[Cite as *Christiana Bank & Trust Co. v. Odita*, 2009-Ohio-7231.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Christiana Bank & Trust Co. et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 08AP-799 (C.P.C. No. 07CVE-02-1975)
Eric C. Odita et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

O P I N I O N

Rendered on February 5, 2009

Karl H. Schneider, *Mark R. Meterko*, and *Trina N. Goethals*, for appellees.

Florence E. Odita, for appellant Eric C. Odita.

APPEAL from the Franklin County Court of Common Pleas.

TYACK, J.

{¶1} This is a residential foreclosure matter. In April 2003, Eric C. Odita gave a note and mortgage to the Arlington Bank in Columbus, Ohio, which subsequently sold the note to another bank. The note was sold at least two more times and, at some point, Odita stopped making his mortgage payments. After Odita defaulted on the note, the note's holder accelerated the balance owed, and then filed a foreclosure action in the trial court. Along with its motion for summary judgment, the bank presented the requisite

affidavits and accounting ledgers. Odita has never denied the material allegations of default, and has only asserted that the amount the bank claims he owes is incorrect.

{¶2} Under Ohio law, summary judgment may be proper for a bank in a foreclosure action when the bank presents evidence showing that the note and mortgage were maintained in the ordinary course of business, the mortgage was recorded, and that the mortgagor failed to make the requisite payments. If the bank meets this burden, the burden shifts to the mortgagor to prove otherwise. Alleging that the bank's records are inaccurate, even if true, does not change (or even deny) the fact that the mortgagor is in default. Because Odita failed to present any evidence that he did not default on the note and mortgage, we must affirm the trial court's decision granting summary judgment for the bank.

{¶3} Counsel for Odita lists the following statements on page four of her brief, which she styles as "Appellants Assignment of Error":

> 1. Whether the trial court committed reversible error in entering summary judgment in favor of the Plaintiff/Appellee.
>
> 2. Whether the court abused its discretion in denying Defendant/Appellant's motion to dismiss Foreclosure action by Alaska Seaboard for failure to establish standing to bring the foreclosure complaint.
>
> 3. Whether the trial court erred by finding the Plaintiff/Appellee met its obligations under the Mortgage and Note in respect to serving the Defendant/Appellant with notice it intended to accelerate the mortgage and note.
>
> 4. Whether the trial court erred granting summary judgment to the Plaintiff/Appellee when the original party who filed the complaint had no standing, was not a party in the Note or Mortgage and had no record of ownership in the Franklin County recorder's Office.

> 5. Whether the trial court erred in granting substitution of parties when the Alaska Seaboard who brought the action in Foreclosure was in violation of the Ohio Revised Code 1335.04, the principle of the "real party in interest" and in terms of assignment R.C. 5301.25, the subjection of mortgages to a "recorded interest".
>
> 6. Whether the trial court erred by finding there are no genuine issues of material fact as to the validity of the Mortgage and Note attached to the complaint.
>
> 7. Whether the trial court erred because Plaintiff/Appellee is not entitled to summary judgment and genuine issues as to material facts exist.

{¶4} These are not assignments of error, per se, but we group them and interpret them to mean: "The trial court erred by granting summary judgment for the plaintiffs." We will consider the issues raised as subparts of that single assignment of error.

{¶5} We review the appropriateness of granting a motion for summary judgment de novo, using the same standard as the trial court. *Boroff v. Meijer Stores Ltd. Partnership*, Franklin App. No. 06AP-1150, 2007-Ohio-1495, ¶7. Under Civ.R. 56(C), summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion—that conclusion being adverse to the nonmoving party. Id. at ¶6; *Burstion v. Chong-Hadaway, Inc.* (Mar. 2, 2000), Franklin App. No. 99AP-701; *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201.

{¶6} Under Ohio law, once a mortgagor (i.e., borrower) defaults under the terms of a note, and once the note has been accelerated, the holder of the note is

entitled to judgment. See *Gaul v. Olympia Fitness Center, Inc.* (1993), 88 Ohio App.3d 310, 315, 623 N.E.2d 1281 (citing *Bradfield v. Hale* [1902], 67 Ohio St. 316, 65 N.E. 1008, paragraph one of the syllabus; *Union Cent. Life Ins. Co. v. Curtis* [1880], 35 Ohio St. 357; *King v. Safford* [1869], 19 Ohio St. 587). In general, "default" means failure to fulfill one's obligations under an agreement. See, e.g., *Bailey Lumber Co. v. Dept. of Natural Resources* (1992), 79 Ohio App.3d 434, 438, 607 N.E.2d 533. Thus, when a person borrows money from a bank to buy a house, if they fail to repay the money as agreed, they are in default. Once the borrower has defaulted under the terms of the note, the bank is entitled to accelerate the balance owed, and upon proof thereof, the bank is entitled to judgment against the borrower.

{¶7} Banks typically prove the elements of default by swearing to an affidavit, and filing it with the court in a foreclosure action. See, e.g., *Beneficial Ohio, Inc. v. Kennedy*, Franklin App. No. 04AP-1383, 2005-Ohio-5159, ¶13; *JP Morgan Chase Bank v. Ritchey*, Lake App. No. 2006-L-247, 2007-Ohio-4225, ¶35; *U.S. Bank, NA v. Fowler*, Summit App. No. 22159, 2005-Ohio-2396, ¶13. The affidavit will satisfy the bank's burden under Civ.R. 56(C), provided that the affidavit is made by a bank employee who has personal knowledge of the note and mortgage in question and the loan documents are kept within the ordinary course of business. See ibid. Once the bank establishes default, the borrower has the burden of demonstrating that there is an issue of material fact for trial (i.e., that the borrower is not in default). See *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (quoting Civ.R. 56[E]).

{¶8} Here, Christiana Bank moved for summary judgment, and submitted the affidavit of bank employee Gina Miller. Miller's affidavit stated that she had personal

knowledge of the history of Odita's note and mortgage, that she was the custodian of those records, and that those records were maintained in the ordinary course of business. The affidavit further established that the note and mortgage, which were attached to the foreclosure complaint, were true and accurate copies of those documents, and that they were properly recorded. Finally, the affidavit established that Odita had stopped making payments on the note and was in default. The affidavit also indicated that Christiana Bank had accelerated the balance owed ($320,379.54 plus interest, late charges, and litigation expenses). This affidavit satisfied the bank's burden of going forward with evidence which supported its claim. Odita then needed to show that there was a genuine issue of material fact for trial.

{¶9} In Odita's response to the motion for summary judgment, he alleged that the balance claimed by the bank was incorrect. Even if true, Odita's allegation fails to demonstrate that there are genuine issues of fact that must be tried as to the issue of foreclosure. If the balance claimed is incorrect, that can be remedied by additional documentary evidence. Obviously the exact balance due increases as time passes and interest accrues. Further, the proceeds of a sheriff's sale will usually alter the remaining balance due or erase it altogether.

{¶10} The problem with Odita's response is that: (1) he never denied being in default; and (2) even if he had denied being in default, he did not present any evidence, or point to any evidence in the record that would support his argument. Once a party moving for summary judgment satisfies its burden under Civ.R. 56(C), the nonmoving party must do more than submit a contra motion and argue. See, e.g., *Dresher*, supra, at 293 ("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 his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him"). (Emphasis sic.)

{¶11} Because Odita failed to meet his burden of going forward with evidence to demonstrate the existence of a genuine issue of material fact under Civ.R. 56, we hold that summary judgment for the bank was proper, and we therefore overrule the assignment of error.

Judgment affirmed.

BROWN and McGRATH, JJ., concur.