ORIGINAL

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
APR 26 2022
JOHN D. HADDEN
CLERK

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Certificate Trustee,

Plaintiff/Appellee,

vs.

KENNETH R. BROWN and JANET K. BROWN,

Defendants/Appellants,

and

LASALLE BANK NATIONAL ASSOCIATION, AS CUSTODIAN FOR MORGAN STANLEY, MSAC 2007-HES; GE MONEY BANK; JOHN DOE, as Occupant of the Premises; and JANE DOE, as Occupant of the Premises,

Defendants.

Case No. 119,219

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APPEAL FROM THE DISTRICT COURT OF
CARTER COUNTY, OKLAHOMA

HONORABLE DENNIS MORRIS, TRIAL JUDGE

AFFIRMED

Blake C. Parrott
BAER & TIMBERLAKE, P.C.
Oklahoma City, Oklahoma — For Plaintiff/Appellee

Sherry Doyle
SHERRY DOYLE, PLLC
Edmond, Oklahoma — For Defendants/Appellants

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Kenneth R. Brown and Janet K. Brown appeal a summary judgment in favor of Deutsche Bank National Trust Company (Bank), and the district court's denial of their motion to vacate the judgment. On review, we affirm the decisions of the district court.

BACKGROUND

This matter began as a routine foreclosure. In December 2016, Bank, acting as "certificate trustee" for the Bosco Credit II Series Trust 2010-1 (Bosco Trust), filed to foreclose a second mortgage on the Browns' property. The unpaid balance was approximately $24,000. The original note, which bore 13.34% interest, was made by Decision One Mortgage LLC. The copy of the note attached to Bank's petition was indorsed in blank by Decision One.

The Browns answered *pro se*. Bank moved for summary judgment. The court ruled in favor of Bank via a January 2018 court minute. On September 24, 2018, the Browns filed a motion to vacate the ruling indicated by the January 2018 minute entry. The Browns argued that the second mortgage was a "supervised" loan pursuant to Oklahoma law; that Decision One was not a registered supervised lender in Oklahoma, and hence the note was unenforceable. The motion was set for hearing, and then continued until March 2019. The parties then filed further submissions arguing the supervised loan question.

In June 2019, the Browns filed a "supplement" to their motion to vacate containing a letter they had received from the loan servicer stating that:

> Pursuant to Federal Law, you are being advised that ownership of your mortgage loan was transferred to Bosco Credit II Trust Series 2010-1 (the "Trust"), effective May 9, 2019, with Wilmington Savings Fund Society, FSB as certificate trustee (the "Trustee") on behalf of the Trust . . . .

The Browns raised this letter as *prima facie* evidence that the Bosco Trust was not, in fact, the owner of the note at either the time of filing, or at the time of judgment.

The district court denied the motion to vacate without specifically addressing the standing question the Browns raised in their supplement. In separate orders, the court memorialized both its grant of summary judgment and its denial of the Browns' motion to vacate. The Browns appeal both orders.

STANDARD OF REVIEW

The standard of review for a trial court's ruling either vacating or refusing to vacate a judgment is abuse of discretion. *Ferguson Enterprises, Inc. v. Webb Enterprises, Inc.*, 2000 OK 78, ¶ 5, 13 P.3d 480. The abuse-of-discretion standard includes appellate review of both fact and law issues. *Christian v. Gray*, 2003 OK 10, ¶ 43, 65 P.3d 591. In this case however, the underlying summary judgment appears to be interlocutory[1] and was not reduced to a final judgment until *after* the motion to vacate was denied. The final order of summary judgment made in October 2020 is, therefore, the appealable order in this case.

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[1] Although the district court stated that the January 2018 minute "contained all the information necessary to constitute a judgment," it left open the question of accrued interest, and hence was not a final judgment, but merely interlocutory.

Review of a court's ruling on summary judgment is a purely legal issue, and is reviewed *de novo*, considering the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party. *See Smith v. City of Stillwater*, 2014 OK 42, ¶ 21, 328 P.3d 1192.

