[Cite as *Huntington Natl. Bank v. Payson*, 2015-Ohio-1976.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

THE HUNTINGTON NATIONAL BANK	:	
	:	Appellate Case No. 26396
Plaintiff-Appellee	:	
	:	Trial Court Case No. 13-CV-1000
v.	:	
	:	(Civil Appeal from
SUSAN L. PAYSON, et al.	:	Common Pleas Court)
	:	
Defendants-Appellants	:	
	:	

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O P I N I O N

Rendered on the 22nd day of May, 2015.

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FAIN, J.

{¶ 1} Defendants-appellants Susan Payson and Daniel Hennessey appeal from a

judgment of foreclosure rendered in favor of plaintiff-appellee The Huntington National Bank. Payson and Hennessey raise eleven assignments of error, contending that the trial court erred by failing to rule on three motions and by failing to grant their motion to dismiss and motion to strike. Payson and Hennessey argue that the court erred in rendering summary judgment for Huntington, because genuine issues of material fact remain and the evidence submitted is insufficient to prove the essential elements of the cause of action.

{¶ 2} We conclude that the trial court erred by rendering summary judgment, without addressing whether the bank met its burden of proving its compliance with contractual conditions precedent, which should have been recognized as an affirmative defense when the trial court found that the allegation that the conditions precedent were not met was not properly denominated as a counterclaim. The court did not abuse its discretion by refusing to conduct a hearing on the motion to enforce settlement prior to granting the final decree of foreclosure or by failing to rule on the motion to vacate judgment or the motion to stay. Upon remand, the court should allow the parties to conduct additional discovery.

I. The Course of Proceedings

{¶ 3} In July 2005, Payson and Hennessy executed a personal loan agreement with Huntington Bank, which was secured by a mortgage on rental property owned by Payson and Hennessey. The Bank brought this action to enforce the note and foreclose on the mortgage. Payson and Hennessey moved to dismiss, pursuant to Civ. R. 12(B)(4) and (5), arguing that service was improperly obtained by delivery of the summons and

complaint to a business address, rather than a personal address. The trial court overruled the motion to dismiss, concluding that the civil rules do not prohibit service at a business address, and that Payson and Hennessey were properly served by regular mail, after certified mail to a post office box was returned as unclaimed.

{¶ 4} The original complaint listed "John Doe" as the occupant of the premises, which was later discovered to be a tenant by the name of Joanna Lewis, when she was personally served by process server. Huntington Bank moved to amend the complaint to name Joanna Lewis, as a party in place of "John Doe". An entry was filed granting the motion to amend "by interlineation," but an amended complaint specifically identifying Joanna Lewis as a named party was never filed or served on Joanna Lewis in accordance with Civ. R. 15. The record is devoid of any motion for default judgment against Joanna Lewis, or any entry granting a default judgment against her. The tenant, Joanna Lewis, was not addressed in the motion for summary judgment or in the decision granting the motion for summary judgment. The final decree of foreclosure states that "Lewis is in default of Answer, Motion or other pleading and has by reason thereof confessed the allegations in the Complaint for Money and Foreclosure to be true, and is forever barred from asserting any right, title or interest in the premises described herein." Dkt at 5.

{¶ 5} Payson and Hennessey filed an answer and counterclaim. Huntington Bank moved to dismiss the counterclaim. In October 2013, the trial court issued a final pretrial order setting forth a deadline of February 10, 2014 for all discovery, a deadline of December 10, 2013 for filing a summary judgment motion, and a trial date of March 10, 2014. Payson and Hennessey moved to strike the motion to dismiss. As counterclaims, Payson and Hennessey raised two causes of action, both alleging that Huntington Bank

breached the contract by failing to complete steps set forth in the mortgage contract, which constituted conditions precedent to filing suit. The answer also included an affirmative defense that stated as the twelfth defense: "The Plaintiff failed to satisfy one or more prerequisites or preconditions for the commencement of suit against the answering Defendants." The First Cause of Action in the Counterclaim states as follows:

