COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

PNC BANK, N.A., substitute-plaintiff for BANK OF AMERICA, N.A.	:	
	:	**CASE NO. 2011 CVE 00987**
Plaintiff	:	
vs.		**Judge McBride**
	:	
DAVID C. KNAPKE, et al.	:	**DECISION/ENTRY**
Defendant	:	

Manley Deas Kochalski L.L.C., Lynn A. Busch-Heyman, Michael E. Carleton, Kelly A. Spangler, and Andrew C. Clark, attorneys for the plaintiff Bank of America, N.A., P.O. Box 165028, Columbus, Ohio 43216-5028.

Crowe and Welch, Stephen C. Crowe, attorney for the defendants David C. Knapke and Patricia M. Knapke, 1019 Main Street, Milford, Ohio 45150.

Richard G. McCue Co., L.P.A., Richard G. McCue, attorney for the defendant/counterclaimant/cross-claimant National Bank & Trust Company, Eastgate Professional Centre, 948 Old St. Rt. 74, Suite 6, Cincinnati, Ohio 45245.

James G. Nichols, assistant prosecuting attorney for the defendant Clermont County Treasurer, 123 N. Third Street, Batavia, Ohio 45103.

This cause is before the court for consideration of a motion for summary judgment filed by the plaintiff PNC Bank, N.A. (hereinafter “PNC Bank”).

The court scheduled and held a hearing on the motion for summary judgment on July 9, 2011. At the conclusion of the hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

The complaint in foreclosure in this case was originally filed by Bank of America, N.A., with PNC Bank being substituted as the party-plaintiff on March 29, 2012.[1] In pertinent part to the present motion, the complaint alleges that "[t]he Note and Mortgage are in default. Plaintiff has satisfied all conditions precedent and has declared the entire balance due and payable."[2] In their answer, the defendants David Knapke and Patricia Knapke make a general denial as to that allegation.[3]

The plaintiff now moves for summary judgment. In the affidavit filed in support of the motion, Charles DeBono, Jr., Vice President of Loan Documentation of PNC Bank's servicing agent, states that "payments have not been made as required under the terms of the Note and Mortgage; the default on the loan has not been cured; and Plaintiff or its agent has accelerated the account, pursuant to the terms of the loan, making the entire balance due."[4]

The defendants did not present any evidence in opposition to the motion for summary judgment but they do argue that the plaintiff has not established that it complied with two conditions precedent in order to prevail on its motion for summary

[1] Order Substituting Plaintiff filed March 29, 2012.
[2] Complaint for Foreclosure at ¶ 5.
[3] Answer of Defendants David C. Knapke and Patricia M. Knapke at ¶ 5.
[4] Affidavit of Status of Account at ¶ 8.

judgment. As evidenced by the mortgage attached to the plaintiff's motion, paragraph 2 of the mortgage sets forth a priority by which payments are to be applied to the loan. Paragraph 22 of the mortgage requires the lender to give the borrower notice prior to acceleration following any breach by the borrower and sets forth the specific information required to be included in that notice.

WHAT IS THE STANDARD FOR REVIEW ON A MOTION FOR SUMMARY JUDGMENT?

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."[5]

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.[6] Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.[7]

---

[5] Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Davis v. Loopco Indus., Inc.* (1993), 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144.

[6] *Engel v. Corrigan* (1983), 12 Ohio App.3d 34, 35, 465 N.E.2d 932; *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378; *Welco Indus. Inc. v. Applied Cas.* (1993), 67 Ohio St.3d 344, 356, 617 N.E.2d 1129; *Willis v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.

[7] *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123.

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[8]

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law[?]"[9] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[10]

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[11] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[12]

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence

---

[8] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.
[9] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.
[10] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.
[11] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3fd 157, 161, 553 N.E.2d 597; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.
[12] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.

of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[13] The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case.[14] Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[15]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[16] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[17] The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.[18] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial."[19]

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported allegations.[20] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and

---

[13] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164.
[14] Id.
[15] Id.
[16] Id.
[17] Id.
[18] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[19] *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Welco Indus., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129; *Gockel v. Ebel* (1994), 98 Ohio App.3d 281, 292, 648 N.E.2d 539.
[20] *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.

must show affirmatively that the affiant is competent to testify on the matters stated therein.[21]

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[22]

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[23]

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed affidavit.[24] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

---

[21] Civ.R.56(E); *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646, 662 N.E.2d 1112; *Smith v. A-Best Products Co.* (Feb. 20, 1996), 4th Dist. No 94 CA 2309, unreported.
[22] *Carlton v. Davisson*, 104 Ohio App.3d at 646, 662 N.E.2d at 1119; *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049.
[23] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.
[24] *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[25] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[26]

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.[27]

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.[28]

LEGAL ANALYSIS

[25] *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[26] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.
[27] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.
[28] Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.

" 'Where prior notice of default and/or acceleration is required by a provision in a note or mortgage instrument, the provision of notice is a condition precedent,' and it is subject to the requirements of Civ.R. 9(C).' "[29]

Pursuant to Civ.R. 9, "[i]n pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity."

This rule has been discussed as follows:

> "Where a cause of action is contingent upon the satisfaction of some condition precedent, Civ.R. 9(C) requires the plaintiff to plead that the condition has been satisfied, and permits the plaintiff to aver generally that any conditions precedent to recovery have been satisfied, rather than requiring plaintiff to detail specifically how each condition precedent has been satisfied. In contrast to the liberal pleading standard for a party alleging the satisfaction of conditions precedent, a party denying performance or occurrence of a condition precedent must do so specifically and with particularity. Civ.R. 9(C). A general denial of performance of conditions precedent is not sufficient to place performance of a condition precedent in issue. * * * The effect of the failure to deny conditions precedent in the manner provided by Civ.R. 9(C) is that they are deemed admitted."[30]

In the complaint, the original plaintiff Bank of America pleaded that the plaintiff satisfied all conditions precedent. The defendants did not deny this allegation with particularity and, instead, made only a general denial. Thus, it would appear that

---

[29] *National City Mortgage Co. v. Richards*, 182 Ohio App.3d 534, 913 N.E.2d 1007, 2009-Ohio-2556, ¶ 21 (Ohio App. 10th Dist., 2009), quoting *First Financial Bank v. Doellman* (Jan. 22, 2007), 12th Dist. No. CA2006–02–029, 2007-Ohio-222, ¶ 20.

[30] *U.S. Bank, N.A. v. Coffey* (Feb. 24, 2012), 6th Dist., 2012-Ohio-721, ¶ 37, quoting *Lewis v. Wal–Mart, Inc.* (Aug. 12, 1993), 10th Dist. No. 93AP–121, 1993 WL 310411, *3.

because the defendants failed to deny the performance of any condition precedent with particularity, the effect would be that they are deemed admitted.[31]

However, several recent cases have found otherwise. In U*.S. Bank, N.A. v. Coffey* (Feb. 24, 2012), 6th Dist., 2012-Ohio-721, the court emphasized the requirement that the moving party on summary judgment has the burden of pointing out to the trial court that there is an absence of a genuine issue of material fact.[32] The *Coffey* court found that "[b]ecause U.S. Bank made no mention of possible admissions in the pleadings in its motion for summary judgment, the question of whether the purported general denial constituted an admission by Coffey is not before us."[33] In support of its motion for summary judgment, the plaintiff pointed only to the affidavit of status of account, in which the affiant did not address the issue of whether the plaintiff satisfied all conditions precedent in accordance with the mortgage agreement.[34] Therefore, the *Coffey* court found that the plaintiff failed to meet its initial burden of pointing to portions of the record that show the absence of a genuine issue of material fact.[35]

Similarly, in *Wells Fargo Bank, N.A. v. Beirne* (Dec. 27, 2011), 9th Dist. No. 09CA0103-M, 2011-Ohio-6678, the court noted that, in its motion for summary judgment, the bank made no reference to a possible admission in the parties' pleadings pursuant to Civ.R. 9(C).[36] Therefore, the court found that "the question of whether the purported general denial constituted an admission by the [defendants] is not before us."[37] Furthermore, because the bank's affidavit in support of summary judgment did not

[31] Id. at ¶ 39.
[32] Id. at ¶ 40, quoting, *Dresher*, supra, 75 Ohio St.3d at 289-290.
[33] Id.
[34] Id.
[35] Id.
[36] *Beirne* at ¶ 12.
[37] Id. at ¶ 15.

address the issue of whether conditions precedent were met, the court found that the bank had not met its initial burden under the summary judgment standard of showing an absence of a genuine issue of material fact.[38] It should be noted that in both *Coffey* and *Beirne*, the defendants did not present any affidavits in opposition to summary judgment; instead, they simply argued that the plaintiff failed to meet its burden.

