

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

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|----------------------------------------------|---|---------------------------------|
| <b>FEDERAL NATIONAL MORTGAGE ASSOCIATION</b> | : |                                 |
| Plaintiff                                    | : | <b>CASE NO. 2013 CVE 001385</b> |
| vs.                                          | : | <b>Judge McBride</b>            |
| <b>ALICE G. SWEET, et al.,</b>               | : |                                 |
| Defendants                                   | : | <b>DECISION/ENTRY</b>           |
|                                              | : |                                 |

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Cozmyk Law Offices, Peter Cozmyk, counsel for defendant Alice Sweet, 6100 Oak Tree Boulevard, Suite 200, Independence, Ohio 44131.

Cuni, Ferguson & Levay Co., L.P.A., Lisa M. Conn, counsel for defendant Villages of Belmont Homeowners' Association, Inc., 10655 Springfield Pike, Cincinnati, Ohio 45215.

Marshall McCachran, assistant prosecuting attorney for defendant Clermont County Treasurer, 101 E. Main Street, Batavia, Ohio 45103.

This cause is before the court for consideration of a motion filed by the plaintiff Federal National Mortgage Association to strike, or in the alternative to deny, a jury demand filed by the defendant Alice Sweet on June 27, 2014.

The court entering a briefing schedule as to the motion to strike and neither party requested oral argument. The matter was taken under advisement on September 11, 2014.

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

### **FACTS OF THE CASE**

The plaintiff in the present matter filed its complaint for foreclosure with reformation on September 11, 2013. Count two of the complaint alleges that the plaintiff is the holder of the promissory note at issue, that the plaintiff has declared the debt due under note due to default in payment, and that there is due and unpaid thereon the sum of \$156,879.41 plus interest.

At the end of the complaint, the plaintiff “demands judgment against the defendants Alice G. Sweet and James Sweet \* \* \* in the sum of \$156,879.41 plus interest \* \* \* .”

Defendant Alice Sweet’s answer was filed on January 24, 2014. On June 27, 2014, Alice Sweet filed a “Request for Jury Trial,” which states that “[p]ursuant to Rule 38(B) a trial is hereby demanded in the within cause of action.” The plaintiff then filed its motion to strike or deny the jury demand.

## LEGAL ANALYSIS

The plaintiff now seeks to strike Alice Sweet's jury demand under the theory that a foreclosure action is an equitable action which is not subject to a trial by jury.

“ \* \* \* ‘[T]he law of Ohio has long been established that a real estate foreclosure is an equitable action and not subject to a trial by jury.’ ”<sup>1</sup> “Nonetheless, ‘[a]n exception to the general rule that a party is not entitled to a jury trial in foreclosure actions applies when there is a claim for a personal judgment against a party.’ ”<sup>2</sup>

In *Nationstar Mtge., LLC v. West*, 2<sup>nd</sup> Dist. Montgomery Nos. 25813 and 25837, 2014-Ohio-735, the court held that “[b]ecause the complaint in the case before us requested a judgment against West for \$47,254.60, West would have been entitled to a jury trial with regard to the money judgment.”<sup>3</sup> Likewise, it has been held that “[i]n an action requesting judgment on a note and foreclosure of a mortgage, the issues of the note, the valid defenses and the request for personal judgment are triable by a jury.”<sup>4</sup> “Said issues regarding the note must first be resolved before the trial court proceeds to resolve the equitable issues on the foreclosure claim.”<sup>5</sup>

Due to the fact that the plaintiff seeks a monetary judgment against Alice Sweet, she would be entitled to a jury trial with regard to that claim for a monetary judgment.

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<sup>1</sup> *Nationstar Mtge., LLC v. West*, 2<sup>nd</sup> Dist. Montgomery Nos. 25813 and 25837, 2014-Ohio-735, ¶ 41, quoting *Gem City Savings Assn. v. Morrow*, 2<sup>nd</sup> Dist. Montgomery No. 7501, 1982 WL 3716 (April 14, 1982), citing *Natl. Bank v. Wheelock*, 52 Ohio St. 534, 40 N.E. 636 (1895); and, *Carr v. Loan Corp.*, 148 Ohio St. 533, 76 N.E.2d 389 (1947).

<sup>2</sup> *Id.* at ¶ 42, quoting *Rokakis v. W. Res. Leasing Co.*, 8th Dist. Cuyahoga No. 95058, 2011-Ohio-1926, ¶ 9, citing *Sec. Fed. Sav. & Loan of Iowa v. King*, 8th Dist. Cuyahoga Nos. 44864 and 45071, 1983 WL 4645 (Aug. 25, 1983), and *Grapes v. Barbour*, 58 Ohio St. 669, 675, 49 N.E. 306 (1898).

<sup>3</sup> *Id.* See also, 69 Ohio Jur.3d Mortgages § 369 (“\* \* \* [W]here a complaint is filed for a personal judgment and for foreclosure, the issues of fact raised as to the right to the personal judgment give rise to the right to demand a jury trial.”).

<sup>4</sup> *Zajackowski v. Lengle*, 8<sup>th</sup> Dist. Cuyahoga No. 61455, 1992 WL 354799, \*6 (Nov. 19, 1992).

<sup>5</sup> *Id.*, citing *City Loan & Savings Co. v. Howard*, 16 Ohio App.3d 185, 475 N.E.2d 154 (2<sup>nd</sup> Dist.1984), paragraph three of the syllabus.

However, pursuant to Civ.R. 38(B), “[a]ny party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefor at any time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue.”

As set forth above, Alice Sweet’s answer was filed on January 24, 2014. The fourteen day period in which she could have filed a written demand for a jury trial had long expired by the time the request for a jury trial was filed in June 2014.

“Trial by jury is a substantive, fundamental right protected by the Seventh Amendment to the United States Constitution and Section 5, Article I of the Ohio Constitution.”<sup>6</sup> “However, in order to invoke the right to a jury trial, a party must take affirmative action[,]” and failure to take such action constitutes a waiver of the right to a trial by jury.<sup>7</sup> Civ.R. 38(D) provides that “[t]he failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(D) constitutes a waiver by him of trial by jury.”

Due to the fact that Alice Sweet’s jury demand was not timely filed, the motion to strike said jury demand shall be granted.

## CONCLUSION

The plaintiff’s motion to strike the jury demand is well-taken and is hereby granted.

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<sup>6</sup> *Morgan v. Mikhail*, 10<sup>th</sup> Dist. Franklin Nos. 08AP-87 and 08AP-88, 2008-Ohio-4598, ¶ 36, citing, *Soler v. Evans, St. Clair & Kelsey*, 94 Ohio St.3d 432, 437, 763 N.E.2d 1169 (2002).

<sup>7</sup> *Id.* See, also, *White v. Bannerman*, 5<sup>th</sup> Dist. Stark Nos. 2009CA00221, 2009CA00245 and 2009CA00268, 2010-Ohio-4846, ¶¶ 57-64.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_

\_\_\_\_\_  
Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

The undersigned certifies that copies of the within Decision/Entry were sent by e-mail on this \_\_\_\_\_ day of October, 2014 to the following parties and/or counsel:

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