[Cite as *U.S. Bank, N.A. v. Goldsmith*, 2015-Ohio-3008.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

U.S. Bank, National Association, Successor Trustee to Bank of America, N.A., as Successor to LaSalle Bank, N.A. as Trustee for the Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-2,	:	No. 14AP-783 (C.P.C. No. 13 CV 011867)
Plaintiff-Appellee,	:	(REGULAR CALENDAR)
v.	:	
Ruby Goldsmith,	:	
Defendant-Appellant,	:	
	:	
John Doe, Unknown Spouse of Ruby Goldsmith et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on July 28, 2015

Thompson Hine LLP, *John B. Kopf*, *Brad W. Stoll*, and *Todd M. Seaman*, for appellee U.S. Bank, National Association.

Haynes Thompson Steward LLC, and *Bryan O. Steward*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Ruby Goldsmith, defendant-appellant, appeals the judgment of the Franklin County Court of Common Pleas, in which the court granted the motion for summary judgment filed by U.S. Bank, National Association, Successor Trustee to Bank of America, N.A., as Successor to LaSalle Bank, N.A. as Trustee for the Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-2 ("the bank"), plaintiff-appellee.

{¶ 2} On February 21, 2007, appellant signed a mortgage and note in favor of First Franklin Financial ("First Franklin"). First Franklin indorsed the note to First Franklin Financial Corporation, which indorsed the note in blank. The bank is the owner and holder of the note. On April 25, 2011, appellant executed a loan-modification agreement. Appellant stopped paying on the mortgage in January 2013.

{¶ 3} On October 28, 2013, the bank filed a foreclosure action against appellant, as well as other defendants who are not relevant to this appeal. On April 28, 2014, appellant filed a letter with the court in which appellant stated that it was her intention to pay the reinstatement amount by the end of April. On August 15, 2014, the bank filed a motion for summary judgment contending that appellant was delinquent on her mortgage payments and it had performed all of the prerequisites required under the note and mortgage to accelerate the balance due on the note. Appellant failed to file a memorandum contra. The bank also filed a motion for default judgment on August 15, 2014, and appellant failed to reply to that motion. On September 15, 2014, new counsel for appellant filed an appearance and a motion for an extension of time to reply to the bank's motion for summary judgment.

{¶ 4} The next day, September 16, 2014, the trial court issued a judgment entry granting summary judgment in favor of the bank and ordering foreclosure. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

> The trial court erred in granting U.S. Bank's Motion for Summary Judgment as a genuine issue of material fact and U.S. Bank did not properly establish it was entitled to Summary Judgment as a matter of law.

{¶ 5} Appellant argues the trial court erred when it granted the bank's motion for summary judgment. Summary judgment is appropriate when 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 when viewing the evidence most strongly in favor of the non-moving party, and that conclusion is adverse to the non-moving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 6} When seeking summary judgment on the ground that the non-moving party cannot prove its case, the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the non-moving party has no evidence to prove its case. *Id*. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the non-moving party has no evidence to support its claims. *Id*. If the moving party meets its burden, then the non-moving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E); *Dresher* at 293. If the non-moving party does not so respond, summary judgment, if appropriate, shall be entered against the non-moving party. *Id*.

{¶ 7} Before addressing appellant's arguments, we first note that appellant failed to file a memorandum contra the bank's motion for summary judgment and, thus, is raising her present arguments for the first time on appeal. In the absence of plain error, failure to draw the trial court's attention to possible error at a time at which the error could have been corrected results in a waiver of the issue for purposes of appeal. *In re H.D.D.*, 10th Dist. No. 12AP-134, 2012-Ohio-6160, ¶ 71. In civil cases, the plain error doctrine will only apply in the "extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic

fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997), syllabus. The plain error doctrine permits correction of judicial proceedings when error is clearly apparent on the face of the record and is prejudicial to the appellant. *Reichert v. Ingersoll*, 18 Ohio St.3d 220, 223 (1985).

