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# ORIGINAL

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

U.S. BANK NATIONAL )  
ASSOCIATION, AS TRUSTEE FOR )  
STRUCTURED ASSET INVESTMENT )  
LOAN TRUST MORTGAGE )  
PASS-THROUGH CERTIFICATES, )  
SERIES 2006-1, )

**FILED**  
**COURT OF CIVIL APPEALS**  
**STATE OF OKLAHOMA**

**AUG 28 2017**

Plaintiff/Appellee,

vs.

MICHAEL CHAD SMITH and  
MISTY SMITH,

Defendants/Appellants.

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Case No. 115,823

APPEAL FROM THE DISTRICT COURT OF  
ADAIR COUNTY, OKLAHOMA

HONORABLE J. JEFFREY PAYTON, TRIAL JUDGE

**REVERSED AND REMANDED FOR FURTHER PROCEEDINGS**

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OPINION BY DEBORAH B. BARNES, PRESIDING JUDGE:

In this mortgage foreclosure action, Michael Chad Smith and Misty Smith appeal from an Order of the trial court denying their petition/motion to vacate a default judgment of foreclosure filed on July 17, 2007. We reverse and remand for further proceedings.

**BACKGROUND**

It is undisputed the Smiths filed no answer to the March 15, 2007 petition for foreclosure filed by U.S. Bank National Association, Trustee for Lehman Brothers-Structured Asset Investment Loan Trust SAII (U.S. Bank), in which it was alleged the Smiths defaulted on a promissory note which was secured by a mortgage on the subject real property. It alleged it was the holder of the note and mortgage through mesne assignments of record. However, the note attached to the petition identified the lender as BNC Mortgage, Inc. No endorsements or allonge was attached to the note. In July 2007, the court entered a default judgment of foreclosure in personam and in rem against the Smiths and in favor of U.S. Bank. No appeal was taken from this judgment.

According to the case docket sheet, from the date of the July 2007 foreclosure judgment through the date of the Smiths' petition/motion to vacate,

May 14, 2015, numerous special executions of Sheriff's Sale and notices of alias sales of land have issued in this case, including a 2013 motion by U.S. Bank to vacate a February 25, 2013 Sheriff's Sale because Michael Smith filed for bankruptcy. That order was vacated May 9, 2013.

On March 26, 2015, the Plaintiff/Appellee in this appeal, U.S. Bank National Association, as Trustee for Structured Asset Investment Loan Trust Mortgage Pass-Through Certificates, Series 2006-1 (U.S. Bank National), filed a special execution and order of sixth alias sale. U.S. Bank National also filed an assignment of judgment from U.S. Bank assigning the July 2007 foreclosure judgment to it. The assignment stated: "A copy of endorsed note is attached as Exhibit A." Exhibit A, entitled "ALLONGE TO NOTE," states "PAY TO THE ORDER OF [U.S. Bank National] WITHOUT RECOURSE BNC MORTGAGE, INC." and is signed by a Jamie Langford Vice President. The allonge is not dated. Notice of sixth alias sale of land was issued April 1, 2015.

On May 14, 2015, an entry of appearance by the Smiths' attorney was filed as was a "Petition to Vacate Default Judgment."<sup>1</sup> In addition to its motion to

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<sup>1</sup> Meanwhile, on May 18, 2015, numerous filings were made by U.S. Bank National concerning the sixth alias sale of the subject property including a motion to confirm sixth alias sale and notice of a hearing to confirm that sale set for June 16, 2015. U.S. Bank National moved to dismiss the petition because it claimed the petition to vacate was not properly filed and notice had not been given. The Smiths filed their response and objection. After other filings were made, on September 23, 2015, the court denied the motion to dismiss the petition and ordered the matter to be reset upon application.

dismiss the petition, U.S. Bank National filed two responses to the petition to vacate, the second in March 2016. A hearing was set on the petition and on May 25, 2016, the court entered a minute order stating “Parties to set aside JE. Denied per statute of limitations. Under advisement.” After several postponements, a hearing was held and by court minute entered January 24, 2017, the trial court denied the motion to vacate. The Order denying the Smiths’ “petition/motion” to vacate was entered February 21, 2017.

The Smiths appeal.

### **STANDARD OF REVIEW**

As stated by the Oklahoma Supreme Court in *Wells Fargo Bank, N.A. v. Heath*, 2012 OK 54, 280 P.3d 328:

The standard of review for a trial court’s ruling either vacating or refusing to vacate a judgment is abuse of discretion. A clear abuse-of-discretion standard includes appellate review of both fact and law issues. An abuse of discretion occurs when a court bases its decision on an erroneous conclusion of law, or where there is no rational basis in evidence for the ruling.

*Id.* ¶ 7 (citations omitted).

### **ANALYSIS**

As was the dispositive issue in *Heath*, the dispositive issue presented to this Court is a jurisdictional issue, a question that “may be correctly raised at any level

of the judicial process or by the Court on its own motion.”<sup>2</sup> *Id.* The Oklahoma Supreme Court has stated:

A district court judgment or order is facially void if, on an inspection of the judgment roll, it is apparent that one or more of the requisite jurisdictional elements – that of the subject matter, *in personam* cognizance, or the court’s power to render a particular decision – is shown to have been absent. Whenever absence of cognizance appears on the face of the judgment roll, the judicial act is void and subject to attack at any time.

