[Cite as *Pacetti's Apothecary, Inc. v. Rebound Bracing & Pain Solutions, L.L.C.*, 2023-Ohio-93.]

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

PACETTI'S APOTHECARY, INC. dba MEDICINE SHOPPE, et al.	:	
	:	C.A. No. 2022-CA-28
Appellants	:	
	:	Trial Court Case No. 2021 CV 0415
v.	:	
	:	(Civil Appeal from Common Pleas
REBOUND BRACING AND PAIN SOLUTIONS, LLC, et al.	:	Court)
	:	
Appellees	:	

. . . . . .

O P I N I O N

Rendered on January 13, 2023

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JOHN A. FISCHER, Attorney for Appellants

DAVID BOCKRATH c/o Rebound Bracing and Pain Solutions, LLC, Appellees, Pro Se

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WELBAUM, J.

{¶ 1} Plaintiffs-Appellants, Pacetti's Apothecary, Inc. dba Medicine Shoppe and Cindi Pacetti (collectively, "Pacetti") appeal from a trial court judgment awarding them $94,456.50 in damages against Defendant-Appellee, Rebound Bracing and Pain Solutions, LLC ("Rebound").

{¶ 2} According to Pacetti, the trial court erred in finding that a late fee provision in the parties' contract was a penalty instead of being enforceable as liquidated damages. Pacetti further contends that the court erred in failing to hold Defendant-Appellee Richard Bockrath personally liable for the damages. Rebound and Bockrath failed to file a brief.

{¶ 3} After reviewing the record, we conclude that the trial court did not err in finding the late fee provision unenforceable as a penalty. Under the established test for resolving this issue, Pacetti's damages were not uncertain as to amount or difficult to prove. The trial court correctly found no relationship between the late fee provision and Pacetti's damages.

{¶ 4} The court also did not err in refusing to pierce the corporate veil. The court correctly found insufficient evidence that Bockrath exercised control over Rebound in such a manner as to commit fraud, an illegal act, or a similarly unlawful act. Accordingly, the judgment of the trial court will be affirmed.

I. Facts and Court of Proceedings

{¶ 5} On August 30, 2021, Pacetti filed a complaint for breach of contract and unjust enrichment against Rebound and Bockrath. The amount claimed included $50,000 on a promissory note, $10,000 in interest on the note, and a late fee of 0.5% (or $250) on the principal amount for each day the amount due was unpaid. In addition, Pacetti requested $32,456.50 in unpaid billing fees. Pacetti also asked for attorney fees and the costs of bringing the action.

{¶ 6} Service was made on Rebound and Bockrath, but they failed to either appear

in the action or file answers to the complaint. As a result, on October 5, 2021, Pacetti filed a motion for default judgment. The court referred the case to a magistrate, who held a default judgment and damages hearing on January 10, 2022. Cindi Pacetti testified at the hearing and presented the court with two exhibits, including the promissory note attached to the complaint. Bockrath did not appear for the hearing.

{¶ 7} Ms. Pacetti testified that she is the owner of Pacetti's Apothecary, which does business as Medicine Shoppe. The Medicine Shoppe is an independent retail pharmacy that also sells durable medical equipment. Besides the retail business, Pacetti has various exclusive contracts with insurance companies for billing durable medical equipment. Transcript of Default Judgment Hearing ("Tr.") (Jan. 10, 2022), p. 2-3. Bockrath owns Rebound, which is in the business of providing durable medical equipment. A number of years ago, Bockrath and Pacetti entered into an agreement, pursuant to which Pacetti would perform insurance billing services for Rebound and would receive a 20% commission for its efforts. *Id.* at p. 4 and 12-13.

{¶ 8} During this relationship, Bockrath, on occasion, asked Pacetti to forego its commission. Typically, this occurred when Bockrath needed money for payroll or needed to buy medical equipment. *Id*. On one occasion, Bockrath asked Pacetti to refrain from collecting the commission because he needed money for his daughter's wedding. *Id*. at p. 13. At the time of the damages hearing in January 2021, the total amount owed to Pacetti was $32,456.50. *Id*. at p. 13-15.

{¶ 9} A separate matter involved a $50,000 promissory note that Pacetti's Apothecary and Rebound entered into on September 1, 2020. This was done at

Bockrath's request, because he wanted to purchase more durable medical equipment to keep his business going. *Id*. at p. 5-6 and Exhibit 1. The note required repayment of the entire amount of the loan by December 1, 2020, and it imposed $10,000 as interest charges for the three-month duration of the loan. As a result, $60,000 was due on December 1, 2020. In addition, the note stated that:

> FAILURE TO PAY[:] If the Lender has not received the full amount of the payment after [December 1, 2020], the Borrower shall owe a late payment fee to the Lender of 1/2 % of the principal amount each day the amount due is late.

Ex. 1 (Promissory Note), p. 1.

{¶ 10} The "Lender" on the Loan was Pacetti's Apothecary, Inc., and the "Borrower" was Rebound Bracing and Pain Solutions, LLC. *Id*. at p. 2. Ms. Pacetti signed the note on Apothecary's behalf, and Bockrath signed it on Rebound's behalf. *Id*.; *see also* Tr. at p. 6. The note further provided that if any payment obligation under the loan was late, the Borrower would pay collection costs, including attorney fees and costs.

{¶ 11} After the note was signed, Ms. Pacetti gave Bockrath a $50,000 check, and he accepted the money. *Id*. at p. 7 and Ex. 1 at p. 3. Bockrath never made any payment on the loan. As a result, Pacetti filed suit on August 30, 2021. Tr. at p. 7-8. At the time of the magistrate's hearing on January 10, 2022, 405 days had elapsed, and Pacetti stated that an additional $101,450 was owed, which represented ½% of $50,000 (or $250) per day times 405 days. *Id*. at p. 8-10. Pacetti had also incurred $2,000 in attorney fees. *Id*. at p. 10. As a result, Pacetti's total damages amounted to $195,706.50

($60,000 + $101,250 + $2,000 + 32,456.50 = $195,706.50).

