[Cite as *Bank of New York v. Dobbs*, 2009-Ohio-4742.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
THE BANK OF NEW YORK AS	:	Hon. W. Scott Gwin, P.J.
TRUSTEE	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
Plaintiff-Appellee	:	
	:	
-vs-	:	Case No. 2009-CA-000002
	:	
KEVIN DOBBS, ET AL	:	
	:	
Defendants-Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Knox County Court of Common Pleas, Case No. 08FR06-0341
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 8, 2009

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
LAURA C. INTANTE LAW OFFICES OF JOHN D. CLUNK 5601 Hudson Drive Hudson, OH 44236	SCOTT E. TORGUSON MICHAEL GIBBONS-CAMP 12 W. Locust St. Newark, OH 43055

Gwin, P.J.

{¶1} Defendants Kevin Dobbs and Rebecca Slone appeal a judgment of the Court of Common Pleas of Knox County, Ohio, entered in favor of plaintiff-appellee the Bank of New York as Trustee for the Certificate Holders CWAMS, Inc. Asset-Backed Certificate, Series 2006-11, which ordered appellants' home be sold in a sheriff's foreclosure sale. Appellants assign two errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT TO THE SECURITIZED TRUST.

{¶3} "II. THE TRIAL COURT ERRED IN GRANTING EQUITABLE RELIEF BY SUMMARY JUDGMENT WITHOUT ANY EXPLICIT OR IMPLICIT INDICATION IT WEIGHED THE EQUITIES."

{¶4} Appellants' statement made pursuant to Loc. App. R. 9, asserts there are material facts in genuine dispute in this matter. Appellants list the disputed facts as: 1.) Whether appellee was the holder of appellants' note; 2.) whether appellee received transfer of appellants' note and mortgage through means other than proper negotiation; and 3.) whether appellee presented any facts in support of its request for the equitable remedy of foreclosure.

{¶5} The record indicates appellants purchased their home in 2006, with a loan through Countrywide Home Loans. The appellants also obtained a second loan from Countrywide Home Loans at the same time. Appellants reside in the home with their two children.

{¶6} Appellants fell behind on their mortgage payments in 2007, and entered into a repayment plan with Countrywide Home Loans. After an unspecified length of

time, Countrywide unilaterally cancelled the repayment plan even though appellants were current with the agreed upon payments. Appellants attempted to negotiate a new re-payment plan, but after some delay from October 2007, to March 2008, and after receiving conflicting information, appellants learned the home was in foreclosure. Countrywide offered to stop the foreclosure if appellants paid $4,000.00. Appellants have the ability to make regular payments on their home, but could not pay the $4,000.00.

{¶7} Appellants asserted they had never heard of appellee until appellee filed its complaint.

{¶8} Civ. R. 56 states in pertinent part:

{¶9} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶10} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

{¶11} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v. Shaffer,* 90 Ohio St.3d 388, 2000-Ohio-186.

{¶12} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, Id. The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

{¶13} In the recent case of *Wilborn v. Bank One Corporation,* 121 Ohio St. 3d 546, 2009-Ohio-306, 906 N.E. 2d 396*,* the court explained: "Foreclosure is a legal

process guided by common law and statute. See, e.g., R.C. Chapter 2329 (execution against property); *Carr v. Home Owners Loan Corp*. (1947), 148 Ohio St. 533, 36 O.O. 177, 76 N.E.2d 389. As a result, foreclosure affords a number of mechanisms and processes intended as legal protection for the debtor. See, e.g., R.C. 2329.02 (public foreclosure proceedings); R.C. 2329.09 (writs of execution); R.C. 2329.17 (appraisal of property). The statutory and common-law nature of foreclosure proceedings and of the right of redemption results in a system of "checks and balances" for the borrower and lender. The foreclosure proceeding is the enforcement of a debt obligation***". Id. at paragraph 17.

I & II

{¶14} Appellants' issues are intertwined, so for the purposes of clarity we will address the two assignments of error together.

{¶15} Appellants assert there are three issues presented herein. First, whether appellee produced evidence it was the real party in interest and had the right to foreclose on appellants' home. The second issue is whether there was a dispute of the material fact about the equities weighing in favor of foreclosure, and the third issue is whether a court is required to weigh the equities before granting equitable relief.

