Circuit Court for Montgomery County
Case No. 402234

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 166

September Term, 2017

RICHARD GJERULFF

v.

KEITH M. YACKO, ET AL.

Friedman,
Beachley,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: May 20, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Richard and Patricia Gjerulff, appellants, appeal an order of the Circuit Court for Montgomery County ratifying a foreclosure sale of their property. On March 17, 2015, Appellees filed a foreclosure action due to the Gjerulffs' default in payment on a promissory note, secured by a deed of trust. The Gjerulffs filed a motion to stay and dismiss the action, and requested the parties engage in discovery. The circuit court stayed the foreclosure sale pending an evidentiary hearing on the motion, and denied the request for discovery. Following the evidentiary hearing, the court ordered a temporary stay of 90 days to allow the parties to participate in further loss mitigation. On January 5, 2017, the Gjerulffs' property was sold at a public foreclosure auction. The sale was ratified on March 6, 2017. The Gjerulffs timely appealed, and present the following questions for our review:

1. Did the circuit court err in denying Appellant's request to engage in discovery?
2. Did the circuit court err in failing to dismiss the foreclosure action in light of the conflicting copies of the promissory note?

BACKGROUND

On August 10, 2007, Mr. Gjerulff signed a promissory note (the "Note") that memorialized a loan of $975,000 with SunTrust Mortgage, Inc. ("SunTrust"). That same day, Mr. and Mrs. Gjerulff secured the Note by executing a deed of trust (the "Deed of Trust") in favor of SunTrust encumbering property located at 16417 Equestrian Lane, Derwood, Maryland ("the Property").

The Gjerulffs defaulted on the loan on April 2, 2009. SunTrust appointed Keith Yacko, Robert Frazier, Thomas Gartner, Jason Hamlin, Gene Jung, and Glen Tsichirgi, appellees, as substitute trustees for the Deed of Trust (the "Substitute Trustees"). On March

17, 2015, the Substitute Trustees initiated foreclosure proceedings in the circuit court and filed copies of the Note and Deed of Trust with the court. The Note evidenced that, at some point, SunTrust indorsed the Note to U.S. National Bank as trustee for MASTR-2007-2.[1] After the Note was indorsed to U.S. National Bank, SunTrust became the servicer of the mortgage.

On December 3, 2015, the Gjerulffs filed a motion to stay and dismiss the foreclosure pursuant to Maryland Rule 14–211, and, in addition, requested the court allow the parties to engage in discovery. The motion raised factual allegations concerning the standing of SunTrust, and thereby the Substitute Trustees, to foreclose due to "conflicting" copies of the Note and 1099-A tax forms provided to the Gjerulffs. The Gjerulffs alleged that there was a copy of the Note filed by SunTrust in their bankruptcy case inconsistent with the copy submitted to the circuit court in this case. The circuit court scheduled a full evidentiary hearing on the merits of the motion, but denied the request for discovery.

At the evidentiary hearing on February 4, 2016, the Gjerulffs presented testimony of Mark Kellogg, an expert in tax law. The testimony centered around a 1099-A tax form

[1] Regularly, mortgage loans are originated with one entity, such as SunTrust, then sold to another and securitized. As the Court of Appeals explained in *Anderson v. Burson*, 424 Md. 232, 237 (2011), and reiterated in *Deutsche Bank National Trust Company v. Brock*, 430 Md. 714, 718 (2013):

> Securitization starts when a mortgage originator sells a mortgage and its note to a buyer, who is typically a subsidiary of an investment bank. The investment bank bundles together the multitude of mortgages it purchased into a "special purpose vehicle," usually in the form of a trust, and sells the income rights to other investors. A pooling and servicing agreement establishes two entities that maintain the trust: a trustee, who manages the loan assets, and a servicer, who communicates with and collects monthly payment from the mortgagors.

issued to the Gjerulffs in 2010, which indicated that UBS Securities, LLC was the secured party and the principal amount of the Gjerulffs' mortgage was zero, and a corrected 1099-A tax form issued by SunTrust in December 2015.

Mr. Gjerulff also testified at the hearing regarding the 1099-A tax forms and the parties' conduct during loss mitigation discussions. He explained that he had received conflicting letters from SunTrust; one indicating that the information SunTrust requested had not been received and another that indicated that SunTrust's loss mitigation department was reviewing his submitted documentation, which would be completed within five days.

At the conclusion of the hearing, the circuit court declined to dismiss the foreclosure, and stayed the action for ninety days to allow for loss mitigation to proceed. The Property was sold at auction on January 5, 2017. The circuit court ratified the sale on March 6, 2017. The Gjerulffs timely filed this appeal.

DISCUSSION

I. Whether the circuit court erred in denying the Gjerulffs' request for discovery.

The Gjerulffs argue the circuit court "committed reversible error by denying [their] request to engage in discovery." The Gjerulffs contend that their motion "raised the specter of conflicting promissory notes and competing ownership interests in the underlying debt," and the court's denial of discovery "effectively prevented [them] from proving [their] case." In essence, the Gjerulffs suggest discovery was necessary to determine whether the Substitute Trustees, acting on behalf of SunTrust, have standing to foreclose on the Property. The Substitute Trustees counter by claiming that the circuit court did not abuse

its discretion in denying discovery because the "conflicting promissory notes" issue was not relevant to the validity of the lien instrument.

We decline the Gjerulffs' invitation to examine and interpret Maryland Rule 14–211(a)(3)(C).[2] Rather it suffices to note for purposes of this appeal that "[w]e review the denial of discovery under the abuse of discretion standard." *Jones v. Rosenberg*, 178 Md. App. 54, 66 (2008). "A trial court abuses its discretion only if no reasonable person would take the view adopted by the trial judge in denying discovery." *Id.*

The Gjerulffs do not dispute the validity of the Note or Deed of Trust. Pursuant to the Commercial Law Article, a promissory note may be enforced by the holder of the instrument. Md. Code, Com. Law, § 3–301. A "holder" is "a person who has legal possession of a negotiable instrument and is entitled to receive payment on it." BLACK'S LAW DICTIONARY 848 (10th ed. 2009). Thus, SunTrust was a holder of the Note and could enforce it against the Gjerulffs as SunTrust had possession of and was listed as a payee on Note.

The Gjerulffs only seem to dispute the *ownership* of the Note, suggesting that SunTrust's issuance of the Note to U.S. Bank affects SunTrust's right to foreclose on the Property. However, "[t]he right to enforce an instrument and ownership of the instrument are two different concepts." *Deutsche Bank Nat. Trust Co. v. Brock*, 430 Md. 714, 731 (2013) (citing Comment 1, Md. Code, Com. Law, § 3–203)). "[A]s the borrower pays and

[2] Maryland Rule 14–211(a)(3)(C) provides, "A motion to stay and dismiss shall . . . be accompanied by any supporting documents or other material in the possession or control of the moving party and any request for the discovery of any specific supporting document in the possession or control of the plaintiff or the secured party."

incrementally discharges h[is] obligations under the note with each payment, it necessarily follows that the party to whom the borrower pays is entitled to enforce the note." *Anderson v. Sullivan*, 224 Md. App. 501, 513 (2015) (citing *Id*. at 729)). "[U]nder the established rules, the maker [of a note] should be indifferent as to who owns or has an interest in the note so long as it does not affect the maker's ability to make payments on the note." *Deutsche Bank Nat. Trust Co.*, 430 Md. at 731 (quoting *In re Veal*, 450 B.R. 897, 912 (9th Cir. 2011)) (brackets in the original). For purposes of foreclosure, "we are not required to consider whether the owner has been sufficiently identified[.]" *Anderson*, 224 Md. App. at 513 (holding lender listed on promissory note and deed of trust able to enforce foreclosure rights pursuant to deed of trust despite owner of promissory note being unidentified).

Applying these principles, we conclude that the Gjerulffs' discovery of the "conflicting" promissory note, which was not indorsed by SunTrust to U.S. Bank, would not have affected the result of the foreclosure action. The Substitute Trustees, as appointed agents of SunTrust, submitted to the circuit court the Note that SunTrust indorsed to U.S. Bank. Even with U.S. Bank being the owner of the Note, SunTrust was the holder of the Note and Deed of Trust, which evidenced the Gjerulffs' promise to pay SunTrust a sum of money and, upon the Gjerulffs' default on that promise, SunTrust's right to foreclose on the Property. SunTrust was free to issue the Note and thereby confer the right to receive the payments on the Note to another entity, as it did to U.S. Bank. The issuance neither relieved the Gjerulffs of their debt under the Note nor extinguished SunTrust's right to foreclose.

Similarly, under the "conflicting" promissory note that did not reflect SunTrust's issuance to U.S. Bank, SunTrust would have been the holder *and* owner of the Note. Under such circumstances, SunTrust would have had the right to foreclose upon the Property upon default as well as the right to retain the Gjerulffs' payments on the Note. In either circumstance, the result of the foreclosure proceeding is the same—SunTrust, and thereby the Substitute Trustees as its agents, had the right to foreclose on the Property. Accordingly, the circuit court did not abuse its discretion in failing to grant the Gjerulffs' motion for discovery.

The Gjerulffs, citing *Anderson v. Burson*, 424 Md. 232 (2011), argue that SunTrust, to gain status of holder of the Note, was required to produce the original Note for inspection to prove that it may enforce the instrument. However, the Gjerulffs' reliance is misplaced as *Anderson* is not applicable to the facts of this case.

In that case, the Andersons signed a promissory note and deed of trust in favor of Wilmington Finance, Inc.. The promissory note was then transferred, but not correspondingly indorsed, three times to different entities. *Id*. at 239. The third entity to which the note was transferred appointed a trustee who, upon the Andersons' default on the loan, attempted to enforce the note and foreclose on their property pursuant to the accompanying deed of trust. *Id*. The Court of Appeals held that the trustee, as a transferee, was only able to enforce the note and foreclose after establishing the chain of transfer from the original holder of the note, Wilmington Finance, Inc., to the trustee. *Id*. at 252.

Unlike the trustee in *Anderson*, here, SunTrust is not a transferee of the Note. Instead, SunTrust is the issuer of the Note. *See* Md. Code, Com. Law, § 3–105(a) ("'Issue'

means the first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person."); *see also Id.* at § 3–103(a)(3) ("'Drawer' means a person who signs or is identified in a draft as a person ordering payment."). Therefore, *Anderson* and the requirements of transferees do not apply to SunTrust.

II. Whether the circuit court erred in failing to dismiss the foreclosure action in light of the conflicting promissory notes.

The Gjerulffs claim the circuit court committed reversible error in failing to dismiss the foreclosure action on its merits because of the "incongruous copies of the promissory note." The Substitute Trustees argue that this issue is not properly before the Court for our consideration because the Gjerulffs failed to raise the issue at the evidentiary hearing before the circuit court. We agree.

"Ordinarily, [an] appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8–131. Appellants referenced the issue of the "conflicting promissory notes" in their motion to stay and dismiss and request for discovery. However, Appellants did not raise or otherwise mention the issue during the circuit court's evidentiary hearing on the motion's merits. Instead, the only issues presented were the inconsistent 1099-A tax forms issued to the Gjerulffs and SunTrust's conduct during the loss mitigation. Thus, the issue is not properly before this Court.

Nevertheless, in light of the overlap between the issues presented by this appeal, we have considered the question presented and find the Gjerulffs' contention meritless. As we

have stated, the Substitute Trustees, as agents of SunTrust, had the right to foreclose upon the Property pursuant to the Deed of Trust. The owner of the underlying debt, whether it be SunTrust, U.S. Bank, or another entity, is not relevant to our analysis. Accordingly, we hold the circuit court did not err in failing to dismiss the foreclosure action due to the conflicting promissory notes.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.