

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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| The Huntington National Bank, | : |  |
| Plaintiff-Appellee,           | : |  |
| v.                            | : | No. 14AP-716<br>(C.P.C. No. 13CV-9126) |
| Terrance A. Miller et al.,    | : | (ACCELERATED CALENDAR)                 |
| Defendants-Appellants.        | : |  |

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D E C I S I O N

Rendered on April 23, 2015

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*Carlisle, McNellie, Rini, Kramer & Ulrich Co., LPA, and  
Eric T. Deighton, for appellee.*

*Fusco, Mackey, Mathews & Gill LLP, Matthew M. Nierman  
and Michael J. Fusco, for appellant Terrance A. Miller.*

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APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendant-appellant, Terrance A. Miller, appeals a judgment of the Franklin County Court of Common Pleas that granted summary judgment to plaintiff-appellee, The Huntington National Bank ("Huntington"). For the following reasons, we affirm that judgment.

{¶ 2} On August 16, 2013, Huntington filed a complaint in foreclosure against Terrance and Venica Miller. Huntington alleged that it was the holder of a note and mortgage, both signed by Miller. According to Huntington, Miller defaulted in payment of the mortgage loan, causing Huntington to accelerate the debt. Huntington sought judgment in the amount of \$29,750.95, plus interest and late charges.

{¶ 3} Huntington moved for summary judgment on October 28, 2013. Huntington's motion relied on the affidavit of a Huntington employee who had reviewed Miller's loan history and, based on that history, testified that "payment of [Miller's] loan has been and remains in default because the monthly installments due pursuant to the note and mortgage for the month of May, 2013 and thereafter have not been made." (Clair L. Turk affidavit, at ¶ 6.)

{¶ 4} Miller responded to the motion for summary judgment and contested the allegation that he stopped making monthly loan payments in May 2013. Through his own affidavit, Miller listed the monthly loan payments he had submitted from January 2012 to August 2013. Miller also attached copies of negotiated checks, made out to "Huntington Mortgage," that were dated March 5, 2013; April 5, 2013; May 5, 2013; June 6, 2013; July 7, 2013; and August 7, 2013. Each check was endorsed by Huntington.

{¶ 5} In a decision dated February 4, 2014, the trial court found that a question of fact remained regarding whether Miller defaulted on the note by failing to make monthly loan payments. The trial court, therefore, denied Huntington summary judgment.

{¶ 6} On May 22, 2014, Huntington moved for leave to file a second motion for summary judgment. At the same time, Huntington filed the summary judgment motion that it sought leave to file.

{¶ 7} In its second motion for summary judgment, Huntington relied on different affidavit testimony. In a new affidavit, a Huntington employee testified that "due to escrow advances for forced placed insurance, said payment of the loan has been and remains in default." (Alex Fant affidavit, at ¶ 6.) The Huntington employee also authenticated a printed copy of Miller's loan history, which showed a "hazard premium disbursement" from Miller's escrow account on June 4, 2013. That payment caused a deficiency in the escrow account.

{¶ 8} Miller filed a memorandum contra to Huntington's second motion for summary judgment. Miller reiterated that he had not missed any monthly loan payments from the inception of the loan through August 2013. However, Miller did not challenge the evidence that Huntington had purchased hazard insurance for the mortgaged property and that payment for that insurance caused a deficiency in Miller's escrow account.

{¶ 9} On August 1, 2014, the trial court granted Huntington's motion for leave to file the second motion for summary judgment. Eleven days later—on August 12, 2014—the trial court entered summary judgment in Huntington's favor.

{¶ 10} Miller now appeals the August 12, 2014 judgment, and he assigns the following error:

The trial court erred in granting Appellee's motion for summary judgment where Appellant was not permitted fourteen (14) days to answer Appellee's dispositive motion in violation of Franklin County Common Pleas General Rule 21.01.

{¶ 11} Procedural due process demands that a trial court allow a non-moving party time for a fair opportunity to respond before ruling on a motion for summary judgment. *Hooten v. Safe Auto Ins. Co.*, 100 Ohio St.3d 8, 2003-Ohio-4829, ¶ 40; *Harbor View v. Jones*, 10th Dist. No. 10AP-356, 2010-Ohio-6533, ¶ 37. Generally, a trial court's local rules designate the deadline for filing a response to a motion for summary judgment. *Hooten* at ¶ 33; *Union Sav. Bank v. Schaefer*, 10th Dist. No. 13AP-222, 2013-Ohio-5704, ¶ 19. Here, the applicable local rule specifies that "[t]he opposing counsel or party shall serve any answer brief on or before the 14th day after the date of service as set forth on the certificate of service attached to the served copy of the motion." Loc.R. 21.01 of the Court of Common Pleas of Franklin County, General Division.

{¶ 12} The submittal of a motion for leave to file a motion for summary judgment complicates the application of Loc.R. 21.01. When the moving party seeks leave to file a motion for summary judgment, the non-moving party has no obligation to respond to the merits of the summary judgment motion until the trial court grants leave to file that motion. *M-N N. Chase II, LLC v. Roe*, 9th Dist. No. 25694, 2011-Ohio-4071, ¶ 9; *Maddox v. E. Cleveland*, 8th Dist. No. 92673, 2009-Ohio-6308, ¶ 43-44; *Capital One Bank v. Toney*, 7th Dist. No. 06 JE 28, 2007-Ohio-1571, ¶ 47; *Brengman v. Glass*, 10th Dist. No. 92AP-522 (Oct. 1, 1992). Once the trial court grants the motion for leave, the 14-day period for filing the answer brief to the motion for summary judgment begins. *Cheap Escape Co. v. Tri-State Constr., L.L.C.*, 173 Ohio App.3d 683, 2007-Ohio-6185, ¶ 31 (10th Dist.). Generally, entry of a decision prior to the end of that 14-day period contravenes the non-moving party's right to a fair opportunity to respond. *Id.* at ¶ 34.

{¶ 13} In the case at bar, the trial court curtailed the 14-day response period by issuing a decision on Huntington's summary judgment motion only 11 days after granting Huntington leave to file that motion. By issuing its decision prematurely, the trial court erred. This error, however, is not a basis for reversal because Miller was not prejudiced. *See Robinson v. Kokosing Constr. Co., Inc.*, 10th Dist. No. 05AP-770, 2006-Ohio-1532, ¶ 16 (holding that an appellate court will not disturb a judgment unless the error within is materially prejudicial to the complaining party). Prior to the grant of Huntington's motion for leave, Miller submitted a memorandum contra responding to the merits of the motion for summary judgment, even though he had no obligation to do so. Consequently, Miller had of a fair opportunity to present arguments and evidence showing why the trial court should not grant Huntington summary judgment. While the trial court eliminated three days from Miller's response period, this elimination did not harm Miller because he had already responded.

{¶ 14} For the foregoing reasons, we overrule Miller's sole assignment of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

SADLER and DORRIAN, JJ., concur.

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