

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS INDENTURE TRUSTEE FOR
AMERICAN HOME
MORTGAGE INVESTMENT TRUST 2007-2,
MORTGAGE-BACKED NOTES, SERIES
2007-2

IN THE SUPERIOR COURT OF
PENNSYLVANIA

v.

LARRY I. TURK AND PATRICIA E. TURK

APPEAL OF: DEUTSCHE BANK NATIONAL
TRUST COMPANY

No. 1087 MDA 2013

Appeal from the Judgment Entered June 7, 2013
In the Court of Common Pleas of York County
Civil Division at No(s): 2008-SU-6282

BEFORE: GANTMAN, P.J.*, OTT, J., and MUSMANNNO, J.

MEMORANDUM BY OTT, J.:

FILED JULY 01, 2014

This matter is before our Court following a remand to determine whether Appellant, Deutsche Bank National Trust Company ("Deutsche Bank"), was the holder of the note associated with the mortgage on Appellees', the Turks, home. It is undisputed that the Turks failed to make payments as required. The question before the trial court was whether Deutsche Bank was the party with standing to enforce the note and foreclose

* President Judge Gantman did not participate in the consideration or decision of this case.

on the mortgage. A prior panel of our Court remanded the matter for a determination of Deutsche Bank's status as holder of the note.¹ Following a hearing, the trial court determined that Deutsche Bank had not produced sufficient evidence to prove it held the note. Therefore, Deutsche Bank was not entitled to foreclose on the Turks' home. After a thorough review of the submissions by the parties, relevant law, and the certified record, we affirm.²

We recite the history from our Court's initial decision.

¹ We note that following the remand, there were two subsequent appeals – but prior to this appeal – that were disposed of on procedural grounds. **See** 81 A.3d 995 (Pa. Super. 2013)(unpublished memorandum), 48 A.3d 480 (Pa. Super. 2011)(unpublished memorandum). Those appeals have no effect on the disposition of this appeal.

² This appeal presents mixed questions of law and fact.

With regard to such mixed questions, we announce that we will follow ***Gentile's [v. State Bar of Nevada]***, 501 U.S. 1030, 111 S.Ct. 2720 (1991)] directive to review the whole record. Furthermore, to the extent that factual findings and credibility determinations are at issue, we will accept the trial court's conclusions insofar as they are supported by the record. To the extent that that a legal question is at issue, a determination by the trial court will be given no deference and will instead be reviewed *de novo*.

In re Condemnation by Urban Redevelopment Auth. of Pittsburgh, 913 A.2d 178, 183 (Pa. 2006). The law relevant to this matter is set forth in various sections of the Pennsylvania Uniform Commercial Code, Pa.C.S. Title 13. The facts were presented at the non-jury trial held March 23, 2010, before the Honorable John W. Thompson, Jr. Additionally, we make note of evidence presented by the Turks via a motion to supplement the record.

On December 13, 2006, Larry Turk borrowed money from Baltimore American Mortgage Corp., Inc. ("Baltimore American") secured by a mortgage on real property. The Turks signed a mortgage (the "Mortgage") that defines Baltimore American as the Lender. The collateral under the Mortgage is real property located at 3765 Compton Lane, York, Pennsylvania.

The Mortgage identifies Mortgage Electronic Registration Systems, Inc. ("MERS")¹ as "a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument." Mortgage, Plaintiff's Ex. A, at 1. The Mortgage states:

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 the law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all 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 or canceling this Security Instrument.

Mortgage, Plaintiff's Ex. A, at 4.

¹ The MERS system was developed in 1993 by Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, the Government National Mortgage Association, the Mortgage Bankers Association of America, and several other major participants in the real estate mortgage field in order to track ownership interests in residential mortgages electronically. Under this program MERS members subscribe to the system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages. The participants agree to appoint MERS to act as their common agent on all mortgages registered by them in the MERS system, thus simplifying the packaging and transfer of mortgages on individual parcels.

Taylor v. Deutsche Bank Nat. Trust Co., 44 So. 3d 618, 619-20 (Fla. Dist. Ct. App. 2010).

