SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1667-15T3

U.S. BANK NATIONAL ASSOCIATION,
AS TRUSTEE FOR SASCO MORTGAGE
LOAN TRUST 2006-WF3,

Plaintiff-Respondent,

v.

KARIN POLHEMUS, HER HEIRS,
DEVISES AND PERSONAL
REPRESENTATIVE AND HIS/HER
THEIR, OR ANY OF THEIR
SUCCESSORS IN RIGHT, TITLE
AND INTEREST, MR. POLHEMUS,
HUSBAND OF KARIN POLHEMUS,

Defendant-Appellant.

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Submitted February 15, 2017 – Decided June 16, 2017

Before Judges Simonelli and Carroll.

On appeal from the Superior Court of New Jersey, Chancery Division, Passaic County, Docket No. F-010769-14.

Joseph A. Chang & Associates, LLC, attorneys for appellant (Joseph A. Chang, of counsel and on the brief; Jeffrey Zajac, on the brief).

Reed Smith LLP, attorneys for respondent (Henry F. Reichner, of counsel and on the brief).

PER CURIAM

In this foreclosure matter, defendant Karin Polhemus appeals from the June 30, 2015 Chancery Division order, which granted summary judgment to plaintiff U.S. Bank National Association, and from the November 5, 2015 final judgment. For the following reasons, we affirm.

I.

We derive the following facts from evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, viewed in the light most favorable to the non-moving party. Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)).

On May 24, 2006, defendant executed a note to American Financial Resources, Inc. (AFR) in the amount of $210,000. To secure payment of the note, defendant executed a mortgage to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for AFR, on her property located in Bloomingdale. On May 24, 2006, AFR executed an allonge to the note making it payable to Wells Fargo Bank, N.A. (Wells Fargo). On June 7, 2006, the mortgage was recorded with the Clerk of Passaic County.

On June 14, 2006, Wells Fargo acquired the loan by purchase, took possession of the original note, and began servicing the loan. Wells Fargo thereafter indorsed the note in blank.

On September 1, 2006, Structured Asset Securities Corporation (as Depositor), plaintiff (as Trustee), Wells Fargo (as Securities Administrator, Servicer, Originator, and Trustee Document Custodian), and Aurora Loan Services LLC (as Master Servicer), entered into a pooling and servicing trust agreement governing Structured Asset Securities Corporation Mortgage Pass-Through Certificates Series 2006-WF3 (the PSA). The PSA provided for the formation of the relevant Trust, the conveyance of a pool of mortgages to plaintiff as Trustee, the issuance of mortgage-backed securities representing interests in the pooled loans, and the servicing of the pooled loans by Wells Fargo. The PSA had a cut-off date of September 1, 2006, but permitted mortgage loans to be added to the pool of loans backing the certificates issued by the Trust for a two-year period following the cut-off date, or by September 1, 2008.

Defendant defaulted on January 1, 2008. On March 26, 2008, MERS, as nominee for AFR, executed an assignment of mortgage, which assigned the mortgage to plaintiff as Trustee for Structured Asset Securities Corporation Trust 2006-WF3. On November 7, 2008, the assignment was recorded with the Clerk of Passaic County.

On June 14, 2012, MERS, as nominee for AFR, executed a second assignment of mortgage, which assigned the mortgage to plaintiff as Trustee for SASCO Mortgage Loan Trust 2006-WF3. The only change

between this assignment and the first assignment was the shortening of Structured Asset Securities Corporation to SASCO. The reason for the second assignment was so that the name of the assignee would match that of the plaintiff ultimately filing the foreclosure action against defendant. On June 15, 2012, the second assignment was recorded with the Clerk of Passaic County.

An authorized representative from Wells Fargo confirmed in a supplemental certification with supporting documents that as of December 11, 2013, Wells Fargo, as Trustee Document Custodian under the PSA, held possession of the original note as plaintiff's agent. On January 3, 2014, Wells Fargo, as servicer of the loan, sent defendant a notice of intent to foreclose (NOI). The NOI identified the lender as plaintiff as Trustee for SASCO Mortgage Loan Trust 2006-WF3. On September 8, 2014, Wells Fargo transferred the original note to plaintiff's attorney for purposes of litigation.

On March 21, 2014, plaintiff, as Trustee for SASCO Mortgage Loan Trust 2006-WF3, filed a complaint for foreclosure against defendant. Defendant filed an answer. Both parties filed motions for summary judgment. Defendant did not dispute that she signed the note and mortgage and was in default. Rather, she argued that plaintiff lacked standing to foreclose because it did not own the note and mortgage prior to filing the complaint. Defendant

challenged plaintiff's ownership of her loan, asserting that plaintiff failed to comply with the terms of the PSA because the mortgage was not timely assigned by the cut-off date of September 1, 2006. Plaintiff countered that defendant lacked standing to raise this challenge.

In a June 30, 2015 written opinion, the trial court relied on HSBC Bank USA v. Gomez, A-4194-11 (App. Div. Jan. 10, 2013), to find that defendant lacked standing to challenge plaintiff's ownership of the mortgage based on alleged noncompliance with the terms of the PSA. The court also found that plaintiff, as Trustee for SASCO Mortgage Loan Trust 2006-WF3, had a prima facie right to foreclose because: (1) defendant executed the note and mortgage on May 24, 2006, and was in default; (2) the mortgage was validly assigned to plaintiff prior to filing the complaint; and (3) plaintiff was the holder of the note and mortgage. The court entered an order on June 30, 2015, granting summary judgment to plaintiff, striking defendant's answer, and referring the matter to the Office of Foreclosure. On November 5, 2015, the court entered final judgment. This appeal followed.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (citation omitted). Thus, we consider, as the trial judge

did, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill, supra, 142 N.J. at 536). Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Templo Fuente, supra, 224 N.J. at 199 (quoting R. 4:46-2(c)). If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008). We review issues of law de novo and accord no deference to the trial judge's conclusions on issues of law. Nicholas v. Mynster, 213 N.J. 463, 478 (2013). Applying these standards, we discern no reason to reverse the grant of summary judgment and entry of final judgment.

II.

Defendant contends that the court erred in holding she lacked standing to challenge plaintiff's ownership of the mortgage

based on alleged noncompliance with the terms of the PSA.[1] Relying on Bank of N.Y. v. Ukpe, A-2209-11 (App. Div. Aug. 20, 2014), and Yvanova v. New Century Mortg. Corp., 365 P.3d 845 (Cal. 2016), plaintiff argues that she had standing to assert a violation of the PSA and is a valid third-party beneficiary of the PSA. However, unpublished opinions, such as Upke, do not constitute precedent and are not binding on us, Trinity Cemetery Ass'n v. Twp. of Wall, 170 N.J. 39, 48 (2001); R. 1:36-3, and we are not bound by opinions from other jurisdictions.[2] See Lipkowitz v. Hamilton Surgery Ctr., LLC, 415 N.J. Super. 29, 36 (App. Div. 2010); Young v. Prudential Ins. Co. of Am., 297 N.J. Super. 605, 622 (App. Div.), certif. denied, 149 N.J. 408 (1997).

Nevertheless, neither Upke nor Yvanova support defendant's position. In Upke, we did not discuss whether a borrower may challenge compliance with a PSA, let alone hold or even suggest that a borrower has standing to do so. In Yvanova the Supreme Court of California merely held that a borrower who suffered a non-judicial foreclosure could sue for wrongful foreclosure when

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[1] We decline to address defendant's public policy argument that banks and lending institutes developed a complex securitization scheme behind which they should not be permitted to "hide."

[2] Defendant also relies on opinions from other jurisdictions to argue that recent trends in those jurisdictions provide strong support for her position. However, as we have stated, we are not bound by opinions from other jurisdictions.

an assignment is void, as opposed to voidable. Yvanova, supra, 365 P.3d at 848. The Supreme Court of California repeatedly stressed it was expressing no opinion on whether a mortgage assignment made after the closing date of a New York securitized trust was void or voidable. Id. at 853.

That being said, the PSA is governed by New York law. Under New York law, a person not a party to a PSA or specifically included in the PSA as a third-party beneficiary, such as defendant here, lacks standing to challenge any alleged violation of a PSA. Rajamin v. Deutsche Bank Nat'l Trust Co., 757 F.3d 79, 88 (2d Cir. 2014); see also Wells Fargo Bank, N.A. v. Erobobo, 127 A.D.3d 1176, 1178 (N.Y. App. Div. 2015) (holding that "a mortgagor whose loan is owned by a trust, does not have standing to challenge the plaintiff's possession or status as assignee of the note and mortgage based on purported noncompliance with certain provisions of the PSA"); Bank of N.Y. Mellon v. Gales, 116 A.D.3d 723, 725 (N.Y. App. Div. 2014) (finding the mortgagor "did not have standing to assert noncompliance with the subject lender's [PSA]"); In re Richmond, 534 B.R. 479, 491 (Bankr. E.D.N.Y. 2015) (noting "[i]t is well established that a non-party to a [PSA] lacks standing to assert non-compliance with the terms of that agreement as a defense to enforcement of a note and mortgage by a trust"); In re Estate of McManus, 390 N.E.2d 773, 774 (N.Y. 1979) (holding that those

not beneficially interested in a trust "lack standing to challenge the actions of its trustee"). See also Restatement (Third) of Trusts § 94(1) (2012) ("A suit against a trustee of a private trust to enjoin or redress a breach of the trust or otherwise to enforce the trust may be maintained only by a beneficiary or a co-trustee, successor trustee, or other person acting on behalf of one or more beneficiaries"). Thus, regardless of whether the mortgage assignments complied with the PSA in this case, defendant lacked standing to advance such a challenge.

In any event, there was no violation of the PSA. The PSA permitted mortgage loans to be added to the pool of loans backing the certificates issued by the Trust for a two-year period following the cut-off date, or by September 1, 2008. On March 26, 2008, MERS, as nominee for AFR, assigned the mortgage to plaintiff as Trustee. Thus, the assignment complied with the terms of the PSA.

III.

Defendant contends that the court erred in holding that plaintiff proved it possessed the note and mortgage. We disagree.

Under the Uniform Commercial Code (UCC), a "'[p]erson entitled to enforce' an instrument" includes a holder of the instrument and such a person is "entitled to enforce the instrument even though the person is not the owner of the instrument[.]"

N.J.S.A. 12A:3-301. See also N.J.S.A. 12A:3-302 (defining "holder in due course"). That is, under the UCC, the enforcing party must be a holder or non-holder in possession of the rights of the holder. The UCC does not specify that physical possession is necessary for a holder to enforce an instrument and courts recognize that delivery of the instrument to an agent of the owner can constitute constructive delivery or possession. N.J.S.A. 12A:3-301; Bank of N.Y. v. Raftogianis, 418 N.J. Super. 323, 331, 339 (Ch. Div. 2010) (citations omitted). Under New York law, "constructive delivery may be accomplished through the vehicle of an agent." Corporacion Venezolana de Foments v. Vintero Sales Corp., 452 F. Supp. 1108, 1117 (S.D.N.Y. 1978).

"As a general proposition, a party seeking to foreclose a mortgage must own or control the underlying debt." Deutsche Bank Nat'l Trust Co. v. Mitchell, 422 N.J. Super. 214, 222 (App. Div. 2011) (citations omitted). "[E]ither possession of the note or an assignment of the mortgage that predated the original complaint confer[s] standing." Deutsche Bank Trust Co. Americas v. Angeles, 428 N.J. Super. 315, 318 (App. Div. 2012) (citing Mitchell, supra, 422 N.J. Super. at 225). Consistent with this principle, "there can be constructive delivery or possession, through the delivery of the instrument to an agent of the owner" and "the actual delivery of the notes to [the trust's] custodian, would presumably

constitute constructive delivery to the [trustee]." Raftogianis, supra, 418 N.J. Super. at 331, 339.

The evidence in this case clearly established that plaintiff had standing when it filed the foreclosure complaint. Plaintiff had constructive possession of the original note through its agent, Wells Fargo, as well as a valid assignment of the mortgage that pre-dated the complaint. Defendant's argument that the evidence was insufficient to prove plaintiff's possession of the note and mortgage lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.