{¶ 12} After hearing the evidence, the magistrate filed a decision on January 21, 2022, granting the default judgment and awarding Pacetti damages of $94,456.40. The magistrate found that Pacetti was entitled to the loan amount and interest (totaling $60,000), attorney fees of $2,000, and the billing amounts that had been deducted ($32,456.40).[1] Magistrate's Decision (Jan. 21, 2021), p. 4-6. However, the magistrate rejected the late fee amount of $101,250 due to insufficient evidence of a relation between the late fees and actual damages. *Id*. at p. 5.

{¶ 13} Pacetti filed timely objections to the magistrate's decision and also asked the court for permission to file supplemental objections after the transcript was completed. The court granted the motion, and Pacetti then filed supplemental objections on February 28, 2022. On April 1, 2022, the court issued a decision overruling the objections. First, the court agreed with the magistrate that Pacetti was not entitled to late fees because this amount was not intended to compensate Pacetti; instead, it was intended to punish Rebound. Decision and Judgment Entry (Apr. 1, 2022), p. 3-5. The court also rejected Pacetti's argument that Bockrath should be held personally responsible for the debt. The court noted that the complaint lacked any allegations about piercing the corporate veil and that Pacetti had also failed to offer any evidence in support of such a theory. As indicated, the court modified the amount for the billing fees from $32,456.40 to $32,456.50. In all other respects, the court adopted the magistrate's decision. *Id*. at p. 6-7. Pacetti then timely appealed from the court's judgment.

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[1] The magistrate's stated billing amount was incorrect, and the trial court changed this in its decision overruling the objections. The actual billing amount was $32,456.50.

II. Late Payment Fee

{¶ 14} Pacetti's first assignment of error states that:

> The Trial Court Erred by Finding That the Late Payment Fee Provided in the Contract Was Not Enforceable as Agreed Upon by Two Parties with Business Acumen.

{¶ 15} Under this assignment of error, Pacetti contends that the trial court erred in rejecting the late fee because late fees are permissible and the fee was not a penalty. According to Pacetti, the contract indicates that the parties contemplated a quick repayment, and the amount of its damages was uncertain and difficult to prove. Pacetti further argues that the amount of the fee was not unreasonable, as it was only .5% of the principal amount, and Bockrath, as a sophisticated businessperson, could not be deemed ignorant of the provision's effect.

{¶ 16} Before addressing the merits, we note that the trial court's decision was made after a referral to the magistrate, who held a hearing on damages. This is consistent with Civ.R. 55(A), which states that:

> If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties.

{¶ 17} We have stressed that the trial court has discretion to require a hearing on damages and to require proof of damages " 'where the claim is based upon a written instrument, a contract where a specific amount is due or an account.' " *Day Air Credit Union, Inc. v. Davis*, 2021-Ohio-2054, 173 N.E.3d 1285 ¶ 19 (2d Dist.), quoting *Schroeder v. Gold*, 2d Dist. Montgomery No. 10052, 1987 WL 5627, *4 (Jan. 22, 1987). In *Davis*, we found that the trial court had abused its discretion by refusing to award a credit union $100 in late fees without holding a hearing. *See also Countrywide Home Loans Servicing v. Nichpor*, 136 Ohio St.3d 55, 2013-Ohio-2083, 990 N.E.2d 565, ¶ 5 ("[i]n order to enter a default judgment, a court must determine that no issues of law or fact exist and that the plaintiff is entitled to judgment").

{¶ 18} In reviewing a trial court's adoption of a magistrate's decision, we apply an " 'abuse of direction standard.' " *Holfinger v. Stonespring/Carespring, L.L.C.*, 2d Dist. Montgomery No. 27091, 2016-Ohio-7982, ¶ 33, quoting *State Farm Mut. Auto. Ins. Co. v. Fox*, 182 Ohio App.3d 17, 2009-Ohio-1965, 911 N.E.2d 339, ¶ 11 (2d Dist.). An abuse of discretion " 'implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " (Citation omitted.) *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary." *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp*., 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue de novo, would not have

found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *Id*.

{¶ 19} Analysis of the appropriate standard of review can also involve whether a question of law is concerned. If issues pertain to questions of law, they are reviewed de novo, in which case "an appellate court may properly substitute its judgment for that of the trial court." *Castlebrook, Ltd. v. Dayton Properties Ltd. Partnership*, 78 Ohio App.3d 340, 346, 604 N.E.2d 808 (2d Dist.1992); *Payson v. Phipps*, 2d Dist. Miami No. 2021-CA-36, 2022-Ohio-1525, ¶ 36. *See also Davis*, 2021-Ohio-2054, 173 N.E.3d 1285, at ¶ 26 (in default judgment case, "[w]hether a trial court's determination of prejudgment and postjudgment interest is reviewed de novo or, instead, for an abuse of discretion depends on the statutory basis for the interest and whether questions of law are involved"). Regardless of the standard of review applied here, however, Pacetti's claim fails.

{¶ 20} "As a general rule, parties are free to enter into contracts that contain provisions which apportion damages in the event of default." *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 381, 613 N.E.2d 183 (1993). "In certain circumstances, however, complete freedom of contract is not permitted for public policy reasons. One such circumstance is when stipulated damages constitute a penalty. Because the sole purpose of contract damages is to compensate the nonbreaching party for losses suffered as a result of a breach, '[p]unitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.' " *Id*., quoting 3 Restatement of the Law 2d, Contracts Section 355, at 154 (1981). "A punitive remedy is one that subjects the breaching party to a liability

'disproportionate to the damage which could have been anticipated from breach of the contract * * *.' " *Id.*, quoting 5 Williston on Contracts Section 776 at 668 (3d Ed.1961). "A penalty is designed to coerce performance by punishing nonperformance; its principal object is not compensation for the losses suffered by the nonbreaching party." *Id*.

{¶ 21} The Supreme Court of Ohio has established the following test to decide if a provision for stipulated damages is for liquidated damages or is punitive:

> Where the parties have agreed on the amount of damages, ascertained by estimation and adjustment, and have expressed this agreement in clear and unambiguous terms, the amount so fixed should be treated as liquidated damages and not as a penalty, if the damages would be (1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof.

Samson Sales, Inc. v. Honeywell, Inc., 12 Ohio St.3d 27, 465 N.E.2d 392 (1984), syllabus, following *Jones v. Stevens*, 112 Ohio St. 43, 146 N.E. 894 (1925), paragraph two of the syllabus.

