

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
PREBLE COUNTY

PNC MORTGAGE, Division of PNC Bank, :
National Association, :

Plaintiff-Appellee, :

CASE NO. CA2010-10-013

- vs - :

OPINION
10/31/2011

ERIC INNIS, et al., :

Defendants-Appellants. :

CIVIL APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 10 CV 028319

Lerner, Sampson & Rothfuss, Julia E. Steelman, Adam R. Fogelman, 120 East Fourth Street,
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Gray W. Bennett, Bennett Law Bldg., 200 West Main Street, Eaton, Ohio 45320, for
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PIPER, J.

{¶1} Defendants-appellants, Eric and Rhonda Innis, appeal the decision of the
Preble County Court of Common Pleas granting summary judgment in favor of plaintiff-
appellee, PNC Mortgage, a division of PNC Bank, National Association (PNC). We affirm the

decision of the trial court.

{¶2} Eric and his wife Rhonda acquired property in West Alexandria, Ohio, in 2006, obtained a loan from Franklin Financial for the purchase price, and gave Franklin Financial a mortgage on the note. In 2007, Eric refinanced with National City Mortgage and signed a note for \$164,000, but Rhonda did not sign the note. However, both Eric and Rhonda mortgaged the West Alexandria property in favor of National City Mortgage, who later merged with PNC.

{¶3} Payments were made according to the terms of the note for approximately two years before the Innises defaulted. PNC later filed a foreclosure action, claiming a default in the sum of \$159,107.77 plus interest, tax advances, and fees. PNC did not seek any personal judgment against Eric, as he had filed bankruptcy. The Innises filed an answer with the trial court, setting forth several defenses.

{¶4} PNC moved for summary judgment and the Innises filed a motion in opposition. The trial court granted PNC's motion for summary judgment and signed a Decree in Foreclosure. The Innises now appeal the decision of the trial court, raising the following assignment of error.

{¶5} "THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND DECREE IN FORECLOSURE."

{¶6} The Innises argue in their assignment of error that the trial court erred in granting summary judgment in favor of PNC, and raise several issues regarding the note and mortgage.

{¶7} This court's review of a trial court's ruling on a summary judgment motion is de novo. *Broadnax v. Greene Credit Serv.* (1997), 118 Ohio App.3d 881, 887. Civ.R. 56 sets forth the summary judgment standard and requires that (1) there be no genuine issues of material fact to be litigated; (2) the moving party is entitled to judgment as a matter of law;

and (3) reasonable minds can come to only one conclusion being adverse to the nonmoving party. *Slowey v. Midland Acres, Inc.*, Fayette App. No. CA2007-08-030, 2008-Ohio-3077, ¶8. The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶8} "Once the moving party's burden has been satisfied, the burden shifts to the non-moving party, as set forth in Civ.R. 56(E)." *Jackson v. Walker*, Summit App. No. 22996, 2006-Ohio-4351, ¶10. The nonmoving party "may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing the existence of a genuine triable issue." *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389. Not all arguable facts are material. A dispute of fact can be considered "material" only if it affects the outcome of the litigation. *Myers v. Jamar Enterprises* (Dec. 10, 2001), Clermont App. No. CA2001-06-056, 2001 WL 1567352. Not all disputes of fact create a genuine issue. Instead, a dispute of fact can be considered "genuine" if it is supported by substantial evidence that exceeds the allegations in the complaint. *Id.*

{¶9} After reviewing the record, PNC's motion for summary judgment and supporting exhibits and affidavit effectively established PNC's right to relief because of the default. The summary judgment burden therefore shifted to the Innises to demonstrate that genuine issues remained. In order to do so, the Innises raised several issues regarding the execution of the note and mortgage, as well as issues concerning supporting information PNC provided the trial court. The Innises now argue on appeal that the trial court erred in granting summary judgment because of the issues they raised.

{¶10} First, the Innises argue that the trial court could not have ruled on PNC's motion for summary judgment because PNC failed to provide the underlying note to the trial court. However, the record is clear that PNC attached the note to its motion for summary judgment.

The note was properly authenticated by PNC's affidavit in support of summary judgment because "a party may properly introduce evidence not specifically authorized by Civ.R. 56(C) by incorporating it by reference through a properly framed affidavit pursuant to Civ.R. 56(E)." *State ex rel. Varnau v. Wenninger*, Brown App. No. CA2009-02-010, 2011-Ohio-3904, ¶7.

{¶11} Second, the Innises assert that there are genuine issues of material fact regarding whether or not Rhonda executed the note. The record demonstrates that Rhonda did not sign the note, and the copy of the note attached to PNC's motion for summary judgment does not bear her signature. However, a spouse may mortgage his or her interest in the property as collateral in support of the other spouse's loan without ever signing the underlying note. See *SFJV 2005 v. Ream*, 187 Ohio App.3d 715, 2010-Ohio-1615.

{¶12} According to the Innises' answer to PNC's foreclosure action, Rhonda had an interest in the property as a joint tenant, so that she had a one-half interest in the property. For this reason, National City required Rhonda's signature on the mortgage in order to secure her interest in the property regardless of the fact that she did not procure the underlying loan or sign the note. However, by signing the mortgage to facilitate the loan, Rhonda pledged the interest she held in the property and was subject to foreclosure once Eric defaulted on the note. The fact that Rhonda did not sign the note is of no consequence to PNC's ability to foreclose on the property. See *SFJV 2005*, 2010-Ohio-1615.

{¶13} Third, the Innises argue that Rhonda's signature on the mortgage was obtained by National City through unclean hands and the signature on the mortgage was "perhaps altered in order to be attached to" PNC's pleadings.

{¶14} "For the doctrine of unclean hands to apply, the offending conduct must constitute reprehensible, grossly inequitable, or unconscionable conduct, rather than mere negligence, ignorance, or inappropriateness. * * * Furthermore, 'the unclean hands doctrine should not be imposed where a party has legal remedies available to address an opposing

party's asserted misconduct.'" *Deutsche Bank National Trust Co. v. Pevarski*, 187 Ohio App.3d 455, 2010-Ohio-785, ¶24, quoting *Safranek v. Safranek*, Cuyahoga App. No. 80413, 2002-Ohio-5066, ¶20.

{¶15} The Innises essentially argue that PNC had unclean hands because PNC represented to the trial court that Rhonda was bound by the mortgage even though the Innises have disputed the fact that Rhonda executed the mortgage. The Innises suggest that PNC "perhaps altered" the mortgage to include Rhonda's signature prior to attaching the mortgage to its summary judgment materials.

{¶16} The mortgage attached to PNC's motion for summary judgment contains Rhonda's signature next to Eric's on the signature page. The mortgage signature page contains two columns of signature lines, several labeled 'borrower,' and two labeled 'witnesses.' Eric signed his name on the first borrower line, and Rhonda signed to the left of his signature on one of the witness lines. However, the Innises do not argue that the mortgage was not properly executed because Rhonda signed on the witness line as opposed to one of the other borrower lines. Instead, the Innises rely on Eric's affidavit attached to the Innises' motion in opposition to PNC's motion for summary judgment to demonstrate that Rhonda did not know what she was signing when she signed the mortgage.

{¶17} In Eric's affidavit, he avers that he went to the closing at National City and signed several documents, including the mortgage, but that Rhonda did not go with him. Eric further stated that after the closing, he went to a sporting event, and upon returning home later that evening, Rhonda informed him that a National City representative came to their home and had her sign some documents. According to Eric's affidavit, Rhonda "did not know or understand what she was signing, she was simply doing what was ordered."

{¶18} While the Innises now attempt to involve several affirmative defenses, they did not plead duress, coercion, or fraud in their answer to PNC's complaint. Even if the Innises

referenced or insinuated that PNC somehow defrauded them by going out to the Innises' home when Eric was at the sporting event, their answer did not present any specific facts in accordance with Civ.R. 9(B), which requires that "the circumstances constituting fraud * * * shall be stated with particularity." See, also, *Paparodis v. Snively*, Columbiana App. No. 06-CO-5, 2007-Ohio-6910.

{¶19} Furthermore, the Innises failed to present any evidence to substantiate Eric's self-serving affidavit. Rhonda did not offer her own affidavit, and we cannot rely on Eric's to set forth Rhonda's thoughts and beliefs at the time she signed the mortgage. As this court stated in *State ex rel. Varnau v. Wenninger*, 2011-Ohio-3904 at ¶8, "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matter stated in the affidavit." "Personal knowledge is defined as 'knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay.'" *Id.*, quoting *Re v. Kessinger*, Butler App. No. CA2007-02-044, 2008-Ohio-167, ¶32.

{¶20} Moreover, a claim that Rhonda did not know what she signed is not the same as the Innises' claim that PNC had unclean hands because Rhonda had never executed the mortgage. Nor is it the same as the Innises' insinuation that PNC altered the mortgage before attaching it to its motion for summary judgment. Eric's affidavit failed to set forth specific facts showing the existence of a genuine triable issue, and he cannot rely on his own bare allegations that Rhonda did not know what she was signing.

{¶21} Lastly, the Innises argue that PNC failed to properly identify the relevant documents used in support of its motion for summary judgment. The Innises assert that PNC made reference to instrument numbers that do not exist and have never been used in the Preble County Recorder's Office. However, this argument fails to take into consideration that the mortgage is valid between the two parties, and the purpose of recordation practices is to

place third parties on notice that the mortgage exists and to establish lien priority. See *Sidle v. Maxwell* (1854), 4 Ohio St. 236.

{¶22} The trial court stated in its judgment entry that it found that the note was secured by the mortgage and that the mortgage is a valid first lien on the premises as described in Exhibit A to PNC's complaint in foreclosure. Therefore the trial court identified the proper documents necessary for it to rule on PNC's motion for summary judgment, and the Innises have failed to raise any genuine issues of material fact regarding the lack of proper documents being identified.

{¶23} Having found that there are no genuine issues of material fact to be litigated, PNC was entitled to judgment as a matter of law. The Innises' single assignment of error is overruled.

{¶24} gment affirmed.

HENDRICKSON, P.J., and HUTZEL, J., concur.