

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

DEUTSCHE BANK NATIONAL TRUST COMPANY as Trustee for GSAA Home Equity Trust 2008-5,	:	
	:	CASE NO. CA2009-11-288
Plaintiff-Appellee,	:	<u>OPINION</u>
	:	10/4/2010
- vs -	:	
ROGER D. SEXTON, JR., et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2009-02-0652

Laura C. Infante, Jason A. Whitacre, 4500 Courthouse Blvd., Suite 400, Stowe, Ohio 44224, for plaintiff-appellee

Matre & Beyke Co., LPA, Kerry K. Matre, Joseph L. Beyke, 11800 Conrey Road, Suite 200, Cincinnati, Ohio 45249, for defendant-appellant, Roger D. Sexton

BRESSLER, J.

{¶1} Defendant-appellant, Roger D. Sexton, Jr., appeals a judgment of the Butler County Court of Common Pleas, granting summary judgment in favor of plaintiff-appellee, Deutsche Bank National Trust Company.

{¶2} On January 9, 2007, Sexton executed an interest only adjustable rate note and mortgage in favor of Countrywide Home Loans, Inc. The record reflects that on February 9, 2009, Countrywide assigned the note and mortgage to Deutsche Bank, and

recorded the assignment on February 19, 2009. On February 12, 2009, Deutsche Bank filed a complaint in foreclosure against Sexton, alleging that Sexton was in default under the terms of the note and mortgage, owing \$593,600 plus 6.5 percent interest per annum from September 1, 2008.

{¶3} In May 2009, Deutsche Bank moved for summary judgment. Sexton filed a memorandum contra Deutsche Bank's motion, arguing Deutsche Bank was not the real party in interest because the assignment was recorded with the Butler County Recorder's office seven days after the complaint was filed. On October 16, 2009, the trial court granted Deutsche Bank's motion for summary judgment, finding Deutsche Bank had submitted evidence that it owned both the note and mortgage at the time the complaint in foreclosure was filed, therefore establishing standing to bring the action.

{¶4} Sexton appeals, raising one assignment of error:

{¶5} "THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS WELL TAKEN WHEN IT WAS NOT SUPPORTED BY COMPETENT EVIDENCE."

{¶6} Sexton argues the trial court erred in granting summary judgment in favor of Deutsche Bank because genuine issues of material fact existed as to whether Deutsche Bank was the owner and holder of the note and mortgage at the time the complaint in foreclosure was filed. Sexton argues the evidence submitted by Deutsche Bank in support of summary judgment was insufficient to establish Deutsche Bank as the real party in interest in the foreclosure proceeding.

{¶7} This court's review of summary judgment is de novo. See *Deutsche Bank Natl. Trust Co. v. Cassens*, Franklin App. No. 09AP-865, 2010-Ohio-2851, ¶6. Summary judgment is appropriate under Civ.R. 56 when "(1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3)

reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor." *BAC Home Loans Servicing, L.P. v. Hall*, Warren App. No. CA2009-10-135, 2010-Ohio-3472, ¶12, quoting *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389. The party moving for summary judgment has the initial burden of producing some evidence that affirmatively demonstrates the lack of a genuine issue of material fact. *Hall* at ¶12. The nonmoving party must then rebut the moving party's evidence with specific facts showing the existence of a genuine triable issue; it may not rest on the mere allegations or denials in its pleadings. *Id.*; Civ.R. 56(E).

{¶18} As noted, Sexton argues Deutsche Bank was not the real party in interest in the foreclosure proceeding. In support of his argument, Sexton submitted his own affidavit, stating (1) he was never given an original or an authenticated copy of the assignment of the mortgage, and (2) he only dealt with Bank of America Home Loans in discussing his mortgage and that he "never had any discussions with anyone from Deutsche Bank or from anyone claiming to be an agent of Deutsche Bank[.]" Attached to Sexton's affidavit was an automated payoff receipt from Bank of America Home Loans, dated June 2009.

{¶19} Pursuant to Civ.R. 17(A), "[e]very action shall be prosecuted in the name of the real party in interest." A real party in interest is one who can "discharge the claim upon which the suit is brought * * * [or] is the party who, by substantive law, possesses the right to be enforced." *Hall*, 2010-Ohio-3472 at ¶14. Unless the party has some real interest in the subject matter of the action, the party lacks standing to invoke the jurisdiction of the court. *Id.* In a foreclosure action, the real party in interest is the entity that is the current holder of the note and mortgage. *Id.*; *Cassens*, 2010-Ohio-2851 at

¶8.

{¶10} In support of its summary judgment motion, Deutsche Bank submitted a copy of the note and mortgage, along with the affidavit of David Perez, "an officer of Countrywide Home Loans Servicing, L.P., a loan servicing agent for [Deutsche Bank.]" In his affidavit, Perez stated Deutsche Bank exercised the option contained in the "mortgage note" and accelerated and called due the entire principal balance. Perez further stated Sexton's loan account was under his supervision, that Sexton was in default in payment under the terms of the note and mortgage, and the principal balance due was \$593,600 plus 6.5 percent interest per annum from September 1, 2008. In addition, Deutsche Bank attached a document titled "Assignment," which stated in part:

{¶11} "KNOW ALL MEN BY THESE PRESENTS, that Mortgage Electronic Registration Systems, Inc., acting solely as a nominee for Countrywide Home Loans, Inc. * * * for valuable consideration, the receipt of which is hereby acknowledged, does hereby sell, assign, transfer and set over, without recourse, unto Deutsche Bank National Trust Company as Trustee for GSAA Home Equity Trust 2008-5 * * * a certain Mortgage Deed bearing the date of January 9, 2007, executed and delivered by Roger D. Sexton, Jr., unmarried, and recorded in Book 7851 Page 1135, of the Butler County Recorder's Office on January 29, 2007, and all sums of money due and to become due thereon."

{¶12} In addition, Deutsche Bank submitted a copy of an allonge to the note, containing an endorsement by the "1st Vice President" of Mortgage Electronic Registration System, Inc., indicating that the note was payable to the order of Deutsche Bank. Deutsche Bank also submitted a second supporting affidavit from Melonie Keshishi, "an employee of BAC Home Loans Servicing, LP[.]" In her affidavit, Keshishi stated "Plaintiff [Deutsche Bank] is the owner in possession of the complete copy of the

Interest Only Adjustable Rate Note * * * Plaintiff is also the owner in possession of the complete copy of the Mortgage * * * Plaintiff purchased, acquired and/or otherwise obtained possession of the Interest Only Adjustable Rate Note and Mortgage prior to February 12, 2009, the Complaint filing date in the present case, by way of an Assignment of Mortgage, executed February 9, 2009, recorded on February 19, 2009 as Book 8085, Page 1738, in the Butler County Records[.]" Keshishi also stated Sexton was in default, owing a principal balance of \$593,600 plus 6.5 percent interest per annum from September 1, 2008.

{¶13} Sexton argues the affidavits submitted, namely that of David Perez, was "wholly insufficient to establish that [Deutsche Bank] is entitled to enforce the note." We disagree. See *Detusche Bank Natl. Trust Co. v. Ingle*, Cuyahoga App. No. 92487, 2009-Ohio-3886, ¶18 (affidavit of bank's loan servicing agent, along with other supporting documents, including allonge of note, sufficient to show bank was the real party in interest). Further, Deutsche Bank provided ample additional evidence indicating it was the owner of Sexton's note and mortgage at the time the foreclosure action was commenced, and Sexton failed to offer countervailing evidence sufficient to create a genuine issue of material fact challenging Deutsche Bank as the real party in interest. Accordingly, we find no error in the trial court's grant of summary judgment in favor of Deutsche Bank.

{¶14} Based upon the foregoing, Sexton's single assignment of error is overruled.

{¶15} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.