

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

DOLLAR BANK, FEDERAL SAVINGS BANK,	:	O P I N I O N
	:	
Plaintiff-Appellee,	:	CASE NO. 2015-P-0044
	:	
- vs -	:	
	:	
CAPITAL L. CORP., ET AL.,	:	
	:	
Defendants-Appellants.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2013 CV 00131.

Judgment: Affirmed.

Steven L. Wasserman, Evan T. Byron, and Matthew J. McCracken, Chernett Wasserman, LLC, The Tower At Erieview, 1301 East Ninth Street, #3300, Cleveland, OH 44114 (For Plaintiff-Appellee).

Susan J. Lax, 755 White Pond Drive, #403, Akron, OH 44320 (For Defendants-Appellants).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellants, Capital L. Corp., Personal Management Group, Incorporated, T X Four Holdings, LLC, and Circle Farm, Inc., appeal from the May 19, 2015 judgment of the Portage County Court of Common Pleas, granting appellee's, Dollar Bank, Federal Savings Bank ("Dollar Bank"), motion for summary judgment and decree in foreclosure and finding that appellants owe Dollar Bank \$2,636,657.99 plus interest on

a promissory note for commercial real estate. On appeal, appellants assert the trial court erred in granting summary judgment in favor of Dollar Bank. For the reasons that follow, we affirm.

{¶2} On March 30, 2010, appellants executed and delivered to Dollar Bank a cognovit promissory note payable on demand in the amount of \$4,534,310.03 in consideration of a commercial real estate loan. The document was signed by appellants' president/managing member, Louis Telerico. In order to secure payment of the note, appellants executed and delivered five separate open-end mortgage and security agreements as well as assignments of rents and leases which encumber as first liens ten parcels of undeveloped land in Portage County, Ohio.

{¶3} After receiving no more payments as of 2012, Dollar Bank submitted a letter on January 7, 2013 to appellants accelerating the balance due and demanding payment in full. However, appellants failed to comply.

{¶4} On February 1, 2013, Dollar Bank filed a complaint for foreclosure against appellants and defendants, Four Wells Limited, Park View Federal Savings Bank, Dennis Gehrisch, Robert Ranallo, Fifth Third Bank, and Vicki Kline (Portage County Treasurer), Case No. 2013 CV 00131.¹ Appellants filed a joint answer on June 26, 2013.

{¶5} On December 19, 2013, Dollar Bank filed a motion for summary judgment and a decree in foreclosure as well as an order appointing a private auctioneer to

1. Defendants are not named parties to this appeal. In a companion case, *Dollar Bank, Federal Savings Bank v. Louis A. Telerico, et al.*, Portage County Court of Common Pleas Case No. 2013 CV 00130, Dollar Bank obtained a cognovit judgment on the note against appellants and Mr. Telerico, jointly and severally, in the amount of \$2,636,657.99 for principal, interest, costs, attorney fees, and late fees through February 1, 2013, on February 8, 2013. Dollar Bank thereafter filed a judgment lien against Mr. Telerico and appellants. In September 2013, appellants made a \$100,000 payment to Dollar Bank to settle Dollar Bank's attachment proceeding related to Mr. Telerico's personal property in the companion case, Case No. 2013 CV 00130.

conduct a public auction of the real property at issue. Appellants filed a reply on January 17, 2014. Dollar Bank filed a reply in support of its motion on February 5, 2014.

{¶6} On May 19, 2014, appellants filed a series of bankruptcy petitions. As a result, the trial court stayed the matter on June 17, 2014 pending the bankruptcy proceedings. On May 5, 2015, the United States Bankruptcy Court dismissed the petitions with prejudice for one year finding that they were filed in bad faith. See *In re Four Wells Limited, et al.*, United States Bankruptcy Court, Northern District of Ohio, Eastern Division, Case No. 14-51269-AMK.