ANALYSIS

The Browns' arguments are fairly summarized as follows:

1. Enforcement of part of the principal of the note was barred by the six-year statute of limitations.
2. The second mortgage was a "consumer loan" secured by real estate, but neither the original lender nor the Bank are licensed as supervised lenders in Oklahoma. Hence the loan is unenforceable.
3. Deutsche Bank failed to establish standing in its petition, as required by *Wells Fargo Bank, N.A. v. Heath,* 2012 OK 54, 280 P.3d 328, because, the Browns allege, the Bosco Trust did not own the note during this litigation.
4. The court inequitably allowed Bank to delay filing a journal entry resulting in Bank unjustly obtaining thirty-three months of interest and penalties.

We will address these allegations of error in turn.[2]

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[2] We note that, in March 2018, Deutsche Bank (as trustee for "Morgan Stanley ABS Capital I") and a holder of the first mortgage, filed a motion to intervene and to vacate the summary judgment, apparently on the grounds that Deutsche Bank (trustee for the second mortgage), had not noticed Deutsche Bank (trustee for the first mortgage). No hearing was held on this motion, and we find no decision on this motion. Nonetheless, the court did later appear to take notice of the priority of the "Deutsche Bank as trustee for Morgan Stanley"

Statute of Limitations[3]

The Browns argue that the first default on the loan took place in May 2010, and foreclosure was not filed until December 8, 2016, more than six years after the first default. The district court held that Bank could not recover any unpaid *interest, fees, or costs* that accrued before December 8, 2010, pursuant to the six-year limitation period prescribed by 12A O.S.2011, § 3-118. The Browns argue, however, that § 3-118 bars the recovery of *any* payment that is more than six years overdue, and hence the missed installments from May 2010 through December 2010 should have been subtracted from the principal of the current debt.

The statute in question states:

> (a) Except as provided in subsection (e) of this section, an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six (6) years after the due date or dates stated in the note or, if a due date is accelerated, within six (6) years after the accelerated due date.

12A O.S.2011, § 3-118.

The Browns are generally correct that, when a debtor under an installment payment obligation defaults on the installments, the statute of limitations begins to run separately as to each missed installment. *See Oklahoma Brick Corp. v. McCall*, 1972 OK 70, 497 P.2d 215. This is because each obligation to pay an

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mortgage over the "Deutsche Bank as trustee for the Bosco Trust" mortgage in its judgment. We will assume this issue was resolved between the two parties filing as "Deutsche Bank."

[3] The statute of limitations is an affirmative defense. *Horton v. Hamilton*, 2015 OK 6, ¶ 10, 345 P.3d 357. We find no direct assertion of this defense in the Browns' answer. A statute of limitations defense not pled by a defendant is waived. *Scott v. Peters*, 2016 OK 108, n.8, 388 P.3d 699. Although we address the merits of the Brown's argument here, waiver is an alternate ground for affirmance on this issue.

installment matures separately, and this provides a separate cause of action on each missed installment.

Here, however, Bank did not seek to recover missing individual payments. The installment contract was accelerated to a lump sum. Section 3-118 is clear that "if a due date is accelerated" suit must be filed "within six (6) years after the accelerated due date." *Id. See also* PNC *Bank, Nat'l Ass'n v. Unknown Successor Trustees of Robert C. Keck Revocable Living Trust*, 2020 OK CIV APP 60, ¶¶ 30-31, 479 P.3d 238. No recovery of the accelerated lump sum principal was time-barred in this case because suit was filed within six years of the accelerated due date.

Supervised Loans and Supervised Lenders

The Browns next argue that, pursuant Oklahoma's Uniform Consumer Credit Code, the note and mortgage in question are invalid because the loan was a "supervised consumer loan" made by an entity that was not licensed in Oklahoma as a supervised lender.[4] A "consumer loan" in this context is defined by 14A O.S.Supp. 2014, § 3-104. It is a loan made by a person regularly engaged in the business of making loans in which (a) the debtor is a person other than an organization; (b) the debt is incurred primarily for a personal, family or household purpose; (c) the debt is payable in installments or a loan finance

[4] Bank argued that this affirmative defense was not raised in the Browns' answer, and hence was waived. The answer does state a defense of lack of an enforceable contract, which we find sufficient pursuant to notice pleading.

charge is made; and (d) the principal does not exceed $50,000. *Id.* The $24,000 loan in question appears to meet this definition.

Additionally, pursuant to 14A O.S.2011, § 3-501(1), a "supervised loan" means a consumer loan in which the rate of the loan finance charge exceeds ten percent per year as determined according to the provisions on loan finance charge for consumer loans. Again, the loan in question meets this definition. Pursuant to 14A O.S.2011, § 3-502(1), "Unless a person is a supervised financial organization or has first obtained a license from the Administrator authorizing the person to make supervised loans, a person shall not engage in the business of: (a) making supervised loans; or (b) taking assignments and undertaking direct collection of payments from or enforcement of rights against debtors arising from supervised loans."

If a creditor has violated the provisions of this act applying to the authority to make supervised loans, the loan is void and the debtor is not obligated to pay either the principal or any loan finance charge. 14A O.S.2011, § 5-202; *Bunch v. Terpenning,* 2009 OK CIV APP 106, ¶ 19, 229 P.3d 574. The original lender here was Decision One Mortgage Company. It appears undisputed that neither Decision One nor Bank is licensed as a supervised lender in Oklahoma. Bank argued, however, that these entities are exempt from the provisions of the Uniform Consumer Credit Code, being all of Title 14A, pursuant to 14A O.S.2011 § 1-202:

> This act does not apply to ...
>
> (5) Loans made to enable the debtor to build or purchase a residence or to refinance such loan when made by a lender whose loans are

supervised by an agency of the United States or made by a Federal Housing Administration approved mortgagee unless the loan is made subject to this act by agreement (Section 14A-3-601), and except as provided with respect to disclosure (Section 14A-3-301), debtors' remedies (Section 14A-5-201) and loan finance charges for other loans (Section 14A-3-605).

Id. Bank argued that this exclusion applied to both it and Decision One and that they are not, therefore, required to be licensed by Oklahoma to operate within the State.

The first question is whether the second mortgage in this case was "made to enable the debtor to build or purchase a residence or to refinance such loan"—that is, whether the mortgage in question was a purchase-money mortgage. Bank cited the fact the contract and deed transferring the property to the Browns and the Decision One mortgage were executed on the same date, and argued that the loan was "clearly made" to enable the Browns to purchase a residence or to refinance a loan. The Browns agreed that the second mortgage was made "[a]s part of the same transaction" as the first mortgage, R. Doc. 11 and do not dispute that the mortgage under review was in fact a purchase-money mortgage.[5] For purposes of our review, therefore, we presume that it was. [6]

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[5] The record indicates the Browns purchased the property for $122,000, and made *two* mortgages at the time of purchase, a first mortgage for $98,320, and a second for $24,580. It is the second mortgage that was foreclosed here.

[6] Even if the loan was not to "build or purchase a residence" this does not establish that Bank was required to be licensed in Oklahoma as a supervised lender. Title 14 A O.S.2001, § 3-502(1) specifically exempts a "supervised financial organization" from the requirement of state licensure to make *supervised loans.* The difference between the two statutory sections is that § 1-202 exempts supervised financial organizations making loans to *build or purchase* a residence from the *entire* Uniform Consumer Credit Code, while § 3-502(1) exempts supervised financial organizations from the section requiring state licensure of a supervised lender, irrespective of the purpose of the loan.

Instead, the Browns focus on arguing that there was no proof that Bank and Decision One are federally supervised lenders and that § 1-202 does not exempt them from Oklahoma licensing, even if they are federally supervised. On the first point, these arguments regarding Bank's status as a federally supervised lender were first presented as part of the Browns' *motion to vacate,* not during the original summary judgment proceedings. The moving parties have the burden of proof in a proceeding to vacate a court's prior order. *Cosgrove v. Stewart,* 1963 OK 251, ¶ 11, 386 P.2d 998. As the movants, it was therefore the Browns' burden to show some credible evidence that Bank was *not* a federally licensed supervised lender, not Bank's burden to show that it was. The Browns made no such showing in the proceedings below, or on appeal.

