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United States Court of Appeals
Tenth Circuit

April 12, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

WILMINGTON SAVINGS FUND SOCIETY FSB, d/b/a Christiana Trust as Owner Trustee of the Residential Credit Opportunities Trust III,

Plaintiff - Appellee,

v.

GREGORY HUTCHINS, in his individual capacity and as personal representative of the Estate of Sandra J. Neill, and The Unknown Heirs, Devisees or Legatees of Sandra J. Neill,

Defendant - Appellant.

No. 21-2094
(D.C. No. 1:18-CV-00346-JCH-JHR)
(D. N.M.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **BRISCOE**, and **ROSSMAN**, Circuit Judges.

In this mortgage-foreclosure action, Gregory Hutchins appeals pro se from a district court order that entered summary judgment in favor of Wilmington Savings Fund Society FSB, d/b/a Christiana Trust as Owner Trustee of the Residential Credit

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Opportunities Trust III ("Wilmington Savings"). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

This case involves real property located in Bernalillo, New Mexico. In 2007, Sandra J. Neill borrowed $225,000 from CTX Mortgage Company (CTX) to purchase a home. Neill executed a promissory note in CTX's favor and granted CTX a mortgage to secure repayment. Neill soon defaulted on the loan.

CTX indorsed the note in blank and, in 2009, assigned it and the mortgage to J.P. Morgan Mortgage Acquisition Corp. ("JPMMA"), which later sued Neill in New Mexico state court. In 2015, JPMMA assigned the note and mortgage to "Wilmington Trust, National Organization," R., Vol. I at 46, which in turn executed an assignment to Wilmington Savings, *id.* at 48, 50.

In April 2018, Wilmington Savings joined the state lawsuit as a plaintiff and elected to seek only "recovery on the promissory note . . . as opposed to on the mortgage." *Id.* at 252. Contemporaneously, Wilmington Savings filed the instant litigation in federal district court based on diversity jurisdiction, seeking only to foreclose on the mortgage.[1] Legal proceedings were stayed in June, however, by Neill's filing of a Chapter 7 bankruptcy petition.

[1] "New Mexico continues to follow the common law rule that a foreclosure action and a suit on the underlying note may be filed separately at the mortgagee's option." *Kepler v. Slade*, 896 P.2d 482, 485 (N.M. 1995). According to Wilmington Savings, it has not pursued the state court litigation on the note.

On September 20, 2018, the bankruptcy court entered a final decree, closing the case upon the full administration of Neill's estate. The next day, Hutchins filed in the district court a Fed. R. Civ. P. 25(a)(1) suggestion of death, indicating that Neill had died "during the pendency of this action" and that he was the executor of her estate. *Id.* at 94. In response, Wilmington Savings amended its complaint, designating as defendants: Hutchins, both in his individual capacity and as the estate's personal representative; and Neill's unknown heirs, devisees, or legatees.

Hutchins then moved to dismiss the complaint, challenging the federal district court's diversity jurisdiction and Wilmington Savings' standing to sue. After a magistrate judge recommended denying the motion to dismiss, the district court reviewed Hutchins' objections de novo, adopted the recommendation, and denied the motion to dismiss.

While Hutchins' motion to dismiss was pending, Wilmington Savings sought summary judgment, presenting evidence of Neill's default and its right to foreclose on the property. Hutchins opposed the motion, re-asserting his arguments from his motion to dismiss and seeking to strike the affidavit of Ron McMahan, the CEO of Wilmington Savings' parent company. Given the overlap of Hutchins' arguments in the motion to dismiss and summary-judgment response, the magistrate judge incorporated his analysis of Hutchins' motion to dismiss into a recommendation to grant Wilmington Savings' summary-judgment motion. Hutchins filed objections. The district court overruled Hutchins' objections, adopted the magistrate judge's recommendation, and entered summary judgment against Hutchins and a default judgment against the other defendants.

Hutchins unsuccessfully sought to set aside the summary judgment and then appealed.[2]

DISCUSSION

I. Standard of Review

"We review the district court's grant of summary judgment de novo." *Young v. Dillon Cos., Inc.*, 468 F.3d 1243, 1249 (10th Cir. 2006). "The court shall grant summary judgment 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." Fed. R. Civ. P. 56(a).

We construe Hutchins' pro se filings liberally, but we do not act as his advocate. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

II. Diversity Jurisdiction

Hutchins first argues the district court lacked diversity jurisdiction. Diversity jurisdiction under 28 U.S.C. § 1332 requires "complete diversity of citizenship . . . between the adverse parties and" an "amount in controversy exceed[ing] $75,000."

[2] Hutchins' notice of appeal designated the district court's order granting summary judgment and other pre-judgment decisions, including the order denying his motion to dismiss. Ordinarily, an order denying a motion to dismiss is not appealable. *See Decker v. IHC Hosps., Inc.*, 982 F.2d 433, 435 (10th Cir. 1992). And although an "appeal from a final judgment supports review of . . . earlier interlocutory orders," *Siloam Springs Hotel, LLC v. Century Sur. Co.*, 906 F.3d 926, 931 (10th Cir. 2018) (internal quotation marks omitted), we decline to separately review the order denying Hutchins' motion to dismiss because the district court incorporated its analysis of the motion to dismiss into the final order in this case (the order granting Wilmington Savings' motion for summary judgment). *See Long v. St. Paul Fire & Marine Ins. Co.*, 589 F.3d 1075, 1078 n.2 (10th Cir. 2009) (declining to separately review interlocutory order denying plaintiff's motion for summary judgment, where plaintiff had appealed from the final order granting defendant's motion for judgment on the pleadings and motion to dismiss).

Dutcher v. Matheson, 733 F.3d 980, 987 (10th Cir. 2013) (internal quotation marks omitted).

We review de novo "the ultimate question of whether diversity jurisdiction exists," but "we review the district court's citizenship finding only for clear error," reversing "only if the district court's finding lacks factual support in the record or if, after reviewing all the evidence, we have a definite and firm conviction that the district court erred." *Middleton v. Stephenson*, 749 F.3d 1197, 1201 (10th Cir. 2014) (citation and internal quotation marks omitted).

Hutchins asserts that because he was unable to locate a state government document using Wilmington Savings' name in its complete form, as it appears in the amended complaint's caption, then Wilmington Savings does not "exist[ ]" for purposes of diversity jurisdiction. Aplt. Opening Br. at 21. This argument is meritless.

In finding that Wilmington Savings is a Delaware citizen, the district court first cited the trust agreement establishing "Wilmington Savings Fund Society, FSB, d/b/a Christian Trust" as the "Owner Trustee" of the "Residential Credit Opportunities Trust III." R., Vol. I at 444. When a trustee of a traditional trust files a lawsuit, its "citizenship is all that matters for diversity purposes." *Americold Realty Trust v. Conagra Foods*, 577 U.S. 378, 383 (2016); *see also Navarro Savings Association v. Lee*, 446 U.S. 458, 464, 465 (1980) (indicating that "a trustee is a real party to the controversy for purposes of diversity jurisdiction when [it] possesses certain customary powers to hold, manage, . . . dispose of assets for the benefit of others," and "control the litigation"). Next, the district court cited a document from Delaware's Division of Corporations recognizing

"Wilmington Savings Fund Society, FSB" as the registered agent for the "Residential Credit Opportunities Trust III," a Delaware statutory trust. R., Vol. I at 454. Given these documents, and the unrefuted allegations of the complaint alleging that Wilmington Savings is a Delaware citizen,[3] the district court found diversity based on Hutchins' citizenship, both as an individual (Connecticut) and as the representative of Neill's estate (New Mexico), *see* 28 U.S.C. § 1332(c)(2) (giving "the legal representative of the estate of a decedent" the same citizenship as the decedent). Finally, it is undisputed in this case that the amount in controversy exceeded $75,000.

We conclude that the district court's citizenship findings are not clearly erroneous and that the district court had diversity jurisdiction in this case.

III. Standing

Hutchins argues that Wilmington Savings lacked Article III standing to enforce Neill's promissory note and therefore could not foreclose on the mortgage. We review de novo the district court's determination that Wilmington Savings had standing to bring this lawsuit. *See Lupia v. Medicredit, Inc.*, 8 F.4th 1184, 1190 (10th Cir. 2021).

"The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing" standing, which requires (1) "an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a

[3] "For diversity, a corporation is a citizen of its state of incorporation and the state where its principal place of business is located." *See Grynberg v. Kinder Morgan Energy Partners*, 805 F.3d 901, 905 (10th Cir. 2015).

favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). To address these elements, "[a] federal court sitting in diversity applies the substantive law of the forum state," *Mincin v. Vail Holdings, Inc.*, 308 F.3d 1105, 1108 (10th Cir. 2002), which here, is New Mexico.

First, to show injury in fact, "a party seeking to enforce a promissory note must establish that it has the right to enforce the note" by, for example, being a "holder of the instrument." *Los Alamos Nat'l Bank v. Velasquez*, 446 P.3d 1220, 1225 (N.M. App. 2019). "[P]ossession of a note properly indorsed in blank establishes the right to enforce that note" as a holder of the instrument. *Id.* (internal quotation marks omitted); *see also HSBC Bank USA, Nat'l Ass'n v. Wiles*, 468 P.3d 922, 925 (N.M. App. 2020) ("The mortgage follows the note, allowing the subsequent holder of the note to enforce the mortgage even without a formal assignment of the mortgage."). Here, Wilmington Savings possessed Neill's promissory note, which was indorsed in blank and attached to the initial complaint. Thus, Wilmington Savings was entitled to enforce the note and recover the debt. Contrary to Hutchins' assertion, Wilmington Savings could do so without suing in federal court on the note itself. *See Kepler v. Slade*, 896 P.2d 482, 484-85 (N.M. 1995) (explaining that "independent remedies" arise upon a mortgagor's default, enabling a mortgagee to "pursue [a] remedy in personam for the debt, or [a] remedy in rem to subject the mortgaged property to its payment" (internal quotation marks omitted)).

Second, Wilmington Savings' injury in this case is traceable to Neill's default on the debt and Hutchins' failure, either independently or as the executor/representative of

Neill's estate, to satisfy that debt. And finally, a judicial decision in Wilmington Savings' favor will redress the injury by foreclosing the mortgage and allowing the property to be sold in satisfaction of the debt.

Thus, we conclude that Wilmington Savings had standing to bring this lawsuit.[4]

IV. The McMahon Affidavit

Hutchins contends that the district court erred in not striking McMahon's affidavit, which was offered in support of Huntington Savings' summary judgment motion. In particular, Hutchins argues the affidavit was inadmissible because McMahon relied on a default notice and a loan-payoff schedule to show that the real property is subject to an unpaid debt. We conclude that the district court did not abuse its discretion in not striking McMahon's affidavit. *See Johnson v. Weld County*, 594 F.3d 1202, 1207 (10th Cir. 2010) ("[W]e review challenges to the district court's determinations regarding what is and is not competent evidence for our consideration at the summary judgment stage for abuse of discretion.").

[4] Hutchins argues that Wilmington Savings could not foreclose after (1) the bankruptcy court discharged Neill's liability on the note; and (2) Neill died. Hutchins is mistaken on both counts. First, although a Chapter 7 bankruptcy "discharge extinguishes . . . the personal liability of the debtor," "a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy." *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991) (internal quotation marks omitted). Further, Neill's Chapter 7 bankruptcy petition identified Wilmington Savings as a creditor possessing a secured claim against her home, and "an *in rem* action on a secured claim survives [a Chapter 7] bankruptcy," *Chandler Bank of Lyons v. Ray*, 804 F.2d 577, 579 (10th Cir. 1986). Second, in New Mexico, the mortgagor's death does not extinguish the mortgagee's lien on real property. *See* 5 Tiffany Real Property § 1546 (3d ed. 2021) (citing *Cleveland v. Bateman*, 158 P. 648, 657 (N.M. 1915), *on reh'g*, (N.M. 1916)).

McMahon's affidavit satisfied the evidentiary requirements for his reliance on the default notice and payoff schedule. Specifically, McMahon stated that in his role as the CEO of Huntington Savings' parent company and in the performance of his regular job duties, he was familiar with the companies' business records maintained for the purpose of collecting loan debts. A witness may testify about a matter within his personal knowledge as long as there is "[e]vidence to prove personal knowledge[,] [which] may consist of the witness's own testimony." Fed. R. Evid. 602. And unless "the witness could not have actually perceived or observed that which he testifies to," the testimony is proper. *United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1132 (10th Cir. 2014) (internal quotation marks omitted). McMahon's affidavit testimony established the personal-knowledge requirement.

Further, although the default notice and payoff schedule contained out-of-court statements "offered to prove the truth of the matter asserted," Fed. R. Evid. 801(c), i.e., the existence of the debt, McMahon could nevertheless rely on those documents under the business-records exception to the hearsay rule. That exception allows the admission of hearsay statements in business records if the following conditions are met: the records were (A) made around the time of the events at issue, (B) kept in the course of a regularly conducted business activity, and (C) made as a regular practice of that activity. *See* Fed. R. Evid. 803(6)(A)-(C). McMahon testified as to these conditions, and Hutchins has not

"show[n] that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." *Id.* 803(6)(E).[5]

CONCLUSION

We affirm the district court's judgment.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

[5] Even if McMahon's affidavit contained flaws, they were harmless, given that Neill herself acknowledged during the bankruptcy proceedings the existence of a $466,737.42 debt owed to Huntington Savings that was secured by her residence.