{¶ 22} In the case before us, Pacetti's claim fails on the first prong, which is that the damages would be "uncertain as to amount and difficult of proof." In this context, Pacetti argues that damages are uncertain because failure to repay the $60,000 would

require proof about various matters, such as how the failure would impact Pacetti's business, whether it would cause Pacetti to have trouble making payroll, and whether the failure would cause Pacetti to not be able to pay other debts. Appellant's Brief, p. 4-5. However, no evidence was presented on these points during the hearing. Furthermore, even if this were otherwise, Pacetti's situation is no different than that of any other person or entity who loans money to another. Repayment of a loaned amount is never a given, and this is a risk any lender takes.

{¶ 23} When the parties entered into the agreement in September 2020, the amount of damages was also easily ascertainable; the amount was the $50,000 loaned, plus the $10,000 in interest charged for three months' use of the money (in itself a very large sum). Therefore, the trial court did not err in concluding that the daily assessment of $250 in the event of breach was a penalty rather than liquidated damages. *Compare Indus. Waste Disposal v. Shone*, 2d Dist. Montgomery No. 12267, 1991 WL 47538, *3 (Mar. 27, 1991) (upholding a liquidated damages provision in a contract for waste disposal where testimony indicated that "damages were difficult to determine due to fluctuations in prices charged by the EPA and Montgomery County for the waste disposal"). Accordingly, the trial court did not err in finding a lack of relationship between the late fee and Pacetti's damages.

{¶ 24} We do disagree with the trial court's comment that the current amount of damages was more than double the amount borrowed. Decision and Judgment (Apr. 1, 2022), at p. 5. The Supreme Court of Ohio has specifically rejected a hindsight approach to the analysis. Instead, the court has stressed that "Ohio law requires a court, when

considering a liquidated-damages provision, to ' "examine it in light of what the parties knew at the time the contract was formed." ' " *Boone Coleman Constr., Inc. v. Piketon*, 145 Ohio St.3d 450, 2016-Ohio-628, 50 N.E.3d 502, ¶ 35, quoting *Jones*, 112 Ohio St. 43, 146 N.E. 894, at paragraph one of the syllabus. (Other citations omitted.) The trial court's error was harmless, however, given Pacetti's failure on the first prong of the liquidated damages analysis.

{¶ 25} Based on the preceding discussion, the first assignment of error is overruled.

III. Piercing the Corporate Veil

{¶ 26} Pacetti's second assignment of error states that:

> The Trial Court Erred by Failing to Hold Mr. Bockrath Personally Liable When He Failed to Respond in Any Way to Either the Complaint or the Motion for Default Judgment.

{¶ 27} Under this assignment of error, Pacetti contends that the trial court erred in failing to pierce the corporate veil, which would have allowed Bockrath to be held personally liable for Rebound's debt. According to Pacetti, Bockrath's failure to appear in the action deprived her of the ability to conduct discovery on this point. Pacetti notes, however, that some evidence was presented at the hearing to indicate that Bockrath was mingling corporate and personal finances. This is based on testimony that Bockrath sought money " 'because he needed to make payroll, his daughter's wedding was coming up, and that he needed the money.' " Appellant's Brief at p. 7, quoting the Magistrate's

Decision (Jan. 21, 2022), p. 2, fn.4.

{¶ 28} The complaint did not contain any allegations pertaining to piercing the corporate veil, nor was this matter discussed at the hearing that was conducted. In objecting to the magistrate's decision, Pacetti did claim that the magistrate had erred by failing to hold Bockrath personally liable. *See* Plaintiff's Objections to the Magistrate's Decision (Jan. 31, 2022), p. 1 and 5-6, and Plaintiff's Supplemental Objections to the Magistrate's Decision (Feb. 28, 2022), p. 8-9. The trial court overruled this objection, finding that the matter had not been raised in the complaint and no evidence or argument had been offered on this subject at the default judgment hearing. Decision and Judgment Entry (Apr. 1, 2022), at p. 6. The court further found that the record did not contain sufficient evidence to pierce the corporate veil. *Id*.

{¶ 29} Again, we review the trial court's adoption of a magistrate's decision for abuse of discretion. *Holfinger*, 2d Dist. Montgomery No. 27091, 2016-Ohio-7982, at ¶ 33. As previously noted, "most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary." *AAAA Ents.,* 50 Ohio St.3d at 161, 553 N.E.2d 597.

{¶ 30} Having reviewed the record, we cannot find that the trial court's decision lacked a sound reasoning process. The Supreme Court of Ohio has said that:

> The corporate form may be disregarded and individual shareholders held liable for wrongs committed by the corporation when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control

> over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.

Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., *Inc*., 67 Ohio St.3d 274, 275, 617 N.E.2d 1075 (1993).

{¶ 31} The court later modified this test by stating that "[t]o fulfill the second prong of the *Belvedere* test for piercing the corporate veil, the plaintiff must demonstrate that the defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act." *Dombroski v. WellPoint, Inc.*, 119 Ohio St.3d 506, 2008-Ohio-4827, 895 N.E.2d 538, syllabus.

{¶ 32} *Dombroski* involved a claim that was resolved on a Civ.R. 12(B)(6) motion to dismiss. *Id*. at ¶ 3. Thus, like here, the plaintiff had no ability to conduct discovery.

{¶ 33} In *Dombroski*, the plaintiff asserted that various insurers had acted in bad faith in denying coverage for a cochlear implant. *Id*. at ¶ 6-9. The issue before the court was resolution of a conflict among districts about whether *Belvedere* allowed " 'the corporate veil to be pierced in cases where control was exercised to commit unjust or inequitable acts that do not rise to the level of fraud or an illegal act.' " *Id*. at ¶ 1. For purposes of deciding the issue, the court assumed "as true the allegation that WellPoint and Anthem Insurance controlled the subsidiary corporations, Community and Anthem UM, to such a degree that those corporations had no separate minds, wills, or existences of their own." *Id*. at ¶ 19.

