COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

WELLS FARGO BANK. N.A., AS TRUSTEE FOR MASTR ASSET BACKED SECURITIES TRUST 2003-OPT1	:	
	:	**CASE NO. 2012 CVE 000122**
	:	
Plaintiff		
	:	**Judge McBride**
vs.		
	:	
RICKY B. FONTAINE, et al.		
	:	**DECISION/ENTRY**
Defendants		
	:	

The Law Office of Manbir S. Sandhu, Manbir S. Sandhu, attorney for the plaintiff Wells Fargo Bank, N.A., 1370 Ontario Street, Suite 600, Cincinnati, Ohio 44113.

The Law Offices of Lance Denha, Feisul M. Kahn, attorney for the defendant Ricky Fontaine, 1675 Old Henderson Road, Columbus, Ohio 43220.

This cause is before the court for consideration of a motion for summary judgment filed by the plaintiff Wells Fargo Bank, N.A., as Trustee for Mastr Asset Backed Securities Trust 2003-OPT1.

The court scheduled and held a hearing on the motion for summary judgment on April 8, 2013. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

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

FACTS OF THE CASE

The plaintiff Wells Fargo Bank, N.A. (hereinafter referred to as "Wells Fargo Bank") filed its complaint for foreclosure and money damages in this case on January 24, 2012. The plaintiff then filed its motion for summary judgment as to the claims against the defendant Ricky B. Fontaine on September 10, 2012.

Fontaine in turn filed his response to the motion for summary judgment and a motion for leave to amend his answer. On November 7, 2012, the court issued a written decision granting Fontaine leave to file an amended answer with three new affirmative defenses.

Thereafter, on February 5, 2013, the plaintiff filed a supplemental motion for summary judgment addressing the three additional affirmative defenses set forth in the amended answer.

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."[1]

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.[2] 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.[3]

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."[4]

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[?]"[5] "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

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[1] 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.
[2] *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.
[3] *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.
[4] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.
[5] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.

resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[6]

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.[7] 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."[8]

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 of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[9] 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.[10] 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.[11]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[12] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the

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[6] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.
[7] *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.
[8] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.
[9] *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.
[10] Id.
[11] Id.
[12] Id.

allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[13] The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.[14] 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."[15]

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.[16] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.[17]

"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."[18]

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.[19]

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[13] Id.
[14] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[15] *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.
[16] *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.
[17] 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.
[18] *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.
[19] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.

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.[20] 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."

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.[21] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[22]

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

[20] *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.
[21] *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[22] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.

evidence, a claim to survive a summary judgment motion must be more than merely colorable.[23]

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.[24]

LEGAL ANALYSIS

The defendant Ricky Fontaine does not deny signing the subject note and mortgage at issue. Nor does he deny that he failed to make the requisite payments under the note. The affidavit of Angela Edwards, an attorney-in-fact for Wells Fargo Bank whose duties include supervision of the servicing of defendant's loan, establishes that payments have not been made as required under the terms and conditions of the note and mortgage and, as a result, the note and mortgage are now in default and the balance due and owing ($117,499.97 plus interest at the rate of 6.750% per annum from June 1, 2011) has been accelerated.[25]

The affidavit references the note and mortgage attached as exhibits to the complaint and states that they are kept in the ordinary course of business[26], although the affidavit does not state that Exhibits A and B are fair and accurate copies of the documents therein. However, "[f]ailure to move to strike or otherwise object to

[23] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.
[24] Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.
[25] Affidavit Regarding Account at ¶¶ 5-7.
[26] Id. at ¶ 3.

documentary evidence submitted by a party in support of, or in opposition to, a motion for summary judgment waives any error in considering that evidence under Civ.R. 56(C)."[27]

While Exhibits A and B attached to the complaint were not also attached as exhibits to the motion for summary judgment or the affidavit regarding the account, they are referenced in the motion and in that affidavit and were clearly being relied upon by the plaintiff in support of summary judgment. The defendant made several legal arguments regarding the content of those documents but he made no objection to the court's consideration of the documents for the purpose of ruling on the motion for summary judgment. As such, the court will consider Exhibits A and B attached to the Complaint for the purpose of examining the summary judgment motion.

Exhibit A to the complaint includes the adjustable rate note executed by Ricky Fontaine for the benefit of lender Option One Mortgage Corporation and an allonge to the note executed by Option One Mortgage Corporation and paid to the order of Wells Fargo Bank as trustee under the applicable agreement.[28]

Exhibit B to the Complaint includes the open-end mortgage and an adjustable rate rider executed by Ricky Fontaine for the benefit of lender Option One Mortgage Corporation and an assignment of mortgage executed on November 18, 2011, in which Sand Canyon Corporation f/k/a Option One Mortgage Corporation assigned Fontaine's mortgage and all interest and liens secured thereby to the plaintiff in the present matter Wells Fargo Bank, N.A., as trustee for Mastr Asset Backed Securities Trust 2003-OPT1,

[27] *Foster v. Cleveland Clinic Foundation* (Dec. 16, 2004), 8th Dist. Nos. 84156 and 84169, 2004-Ohio-6863, at ¶ 8, citing *Stegawski v. Cleveland Anesthesia Group*, 37 Ohio App.3d 78, 83, 523 N.E.2d 902 (Ohio App. 8th Dist., 1987).
[28] Complaint, Exhibit A.

