

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

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

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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.

Marshall McCachran, 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 renewed motion for summary judgment filed by the substitute plaintiff PNC Bank, N.A. (hereinafter "PNC Bank").

The court scheduled and held a hearing on the renewed motion for summary judgment on December 17, 2012. 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 oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

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

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.

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 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

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.

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.3d 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.

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 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

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.*

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.

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

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.”

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.

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.

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 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

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

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, 2012.²⁵ The complaint alleges in part that “[t]he Note and Mortgage are in default. Plaintiff has

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.

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 Order Substituting Plaintiff filed March 29, 2012.

satisfied all conditions precedent and has declared the entire balance due and payable.”²⁶ In their answer, the defendants David Knapke and Patricia Knapke make a general denial as to that allegation.²⁷

The plaintiff first moved for summary judgment on June 4, 2012. The defendants did not present any evidence in opposition to that motion for summary judgment, but they argued that the plaintiff had not established that it complied with two conditions precedent in order to prevail on its motion for summary judgment, namely Paragraph 2 of the mortgage which sets forth a priority by which payments are to be applied to the loan and Paragraph 22 of the mortgage which 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. The affidavit filed in support of that motion stated only 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.”²⁸ There were no evidentiary materials presented showing the application of payments on the loan or that a demand letter was sent to the defendants.

This court issued a decision denying the motion for summary judgment on August 24, 2012 for the following reasons: (1) due to a recent trend in Ohio jurisprudence, the fact that the defendants failed to deny with particularity the allegation in the complaint that conditions precedent were satisfied was not dispositive of the 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

²⁶ Complaint for Foreclosure at ¶ 5.

²⁷ Answer of Defendants David C. Knapke and Patricia M. Knapke at ¶ 5.

²⁸ Plaintiff’s Motion for Summary Judgment, Affidavit of Status of Account at ¶ 8.

answer and (2) the sole statement in the bank's affidavit that the loan was accelerated "pursuant to the terms of the loan" was not sufficient to demonstrate that conditions precedent, particularly the notice requirement, were satisfied.²⁹

The plaintiff has now filed a renewed motion for summary judgment. In the affidavit in support of the renewed motion for summary judgment, Jennifer L. Owens, a Vice President of Loan Documentation for Wells Fargo Bank (servicing agent of PNC Bank), authenticated copies of the note and mortgage, as well as a copy of the payment history on the loan and the demand letter sent to the defendants.³⁰ That affidavit also states that the loan is in default and has not been cured and that the plaintiff or its agent accelerated the account pursuant to the terms of the loan, making the entire balance due, which is currently \$436,165.47.³¹ The defendants did not file any evidentiary materials in opposition to the renewed motion for summary judgment.

LEGAL ANALYSIS

As noted above, the affidavit in support of the motion for summary judgment establishes that the Knapkes are in default of the note and mortgage. Additionally, the affidavit properly authenticates pertinent documents, including the payment history on the loan and the demand letter sent to the defendants. Upon review of the payment history, the court finds that the payments were applied as required under the terms of the mortgage. Furthermore, the court finds that the demand letter complies with the requirements of Paragraph 22 of the mortgage.

²⁹ Decision/Entry, filed August 24, 2012.

³⁰ Plaintiff's Renewed Motion for Summary Judgment, Affidavit in Support of Summary Judgment, ¶ 10.

³¹ Id. at ¶ 8.

As discussed in this court's previous decision, the plaintiffs 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 a summary judgment motion but did argue that the bank failed to establish that it complied with the requirements of the mortgage's acceleration clause.³² In response, the bank filed a supplementary affidavit with a copy of the notice of default.³³ 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."³⁴

In the case at bar, PNC Bank met its initial burden of establishing the absence of a genuine issue of material fact as to all of the elements required to grant judgment as a matter of law on its claims, including presenting evidentiary materials which demonstrate that all condition precedents set forth in the mortgage have been satisfied. In response, the defendants argued that the conditions precedent were not met but offered no evidentiary materials in support of this contention. As a result, the defendants failed to meet their reciprocal burden under the summary judgment standard of establishing the existence of a genuine issue of material fact.

The court notes for the record that the plaintiff also addressed the priority of its lien on the property in its renewed motion for summary judgment, noting that the Clermont County Treasurer has the senior priority lien but that the plaintiff's mortgage lien has priority over the mortgage held by National Bank & Trust Company. This

³² *Adams* at ¶ 11.

³³ *Id.* at ¶ 12.

³⁴ *Id.* at ¶ 15.

appears to be a non-issue as National Bank & Trust Company's position throughout the pendency of this case has been that its mortgage is a second lien on the property. As such, the court will note for the record that the plaintiff's mortgage lien has priority over the mortgage lien of National Bank & Trust Company.

CONCLUSION

The court finds that the plaintiff's motion for summary judgment 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 22nd day of January 2013 to all counsel of record and unrepresented parties.

Administrative Assistant to Judge McBride