The Mortgage was security for an adjustable rate note signed by Larry Turk in favor of Baltimore American on December 13, 2006 (the "Note"). In exchange for the loan, the Note obligated Larry Turk to pay \$228,000.00 in principal, plus interest, to Baltimore American over a 30 year term. After closing the loan, Baltimore American sold the loan on the secondary mortgage market.

Baltimore American signed an allonge to the Note (the "Allonge")² which stated, in relevant part, "Pay to the order of: AMERICAN HOME MORTGAGE CORPORATION without recourse." Allonge to Note, Plaintiff's Ex. D, at 1. The Allonge is signed by Doreen A. Strothman, a vice president of Baltimore American. ***Id.*** The bottom left corner of the Allonge states: "PAY TO THE ORDER OF" and then there is a blank space, followed by "WITHOUT RECOURSE BY AMERICAN HOME MORTGAGE CORP." ***Id.*** Below that text is the signature of Rosa Montella as "ASST. SECRETARY." ***Id.***

²An allonge is "[a] slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." Black's Law Dictionary (9th ed. 2009).

Sometime around April, 2008, Larry Turk stopped making payments on the Note. On December 24, 2008, Deutsche Bank filed a complaint in foreclosure against the Turks. The complaint averred MERS assigned the Mortgage to Deutsche Bank by an instrument "which will be duly recorded in the Office of the Recorder of York County." Complaint, 12/24/2008, at 3.

In their requests for admissions, the Turks admitted not paying on the Note after April 2008. The Turks only asserted the defense that Deutsche Bank lacked standing to foreclose. On March 6, 2009, Deutsche Bank filed a motion for summary judgment, but withdrew it on April 16, 2009.

By an assignment dated April 29, 2009 and recorded May 5, 2009, MERS assigned the Mortgage to Deutsche Bank (the "April

29 Assignment"). The assignment had an effective date of December 19, 2008 (prior to the filing of the foreclosure complaint).

Deutsche Bank v. Turk, 24 A.3d 453 (Pa. Super. 2011)(unpublished memorandum).

As noted above, the prior panel of our Court remanded the appeal to the trial court because there had been no determination on the record that Deutsche Bank was the holder of the note, and therefore, no analysis of the matter under the provisions of Article 3 of the Pennsylvania Uniform Commercial Code, 13 Pa.C.S. § 3101 *et seq.*

In essence, Deutsche Bank is claiming that it proved it was the holder of the note when it introduced the original note and allonge in its case in chief. "As discussed in detail in Deutsche Bank's Brief on Remand, what is important, is that Deutsche Bank proffered originals of the Note and the Allonge, demonstrating its possession of the same, and that the note is indorsed in blank and is payable to the entity in possession of the Note (Deutsche Bank). In turn, Deutsche Bank is the holder of the Note, and therefore entitled to enforce it." Deutsche Bank's Brief of Response in Opposition to Defendant's Motion to Supplement Record³ and Reply to

³ The Turks were allowed to supplement the official record and presented documentation calling into question the propriety of the mortgage transfer to Deutsche Bank. However, after remand, the trial court made no determinations regarding the allegations of fraud, so that issue is not before
(Footnote Continued Next Page)

Defendant's Memorandum of Law Concerning Remand Issue, at 16. Our review of the record leads us to disagree with Deutsche Bank's conclusions.

We begin our analysis by noting the U.C.C. provides, in relevant part, that a holder of a note is entitled to enforce the note. 13 Pa.C.S. § 3301 (1). A person or entity ("person") can be the holder in different ways. A note is a negotiable instrument. 13 Pa.C.S. § 3104(a)(1)-(3), (e). In circumstances such as are present here, a person can be the holder as the original lender. In this case, the original lender was Baltimore American Mortgage Company (Baltimore). It is undisputed that Baltimore negotiated the note. Therefore, Baltimore is not the holder.

Having been negotiated,⁴ there are two means by which a person can be the holder. First, one can hold the instrument as the result of a "special indorsement." **See** 13 Pa.C.S. § 3205(a). This simply means that on the note itself or on an allonge the person is specifically identified as the holder. In this matter, the allonge has been specially indorsed to American Home Mortgage Corporation. Because Deutsche Bank does not appear anywhere on either the note or the allonge, it is not the holder of the note by special indorsement. Deutsche Bank does not dispute that fact.

(Footnote Continued) _____

us. In the event that Deutsche Bank re-attempts to foreclose on this property, it will, in all probability, need to address those issues.

⁴ Negotiation is the technical term for the transfer of the instrument. **See** 13 Pa.C.S. § 3201(a).

Rather, Deutsche Bank is claiming to be the holder of the note by physical possession of the note indorsed in blank. The allonge is undisputedly indorsed in blank. The only question remaining is whether Deutsche Bank possessed the document.

Deutsche Bank argues it conclusively demonstrated possession of the note by introducing the document in its case in chief. Deutsche Bank specifically sites to pages 22-24 of the notes of testimony of the March 23, 2010, non-jury trial to support its claim.

The cited pages are from the testimony of the sole witness on behalf of Deutsche Bank, Christina Glynn, an employee of American Home Mortgage Servicing, a separate entity from American Home Mortgage Corporation. Relevant to this appeal, Glynn, a default litigation specialist, testified she had no doubt that Deutsche Bank possessed both the mortgage and the note. N.T. Trial, at 23. Glynn further testified that although the allonge was indorsed in blank, she *presumed* that Deutsche Bank also possessed the note because the mortgage had been assigned to it. *Id.* at 17. This assumption was demonstrated as false in the original decision of this Court which rejected Deutsche Bank's argument that the note and mortgage are presumed to have traveled together. *See Deutsche Bank v. Turk, supra*, at 11-12 (note and mortgage travelled different paths of ownership).

Because the presumption was not instantly supportable, Deutsche Bank was still required to demonstrate actual possession in order to

demonstrate entitlement to enforce the note. Glynn's testimony did not demonstrate Deutsche Bank's possession. As the trial court notes, and our review of the certified record confirms, Deutsche Bank's name appears nowhere on the original note or allonge. Glynn testified someone could have added Deutsche Bank's name to the allonge, but that was not done out of normal practice. N.T. Trial, at 22. Glynn further testified that she obtained the original note and allonge in a file that was supplied to her by her office. *Id.* at 19. Finally, Glynn testified she did not work solely on files from Deutsche Bank, but on files from a variety of clients. *Id.* at 45-46.

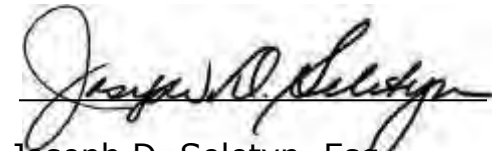
Based upon this evidence, we agree with the trial court's determination that there was no independent proof that Deutsche Bank ever possessed the note and allonge. Glynn, an employee of American Home Mortgage Servicing, produced the documents in question at trial. Glynn testified that at all times relevant to her work on the foreclosure, the original note and allonge were in the possession of her employer, not Deutsche Bank. We do not believe, and Deutsche Bank has provided no authority for the proposition, that the fact that Deutsche Bank's counsel at trial introduced the documents into evidence is proof that Deutsche Bank possessed them.

The facts as determined by the trial court are supported by the certified record. Our independent review of the law demonstrates that it is the holder who is entitled to enforce the instrument. 13 Pa.C.S. § 3301. The

statute is clear that to be the holder of the instrument indorsed in blank, one must possess it. 13 Pa.C.S. §§ 1201, 3205(b), 3301. Because Deutsche Bank never proved it possessed the note and allonge, it did not prove it was the holder of those instruments. Therefore, Deutsche Bank cannot prevail under the application of the Uniform Commercial Code. Accordingly, we find no abuse of discretion or error of law in the trial court's determinations and, therefore, Deutsche Bank is not entitled to relief.

Judgment affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", is written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/1/2014