*Halliburton Oil Producing Co. v. Grothaus*, 1998 OK 110, ¶ 10, 981 P.2d 1244

(footnotes omitted). The Court further explained:

When a district court judgment or order is void on the face of the judgment roll (and no proof dehors the record is needed to show a fatal jurisdictional defect), no lapse of time can bar an attack, direct or collateral. 12 O.S. 1991 § 1038[.] But if extrinsic evidence is needed to show the jurisdiction’s absence, the judgment is not facially invalid, although it may be declared voidable.

*Halliburton*, ¶ 10 n.11 (case citations omitted). Title 12 O.S. 2011 § 32.1, states, in part, as follows: “The record shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court . . . .”

The uncontroverted facts presented clearly demonstrate the 2007 foreclosure petition in this foreclosure proceeding did not have appended to it a note that

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<sup>2</sup> Because this is the dispositive issue, we need not and do not address other issues raised by the parties.

included either the needed endorsements or an allonge attached to the note demonstrating U.S. Bank had a right to enforce the note. Because U.S. Bank did not demonstrate at the commencement of the foreclosure action that it was entitled to enforce the note – “an essential requirement to initiate a foreclosure lawsuit”<sup>3</sup> – the trial court was without authority to enter the default judgment of foreclosure; thus, the 2007 judgment was void. The assignment by U.S. Bank of the 2007 judgment to U.S. Bank National in 2015 did not cure the jurisdictional defect although it contained an allonge from BNC – the original lender on the note – to U.S. Bank National. Not only was the allonge from BNC to U.S. Bank National – not U.S. Bank, the party who filed the 2007 foreclosure action – but the allonge is undated. There simply is a question of material fact regarding whether U.S. Bank National – or its predecessor in interest, U.S. Bank – had standing to enforce the note prior to the filing of the 2007 foreclosure petition

U.S. Bank National voices the concern that

[i]f the Court were to find that the Judgment is void and not merely voidable, the Court would open up every foreclosure ever filed in the history of the state which did not include a copy of the Promissory Note with proper history of either an Allonge or indorsement. There must be finality to Judgments and 12 O.S. § 1038 provides for that finality.<sup>4</sup>

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<sup>3</sup> *Deutsche Bank Nat'l Trust v. Brumbaugh*, 2012 OK 3, ¶ 11, 270 P.3d 151.

<sup>4</sup> R. at Tab 7, pp. 6-7.

It argues the 2007 foreclosure petition followed the law governing standing at the time it was filed, because a copy of the note was attached to the petition; thus, it argues, the trial court's foreclosure judgment was in accord with the law and the infirmity is not on the face of the judgment roll. However, that position is not in accord with the Oklahoma Supreme Court's pronouncements in the line of cases concerning standing and jurisdiction in foreclosure proceedings.

For example, in *U.S. Bank National Association v. Moore*, 2012 OK 32, 278 P.3d 596, in which the debtor moved to vacate a 2009 default judgment, the Supreme Court stated:

Appellee must also demonstrate it became a "person entitled to enforce" *prior* to the filing of the foreclosure proceeding. We find there is no evidence in the record establishing Appellee had standing to commence this foreclosure action. *The trial court's granting of a default judgment in favor of Appellee could not have been rationally based upon the evidence or Oklahoma law.* Therefore, we find that the trial court abused its discretion by dismissing the Appellants' Petition to Vacate the default judgment.

*Id.* ¶ 20 (emphasis added). *See also Heath*, ¶ 16 (foreclosure judgment entered in 2009). Thus, the Supreme Court has determined that default foreclosure judgments entered prior to its 2012 decisions are subject to the jurisdictional constraints

discussed in those 2012 cases in foreclosure proceedings that had not and have not yet terminated.<sup>5</sup>

Consequently, we conclude the trial court abused its discretion in denying the Smiths' petition/motion to vacate the 2007 default foreclosure judgment.

### **CONCLUSION**

Based upon settled law governing foreclosure proceedings, we conclude U.S. Bank had not demonstrated it had the right to enforce the subject note at the time it filed its petition of foreclosure; thus the 2007 default judgment was improperly granted. Further, the assignment to U.S. Bank National of the 2007 judgment did not cure the jurisdictional defect; therefore, the trial court abused its discretion by denying the Smiths' petition/motion to vacate. Accordingly, we reverse and remand for further proceedings consistent with the Oklahoma Supreme Court decisions concerning standing in foreclosure proceedings.

### **REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**

THORNBRUGH, V.C.J., and WISEMAN, J., concur.

August 28, 2017

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<sup>5</sup> We note that at the time U.S. Bank National made this argument in April 2016, it cited no case in which a terminated foreclosure proceeding "ever filed in the history of the state" had been "open[ed] up," nor has this Court discovered any such reported cases. Nor is such a case presented by the facts of this appeal. As such, we decline to address a hypothetical case.