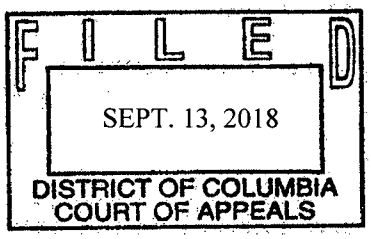
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 17-CV-1141

RICARDO A. BOPP, APPELLANT,

v.

WELLS FARGO BANK, N.A., APPELLEE.



Appeal from the Superior Court
of the District of Columbia
(CAR-5374-15)

(Hon. Neal E. Kravitz, Trial Judge)

(Submitted July 19, 2018 Decided September 13, 2018)

Before FISHER, *Associate Judge*, and WASHINGTON and RUIZ, *Senior Judges*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellee Wells Fargo Bank filed suit against appellant Ricardo A. Bopp after he defaulted on his mortgage. Finding that appellant was in default and that appellee was the holder of the note, the trial court granted summary judgment in favor of appellee and ordered a judicial sale of the mortgaged property. Appellant appeals from these orders, arguing that there is a genuine dispute as to whether appellee is the holder of the note, and that, even if it is, appellee is equitably estopped from foreclosing on the property because of appellee's alleged failure to comply with the terms of a class action settlement agreement in the United States District Court for the Northern District of California. We reject appellant's arguments and affirm.

I.

On March 8, 2007, appellant obtained a $720,000 "Pick-a-Payment" loan from World Savings Bank, secured by his property at 2033 13th Street NW in the

District of Columbia. Appellant executed a deed of trust and a promissory note, which set forth the terms of the loan and identified the lender as "World Savings Bank, FSB . . . its successors and/or assignees, or anyone to whom this note is transferred." The deed of trust gave the lender the right to accelerate the loan and sell the property if appellant defaulted on the mortgage. World Savings Bank was later acquired by Wachovia Corporation, which in turn was acquired by Wells Fargo.

In March of 2009, appellant stopped making his monthly payments. After mailing a demand letter to appellant, Wells Fargo filed a complaint for judicial foreclosure on July 16, 2015. Appellant initially filed a *pro se* answer, and the parties proceeded to mediation. While the lawsuit was in mediation, appellant's application for a loan modification was denied, as was his appeal of that denial. Thereafter, appellant obtained counsel and filed an amended answer to the complaint.

In his amended answer, appellant admitted that he had defaulted and had failed to cure the default, but denied that Wells Fargo was the current holder of the note or the beneficiary of the deed of trust. Appellant also raised as an affirmative defense that Wells Fargo "should be equitably estopped from engaging in this proceeding due to a failure to extend unto [appellant] all obligations to which it agreed pursuant to" a class action settlement agreement in the United States District Court for the Northern District of California, which appellant identified by a case caption and number. Appellant did not attach a copy of the California class action settlement agreement or any other documents related to that litigation, or provide any details about the obligations that, according to appellant, Wells Fargo had failed to meet.

On July 21, 2017, Wells Fargo filed a renewed motion for summary judgment.[1] Despite an extension of time granted *sua sponte* by the trial court, appellant did not file a response to the motion. The trial court granted summary judgment in favor of Wells Fargo, finding that there was no genuine dispute that appellant was in default on the note and that Wells Fargo was the holder of the note and beneficiary of the deed of trust. The court also acknowledged appellant's asserted defense regarding the California class action settlement, but stated that appellant "has provided no evidence that he was a member of the class to be

[1] Appellee had previously filed a motion for summary judgment, which was withdrawn after appellant filed his amended answer.

benefited by that class action settlement and no explanation of the specific obligations [Wells Fargo] allegedly failed to fulfill." The court therefore ordered a judicial sale of the mortgaged property. Appellant now appeals the orders granting summary judgment and authorizing the judicial sale.

II.

On appeal, we "review[] the trial court's grant of summary judgment *de novo*, using the same standard the trial court uses to evaluate the motion." *Sibley v. St. Albans School*, 134 A.3d 789, 801 (D.C. 2016) (citing *Young v. U-Haul Co.*, 11 A.3d 247, 249 (D.C. 2011)). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Super. Ct. Civ. R. 56 (a). Once the movant has shown the absence of any such dispute, the burden shifts to the non-movant to demonstrate that there is a genuine factual dispute. *Sibley*, 134 A.3d at 801. The non-movant "must proffer enough evidence to make out a prima facie case in support of its position . . . [and] may not defeat a motion for summary judgment by merely asserting conclusory allegations." *Parcel One Phase One Assocs., L.L.P. v. Museum Square Tenants Ass'n*, 146 A.3d 394, 399 (D.C. 2016) (internal quotation marks omitted).

As an initial matter, appellant contends on appeal that the trial court's grant of summary judgment against him should be set aside because he did not receive effective assistance of counsel. There is no constitutional right to counsel in a civil action. *See In re Ak. V.*, 747 A.2d 570, 576 n.17 (D.C. 2000). While a statutory right to counsel exists in certain non-criminal proceedings, such as cases involving child neglect or termination of parental rights, *see* D.C. Code § 16-2304 (b)(1) (2012 Repl.), this is not the case for foreclosure defendants. Without a right to counsel grounded on the Constitution or statute, appellant cannot prevail on an ineffective assistance of counsel claim as a reason to set aside the judge's order. In civil actions, a represented party is bound by the actions (and omissions) of counsel. Any complaint about counsel's performance is a matter between lawyer and client, and, if appropriate, the bar discipline system.

Turning to the merits, appellant argues that summary judgment should not have been granted because there is a genuine dispute as to whether Wells Fargo is the holder of the note. By the terms of the deed of trust, once appellant defaulted on the note and (following appellee's demand letter) failed to cure the default, the holder of the note was entitled to seek foreclosure. Appellant admitted in his amended answer, and does not challenge on appeal, that he failed to cure the

default. Wells Fargo asserted in the verified complaint that it, as successor in interest to the original lender, was the current holder of the note and beneficiary of the deed of trust. In its motion for summary judgment, Wells Fargo noted that as a matter of public record, World Savings Bank (the original lender) had merged into Wells Fargo, which is the successor entity. Wells Fargo attached FDIC records that confirm this succession.

Wells Fargo thus presented evidence sufficient to show that there is no genuine dispute as to whether it was entitled to seek foreclosure. The burden then shifted to appellant to show that there is a genuine factual dispute. However, appellant has offered no evidence in support of his position. His amended answer simply asserted that Wells Fargo was not the holder of the note without citing to any supporting material in the record, and he did not file any response to the summary judgment motion, or submit additional evidence to rebut the evidence presented by Wells Fargo. Appellant's mere "conclusory allegation[]," *Parcel One Phase One Assocs.*, 146 A.3d at 399, is not enough to create a genuine dispute of material fact. *See* Super. Ct. Civ. R. 56 (c)(1) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record . . . .").

III.

Appellant's remaining argument is that the trial court failed to consider his affirmative defense regarding the California class action settlement. He argues, as he did in the trial court, that Wells Fargo did not comply with the settlement agreement and should therefore be equitably estopped from enforcing the note through foreclosure. As the trial court noted, appellant did not expressly identify himself as a member of the class to be benefited or explain how Wells Fargo failed to meet its obligations under the class settlement.

