J-A29040-15

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

NATIONSTAR MORTGAGE, LLC F/K/A CENTEX HOME EQUITY COMPANY LLC	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
JOHN PUHL AND MARGARET PUHL,	:	
Appellants	:	No. 1993 WDA 2014

Appeal from the Order entered on November 12, 2014
in the Court of Common Pleas of Mercer County,
Civil Division, No. 2013-2755

BEFORE: FORD ELLIOTT, P.J.E., BOWES and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED DECEMBER 14, 2015**

John Puhl and Margaret Puhl (hereinafter "the Puhls") appeal from the Order granting summary judgment in favor of Nationstar Mortgage, LLC f/k/a Centex Home Equity Company, LLC (hereinafter "Nationstar"). We affirm.

The trial court set forth the relevant factual and procedural history in its Opinion, which we adopt herein for purposes of this appeal. ***See*** Trial Court Opinion, 12/30/14, at 3-4.

On November 12, 2014, the trial court entered an Order granting Nationstar's Motion for summary judgment, and denying the Puhls' Motion for summary judgment. The Puhls filed a timely Notice of Appeal, and a

court-ordered Statement of Matters Complained of on Appeal. In response thereto, the trial court issued an Opinion.

On appeal, the Puhls raise the following issues for our review:

> 1. Did the trial court err as a matter of law when it granted [Nationstar's] [M]otion for summary judgment on the grounds that [Nationstar] had standing to bring this foreclosure action because it possessed the original note, even though it did not own the note or possess the current debt instrument?
>
> 2. Does a plaintiff who possesses a note have standing to bring an action in foreclosure if that note no longer represents the debt instrument?
>
> 3. If a note has been sold to a third party, turned into a security and then sold again, does the original holder of the note have standing to bring an action simply because it possesses the note document as it existed prior to any transfers?
>
> 4. If a matter is dismissed without prejudice by the granting of preliminary objections[,] and then refiled without any additional evidence, is the issue upon which dismissal was granted subject to issue preclusion (*res judicata*)?
>
> 5. Did the trial court err as a matter of law when it granted [Nationstar's] [M]otion for summary judgment[,] and found that there were no genuine issues of any material fact upon which a reasonable trier of fact could find in [the Puhls'] favor?

Brief for Appellants at 5 (some capitalization omitted, issues renumbered for ease of disposition).

Our standard of review of an order granting a motion for summary judgment is well-established:

> We view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and

> it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered. Our scope of review of a trial court's order granting or denying summary judgment is plenary, and our standard of review is clear: the trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion.

Daley v. A.W. Chesterton, Inc., 37 A.3d 1175, 1179 (Pa. 2012) (citation omitted).

As the Puhls' first three issues pertain to the issue of standing, we will address them together. The Puhls contend that Nationstar previously filed an action for mortgage foreclosure against them involving the same property, mortgage and note at issue in this action.[1] Brief for Appellants at 14. The Puhls assert that, in the Mercer County action, Nationstar had failed to deny, and thereby admitted, that it was not the owner of the note at the time it filed its prior complaint, resulting in the granting of the Puhls' preliminary objections and the dismissal of that action. ***Id***. at 14-15. Thus, according to the Puhls, they successfully established that Nationstar did not have standing in the Mercer County action. ***Id***. The Puhls argue that Nationstar has refiled this action without presenting any new evidence to demonstrate that it has standing, requiring dismissal of this action. ***Id***. at 15.

The Puhls contend that, at the time the Complaint in Mortgage Foreclosure ("Complaint") was filed in this action, the owner of the note was

[1] ***Nationstar Mortgage, LLC v. Puhl***, Mercer County Court of Common Pleas, Docket No. 2007-3855 (filed September 20, 2012) (hereinafter "the Mercer County action").

Newcastle Mortgage Securities Trust 2006-1 ("Newcastle"). ***Id***. at 17. The Puhls assert that, because "Northstar aka Centex"[2] was not a real party in interest, it lacked standing to bring this action. ***Id***. at 18. The Puhls also claim that Nationstar has failed to prove that it is the holder of the note through properly authenticated and original documents. ***Id***. The Puhls argue that Nationstar's possession of the original note document is no longer evidence of the current debt instrument, as the debt was converted to securities (*i.e*., bonds) that were sold to Newcastle, which thereafter sold the securities to investors. ***Id***. The Puhls contend that Nationstar has not presented evidence that it is the holder of the securities, or that it is entitled to enforce the collection of the securitized debt.[3] ***Id***. The Puhls assert that Newcastle is currently in possession of the bonds, and that it possessed the bonds at the time the Complaint was filed. ***Id***. at 19. Finally, the Puhls claim that, because the note was purchased from Nationstar, it has already been made whole. ***Id***.