{¶ 34} In deciding to modify *Belvedere*, the court stressed its adherence "to the principle that limited shareholder liability is the rule * * * and piercing the corporate veil is the 'rare exception' that should only be 'applied in the case of fraud or certain other exceptional circumstances.' " *Id*. at ¶ 26, quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474, 475, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003). (Other citation omitted.) The court also emphasized that:

> Limiting piercing to cases in which the shareholders used their complete control over the corporate form to commit specific egregious acts is key to maintaining this balance. Were we to allow piercing every time a corporation under the complete control of a shareholder committed an unjust or inequitable act, virtually every close corporation could be pierced when sued, as nearly every lawsuit sets forth a form of unjust or inequitable action and close corporations are by definition controlled by an individual or small group of shareholders.

Id. at ¶ 27.

{¶ 35} The court therefore held that "to fulfill the second prong of the *Belvedere* test for piercing the corporate veil, the plaintiff must demonstrate that the defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act. Courts should apply this limited expansion cautiously toward the goal of piercing the corporate veil only in instances of extreme shareholder misconduct." *Id*. at ¶ 29. As applied to the case before it, the court found dismissal under Civ.R. 12(B)(6) appropriate because "[i]Insurer bad faith is a

straightforward tort, a basic example of unjust conduct; it does not represent the type of exceptional wrong that piercing is designed to remedy." *Id*.

{¶ 36} The same observation applies here. There were no allegations or testimony that would transform this situation into the kind of exceptional wrong that causes courts to pierce the corporate veil. The "Borrower Name" on the promissory note was "Rebound Bracing and Pain Services, LLC," and Ms. Pacetti and Bockrath both signed the note on behalf of their respective corporate entities. The check stub for the $50,000 payment also referred only to corporate entities, not to individuals, i.e., it bore the names "Rebound Bracing, LLC," and "Dave Bockrath, LLC." *See* Ex. 1 to the Complaint and Tr. at p. 6-7.

{¶ 37} In addition, Ex. 2 (which referred to situations in which Pacetti chose not to charge Rebound a 20% commission) only mentions these limited liability corporations, not Bockrath individually. *See* Tr. at p. 10-11 and Ex. 2 attached to Notice of Plaintiffs['] Filing of Redacted Exhibit (Jan. 21, 2022).

{¶ 38} Based on the preceding discussion, the trial court correctly held that there was insufficient evidence in the record to pierce the corporate veil. Accordingly, Pacetti's second assignment of error is overruled.

IV. Conclusion

{¶ 39} Both of Pacetti's assignments of error having been overruled, the judgment of the trial court is affirmed.

. . . . . .

TUCKER, P.J. and LEWIS, J., concur.

[Cite as *JoMar Group, Ltd. v. Brown*, 2023-Ohio-98.]

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOMAR GROUP, LTD.

Plaintiff-Appellee

-vs-

GARY M. BROWN

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 22 CA 005

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 20 CV 039
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	January 12, 2023

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Defendant-Appellant, Gary M. Brown, appeals from the March 17, 2022, Judgment Entry by the Holmes County Court of Common Pleas. Defendant-Appellee is JoMar Group, Ltd. The relevant facts leading to this appeal are as follows.

STATEMENT OF THE FACTS AND CASE

{¶2} On June 19, 2020, Appellee, an Ohio limited liability company, filed a complaint alleging breach of contract and seeking specific performance.

{¶3} On July 13, 2020, Appellant filed his Answer.

{¶4} On August 18, 2020, Appellee filed an Amended Complaint. The amended complaint contained one count of breach of contract seeking specific performance, one count seeking damages for breach of contract, and one count of intentional interference with a contract also seeking damages.

{¶5} On September 8, 2020, Appellant filed his Answer to the Amended Complaint.

{¶6} On October 9, 2020, Appellee filed a Motion for Partial Summary Judgment.

{¶7} On November 13, 2020, Appellant filed a Response in Opposition.

{¶8} On November 25, 2020, Appellee filed a Reply to Appellant's Response in Opposition.

{¶9} On December 23, 2020, Appellant filed a Sur Reply.

{¶10} On January 27, 2021, the trial court held a hearing on Appellee's Motion for Partial Summary Judgment.

{¶11} On February 25, 2021, the trial court overruled Appellee's Motion for Partial Summary Judgment.

{¶12} On October 6, 2021, Appellee filed a Second Amended Complaint. The final amended complaint alleged Appellant sold a 260-acre tract of land. The contract called for Appellee to purchase around 158 acres from Appellant. The contract included a provision that provided Appellee the ability to purchase the remaining 102 acres ("Option").

{¶13} Within the time period of the Option, Appellee notified Appellant of his intention to exercise his option to purchase the remaining acreage. After receiving no response from Appellant, Appellee sent a certified letter notifying Appellant of his intention to exercise the Option.

{¶14} After sending the certified letter, Appellee began negotiations with a third party for the sale of the real estate subject to the Option. An agreement was reached on June 25, 2020. Appellee then informed Appellant of the contract between Appellee and the third party for the sale of the real estate.

{¶15} On November 2, 2021, Appellant filed an Answer.

{¶16} On December 16, 2021, the trial court held a bench trial.

{¶17} On March 17, 2022, the trial court issued a judgment entry finding in favor of Appellee on the First and Third Counts. Count two was found to be moot.

{¶18} On April 13, 2022, Appellee filed a notice of waiver of damages and a motion for the court to enter a final appealable order.

{¶19} On May 24, 2022, the trial court entered its final judgment entry.

ASSIGNMENTS OF ERROR

{¶20} Appellant filed a timely notice of appeal and herein raises the following two Assignments of Error:

{¶21} "I. THE TRIAL COURT ERRED BY GRANTING APPELLEE'S COUNT I FOR BREACH OF CONTRACT AND ORDERING SPECIFIC PERFORMANCE.

{¶22} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FOUND INTENTIONAL INTERFERENCE OF CONTRACT AND AWARDED DAMAGES FOR ALLEGED INTERFERENCE THAT TOOK PLACE PRIOR TO THE EXISTENCE OF THE CONTRACT."

I.

