



**ORIGINAL**

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA  
COURT OF CIVIL APPEALS  
STATE OF OKLAHOMA

DIVISION II

JUL 27 2022

JOHN D. HADDEN  
CLERK

GREYT ESTATES, LLC,<sup>1</sup> )  
 )  
 Plaintiff/Appellee, )  
 )  
 vs. )  
 )  
 KENNETH E. RICHERSON, III aka )  
 KENNETH RICHARDSON, )  
 )  
 Defendant/Appellant, )  
 )  
 and )  
 )  
 SPOUSE OF KENNETH E. )  
 RICHERSON, III aka KENNETH )  
 RICHARDSON, if married and )  
 OCCUPANTS OF THE PREMISES, )  
 )  
 Defendants. )

Case No. 119,980

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APPEAL FROM THE DISTRICT COURT OF  
MUSKOGEE COUNTY, OKLAHOMA

HONORABLE BRET SMITH, TRIAL JUDGE

**VACATED AND REMANDED**

Shannon Taylor  
Brian J. Rayment  
KIVELL, RAYMENT & FRANCIS, P.C.  
Tulsa, Oklahoma

For Plaintiff/Appellee

<sup>1</sup> The appellate caption lists "GREY T ESTATES, LLC" as the plaintiff and appellee. However, the trial court's docket, as well as all documents submitted by the plaintiff in the district court, reference the plaintiff as "GREYT ESTATES, LLC." Although the defendant/appellant often uses "Grey T Estates, LLC," this appears to be an error. The Clerk of the Appellate Courts is advised of this correction to the caption.

Teressa L. Webster  
LEGAL AID SERVICES  
OF OKLAHOMA, INC.  
Muskogee, Oklahoma

For Defendant/Appellant  
Kenneth E. Richerson, III  
aka Kenneth Richardson

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Kenneth Richardson appeals the district court's granting of Greyt Estates, LLC's motion to foreclose on a note and contract for deed by summary judgment. On review, we find that no certified or sworn copy of the note in question was presented during the summary judgment procedure, as required by 12 O.S. § 2056. As such, we vacate the grant of summary judgment, the related award of attorney's fees, and remand for further proceedings.

**BACKGROUND**

On March 7, 2008, Kenneth Richardson executed a note for \$19,400 in favor of RECA Limited Partnership. The note was secured by an "Agreement for Deed" on property located at 201 S. Cherokee, in Muskogee. In October 2020, Greyt Estates, LLC, filed a "petition for foreclosure of contract by deed," alleging that Richardson had defaulted with some \$9,000 still owed on the note. Although the petition contained an assignment of the contract for deed to Greyt Estates, the attached copy of the note still showed RECA Limited Partnership as the lender, and it bore no endorsement.

Richardson filed a motion to dismiss pursuant to the rule of *Wells Fargo Bank, N.A. v. Heath*, 2012 OK 54, 280 P.3d 328. Richardson argued that the petition did not show any right of Greyt Estates to enforce the note, and should be dismissed. On February 19, 2021, the court denied this motion to dismiss,

but in a separate order filed that same day the court dismissed the petition on its own motion, “retain[ing] jurisdiction” to give Greyt Estates leave to amend. Greyt Estates filed an amended petition, “pursuant to 12 O.S. § 2019,”<sup>2</sup> in which it “incorporated” its original petition.

The amended petition included a chain of endorsements culminating in an assignment to Greyt Estates.<sup>3</sup> On April 12, 2021, Greyt Estates filed a motion for summary judgment. Richardson responded with a Rule 13(d) motion to continue the summary judgment hearing until he could gather evidence to oppose the motion, which the court granted, requiring a response by August 10th.

We find no indication in the record or docket sheet that a response to the summary judgment motion was ever filed. On October 4, 2021, the district court granted summary judgment to Greyt Estates. Richardson now appeals this decision.

### **STANDARD OF REVIEW**

Although a trial court in making a decision on whether summary judgment is appropriate considers factual matters, the ultimate decision turns on purely legal determinations, *i.e.*, whether one party is entitled to judgment as a matter of law because there are no material disputed factual questions. *H2K Techs., Inc. v. WSP USA, Inc.*, 2021 OK 59, ¶ 7, 503 P.3d 1177. Therefore, as the decision

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<sup>2</sup> Section § 2019 involves joinder of persons needed for just adjudication. We assume this was an error and § 2015 (amended and supplemental pleadings) was intended.