---

[2] It is unclear as to whether the Puhls' repeated references to "Northstar Mortgage, LLC fka Centex Home Equity Company, LLC" or "Northstar," ***see*** Brief for Appellants at 9, 17, 18, constitute erroneous references to *Nationstar*, the plaintiff/appellee herein; or whether the Puhls intended to reference an entirely different entity, of which there is no evidence of record. We will assume that the references to *Northstar* were intended to be references to *Nationstar*.

[3] Although the Puhls contend that Newcastle sold the securities/bonds "to investors," ***see*** Brief for Appellants at 18, the Puhls also contend that Newcastle remains the owner of such securities. ***See id***. at 19 (wherein the Puhls allege that Newcastle is the owner of the bonds, which are the "current evidence of the debt").

The trial court addressed the Puhls' first three issues, set forth the relevant law, and concluded that these issues lack merit. ***See*** Trial Court Opinion, 12/30/14, at 5-8. We concur with the reasoning of the trial court and affirm on this basis as to the Puhls' first three issues. ***See id***.

In their fourth issue, the Puhls contend that the action is barred by the doctrine of *res judicata* because "the Complaint in this matter is essentially identical to the Complaint in [the Mercer County action], and does not include any additional documentation or evidence indicating that Nationstar [] owns the note it now seeks to foreclose upon." Brief for Appellants at 22. The Puhls assert that "(1) the same thing is being sued upon or for in both cases; (2) the cause of action is the same; (3) the identity of persons and parties to the action are the same; and (4) [the] identity of the quality or capacity of the parties suing or sued is the same." ***Id***. The Puhls claim that the trial court erroneously determined that the Mercer County action was dismissed because Nationstar admitted, by not specifically denying, that it did not hold the note. ***Id***. The Puhls assert that this is "not the whole story," and that the Mercer County trial court determined that Nationstar "did not have standing because the undisputed evidence provided by [the Puhls] 'established' this fact despite [Nationstar] producing the exact same documentation it presented to the [trial c]ourt in this matter."[4] ***Id***. The

[4] The Puhls have not identified what other "undisputed evidence" the Mercer County trial court purportedly relied upon in determining that Nationstar lacked standing to bring that action.

Puhls contend that, to have standing, one must have (1) an immediate discernable adverse effect if the debt is not paid; and (2) an interest in the satisfaction of the debt. ***Id***. at 23. According to the Puhls, Nationstar was already made whole when it sold the debt; hence, the only entity which would have an immediate discernable adverse effect if the debt isn't paid is Newcastle. ***Id***.

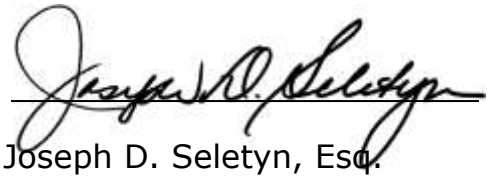
The trial court addressed the Puhls' fourth issue, set forth the relevant law, and concluded that it lacks merit. ***See*** Trial Court Opinion, 12/30/14, at 8-9. We concur with the reasoning of the trial court and affirm on this basis as to this issue. ***See id***.

Although the Puhls have identified a fifth issue in their Statement of Questions Involved, ***see*** Brief for Appellants at 5, they have failed to include any discussion of this issue in their brief. Therefore, this issue is waived. ***See*** Pa.R.A.P. 2119(a).[5]

Order affirmed.

[5] Even if the Puhls had properly addressed this issue in their brief, we would have concluded that it lacks merit for the reasons set forth by the trial court. ***See*** Trial Court Opinion, 12/30/14, at 9-10.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/14/2015

J-A24040-15

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA
CIVIL DIVISION

Nationstar Mortgage, LLC f/k/a Centex Home Equity Company, LLC,	
Plaintiff,	No. 2013–2755
v.	
John Puhl and Margaret Puhl,	
Defendants.	

1925 Opinion

Defendants John and Margaret Puhl have appealed to the Superior Court of Pennsylvania this Court's November 12, 2014 Order granting Plaintiff's Motion for Summary Judgment and denying Defendants' Motion for Summary Judgment. Defendants have raised five issues in their Statement of Matters Complained of on Appeal:

1. Does a Plaintiff who does not own the note or current debt instrument have standing to bring a foreclosure action against a party alleged to have defaulted on said note or debt instrument?
2. Does a Plaintiff who possesses a note have standing to bring an action in foreclosure if that note no longer represents the debt instrument?
3. If a note has been sold to a third party, collateralized, turned into a security and then sold again, does the

40

4. original holder of the note have standing to bring an action simply because it possess the note document as it existed prior to any transfers?

