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DISTRICT II

July 24, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP2705-FT

Deutsche Bank National Trust Company v. Richard E. Johnson
(L.C. #2008CV252)

Before Brown, C.J., Reilly and Gundrum, JJ.

Richard and Andrea Johnson appeal from a judgment of foreclosure. On appeal, the Johnsons argue that Deutsche Bank National Trust Company did not have standing to enforce their note and foreclose upon their mortgage. Pursuant to a presubmission conference and this court's order of January 29, 2013, the parties submitted memorandum briefs. Upon review of those memoranda and the record, we agree with the circuit court that Deutsche Bank had standing. Therefore, we affirm.

The Johnsons defaulted on a note secured by a mortgage on their home. Deutsche Bank's amended foreclosure complaint alleged the Johnsons' indebtedness and default. The note and mortgage were attached as exhibits to Deutsche Bank's amended complaint. The circuit court granted Deutsche Bank summary judgment after concluding that the following facts were undisputed: the Johnsons were in default, Deutsche Bank is the holder of the note, and balances are due on the note.

On appeal, the Johnsons renew their argument that Deutsche Bank lacked standing to enforce the note and foreclose upon the mortgage because Deutsche Bank never recorded the mortgage and could not prove that it owned the mortgage. Because the Johnsons limit their appellate challenge to standing, if we conclude that Deutsche Bank had standing to enforce the note and foreclose upon the mortgage, we will necessarily hold that the circuit court properly granted summary judgment.

On the question of whether Deutsche Bank had standing, we review the circuit court's grant of summary judgment de novo, and we apply the same methodology employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis.2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). "We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Streff v. Town of Delafield*, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994).

The Johnsons claim that Deutsche Bank lacked standing because it did not have an interest in the mortgage. The summary judgment record does not support this claim. In support of its summary judgment motion, Deutsche Bank submitted the affidavit of Erin Hirzel Roesch, who made the affidavit from her personal knowledge and averred that she was the custodian of the

accounting records relating to the Johnsons' mortgage. The affidavit attached the note and mortgage and alleged that the Johnsons' note and mortgage were subject to a Pooling and Servicing Agreement for which Deutsche Bank was the trustee. The original lender, Fremont Investment & Loan, endorsed the note in blank. *See* WIS. STAT. § 403.205(2) (2011-12).¹ The affidavit averred that Deutsche Bank was the holder of the note and mortgage. The affidavit also alleged the Johnsons' default and the balance due.

In *PNC Bank, N.A. v. Bierbrauer*, 2013 WI App 11, 346 Wis. 2d 1, 827 N.W.2d 124, we addressed the circumstances under which a bank employee's affidavit would suffice to establish the bank's right to enforce a note for purposes of summary judgment. In *Bierbrauer*, the court concluded that a bank employee had adequate personal knowledge to aver that PNC was the current note holder where the affidavit established that the bank had possession of the loan records and the affidavit was based upon the affiant's inspection of those records. *Id.*, ¶10. We are sufficiently persuaded that, given the particular facts of this case and considering the reasoning in *Bierbrauer*, Deutsche Bank's affidavit established Deutsche Bank as the note holder.

The affidavit attached as an exhibit a copy of the note. The note was endorsed in blank, which rendered the note payable to the bearer, Deutsche Bank. WIS. STAT. § 403.205(2); *Bierbrauer*, 346 Wis. 2d 1, ¶12. The documents are presumed to be authentic and authorized. *See* WIS. STAT. § 403.308(1); *see also* WIS. STAT. § 909.02(9). There is no dispute that Deutsche Bank is the note holder and therefore entitled to enforce the note. WIS. STAT. § 403.301.

¹ All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

We turn to the Johnsons' argument that Deutsche Bank lacked standing to foreclose because the mortgage was not recorded. The Johnsons' original 2006 mortgage to Fremont Investment & Loan was filed in the office of the Green Lake County Register of Deeds. Therefore, we assume that the Johnsons mean to argue that the failure to record the mortgage assignment to Deutsche Bank relieves them from liability in this foreclosure action.²

An unrecorded mortgage assignment does not insulate the mortgagor from the consequences of defaulting on the note secured by the mortgage. Deutsche Bank relied upon a note payable to the bearer. WIS. STAT. § 403.205(2). Deutsche Bank had the right to demand payment of the debt evidenced by the note. WIS. STAT. § 403.203(2). The note carried with it the mortgage securing its payment. See *Tidioute Sav. Bank v. Libbey*, 101 Wis. 193, 196-97, 77 N.W. 182 (1898); *Kornitz v. Commonwealth Land Title Ins. Co.*, 81 Wis. 2d 322, 327, 260 N.W.2d 680 (1978) (when a note is transferred or assigned, the equitable interests in the mortgage follow). Deutsche Bank's status as the holder of the note effected an equitable assignment of the mortgage to Deutsche Bank. Deutsche Bank had standing to foreclose on the Johnsons' mortgage.

Our review confirms that Deutsche Bank held the Johnsons' note, the mortgage followed the note, and Deutsche Bank had standing to foreclose. Summary judgment was appropriate. We affirm the circuit court.

² Recording gives notice to others that the property is encumbered and preserves the priority of the mortgagee vis-à-vis other lienholders and claimants on the property. WISCONSIN STAT. § 706.08(1) addresses the effect of the failure to record a conveyance. Such a conveyance is "void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate or any portion of the same real estate whose conveyance is recorded first." *Id.* A failure to record, though not present in this case, would not insulate the mortgagor from liability to the mortgagee. *Claridge v. Evans*, 137 Wis. 218, 223, 118 N.W. 198 (1908). Similarly, whether the Pooling and Servicing Agreement that established Deutsche Bank as a trustee was recorded does not determine whether Deutsche Bank had standing vis-à-vis the Johnsons to enforce the note and foreclose on the mortgage.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is affirmed.

Diane M. Fremgen
Clerk of Court of Appeals