[Cite as *Bank of New York Mellon v. Rankin*, 2013-Ohio-2774.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The Bank of New York Mellon, as Trustee on Behalf of the Registered Certificateholders of GSAMP Trust 2004-SEA2, Mortgage Pass-Through Certificates, Series 2004-SEA2,	:	
Plaintiff-Appellee,	:	No. 12AP-808 (C.P.C. No. 2010 CV 11414)
v.	:	(REGULAR CALENDAR)
John A. Rankin,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 28, 2013

Dinn, Hochman & Potter, LLC, and *Benjamin D. Carnahan*, for appellee.

John Rankin, pro se.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, John A. Rankin ("appellant"), appeals from a summary judgment of foreclosure granted by the Franklin County Court of Common Pleas to plaintiff-appellee, The Bank of New York Mellon, as Trustee on Behalf of the Registered Certificateholders of GSAMP Trust 2004-SEA2, Mortgage Pass-Through Certificates, Series 2004-SEA2 ("BNYM"). For the following reasons, we affirm.

{¶ 2} On July 22, 2000, appellant executed a promissory note in the amount of $185,000 in connection with a loan in the same amount. The note identified the lender as

Bank One, NA, and was secured by a mortgage on real property located in Worthington, Ohio.

{¶ 3} On August 4, 2010, BNYM filed a complaint for foreclosure alleging that it was the owner and holder of the promissory note, that appellant had defaulted on his payment obligations under the note, and that BNYM had declared the debt due. BNYM sought judgment against appellant in the sum of $98,605.01, plus interest and advances it had made pursuant to the terms of the mortgage, including payments for real estate taxes and insurance premiums. BNYM sought sale of the premises to satisfy the amounts due it.

{¶ 4} On August 18, 2010, appellant, appearing pro se, timely filed an answer denying the allegations in the complaint. Appellant further asserted that BNYM had incorrectly calculated the principal and interest owing on the loan. The case then followed a complicated procedural path as discussed below.

{¶ 5} On June 8, 2011, and after the matter had been scheduled for trial, appellant sought leave to file an amended answer for the sole purpose of asserting a counterclaim against BNYM. The following day BNYM filed (1) a memorandum in opposition to appellant's motion for leave to file an amended answer, and (2) a motion seeking summary judgment in its favor. On that same day, June 9, 2011, the court granted appellant leave to amend his answer "only for the purpose of asserting a Counter Claim." (June 9, 2011 Entry.)

{¶ 6} Appellant thereafter filed a memorandum in opposition to BNYM's summary judgment motion. In the certificate of service, appellant stated that he served the document on BNYM on June 22, 2011. The clerk of courts, however, time-stamped the document as having been filed approximately two weeks later on July 7, 2011. On June 27, 2011, the court entered summary judgment in favor of BNYM, prior to the date on which the clerk filed appellant's memorandum in opposition to the summary judgment motion but after the date recorded on the certificate of service.

{¶ 7} On July 5, 2011, appellant filed two documents, apparently unaware that the court had already entered summary judgment against him. The first document was the amended answer for which he had obtained leave and included counterclaims sounding in breach of contract and fraud, as well as a request that the court certify the case as a class

action. The second document filed by appellant was a motion asking the trial court to designate the case as complex litigation pursuant to Loc.R. 37.03 and 39.04 and Sup.R. 42.

{¶ 8} On July 6, 2011, appellant filed a motion for reconsideration of the entry of summary judgment against him. Appellant suggested that the court may not have had the opportunity to review his memorandum in opposition to BNYM's motion for summary judgment and the affidavit supporting it, due to the clerk's apparent delay in filing that memorandum.[1]

{¶ 9} On July 20, 2011, BNYM filed a motion to strike appellant's July 5, 2011 amended answer and counterclaim.[2] BNYM argued that appellant's amended answer had been filed "after the case had been decided on its merits [and raised issues] that are now moot as a result of the [j]udgment entry rendered by [the trial] court." (BNYM's July 20, 2011 Memorandum in Support, 3.) On that same day, the trial court entered an order granting BNYM's motion, stating that "[f]or good cause shown * * * [appellant's] * * * Amended Answer and Counterclaim with Jury Demand and Class Action Claims * * * are stricken from the record." (July 20, 2011 Order.)

