IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

THE BANK OF NEW YORK MELLON,	:	APPEAL NO. C-210354 TRIAL NO. A-1902593
Plaintiff-Appellee,	:	
vs.	:	*JUDGMENT ENTRY.*
NECOLE MITCHELL,	:	
and	:	
MICHAEL L. GRIFFIN,	:	
Defendants-Appellants.	:	

The court sua sponte removes this case from the regular calendar and places it on the court's accelerated calendar, 1st Dist. Loc.R. 11.1.1(A), and this judgment entry is not an opinion of the court. See Rep.Op.R. 3.1; App.R. 11.1(E).

This is an appeal from a decision granting summary judgment to plaintiff-appellee The Bank of New York Mellon ("BONY") on its foreclosure action against defendants-appellants Necole Mitchell and Michael L. Griffin ("defendants"). On appeal, defendants raise 11 assignments of error, challenging an array of purported procedural errors and essentially arguing that BONY has no legal mortgage on which it can foreclose on the property at issue. After careful review of all of the evidence and relevant authorities, however, we affirm the trial court's judgment in this foreclosure matter. Defendants' positions in this appeal are not supported under Ohio law, for the reasons we explain in detail below.

In June 2001, Ms. Mitchell borrowed $118,753 from Washington Mutual Home Loans, Inc., with a note secured by a mortgage. The mortgage named Mortgage

Electronic Registration Systems, Inc., ("MERS") as mortgagee. MERS filed a foreclosure action on the mortgage in 2003, but after Ms. Mitchell executed a loan modification agreement that reamortized the mortgage, MERS voluntarily dismissed the complaint in January 2004.

From 2003 until 2013, three assignments of the mortgage were executed. In November 2003, Washington Mutual Bank, FA, assigned the mortgage to EMC Mortgage Corporation. Then in August 2012, EMC assigned the mortgage to BONY. Finally, in April 2013, MERS assigned the mortgage to BONY as trustee. A Hamilton County official examiner subsequently deemed the 2003 and 2012 assignments invalid because those assignments were not authorized by MERS. However, the examiner did not address the 2013 assignment, which was authorized by MERS.

BONY filed a foreclosure action on the mortgage in June 2013, but the trial court dismissed without prejudice for failure to timely prosecute the action. BONY refiled in 2015, but then voluntarily dismissed in January 2017 for reasons that are unclear. BONY again refiled in May 2019. The parties eventually filed cross-motions for summary judgment, and the trial court granted a judgment in BONY's favor. In this appeal from that judgment, defendants raise 11 assignments of error, which address a variety of procedural issues.

Defendants' first assignment of error maintains that this action is time barred under the savings statute because BONY did not refile within one year after voluntarily dismissing the 2015 foreclosure action. Under R.C. 2305.19(A), after a plaintiff has voluntarily dismissed her claim, she may refile "within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise upon the merits *or within the period of the original applicable statute of limitations, whichever occurs later*." (Emphasis added.) By R.C. 2305.19(A)'s plain terms, the one-year period is inapplicable where the new action is filed within the original statute of limitations. R.C. 1303.16(A) provides a six-year statute of limitations for foreclosure actions, which is triggered after the due date in the note or the date of acceleration. There is no dispute that the statute

of limitations was triggered on June 7, 2013, (when BONY filed its first complaint against defendants) and expired six years later on June 7, 2019. Defendants conceded in their objections to the magistrate's decision that the mortgage was accelerated on June 7, 2013, and thus the statute of limitations expired on June 7, 2019. The docket reflects that BONY filed this foreclosure action on May 29, 2019 (i.e., roughly one week before the statute of limitations expired). Accordingly, the one-year period in the savings statute is inapplicable because this action was filed before the statute of limitations expired. We accordingly overrule the first assignment of error.

Defendants' second assignment of error challenges the grant of summary judgment to BONY on their counterclaim for quiet title. Defendants insist that they are entitled to quiet title because they are in possession of the property in fee simple. "A mortgage is * * * nothing more than a lien on the premises, the purpose of which is to put other lien holders on notice that there is a prior claim on the premises." *Bank of New York Mellon Trust Co., N.A. v. Unger*, 8th Dist. Cuyahoga No. 97315, 2012-Ohio-1950, ¶ 37. There is no requirement that a mortgagee have possession of real property to foreclose on it. *See id.* (holding that defendants were not entitled to quiet title where they were in possession of real property that was subject to a mortgage because a mortgage is "not a 'cloud' on the [possessor's] title"). We overrule the second assignment of error.