{¶7} On May 11, 2015, Dollar Bank filed a motion for an expedited lift of the bankruptcy stay and for an immediate reinstatement of the case. On May 19, 2015, the trial court granted Dollar Bank's May 11, 2015 motion as well as its December 19, 2013 motion for summary judgment. Appellants filed a timely appeal and assert the following assignment of error:

{¶8} "The trial court erred in granting summary judgment to Appellees (sic)."

{¶9} In their sole assignment of error, appellants argue the trial court erred in granting Dollar Bank's motion for summary judgment. Appellants allege that an issue of material fact exists regarding the \$100,000 payment appellants made to Dollar Bank. Appellants further contend the trial court should have considered purchase contracts related to Dollar Bank's collateral.

{¶10} "Summary judgment is a procedural tool that terminates litigation and thus should be entered with circumspection. *Davis v. Loopco Industries, Inc.*, 66 Ohio St.3d 64, 66 * * * (1993). Summary judgment is proper where (1) there is no genuine issue of

material fact remaining to be litigated; (2) the movant is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and, viewing the evidence in the non-moving party's favor, that conclusion favors the movant. See, e.g., Civ.R. 56(C).

{¶11} “When considering a motion for summary judgment, the trial court may not weigh the evidence or select among reasonable inferences. *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 121 * * * (1980). Rather, all doubts and questions must be resolved in the non-moving party's favor. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359 * * * (1992). Hence, a trial court is required to overrule a motion for summary judgment where conflicting evidence exists and alternative reasonable inferences can be drawn. *Pierson v. Norfolk Southern Corp.*, 11th Dist. No. 2002-A-0061, 2003-Ohio-6682, ¶36. In short, the central issue on summary judgment is, ‘whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 * * * (1986). On appeal, we review a trial court's entry of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 * * * (1996).” *Meloy v. Circle K Store*, 11th Dist. Portage No. 2012-P-0158, 2013-Ohio-2837, ¶5-6. (Parallel citations omitted.)

{¶12} “To properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials showing: (1) the movant is the holder of the note and mortgage, or is a party entitled to enforce the instrument; (2) if the movant is not the original mortgagee, the chain of assignments and transfers; (3) the mortgager is in default; (4) all conditions precedent have been met; and (5) the

amount of principal and interest due.” *Nat’l City Real Estate Servs. LLC v. Shields*, 11th Dist. Trumbull No. 2012-T-0076, 2013-Ohio-2839, ¶16, citing *Wachovia Bank v. Jackson*, 5th Dist. Stark No. 2010-CA-00291, 2011-Ohio-3203, ¶40-45.

{¶13} Appellants do not dispute that Dollar Bank has satisfied the foregoing elements regarding this foreclosure action. Instead, appellants contend that an issue of material fact exists regarding the \$100,000 payment made to Dollar Bank and that the trial court should have considered purchase contracts related to Dollar Bank’s collateral.

{¶14} This court understands the difficulties and economic hardship underlying this case. However, for the reasons stated, appellants’ contentions have no merit under the law.

{¶15} As stated, in September 2013, appellants made a \$100,000 payment to Dollar Bank solely and exclusively to settle Dollar Bank’s attachment proceeding related to Mr. Telerico’s *personal property* in the *companion case*, Case No. 2013 CV 00130. Thus, the \$100,000 payment was not made in this case, Case No. 2013 CV 00131. As a result, that payment did not cure appellants’ default in any manner under the note and mortgage at issue.

{¶16} Further, the record establishes that on September 9, 2013, Dollar Bank’s counsel, Steven Wasserman, sent an email to appellants’ counsel, Susan Lax. That email, Exhibit 1, provides in pertinent part:

{¶17} “We have discussed the matter of the \$100,000 check that you had delivered to our office last week and have consulted with representatives of Dollar Bank regarding the same. Dollar Bank will accept this payment and apply the funds in

accordance [with] the provisions of the loan documents, and further subject [to] the following agreement:

{¶18} “1. Dollar Bank will release its attachment only with respect to the personal property itemized in the *Receiver’s Written Report Concerning Inventory* filed on July 1, 2013 in Case No. 2013CV00130 * * *.

{¶19} “* * *

{¶20} “4. Except as set forth in paragraph 1 above, Dollar Bank’s acceptance of the \$100,000 check shall not constitute a waiver or release of any of Dollar Bank’s rights and/or claims against Mr. Telerico and/or his affiliates, including, without limitation, those provided for under the loan documents and all pending and future litigation.

{¶21} “Please confirm your and Mr. Telerico’s joint consent to the foregoing in a return email by the close of business tomorrow (September 10, 2013). * * *” (Emphasis sic).

{¶22} In response, on September 10, 2013, appellants’ counsel, Attorney Law, sent an email to Dollar Bank’s counsel, Attorney Wasserman, stating the following:

{¶23} “Lou [Telerico] accepts terms outlined in Steve’s [Wasserman] e-mail yesterday.”

{¶24} Thus, the \$100,000 payment made to Dollar Bank was solely and exclusively to settle Dollar Bank’s attachment proceeding related to Mr. Telerico’s personal property in the companion case, not the case at bar. Mr. Telerico, by and through his attorney, accepted the terms outlined in Dollar Bank’s foregoing email. The

\$100,000 payment did not cure appellants' default in any manner under the note and mortgage at issue.

{¶25} Appellants further contend the trial court should have considered purchase contracts related to Dollar Bank's collateral. However, the purchase contracts were not part of the record before the trial court. Appellants only submitted the contracts in the subsequent bankruptcy proceeding which were rejected by the bankruptcy judge. Because the purchase contracts were not properly in evidence before the trial court, this court cannot consider them. *Jones v. Hunter*, 11th Dist. Portage No. 2008-P-0015, 2009-Ohio-917, ¶13 (holding that we are unable to consider evidence that was not before the trial court judge when his or her decision was rendered. "Appellate Rule 12(A)(1)(b) provides that a court of appeals is to '(d)etermine the appeal on its merits on (* * *) the record on appeal under App.R. 9.' See *Napper v. Napper*, 3rd Dist. No. 1-02-82, 2003-Ohio-2719, at ¶5 ('an appellate court's review is strictly limited to the record that was before the trial court, no more and no less')[.]"

{¶26} As a means of trying to avoid summary judgment, appellants cite in their appellate brief to this court's decision in *Chase Home Fin., LLC v. Smith*, 11th Dist. Portage No. 2007-P-0097, 2008-Ohio-5451, in which we reversed and remanded the judgment of the trial court. Appellants' reliance on *Smith*, however, is misplaced as that case is clearly distinguishable from the case at bar.

{¶27} In *Smith*, the borrower tendered payment to the bank of the full principal amount owed. *Id.* at ¶3. The bank rejected the payment because it was insufficient to cure the borrower's defaults as interest and other fees had accrued. *Id.* at ¶3, 17. This court held that a genuine issue of material fact existed due to the fact that the borrower

tendered the entire principal payment and the bank rejected it. *Id.* at ¶19. This court found that the borrower substantially performed under the subject contract by attempting to pay the principal balance. *Id.* at ¶22. Based on the facts in that case, this court determined that the Bank should not have rejected the borrower's payment and had a duty to mitigate its damages. *Id.*

{¶28} Unlike *Smith*, in the case sub judice, appellants did not offer payment in full and Dollar Bank refused to accept it. Rather, appellants made a \$100,000 payment to Dollar Bank and Dollar Bank accepted it. However, as stated, that payment was solely and exclusively to settle Dollar Bank's attachment proceeding related to Mr. Telerico's personal property in the companion case, Case No. 2013 CV 00130, not the case at bar, Case No. 2013 CV 00131.

{¶29} For the foregoing reasons, appellants' sole assignment of error is not well-taken. The judgment of the Portage County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, P.J.,

TIMOTHY P. CANNON, J.,

concur.