<sup>3</sup> The chain of endorsements is somewhat suspect, however, as it shows that “Transportation Alliance Bank” transferred its interest to “Home Opportunity LLC” some seventeen days *before* it received that interest from “Home Solutions Partners IV REO, LLC.” The question of whether the plaintiff had the legal right to sue on the note at the time of the amended petition remains open on remand.

involves purely legal determinations, the appellate standard of review of a trial court's grant of summary judgment is *de novo*. *Id.*

### **ANALYSIS**

Richardson raised five allegations of error in his petition in error. He claims that the district court erred:

- (1) By granting summary judgment to Greyt Estates where the record showed that Richardson did not have sufficient time to conduct discovery, obtain affidavits, or conduct depositions to respond to Greyt Estates' motion for summary judgment;
- (2) By granting summary judgment where the undisputed facts showed that Greyt Estates failed to apply more than \$4,600 in payments made by Richardson prior to the filing of the foreclosure action;
- (3) In refusing to dismiss the case where the demand for relief did not meet the jurisdictional threshold;
- (4) In granting summary judgment to Greyt Estates because Greyt Estates did not support the motion for summary judgment with admissible evidence to support that it had standing to foreclose as of the date of the filing of the petition; and,
- (5) In granting the attorney's fee award where Greyt Estates did not file a motion for attorney's fees that outlined the fees and costs incurred, and where Richardson's counsel had no opportunity to dispute the reasonableness of the fee awarded.

Because we agree with Richardson as to allegation (4), we vacate both the summary judgment and corresponding award of attorney's fees. For clarity upon remand, however, each allegation of error will be addressed.

As a final preliminary matter, we also note that Richardson's allegations of error are presented as if he had filed a brief in the district court opposing summary judgment. He did not. As such, the situation here is similar to that addressed in *Spirgis v. Circle K Stores, Inc.*, 1987 OK CIV APP 45, ¶ 9, 743 P.2d

682. *Spirgis* held that the “failure of the opposing party to respond does not mean that the motion must be granted by the court.” *Id.* The Court continued:

Even when no counterstatement has been filed, it is still incumbent upon the trial court to insure that the motion is meritorious. The trial court must examine the evidentiary materials supporting the motion and if all the material facts are addressed and are supported by admissible evidence, those facts are admitted and judgment for the movant is proper. However, if the movant has not addressed all material facts, or if one or more such facts is not supported by admissible evidence, judgment for the movant is not proper.

*Id.* ¶ 10. We will assess this appeal by the standards set forth in *Spirgis*.

*Richardson’s Rule 13(d) Motion*

Richardson filed a motion seeking to postpone or deny summary judgment on the grounds that discovery was needed before Richardson could present evidentiary material sufficient to support an opposition. District Court Rule 13(d) requires that

Should it appear from an *affidavit* of a party opposing the motion that for reasons stated the party cannot present evidentiary material sufficient to support the opposition, the court may deny the motion for summary judgment or summary disposition without prejudice or may order a continuance to permit affidavits to be obtained or depositions ....

12 O.S. Ch.2, Rule 13(d) (emphasis added).

Richardson’s motion did not include the required affidavit. As such, the motion was defective, and the court would have been within its discretion to deny it. However, the docket sheet for this case indicates that the Court actually *granted* an extension of the involved deadlines and did not require an answer to the summary judgment motion until August 10th, a deadline which Richardson missed. As noted above, Richardson obtained an extension requiring him to file

by August 23rd, but he also missed this deadline. No further extension was requested. Under the circumstances, we find no error.

*The “Failure to Apply More Than \$4,600 in Payments”*

Richardson does not direct us to any evidence in the record regarding a failure to apply more than \$4,600 in payments, and upon a thorough review, we find no such evidence in the record on appeal. Thus, no error is detected here, either.