{¶ 10} On July 22, 2011, appellant filed in this court an appeal of the trial court's June 27, 2011 entry of summary judgment against him and in favor of BNYM.

{¶ 11} On September 15, 2011, and despite the fact that an appeal in this court was pending, appellant filed a motion in the trial court asking it to vacate the summary judgment entered on June 27, 2011. In support, appellant asserted that he had several meritorious defenses to the complaint. He did not, however, request leave to file a second amended answer.

{¶ 12} On December 28, 2011, we filed an entry disposing of appellant's appeal, noting that the parties had agreed to vacate the trial court judgment. *Bank of New York Mellon v. Rankin*, 10th Dist. No. 11AP-630 (Dec. 28, 2011 Journal Entry of Dismissal). We remanded the case to the trial court for purposes of vacating the June 27, 2011 judgment

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[1] Appellant speculated that the delay of the filing of his memorandum in opposition might have been due to the court's move into a newly built courthouse, which occurred in early June 2011, or an incident involving the mail.

[2] BNYM's July 20, 2011 motion also asked the court to strike (1) appellant's motion for reconsideration of the court's entry of summary judgment against him; and (2) appellant's memorandum in opposition to BNYM's motion for summary judgment. BNYM asserted that both of the foregoing had been untimely filed. by appellant. The court's July 20, 2011 order also struck from the record these two additional filings.

and dismissed the appeal effective upon remand. On February 10, 2012, the trial court reinstated the case and set it for trial on June 19, 2012.

{¶ 13} On February 12, 2012, the trial court filed an agreed entry vacating its earlier summary judgment in favor of BNYM, noting that "it has been represented to this Court that * * * judgment was entered prior to expiration of Defendants' time to file their response to [BNYM's] motion for summary judgment." (Feb. 12, 2012 Agreed Entry Vacating Judgment, 1.) In its entry, the court granted BNYM leave to refile its motion for summary judgment and expressly provided that appellant could timely file his opposition, if any, to such a motion. The court did not reference the fact that it had previously struck appellant's amended answer, nor did it discuss the legal implications of that action.

{¶ 14} Nevertheless, on February 12, 2012, appellant again filed an amended answer with counterclaims and a request for class-action status. Appellant had not first sought or obtained leave of court or the consent of BNYM to file a second amended answer.

{¶ 15} On March 12, 2012, BNYM filed a new motion for summary judgment. BNYM attached to its motion copies of the note and the mortgage, and an affidavit evidencing that the note had been endorsed to appellee BNYM, Trustee, and that the mortgage had been assigned by JPMorgan Chase Bank, N.A., as successor in interest to Bank One, N.A., to appellee, BNYM, Trustee. The affidavit further stated that both the note and the assignment had been filed with the Franklin County Recorder and that appellant had not made payments as required by the terms of the note and mortgage. BNYM attached to the affidavit a computer printout showing appellant's payments and other financial transactions relative to the note and mortgage. The affidavit stated that the note and mortgage were in default and that appellant had failed to cure the default after having been notified of default and acceleration of the loan.

{¶ 16} Appellant opposed BNYM's motion for summary judgment and attached evidentiary materials, including an affidavit signed by him. The affidavit stated that appellant had reviewed BNYM's record of his payments and that it was his position that the bank had not properly allocated his payments between principal and interest. As a result of this misapplication of payments, appellant stated that the balance of principal due on the note was $82,927—approximately $6,000 less than the amount BNYM claimed was

owed. He stated that the note required that he submit payments totaling $225,369.30 by the end of June 2011 and that he had, in fact, paid BNYM $242,448.76 by that date. He stated that he had, more often than not, paid amounts greater than the monthly $1,733.61 payment amount set forth in the note and that BNYM had not correctly applied his overpayments to reduce the principal, resulting in subsequent interest calculations that were incorrect. He further asserted that he had reviewed relevant records and that it was his conclusion that BNYM had not made any property tax or insurance payments anytime during the duration of the note for which it should be compensated.