Based on this recent case law, the fact that the defendants in the present case failed to deny with particularity the allegation in the complaint that conditions precedent were satisfied is not dispositive of the current motion because the plaintiff failed to state in its motion that it was relying on any admission resulting from a failure of the defendants to comply with Civ.R. 9(C) in their answer. Therefore, the court must consider whether the materials submitted in support of summary judgment contain a sufficient basis upon which to grant summary judgment to the plaintiff.

In C*ent. Mtge. Co. v. Elia* (June 29, 2011), 9th Dist. No. 25505, 2011-Ohio-3188, the only reference to acceleration contained in the plaintiff's affidavit was a statement that "all of the prerequisites required under the note and mortgage necessary to accelerate the balance due on the note have been performed."[39] The court found that this statement did not set forth any facts, but instead merely set forth a legal conclusion. As such, the court found that this statement in the affidavit did not meet the requirement of Civ.R. 56(E) that affidavits in support of summary judgment "shall set forth such facts as would be admissible in evidence."[40]

In *LaSalle Bank, N.A. v. Kelly* (June 14, 2010), 9th Dist. No. 09CA0067-M, 2010-Ohio-2688, the court found that the affidavit in support of summary judgment did not

[38] Id.
[39] *Elia* at ¶ 15.
[40] Id.

mention whether the bank sent the defendants notice prior to filing default.[41] As such, the court held that the bank failed to show the absence of a genuine issue of material fact with regard to its compliance with the notice requirement.[42]

In *Wachovia of Delaware, N.A. v. Jackson* (June 27, 2011), 5th Dist. No.2010–CA–00291, 2011-Ohio-3202, the Fifth District Court of Appeals discussed at length what a plaintiff must attach in support of a motion for summary judgment in a foreclosure action and held that a plaintiff must present evidentiary-quality material showing, among other things, that all conditions precedent have been met.[43]

The plaintiff's in the case of *R.B.S. Citizens v. Adams* (April 30, 2012), 3rd Dist. No. 13-11-35, 2012-Ohio-1889, did not file any evidence in opposition to summary judgment but did argue that the bank failed to establish that it complied with the requirements of the mortgage's acceleration clause.[44] In response, the bank filed a supplementary affidavit with a copy of the notice of default.[45] The appellate court upheld the granting of summary judgment, noting that the defendants' only basis for claiming that the bank was not entitled to summary judgment was their allegation that it failed to provide evidence that it complied with the notice requirement, and "[t]his unsupported contention was disproved by the Bank's unchallenged evidence that notice had been sent."[46]

In the case at bar, the court must determine whether the phrase "[p]laintiff or its agent has accelerated the account, pursuant to the terms of the loan, making the entire

---

[41] *Kelly* at ¶ 14.
[42] Id.
[43] *LaSalle Bank, N.A. v. Fulk* (June 29, 2011), 5th Dist. No. 2010-CA-00294, 2011-Ohio-3319, ¶ 12-16, quoting, *Jackson*, supra.
[44] *Adams* at ¶ 11.
[45] Id. at ¶ 12.
[46] Id. at ¶ 15.

balance due[,]" is sufficient for the plaintiff to meet its initial burden under *Dresher*. The court finds, under the case law discussed above, that the phrase "pursuant to the terms of the loan" is not sufficient to demonstrate that conditions precedent were satisfied, particularly the notice requirement.

As a result, a genuine issue of material fact remains and summary judgment cannot be granted at this time. The court notes for the record that if the plaintiff wishes to file a second motion for summary judgment, it will consider granting leave for it do to so, particularly considering that no trial date is currently set in this case.

CONCLUSION

The plaintiff's motion for summary judgment is not well-taken and is hereby denied.

CONCLUSION

The defendant's motion for leave to file motion for new trial and motion for post-conviction relief is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 24th day of August 2012 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride