MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Eileen Howard,

Appellant-Defendant

v.

US Bank Trust National Association, not in its individual capacity but solely as owner trustee of VRMTG Asset Trust,

Appellee-Plaintiff

October 15, 2024

Court of Appeals Case No.
24A-MF-142

Appeal from the Dekalb Superior Court

The Honorable Monte L. Brown, Judge

Trial Court Cause No.
17D02-2107-MF-13

Memorandum Decision by Judge Weissmann
Judges Vaidik and Foley concur.

Weissmann, Judge.

[1] Eileen Howard's mortgage loan changed hands multiple times after she financed her home. By February 2021, she was in default on her loan payments, and J.P. Morgan was in the process of transferring the loan to US Bank. US Bank initiated foreclosure proceedings three months after it purportedly received physical possession of Howard's promissory note but eight days before it received J.P. Morgan's written assignment of Howard's mortgage. Both parties eventually moved for summary judgment, with US Bank claiming it obtained the right to foreclose when it acquired physical possession of Howard's note. Howard argued that US Bank failed to establish the acquisition date and, moreover, that the note was not properly endorsed for possession alone to transfer the right of foreclosure.

[2] The trial court properly denied Howard's motion for summary judgment. However, US Bank presented only inadmissible evidence to show the date on which it acquired physical possession of Howard's promissory note. The trial court therefore erred by granting summary judgment to US Bank. We reverse and remand.

Facts

[3] In 2011, Howard took out a 15-year home loan by executing both a promissory note and a mortgage. The terms of these instruments required Howard's lender to provide a 30-day notice of default before accelerating full payment of the

note and filing suit to foreclose on the mortgage. They also allowed the note and mortgage to be transferred to a different lender.

[4] Howard's promissory note and mortgage were transferred several times over the next decade. J.P. Morgan obtained the instruments in late 2019 but transferred them to US Bank less than two years later. US Bank allegedly acquired physical possession of the note on February 18, 2021, by which time Howard was in default on her loan payments. On May 26, US Bank sent Howard the mandatory pre-suit notice of default. Then on June 3, J.P. Morgan issued to US Bank a written Assignment of Mortgage, which US Bank promptly recorded.

[5] When Howard failed to cure her default within 30 days of US Bank's pre-suit notice, US Bank initiated foreclosure proceedings. US Bank eventually moved for summary judgment on its foreclosure complaint, designating the following pertinent evidence:

1. Howard's promissory note, endorsed in blank by her original lender;
2. An affidavit attesting to US Bank's possession of Howard's note but not specifying the date on which US Bank acquired possession;
3. A written Assignment of Mortgage, which a prior lender had issued to J.P. Morgan; and
4. The written Assignment of Mortgage that J.P Morgan issued to US Bank.

[6] From this evidence, a key issue emerged: the Assignment of Mortgage to US Bank was not signed by J.P. Morgan until eight days after US Bank sent

Howard the mandatory pre-suit notice of default. Howard seized on this and filed her own motion for summary judgment, arguing that US Bank had no right to enforce her note and mortgage when it sent the notice. Therefore, according to Howard, the notice was invalid, and US Bank's foreclosure action was premature.

[7] US Bank countered with the affidavit of Karen Dunlap, a representative of US Bank's loan servicing agent. Dunlap stated that US Bank's "business records" showed that it acquired possession of Howard's promissory note on February 18, 2021. App. Vol. IV, p. 88. However, the only document attached to the Dunlap Affidavit was another copy of Howard's note. When Howard moved to strike the Dunlap Affidavit as inadmissible, US Bank filed an unsworn Notice of Filing of Business Record and an attached email from Dunlap dated July 25, 2023. Embedded in the Dunlap Email was an image of a computer record, which seemed to confirm that US Bank acquired possession of Howard's promissory note in February 2021.

[8] With this supplemental evidence, the trial court denied Howard's motion to strike, entered summary judgment in US Bank's favor, and implicitly denied Howard's cross-motion for summary judgment.

Discussion and Decision

[9] On appeal, Howard again challenges the Dunlap Affidavit and the Dunlap Email as inadmissible and argues that the admissible designated evidence shows that she, not US Bank, was entitled to summary judgment. "In ruling on

a motion for summary judgment, the trial court will consider only properly designated evidence which would be admissible at trial." *Seth v. Midland Funding, LLC*, 997 N.E.2d 1139, 1141 (Ind. Ct. App. 2013). Summary judgment is appropriate only if "the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). The filing of cross-motions for summary judgment does not alter this standard. *Reed v. Reid*, 980 N.E.2d 277, 285 (Ind. 2012).