{¶23} In Appellant's first Assignment of Error, Appellant argues the trial court erred by finding the existence of a valid option contract, and if a breach occurred, ordering specific performance. We disagree.

a. Standard of Review

{¶24} The interpretation and construction of written contracts is reviewed de novo. *Long Beach Assn., Inc. v. Jones*, 82 Ohio St.3d 574, 576, 697 N.E.2d 208 (1998). However, an appellate court is not the finder of fact, we neither weigh evidence nor judge credibility of witnesses. Our role is to determine whether relevant, competent, and credible evidence exists upon which the fact finder could base his or her judgment. *Peterson v. Peterson*, 5th Dist. Muskingum No. CT2003-0049, 2004-Ohio-4714, ¶10, citing *Cross Truck v. Jeffries*, 5th Dist. Stark No. CA 5758, 1982 WL 2911 (Feb. 10, 1982).

b. Consideration for Option Contract

{¶25} "In the ordinary real estate option contract, the seller offers to sell his real property upon fixed terms, and he and his prospective buyer agree that, in exchange for a consideration paid by the buyer, the seller will leave his offer open for a specified time. Within this context, the option contract is not a contract to buy and sell the property, but

only a contract whereby the seller agrees to leave his offer open for a time certain. Confusion often arises since the option is combined with the main offer to sell and its attendant detailed terms." *Ritchie v. Cordray*, 10 Ohio App.3d 213, 215, 461 N.E.2d 325 (1983).

{¶26} "However, the two are separate and independent, even though found in one document; the option is collateral to the main offer to sell. The main offer does not become a contract to buy and sell unless and until its terms are accepted. The option, on the other hand, is already a binding complete contract to leave the offer open-there has been both offer and acceptance, supported by consideration." *Id*.

{¶27} This particular case has another layer of complexity as the document which allegedly contains the Option is also part of a contract for the sale of a different parcel of real estate.

{¶28} Appellant argues that since the Option was part of a larger contract, and no distinct consideration was called out, then the option contract is unenforceable. For support they cite *Bhavnani v. Voldness*, 10th Dist. Franklin No. 95APE03-284, 1995 WL 578124. *Bhavnani* clearly states, "appellant has failed to affirmatively demonstrate that he gave *separate* consideration for the option." *Id*. However, the Tenth District Court of Appeals uses the term "separate consideration" as "something other and independent of the consideration that will pass between the parties in the event that the option is exercised." *Mirich v. Safarek*, 7th Dist. Mahoning No. 81 C.A. 48, 1982 WL 6105, citing, 17 Ohio Jurisprudence 3d 453-454, Contracts, Section 22.

{¶29} In the case *sub judice*, Appellant received consideration of $1,425,000, a van, a promise not to divide the real estate for two and half years, and the right to walk or

ride over the property during his lifetime. Appellant gave consideration of real estate and the option to purchase 102 acres of land located south of SR 241 for $1,800,000.

{¶30} Accordingly, separate consideration of "something other and independent of the consideration that will pass between the parties in the event that the option is exercised" was provided.

c. Specific Performance

{¶31} The remedy of specific performance rests in the sound discretion of the trial court, "not arbitrary, but controlled by principles of equity, on full consideration of the circumstances of each particular case." *Hog Heaven of New Philadelphia, Inc. v. M & M W. High Ave, L.L.C.*, 5th Dist. Tuscarawas No. 2014AP020006, 2014-Ohio-5125, ¶16.

> The remedy of specific performance is governed by the same general rules which control the administration of all other equitable remedies. The right to it depends upon elements, conditions, and incidents which equity regards as essential to the administration of all its peculiar modes of relief. When all these elements, conditions, and incidents exist, the remedial right is perfected in equity. These elements, conditions, and incidents, as collected from the cases, are the following: The contract must be concluded, certain, unambiguous, mutual, and based upon a valuable consideration; it must be perfectly fair in all its parts; it must be free from any misrepresentation or misapprehension, fraud or mistake, imposition or surprise; it cannot be an unconscionable or hard bargain; its performance must not be oppressive upon the defendant; and, finally, it must be capable of specific execution through a decree of the court."

Manning v. Hamamey, 8th Dist. Cuyahoga No. 72072, 1998 WL 57093.

{¶32} Appellant argues that because the parties exchanged various versions of a real estate purchase agreement, this makes the final contract ambiguous. We disagree.

{¶33} Appellant hired an attorney to represent him in the negotiations. The prior versions of the proposed real estate purchase agreement show ongoing negotiations to arrive at the final signed contract of May 28, 2015. Nothing in the record shows the final contract was unclear or ambiguous, that fraud, mistake, or misrepresentation took place, or that it was unconscionable. As such the trial court did not abuse its discretion in ordering specific performance of the contract.

{¶34} Appellant's first Assignment of Error is overruled.

II.

{¶35} In Appellant's second Assignment of Error, Appellant argues the trial court erred when it found intentional interference of a contract. We disagree.

{¶36} The elements of tortious interference with a contract are "(1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages." *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 176, 707 N.E.2d 853 (1999).

{¶37} Appellant argues he was unaware of the third-party contract and that because his initial refusal to honor the Option took place before the third-party contract was signed, the trial court erred finding Appellant committed intentional interference of a contract.

{¶38} Appellant testified that on July 29, 2020, he was aware that the third-party contract existed. Therefore, we must determine if the trial court abused its discretion in finding the Appellant's refusal to honor the Option after being made aware of the third-party contract was justified. An abuse of discretion implies the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶39} A court determining whether an actor's interference with a contract was justified should consider the following factors:

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.
>
> *Siegel*, 85 Ohio St.3d at 176, 707 N.E.2d 853.

{¶40} It has been established that Appellee properly exercised the Option within the timeframe noted. A series of preparatory draft contracts were exchanged leading to the final contract. Each draft contract and the final contract contained some form of the Option. Appellant knew the Option existed and never objected to the Option until Appellee attempted to exercise it. Appellant knew Appellee entered into a third-party contract selling the real estate subject to the Option and still refused to honor the Option.

{¶41} Based on the forgoing, we find the trial court did not abuse its discretion in finding Appellant intentionally interfered with Appellee's third-party contract.

{¶42} Appellant's Second Assignment of Error is overruled.

{¶43} For the foregoing reasons, the judgment of the Court of Common Pleas of Holmes County, Ohio, is hereby affirmed.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

JWW/br 0106

[Cite as *Deutsche Bank Natl. Trust Co. v. Talliere*, 2023-Ohio-75.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE, :

Plaintiff-Appellee, :

No. 111520

v. :

KATHLEEN TALLIERE, ET AL., :

Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: January 12, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-917195

Appearances:

Dinsmore & Shohl LLP, Shannon O'Connell Egan, and Nathan H. Blaske, *for appellee*.

