[Cite as *Beneficial Ohio, Inc. v. Hadbavny*, 2010-Ohio-6062.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

BENEFICIAL OHIO, INC., d.b.a. BENEFICIAL MORTGAGE CO. OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-G-2944**
- vs -	:	
TODD A. HADBAVNY, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 F 000510.

Judgment: Affirmed.

Stephen D. Miles and *Vincent A. Lewis*, 18 West Monument Avenue, Dayton, OH 45402 (For Plaintiff-Appellee).

James R. Douglass, James R. Douglass Co., L.P.A., 20521 Chagrin Boulevard, Ste. D, Shaker Heights, OH 44122-9736 (For Defendants-Appellants).

CYNTHIA WESTCOTT RICE, J.

{¶1} The instant matter, submitted on the briefs of the parties, emanates from an entry of summary judgment by the Geauga County Court of Common Pleas in favor of appellee, Beneficial Ohio, Inc., d.b.a., Beneficial Mortgage Co. of Ohio. Appellants, Todd A. Hadbavny, et al., contest the trial court's ruling as well as the trial court's denial of their motion to amend their pleadings and an extension of time to file their brief in

opposition to appellee's motion for summary judgment. For the reasons discussed below, we affirm the judgments entered by the lower court.

{¶2} On August 1, 2000, appellants refinanced their new home mortgage in the amount of $335,853.69, with interest at a rate of 12.927%. The promissory note was secured by a mortgage deed constituting a lien on the property. On May 5, 2008, appellee filed a foreclosure action in the Geauga County Court of Common Pleas. Appellee alleged appellants defaulted on the note on March 28, 2008, at which time they owed appellee $330,812.27, "together with interest thereon according to the terms of said note." Appellee attached a copy of the promissory note as well as a copy of the mortgage deed to the complaint.

{¶3} Appellants filed their answer on July 14, 2008, denying appellee's allegations. On August 6, 2008, appellee moved the trial court for summary judgment. Appellee attached the affidavit of Michelle Caruso, a "Sr[.] Forecloure Specialist" for appellee, to its motion. Her affidavit indicated Caruso had firsthand knowledge of appellee's record-keeping procedures; that appellee kept records in the form of transaction histories as its regular custom and practice; that the transactions at issue were recorded by employees of appellee who had a duty to record the transactions; and that appellants owed arrearages prior to May 5, 2008 in the amount of $15,112.08.

{¶4} On August 8, 2008, appellants filed a pleading, which purported to oppose appellee's motion for summary judgment and simultaneously move the court for permission to conduct discovery. With respect to the brief in opposition, appellants asserted appellee's motion should be overruled because it failed to meet the

requirements of Civ.R. 56(C). Namely, it failed to provide proper evidence specifically demonstrating appellants had indeed defaulted in payment of the note.

{¶5} With respect to their motion to compel discovery, appellants asserted that, at the time of filing their answer, they had insufficient documentary evidence to fully investigate whether defenses or counterclaims were viable to their case. They asserted their belief that "the loan that is the subject of the instant case has certain earmarks of predatory lending practices." Appellants also alleged, on July 22, 2008, they issued a discovery request to appellee in an effort to determine whether any defenses or counterclaims could be asserted. Appellants alleged, however, that "[r]ather than prepare responses to the discovery requests ***, [appellee] elected to file a motion for summary judgment." In light of these contentions, appellants claimed they should be entitled to discover the documents requested in their discovery requests.

{¶6} On August 21, 2008, the trial court granted appellants 60 days to obtain discovery and supplement their brief in opposition. As a result of this order, the trial court reserved its ruling on appellee's motion for summary judgment. Subsequent to the order, on October 2008, appellants moved the trial court to dismiss appellee's action based upon its failure to adequately respond to their discovery requests. Appellee sought two extensions to file a response to the motion, which were granted. In the meantime, appellee withdrew its original motion for summary judgment.

{¶7} On March 19, 2009, appellee filed a "notice of compliance" in which appellee represented to the court and opposing counsel it had complied with all discovery requests. Despite the notice, appellee had still not responded to appellants' motion to dismiss and, on March 25, 2009, appellee filed a third motion for additional

time. On March 30, 2009, the trial court denied appellee's motion for an extension of time and granted appellants' motion to dismiss.

{¶8} On April 23, 2009, appellees moved the trial court for relief from judgment pursuant to Civ.R. 60(B). The trial court later granted the motion based upon appellee's uncontested representation that it had complied with discovery.