{¶ 17} On August 31, 2012, the trial court granted BNYM's motion for summary judgment and entered a decree of foreclosure. The court found that reasonable minds could only conclude that appellant owed BNYM the sum of $98,605.01, the sum alleged in the complaint, plus interest. The court ordered sale of the mortgaged property in the event that appellant did not pay that amount within three days. The court further struck from the record appellant's amended answer and counterclaims, observing that it had reactivated the case on February 10, 2012, and that "on February 12, 2012 [appellant] filed a subsequent Amended Answer and Counterclaims without first obtaining leave and/or consent from [BNYM] to file same." (Aug. 31, 2012 Final Judgment Entry, 2.)

{¶ 18} Appellant timely filed a notice of appeal from the trial court's judgment and asserts in this court the following two assignments of error:

> 1. The Trial Court erred by granting the Appellee's Motion for Summary Judgment, while issues of material fact were still to be litigated.
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> 2. The Trial Court erred by failing to allow the Appellant's amended answer, previously granted by the Court's Order of June 9th, 2011.

Summary Judgment Review

{¶ 19} Summary judgment is appropriate where "the moving party demonstrates that (1) there is no genuine issue of 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 that conclusion is adverse to the party against whom the motion for summary judgment is made." *Capella III, L.L.C. v. Wilcox*, 190 Ohio App.3d 133, 2010-Ohio-4746,

¶ 16 (10th Dist.), citing *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶ 6. In *Heider v. Ohio Dept. of Transp.*, 10th Dist. No. 12AP-115, 2012-Ohio-3771, ¶ 8, this court stated:

> When determining what is a "genuine issue," the court decides if the evidence presents a sufficient disagreement between the parties' positions. [*Turner v. Turner*, 67 Ohio St.3d 337, 340 (1993).] "[T]he moving party bears the initial responsibility 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 fact on a material element of the non-moving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Once the moving party meets its initial burden, the non-moving party must then produce competent evidence showing that there is a genuine issue for trial. *Id.* Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 604 N.E.2d 138 (1992).

{¶ 20} Moreover, "appellate review of summary-judgment motions is de novo." *Geczi v. Lifetime Fitness*, 10th Dist. No. 11AP-950, 2012-Ohio-2948, ¶ 8, citing *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548 (2001). "De novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision." (Internal citations omitted.) *Holt v. State*, 10th Dist. No. 10AP-214, 2010-Ohio-6529, ¶ 9. "We stand in the shoes of the trial court and conduct an independent review of the record applying the same summary judgment standard. As such, we must affirm the trial court's judgment if any of the grounds raised by the moving party are found to support it, even if the trial court failed to consider those grounds." *Heider* at ¶ 9.

{¶ 21} In his first assignment of error, appellant asserts that the trial court erred in granting summary judgment to BNYM as the parties' affidavits evidenced the existence of unresolved material facts as to whether appellant had, in fact, defaulted on the loan; whether BNYM had accurately calculated amounts due pursuant to the note; and whether BNYM had paid real estate taxes and insurance for which it should be reimbursed.

{¶ 22} Both parties acknowledge that the note contained the following provisions:

> **PAYMENT.** This Note shall be payable as follows: The principal of and interest on this Note shall be due and payable in 179 *equal*

> *monthly installments* in the amount of $1733.61 each, * * *. *The amount of each of the foregoing scheduled payments includes principal and interest.* Interest on this Note is computed on a 365/365 simple interest basis; that is [formula omitted[3].] The finance charge shown above is based on the assumption that I will make payments exactly on the date scheduled. If I pay early, the finance charge I pay may be less that the amount shown. If I pay late, the finance charge that I pay many be more than the amount shown. * * * Unless otherwise agreed or required by applicable law, payments will be applied first to accrued unpaid interest, then to principal, and any remaining amount to any unpaid collection costs and late charges.
>
> **PREPAYMENT FEE. * * *** I may make a partial prepayment of any amount, at any time, *but I will be required to make all scheduled payments when due.* If I repay my loan *in full* before [25 percent] of the total number of scheduled payments have been made, I agree to pay a prepayment charge of [an additional $50]. * * * Except for the foregoing, I may pay all or a portion of the amount owed earlier than it is due. *Early payments will not, unless agreed to by Lender in writing, relieve me of my obligation to continue to make payments under the payment schedule. Rather they will reduce the principal balance due and may result in me making fewer payments.*

(Emphasis added.)

{¶ 23} "A party seeking to foreclose on a mortgage must establish execution and delivery of the note and mortgage; valid recording of the mortgage; it is the current holder of the note and mortgage; default; and the amount owed." *Perpetual Fed. Sav. Bank v. TDS2 Prop. Mgmt., LLC,* 10th Dist. No. 09AP-285, 2009-Ohio-6774, ¶ 19, citing *Neighborhood Housing Servs. of Toledo, Inc. v. Brown,* 6th Dist. No. L-08-1217, 2008-Ohio-6399, ¶ 16. Moreover, in a mortgage foreclosure case, " '[a]n affidavit stating the loan is in default, is sufficient for purposes of Civ.R. 56 in the absence of evidence controverting those averments.' " *Id.,* quoting *Bank One, N.A. v. Swartz,* 9th Dist. No. 03CA-008308, 2004-Ohio-1986, ¶ 14; and citing *Deutsche Bank Natl. Trust Co. v. Ingle,* 8th

[3] The formula omitted above calculating the amount of interest to be allocated to interest on each monthly payment is as follows: "by applying the ratio of the annual interest rate over the number of days in a year (366 during leap years), multiplied by the outstanding principal balance, multiplied by the actual number of days the principal balance is outstanding." (July 22, 2000 Note, Payment Clause.)

Dist. No. 92487, 2009-Ohio-3886, ¶ 33; and *JPMorgan Chase Bank, N.A. v. Brown,* 2d Dist. No. 21853, 2008-Ohio-200, ¶ 54.

{¶ 24} In this case, BNYM provided with its summary judgment motion an affidavit supporting the existence of the loan and mortgage, the fact that the mortgage had been recorded, appellant's default, and the amount due BNYM under the terms of the note. This evidence was sufficient to shift the burden to appellant to demonstrate that a genuine issue of material fact existed for trial. In response, appellant provided an affidavit he himself had executed.

{¶ 25} Appellant argues that genuine issues of material fact exist as to the following: whether prepayments made by appellant over the course of the loan should have been recognized as prepayments of principal that advanced the schedule of required payments, i.e., that he "paid ahead the scheduled payments on the loan by a significant number of months" so that he should not be deemed to have "missed payments" in default of his obligations under the terms of the note; whether the bank miscalculated the amount owed by appellant pursuant to the contractual provisions of the note; and whether BNYM in fact paid real estate taxes and insurance premiums for which it is entitled to reimbursement. (Appellant's brief, 15.)

{¶ 26} We consider each of these issues below to determine whether appellant has met his burden of producing evidence rebutting the representations of fact provided in BNYM's affidavit, thereby establishing the existence of a genuine issue of material fact inconsistent with entry of a summary judgment of foreclosure.

1. *Legal Effect of Prepayments*

{¶ 27} Appellant's argument concerning the legal effect of prepayments challenges BNYM's assertion that appellant defaulted on the note. Appellant submitted with his memorandum in opposition to summary judgment an affidavit that he himself prepared. Appellant testified in his affidavit that he was a software architect and able to analyze mathematical procedures implemented within company software programs. He stated that he had used data provided by BNYM during discovery and created his own computer spreadsheet. The spreadsheet purportedly calculates the sum of all the payments of principal appellant made over the course of the loan, the bank's allocation of those

payments between principal and interest, and appellant's theory as to how his payments should have been allocated between principal and interest.

{¶ 28} Appellant observes that the note allowed him to "pay all or a portion of the amount owed earlier than it is due." (Appellant's brief, 14, citing note's provision as to prepayment fee.) He extrapolates from this that he was relieved of the obligation of making scheduled payments on a monthly basis so long as his "prepayments" equaled or exceeded the amount that he would have paid had he, in fact, made equal monthly payments. Under appellant's reasoning, if, for example, he paid twice the amount of the prescribed monthly payment in his January payment, he would not be required to make a payment in February because he had "prepaid" the February payment in January.