I. US Bank Was Not Entitled to Summary Judgment

[10] Promissory notes are negotiable instruments, which generally may only be enforced by their "holder." *Lunsford v. Deutsche Bank Tr. Co. Ams.*, 996 N.E.2d 815, 821 (Ind. Ct. App. 2013); Ind. Code §§ 26-1-3.1-104, -301. A "holder" is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person if the identified person is in possession of the instrument." Ind. Code § 26-1-1-201(20)(A). "Negotiation" occurs when the holder of a negotiable instrument transfers it to a new holder. Ind. Code § 26-1-3.1-201(a).

[11] On appeal, the parties agree that US Bank had to physically possess Howard's promissory note when it sent Howard the mandatory pre-suit notice of default; otherwise, US Bank could not be the note's holder. The parties also agree that, without the right to enforce the note, the notice was invalid and this foreclosure action was premature. Additionally, the parties agree that the Dunlap Affidavit

and the Dunlap Email were the only designated evidence establishing that US Bank physically possessed Howard's note before it sent the notice of default.

[12] Howard claims the Dunlap Affidavit and the Dunlap Email were inadmissible and, without that evidence, the trial court erred by granting US Bank's motion for summary judgment. We agree.

A. Designated Evidence

[13] In her Affidavit, Dunlap stated:

> 1. I am a duly authorized signer of Fay Servicing, the loan serving agent for US Bank. I am over the age of eighteen years, duly authorized by Fay Servicing to make the representations contained in this affidavit, and competent to testify to the matters stated in this affidavit. In my capacity as an authorized representative of Fay Servicing, I have access to business records relating to mortgage loans that are maintained in the ordinary course of the regularly conducted activity of mortgage loan servicing, including the business records for and relating to the mortgage loan of Howard. The statements I make in this Affidavit are based upon my review of those records relating to Howard's mortgage loan. The business records for Howard's mortgage loan were made at or near the time of the event, and by or from information transmitted from a person with knowledge. I have personally reviewed and independently verified the accuracy of the factual information included in this affidavit.
>
> 2. Affiant states that US Bank was transferred the Note, which is indorsed in blank as transferee on February 18, 2021, prior to instituting this action.
>
> 3. US Bank physically possessed the Note as of February 18, 2021 and the Note was in its custody and possession.

4. The original note is in the care, custody, or control of the US Bank and has been since February 18, 2021. Attached hereto as Exhibit A is a copy of the promissory note.

App. Vol. IV, pp. 88-89 (cleaned up).

[14] Howard moved to strike the Dunlap Affidavit, arguing that Dunlap's material statements were based solely on the inadmissible hearsay of unspecified business records. Howard also asserted a violation of Indiana's summary judgment rules because Dunlap did not attach to the affidavit sworn or certified copies of the referenced records. Howard further emphasized that the affidavit "[did] not purport to authenticate any business records." *Id.* at 108.

[15] In response, US Bank filed an unsworn Notice of Filing of Business Record, stating:

> [Dunlap] had knowledge of the [promissory note] acquisition date by virtue of the attached business record, which was inadvertently not included with the [Second Affidavit]. To the extent the Court requires an amended affidavit or further evidence of [US Bank's] acquisition of the Note, that it be granted leave to prepare and file the amended affidavit.

Id. at 111.

[16] The Dunlap Email attached to US Bank's unsworn notice is depicted below, in pertinent part:

Hello,

Are you referring to the Note possession below. Fay acquired the loan on 4/14/21. Please advise name of the exact document you need.

Short Payoff denied.

Original note status:	Note possession confirmed
	Entered By: Daniel Alvarado 8/5/2021 5:07:00 PM
If possession confirmed, custodian name/address::	U.S Bank West Side Flats St Paul 60 Livingston Ave, Saint Paul, MN 55107
	Entered By: Daniel Alvarado 8/5/2021 5:07:00 PM
If possession confirmed, date of possession:	02/18/2021
	Entered By: Daniel Alvarado 8/5/2021 5:07:00 PM

Id. at 113.

[17] US Bank does not dispute that the Dunlap Affidavit and the Dunlap Email contained hearsay. And Howard does not dispute that the hearsay was admissible if the Dunlap Email was self-authenticating. The authentication issue therefore controls Howard's admissibility challenge.

B. Improper Authentication

[18] "To lay a foundation for the admission of evidence, the proponent of the evidence must show that it has been authenticated." *Whetstine v. Menard, Inc.*, 161 N.E.3d 1274, 1282 (Ind. Ct. App. 2020). This generally requires extrinsic evidence "sufficient to support a finding that the item is what the proponent claims it is." Ind. Evidence Rule 901(a). But under Evidence Rule 902(11), certified records of regularly conducted business activity are "self-

authenticating" and "require no extrinsic evidence of authenticity in order to be admitted."

[19] A business record is considered certified under Evidence Rule 902(11) if it "meets the requirements of Rule 803(6)(A)-(C), as shown by a certification under oath of the records custodian or another qualified person." Evidence Rule 803(6), in turn, requires that:

> (A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; [and]
>
> (C) making the record was a regular practice of that activity.

