

MAR 08 2010

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

CLERK OF COURTS

BAC HOME LOANS SERVICING,
L.P. FKA COUNTRYWIDE HOME
LOANS SERVICING, L.P.,

Case No. CV2009 06 2801

(Charles L. Pater, Judge)

Plaintiff

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

vs.

ANGELA B. BATES, et al.,

Defendant

This matter is before the court on the motion for summary judgment filed by plaintiff BAC Home Loans Servicing, L.P. fka Countrywide Home Loans Servicing, L.P. ("BAC"). Upon consideration of the motion, the pleadings and the other matters of record herein, and for good cause shown, the motion is DENIED.

This is a foreclosure action. Defendant Angela B. Bates executed a promissory note and mortgage in favor Countrywide Bank, FSB on July 6, 2007. The original note was assigned to BAC pursuant to an allonge on that same date and, thereafter, Mortgage Electronic Registration Systems, Inc., as nominee for Countrywide, assigned the mortgage to BAC. According to the affidavit filed in support of BAC's motion for summary judgment, the note is in default and there is now due and payable the principal amount of \$125,702.28 plus interest at the rate of 6.5% per annum from June 1, 2008.

Under Civil Rule 56(C), a trial court may grant a motion for summary judgment when there is no genuine issue of material fact, the moving party is entitled to

Judge
Charles L. Pater
Common Pleas Court
Butler County, Ohio

judgment as a matter of law, and it appears that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. See, *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327. The court views the facts in a light most favorable to the non-moving party. See, *Stefano v. Commodore Cove E., Ltd.* (9th Dist. 2001), 145 Ohio App.3d 290, 293.

If a mortgagor breaches a condition of the mortgage, the mortgagee is entitled to sue to foreclose on the property. *Bradfield v. Hale* (1902), 67 Ohio St. 316, 65 N.E. 1008, at paragraph one of the syllabus. It is well-settled law in Ohio that once a mortgagor has defaulted in payment under the terms of a note, and the note has been accelerated, the mortgagee is entitled to judgment. See, *Gaul v. Olympia Fitness Center, Inc.* (8th Dist. 1993), 88 Ohio App.3d 310.

Here, however, Bates asserts that BAC is not entitled to foreclose for two reasons. She first argues that BAC is not the real party in interest and, therefore, has no standing to bring this action because the allonge purporting to transfer Countrywide's interest in the note to BAC was not affixed to the original note. An allonge is a separate document or "paper affixed to the instrument" that, therefore, "is a part of the instrument." R.C. 1303.24(A)(2). Bates asserts that a review of the copy of the note and allonge attached to BAC's motion can only lead to the conclusion that the allonge was not attached to the original note in this case. However, the assignment of a note may be accomplished in ways other than an allonge.

Judge
Charles L. Pater
Common Pleas Court
Butler County, Ohio

Every action must be prosecuted in the name of the real party in interest. Civ.R. 17(A). The real party in interest in a foreclosure action is the current holder of the note and mortgage. *Everhome Mtge. Co. v. Rowland*, (10th Dist. 2008), 2008-Ohio-1282. Here, the *mortgage* was effectively transferred and, as BAC argues, this alone is sufficient as a matter of law to transfer Countrywide's interest in the note.

The transfer of a mortgage will be found sufficient to transfer the related note where it is the clear intent of the parties at the time they executed the note and mortgage to keep the two together rather than permitting the transfer of one without the other. See, *Bank of New York v. Dobbs* (5th Dist. 2009), 2009-Ohio-4742, par. 36 ("Because the note refers to the mortgage and the mortgage, in turn, refers to the note, we find a clear intent by the parties to keep the note and mortgage together, rather than transferring the mortgage alone."); see also, *Deutsche Bank Natl. Trust Co. v. Ingle* (8th Dist. 2009), 2009-Ohio-3886, ft.nt. 2; *Deutsche Bank Natl. Trust Co. v. Doucet* (10th Dist. 2008), 2008-Ohio-589, par. 12. Whether or not the allonge is, in fact, attached to the note here, the evidence establishes that it was the intent of Bates and her original lender, Countrywide, to keep the note and mortgage together rather than permitting the transfer of one without the other.

First, the mortgage clearly refers to the note, defining "note," as "the promissory note signed by borrower [Bates] and dated July 6, 2007." Furthermore, the mortgage states:

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for

Lender and Lender's successors and assigns) and to the successors and assigns of MERS the following described property . . . [there follows the legal description of the property].

In addition, the note clearly refers to the mortgage. Section 10 of the note provides:

In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I made in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. . . .

Finally, the assignment of mortgage from MERS to BAC clearly states that it transfers both the note and the mortgage.

Under these same facts, including documents with language virtually identical to that quoted above, the Fifth District Court of Appeals in *Bank of New York v. Dobbs*, supra, held that the note and mortgage sufficiently referred to each other to evidence the parties intent that the note and mortgage be kept together. *Id.* at par. 36. Moreover, the Restatement (Third) of Property (Mortgages), Sec. 5.4(b) provides that "a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise." Here, there the parties did not "agree otherwise."

Based on the foregoing, BAC is the real party in interest to bring this action. However, Bates also argues that because her mortgage is guaranteed by the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and she is eligible for the Home Affordable Modification Program ("HAMP"), BAC was legally and equitably required to consider her for a loan modification under that program before instituting this foreclosure action. The court agrees that BAC is required to consider her for a loan

modification under the HAMP program, though whether this was required to have been done before suit was filed and whether she is, in fact, eligible for as modification under the program can not be determined from the evidence in the record. Nevertheless, because Bates has clearly not been considered under the program, there are genuine issues of material fact that preclude summary judgment.

On March 4, 2009, the HAMP program, a component of the federal government's Making Home Affordable Program, was implemented. The HAMP program was designed to address the crisis in the housing market, and provides guidelines for modification of mortgages guaranteed by Freddie Mac, Fannie Mae, and other financial institutions receiving assistance under the federal Financial Stability Plan. The goal of the program is to help troubled borrowers who have defaulted on their mortgages, or whose default is imminent, keep their homes. Bates's mortgage is guaranteed by Freddie Mac.

Guidelines developed for the HAMP program are set forth, among other places, in the Single-Family Seller/Service Guide, published by Freddie Mac. In section 5 of chapter C65 of the Guide, BAC, or any other loan servicer, is required to "solicit all Borrowers who are 31 days or more delinquent for a modification under HAMP . . . provided the eligibility criteria specified in this chapter are met." Section 7 of chapter C65 of the guide provides that after the loan servicer determines that a borrower is eligible for the program, the servicer must prepare and send to the borrower a workout plan that provides for a three month trial period. Chapter C65.7(a) then provides that:

Servicers must not refer a Mortgage to foreclosure or conduct a foreclosure sale of the property securing the Mortgage, until the Borrower has had time to respond to the Trial Period Plan offer, the Servicer has made the required attempts to contact the Borrower, and the Trial Period Plan Offer Deadline has expired. Servicers should postpone any foreclosure sale scheduled to occur during that time period in the most effective manner to avoid the need to restart the foreclosure process. . . .

After the borrower has executed the trial period plan, lenders are subject to additional restrictions. Chapter C65.7(b) provides, in pertinent part, that:

. . . Servicers may not refer the Mortgage to foreclosure if the Borrower has executed the Trial Period Plan and commenced payments during the Trial Period. If the Mortgage is already in foreclosure, the Servicer must postpone the foreclosure sale in the most cost effective way and ensure there is minimal impact on the foreclosure timeline if the Borrower fails to remit the remaining payments during the Trial Period. Except in "foreclosure restart states," any foreclosure sale must be suspended and no new foreclosure action may be initiated during the Trial Period, including any period of time between the Borrower's execution of the Trial Period Plan and the Trial Period Plan Effective Date. Foreclosure actions may not be initiated or restarted until the Borrower has failed the Trial Period Plan and the Borrower has been considered and found ineligible for other available foreclosure prevention options.

Bates asserts in an affidavit attached to her response to BAC's motion that she meets all the eligibility requirements for the HAMP program. There is no evidence in the record that BAC ever evaluated her under the eligibility criteria, and if she did indeed meet those criteria prior to this suit being filed, then BAC was prohibited from referring her loan for foreclosure, as Bates argues. Instead, BAC would have been required to provide her with a loan modification plan that included a 90-day trial period. Bates has clearly not been evaluated, provided a loan modification plan, or provided a trial period.

Judge
Charles L. Pater
Common Pleas Court
Butler County, Ohio

Moreover, if Bates meets the eligibility criteria now, then BAC would, again, have to provide her with a loan modification plan that includes a 90-day trial period, and it would be prohibited from proceeding with a sheriff's sale. Under either this scenario or that previously described, Bates is entitled to be evaluated under the HAMP eligibility criteria, and she has not been. Therefore, genuine issues of fact exist which prohibit this court from granting BAC's motion for summary judgment.

ENTER



Charles L. Pater, Judge

cc: Stacy L. Hart, Esq.
Thierry V. Guastavino, Esq.

Judge
Charles L. Pater
Common Pleas Court
Butler County, Ohio