{¶16} First Issue

{¶17} In order to proceed, appellee must establish it has standing to present the claim. *Cuyahoga County Board of Commissioners v. State of Ohio* (2006), 112 Ohio St. 3d 59, 2006-Ohio-6499. In order to foreclose on appellants' property appellee had to demonstrate it was a person entitled to enforce the note as defined by the statute.

Appellants argue appellee did not prove it is the holder of the note and mortgage, and further, did not demonstrate it had the right to foreclose.

{¶18} R.C. 1303.31 states:

{¶19} "(A) "Person entitled to enforce" an instrument means any of the following persons:

{¶20} "(1) The holder of the instrument;

{¶21} "(2) A non-holder in possession of the instrument who has the rights of a holder;

{¶22} "(3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 1303.38 or division (D) of section 1303.58 of the Revised Code.

{¶23} "(B) A person may be a "person entitled to enforce" the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."

{¶24} The copy of the note attached to appellee's complaint is not payable to bearer, but to Countrywide Home Loans, Inc. The mortgage between Countrywide and appellants names Mortgage Electronic Registration Systems, Inc. (MERS) as the mortgagee in the transaction, but the note does not mention MERS or any other entity.

{¶25} The record contains a document entitled "Assignment of Note and Mortgage" which was recorded with the Knox County Recorder's office. The assignment states: "***Mortgage Electronic Registration Systems, Inc. acting solely as a nominee for Countrywide Home Loans, Inc. *** for valuable consideration ***does hereby sell, assign, transfer and set over, without recourse, unto The Bank of New York

as Trustee for the Certificate Holders CWAS Inc. Assert-Backed Certificates, Series 2006-11*** a certain Mortgage Deed bearing the date of April 27, 2006, executed and delivered by Kevin Dobbs*** and recorded in Book 1012, Page 0564 of the Knox County Recorder's office** together with the Promissory Note secured thereby and referred to therein; and all sums of money due and to become due thereon."

{¶26} Appellants argue the chain of title is incomplete because the record does not contain any evidence Countrywide assigned the note to MERS. Courts have generally stated the debt is the promissory note, and the mortgage is the only evidence of the debt and the security offered. *In re: Perrysburg Marketplace Co.* (1997) 208 B.R. 148, 34 UCC Rep. Serv. 2d 731, at 159, citations deleted.

{¶27} Section 5.4 of the Restatement III, Property (Mortgages) discusses transfers of the obligations secured by a mortgage and transfers of the mortgage itself by the original mortgagee to a successor, or a chain of successors. Such transfers occur in what is commonly termed the "secondary mortgage market", as distinct from the "primary mortgage market" in which the mortgage loans are originated by lenders and executed by borrowers.

{¶28} The Restatement asserts as its essential premise is that it is nearly always sensible to keep the mortgage and the right of enforcement of the obligation it secures in the hands of the same party. This is because in a practical sense separating the mortgage from the underlying obligation destroys the efficacy of the mortgage, and the note becomes unsecured. The Restatement concedes on rare occasions a mortgagee will disassociate the obligation from the mortgage, but courts should reach this result only upon evidence that the parties to the transfer agreed. Far more commonly, the

intent is to keep the rights combined, and ideally the parties would do so explicitly. The Restatement suggests that with fair frequency mortgagees fail to document their transfers so carefully. Thus, the Restatement proposes that transfer of the obligation also transfers the mortgage and vice versa. Section 5.4 (b) suggests "Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise." Thus, the obligation follows the mortgage if the record indicates the parties so intended.

{¶29} In Ohio it has been held that transfer of the note implies transfer of the mortgage. In *Lasalle Bank National Association v. Street,* Licking App. No. 08CA60, 2009-Ohio-1855, this court stated:

{¶30} "Where a note secured by a mortgage is transferred so as to vest the legal title to the note in the transferee, such transfer operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered. *Kuck v. Sommers* (1950), 59 Ohio Law Abs. 400, 100 N.E.2d 68, 75. Furthermore, Ohio courts have recognized that technical noncompliance with Civ. R. 56 authentication procedures is not prejudicial if the authenticity of the supporting documents is not called into question. See *Insurance Outlet Agency, Inc. v. American Medical Sec., Inc.,* Licking App. No. 01 CA 118, 2002-Ohio-4268, paragraph 13, citing *Knowlton v. Knowlton Co.* (1983), 10 Ohio App.3d 82, 460 N.E.2d 632; *International Brotherhood of Electrical Workers v. Smith* (1992), 76 Ohio App.3d 652, 602 N.E.2d 782; *In re: Foreclosure of Liens* (Feb. 9, 2000), Harrison App. No. 96-489-CA. In the case sub judice, appellants did not expressly contradict the evidence of ownership via their memorandum contra or

affidavit; as such, we hold appellants' "real party in interest" argument must fail. Cf. *Provident Bank v. Taylor,* Delaware App.No. 04CAE05042, 2005-Ohio-2573, paragraph 17." *Street,* at paragraph 28.