On appeal, we are required to "conduct[] an independent review of the record," *Drejza v. Vaccaro*, 650 A.2d 1308, 1312 (D.C. 1994), taking into account the pleadings, depositions, admissions and affidavits. *Turner v. Am. Motors Gen. Corp.*, 392 A.2d 1005, 1006 (D.C. 1978). In this case, the record includes the citation to the District Court order in appellant's amended answer.[2] That order

[2] We disagree with Wells Fargo's argument that appellant never cited to any materials relating to the California class action settlement or evidence relating to his inclusion in the class. Appellant's citation to the District Court's order, a

(continued . . .)

relates to Wells Fargo's pre-screening process for determining whether members of the settlement class were entitled to a loan modification. *In re Wachovia Corp. "Pick-a-Payment" Mortg. Mktg. & Sales Practices Litig.*, No. 3:09-MD-02015, 2014 WL 2905056, at *1-2 (N.D. Cal. June 26, 2014). In its order, the District Court discussed a previous court order in which Wells Fargo's pre-screening process was found to have violated the terms of the settlement agreement. *Id.* at *2. Appellant testified that he sought a loan modification from Wells Fargo during mediation in this case, but was denied. We understand his argument to be that Wells Fargo improperly denied him a loan modification in a manner which violates the California class action settlement, and should as a consequence be estopped from foreclosing on the mortgage.

Based on our review of the District Court order, and the years when appellant obtained the loan (2007) and defaulted on the note (2009), we think it reasonable to conclude that appellant would be a member of Class C, defined as "current and former borrowers who obtained a ["Pick-A-Payment"] mortgage loan between August 1, 2003 and December 31, 2008 . . . who still had such a loan at the time of the settlement [in 2010] and who were already in default." *In re Wachovia Corp.*, 2014 WL 2905056, at *1. There was thus enough information in the pleadings to support that the California class action settlement could be relevant to appellant's defense.

In order to successfully oppose summary judgment, appellant must "present[] admissible evidence of a *prima facie* case to support his" assertion of an equitable estoppel defense. *Sibley*, 134 A.3d at 801.[3] The District Court,

---

(. . . continued)
public document, sufficed to alert the trial court to the California class action settlement agreement, Wells Fargo's breach, and its possible relevance to the instant case. *See Drake v. McNair*, 993 A.2d 607, 616 (D.C. 2010) (noting that the "court is 'allowed to take judicial notice of matters in the general public record, including . . . records of prior litigation'") (quoting *Wise v. Glickman*, 257 F. Supp. 2d 123, 130 n.5 (D.D.C. 2003)); *In re Estate of Barfield*, 736 A.2d 991, 995 n.8 (D.C. 1999) ("[T]he trial court is entitled to take judicial notice of matters of public record.").

[3] Wells Fargo does not argue that if appellant had presented a *prima facie* case, equitable estoppel is inapplicable, and it would be entitled to judgment as a matter of law.

according to the cited order, found that in 2014, Wells Fargo's pre-screening process for determining whether borrowers qualified to have a loan modification was improper and violated the California class action settlement agreement. *In re Wachovia Corp.*, 2014 WL 2905056, at *1-2. However, there is nothing we can glean from that order or anywhere else in the record to support that Wells Fargo was still using such a process, even after it had been sanctioned by the California court, when it denied appellant's application for loan modification in 2016. Appellant offers no evidence about the circumstances of his loan modification request beyond the fact that his application was denied to suggest that Wells Fargo violated its obligations under the settlement agreement with respect to his mortgage. Without evidence in the record to support that Wells Fargo violated the settlement agreement when dealing with appellant's request for a loan modification, appellant has not met his burden to demonstrate that there is a genuine dispute of a material fact. *See* Super. Ct. Civ. R. 56 (c)(1).

IV.

As there is no genuine dispute of any material fact and Wells Fargo, as holder of the note, has succeeded to the rights under the deed, the trial court did not err in granting summary judgment in favor of Wells Fargo and ordering a judicial sale of the property. Accordingly, the orders are

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable Neal E. Kravitz

Director, Civil Division

Ricardo A. Bopp
2033 13th Street, NW
Washington, DC 20009

Copies e-served to:

David Chen, Esquire

Sarah E. Meyer, Esquire

Virginia W. Barnhart, Esquire