Law Office of William C. Behrens and William C. Behrens, *for appellant*.

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Kathleen Talliere ("Talliere"), appeals the trial court's judgment granting foreclosure in favor of plaintiff-appellee, Duetsche Bank National Trust Company, as Trustee for the Certificateholders of the Soundview

Home Loan Trust 2005-DO1 Asset Backed Certificates, Series 2005-DO1 ("DBNTC"). For the reasons set forth below, we affirm.

I. Facts and Procedural History

{¶ 2} This in rem foreclosure case stems from a February 1, 2005 mortgage loan made by Intervale Mortgage Corporation to Talliere, in the original principal amount of $167,450. The loan is evidenced by an Adjustable Rate Note ("Note") and a Mortgage ("Mortgage"), and is secured by the property known as 13700 Delaware Drive, Middleburg Heights, OH 44130 ("property"). DBNTC alleges that the Mortgage and Note were assigned to it and Talliere did not pay the Note. DBNTC further alleges that there was a break in the chain of assignments because of a mistake. The assignment was mistakenly recorded in the name of Duetsche Bank National Trust Company in Trust for the Benefit of the Certificate Holders Financial Asset Securities Corp. Soundview Home Loan Trust 2005-DO1 Asset Backed Certificates, Series 2005-DO1, M/A – FTW-35.

{¶ 3} Because Talliere's personal obligations were previously discharged in bankruptcy court, DBNTC did not seek personal judgment against Talliere.[1] Instead, DBNTC sought a declaration that it is the owner and holder of the Mortgage and Note and is owed $161,339.14 with interest at the rate of 6.89% per annum from May 22, 2009.

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[1] We note that "a bankruptcy discharge extinguishes only one mode of enforcing a claim — namely, an action against the debtor *in personam* — while leaving intact another — namely, an action against the debtor *in rem*." (Emphasis sic.) *Johnson v. Home State Bank*, 501 U.S. 78, 84, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991)

{¶ 4} In response, Talliere filed an answer and counterclaim against DBNTC alleging that DBNTC does not have a valid interest in the Mortgage or Note and is attempting to collect a debt it does not own. Talliere alleges that the Mortgage was assigned to DBNTC more than ten years after the date of the alleged default in May 2009. Talliere further alleges that DBNTC violated the Fair Debt Collection Practices Act, 15 U.S.C. 1692, for attempting to collect a debt that it does not own.

{¶ 5} In August 2021, DBNTC sought summary judgment on its claims, as well as Talliere's counterclaims. DBNTC argued that it is the assignee of the Mortgage and it had constructive possession of the Note before its June 2019 foreclosure complaint was filed. In support of its motion, DBNTC relied on the affidavit of Jean Knowles ("Knowles"), an authorized representative for NewRez, LLC d/b/a Shellpoint Mortgage Servicing ("Shellpoint"). Shellpoint services the mortgage loan for DBNTC. Knowles averred that "DBNTC is the owner of the Mortgage Loan, and it has been in constructive possession of the original Note since prior to the filing of the Complaint in this action." (DBNTC's motion for summary judgment, Knowles affidavit, ¶ 7.) Knowles further averred:

> For purposes of this action, and in its capacity as agent and servicer of the Mortgage Loan for DBNTC, Shellpoint obtained the original Note from the document custodian, Bank of America, N.A., on or about July 30, 2019. On July 30, 2019, Shellpoint sent the original Note to its counsel, Keith D. Weiner & Associates.
>
> * * *
>
> The Mortgage was mistakenly assigned to Deutsche Bank National Trust Company In Trust For The Benefit Of The Certificate Holders Financial Asset Securities Corp. Soundview Home Loan Trust 2005-D01 Asset-Backed Certificates, Series 2005-D01, and then to Deutsche

> Bank National Trust Company, As Trustee, In Trust For Registered Holders Of Soundview Home Loan Trust 2005-D01, Asset-Backed Certificates, Series 2005-D01. The mortgage was then assigned by corrective assignment to DBNTC.
>
> * * *
>
> The Payment History shows that the Loan is in default under the terms of the Note and Mortgage due to a payment default.
>
> * * *
>
> Attached * * * are true and accurate copies of the notices that were sent to Talliere regarding the default.
>
> Because of the default, DBNTC elected to call the entire balance of said account due and payable. The Payment History shows that there is due on said account the sum of $161,339.14, plus interest at the rate of 6.890% per annum from May 22, 2009, and at such interest rate as may change from time to time pursuant to the terms of said note, plus late charges, advances for taxes and insurance, and all other expenditures recoverable under the Note and Mortgage and/or Ohio law. The default has not been cured.
>
> Attached * * * is a true and accurate copy of a letter that was sent to Talliere regarding the servicing transfer.

(DBNTC's motion for summary judgment, Knowles affidavit, ¶ 8, 10-14.)

{¶ 6} In March 2022, the magistrate issued her decision, finding in DBNTC's favor on both DBNTC's in rem foreclosure claim and Talliere's counterclaims. The magistrate found that: (1) DBNTC had standing and was the holder of the Note, which had a blank endorsement at the time the case was filed; (2) DBNTC presented evidence of the chain of assignments from the original mortgagee, MERS Inc., to DBNTC; (3) DBNTC submitted a loan history summary and an affidavit attesting to the amount due under the loan; and (4) Talliere failed to address DBNTC's motion for summary judgment on her counterclaims.

{¶ 7} Talliere objected to the magistrate's decision and DBNTC opposed Talliere's objections. The court overruled Talliere's objections and adopted the magistrate's decision finding that there is no genuine issue of material fact and DBNTC is entitled to judgment and a foreclosure decree as a matter of law. The court further found that Talliere's counterclaims fail as a matter of law and should be dismissed.

{¶ 8} Talliere now appeals, raising the following single assignment of error for review:

> **Assignment of Error:** The trial court erred by accepting the inference without evidence that [DBNTC] had constructive possession of the note on the day the complaint was filed.

II. Law and Analysis

A. Standard of Review

1. Summary Judgment

{¶ 9} An appellate court reviews the grant or denial of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). In a de novo review, this court affords no deference to the trial court's decision and independently reviews the record to determine whether the denial of summary judgment is appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 2009-Ohio-2136, 912 N.E.2d 637, ¶ 12 (8th Dist.).

{¶ 10} Summary judgment is appropriate if (1) no genuine issue of any material fact remains; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one

conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *Id.*, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St. 3d 217, 631 N.E.2d 150 (1994).

{¶ 11} The party moving for summary judgment bears the burden of demonstrating that no material issues of fact exist for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). The moving party has the initial responsibility of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims. *Id.* After the moving party has satisfied this initial burden, the nonmoving party has a reciprocal duty to set forth specific facts by the means listed in Civ.R. 56(C) showing that there is a genuine issue of material fact. *Id.*

2. Foreclosure Action

{¶ 12} Talliere requests that this court clarify the proper evidentiary standard for this in rem foreclosure action because the trial court did not address her argument. She contends that because a foreclosure action is an equitable remedy, a clear-and-convincing-evidence standard is required. Whereas, DBNTC argues that the preponderance-of-the-evidence standard applies.

{¶ 13} We find DBNTC's argument more persuasive and note that Talliere fails to cite to any authority that would have compelled the trial court to deviate from the typical preponderance-of-the-evidence standard in civil matters. Instead, she

relies on cases for the general proposition that a heightened standard applies in equitable actions.

{¶ 14} In a typical civil case, "'the degree of proof, or the quality of persuasion, as some text-writers characterize it, is a mere preponderance of the evidence.'" *CitiMortgage, Inc. v. Elrod*, 11th Dist. Portage No. 2017-P-0022, 2017-Ohio-8442, ¶ 14, *discretionary appeal not allowed*, 152 Ohio St.3d 1445, 2018-Ohio-1600, 96 N.E.3d 300 (foreclosure action where homeowner challenged the evidence presented at a bench trial), quoting *Merrick v. Ditzler*, 91 Ohio St. 256, 260, 110 N.E. 493 (1915), citing *Cincinnati, Hamilton & Dayton Ry. Co. v. Frye*, 80 Ohio St. 289, 88 N.E. 642 (1909), syllabus.

{¶ 15} We recognize, however, that the clear-and-convincing-evidence standard has been found to apply in foreclosure cases that include: (1) allegations of fraud (*Bank of New York v. Stilwell*, 5th Dist. Fairfield No. 12 CA 3, 2012-Ohio-4123, ¶ 29, where mortgagor's allegations that mortgagee's agents had misrepresented to her that she did not have to be concerned with the foreclosure action due to the ongoing loan modification negotiations failed to establish fraud by clear and convincing evidence, as required to entitle mortgagor to relief from default judgment in foreclosure action); (2) mutual mistake (*Wilmington Sav. Fund Soc., FSB v. West*, 5th Dist. Fairfield No. 18CA20, 2019-Ohio-1249, ¶ 50, citing *Huber v. Knock*, 1st Dist. Hamilton No. C-080071, 2008-Ohio-5900, ¶ 6, as quoted in *Huntington Natl. Bank v. Betteley*, 2015-Ohio-5067, 53 N.E.3d 860, ¶ 24 (11th Dist.), "'The party wishing to reform the [agreement] must demonstrate the "mutual

mistake" by clear and convincing evidence. Clear and convincing evidence is the degree of proof necessary "to produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established."""); (3) the appointment of a receiver (*U.S. Bank Natl. Assn. v. Minnillo*, 8th Dist. Cuyahoga No. 98593, 2012-Ohio-5188, ¶ 12, citing *Malloy v. Malloy Color Lab, Inc.*, 63 Ohio App.3d 434, 437, 579 N.E.2d 248 (10th Dist.1989), "The appointment of a receiver is an extraordinary remedy. Therefore, the party requesting the receivership must show by clear and convincing evidence that the appointment is necessary for the preservation of the complainant's rights."); and (4) setting aside a foreclosure sale based on a faulty appraisal (*FirstMerit Bank, N.A. v. Ashland Lakes, LLC*, 5th Dist. Ashland No. 11-COA-017, 2012-Ohio-549, ¶ 25, citing *Conseco Fin. Servicing Corp. v. Taylor*, 5th Ashland No. 01 COA 1442, 2002-Ohio-2504, "To set aside an appraisement, a movant must demonstrate by clear and convincing evidence not only that the appraisement was in error, but also that the movant was prejudiced thereby."). These circumstances do not apply to the matter before us, and therefore, do not compel the higher evidentiary standard.

B. Constructive Possession of the Note

{¶ 16} As an initial matter, we note that Talliere does not dispute that she defaulted on her loan payments. Rather, Talliere's argument focuses on the trial court's finding that DBNTC had constructive notice of the Note and had standing when the complaint was filed on June 24, 2019. Talliere contends that the trial court erred because the evidence demonstrates that Shellpoint obtained possession of the

original Note from Bank of America on July 30, 2019, which was more than a month after this action was filed and that Knowles made the unsupported legal conclusion that Bank of America was a "document custodian," but attached no documentation to support that statement. Talliere maintains that without possession of the Note, DBNTC was not entitled to enforce the Note at the time that the complaint was filed and lacked standing to file the complaint.

{¶ 17} In support of her argument, Talliere relies on *Kemp v. Countrywide Home Loans, Inc. (In re Kemp)*, 440 B.R. 624 (Bankr.D.N.J.2010) — a case from the United States Bankruptcy Court for the District of New Jersey. Talliere's reliance on this case, however, is misplaced. *Kemp* is distinguishable. In *Kemp*, the court found that the bank lacked authority to enforce the note because the bank did not have, and never had, possession of the note, and the note lacked proper endorsement. *Id.* at 630-631. Whereas in the instant case, the evidence in the record demonstrates that DBNTC was in possession of the Note and it contains a blank endorsement.

{¶ 18} To decide the question of standing, we must determine whether DBNTC was the holder of the Note Talliere executed. Standing is "'[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27, quoting *Black's Law Dictionary* 1442 (8th Ed.2004). "To have standing, a plaintiff must have 'a personal stake in the outcome of the controversy and have suffered some concrete injury that is capable of resolution by the court.'"

