IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

JPMorgan Chase Bank, National Association

Appellee

v.

Jennifer L. Swan aka Jennifer L. Jackson and Thomas M. Ziegler, et al.

Appellants

Court of Appeals No. L-14-1186

Trial Court No. CI0201202980

DECISION AND JUDGMENT

Decided: March 20, 2015

* * * * *

Bill L. Purtell, for appellee.

Jennifer L. Swan and Thomas M. Ziegler, pro se.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} This is an appeal from the judgment of the Lucas County Court of Common Pleas, granting appellee's, JPMorgan Chase Bank, National Association, motion for summary judgment in this foreclosure action. We affirm.

A. Facts and Procedural Background

{¶ 2} On September 17, 2003, appellants, Jennifer Swan and Thomas Ziegler, executed a note promising to pay $91,563 plus interest to Midwest Mortgage Investments, Ltd. ("Midwest Mortgage") in exchange for a loan so that appellants could purchase a house. The loan was secured by a mortgage on the residence in favor of Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Midwest Mortgage.

{¶ 3} Subsequently, appellants defaulted on the terms of the note by failing to make the scheduled payments. On April 27, 2012, appellee filed its complaint in foreclosure, in which it alleged that it had possession of, and was entitled to enforce, the note. Further, the complaint alleged that appellants were in default of the note, that appellee had accelerated the amount due, and that all conditions precedent had been satisfied. Attached to the complaint was a copy of the note, which was indorsed in blank by an officer of Midwest Mortgage, a copy of the mortgage, and a copy of the assignment of mortgage. The assignment of mortgage was notarized on April 17, 2012, and stated that MERS as nominee for Midwest Mortgage was assigning the mortgage to appellee.

{¶ 4} On March 24, 2014, appellants filed their answer.[1] In their answer, appellants denied the allegations contained in the complaint, including that appellee had

[1] The delay between the filing of the complaint and answer is attributable to litigation concerning whether appellee was entitled to default judgment. Ultimately, we resolved the issue in favor of appellants in *JPMorgan Chase Bank, Natl. Assn. v. Swan*, 6th Dist. Lucas No. L-13-1064, 2014-Ohio-999.

satisfied the conditions precedent to foreclosure. Appellants also raised a number of affirmative defenses.

{¶ 5} On June 26, 2014, appellee moved for summary judgment. Filed with the motion for summary judgment was the affidavit of Samuel Muller, a vice president of appellee. Muller averred that he had personal knowledge of appellants' loan records. Further, he averred that he had personal knowledge of the manner in which appellee kept and maintained its business records, specifically that the records were created in the course of appellee's regularly conducted business activities at or near the time of the event by a person with knowledge. Muller then stated that appellee was in possession of the original note at the time of filing the complaint, is currently in possession of the note, and that the note is indorsed in blank. In addition, Muller stated that appellants have failed to make the January 1, 2011 payment, and have subsequently not made payments to bring the loan current. Finally, Muller asserted that, as of May 16, 2014, appellants owed $98,558.47 in principal and interest. Attached to the affidavit were true and correct copies of the note, the mortgage, the assignment of mortgage, the breach letter sent to appellants, and the account history of the loan.

{¶ 6} Appellants did not file an opposition to appellee's motion for summary judgment. On July 11, 2014, the trial court granted appellee's motion. This pro se appeal followed.

B. Assignment of Error

{¶ 7} Appellants assert one assignment of error for our review:[2]

Second Assignment of Error: "The Court finds that the plaintiff has filed a motion for Summary Judgment supported by a Memorandum and Affidavit. Upon consideration thereof, the Court finds no genuine issue as to any material fact and the plaintiff is entitled to a Judgment and Decree in Foreclosure as a matter of law."

This is in Error, There was no Notice served upon Appellants for Hearing on the Motion for summary judgment. This same motion has no evidence or affidavit attached to support plaintiff's assertions Pursuant to Civil Rule 56(C). Appellee's lack Standing to sue as they have no competent fact witness and were not holders of the Note at time of filing Complaint, Trial court abused its discretion and was without subject matter jurisdiction to rule in favor of Appellee's (sic).

[2] In addition to the motion for summary judgment, appellee moved for default judgment against Antoine Jackson and Carolyn E. Stone-Ziegler. The trial court granted the motion for default judgment. Appellants, pro se, appealed that judgment on behalf of Jackson and Stone-Ziegler. Because we found that such conduct constituted the unauthorized practice of law, we dismissed the appeal as it pertained to Jackson and Stone-Ziegler. Nonetheless, the appellate brief contained an assignment of error challenging the entry of default judgment. The brief was signed by appellants and by Jackson and Stone-Ziegler. However, having dismissed the appeal as it relates to Jackson and Stone-Ziegler, we struck that assignment of error. Therefore, we will not address any arguments presented in support of appellants' first assignment of error.