{¶ 29} Applying appellant's interpretation of the note to his own payment history, appellant contends that he paid $17,079.46 more in total payments on the principal of the loan as of March 12, 2011, than he would have been required to pay had he paid the minimum monthly payment amount each month since the loan's origination. He argues that he therefore "paid ahead the scheduled payment on the loan by a significant number of months." (Appellant's brief, 15.) Therefore, under appellant's reasoning, BNYM's assertion that he had defaulted by missing payments was unfounded, as he "had not been late or missed a single payment." (Appellant's brief, 21.) Fundamentally, appellant's argument is based on his interpretation of the contractual language of the note and raises an issue of law, i.e., the interpretation of contractual terms to which appellant agreed.

{¶ 30} The construction of a written contract is a matter of law and the purpose of contract construction is to realize and give effect to the intent of the parties. *Beasley v. Monoko, Inc.*, 195 Ohio App.3d 93, ¶ 30 (10th Dist.2011), citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph one of the syllabus, and *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313 (1996). The meaning of contractual language becomes a question of fact only where the parties' intent cannot be discerned from the four corners of the agreement or if the language is susceptible of two or more reasonable interpretations. *Geczi* at ¶ 17, citing *Hedmond v. Admiral Ins. Co.*, 10th Dist. No. 02AP-910, 2003-Ohio-4138, ¶ 38.

{¶ 31} Moreover, contracts must be read as a whole, and individual provisions must not be read in isolation. *Heritage Mut. Ins. Co. v. Ricart Ford, Inc.*, 105 Ohio App.3d

261, 265 (10th Dist.1995). "[I]n contract construction, the court should give effect to every provision within the contract, if possible, and if one construction of a doubtful condition would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction must prevail." *Drs. Kristal & Forche, D.D.S., Inc. v. Erkis*, 10th Dist. No. 09AP-06, 2009-Ohio-5671, ¶ 24, citing *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361-62 (1997).

{¶ 32} Appellant's interpretation of the contractual terms of the note is not reasonable. Acceptance of appellant's interpretation of the note's provision allowing him to make prepayments would render meaningless the express provision of the note providing that appellant's prepayments would not relieve him of his obligation to continue to adhere to the payment schedule, which consisted of "equal monthly installments of $1,733.61 each." It is true that the note permitted prepayments but, in order to give effect to all contractual terms in the note, the note must be construed as providing that: (1) appellant was required to make, at a minimum, monthly payments of $1,733.61 each; (2) each monthly payment would be allocated as representing a partial payment of principal and a payment of interest; and (3) appellant could make prepayments of the loan, but if he did so those early payments would not "relieve [him] of any obligation to continue to make payments under the payment schedule," i.e., make a payment every month of at least $1,733.61. (July 22, 2000 Note, Prepayment Fee Clause.) BNYM observes, and appellant does not contest, that he failed to make *any* monthly payments after November 30, 2009—approximately eight months prior to the initiation of the foreclosure action. There is no question of fact, therefore, that appellant was in default of his obligation to make monthly payments as established in the note. Accordingly, there is no genuine issue of material fact as to the existence of default by appellant.

2. *Calculation of Damages/Interest Calculation*

{¶ 33} Appellant further contends that BNYM miscalculated the amount he owes BNYM by misallocating his payments between interest and principal. Appellant claims that, between the date of execution of the loan in July 2000 until June 2009, he on many occasions made monthly payments in excess of $1,733.61; e.g., payments of $2,000 each month between April and October 2001. (*See* Spreadsheet attached to his Memorandum in

Opposition to Summary Judgment.) Appellant asserts that BNYM overcharged him interest during the loan period, which resulted in the bank overstating the amount of outstanding principal by approximately $16,000.[4] He bases this figure on the spreadsheet he prepared and attached to his affidavit as an exhibit.

{¶ 34} In considering appellant's argument, we note that "[i]t is well-settled that, once the party seeking summary judgment satisfies its evidentiary burden, the opposing party 'must then present its own evidence to show a genuine issue of fact does remain as it may not rest upon the mere allegations or denial of its pleadings.' " *Fifth Third Bank v. Mufleh*, 6th Dist. No. L-04-1188, 2005-Ohio-2351, quoting *The Leader Mtge. Co. v. Haught*, 9th Dist. No. 03CA008318, 2004-Ohio-1417, ¶ 9, citing Civ.R. 56(E).

{¶ 35} BNYM asserts that appellant's amortization schedule reflected in his spreadsheet is inaccurate because appellant improperly calculated the initial per diem interest figure. BNYM contends that the interest that accrued on the first day of the loan is $54.49 and used that figure as the starting point for its amortization schedule. Appellant contends that the first-day interest figure was $54.34, and he used that figure as the starting point in his amortization spreadsheet. BNYM argues that, since appellant based his spreadsheet on an incorrect starting figure, that spreadsheet cannot serve to satisfy appellant's burden of rebutting BNYM's figures concerning unpaid principal and interest. We agree. Appellant's spreadsheet is relevant only if one accepts appellant's interpretation of the note's formula as to the calculation of interest payable on the first day of the loan.

{¶ 36} The note's formula to establish daily interest is as follows: "Interest on this Note is computed on a 365/365 simple interest basis; that is, by applying the ratio of the annual interest rate [10.750 percent] over the number of days in a year (366 during leap years), multiplied by the outstanding principal balance [$185,000], multiplied by the actual number of days the principal balance is outstanding [1]." Accordingly, the determinative question is whether the correct figure representing the first day's interest is $54.34, as appellant contends, or $54.49, as contended by BNYM. The answer to that question is provided by performing a mathematical calculation using the formula contained in the note. The question does not present an issue of fact.

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[4] BNYM asserted in its summary judgment motion that appellant owed unpaid principal of $98,605.01 on March 2, 2012. Appellant claims that the unpaid principal balance is $82,927.81.

{¶ 37} BNYM used 365 as the number of days in a year, producing 2.9452 as the multiplier contemplated in the first phrase of the formula (interest rate of .1075 (10.75 percent) divided by 365). When 2.9452 is multiplied by the outstanding balance of the loan on the first day of the loan ($185,000), the resulting product, when rounded, is 54.49, which accords with the bank's calculated interest on the first day of the loan ($54.49). When the multiplier is calculated by dividing the interest rate (.1075) by 366 (representing the number of days in a leap year), the resulting multiplier is 2.9372. When that multiplier is applied to the outstanding balance of the loan on the first day of the loan ($185,000), the resulting product, when rounded, is 54.34, which accords with appellant's calculated interest on first day of the loan ($54.34).

{¶ 38} Appellant points out that the loan originated in 2000, which was a leap year, and he contends that the appropriate denominator in determining the ratio discussed above is 366, i.e., the number of days in a leap year. But appellant did not execute the note agreement until July 22, 2000—after the extra leap year day (February 29, 2000). Because BNYM did not collect interest for February 29, 2000, it was appropriate for BNYM to use 365 in the denominator to determine the ratio for purposes of the formula set forth in the note.[5] For purposes of this loan, which was executed on July 22, 2000, *after* February 29, 2000, the fact that 2000 was a leap year is irrelevant in terms of determining per diem interest.

{¶ 39} Accordingly, because appellant used in his spreadsheet an inappropriate starting figure of per diem interest, his spreadsheet does not rebut BNYM's calculations of the amounts owed on the loan. In relying solely on calculations of his alternative spreadsheet, all of which flow from an incorrect starting point, appellant has failed to meet his evidentiary burden of demonstrating that a genuine issue of material fact exists as to the amount he owed on the accelerated note on the date BNYM commenced the action.

{¶ 40} There is no genuine issue of material fact as to the amount appellant owes BNYM.

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[5] We note that BNYM asserts in its brief that, in calculating the interest accruing on his loan during 2012—also a leap year—it used 366 days as the relevant number to calculate per diem interest.