Defendants' third assignment of error ostensibly argues that BONY lacked standing to bring this foreclosure action. "Whether established facts confer standing to assert a claim is a matter of law. We review questions of law de novo." *Portage Cty. Bd. of Commrs. v. City of Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 90. "To establish traditional standing, a party must show that the party has 'suffered (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief.' " *State ex rel. Food & Water Watch v. State,* 153 Ohio St.3d 1, 2018-Ohio-555, 100 N.E.3d 391, ¶ 19, quoting *Moore v. City of Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975

N.E.2d 977, ¶ 22. MERS assigned the mortgage to BONY in 2013. Defendants point to nothing in the record to establish that this assignment is invalid or fraudulent. Ohio law is clear that the assignee of a mortgage at the commencement of the suit has standing to foreclose on that mortgage. *HSBC Bank USA, Natl. Assocs. v. Sherman*, 1st Dist. Hamilton No. C-120302, 2013-Ohio-4220, ¶ 15 (holding that an assignee of a mortgage had standing to foreclose on it). BONY had standing as assignee of the mortgage, and we thus overrule the third assignment of error.

Defendants' fourth assignment of error challenges the trial court's decision granting an extension of time to respond to defendants' counterclaims. Defendants maintain that BONY could not obtain an extension because it failed to prove "excusable neglect." Although defendants cite to caselaw addressing "excusable neglect" under Civ.R. 60(B), BONY filed a motion for extension, which is governed by Civ.R. 6(B). Under Civ.R. 6(B), a party moving for an extension is only required to prove excusable neglect when the motion was "made after the expiration of the specified period." BONY filed its motion for extension 22 days after the counterclaim was filed—that is, within the 28-day period for answering per Civ.R. 12. Since BONY filed its motion for extension before the specified period expired, it had no obligation to prove excusable neglect under Civ.R. 6(B). Accordingly, we overrule the fourth assignment of error.

For the fifth assignment of error, defendants raise a litany of theories. They argue that (1) MERS had no authority to assign the mortgage to BONY because MERS had already transferred the mortgage, (2) MERS acted with unclean hands by filing its foreclosure action against Ms. Mitchell, and (3) BONY's voluntary dismissal in 2017 constituted a double dismissal.

Defendants point to nothing in the record that supports their claim that MERS had already transferred the mortgage before assigning it to BONY. And while defendants invoke the doctrine of unclean hands, they do not point to supporting evidence to suggest that MERS acted with unclean hands (or cite to any legal authorities to explain how this theory applies here). Accordingly, these theories fail.

Turning to the double dismissal theory, defendants argue that the voluntary dismissal in 2017 constituted a double dismissal because MERS voluntarily dismissed its foreclosure action against them in 2004. Civ.R. 41(A)(1) provides that "a plaintiff * * * may dismiss all claims asserted by that plaintiff against a defendant" and "the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court." The double dismissal rule only applies to voluntary dismissals by the plaintiff under Civ.R. 41(A)(1); other forms of dismissal under Civ.R. 41 "do not implicate the double dismissal rule." *Olynyk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878, 868 N.E.2d 254, ¶ 26.