II. Analysis

{¶ 8} We review summary judgment decisions de novo, applying the same standard as the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). Applying Civ.R. 56(C), summary judgment is appropriate where (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and viewing the evidence in the light most favorable to the non-moving party, that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶ 9} In order to properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials demonstrating: (1) that it is the holder of the note, which is secured by a mortgage, or that it is otherwise entitled to enforce the instrument; (2) that the mortgagor is in default; (3) that all conditions precedent have been met; and (4) the amount of the principal and interest due. *Fed. Natl. Mtge. Assn. v. Brunner*, 2013-Ohio-128, 986 N.E.2d 565, ¶ 10 (6th Dist.); *U.S. Bank, N.A. v. Coffey*, 6th Dist. Erie No. E-11-026, 2012-Ohio-721, ¶ 26.

{¶ 10} In support of their assignment of error, appellants present a litany of arguments, which we will address in turn.

{¶ 11} First, appellants argue that they were not served with notice for the hearing on the motion for summary judgment. Also included within their brief is a claim that the trial court entered judgment before appellants had an opportunity to respond. As it relates to the opportunity to respond, appellee points out that the motion for summary judgment was served by ordinary mail on June 23, 2014. Appellants thereafter had 14 days to respond pursuant to Gen.R. 5.04(D) of the Lucas County Court of Common Pleas, plus an additional three days pursuant to Civ.R. 6(D). Thus, the deadline for appellants to file their response was July 10, 2014. No response was filed, and the trial court entered its judgment the next day, on July 11, 2014. Relative to appellants' argument that they were not served with notice for a hearing, we have recognized that "Civ.R. 56(C) does not require an oral hearing on every motion for summary judgment." *S & S Elec. Contrs. v. Zarick Elec. Co.*, 6th Dist. Lucas No. L-81-343, 1982 WL 6328, *1 (Mar. 26, 1982), quoting *Gates Mills Invest. Co. v. Pepper Pike*, 59 Ohio App.2d 155, 392 N.E.2d 1316 (8th Dist.1978). Further, "A trial court need not notify the parties of the date of consideration of a motion for summary judgment or the deadlines for submitting briefs and Civ.R. 56 materials if a local rule of court provides sufficient notice of the hearing date or submission deadlines." *Hooten v. Safe Auto Ins. Co.*, 100 Ohio St.3d 8, 2003-Ohio-4829, 795 N.E.2d 648, syllabus. Here, Lucas County Court of Common Pleas

Gen.R. 5.04(D) set forth the deadline for filing a brief in opposition, thus no notice was required. Accordingly, we find appellants' first argument to be without merit.

{¶ 12} Next, appellants argue that the motion has no evidence or affidavit attached in support as required by Civ.R. 56(C). Appellants are correct that Muller's affidavit was not attached to the motion. Instead, the affidavit was filed contemporaneously with the motion. Civ.R. 56(C) provides, "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, *timely filed in the action*, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Emphasis added.) Here, the affidavit was timely filed in the action. Thus, appellee has properly supported its motion for summary judgment. Therefore, we find appellants' second argument to be without merit.

{¶ 13} Appellants alternatively argue that the Muller affidavit was insufficient because it was not based on personal knowledge. Civ.R. 56(E) requires that affidavits "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 in the affidavit." "A mere assertion of personal knowledge satisfies Civ.R. 56(E) if the nature of the facts in the affidavit combined with the identity of the affiant creates a reasonable inference that the affiant has personal knowledge of the facts in the affidavit." *Residential Funding Co., LLC v. Thorne*, 6th Dist. Lucas No. L-09-1324, 2010-Ohio-4271, ¶ 70. "Similarly, in order to properly authenticate business records

under Evid.R. 803(6), 'the testifying witness must possess a working knowledge of the specific record-keeping system that produced the document * * * [and] be able to vouch from personal knowledge of the record-keeping system that such records were kept in the regular course of business.'" *Brunner*, 2013-Ohio-128, 986 N.E.2d 565 at ¶ 13, quoting *State v. Davis*, 62 Ohio St.3d 326, 342, 581 N.E.2d 1362 (1991). Here, Muller testified that he was a vice president of appellee, had personal knowledge of appellee's record-keeping system, knew that the records were kept in the regular course of business, and personally reviewed appellants' loan records. Therefore, we hold that Muller's affidavit was based on personal knowledge. *See HSBC Mtge. Servs., Inc. v. Toth*, 6th Dist. Sandusky No. S-14-019, 2014-Ohio-4726, ¶ 12 (affidavit sufficient to demonstrate personal knowledge where a Default Service Officer states that he has access to the loan documents, has knowledge of the operations surrounding their compilation, recording, and maintenance, and has personally reviewed the records for the loan at issue). Accordingly, we find appellants' third argument to be without merit.

