

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

ATTORNEYS FOR APPELLEES:

**ROBERT A. HUTCHENS**  
Carmel, Indiana

**DOUGLAS B. BATES**  
**NEAL F. BAILEN**  
Sites & Harbison, PLLC  
Jeffersonville, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

ROBERT A. HUTCHENS, )  
)  
Appellant-Defendant, )

vs. )

BAC HOME LOANS SERVICING, LP, )  
)  
Appellee-Plaintiff. )

No. 29A02-1010-MF-1085

---

ROBERT A. HUTCHENS, )  
)  
Appellant-Cross-Claimant and )  
Third-Party Claimant, )

vs. )

MORTGAGE ELECTRONIC REGISTRATION )  
SYSTEMS, INC., )  
)  
Appellee-Cross-Defendant, )

and )

BANK OF AMERICA, NATIONAL )  
ASSOCIATION, )  
)  
Appellee-Third-Party Defendant. )

---

APPEAL FROM THE HAMILTON SUPERIOR COURT  
The Honorable Daniel J. Pflieger, Judge  
Cause No. 29D02-0904-MF-1651

---

**June 24, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Robert A. Hutchens (“Hutchens”) appeals the trial court’s grant of summary judgment in favor of BAC Home Loans Servicing, LP (“BAC”) and in favor of Mortgage Electronic Registration Systems, Inc. (“MERS”) and Bank of America, National Association (“BOA”).

Hutchens raises the following restated issues for our review:

- I. Whether the trial court erred when it granted summary judgment in favor of BAC on its foreclosure claim against Hutchens; and
- II. Whether the trial court erred when it granted summary judgment in favor of MERS and BOA as to Hutchens’s claims that the parties should have filed a satisfaction of mortgage on Hutchens’s home equity line of credit.

We affirm.

**FACTS AND PROCEDURAL HISTORY**

On January 4, 2006, Hutchens mortgaged property located at 13682 Royal Saddle Drive, Carmel, Indiana (“the Property”) to Countrywide Home Loans, Inc., and the mortgage was recorded in the Hamilton County Recorder’s Office on January 11, 2006 as Document No. 200600000848 (“the Mortgage”). Contemporaneously with the Mortgage, Hutchens signed a promissory note (“the Note”) in the amount of \$282,267. The Mortgage and the Note were assigned by Countrywide Home Loans, Inc. to Countrywide Home Loans

Servicing, L.P., which subsequently changed its name to BAC. The Note was endorsed in blank by Countrywide Home Loans Inc. Hutchens subsequently stopped making monthly payments on the Note in June 2008. On July 17, 2008, a letter was sent to Hutchens informing of the default, and Hutchens never cured such default.

On May 11, 2006, Hutchens borrowed \$25,759 from Countrywide Bank, N.A. through a Home Equity Line of Credit (“the Home Equity Note”) for the Property. As security for the Home Equity Note, Hutchens granted a mortgage lien on the Property to MERS, as nominee for Countrywide Bank, N.A. (“the Home Equity Mortgage”). Countrywide Bank, N.A. changed its name to Countrywide Bank, FSB in July 2006 and transferred the servicing rights of the Home Equity Note and the Home Equity Mortgage to BAC.

Hutchens stopped making payments on the Home Equity Note in November 2006. Paragraph 18(A) of the Home Equity Note gave BAC the right to transfer the Home Equity Note and Home Equity Mortgage without Hutchens’s consent. *Appellees’ App.* at 167. In July 2007, BAC transferred ownership and servicing rights of the Home Equity Note and Home Equity Mortgage to United Guaranty Residential Insurance Company of North Carolina (“United Guaranty”). After the transfer, BAC no longer had any ownership interest in, or servicing rights for, the Home Equity Note and Home Equity Mortgage.

In 2007, Hutchens, who is a licensed attorney, began negotiations to settle his home equity loan with LTD Financial Services, L.P. (“LTD”), a collection agency acting on behalf of United Guaranty. In October 2007, Hutchens and LTD negotiated a deal, where Hutchens would pay \$5,000 to LTD for the benefit of United Guaranty. On October 30, 2007, LTD sent Hutchens a letter confirming its offer to settle the loan if Hutchens paid \$5,000.

Hutchens accepted the offer and sent a \$5,000 cashier's check to LTD on October 30, 2007. United Guaranty failed to timely file a satisfaction of mortgage.<sup>1</sup>

Due to Hutchens's failure to make monthly payments after June 2008 on the Note, BAC filed a foreclosure complaint on April 14, 2009.<sup>2</sup> Six months after the complaint was filed and before Hutchens filed his answer, BAC filed a motion for summary judgment on October 23, 2009. On November 19, 2009, Hutchens filed his "Motion to Dismiss Plaintiff's Complaint for Failure to Name and Prosecute in the Name of the Real Party in Interest" and his answer to the foreclosure complaint. At the same time, he filed a cross-claim against MERS and a third-party complaint against BOA, alleging that MERS and BOA failed to file a satisfaction of the Home Equity Mortgage. Hutchens also named LTD and United as co-defendants. On May, 28, 2010, MERS and BOA filed a motion for summary judgment as to Hutchens's cross-claim and third-party complaint.

On August 26, 2010, a hearing was held on both summary judgment motions. At the hearing, MERS and BOA moved to strike several of Hutchens's late filings, including his motion to strike certain evidence and his designation of evidence in support of his opposition to the summary judgment motion of MERS and BOA. The trial court granted the motion to strike such late filings. The trial court also granted BAC's previously-filed motion to strike several pleadings filed by Hutchens, including his motion to strike certain evidence

---

<sup>1</sup> A satisfaction of the Home Equity Mortgage was finally recorded in the Hamilton County Recorder's Office on December 8, 2009.

<sup>2</sup> The complaint was filed by Countrywide Home Loans Servicing, L.P., which subsequently changed its corporate name to BAC Home Loans Servicing, L.P. The trial court granted a motion to amend the plaintiff's name to "BAC Home Loans Servicing, LP F/K/A Countrywide Home Loans Servicing, LP" on February 26, 2010. *Appellant's App.* at 215-16.

designated by BAC, his designated evidence in support of his opposition to BAC's motion for summary judgment, and his brief in opposition to BAC's motion for summary judgment. At the conclusion of the hearing, the trial court granted summary judgment in favor of BAC on its foreclosure complaint. The trial court initially denied summary judgment to MERS and BOA, but after the parties filed a motion to reconsider, the trial court entered summary judgment in favor of MERS and BOA on Hutchens's cross-claim and third-party complaint. Hutchens now appeals.

## **DISCUSSION AND DECISION**

### **Standard of Review**

When reviewing a grant or denial of summary judgment, we apply the same standard as the trial court: summary judgment is only appropriate when the designated evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Stowers v. Clinton Cent. Sch. Corp.*, 855 N.E.2d 739, 745 (Ind. Ct. App. 2006), *trans. denied* (2007). We may not look beyond the evidence that the parties specifically designated and must accept as true the facts alleged by the non-moving party. *Hill v. Bolinger*, 881 N.E.2d 92, 94 (Ind. Ct. App. 2008), *trans. denied*. We construe all evidence in favor of the non-moving party and resolve all doubts against the moving party. *Allen v. City of Hammond*, 879 N.E.2d 644, 646 (Ind. Ct. App. 2008), *trans. denied*.

An appellate court faces the same issues that were before the trial court and follows the same process. *Terry v. Stephens*, 921 N.E.2d 516, 519 (Ind. Ct. App. 2010), *trans. denied*. The party appealing from a summary judgment decision has the burden of

persuading the court that the grant or denial of summary judgment was erroneous. *Id.* When a trial court grants summary judgment, we carefully scrutinize that determination to ensure that a party was not improperly prevented from having his or her day in court. *Id.*