*The Jurisdictional Threshold*

Richardson’s third argument is that the matter could not be heard on the “CJ” docket because the amount in controversy was less than \$10,000. Even if we accept that the amount in controversy was only the \$9,010 due on the note, *i.e.*, it did not include contractually provided costs, fees, and “liquidated damages,” we do not find it divested the court of *jurisdiction* here. “Under the State’s constitution, the district court—in all of its divisions—constitutes an omni-competent, single-level, first-instance tribunal with ‘unlimited original jurisdiction over all justiciable matters ....’” *Broadway Clinic v. Liberty Mut. Ins. Co.*, 2006 OK 29, ¶ 25, 139 P.3d 873, 880 (*quoting* Okla. Const. Art. 7, § 7(a)) (footnotes omitted). “While the business of the district court is divided into separate dockets or compartments, its constitutionally-conferred jurisdictional sweep is indivisible.” *Id.* We hold that the trial court had jurisdiction to hear the matter.

*Failure to Support the Motion for Summary Judgment  
with Admissible Evidence*

The next issue is more complex. Greyt Estates characterizes this proceeding as one to “foreclose a contract for deed.” Under Oklahoma law, however, Greyt Estates is attempting to *enforce a note and mortgage* here.

Title 16 O.S. § 11A is clear that contracts for deed “made for the purpose of establishing an immediate and continuing right of possession ... shall to that extent be deemed and held mortgages ... and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.” In this case, the “Agreement for Deed” granted an immediate and continuing right of possession. [Tab 2 Exhibit A]. The contract here is clearly a mortgage securing the note under Oklahoma law.<sup>4</sup>

Pursuant to Oklahoma law, a note and mortgage cannot be bifurcated. *Nat'l Trust Co. v. Byrams*, 2012 OK 4 ¶ 5, 275 P.3d 129. A right to enforce the note is fundamental in these cases, and the mortgage simply follows the note. *Deutsche Bank Nat. Tr. Co. v. Roesler*, 2015 OK CIV APP 36, ¶ 16, 348 P.3d 707, 712. Because the note is the fundamental document in Oklahoma, a mortgage foreclosure is based on default under the installment contract, a contractual acceleration of the balance making the note immediately due, and *a resulting*

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<sup>4</sup> See *State Life Ins. Co. v. State ex rel., Kehn*, 135 P.2d 965, 1942 OK 385 (stating that, in Oklahoma, when a contract for deed is properly executed, equitable title to the real property passes to the buyers and the interest retained by the sellers is equivalent to a mortgage, which guarantees payment of the remaining sums due under the contract). See also *Smith v. Frontier Federal Savings & Loan Assoc.*, 649 P.2d 536, 1982 OK 90; *Panama Timber Co., Inc. v. Barsanti*, 1980 OK CIV APP 18, 633 P.2d 1258; and *Resolution Tr. Corp. v. Sudderth*, 1993 OK CIV APP 53, 854 P.2d 375, 377.

*current right to enforce the note.* After the right to enforce the note is proven, a party can foreclose on the security interest. Pursuant to 12 O.S. § 2056, when a party seeking to enforce a note and mortgage by summary judgment testifies as to the required elements for foreclosure, *a sworn or certified copy of any paper or part of a paper referred to in the affidavit must be attached.*

The copy of the note attached to the initial petition here was not certified and, although the petition is “verified,” it does not mention the note at all, let alone state that the copy attached is true and correct. The amended petition does mention the existence of the note, but it is not verified. As there was no sworn or verified copy of the note in evidence up to the time of summary judgment, a summary judgment affiant is required to either include a certified copy of the note, or, at a minimum, swear under penalty of perjury to the authenticity of the copy already provided. No such affidavit is included here. Indeed, the affidavit does not mention ownership of the note, or a right to enforce it at all. The only evidence presented was an unsworn, uncertified copy of the note.

Greyt Estates argued to the trial court that the note here was “self-authenticating” under the evidence code pursuant to 12 O.S. § 9209(9) because it was “commercial paper,” and hence no one need swear to its authenticity or the accuracy of the copy presented. Even assuming that uncertified, unsworn copies of the note qualify as entirely self-authenticating, however, the committee notes to § 2909 are clear that the rule does not supersede any related authorities since the rule only self-authenticates such documents “to the extent provided by general commercial law.” 12 O.S. § 9209.



As this court noted in *MidFirst Bank v. Wilson*, 2013 OK CIV APP 15, ¶ 10, 295 P.3d 1142, even if the copy of the note could be “convertible to admissible evidence at trial,” the authentication requirements of § 2056 prevent it from being considered in summary judgment unless certified or sworn. *See also Unifund CCR, LLC v. Ekpo*, 2014 OK CIV APP 73, ¶ 12, 335 P.3d 271, 274 (documents essential to summary judgment but not certified or authenticated as required by 12 O.S. § 2056(E) cannot support summary judgment). Therefore, the copy of the note at issue here did not suffice as a basis for summary judgment. Greyt Estates’ motion for summary judgment does not establish, in the manner required by 12 O.S. § 2056, that it is entitled to enforce the note and therefore foreclose the mortgage at issue in this case. Because this evidentiary material on a required element was not proper, the summary judgment was not proper and must be vacated. Additionally, because summary judgment was improper, the award of fees was also improper.

### **CONCLUSION**

There was insufficient evidence to support the grant of summary judgment in this case.<sup>5</sup> As such, we vacate both the judgment and the award of attorney’s fees in favor of the Greyt Estates and remand for further proceedings.

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<sup>5</sup> We further note that the contract for deed has both a fee provision and a provision requiring complete forfeiture of any amount paid as “liquidated damages” [Exhibit A, ¶ 7]. The result is that Richardson had a \$ 9,010 judgment against him on the note, an additional \$8,013 judgment against him for fees, *and* he forfeits the approximately \$10,000 paid off from the note *and* any work done per the contract to “bring the premises to a habitable condition.” Title 15 O.S. §§ 213–215 governs liquidated damages. “Except as expressly provided in Section 215 of this title, penalties imposed by contract for any non-performance thereof, are void.” 15 O.S. § 213. Section 214 provides: “Every contract, by which the amount of damages to be paid, or other compensation to be made, for a breach of an obligation, is

**VACATED AND REMANDED.**

HIXON, J. (sitting by designation), concurs, and WISEMAN, P.J., concurs specially.

WISEMAN, P.J., concurring specially:

I write separately to highlight the concern raised about the chain of endorsements on the allonges. It has long been the rule that a plaintiff in GreyT Estates' position must show it had the right to enforce the note at the time it filed its petition to do so and to foreclose on the secured property. *Wells Fargo Bank, N.A. v. Heath*, 2012 OK 54, ¶ 9, 280 P.3d 328. According to the record, RECA Limited Partnership transferred its interest in the note to Home Solutions Partners on March 7, 2008, who then transferred its interest to Transportation Alliance Bank on November 14, 2013. But Transportation Alliance Bank had 17 days earlier transferred its interest to Home Opportunity on October 28, 2013, before it actually had any interest in the note.

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determined in anticipation thereof, is to that extent void, except as expressly provided by Section 215 of this title." The test for determining whether the damages clause is enforceable involves three criteria:

- 1) the injury caused by the breach must be difficult or impossible to estimate accurately; 2) the parties must intend to provide for damages rather than for a penalty; 3) the sum stipulated must be a reasonable pre-breach estimate of the probable loss.

*Massey v. Bayview Loan Servicing, LLC*, 2011 OK CIV APP 78, ¶ 7, 262 P.3d 371, 374. Whether, pursuant to Oklahoma law, such "liquidated damages" are enforceable in addition to the fees and costs of foreclosure, or constitute an unenforceable "penalty clause" is a question for the trial court on remand, as is whether an adhesion contract can waive the law and policy of Oklahoma in this matter (as the contract here attempts to) and declare that the damages are "not a penalty."

Questions arise as to (1) whether Transportation Alliance Bank transferred anything to Home Opportunity (or by any subsequent assignments in the allonge chain including to GreyT) when it had nothing to assign in October 2013 (See 12A O.S.2011 § 3-203) and (2) whether this has been cured or otherwise rectified to show standing as a matter of law when the petition was filed. Because these queries do not appear to have been raised in the trial court, we will not address them for the first time on appeal, and they remain for resolution on remand. Unless this can be clarified to the court's satisfaction, the case may not be susceptible to amendment and remains subject to dismissal and refiling in a new case with the proper subsequent supporting documentation.

July 27, 2022