

[Cite as *Huntington Natl. Bank v. Hoffer*, 2011-Ohio-242.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY**

HUNTINGTON NATIONAL BANK, et al. :	:	Appellate Case No. 2010-CA-31
Plaintiff-Appellee	:	:
v.	:	Trial Court Case No. 2009-CV-446
	:	:
	:	
DAVID W. HOFFER, et al.	:	(Civil Appeal from
Defendant-Appellant	:	Common Pleas Court)
	:	

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OPINION

Rendered on the 21st day of January, 2011.

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MATTHEW G. BURG, Atty. Reg. #0072556, Weltman, Weinberg & Reis Co., LPA,
Lakeside Place, Suite 200, 323 West Lakeside Avenue, Cleveland, Ohio 44113
Attorney for Plaintiff-Appellee

JAMES H. LAGOS, Atty. Reg. #0014974, Lagos & Lagos, PLL, One South Limestone
Street, Suite 1000, Springfield, Ohio 45502
Attorney for Defendant-Appellant

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BROGAN, J.

{¶ 1} Appellants David Hoffer and Teresa Hoffer (“Hoffer”) appeal the decision of the Greene County Court of Common Pleas, granting Summary Judgment and Final Judgment Entry of Foreclosure on April 15, 2010. Hoffer argues that the mortgage in question was never properly notarized and therefore was defective. Hoffer also

argues that the Appellee, Huntington National Bank (“Huntington”), is not a real party in interest. Absent any fraud or forgery, the certificate of the notary shows a freely signed and acknowledged mortgage. Since Sky Bank merged into Huntington, there was nothing Huntington needed to do to make itself a party in interest in regards to Hoffer’s mortgage. For the following reasons, we affirm the judgment of the trial court.

I

{¶ 2} On June 27, 2002, Hoffer granted a mortgage to Sky Bank for a loan they received totaling \$344,200.00. The mortgage contains the signatures of the Hoffers as well as the signature of a notary. The mortgage was recorded on July 5, 2002.

{¶ 3} Sky Bank was merged out of existence, with Huntington becoming the surviving entity. The note was lost, and Huntington presented an affidavit of lost note, which indicated that the note could not be located. The balance of the note was established through sworn testimony.

{¶ 4} Hoffer presented testimony that they never met the notary who signed the mortgage, Xan Beam, and also presented testimony that they did not sign the note. Hoffer also states that he found no assignment between Sky Bank and Huntington.

II

{¶ 5} Summary judgment is appropriate when: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to

have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co., Inc.*, (1978), 54 Ohio St.2d 64, 66; citing Civ. R. 56(C).

{¶ 6} Upon a motion for summary judgment, the initial burden is on the moving party to show that there is no genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Once a moving party satisfies its burden, “the nonmoving party may not rest upon the mere allegations or denials of the party’s pleadings.” *Murphy v. McDonald’s Restaurants of Ohio, Inc.*, Clark App. No. 2010-CA-4, 2010-Ohio-4761, at ¶ 13; citing *Dresher*, 75 Ohio St.3d at 292-93. “Rather, the burden then shifts to the non-moving party to respond, with affidavits or as otherwise permitted by Civ. R. 56, setting forth specific facts which show that there is a genuine issue of material fact for trial.” *Id.* “Throughout, the evidence must be construed in favor of the non-moving party.” *Id.*

III

{¶ 7} Hoffer sets forth two assignments of error. The first assignment of error is as follows:

{¶ 8} “THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING SUMMARY JUDGMENT AGAINST THE DEFENDANT-APPELLANTS, DAVID W. HOFFER AND TERESA HOFFER DESPITE THE UNCONTRADICTED FACT THAT THE MORTGAGE IN QUESTION WAS DEFECTIVE IN THAT IT HAS NOT BEEN PROPERLY NOTARIZED.”

{¶ 9} Hoffer argues that Huntington is attempting to get judgment on a note it does not have. Hoffer contends that since the mortgage was not properly executed,

Huntington can not go after him for the note, and that if he can prove the notarization of the mortgage was defective, the whole mortgage was defective.

{¶ 10} However, this mortgage appears to be facially valid, since there is evidence that the Hoffers appeared before the notary and signed the mortgage. “In the absence of clear and convincing proof of fraud or forgery, the certificate of a notary stating that the mortgage release was freely signed and acknowledged by the mortgagee is conclusive evidence of the facts stated in the notary’s certification.” *Waddell v. Frasure*, Scioto App. No. 05CA3040, 2006-Ohio-6093. In the present case, we find no evidence of any fraud or forgery, just the contention from Hoffer that they never met the notary. That is not enough to challenge the notary’s certification. The Supreme Court has held that “a defectively executed mortgage is valid as between the parties thereto in the absence of fraud.” *Citizens National Bank v. Denison* (1956), 165 Ohio St. 89.

{¶ 11} Hoffer’s first assignment of error is overruled.¹

IV

{¶ 12} Hoffer’s second assignment of error is as follows:

{¶ 13} “THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING SUMMARY JUDGMENT AGAINST DEFENDANT-APPELLANTS, DAVID W. HOFFER AND TERESA HOFFER DESPITE THE FACT THAT THE PLAINTIFF-APPELLEE HAD FAILED TO JOIN A NECESSARY PARTY WHO WAS

¹Although appellants state in their brief they did not sign the note to which the mortgage refers, they did not assign as error the trial court’s granting summary judgment with respect to the note.

THE HOLDER OF THE NOTE AND THUS THE REAL PARTY OF INTEREST.”

{¶ 14} Hoffer argues that the mortgage was executed for the benefit of Sky Bank and was not assigned in the Greene County Recorder’s Office to Huntington, and therefore Huntington is not a party in interest.

{¶ 15} When an existing bank takes the place of another bank after a merger, no further action is necessary. *Huntington National Bank v. P.A.B., Inc.*, (1982), Franklin App. No. 81AP-753. Since Sky Bank merged into Huntington, there was nothing else that Huntington needed to do to become the real party in interest in regards to Hoffer’s mortgage.

{¶ 16} Hoffer’s second assignment of error is overruled.

V

{¶ 17} Hoffer’s assignments of error being overruled, we affirm the decision of the trial court, granting summary judgment to Huntington.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

Matthew G. Burg
James H. Lagos
Hon. Stephen Wolaver