{¶ 14} Fourth, appellants argue that appellee lacks standing to foreclose, and that as a result, the trial court lacks subject-matter jurisdiction. Appellants raise several issues under this argument. Initially, they argue that appellee is not the holder of the note. In order to have standing to sue, appellee must establish that it is the person entitled to enforce the note and mortgage. *Coffey*, 6th Dist. Erie No. E-11-026, 2012-Ohio-721 at ¶ 13; *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 28 (plaintiff must "establish an interest in the note or

mortgage"). Under R.C. 1303.31(A), a "holder" is a person entitled to enforce an instrument. R.C. 1301.201(B)(21) provides that "holder" includes "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." "Bearer," in turn, means "a person in possession of a negotiable instrument, negotiable tangible document of title, or certified security that is payable to bearer or indorsed in blank." R.C. 1301.201(B)(5). Here, the note is indorsed in blank. Muller testified in his affidavit that appellee had possession of the note at the time it filed the complaint and that appellee currently has possession of the note. Thus, appellee has demonstrated that it is the holder and party entitled to enforce the note.

{¶ 15} Appellants next contend that appellee has failed to produce the original note. Under Evid.R. 1003, "[a] duplicate is admissible to the same extent as an original unless * * * a genuine question is raised as to the authenticity of the original." Appellants asserted in their answer that the copy of the note presented contains unauthorized signatures. However, appellants have not identified which signatures are unauthorized, nor have they presented any evidence that would establish a genuine issue of material fact as to the authenticity of the original document. Therefore, appellants' fourth argument is without merit.[3]

[3] Appellants also raise an argument that "If the original instruments are not available Appellee's have not made a claim of 'Lost Commercial Paper' pursuant to Revised Code 1303.77." While we note that R.C. 1303.77 has been repealed, we also note that there is

{¶ 16} Fifth, appellants argue that appellee provided an outdated judicial report, and that as a result, the trial court lacked subject-matter jurisdiction. R.C. 2329.191 requires a party seeking a judicial sale to provide a preliminary judicial report that "shall be effective within thirty days prior to the filing of the complaint * * *." Here, the complaint was filed on April 27, 2012. The preliminary judicial report had an effective date of April 23, 2012. Therefore, we find that appellee complied with the requirements of R.C. 2329.191, and appellants' fifth argument is without merit.

{¶ 17} As their last argument, appellants contend that they have an affirmative defense of lack of consideration that has never been disproven. Notably, the Ohio Supreme Court has held that "A plaintiff or counterclaimant moving for summary judgment does not bear the initial burden of addressing the nonmoving party's affirmative defenses." *Todd Dev. Co., Inc. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, syllabus. Instead, the party asserting the affirmative defense has the burden of producing enough evidence to show that there remains a genuine issue of material fact. *Id.* at ¶ 18. Here, appellants produced no evidence to support their defense of lack of consideration. Furthermore, it is patently obvious that appellants received consideration in the form of funds used to purchase the house in exchange for their execution of the note. Therefore, we find appellants' last argument to be without merit.

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no indication in the record that the original instruments are not available, thus we find appellants' argument to be irrelevant.

{¶ 18} Finally, we conclude that appellee has produced evidentiary quality materials demonstrating that it is entitled to summary judgment in this foreclosure action. First, the copy of the note indorsed in blank, the mortgage, and the assignment of mortgage—which assignment occurred prior to the filing of the complaint—together with Muller's affidavit stating that appellee has possession of the note, demonstrate that appellee is the holder and party entitled to enforce the note. Next, Muller's affidavit and the attached loan history show that appellants are in default. That evidence also shows the amount of the principal and interest due. *See Natl. City Bank v. TAB Holdings, Ltd.*, 6th Dist. Erie No. E-10-060, 2011-Ohio-3715, ¶ 12 ("[C]ourts have consistently held that an averment of outstanding indebtedness made in the affidavit of a bank loan officer with personal knowledge of the debtor's account is sufficient to establish the amount due and owing on the note, unless the debtor refutes the averred indebtedness with evidence that a different amount is owed."). Lastly, appellee averred in the complaint that all conditions precedent were satisfied, and appellants did not deny that averment with specificity. Thus, they have admitted that the conditions precedent were satisfied. *See Bank of Am., N.A. v. Duran*, 6th Dist. Lucas No. L-14-1031, 2015-Ohio-630, ¶ 49, citing *Coffey*, 6th Dist. Erie No. E-11-026, 2012-Ohio-721 at ¶ 37 (satisfaction of conditions precedent deemed admitted because defendant did not deny such satisfaction with specificity or particularity). Therefore, because appellee has satisfied all of the elements required in a foreclosure action, and appellants have failed to demonstrate a genuine issue of material fact as to any of those elements, we hold that summary judgment for appellee was proper.

{¶ 19} Accordingly, appellants' assignment of error is not well-taken.

III. Conclusion

{¶ 20} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE