

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

CITIFINANCIAL, INC. :
Plaintiff : **CASE NO. 2011 CVE 00238**
vs. : **Judge McBride**
DEANNA MCKENZIE, et al. : **DECISION/ENTRY**
Defendant :

Manley Deas Kochalski, LLC, Lynn A. Busch-Heyman, attorney for the plaintiff
Citifinancial, Inc., P.O. Box 165028, Columbus, Ohio 43216-5028.

Clements Mahin & Cohen, L.P.A. Cp., Edward Cohen, attorney for the defendant
Deanna McKenzie, 35 E. Seventh Street, Suite 710, Cincinnati, Ohio 45202.

This cause is before the court for consideration of a motion for summary judgment filed by the plaintiff Citifinancial, Inc. on November 17, 2011.

The court scheduled and held a hearing on the motion for summary judgment on January 23, 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 evidence presented for the court's consideration, and the applicable law, the oral and written arguments of counsel, the court now renders this written decision.

FACTS OF THE CASE

On June 5, 2008, the defendant Deanna McKenzie executed a note and mortgage on the property located at 624 Cedarville Road, Batavia, Clermont County, Ohio.¹ The plaintiff Citifinancial, Inc. is the holder of that note and mortgage.²

Deanna McKenzie failed to make the required payments as set forth in the terms of the note and mortgage and, as such, is in default of her obligations under the note and mortgage.³ Due to this default, the plaintiff sent the defendant notice of default and, when the default was not cured, chose to accelerate the loan.⁴ There is currently due under the note the amount of \$100,042.29, plus interest at the rate of 12.08% per annum from April 10, 2010.⁵

The defendant has not argued that she made the required payments to keep her note and mortgage current. Instead, in her counterclaim and in her defense to the plaintiff's action, she argues that she purchased credit disability insurance for this particular loan and that, when she became disabled, the insurance company failed to make payments on the note and mortgage.

¹ Affidavit in Support of Summary Judgment, Exhibits A-1 and A-2.

² Id. at ¶ 5.

³ Id. at ¶ 6.

⁴ Id. at ¶ 7 and Exhibit A-3.

⁵ Id. at ¶ 14.

The defendant did purchase credit disability insurance through American Health and Life Insurance Company on June 5, 2008.⁶ Citifinancial, Inc. is listed as a creditor-beneficiary under the insurance policy.⁷

Citifinancial, Inc. argues that the defendant failed to make timely credit insurance premium payments.⁸ Notices of delinquency were sent to the defendant on or about December 1, 2009 and January 1st, February 1st and March 1st, 2010.⁹ These notices state that the defendant's monthly insurance premiums are past due and that if she failed to remit the required premiums, the insurance coverage "WILL TERMINATE[.]"¹⁰ The final notice, sent in the month of February 2010, stated as follows: "Due to deficient premiums, all credit insurance coverage on your account HAS BEEN TERMINATED."¹¹

The plaintiff now seeks summary judgment as to its claims and the defendant's counterclaim.

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

⁶ Application for Insurance.

⁷ Id.

⁸ Affidavit in Support of Summary Judgment at ¶ 9.

⁹ Id. at ¶ 10 and Exhibits A-4 through A-7.

¹⁰ Id.

¹¹ Id. at Exhibit A-7.

minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion.”¹²

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.¹³ 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.¹⁴

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.”¹⁵

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[?]”¹⁶ “The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–

¹² 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.

¹³ *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.

¹⁴ *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.

¹⁵ *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.

¹⁶ *Id.* at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.

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.”¹⁷

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.¹⁸ 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.”¹⁹

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.²⁰ 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.²¹ 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.²²

¹⁷ Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.

¹⁸ *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.

¹⁹ *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.

²⁰ *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.

²¹ Id.

²² Id.

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.²³ 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.²⁴ The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.²⁵ 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.”²⁶

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.²⁷ 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.²⁸

²³ *Id.*

²⁴ *Id.*

²⁵ *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.

²⁶ *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.

²⁷ *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.

²⁸ 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.

“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.”²⁹

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.³⁰

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.³¹ 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

²⁹ *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.

³⁰ *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.

³¹ *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.

be resolved in favor of the nonmoving party.³² Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.³³

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.³⁴

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.³⁵

LEGAL ANALYSIS

The court would first note that the subject application of insurance by the defendant to American Health and Life Insurance Company was attached to the exhibits filed contemporaneously with the plaintiff's motion for summary judgment. The affidavit in support of the motion for summary judgment does not authenticate this particular document. However, "[f]ailure to move to strike or otherwise object to documentary

³² *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.

³³ *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.

³⁴ *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.

³⁵ Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.

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).³⁶ The defendant did not object to this document being submitted by the plaintiff or to its consideration by the court when examining the present motion. Consequently, any such objection has been waived and the court will consider the document as properly submitted with the summary judgment motion.

There is no dispute that the defendant is in default of the note and mortgage and that the plaintiff properly accelerated the loan. The plaintiff has also established that the amount due and owing under the loan is \$100,042.29, plus interest at the rate of 12.08% per annum from April 10, 2010.

The defendant only argues that issues of fact remain regarding the credit disability insurance and, therefore, summary judgment is precluded.

First, the court would note that a necessary party was not included in the defendant's counterclaim for breach of the insurance contract. While the insurance premiums were included as a part of the defendant's mortgage payment amount, Citifinancial, Inc. was not the insurance carrier for this credit disability insurance; instead, American Health and Life Insurance Company was the carrier.³⁷ The contract was between American Health and Life Insurance Company and Deanna McKenzie. Citifinancial was listed as a creditor-beneficiary on the account.³⁸ Therefore, while it is arguable whether Citifinancial, Inc. would need to be a party to a claim between the

³⁶ *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).

³⁷ Application for Insurance.

³⁸ *Id.*

insurer and the insured, it is not arguable that the defendant's counterclaim alleging breach of contract for an improper failure to pay under the insurance policy must at the very least be brought jointly against the actual carrier, American Health and Life.

Furthermore, while the defendant and her daughter submitted affidavits that they did not receive the notices of the insurance account being delinquent, there is no requirement in the insurance contract for receipt of said notices. Instead, the contract states that "[t]he company may cancel this Certificate by giving the Debtor(s) written notice 30 days prior to the effective date of the cancellation." As set forth above, there is uncontroverted evidence that such notices were sent to the defendant. However, the court need not reach this issue due to the analysis below.

Finally, and most significantly, the insurance contract at issue requires the insured to send the insurer written notice of a disability with 20 days after the disability starts or as soon as is reasonably possible.³⁹ Neither Deanna McKenzie nor Deanna Smith allege in their affidavits that any such notice was sent to the insurance carrier or any other entity. While the defendant's attorney submitted an affidavit and documents regarding the defendant's worker's compensation claim, there is no evidence or allegation that notice was provided to the insurance carrier that the defendant was making a claim for disability insurance.⁴⁰ The defendant cannot maintain a claim for breach of contract for failure to make payments under an insurance agreement where there is absolutely no evidence, or even an allegation, that the defendant complied with the requirements under the contract for filing a claim for said insurance benefits. An insurer cannot breach an insurance contract by failing to make payments when it has no

³⁹ Id.

⁴⁰ Affidavit of Edward Cohen.

notice of any claim being made by the insured. This is dispositive of the issues before the court.

CONCLUSION

Based on the above analysis, no genuine issues of material fact remain and the plaintiff's motion for summary judgment as to its claims and the defendant's counterclaim against it 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 this 2nd day of March 2012 to all counsel of record and unrepresented parties.