### **I. BAC's Foreclosure Claim**

Hutchens argues that the trial court erred when it granted summary judgment in favor of BAC because the evidence designated by BAC to the trial court did not establish an absence of genuine issue of material fact and “supported confusing and conflicting inferences on the issue of ownership of the Note and the underlying loan.” *Appellant's Br.* at 24. He contends that a genuine issue of material fact exists as to the ownership of the Note because BAC's designated evidence failed to show that it was a real party in interest to this lawsuit. Hutchens claims this is because the Note was expressly payable to Countrywide Home Loans, Inc. and that there was no assignment or endorsement exhibited in the complaint, or allonge attached to the Note or complaint. BAC therefore failed to show that there was no genuine issue of material fact as to the contested factual issue of ownership of the Note.<sup>3</sup>

Initially, we note that Hutchens does not contest that he defaulted on his mortgage payments. The evidence designated to the trial court showed that, pursuant to the terms of the Note, Hutchens agreed to make monthly payments in the amount of \$1,901.69 beginning on March 1, 2006. *Appellant's App.* at 142. Hutchens stopped making payments in June 2008 and was sent a letter advising him of the default on July 17, 2008. *Id.* at 152, 158.

---

<sup>3</sup> Hutchens filed a motion with this court, requesting that we take judicial notice of the Fannie Mae online lookup tool and its search results. He filed a similar motion with the trial court, which was stricken. *Appellees' App.* at 218-19. On appeal, however, we may not look beyond the evidence that the parties specifically designated. *Hill v. Bolinger*, 881 N.E.2d 92, 94 (Ind. Ct. App. 2008), *trans. denied*. We therefore may not look at this evidence since it was not designated to the trial court, and we deny his motion.

Hutchens did not cure the default and did not make any further payments after the letter.

As to the ownership of the Note, the designated evidence showed that Hutchens mortgaged the Property to Countrywide Home Loans, and contemporaneously signed the Note in the amount of \$282,267. *Id.* at 127, 142. The Note and the Mortgage were assigned to Countrywide Home Loans Servicing, L.P. *Id.* at 144-45. After the complaint was filed with the trial court, Countrywide Home Loans Servicing, L.P. changed its corporate name to BAC, and the trial court granted a motion to amend the name on the complaint to “BAC Home Loans Servicing, LP F/K/A Countrywide Home Loans Servicing LP.” *Id.* at 215-16.

Pursuant to Indiana Code section 26-1-3.1-301(1), a “[p]erson entitled to enforce’ an instrument means the holder of the instrument . . . .” Here, the Note was endorsed in blank by Countrywide Home Loans, Inc. *Appellees’ App.* at 93. This endorsement and an allonge to the Note dated on February 18, 2010 were provided to the trial court as part of BAC’s response to Hutchens’s motion to dismiss BAC’s complaint. *Id.* at 87, 93, 94. Further, both the Note and the Mortgage were properly assigned on February 18, 2009 to Countrywide Home Loans Servicing, L.P., which later changed its corporate name to BAC, and BAC was in possession of the Note and the Mortgage. *Appellant’s App.* at 144-45, 158. We therefore conclude that BAC was authorized to pursue the foreclosure claim against Hutchens and enforce the Note and the Mortgage because it had possession of the instruments and

produced evidence of a proper assignment.<sup>4</sup> The trial court properly granted summary judgment in favor of BAC on its complaint.

## **II. Cross-Claim Against MERS and Third-party Claim Against BOA**

Hutchens argues that the trial court erred when it granted summary judgment in favor of MERS and BOA because the evidence designated by the parties was insufficient to establish an absence of genuine issue of material fact. He contends that the designated evidence submitted by MERS and BOA created “confusing and conflicting inferences” on the issue of whether there was substitution of the legal obligations that MERS and BOA owed him as to the Home Equity Note and Home Equity Mortgage. *Appellant’s Br.* at 29. Hutchens therefore believes that the trial court’s entry of summary judgment should be reversed.

