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This opinion shall not "constitute precedent or be binding upon any court."  
Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3492-14T3

U.S. BANK NATIONAL ASSOCIATION,  
successor in interest to the  
FEDERAL DEPOSIT INSURANCE  
CORPORATION as receiver for  
DOWNEY SAVINGS AND LOAN  
ASSOCIATION, F.A.,

Plaintiff-Respondent,

v.

DEBORAH P. RICHARDS, her heirs,  
devisees, and personal representatives  
and his/her, their, or any of their  
successors in right, title and  
interest, DANIEL D. RICHARDS, her  
husband, his heirs, devisees, and  
personal representatives and  
his/her, their, or any of their  
successors in right, title and  
interest,

Defendants-Appellants.

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Argued November 28, 2016 – Decided March 30, 2017

Before Judges Nugent and Currier.

On appeal from the Superior Court of New  
Jersey, Chancery Division, Somerset County,  
Docket No. F-1352-12.

Nicholas A. Stratton argued the cause for

appellant (Denbeaux & Denbeaux, attorneys; Mr. Stratton, on the brief).

Jeanette J. O'Donnell argued the cause for respondent (Powers Kirn, LLC, attorneys; Ms. O'Donnell, on the brief).

PER CURIAM

In this residential mortgage foreclosure action, defendants Deborah P. Richards and Daniel D. Richards<sup>1</sup> appeal from a November 22, 2013 Chancery Division order granting plaintiff U.S. Bank National Association summary judgment, striking defendants' answer, and referring the matter to the Foreclosure Unit for entry of final judgment. Defendants also appeal from the February 18, 2015 final foreclosure judgment. We affirm.

We derive the following procedural history and facts from the record on appeal. In September 2005, Deborah executed a note to Downey Savings and Loan Association (Downey) in the amount of \$675,000. To secure payment of the note, she and Richard, her spouse, executed a mortgage on a property she owned in Bernards Township. The mortgage was recorded in the Somerset County Clerk's office on October 27, 2005. In September 2007, both defendants executed a modification agreement increasing the interest rate and

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<sup>1</sup> To avoid confusion, when referring to either defendant individually, we use his or her first name, meaning no disrespect.

monthly payment. This instrument was recorded in the Somerset County Clerk's office on April 7, 2008.

On November 21, 2008, the Office of Thrift Supervision closed Downey, and the Federal Deposit Insurance Corporation (FDIC) became Downey's receiver. That same day, the FDIC and plaintiff entered into a Loan Sale Agreement wherein the FDIC agreed to convey all loans and commitments of Downey to plaintiff. In April 2009, the FDIC and plaintiff executed an Assignment and Assumption of Interests and Obligations. The FDIC assigned Deborah's mortgage on the Bernards Township property to plaintiff on August 22, 2011, effective November 21, 2008. This assignment was recorded on September 10, 2012.

Meanwhile, in February 2011, defendants defaulted on the note. Accordingly, in October 2011, plaintiff sent defendants a Notice of Intention to Foreclose. Plaintiff then filed its complaint in the Chancery Division in January 2012. Defendants filed a contesting answer in February 2012.

After further proceedings, plaintiff filed a summary judgment motion in October 2013 and defendants filed a cross-motion for summary judgment. In support of its motion, plaintiff provided

the note and allonge,<sup>2</sup> mortgage, modification agreement, Assignment and Assumption of Interest and Obligations agreement, and Notice of Intention to Foreclose. In addition, plaintiff submitted the certification of an employee of U.S. Bank Mortgage, plaintiff's servicing agent, authenticating the documents as business records.

In their opposition and cross-motion, defendants did not dispute either their execution of the note and mortgage or that they had defaulted in February 2011. Rather, they argued, among other things, plaintiff's proofs did not demonstrate they were in possession of the note and mortgage when they filed the foreclosure complaint. Defendants contended the certification of the servicing carrier's employee was not competent to establish plaintiff's possession of the note and mortgage when the complaint was filed. They also argued the employee's certification was not competent to establish her company acted as plaintiff's servicing carrier.

In reply, plaintiff submitted a certification from one of its officers, who attested she had "personal knowledge of the facts contained in the certification by virtue of [her] position at the

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<sup>2</sup> An allonge is "a slip of paper sometimes attached to a negotiable instrument for the purpose of receiving . . . indorsements." A. Garner, Black's Law Dictionary 92 (10th ed. 2014).

company and [her] familiarity with the company's practices and procedures." Based on the officers' review of the relevant business records, she authenticated the Loan Sale Agreement between the FDIC and plaintiff. The officer averred, "[a] list of the assets acquired by plaintiff . . . was attached to an Assignment and Assumption of Interest in Obligations dated April 20, 2009." The employee noted the list of assets included defendants' note and mortgage. Lastly, the employee averred "[a]t all times since its acquisition of the subject loan, [p]laintiff has been in possession of the subject note. The note has been stored in the Records Retention Department Vault . . . ."