{¶ 8} Appellant first argues that the affidavit of Jay Martinez, the assistant secretary for the bank's loan servicing contractor, that was attached to the bank's motion for summary judgment, failed to incorporate any documents by reference and is not supported by any attachments. The only specific argument appellant raises, in this respect, is that prior notice of acceleration is a condition precedent required by the note and mortgage, and Martinez's affidavit does not confirm that such prior notice was provided to appellant.

{¶ 9} However, in its complaint, the bank alleged that it complied with all the conditions precedent to recovery under the terms contained in the note and mortgage, and appellant failed to file an answer to the complaint. The trial court found that appellant was in default of an answer or other pleading and thereby confessed the allegations of the complaint to be true. We agree. Averments in a pleading to which a responsive pleading is required are admitted when not denied in a responsive pleading. Civ.R. 8(D). Thus, when a party fails to file an answer, a court is correct to rely on Civ.R. 8(D) to treat the allegations contained in the plaintiff's complaint as admitted, obviating the need to prove such facts. *Wells Fargo Bank, N.A. v. Murphy*, 7th Dist. No. 13 MA 35, 2014-Ohio-2937, ¶ 14. Although Civ.R. 8(D) does not differentiate between allegations of fact and legal conclusions, judicial admissions, by definition, can only admit the truth of allegations of fact. *Ohio Valley Associated Builders & Contrs. v. Rapier Elec., Inc.*, 12th Dist. No. CA2013-07-110, 2014-Ohio-1477, ¶ 36-37. Whether a bank complied with the conditions precedent set forth in the note and mortgage is a question of fact. *See Huntington Natl. Bank v. Payson*, 2d Dist. No. 26396, 2015-Ohio-1976, ¶ 17. Therefore, in the present case, by failing to deny such in an answer, appellant was deemed to have admitted that the bank complied with the condition precedent that it gave prior notice of acceleration. *See BAC Home Loans Servicing, LP v. Mullins*, 12th Dist. No. CA2013-12-015, 2014-Ohio-4761 ¶ 36 (by failing to specifically deny the allegations set forth in the

lender's foreclosure complaint within his answer, homeowner admitted that the lender properly accelerated the amount due under the note). Thus, this argument is without merit.

{¶ 10} Appellant next argues that the bank improperly attached the note and mortgage as exhibits to its motion for summary judgment. Appellant contends that Civ.R. 56(C) limits the types of evidence that can be considered with a motion for summary judgment, and the note and mortgage are not specifically enumerated in the rule; thus, they were admissible only by reference in a properly framed affidavit. We find appellant's argument to be without merit. The note and mortgage were also attached to the complaint. Civ.R. 56(C) provides that the pleadings can be used to support a summary judgment motion. Civ.R. 7(A) indicates that a complaint is a pleading. Thus, pursuant to Civ.R. 56(C), the complaint is appropriate evidence to support summary judgment. *Ohio Dept. of Job & Family Servs. v. Amatore*, 7th Dist. No. 09 MA 159, 2010-Ohio-2848, ¶ 37. Furthermore, Civ.R. 10(C) provides that "[a] copy of any written instrument attached to a pleading is a part of the pleading for all purposes." Thus, an attachment to the pleading can be considered a part of the pleading if it is a written instrument, and is proper evidence to rely on when moving for summary judgment. Here, the bank attached a copy of the note and mortgage to the complaint, so it could be considered a part of the complaint. We also note that although Martinez averred in his affidavit that the note and mortgage attached to the complaint were true and accurate copies of the originals, there is no requirement that a plaintiff provide an affidavit authenticating the note and mortgage attached to a complaint in foreclosure. *See M & T Bank v. Steel*, 8th Dist. No. 101924, 2015-Ohio-1036, ¶ 17 (Civ.R. 10(D)(1) does not require an attached account or instrument be verified or authenticated by affidavit; thus, there is no requirement that a plaintiff provide an affidavit authenticating the note and mortgage attached to a complaint in foreclosure). Therefore, the trial court could have properly relied upon the note and mortgage attached to the complaint in rendering summary judgment, and the copies of the note and mortgage attached to the motion for summary judgment were of no consequence. For the foregoing reasons, we find the trial court did not err when it granted summary judgment, and appellant's assignment of error is overruled.

{¶ 11} Accordingly, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and LUPER SCHUSTER, JJ., concur.