Mortgage Pass-through Certificates Series 2003-OPT1.[29] Based on these documents, the court finds that the plaintiff has demonstrated that it is the holder of the note and mortgage at issue in the case at bar.

Furthermore, based on the affidavit regarding the account, the plaintiff has established that the note and mortgage are in default, the balance due and owing has been accelerated, and the current balance due and owing is $117,499.97 plus interest at the rate of 6.750% per annum from June 1, 2011.

The court finds that the plaintiff has met its initial burden of demonstrating that there is no genuine issue of material fact remaining in the case at bar and that judgment as a matter of law is appropriate. As such, the burden shifts to the defendant to demonstrate that a genuine issue of material fact remains in the case at bar.

In his response to summary judgment, Fontaine raises the following issues: (1) standing/real party in interest; (2) allegations that the signatory for Option One Mortgage Corporation is a known "robo-signer;" and (3) Truth-in-Lending Act and Real Estate Settlement Procedures Act violations.

As to the issues of standing and real party in interest, Fontaine argues that, per the pooling and servicing agreement for Mastr Asset Backed Securities Trust 2003-OPT1, a loan must be current to be added to the trust and payments under the subject note and mortgage were not current on November 18, 2011 when the mortgage was assigned to the trust.

On the Friday afternoon prior to the Monday morning hearing on this matter, the defendant filed a "Notice of Submission of Evidence." Included in that evidence is the subject pooling and servicing agreement, the Uniform Residential Loan Application

[29] Complaint, Exhibit B.

completed by Fontaine, the Truth in Lending disclosure statement, and the same affidavit of Ricky Fontaine submitted with the original opposition to the motion for summary judgment in October 2012. The affidavit does not authenticate the documents in the submission of evidence and makes no claim that the TILA and/or loan application documents attached are true and accurate copies of the forms completed and received by the defendant. At the hearing on this matter, counsel for the plaintiff objected to the court's consideration of these documents. The documents have not been properly authenticated as required and, as such, the plaintiff's objection must be sustained and the court cannot consider these documents when examining the issues raised in opposition to summary judgment.

However, even if the court could consider the pooling and servicing agreement, and even if transfer of the present note and mortgage to the trust was in violation of the terms of the trust, Ricky Fontaine has no standing to raise such an argument.[30] When a mortgagor is not a party to the transfer agreement and his contractual obligations under the mortgage are not affected by the assignment, the mortgagor lacks standing to challenge the validity of the assignment.[31]

Due to the fact that the plaintiff has demonstrated that it is the holder of the note and mortgage at issue, it has standing to bring and is the real party in interest in the present action.[32]

The defendant's second argument in opposition to summary judgment is that the signatory to the assignment of the mortgage, Vilma Castro, Vice President of Option

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[30] *Deutsche Bank Natl. Trust Co. v. Rudolph* (Dec. 27, 2012), 8th Dist. No. 98383, 2012-Ohio-6141, ¶ 25, discussing *Bank of New York Mellon Trust Co. v. Unger* (May 3, 2012), 8th Dist. No. 97315, 2012-Ohio-1950, ¶ 35.
[31] Id.
[32] See, e.g., *Deutsche Bank Natl. Trust Co. v. Greene* (April 22, 2011), 6th Dist. No. E-10-006, 2011-Ohio-1976, ¶ 13.

One Mortgage Corporation, is a known "robo-signer." " 'Robo-signing' occurs when bank employees sign large numbers of affidavits and legal documents asserting the bank's right to foreclose without confirming their accuracy."[33] The facts of the case at bar are similar to those of *Chase Home Fin., L.L.C. v. Heft* (March 5, 2012), 3rd Dist. Nos. 8-10-14 and 8-11-16, 2012-Ohio-876. In that case, the defendant never actually alleged that his mortgage documents were robo-signed, only that they might have been robo-signed.[34] Furthermore, the only evidence submitted in support of that allegation was three newspaper articles which included an admission from the signatory that she robo-signed some mortgage foreclosure documents while working for Chase Bank.[35] The court noted that newspaper articles alone are not proper evidence and found that the defendant's allegations were purely speculative.[36]

Similarly, in the case at bar, Fontaine's memorandum in opposition states that "a simple internet search reveals Ms. Castro to be a known robo signer and employee of Nationwide Title Clearing[,]" and that "[i]f this were the case, she would not have authority to transfer property from one company to another." The language utilized by the defendant in his memorandum reveals the purely speculative nature of his argument. Additionally, passing reference to "a simple internet search" is not proper Civ.R. 56(C) evidence. As such, the defendant has demonstrated no genuine issue of material fact relating to his robo-signing allegation.

Finally, the defendant points to two of his additional affirmative defenses, which allege that there were Truth-in-Lending Act ("TILA") and Real Estate Settlement

[33] *Unger*, supra, at fn. 4, citing, *Ohio v. GMAC Mtge., L.L.C.*, 760 F.Supp.2d 741, 743 (N.D.Ohio 2011).
[34] *Heft* at ¶ 37.
[35] Id.
[36] Id.

Procedures Act ("RESPA") violations during the loan origination process. In his affidavit, Ricky Fontaine states as in relevant part as follows:

> "Affiant further says that he obtained a loan and mortgage from Option One in approximately October 2002; that he was mislead (*sic*) by my mortgage broker regarding the terms of the loan; that he believed that he was entering into a 30-year, fixed-rate loan but instead received an adjustable rate mortgage; that the base payment of my loan was much higher than the anticipated amount; that this appeared to be due to misrepresentations made by the originator of the loan and mortgage; and that a combination of personal misfortunes and the increased mortgage payments resulted in his falling behind on his mortgage payments."[37]

First, as the plaintiff correctly points out, "[t]he statute of limitations for TILA claims is one year from the occurrence of the violation."[38] However, when asserted as a defense or claim for recoupment, TILA claims may be raised after the one-year statute of limitations has passed.[39] The TILA issues were raised as an affirmative defense in the case at bar and, therefore, discussion of these issues is not barred by the one-year statute of limitations.

In his memorandum, the defendant discusses the Truth-In-Lending Disclosure Statement. However, as previously discussed, this document was part of the "submission of evidence" that was not properly authenticated and to which the plaintiff objected. As a result, it cannot be considered by the court.

The defendant's statement in his affidavit that he believed he was receiving a fixed-rate loan is belied by the clear language of the note. Beyond the fact that there is an entire section of the note which discusses changes in the interest rate and the

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[37] Affidavit of Ricky Fontaine.
[38] *Ignash v. First Service Federal Credit Union* (Aug. 22, 2002), 10th Dist. No. 01AP-1326, 2002-Ohio-4395, ¶ 11, citing Section 1640(e), Title 15, US Code.
[39] *CitiMortgage, Inc. v. Hoge*, 196 Ohio App.3d 40, 962 N.E.2d 327, 2011-Ohio-3839, ¶ 25 (Ohio App. 8th Dist., 2011), citing *Beach v. Ocwen Fed. Bank* (1998), 523 U.S. 410, 118 S.Ct. 1408, 140 L.Ed.2d 566.

procedure for such a change, the document itself is titled "Adjustable Rate Note" and the defendant executed a separate "Adjustable Rate Rider" to the mortgage. "A person of ordinary mind cannot say that he was misled into signing a paper which was different from what he intended to sign when he could have known the truth by merely looking when he signed."[40]

Furthermore, the defendant's subjective belief is not evidence of a TILA violation. In his affidavit, the defendant first states that he was misled by his mortgage broker regarding the terms of the loan. As the defendant stated that this was his mortgage broker, there is no allegation that this broker was an agent of the plaintiff or its predecessors in interest and, as such, the actions of the defendant's own broker cannot invalidate the loan held by the plaintiff.

The only other reason given for the defendant's beliefs about the nature of the loan he was receiving is contained in the following statement in his affidavit: "* * * the base payment of my loan was much higher than the anticipated amount; * * * this appeared to be due to misrepresentations made by the originator of the loan and mortgage[.]" However, this blanket assertion does not point to any specific facts about what misrepresentations were alleged to have been made by the originator of the loan and, as such, this statement does not rise to the level of demonstrating a genuine issue of material fact.

Finally, the RESPA violations alleged in the amended answer and response to summary judgment are that there were settlement services which were not provided but for which the defendant was charged, and that the originators of the loan failed to comply with the qualified written requests made upon them. There is no reference to

[40] *Provident Bank v. Adriatic, Inc.* (Oct. 31, 2005), 12th Dist. No. CA2004-12-108, 2005-Ohio-5774, ¶ 19.

these issues in the affidavit and no admissible evidence filed to support these claims. As such, the defendant has not established the existence of a genuine issue of material fact on the issue of alleged RESPA violations.

The court would note that defendant's statement in his affidavit that he "has read the Memorandum in Support of his response to Plaintiff's Motion for Summary Judgment, and all the facts therein are accurate[,]" is not sufficient to incorporate all of the statements made in that memorandum to the affidavit. "Affidavits filed in support of and in opposition to motions for summary judgment shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."[41] The defendant's affidavit does not state that he is testifying based on personal knowledge. While the court chose to infer personal knowledge of the specific statements made by the defendant in the second paragraph of his affidavit for discussion purposes above, the court cannot infer such personal knowledge of the defendant to all of the facts set forth in the memorandum in opposition to summary judgment. Furthermore, even if the court were to consider the allegations contained in the memorandum, there is no allegation that the services for which Fontaine was charged were not actually performed, and there is likewise no allegation that Fontaine made any qualified written request.

Based on the above analysis, the defendant Ricky Fontaine has failed to meet his reciprocal burden of demonstrating the existence of any genuine issue of material fact.

[41] Civ.R. 56(E).

CONCLUSION

The motion for summary judgment filed by the plaintiff is well-taken and is hereby granted.

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 May 2013 to all counsel of record and unrepresented parties.

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Administrative Assistant to Judge McBride