That said, we have acknowledged that Civ.R. 41(A) does not " 'apply to bar a third claim if the third claim [is] *different* from the dismissed claims.' " (Emphasis sic.) *Deutsche Bank Natl. Trust Co. v. Smith*, 1st Dist. Hamilton No. C-140514, 2015-Ohio-2961, ¶ 14, quoting *U.S. Bank Natl. Assn. v. Gullotta*, 120 Ohio St.3d 399, 2008-Ohio-6268, 899 N.E.2d 987, ¶ 33. An action on a note or mortgage is "different" than dismissed claims if there has been a " 'change as to the terms of the note or mortgage.' " *Id.,* quoting *Gullotta* at ¶ 38. In *Smith*, we ultimately held that where the defendant paid to cure her default on a note after the plaintiff had twice voluntarily dismissed its claim, the third claim was "different" from previous claims, such that the double dismissal rule did not apply. *Id.* In this case, there is no genuine dispute that the 2003 loan modification between MERS and defendants was valid, and changed the terms of the agreement by providing defendants with financial relief in connection with the mortgage. In light of the 2003 loan modification, the dismissal of the 2003 foreclosure action does not qualify as the first voluntary dismissal under *Smith*. It follows that the 2017 voluntary dismissal did not constitute the second voluntary dismissal for the purposes of Civ.R. 41(A). We thus overrule the fifth assignment of error in full.

The sixth assignment of error insists that defendants are entitled to default judgment because BONY failed to timely respond to their request for admissions. Because defendants never raised this theory below, it is waived on appeal. *U.S. Bank*

Natl. Assn. v. Broadnax, 1st Dist. Hamilton No. C-180650, 2019-Ohio-5212, ¶ 13 (" 'A party who fails to raise an argument in the court below waives his or her right to raise it on appeal.' "), quoting *State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278, 611 N.E.2d 830 (1993). We accordingly overrule the sixth assignment of error in full.

In the seventh assignment of error, defendants posit that BONY cannot enforce the mortgage because the original note was lost. BONY concedes that the original note was lost, but maintains that the mortgage is enforceable under R.C. 1303.38(A), which allows a party to enforce a lost instrument if (1) "[t]he person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred," (2) "[t]he loss of possession was not the result of a transfer by the person or a lawful seizure," and (3) "the person cannot reasonably obtain possession of the instrument because * * * its whereabouts cannot be determined." The first element is plainly met. BONY acquired ownership of the instrument from MERS. MERS is the original mortgagee, and thus had the authority to enforce the mortgage when the note was lost in November 2003. The second element is also met. There is no evidence that suggests that the note was transferred or lawfully seized. Finally, the third element is met because BONY introduced affidavits that aver that the note could not be located after a diligent search was conducted. There is no evidence to the contrary. Accordingly, BONY could enforce the mortgage under R.C. 1303.38(A) even though the note that the mortgage secured has been lost. We overrule the seventh assignment of error.

The eighth assignment of error insists that defendants were entitled to summary judgment because BONY failed to timely respond to their motion for summary judgment. We overrule this assignment of error because defendants failed to raise this theory below. *See Broadnax* at ¶ 13.

The ninth assignment of error challenges the denial of defendants' motion to set aside the magistrate's decision. We review the denial of a motion to set aside a

magistrate's order for abuse of discretion. *Freeman v. Freeman*, 9th Dist. Wayne No. 07CA0036, 2007-Ohio-6400, ¶ 43. Defendants argue that the trial court abused its discretion here because they are in possession of the certificate of title and because BONY's evidence is fabricated. Again, the mortgagor's possession of the original title does not preclude enforcement of a mortgage. Moreover, defendants have come forward with no evidence to support their claim that BONY's evidence is fabricated and/or defaced. We see no basis for finding that the trial court abused its discretion by overruling the motion to set aside the magistrate's order, and thus overrule the ninth assignment of error.

In the tenth assignment of error, defendants essentially reframe the same arguments that we have rejected above (i.e., the lawsuit was time barred, their possession of the certificate of title precludes foreclosure, and BONY lacks standing). Based on our analysis above, we overrule the tenth assignment of error.

The eleventh assignment of error insists that the trial court order violated R.C. 1109.75, which deals with securitization transactions. Defendants ostensibly propose that a trustee, such as BONY, has no authority to foreclose on a mortgage that is held in trust. R.C. 1109.75 says nothing to that effect, and defendants fail to cite to any other authority that supports this proposition. We see no basis in Ohio law to support defendants' argument, and we therefore overrule the eleventh assignment of error.

In light of the foregoing, we overrule all 11 assignments of error and affirm the judgment of the trial court.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

ZAYAS, P.J., BERGERON and **BOCK, JJ.**

To the clerk:

Enter upon the journal of the court on May 25, 2022,

per order of the court_____.

Presiding Judge