5. If a matter is dismissed without prejudice by the granting of preliminary objections and then refiled without additional evidence, is the issue upon which dismissal was granted subject to issue preclusion (res judicata)?

6. Did the Trial Court erroneously find that there were no genuine issues of any material fact when it granted Plaintiff's motion for summary judgment?

(*Concise Statement of Matters Complained of on Appeal*, Issues 1 – 5)

Background

1. On December 13, 2005, John and Margaret Puhl ("Defendants") executed and delivered to Centex Home Equity Company, LLC a note ("Note") with interest thereon at 7.1% per annum. Defendants were required to make monthly payments on the Note commencing February 1, 2006.
2. To secure the obligations under the note, Defendants executed and delivered to Centex a mortgage ("Mortgage") dated December 13, 2005.
3. The Mortgage secures the real property commonly known as 148 Wick Avenue, Hermitage, PA, 16148.
4. In July of 2006, Centex Home Equity Company, LLC changed its name to Nationstar Mortgage, LLC, the current Plaintiff, who then became holder of the Note and Mortgage (Plaintiff's Motion for Summary Judgment, Exhibit H).
5. Defendants defaulted on their obligations pursuant to the Note and Mortgage on May 1, 2007 and have not made payments since.
6. Defendants filed for Chapter 7 bankruptcy in the Western District of Pennsylvania, the result being the discharge of Defendants' personal debts on August 3, 2007.
7. Plaintiff filed a Complaint in Mortgage Foreclosure on August 26, 2013. Attached to the complaint was a copy of the Note and an allonge endorsed in blank (Complaint, Exhibit B).
8. Both parties filed cross motions for summary judgment. In their Motion for Summary Judgment, Defendants argued, *inter alia*, that Plaintiff lacks standing because it is not the current holder of the Note. Defendants attached documents from the SEC as well as an expert report by Carlos Perez, all tending to show that the Defendants' Note and

Mortgage had been securitized and are currently owned by Newcastle Securities Trust 2006-1.

9. An identical action was brought in Mercer County, PA in 2007 (Case No. 2007-3855), involving the same parties, Note, Mortgage, and foreclosure. That case resulted in dismissal *without prejudice* by Judge St. John because Defendants successfully argued in preliminary objections that Plaintiff lacked standing because it did not hold the Note at the time it filed the complaint. In making the preliminary objections for that case, Defendants presented the same SEC documents and export report by Carlos Perez.

10. In the present case, Plaintiff specifically denied that it lacked standing in Paragraph 4 of its Response to Defendants' Preliminary Objections, and additionally Plaintiff attached an affidavit from Plaintiff's counsel swearing that counsel personally holds the Note and Mortgage as bailee in counsel's office. Further, Defendants in this case have never requested that Plaintiff physically produce the original Note and Mortgage for Defendants' inspection.

Analysis

"Summary judgment is appropriate . . . in those cases where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1221 (Pa. 2002). "When considering a motion for summary judgment, the trial court must take all facts of record and reasonable inferences therefrom in a light most favorable to the non-moving party." *Toy v. Metropolitan Life Ins. Co.*, 928 A.2d 186, 195 (Pa. 2007). On review, an appellate court may reverse a grant of

summary judgment if there has been an error of law or an abuse of discretion. *Weaver v. Lancaster Newspapers, Inc.*, 926 A.2d 899, 902 (Pa. 2007) (internal citations omitted).

Defendants raise five issues in their Statement of Matters Complained of on Appeal. However, the first three issues raised all revolve around the single issue of standing as it relates to possession of a debt instrument. Accordingly, this Court consolidates Defendants' first three issues on appeal.

I. Plaintiff has standing as it possesses the original Note

In the first three issues they raise, Defendants challenge this Court's determination that Plaintiff has standing to bring this foreclosure action. Defendants argued in their Preliminary Objections and Motion for Summary Judgment that Plaintiff lacks standing, as it sold the mortgage to a third party, which is an issue that was addressed by Judge St. John in the nearly identical 2007-3855 case. There, Judge St. John dismissed Plaintiff's case against Defendants without prejudice because Plaintiff admitted (by failing to specifically deny) that Plaintiff did not hold the note at issue. Judge St. John noted in his opinion that the Defendants introduced an expert report from Carlos Perez (a certified mortgage securitization auditor) showing that the original Note had been sold and securitized.

In the instant case, Plaintiff specifically denied that it lacks standing in Paragraph 4 of its Response to Defendants' Preliminary Objections. Further, Plaintiff asserted that it holds the Note and Mortgage, and has attached as an exhibit to the *Complaint in Mortgage Foreclosure* a copy of the Note with an allonge endorsed in blank, dated December 13, 2005. Also, in Plaintiff's response to Defendants' preliminary objections, Plaintiff's counsel submitted a sworn affidavit that he is currently personally holding the

original Note in his office and that it still belongs to Plaintiff. Defendants assert again that Plaintiff sold the note to a third party and have attached several lengthy forms filed to the SEC claiming that the note has been dissolved into 15 separate securities and now belongs to a Newcastle Securities Trust 2006-1. Defendants claim that because of transfer of the note, Plaintiff is no longer a "party in interest" to the Note and subsequently lacks standing.

Regarding standing in mortgage foreclosure cases, the Superior Court of Pennsylvania has stated:

> This Court has held that the mortgagee is the real party in interest in a foreclosure action. Section 3301 of the PUCC provides that a holder of a negotiable instrument is a "person entitled to enforce" it. Section 3302 defines a "holder in due course" of a negotiable instrument as the holder of an instrument if "the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity;" and the holder took the instrument for value and in good faith. Finally, Section 1201 defines a "holder," in relevant part, as "the person in possession of a negotiable instrument that is payable either to the bearer or to an identified person that is the person in possession."

PHH Mortg. Corp. v. Powell, 2014 WL 4437646 at *7 (Pa. Super. Ct. 2014) (internal citations omitted). In *Powell*, the Superior Court held that the plaintiff, PHH Mortgage Company, had standing to bring a mortgage foreclosure action when it 1) attached the note and an allonge endorsed in blank to all court filings, and 2) presented the original note to the trial court and the defendants for inspection. *Id. at *8.* The Superior Court held that PHH had standing even though the defendants presented evidence that Sallie Mae, not PHH, was the owner of the note at the time the complaint was filed. *Id.* In

doing so, the Court stated that "[o]wnership of the Note is irrelevant to the determination of whether PHH is a 'person entitled to enforce' the Note." *Id.* Further, "[e]vidence that some other entity may be the 'owner' or an 'investor' in the Note is not relevant to this determination, as the entity with the right to enforce the Note may well not be the entity entitled to receive the economic benefits from payments received thereon." *Id.* at *9.

Here, Plaintiff demonstrates that it is a "person entitled to enforce" the Note by attaching a copy of the Note with an allonge endorsed in blank to the complaint and motion for summary judgment. *Complaint in Mortgage Foreclosure*, Exhibit B; *Plaintiff's Motion For Summary Judgment*, Exhibit C. Plaintiff's counsel also submitted a sworn affidavit that he is currently personally holding the original Note in his office as bailee and that the Note still belongs to Nationstar. *Plaintiff's Response to Defendants' Preliminary Objections*, Attached Affidavit. Clearly, Plaintiff has met its burden in demonstrating that it is in possession of the Note, as per *Powell*. Therefore, Plaintiff is a "person entitled to enforce" and has standing to bring this action.

Defendants have introduced several documents, which are the same ones introduced in the 2007-3855 case, that Defendants claim shows a chain of sale of the Note in 2006, from Nationstar to Newcastle Securities, Inc. to Newcastle Securities Trust 2006-1. *Defendants' Motion for Summary Judgment*, Exhibits B-D. Additionally, the Defendants submitted a report by Carlos Perez, a Bloomberg Professional Researcher, which reported that the Puhl note/mortgage has been transferred. *Defendants' Motion for Summary Judgment*, Exhibit F. The evidence presented by Defendants here is virtually identical to the evidence presented by the defendants in *Powell*. Here, Defendants are essentially arguing that because Newcastle Securities Trust 2006-1 may *own* the Note,

Plaintiff no longer has standing.[1] But as the Superior Court mentioned in *Powell*, ownership of the Note is not the determining factor for standing; possession is. *Id.* Plaintiff here has clearly demonstrated that it possesses the Note and did so at the time of filing the complaint.[2]

The Court finds that Plaintiff has sufficiently demonstrated that it held the Note at the time its filed the Complaint in Mortgage Foreclosure. Therefore, it is a "party in interest" and is entitled to enforce the Note and Mortgage.

II. Res judicata not applicable

Defendants' fourth issue on appeal is that Plaintiff is barred from bringing this foreclosure suit under the doctrine of res judicata. Judge St. John, in the previous case, dismissed Plaintiff's case against Defendants because Plaintiff admitted (by failing to specifically deny) that Plaintiff did not hold the mortgage at issue. Notably, Judge St. John dismissed the case "without prejudice."

"'Res judicata' encompasses the modern principle of issue preclusion . . . which is the common-law rule that *final judgment* forecloses relitigation in later action involving at least one of the original parties, of an issue of fact or law which was actually litigated and which was necessary to the original judgment." *Clark v. Troutman*, 502 A.2d 137, 139 (Pa. 1985) (emphasis added). The Pennsylvania Supreme Court has held that a final judgment, at least for appeal purposes, is one that "terminates the litigation between the parties to the suit *by precluding a party from further action in that court*." *Stadler v.*

---

[1] During argument before this Court on November 3, 2104, Defendants' counsel explicitly stated that ownership of the note, as opposed to possession of the note, dictates whether there is standing. This is a clearly erroneous statement of the law and is against the Superior Court's holding in *Powell*.

[2] Plaintiff never produced the original Note for the Defendants' inspection in court, but Defendants' counsel never requested its production nor disputed that Plaintiff did and still does hold the original Note. The Court believes that this particular factual difference between this case and *Powell* is not significant enough to legally distinguish these cases.

Borough of Mt. Oliver, 95 A.2d 776, 777 (Pa. 1953) (emphasis added). Further, the Superior Court has stated:

> Like a dismissal with prejudice for failure to prosecute a claim, a dismissal without prejudice is not intended to be res judicata of the merits of the controversy. Unlike a dismissal with prejudice for failure to prosecute a claim, however, the phrase "without prejudice" ordinarily imports the contemplation of further proceedings. Thus, it is clear that the same considerations of prompt, final conclusion of pending matters, and avoidance of cluttering the docket for an unreasonable length of time are not present."

Gutman v. Giordano, 557 A.2d 782, 784 (Pa. Super. Ct. 1989). When Judge St. John dismissed the previous case in 2012, he did so because Plaintiff generally denied Defendants' claim that Plaintiff lacked standing, which is treated as an admission by the law. Pa.R.Civ.P. 1029(b). Judge St. John did not hold that Plaintiff was incapable of having standing, but only that Plaintiff admitted by procedure of law that it lacked standing *at that particular time*. Consequently, he dismissed the case without prejudice. Clearly, this dismissal contemplated future proceedings and is not a final judgment for *res judicata* purposes. Further, in this case, Plaintiff specifically denied that it lacks standing in Paragraph 4 of its Response to Defendants' Preliminary Objections, something it failed to do in the first foreclosure action.

Thus, res judicata does not apply. Defendants cannot succeed on this claim.

III. Summary Judgment was appropriate in this case

Defendants' fifth issue on appeal concerns whether there was any genuine issue of material fact and, consequently, whether summary judgment was appropriate in this case. Regarding summary judgment in mortgage foreclosure cases, a plaintiff in a mortgage foreclosure action is entitled to summary judgment when a defendant admits that it

executed the note/mortgage with the plaintiff and when the defendant admits that he or she is in default with regard to scheduled payments. *First Wisconsin Trust Co. v. Strausser*, 653 A.2d 688, 694 (Pa. Super. Ct. 1995).

Here, Plaintiff is entitled to summary judgment because Defendants admitted in their Answer that they executed the Note and Mortgage with the Plaintiff and that they are in default with regard to their scheduled payments. See Defendants' Answer to Plaintiff's Complaint in Mortgage Foreclosure, ¶¶ 2, 4, 5, 7, and 8. See also *Corestates Bank, NA v. Cutillo*, 723 A.2d 1053, 1056 (Pa. Super. Ct. 1999) ("plaintiff presents a prima facie case by showing the execution and delivery of the [note] and its non-payment. Since appellant does not contest the Bank's assertion that he failed to make payments as required under the terms of the note, we are not persuaded that material facts are in dispute"). Although Defendants here generally dispute the balance owed under the Note, the execution amount need not be proven for the entry of summary judgment, only the original amount of the mortgage must be plead. *Landau v. Western Pennsylvania Nat. Bank*, 282 A.2d 335, 340 (Pa. 1971). The mortgagors are entitled to an accounting once the property has been sold at a judicial sale and the funds have been distributed. *Id.*

Therefore, Defendants' final issue is without merit.

Accordingly, the Superior Court should reject Defendants' appeal and uphold this Court's Order granting Plaintiff's Motion for Summary Judgment and denying Defendants' Motion for Summary Judgment.

BY THE COURT,

_____, J.
Robert G. Yeatts, Judge

12-31-14cc Atty Wesner & Kurz