The evidence designated by MERS and BOA showed that on or about, July 3, 2007, BAC transferred ownership and servicing rights of the Home Equity Note and Home Equity Mortgage to United Guaranty. *Appellant’s App.* at 277. Pursuant to paragraph 18(A) of the Home Equity Note, which Hutchens signed, BAC had the authority to transfer the Home Equity Note without Hutchens’s consent. *Appellees’ App.* at 167. After this transfer, United Guaranty became responsible for the Home Equity Note and Home Equity Mortgage and for filing and release or satisfaction of such instruments.

---

<sup>4</sup> Hutchens also argues that several pieces of evidence designated by BAC, including the affidavit of David Perez, the Assistant Vice President of Countrywide Home Loans Servicing, L.P., the Mortgage, the Note, the assignments of the Note and the Mortgage, and the letter informing him of his default should not have been considered by the trial court. Hutchens filed a motion to strike these exhibits, and his motion was stricken by the trial court as being untimely. As Hutchens is not arguing that the trial court erred when it struck his motion, but instead is arguing why BAC’s evidence should not have been considered, we do not reach his argument.

After the transfer, Hutchens and LTD negotiated a deal to satisfy his \$25,759 debt in exchange for a \$5,000 payment. Neither MERS nor BOA was involved in the negotiated deal. The evidence showed that Hutchens understood that he was dealing with LTD and United Guaranty -- and not MERS and BOA -- because he only sent follow-up letters to LTD and included the following reference line, acknowledging that LTD was acting on behalf of United Guaranty: “Your Client: [United Guaranty] as assignee/transferee of Countrywide Bank, N.A., and [MERS].” *Appellant’s App.* at 204, 206. United Guaranty filed the satisfaction on December 8, 2009, about three weeks after Hutchens filed his complaint. *Id.* at 278. The satisfaction was prepared by United Guaranty, demonstrating that it was the party responsible for filing the satisfaction.

Additionally, neither MERS nor BOA had any contact with Hutchens and had no knowledge that the Home Equity Note had been paid off. MERS is an electronic registration and tracking system that electronically tracks transfers of beneficial ownership interests in promissory note and/or loan servicing rights. In *Mortgage Electronic Registration Systems, Inc. v. Estrella*, 390 F.3d 522 (7th Cir. 2004), MERS is described as “a nominee only, holding title to the mortgage but not the note.” *Id.* at 525. In the present case, MERS was the nominee for the original lender of the home equity loan, Countrywide Bank, N.A., its successors and assigns and was not the originator of the loan or the servicer or investor of the Home Equity Note and Home Equity Mortgage. Hutchens never informed MERS that the Home Equity Note had been paid off in 2007 or that a satisfaction had not been filed. MERS was only put on notice that the Home Equity Note had been paid off on December 8, 2009 when United Guaranty updated the MERS system.

As to BOA, it is merely the parent corporation of BAC, which transferred the home equity loan to United Guaranty. BOA was also not notified by Hutchens that the Home Equity Note had been paid off in 2007 or that the Home Equity was not released after it had been satisfied. BOA further had no knowledge or control over whether a satisfaction should have been filed.

Even if MERS and BOA had been shown to have knowledge of the negotiated deal between LTD and Hutchens, MERS and BOA did not have the authority to file a satisfaction when Hutchens paid off the Home Equity Note. As United Guaranty owned the home equity loan, neither MERS nor BOA could have unilaterally, and without United Guaranty's consent, filed a satisfaction of the loan because they could not release an obligation owed to a separate corporation. We therefore conclude that the trial court did not err when it granted summary judgment in favor of MERS and BOA on Hutchens cross-claim and third-party complaint.<sup>5</sup>

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.

---

<sup>5</sup> Hutchens also argues that several pieces of evidence designated by MERS and BOA, including the affidavit of Carrie Daugherty, an Operations Manager of the Litigation Management Department of BAC, the MERS Milestone Report, the Loan Payment History for the Property, and the Satisfaction of the Mortgage should not have been considered by the trial court. Hutchens filed a motion to strike these exhibits, and his motion was stricken by the trial court. As Hutchens is not arguing that the trial court erred when it struck his motion, but instead is arguing why the evidence should not have been considered, we do not reach his argument.