MorEquity, Inc. v. Gombita, 2018-Ohio-4860, 125 N.E.3d 300, ¶ 32 (8th Dist.), quoting *Bank of Am., N.A. v. Adams*, 8th Dist. Cuyahoga No. 101056, 2015-Ohio-675, ¶ 7, citing *Tate v. Garfield Hts.*, 8th Dist. Cuyahoga No. 99099, 2013-Ohio-2204, ¶ 12, and *Middletown v. Ferguson*, 25 Ohio St.3d 71, 75, 495 N.E.2d 380 (1986).

{¶ 19} To have standing in a foreclosure action, the plaintiff must be the "hold[er of] the note and have an interest in the mortgage when the foreclosure complaint is filed." *MorEquity* at ¶ 33 (8th Dist.), citing *Fannie Mae v. Hicks*, 2016-Ohio-8484, 77 N.E.3d 380, ¶ 4, fn. 2 (8th Dist.), citing *Deutsche Bank Natl. Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243, ¶ 27; *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 56; *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. Cuyahoga No. 91675, 2009-Ohio-1092, ¶ 23; *see also Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214. The real party in interest in a foreclosure action is the current holder of the note and mortgage. *Id.*, citing *Deutsche Bank Natl. Trust Co. v. Greene*, 6th Dist. Erie No. E-10-006, 2011-Ohio-1976, ¶ 13.

{¶ 20} "A note secured by a mortgage is a negotiable instrument that is governed by R.C. Chapter 1303." *Id.* at ¶ 34, citing *Wells Fargo Bank, N.A. v. Carver*, 2016-Ohio-589, 60 N.E.3d 473, ¶ 14 (8th Dist.). R.C. 1303.31(A)(1) entitles the holder of an instrument to enforce the instrument. A "holder" is defined as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." R.C. 1301.201(B)(21)(a).

When an instrument is endorsed in blank, it becomes payable to the bearer and may be negotiated by transfer of possession alone. R.C. 1303.25(B). Therefore, "the person in possession of an instrument endorsed in blank is the 'holder' of the instrument, and as such, is a 'person entitled to enforce' the instrument." *MorEquity, Inc.* at ¶ 35, quoting R.C. 1301.201(B)(21).

{¶ 21} "Constructive possession exists when an agent of the owner holds the note on behalf of the owner." *United States Bank Natl. Assn. v. Gray*, 10th Dist. Franklin No. 12AP-953, 2013-Ohio-3340, ¶ 25, citing *Midfirst Bank, SSB v. C.W. Haynes & Co., Inc.*, 893 F.Supp. 1304, 1314 (D.S.C.1994), *aff'd*, 87 F.3d 1308 (4th Cir.1996); *Bankers Trust (Delaware) v. 236 Beltway Invest.*, 865 F.Supp. 1186, 1195 (E.D.Va.1994). "Consequently, a person is a holder of a negotiable instrument, and entitled to enforce the instrument, when the instrument is in the physical possession of his or her agent." *Id.*, citing 1A Lawrence, *Anderson on the Uniform Commercial Code*, Section 1-201:265 (3d Ed.); *In re Phillips*, 491 B.R. 255, 262-64 (Bankr.D.Nev.2013) (servicing agent's possession of the note meant that the principal was the holder); *In re Moehring*, 485 B.R. 571, 576-577 (Bankr.S.D.Ohio 2013) (trustee was holder of and could enforce the note possessed by its servicing agent). In *Bank of Am. N.A. v. Farris*, 2015-Ohio-4980, 50 N.E.3d 1043 (8th Dist.), this court found that a bank has constructive possession of the note and mortgage and has standing to bring an action in foreclosure in situations where the servicer, on behalf of the bank, is in physical possession of the note and mortgage. *Id.* at ¶ 22, citing *Wells Fargo Bank, N.A. v. Odita*, 10th Dist. Franklin No. 13AP-663, 2014-

Ohio-2540; *Freedom Mtge. Corp. v. Vitale*, 5th Dist. Tuscarawas No. 2013 AP 08 0037, 2014-Ohio-1549; *Gray* at ¶ 25-30; *U.S. Bank, N.A. v. Zokle*, 6th Dist. Erie No. E-13-033, 2014-Ohio-636.

{¶ 22} In the instant case, Knowles averred that DBNTC is the owner of the Mortgage and has been in constructive possession of the original Note since prior to the filing of the complaint. (Knowles affidavit ¶ 7.) Knowles further averred that Bank of America had possession of the Note and was DBNTC's document custodian. (Knowles affidavit ¶ 8.) In addition, DBNTC presented evidence of a bailee letter demonstrating that Bank of America was DBNTC's document custodian. Moreover, other than Talliere's allegations, she presented no evidence that Bank of America is not the custodian.[2]

{¶ 23} DBNTC also presented evidence that the Note had a blank endorsement at the time the complaint was filed. *See Deutsche Bank Natl. Trust Co. v. Baxter*, 2017-Ohio-1364, 89 N.E.3d 91 (8th Dist.) (where this court found the bank established that it was the holder of the note at the time the complaint was filed when, among other things, it was in possession of the blank-endorsed note, which was attached to the servicing agent's affidavit, coupled with the servicing agent's statement that the bank had possession of the note. *Id.* at ¶ 15.). Here, DBNTC included a copy of the Note with both the complaint and Knowles's affidavit and

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[2] Talliere further argues that an allonge that was included in her bankruptcy case disappeared from the exhibits for this case. While the missing allonge is curious, it does not discharge Talliere of her obligations under the Note. *Bank of Am., N.A. v. Sweeney*, 8th Dist. Cuyahoga No. 100154, 2014-Ohio-1241, ¶ 22.

produced the original Note in discovery. There is no dispute that the Note contains a blank endorsement. Therefore, based on the foregoing, we find that because the Note contained a blank endorsement and Bank of America had possession of the Note as DBNTC's document custodian, DBNTC had standing to bring this action by constructively possessing the Note at the time the complaint was filed.

{¶ 24} Accordingly, the sole assignment of error is overruled.

III. Conclusion

{¶ 25} DBNTC is entitled to summary judgment as a matter of law. No genuine issue of any material fact remains and reasonable minds can come to but one conclusion that DBNTC had standing to bring this action and is entitled to a foreclosure decree.

{¶ 26} Judgment is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____

MARY J. BOYLE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
LISA B. FORBES, J., CONCUR