

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

Mortgage Electronic Registration  
Systems, Inc. as nominee for Mila, Inc.

Appellee

Court of Appeals No. L-10-1176

Trial Court No. CI0200502699

v.

Molly Harris-Gordon, et al.

Appellant

**DECISION AND JUDGMENT**

Decided: April 22, 2011

\* \* \* \* \*

Jason A. Whitacre, Laura C. Infante, and Kathryn M.  
Eyster, for appellee.

Joanna E. Baron, for appellant.

\* \* \* \* \*

PIETRYKOWSKI, J.

{¶1} Defendant-appellant, Molly Harris-Gordon, appeals the June 7, 2010 judgment of the Lucas County Court of Common Pleas which denied her motion to

vacate the sheriff's sale of her residence following foreclosure. For the reasons set forth herein, we affirm.

{¶2} On April 18, 2005, Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Mila, Inc., commenced this foreclosure action after appellant defaulted on her note and mortgage. On July 7, 2005, MERS assigned the note and mortgage to Franklin Credit Management Corp. ("Franklin"). Appellant failed to answer or otherwise plead and a default judgment was entered. The first sheriff's sale, set for March 8, 2006, was withdrawn after it was discovered that an interested party had not been named. Thereafter, a supplemental complaint was filed. On August 8, 2007, Franklin was formally substituted as plaintiff. Appellee was again granted judgment and a second sale date was set for February 6, 2008. Just prior to the sale, appellant filed a second bankruptcy; she received a discharge in the bankruptcy and the case was reactivated. A third sale date was set for October 15, 2008; however, appellant filed a Chapter 13 bankruptcy. On January 12, 2009, the note and mortgage were assigned to Deutsche Bank National Trust Company, as trustee for Franklin. The bankruptcy action was dismissed on October 8, 2009. An order of sale was issued but withdrawn after appellant filed a complaint in the United States District Court for the Northern District of Ohio. After the federal case was dismissed an order of sale was again issued; the sale was set for June 9, 2010.

{¶3} On May 12, 2010, appellant filed a motion to vacate the sheriff's sale date. Appellant argued that MERS was not the real party in interest because it did not own the mortgage and note. Appellant further argued that because Mila, the interested party, filed for bankruptcy and failed to notify its trustee of the pending foreclosure, the action could not be maintained.

{¶4} In response, appellee asserted that because it held the mortgage it was the real party in interest. Further, that even assuming that appellee was not the holder; it was in possession of the note and, thus, was entitled to enforce it under R.C. 1303.31. On June 7, 2010, the trial court denied the motion. This appeal followed.

{¶5} Appellant now raises the following three assignments of error:

{¶6} "I. The trial court erred when it failed to vacate the sheriff's sale.

{¶7} "II. The appellee is not the true party in interest and therefore cannot foreclose on the property.

{¶8} "III. The foreclosure case should have been stayed pending relief from automatic stay because the holder of the note and mortgage was in Chapter 11 bankruptcy."

{¶9} Appellant's first and second assignments of error are related and will be jointly addressed. Appellant first argues that the trial court should have granted her motion to vacate the sheriff's sale because appellee was not the real party in interest. Appellee counters that, procedurally, because appellant failed to appeal the judgment of

foreclosure and failed to request relief from that judgment, the order being appealed from is not a final and appealable order.

{¶10} In support of its argument, appellee cites *Sky Bank v. Mamone*, 182 Ohio App.3d 323, 2009-Ohio-2265, which discusses the two distinct phases of a foreclosure proceeding: the order of foreclosure and the order confirming the sheriff's sale. *Id.* at ¶ 25. Both of these judgment entries are final and appealable. *Id.*, citing *Smith v. Najjar*, 163 Ohio App.3d 208, 2005-Ohio-4720, ¶ 11.

{¶11} Appellant's proper course of action would have been to appeal the judgment of foreclosure and order of sale or to have filed a motion for relief from judgment pursuant to Civ.R. 60(B). Even construing the motion to vacate as a Civ.R. 60 (B) motion for relief from judgment, we find that it lacks merit. Upon review, we find that the record is devoid of evidence that appellee was not the real party in interest in this action. MERS was the mortgage-holder on the date that the action was filed and, thereafter, assigned the note and mortgage to Franklin. Based on the foregoing, we find that appellant's first and second assignments of error are not well-taken.

{¶12} In appellant's third assignment of error she argues that the foreclosure should have been stayed due to Mila, Inc.'s 2007 bankruptcy filing. As demonstrated by the record, in 2005, two years prior to the bankruptcy filing, MERS, as nominee for Mila, transferred its interest in the note and mortgage to Franklin. Accordingly, appellant's third assignment of error is not well-taken.

{¶13} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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.

Mark L. Pietrykowski, J.

\_\_\_\_\_  
JUDGE

Arlene Singer, J.

\_\_\_\_\_  
JUDGE

Thomas J. Osowik, P.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>.