On the second point, we find it clear that § 1-202, which exempts entities "supervised by an agency of the United States" from the requirements of the act, allows federally supervised lenders to operate in Oklahoma without state licensing. In their petition in error, the Browns argue for the first time that the § 1-202 exemption does not apply because "federal law and/or agencies do not regulate interest rates thereby leaving regulation of that area to the states," presumably relying on the 1945 McCarran-Ferguson Act, which states that "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012. It is clear, however, that § 1-202 contains only four exceptions to the state's allowance of an agency of the United States to fulfill the state's role in regulating supervised lending. The first is that loans may still be made subject

to the Oklahoma Act by agreement. We find no evidence of such an agreement here.[7] The remaining provisions provide that federally supervised lenders who are otherwise exempt from the Act must still comply with Oklahoma law respecting disclosures (§ 3-301), debtors' remedies (§ 5-201), and loan finance charges for other, non-consumer loans (§ 3-605). No failure to comply with these sections was alleged. Accordingly, we find no error by the district court on this issue.

Standing

To commence a foreclosure action in Oklahoma, a plaintiff must demonstrate it has a right to enforce the note and, absent a showing of that right, the plaintiff lacks standing. *Deutsche Bank Nat. Tr. Co. v. Matthews,* 2012 OK 14, ¶ 5, 273 P.3d 43. *Wells Fargo Bank, N.A. v. Heath,* 2012 OK 54 ¶ 9, 280 P.3d 328, states:

> To commence a foreclosure action in Oklahoma, a plaintiff must demonstrate it has a right to enforce the note and, absent a showing of ownership, the plaintiff lacks standing .... The Appellee has the burden of showing it is entitled to enforce the instrument. Unless the Appellee was able to enforce the note at the time the suit was commenced, it cannot maintain its foreclosure action against the Appellants.

Id. (citation omitted).

This rule arose because prior practice often included beginning a foreclosure suit before the purported owner had obtained a properly indorsed

[7] Even if the loan did state that it was subject to the "loans" section of Oklahoma's Uniform Consumer Credit Code, this would *include* § 1-202, which allows federally supervised lenders to make supervised consumer loans without state licensure.

note.[8] *Wells Fargo* and similar cases addressed this issue by requiring foreclosure plaintiffs to show a right to enforce at the time of filing by attaching to the Petition a copy of a suitably indorsed note demonstrating *prima facie* possession and a right to enforce.

In this case, Bank made the required *prima facie* showing of standing by attaching a copy of the note indorsed in blank. No evidence to the contrary was raised before the grant of summary judgment. The original summary judgment was therefore proper based on the record at that time.

The Browns argued in their motion to vacate, however, that a later-acquired document demonstrates that Bank was neither entitled to enforce the note at the time of filing, nor at the time of judgment. That document is a letter sent to the Browns by Franklin Credit Management Corp., the loan servicer, which states:

> Pursuant to Federal Law, you are being advised that ownership of your mortgage loan was transferred to Bosco Credit II Trust Series 2010-1 (the "Trust"), effective May 9, 2019, with Wilmington Savings Fund Society, FSB as certificate trustee (the "Trustee") on behalf of the Trust.

The Browns argue that this letter evidences that the Bosco Trust, the entity that Bank alleges it represented as trustee, did not become an owner or entity with a right to enforce the note until May 9, 2019, *after* the court had granted

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[8] *See e.g., Deutsche Bank Nat. Tr. Co. v. Byrams*, 2012 OK 4, ¶ 3, 275 P.3d 129 (reversing because the face of the note was not indorsed to alleged holder); *U.S. Bank, N.A. ex rel. Credit Suisse First Boston Heat 2005-4 v. Alexander*, 2012 OK 43, ¶ 22, 280 P.3d 936 (reversing because the appellee did not attached an undated allonge until the second motion for summary judgment); *Wells Fargo Bank, N.A. v. Heath*, 2012 OK 54, 280 P.3d 328.

summary judgment by minute order. Bank responded with an affidavit from Franklin Credit Management stating:

> Franklin, as a loan servicing agent on behalf of "Deutsche Bank National Trust Company, as Certificate Trustee on behalf of Bosco Credit II Trust Series 2010-1" and now "Wilmington Savings Fund Society, FSB, as Certificate Trustee on behalf of Bosco Credit II Trust Series 2010-1," has had possession of the duly indorsed, original promissory note that is the subject matter of this action since on and before this action was filed, December 8, 2016, and through and including the date of this Affidavit.

Although it could have been stated more clearly, Franklin testified through an officer that the sentence relied on by the Browns states that May 9, 2019, was the date the *trustee* changed from "Deutsche Bank National Trust Company, as Certificate Trustee on behalf of Bosco Credit II Trust Series 2010-1" to "Wilmington Savings Fund Society, FSB, as Certificate Trustee on behalf of Bosco Credit II Trust Series 2010-1." Hence, the Bosco Trust was the owner of the note both before and after May 9, 2019.

Importantly, even if these competing interpretations could raise a question of fact, the actual "owner" of a note indorsed in blank is simply not relevant here. Pursuant to 12A O.S.2001, § 3-301, a "[p]erson entitled to enforce an instrument" includes "the holder of the instrument." Title 12A O.S.2001, § 1-201(21) defines a "[h]older" as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." A note indorsed in blank is payable to the bearer. 12A O.S.2001, § 3–205(b) ("When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.") Further, pursuant to § 3-301, "[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." *See also, Wells Fargo Bank, N.A. v. Heath*, 2012 OK 54, n.7, 280 P.3d 328 ("It is, however, possible for the owner of the note not to be the person entitled to enforce the note if the owner is not in possession of the note.").

Although it may seem somewhat counter-intuitive, the Oklahoma implementation of the UCC is clear that it is irrelevant whether the Bosco Trust *owned* the note or not.[9] Bank's possession of the note indorsed in blank was sufficient to demonstrate prima facie standing and support enforcement.[10]

The Delay in Producing a Journal Entry

The Browns' last allegation of error appears to be that the court inequitably allowed Bank to delay filing a journal entry, resulting in Bank unjustly obtaining "33 months of interest and penalties."[11] The court minute announcing summary judgment was made in January 2018, and the journal entry of judgment was entered in October 2020.

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[9] The UCC principle that a non-owner may enforce an instrument as a "holder" is widely accepted. *See e.g., U.S. Bank Tr., N.A. as Tr. for LSF9 Master Participation Tr. v. Verhagen*, 489 P.3d 419 (Haw. 2021); *Hood v. CIT Bank, NA*, 14-18-00496-CV, 2021 WL 629751, at *3 (Tex. App. Feb. 18, 2021); *CitiMortgage, Inc. v. Moseley*, 16 Wash. App. 2d 1015; *Castle v. DiMugno*, 199 Conn. App. 734, 237 A.3d 731, 747 (2020); *Inv'rs Bank v. Torres*, 243 N.J. 25, 41, 233 A.3d 424, 434 (2020).

[10] In modern business practice, dozens of scanned copies of a note indorsed in blank may exist, and more can be created at the push of a button. Possession of one of these copies does not necessarily indicate possession of the actual note. Therefore, where a right to enforce is predicated purely on possession of a note indorsed in blank, and the right to enforce is challenged, it appears essential that the original note is produced *at some time before final judgment.*

[11] Although the final judgment does award interest from the date of default (adjusted for the six-year statute of limitations), we find no reference to any "penalties" in the record.

The Browns' argument is not developed much beyond these facts, but appears to be that, per the judgment, they were required to pay six years of contractual interest at six percent when the last thirty-three months of this could have been paid at the lower rate of post-judgment interest if a final judgment had been rendered earlier, or not paid at all. This argument is, however, contrary to the applicable statute, which states:

> D. If a rate of interest is specified in a contract, the rate specified shall apply and be stated in the journal entry of judgment. The rate of interest shall not exceed the lawful rate for that obligation. **Postjudgment interest shall be calculated at the contractual rate and accrued in the same manner as prescribed in subsection C of this section**

12 O.S.Supp.2013, § 727.1 (emphasis added).

Pursuant to statute, the delay would not have changed the interest rate. Alternately, the Browns may argue that they would have paid the full judgment in January 2018, and hence not incurred further interest, but for the lack of a journal entry. We find no impediment, however, that prevented the Browns from seeking a journal entry in the thirty-three months following the minute entry.

AFFIRMED.

WISEMAN, P.J., and BARNES, J., concur

April 25, 2022