[20] US Bank claims Dunlap certified the Dunlap Email under Evidence Rule 902(11) by stating the following in paragraph 1 of the Dunlap Affidavit:

> I have access to business records relating to mortgage loans that are maintained in the ordinary course of the regularly conducted activity of mortgage loan servicing, including the business records for and relating to the mortgage loan of Howard. The statements I make in this Affidavit are based upon my review of those records relating to Howard's mortgage loan. The business records for Howard's mortgage loan were made at or near the time of the event, and by or from information transmitted from a person with knowledge.

App. Vol. IV, pp. 88-89 (cleaned up).

[21] But as Howard argued in her motion to strike, the Dunlap Affidavit "[did] not purport to authenticate any business records." *Id.* at 108. Nowhere in the affidavit did Dunlap mention the Dunlap Email, let alone identify it as one of the "business records" she generally referenced in paragraph 1. *Id.* at 88. In fact, Dunlap only recognized one specific document in the Dunlap Affidavit—a copy of Howard's promissory note, which she "[a]ttached [t]hereto as Exhibit A." *Id.* at 89. Though US Bank later explained in its Notice of Filing of Business Record that the Dunlap Email was "inadvertently not included with the affidavit," that notice was unsworn and did not identify the email with any further specificity. *Id.* at 111.

[22] In *Speybroeck v. State*, 875 N.E.2d 813 (Ind. Ct. App. 2007), this Court held that an affidavit failed to certify attached records as those of regularly conducted business activity despite the following attestation by the affiant:

> I hereby certify, after being duly sworn upon my oath under penalty for perjury, that I am a custodian of the attached records consisting of ___ page(s), and that I have personal knowledge that these records are records of regularly conducted business activity made at or near the time of the occurrence of the matters set forth therein, or by or from information transmitted by a person with knowledge of the matter set forth therein; and, that these documents are kept in the normal course of the regularly conducted activity of [my employer]; and, that these documents are made in the regular course of business activity as a regular practice of [my employer].

Id. at 817. Noting that the affidavit "neither specifie[d] the number of pages nor identifie[d] the documents it purport[d] to authenticate," this Court concluded

the affiant's attestation was "merely a boilerplate recitation unconnected to the underlying documents." *Id*. at 820.

[23] We reach a similar conclusion when comparing the Dunlap Affidavit to the Dunlap Email. Dunlap's attestation is merely a boilerplate recitation of the requirements of Evidence Rule 803(6). As such, it certifies nothing under Evidence Rule 902(11).

[24] Because the Dunlap Email was not self-authenticating under Evidence Rule 902(11), both it and the Dunlap Affidavit were inadmissible and should not have been considered by the trial court. Without the Dunlap Affidavit and the Dunlap Email, there remained a genuine issue of material fact as to whether US Bank physically possessed Howard's promissory note when it sent Howard the mandatory pre-suit notice of default. Therefore, US Bank was not entitled to judgment as a matter of law.

II. Howard Was Not Entitled to Summary Judgment

[25] As indicated above, whether a person in possession of a negotiable instrument is a "holder" and, thus, is entitled to enforce the instrument depends on how the instrument is endorsed. When "specially endorsed" (*i.e.*, signed and made payable to an identified person), only the identified person has enforcement power. Ind. Code § 26-1-3.1-205(a). But when "endorsed in blank" or "made payable to bearer" (*i.e.*, signed and made payable but not to an identified

person), the instrument is enforceable by anyone who possesses it. Ind. Code § 26-1-3.1-205(b).

[26] Here, the admissible designated evidence shows that Howard's original lender endorsed her promissory note in blank before the note was first negotiated. The evidence also shows that US Bank physically possessed the note, but it does not establish the date on which US Bank acquired possession. Thus, there remains a genuine issue of material fact as to whether US Bank was the holder of the note when it sent Howard the mandatory pre-suit notice of default.

[27] In arguing that she was entitled to summary judgment, Howard suggests that the written Assignment of Mortgage to J.P. Morgan was a special endorsement of Howard's promissory note. Thus, according to Howard, only J.P. Morgan could enforce the note until J.P. Morgan endorsed it further—either specially or in blank. Howard contends this requisite endorsement came when J.P. Morgan issued the Assignment of Mortgage to US Bank eight days after US Bank sent Howard the mandatory pre-suit notice of default. Howard therefore claims that, regardless of when US Bank obtained physical possession of the note, US Bank was not the note's holder when it sent the notice.

[28] As Howard cites no authority for the proposition that a written assignment of mortgage constitutes a special endorsement of a separate promissory note, she has failed to carry her burden of establishing she was entitled to judgment as a matter of law.

Conclusion

[29] We reverse the trial court's entry of summary judgment in favor of US Bank, affirm the court's implicit denial of Howard's cross-motion for summary judgment, and remand for further proceedings consistent with this opinion.

Vaidik, J., and Foley, J., concur.

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