{¶31} Particularly given the present state of banking and financing it makes little sense not to apply this reasoning to transfers of mortgages without express transfer of the note, where the record indicates it was the intention of the parties to transfer both.

{¶32} Here, the mortgage specifically states "This Security Instrument secures to Lender: (1) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (2) the performance of Borrower's conveyance under the 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]."

{¶33} The mortgage further provides "***Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS ***has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument."

{¶34} The promissory note contains Section 11, entitled "Secured Note". It states "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 day as this Note, protects the Note Holder from possible losses which might result if I do

not keep the promises which I make 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 the Note. ***"

{¶35} The assignment from MERS to appellee states it transfers both the note and the mortgage.

{¶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. We conclude the chain of title between Countrywide, MERS and appellee is not broken.

{¶37} Appellants also argue appellee did not prove it was entitled to foreclose on the home by virtue of these assignments of the note and mortgage.

{¶38} Under Ohio law, the right to enforce a note cannot be assigned but instead, the note must be negotiated in accord with Ohio's version of the Uniform Commercial Code. See R. C. 1301.01 et seq.; see also U.C.C. Article 3. An attempt to assign a note creates a claim to ownership, but does not transfer the right to enforce the note. Here, the assignment from MERS to appellee states the mortgage and note were sold, assigned and conveyed without retention of any rights.

{¶39} Finally, appellants argue all the documents in the record are not certified or authenticated. Under Civ. R. 56 (F), these documents would not be admissible as evidence to support a motion for summary judgment.

{¶40} The record contains an affidavit from Carrie Hoover, a Loan Servicing Agent and Vice President of Countrywide Home Loans. She states the copies of the note and mortgage attached to the pleadings are true and accurate copies of the

original instruments. Because the original instruments were in the possession of Countrywide, Hoover had access to the original note and mortgage. We find her affidavit provides authentication of the documents even though Hoover is not employed by MERS or appellee. Appellants did not come forward with any evidence indicating any of the documents were inaccurate.

{¶41} We find appellee has legal standing to bring the foreclosure action.

{¶42} Issue Two and Three

{¶43} Appellants argue the court was required to weigh the equities in determining whether to grant the foreclosure. Appellants offered the affidavit of appellant Rebecca Slone, who stated Countrywide had cancelled the repayment plan originally agreed to even though she was current with her payments under the terms of the repayment plan. Countrywide gave no reason why the plan had been cancelled, and suggested they request a "hardship". Appellants filled out the paperwork and submitted it to Countrywide, who rejected it because appellants were not current on the mortgage. Thereafter, appellants applied for another loan modification, but in the mean time, their home went into foreclosure. Slone states she had the ability to make regular payments on the mortgage.

{¶44} It is axiomatic the foreclosure requires two steps: (1) A legal determination on the debt, and (2) an equitable decision whether to enter an order of foreclosure. *In re: Perrysburg Marketplace Co.,* supra.

{¶45} Appellants cite us to *Takis v. Morlock Properties,* 10th Dist. Case No. 07AP-675, 2008-Ohio-6676, as authority for the proposition a court must consider how its foreclosure ruling will allocate the harm between the parties. Appellants urge

appellee presented no evidence dealing with the equitable issues presented by the foreclosure action.

{¶46} A digression into the history of the equitable considerations in a mortgage is revealing. Restatement III, Property (Mortgages), Section 3.1 explains at English common law a mortgage was originally a fee simple conveyance subject to a condition subsequent. In the 14th and 15th centuries, a borrower would convey the property to the lender subject to the condition that on a date certain, he would repay the loan in full. This had the effect of giving the lender legal title to the property along with the right of possession, and to the right to collect any rents and/or profits. This was necessary because at that time lenders could not charge interest on the loans. If he repaid the loan on time, the borrower would have the right to re-enter and to terminate the lender's fee simple estate.