{¶9} On July 10, 2009, appellee re-filed its motion for summary judgment, which it later amended on August 6, 2009. Appellee attached the affidavit of Kathleen Sullivan, appellee's "Sr. Foreclosure Specialist," to its motion. In her affidavit, Sullivan averred, in relevant part: she had first-hand knowledge of appellee's record-keeping procedures; that it is the regular custom and practice of appellee to keep records in the form of a transaction history; that she is the custodian of the records related to appellee's transactions. And Sullivan attested, as of April 14, 2009, appellants were in arrears in the amount of $50,616.13 on the promissory note attached to appellee's original complaint.

{¶10} On August 27, 2009, appellants filed a "Motion to Strike Plaintiff's [Motion] for Summary Judgment or in the Alternative to Confirm that a Responsive Pleading is Due September 28, 2009." Appellants based their motion to strike on appellee's failure to seek leave of the court to file their amended motion. If the court overruled the motion, appellants sought to confirm their response memorandum would be due 45 days from the filing of the amended motion, viz., September 29, 2009.

{¶11} On September 21, 2009, appellants moved the court for an enlargement of time to respond to appellee's motion for summary judgment. On September 28, 2009, the trial court issued a ruling in which it overruled appellants' motion to strike

appellee's amended motion for summary judgment. It further ordered that appellants would have until October 28, 2009 in which to respond to appellee's amended motion. On October 28, 2009, appellants filed a motion to strike the affidavit of Kathleen Sullivan on the basis that it is premised upon inadmissible hearsay in violation of Civ.R. 56(E). On the same date, appellants again sought an extension of time to respond to appellee's amended motion. In its memorandum in support, appellants asserted "the need to respond to [appellee's] motion for summary judgment would be moot" if the trial court granted their motion to strike Sullivan's affidavit.

{¶12} On November 6, 2009, appellants filed an amended answer and counterclaims against appellee. Appellee subsequently moved to dismiss appellants' counterclaims for failure to state a claim. On December 10, 2009, the trial court overruled appellants' motion to strike Sullivan's affidavit and struck appellants' amended answer and counterclaims for appellants' failure to seek leave to amend their answer. Later, on December 23, 2009, the trial court granted appellee's amended motion for summary judgment and entered a judgment of foreclosure in appellee's favor.

{¶13} After filing their notice of appeal, appellants filed their appellate brief asserting two assignments of error. Their first assignment of error provides:

{¶14} "The trial court erred when it granted summary judgment on behalf of the plaintiff based solely upon hearsay testimony."

{¶15} Under their first assignment of error, appellants claim the affidavit upon which appellee's amended motion was based was premised upon hearsay testimony, and failed to meet the requirements for the "business record" exception to Evid.R. 803. We disagree.

{¶16} Pursuant to Civ.R. 56(C), only certain evidence may be considered by a court during a summary judgment exercise. The court may only consider "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence and written stipulations of fact." Civ.R. 56(C). Civ.R. 56(E) provides that an affidavit must "be made on personal knowledge, [and] set forth such facts as would be admissible in evidence." Id. Personal knowledge is defined as "knowledge of factual truth which does not depend on outside information or hearsay." *Wall v. Firelands Radiology, Inc.* (1995), 106 Ohio App.3d 313, 335.

{¶17} Appellants initially contend Sullivan's affidavit was not based upon personal knowledge as the document was boilerplate in nature, comprised of mere conclusory, hearsay statements. We disagree.

{¶18} Sullivan averred she is appellee's Senior Foreclosure Officer with "first hand knowledge" of appellee's record-keeping procedures, such as maintaining the transaction history of appellee's clientele. Sullivan's affidavit further stated she is the custodian of appellants' transaction history, i.e., the records substantiating appellee's cause of action in foreclosure. According to Sullivan, appellants' transaction history reveals their payments on the underlying promissory note were in arrears for more than 60 days prior to May 5, 2008, the day on which appellee filed its complaint.

{¶19} Courts have held that "an affiant's mere assertion that [she] has personal knowledge of the facts asserted in an affidavit can satisfy the personal knowledge requirement of Civ.R. 56(E)." *Residential Funding Co., LLC v. Thorne*, 6th Dist. No. L-09-1324, 2010-Ohio-4271, at ¶70, citing *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, at ¶14. The mere assertion of first-hand knowledge will

satisfy Civ.R. 56(E) if the facts set forth in the affidavit, combined with the identity of the affiant permits the reasonable inference that the affiant possesses personal knowledge of the facts in the affidavit. Id.

{¶20} Here, Sullivan, as an employee of appellee who was the custodian of the records associated with appellants' mortgage stated that the records demonstrated appellants defaulted on their loan more than two months prior to the filing of the complaint. At no point did appellants submit any evidence to refute Sullivan's assertions about the nature of her job or the substance of her testimony. The identity of Sullivan as a Senior Forclosure Specialist employed by appellee, combined with the nature of the facts set forth in the affidavit, permits the reasonable inference that Sullivan did possess personal knowledge that appellants signed the promissory note, secured by the property at issue, and later defaulted on the note.

{¶21} Finally, although the affidavit includes certain conclusions regarding appellee's record-keeping process, they are not "conclusory." The affidavit contains a recitation of sufficient operative facts to adequately support the conclusions. Thus, the details of the affidavit demonstrate its content is not merely conclusory hearsay. See *Burkholder v. Straughn* (June 26, 1998), 11th Dist. No. 97-T-0146, 1998 Ohio App. LEXIS 2895, *13. Given this analysis, we hold Sullivan's affidavit is sufficient to establish personal knowledge pursuant to Civ.R. 56(E).

{¶22} Appellants next assert the affidavit does not meet the requirements of Civ.R. 56(E) because it is grounded upon inadmissible hearsay. In response, appellee maintains that the affidavit, although hearsay, is excepted from the general rule of

exclusion because the information Sullivan imparts is premised upon appellee's "business records."

{¶23} To be admissible under Evid.R. 803(6), a business record must satisfy four elements: (1) it must have been kept in the regular course of business; (2) it must stem from a source who had personal knowledge of the acts, events, or conditions; (3) it must have been recorded at or near the time of the transaction; and (4) a foundation must be set by the testimony of either the custodian of the record or some other qualified person. *State v. Davis*, 116 Ohio St.3d 404, 429, 2008-Ohio-2; see, also, *State v. Comstock* (Aug. 15, 1997), 11th Dist. No. 96-A-0058, 1997 Ohio App. LEXIS 3670, *17-*18. The rule also requires that the source of the information conveyed be reliable or trustworthy. See, e.g., *Spencer v. Lakeview School Dist*., 11th Dist. No. 2005-T-0083, 2006-Ohio-3429, at ¶39.

{¶24} Appellants initially argue Sullivan's affidavit is inadmissible because she failed to authenticate or lay a foundation for the authenticity of the actual records. We do not agree. As discussed above, Sullivan's affidavit attests to her personal knowledge of the record-keeping procedures as well as her status as the custodian of the records germane to the underlying suit. The promissory note and the mortgage deed were appended to the complaint and, although not attached to the affidavit, Sullivan specifically incorporated them by reference in the affidavit. Even if Sullivan's affidavit contains a "technical flaw," Ohio courts have held that such flaws are harmless where there is no indication or suggestion that the documents are not authentic or that the result would be different if the documents were properly authenticated. *Ins. Outlet*

Agency, Inc. v. Am. Med. Sec., Inc., 5th Dist. No. 01 CA 118, 2002-Ohio-4268, at ¶13, citing *Knowlton v. Knowlton Co.* (1983), 10 Ohio App.3d 82, 87.

{¶25} In their motion to strike the affidavit, appellants did not specifically dispute the authenticity of the promissory note or the mortgage deed. Moreover, they did not take issue with the trustworthiness of Sullivan's statements relating to the allegations of default or the amount of arrearages set forth in the affidavit. They generally asserted the affidavit was inadmissible because (1) the information it contained was not based on personal knowledge; and (2) the affidavit it contained nothing more than conclusory statements. As we have already overruled these points, we hold the document is not inadmissible for lack of foundation.

{¶26} Appellants next argue the affidavit is inadmissible because it relies upon compound hearsay. Appellants point out that in paragraphs five and six, the affidavit reads:

{¶27} "5. Affiant further states that the transactions were recorded by an employee/employees of Plaintiff who had a duty to record the transaction(s).

{¶28} "6. Affiant further states that the employee(s) had personal knowledge of the transaction(s)."

{¶29} Although these statements are problematic, they are not fatal to the admissibility of the affidavit. Courts in Ohio have underscored that "Evid.R. 803(6) does not require an affiant to possess personal knowledge of the exact circumstances of the preparation and production of the document so long as the affiant demonstrates that he or she is sufficiently familiar with the operation of the business and with the circumstances of the preparation in order to testify that the record is made in the

ordinary course of business." *Charter One Mtge. Corp. v. Keselica*, 9th Dist. No. 04CA008426, 2004-Ohio-4333, at ¶21, citing *Hinte v. Echo, Inc*. (1998), 130 Ohio App. 3d 678, 684; see, also, *State v. Jackson*, 11th Dist. No. 2007-A-0079, 2008-Ohio-6976, at ¶30. Here, Sullivan's specific first-hand knowledge of the regular record-keeping practices of appellee as well as her status as the custodian of the records relating to appellants' transactions render her testimony sufficiently trustworthy to overcome appellants' hearsay objection. Accordingly, we agree that the affidavit is competent evidence under Civ.R. 56(E).

{¶30} Appellants' first assignment of error is overruled.

{¶31} Appellants' second assignment of error provides:

{¶32} "The trial court erred when it denied defendant-appellants [sic] motion for leave to amend the pleadings and for an extension of time to respond to plaintiff's motion for summary judgment."

{¶33} The record indicates that appellee was somewhat dilatory in responding to appellants' discovery requests, so much so that the trial court dismissed its complaint. Prior to this dismissal, however, appellee complied with appellants' requests on March 19, 2009. Given compliance, the trial court granted appellee relief from judgment and ordered that "*** Plaintiffs have fourteen (14) days from the date of filing hereof to re-file its Motion for Summary Judgment; others who wish to respond have (45) fourty-five days after service of the motion upon them in which to do. ***"

{¶34} In light of this order, appellee filed its motion for summary judgment on July 10, 2009 and later amended the same on August 6, 2009. The court subsequently ordered that appellants would have 45 days from the filing of the amended motion to

respond. On September 21, 2009, appellants moved for an enlargement of time to respond to the amended motion. The trial court granted the motion, ordering appellants to respond by October 28, 2009. Instead of responding, appellants filed a motion to strike Sullivan's affidavit and sought an additional extension of time along with a motion for leave to amend their pleadings on October 28, 2009. On November 6, 2009, without leave of court, appellants filed a motion to amend their answer with counterclaims. On December 10, 2009, the trial court overruled appellants' motion to extend time and leave to amend; given its judgment, it struck appellants' amended pleading.

{¶35} A trial court's decision to deny an extension is reviewed for an abuse of discretion. *Davis v. Immediate Med. Servs., Inc.*, 80 Ohio St.3d 10, 14, 1997-Ohio-363. A reviewing court uses the same standard in considering the denial of a motion for leave to amend. *Patterson v. V & M Auto Body* (1992), 63 Ohio St.3d 573, 576. Although the trial court did not provide specific reasons for overruling appellants' motions, the record indicates the court had previously granted an extension and, because appellants were ostensibly comfortable with the discovery materials they received on March 19, 2009, they had ample time to prepare their motion in opposition. Rather than hedge their bets by filing a substantive motion in opposition, however, appellants chose to simply challenge the admissibility of the Sullivan affidavit. In so doing, appellants rested their entire defense on the success of this motion. Given the lengthy history of the case and the context of the ruling, we hold the court did not abuse its discretion in denying appellants' motion for extension.

{¶36} Once the court denied appellants' motion for extension, it was free to proceed to consider the merits of appellee's motion for summary judgment, irrespective

of appellants' motion for leave to amend. In exercising its discretion to rule upon and eventually grant appellee's motion for summary judgment, appellants' motion to amend was rendered moot. We see no error in the manner in which the court proceeded.

{¶37} Appellants' second assignment of error is overruled.

{¶38} For the reasons discussed above, appellants' two assigned errors are without merit and the judgment of the Geauga County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion,

COLLEEN MARY O'TOOLE, J., dissents.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion,

{¶39} I concur in the judgment in this case. I write separately, however, to address concern with the issue raised by the appellants' objection to Kathleen Sullivan's affidavit on the grounds that it is "filled in the blanks on a pre-printed form."

{¶40} While this court has addressed, and rejected, the argument raised herein in another context, *Citibank (S.D.), N.A. v. Lesnick*, 11th Dist. No. 2005-L-013, 2006-Ohio-1448, at ¶15, the use of fill-in-the blank affidavits must be closely scrutinized. Under Ohio law, the contents of an affidavit must be based on the personal knowledge of the affiant. Civ.R. 56(E); *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 223, 1994-Ohio-92. When a fill-in-the blank form is used, the personal knowledge basis of that affidavit becomes an issue. If the affidavit is drafted

based on information provided by the signing affiant, why would the name of the affiant have to be added later? On the other hand, if the drafter of the affidavit prepares the affidavit and then presents the document to the affiant for signature after its preparation, how is that affidavit prepared on the basis of the "personal knowledge" of that affiant?

{¶41} In this case, there is no evidence contradicting the affiant's representation in the form that the affidavit is based on her personal knowledge. Absent such evidence, we cannot assume or presume otherwise. However, in an age with instant word-processing equipment, pre-printed, fill-in-the blank affidavits should be discouraged.