3. *Real Estate Taxes and Insurance Premiums*

{¶ 41} In its judgment ordering sale of the premises, the trial court found that there "may be due to [BNYM] sums advanced by it under the terms of the note and Mortgage to pay real estate taxes, insurance premiums, and property protection, *which sums are to be determined by further order of this Court*." (Emphasis added.) (Aug. 31, 2012 Judgment Entry, 3.) The fact that the precise amount of taxes and insurance had not yet been determined at the time of the court's decision did not preclude entry of summary judgment ordering sale of the premises. "The valuation of the damages 'for costs of evidence of title required to bring this action, for payment of taxes, [and] insurance premiums' may be mechanical and ministerial, and ascertainable by normal diligence, and thus the court was not required to list them in the judgment entry of foreclosure." *CitiMortgage, Inc. v. Roznowski*, 5th Dist. No. 2012-CA-93, 2012-Ohio-4901, ¶ 9. Moreover, damages whose computation is mechanical and ministerial, such as amounts for payment of taxes and insurance premiums, may be addressed at a hearing on confirmation of the sheriff's sale. *Id.* at ¶ 11. The court therefore was not precluded from entering a summary judgment of foreclosure, despite the fact that the court deferred until a later time its finalization of the amount of real estate taxes and insurance costs to which BNYM was entitled.

{¶ 42} Appellant failed to produce competent evidence showing that there was a genuine issue for trial after BNYM met its initial burden of establishing that it was entitled to damages and foreclosure of the mortgage. Accordingly, the trial court did not err in granting summary judgment in favor of BNYM in the amount alleged in the complaint as evidenced by affidavit testimony provided by BNYM. Appellant's first assignment of error is therefore overruled.

Review of Dismissal of Amended Answer and Counterclaims

{¶ 43} In his second assignment of error, appellant asserts that the trial court erred in striking his second amended answer. The trial court explained its reasoning, as follows:

> Defendant, John A. Rankin, was granted leave to file an Amended Answer and Counterclaims in June, 2011 and those pleadings were ultimately struck by this Court via its entry of July 20, 2011. This Court reactivated this case on February 10, 2012 and on February 12, 2012 Defendant, John A. Rankin,

> filed a subsequent Amended Answer and Counterclaims without first obtaining leave and/or consent from Plaintiff to file same.

(Aug. 31, 2012 Final Judgment Entry, 2)

Civ.R. 15(A) provides, in part:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires.

{¶ 44} Appellant does not address the fact that he failed to move for leave to file a second amended answer. Rather, he implies that the fact that the trial court had, on June 9, 2011, granted leave to file a first amended answer, authorized the filing of his second amended answer as well. We reject this argument. We acknowledge that, pursuant to Civ.R. 15(A), "[l]eave of court shall be granted freely when justice so requires." But nothing in the rule supports the contention that a court is obligated to grant leave to file an amended pleading in the absence of such a motion.

{¶ 45} In this case, appellant did not request leave to file a second amended answer, and the trial court did not, nor was it under any obligation to, exercise its discretion on the question whether leave should be granted. *Accord Cook v. Criminger*, 9th Dist. No. 22313, 2005-Ohio-1949, ¶ 9 ("In the absence of any request by appellant for leave to amend his complaint, the trial court did not err when it ordered the amended complaint stricken from the record."); *Miller-Wagenknecht v. Midland Mut. Life Ins. Co.*, 9th Dist. No. 16457 (May 4, 1994). Appellant had, in fact, filed a first amended pleading based on the court's grant of leave in June 2012, which the court ultimately struck. In granting appellant leave to file an amended pleading, the court did not authorize the filing of additional successive amended pleadings. Indeed, the circumstances surrounding the litigation were significantly different in February 2012 from those present in June 2011 when the court first granted leave. Rather, the filing by appellant of any and all successive

amended pleadings was dependent upon the court granting additional leave or BNYM giving consent. Neither occurred in this case.

{¶ 46} In this case, the time during which appellant had a right to amend his answer had long expired when he filed his second amended complaint and he had obtained neither leave of court nor the consent of BNYM prior to filing it. Accordingly, BNYM was under no obligation to respond to appellant's counterclaims included in the pleading, nor was the court required to adjudicate them. *See Hopkins v. Dyer*, 5th Dist. No. 2001-AP-080088, 2002-Ohio-1576 (second amended third-party complaint deemed "ineffective" pursuant to Civ.R. 15 where appellant neither requested, nor was granted, leave to file the pleading prior to filing it).

{¶ 47} We therefore overrule appellant's second assignment of error.

{¶ 48} For the foregoing reasons, both of appellant's assignments of error are overruled. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and BROWN, JJ., concur.