{¶47} As a consequence, if the mortgagor defaulted and did not make full payment on the date certain, the mortgagee obtained all interest in the property. The Restatement suggests this was an absolute rule applied even if the borrower was unable to find the lender to make payment. One may draw various inferences regarding how this rule must have played out between the borrower and lender. Eventually, English courts began to develop the equitable right of redemption. Under the equitable right of redemption, the mortgagor has a reasonable length of the time after the due date to pay the loan in full and redeem the property. Our term "foreclosure" refers to the lender's equitable right to foreclose the buyer's right of redemption.

{¶48} Ohio has always applied the equity of redemption principle, see *Anonymous* (1823), 1 Ohio 235, 1 Hammond 135. In *Anonymous,* the Ohio Supreme

Court discussed a bill in equity to foreclose the equity of redemption in a mortgaged premises. In 2009 the Supreme Court referenced the rule: "***One such legal protection is the right of redemption, an absolute right that allows the defaulting borrower to redeem the property even after its public sale (but before confirmation) and to thereby terminate the lender's foreclosure proceedings. Kuehnle & Levey, Baldwin's Ohio Real Estate Law (2008), Section 33:4; R.C. 2329.33; *Hausman v. Dayton* (1995), 73 Ohio St.3d 671, 676, 653 N.E.2d 1190." *Wilborn,* supra, at paragraph 17."

{¶49} *Wilborn* continues: "A defaulting borrower is not entitled by law to have a mortgage loan reinstated. Upon a borrower's default, a lender is entitled to initiate foreclosure proceedings, to be paid in full, and to sever its relationship with the defaulting borrower." Id. at paragraph 18.

{¶50} Clearly, lender and borrower both have equitable rights in a foreclosure action. A court's task in weighing the equities is to determine whether the borrower should be given more time in which to redeem the property. Contrary to appellants' argument, weighing the equities should not involve rewriting the mortgage contract for the parties.

{¶51} Courts have occasionally considered other aspects of equity in deciding a foreclosure action, for example, in land contracts, see *Bradford v. B & P Wrecking Company,* 171 Ohio App.3d 616, 872 N.E.2d 331, 2007 -Ohio- 1732; in unrecorded mortgages, see *Wead v. Lutz*, 161 Ohio App. 3d 580, 2005-Ohio-2921, 831 N.E. 2d 482; or in marshalling liens, see *Deutsche Bank Trust Co. Americas,* Cuyahoga Co. App. No. 89738, 2008-Ohio-2778. In addition, some courts have found if a bank accepts less than the full installment payment, it may be estopped from foreclosing

because a full payment was not made, unless the mortgage contains an anti-waiver clause. *First National Bank of America v. Pendergrass*, Erie App. No. E-08-048, 2009-Ohio-3208 at paragraph 25, citations deleted. Here, the mortgage between these parties contains a clause which provides acceptance of less than the full monthly payment does not constitute a waiver of any right under the mortgage.

{¶52} We find appellants did not come forward with evidence legally sufficient to create a genuine issue of material fact regarding whether there are equitable considerations affecting the court's decision on the foreclosure action.

{¶53} The first and second assignments of error are overruled.

{¶54} For the foregoing reasons, the judgment of the Court of Common Pleas of Knox County, Ohio, is affirmed.

By Gwin, P.J., and

Delaney, J., concur,

Hoffman, J., concurs in part;

dissents in part

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. PATRICIA A. DELANEY

WSG:clw 0724

Hoffman, J., concurring in part and dissenting in part

{¶55} I concur in the majority's thorough and well reasoned analysis and disposition of Appellant's Assignment of Error I.

{¶56} I appreciate the majority's scholarly "digression into the history of the equitable considerations in a mortgage" as it impacts today's mortgage foreclosure crisis. While I agree with its conclusion Appellants did not come forward with evidence legally sufficient to create a genuine issue of material fact regarding whether there are equitable considerations affecting foreclosure in this case, I find the fact Countywide Home Loans unilaterally cancelled a repayment plan with Appellants even though Appellants were current with payments under that repayment plan sets forth an affirmative defense on legal contractual grounds sufficient to defeat summary judgment.

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HON. WILLIAM B. HOFFMAN

[Cite as *Bank of New York v. Dobbs*, 2009-Ohio-4742.]

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

THE BANK OF NEW YORK AS TRUSTEE	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
KEVIN DOBBS, ET AL	:	
Defendants-Appellants	:	CASE NO. 2009-CA-000002

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Knox County, Ohio, is affirmed. Costs to appellants.

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. PATRICIA A. DELANEY