In further reply, plaintiff submitted a certification from an authorized representative of the FDIC attesting to the transfer of all of Downey's "loans and . . . loan commitments" to plaintiff on November 21, 2008. Citing federal authority, the representative asserted that on November 21, 2008, plaintiff had become the owner of Downey's loans and loan commitments "by operation of law."

The court issued a written opinion on November 22, 2013, in which it denied defendants' cross-motion for summary judgment and granted plaintiff's summary judgment motion. The court determined that plaintiff possessed both the note and the mortgage when it filed the complaint.

Plaintiff moved for final judgment, which defendants opposed. The court entered final judgment February 18, 2015. Defendants appealed.

Appellate courts "review[] an order granting summary judgment in accordance with the same standard as the motion judge." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014) (citations omitted). We "review the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law." Ibid. (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)); R. 4:46-2(c). A trial court's determination that a party is entitled to summary judgment as a matter of law is "not entitled to any special deference[,]" and is subject to de novo review. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) (citations omitted).

When evaluating the motion record, we view the facts in a light most favorable to the non-moving party, "keeping in mind '[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion . . . would require submission of the issue to the trier of fact.'" Schiavo v. Marina Dist. Dev. Co., 442 N.J. Super. 346, 366 (App. Div. 2015) (alteration in original), certif. denied, 224 N.J. 124 (2016); R. 4:46-2(c). A motion for summary judgment will

not be defeated by bare conclusions lacking factual support, Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011), self-serving statements, Heyert v. Taddese, 431 N.J. Super. 388, 413-14 (App. Div. 2013), or disputed facts "of an insubstantial nature." Pressler & Verniero, Current N.J. Court Rules, comment 2.1 on R. 4:46-2 (2017).

Applying these principles to the facts developed by the parties during the summary judgment proceedings, we conclude plaintiff's proofs established "a single, unavoidable resolution of the alleged disputed issue[s] of fact," and thus the alleged disputed facts are "insufficient to constitute . . . 'genuine' issue[s] of material fact for purposes of [summary judgment]." Brill, supra, 142 N.J. 520, 540 (1995).

On appeal, defendants list several arguments in their point headings that, at their core, challenge the trial court's finding that plaintiff possessed the note and mortgage when it filed the complaint. Defendants also dispute the trial court's finding plaintiff was a holder in due course, though they engage in little analysis concerning FDIC transfers. Defendants' arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following brief comments.

It is now settled that "a party seeking to foreclose a mortgage must own or control the underlying debt" when it files the mortgage foreclosure complaint. Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 597 (App. Div. 2011) (quoting Bank of N.Y. v. Raftogianis, 418 N.J. Super. 323, 327-28 (Ch. Div. 2010)). Absent ownership or control of the underlying debt, a party "lacks standing to proceed with the foreclosure action and the complaint must be dismissed." Ibid.

Here, plaintiff could show it owned or controlled the note in one of three ways set forth in N.J.S.A. 12A:3-301. That statute provides:

"Person entitled to enforce" an instrument means the holder of the instrument, a nonholder in possession of the instrument who has the rights of a holder, or a person not in possession of the instrument who is entitled to enforce the instrument pursuant to [N.J.S.A.] 12A:3-309 or subsection d. of [N.J.S.A.]12A:3-418. 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.

Plaintiff, through circumstantial and direct evidence, proved it was "the holder of the note and the mortgage at the time the complaint was filed." Deutsche Bank Nat'l Trust Co. v. Mitchell, 422 N.J. Super. 214, 224-25 (App. Div. 2011).



Defendants did not dispute Downey held the original note and mortgage, nor did they dispute the FDIC, as Downey's receiver, through an Assignment and Assumption of Interests and Obligations executed on April 20, 2009, transferred to plaintiff all the "right, title and interest" in Downey's assets. An officer of plaintiff noted the list of assets included defendants' note and mortgage. The officer also averred that since its acquisition of defendants' loan, plaintiff had been in possession of the note, which had been stored in plaintiff's Records Retention Department Vault. Plaintiff did not file the mortgage foreclosure complaint until January 2012, more than two years after the FDIC assigned defendants' note and mortgage to plaintiff.

Defendants also challenge the certifications authenticating plaintiff's documents and attesting to plaintiff's possession of the note. Having considered the trial court's evidentiary rulings in light of the proofs presented on the motion record, we discern no abuse of discretion. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010) (citation omitted).

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION