B),

1303.201(B)(21)(a), and 1303.31(A)(1); Mitchell at ¶ 15.

{¶ 36} Upon review we find no abuse of discretion by the trial court when it

admitted business-records-hearsay-excepted documents marked as exhibit Nos. 17 and

18.

{¶ 37} second assignment of error is not well-taken.

III. Standing to Challenge Assignments

{¶ 38} In support of his third assignment of error, appellant argues the trial court

erred in granting partial summary judgment on September 1, 2022, that appellee had

proven an unbroken chain of assignments and transfers of the Note from the originator,

FirstBank, through Live Well Financial, Inc., to appellee. Appellant argues that appellee

lacks standing to sue under Schwartzwald

foreclosure in favor of appellee is null and void. Appellant does not dispute that he

executed the original Note in favor of FirstBank, which indorsed it to Live Well

Financial, Inc., who, in turn, attached a blank allonge to it. However, appellant disputes

whether Live Well Financial, Inc. actually employed Mr. Weiler at the time of the undated, blank allonge and insists that dispute renders the Note defective and

unenforceable if Mr. Weiler did not represent the holder of the Note.

{¶ 39} specifically rejected

-- and his employment

status between Live Well Financial, Inc. and appellee -- as speculation, and we agree. Mr.

the complaint against appellant, appellee used Deutsche Bank as the custodian of the

original Note. Thus, at all relevant times since the filing of the complaint, appellee was

the holder of the original Note through its custodial agent.

{¶ 40} with this court the

issue of his standing to challenge on appeal the chain of assignments and transfers of the

original Note. Appellant does not dispute he executed the original Note in 2013. Nor is

there evidence in the record that appellant, as the original borrower, is a party to or third-

party beneficiary of any subsequent assignment agreement of the Note. We agree with the

trial court June 14, 2023 decision that challenge the

prior transfers/assignments of the Note due to him not being a party to those

transactions, citing Beneficial Financial I Inc. v. Saunders, 2019-Ohio-3577, ¶ 28 (4th

Dist.).

{¶ 41} This court has repeatedly held that where a borrower or mortgagor is not a

party to, or third-party beneficiary of, the assignment of the promissory note or mortgage,

he or she lacks standing to challenge the validity of the assignment between the assignor and assignee. Bank of Am., N.A. v. Duran, 2015-Ohio-630, ¶ 43 (6th Dist.), citing Huth,

2014-Ohio-4860, at ¶ 25; U.S. Bank, N.A. v. Perdeau, 2014-Ohio-5818, ¶ 26 (6th Dist.),

quoting Huth at ¶ 25; Hizer, 2013-Ohio-4621, at ¶ 22; Lewis, 2014-Ohio-5599, at ¶ 52.

Note was improperly

assigned to appellee . Duran at ¶ 43; Perdeau at ¶ 27.

{¶ 42} -taken.

IV. Conclusion

{¶ 43} On consideration whereof, the judgment of the Erie County Court of

Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant

to App.R. 24.

Judgment affirmed.

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

Thomas J. Osowik, J. _____ JUDGE Christine E. Mayle, J. _____ Charles E. Sulek, P.J. JUDGE CONCUR. _____ JUDGE

This decision is subject to further editing by the Supreme Court of

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