> 4. These Defendants/Counter-Plaintiffs entered into a contract with note and mortgage with a financing entity who is allegedly Huntington National Bank, but in the alternative may be another.
>
> 5. The contract required the financing entity to make certain notification actions to Defendants/Counter-Plaintiffs, as preconditions to any action on the contract itself.
>
> 6. These precondition notification actions included notice if the note or mortgage was ever assigned to someone else by the initial financing entity.
>
> 7. No notice of any assignment was ever made or conveyed to these Defendants/Counter-Plaintiffs in breach of the contract.
>
> 8. Before a Foreclosure action could be stated against these Defendants/Counter-Plaintiffs, the mortgage and note holder was required to submit to these Defendants/Counter-Plaintiffs various advance notices of intended actions to be taken, to enable them to take corrective action to preclude foreclosure.
>
> 9. No such communications of any of the required notices was [sic] ever given to these Defendants/Counter-Plaintiffs in breach of contract.
>
> 10. Because various required notices were not given to the

> Defendants/Counter-Plaintiffs, which were preconditions of any anticipated further action against the Defendants/Counter-Plaintiffs, these Plaintiff/Counter-Defendants [sic] breached the contract.
>
> 11. As a result of these Plaintiff/Counter-Defendants' breach of contract, these Defendants/Counter-Plaintiffs have been damaged and thus had no further duty to perform under the contract themselves.

CA 26193 Dkt. at 79.

{¶ 6} Huntington Bank moved for summary judgment on December 11, 2013. The bank's motion was supported by the affidavit of Gene Maki, but no supporting documentary evidence was attached to the affidavit. The Maki affidavit averred as follows:

> 1. I am an authorized Signer of The Huntington National Bank, Plaintiff, and as such I am authorized to make this affidavit. I have personal knowledge of the facts and matters stated herein, and am over the age of 18.
>
> 2. In the regular performance of my job functions, I am familiar with business records maintained by The Huntington National Bank for the purpose of servicing mortgage loans. These records (which include data compilations, electronically imaged documents and others) are made or received and retained at or near the time by, or from information provided by persons with knowledge of the activity and transactions reflected in such records, and are made and kept in the course of business activity regularly conducted by The Huntington National Bank. In connection with making this

affidavit, I have personally examined the business records relating to the account referred to in this affidavit.

3. The Huntington National Bank is the holder of a certain Promissory Note dated July 20, 2005, executed by Susan L. Payson and Dan Hennessey aka G. Daniel Hennessey in the original amount of $75,625.00 with interest at the fixed rate of 6.25%.

4. The Huntington National Bank is the mortgagee of a Mortgage which was executed by Susan L. Payson and Dan Hennessey aka G. Daniel Hennessey on July 20, 2005 and was delivered as security for said promissory note.

5. According to The Huntington National Bank's business records, payments have not been made as required by said Promissory Note. Therefore, said Promissory note is in default. As a result of said default, the balance due thereon has been accelerated and said default has not been cured.

6. The principal balance due on said loan is $70,358.70. Interest due on said principal balance at 6.25% per annum from October 3, 2012 or as otherwise adjusted pursuant to the terms of the Promissory Note.

CA 26193 Dkt. at 92.

{¶ 7} Payson and Hennessey moved to strike the bank's summary judgment motion as untimely, and moved to stay the summary judgment proceedings until the motion to dismiss was decided and discovery was complete. Payson and Hennessey moved to compel discovery and requested sanctions. Payson and Hennessey contend

that Huntington never responded to their October 3rd request to depose the corporate representative or their November 7th request for interrogatories and request for production of documents, or their informal attempt on January 6th to schedule the deposition of Maki, the "authorized signer" for the bank who signed the affidavit in support of summary judgment. In response, Huntington Bank argued that the motion to compel should be denied, because counsel for Defendants had not made reasonable efforts to informally resolve the discovery disputes. Both parties requested a hearing on the discovery dispute, but the record does not reflect that any hearing was held by the trial court prior to its decision of January 27, 2014, overruling the motion to compel and overruling the request to stay the summary judgment proceedings.

{¶ 8} On January 17, 2014, the court sustained the motion to dismiss the counterclaim, and overruled the defendants' motion to strike and motion to stay the summary judgment proceedings, but gave the defendants fourteen days to file their response to the pending motion for summary judgment. Payson and Hennessey filed a timely response to the summary judgment motion, which was supported by the affidavit of Susan Payson. In her affidavit, Payson avers as follows:

> 3. I have firsthand knowledge of all the matters presented in this affidavit.
>
> 4. I have reviewed my real estate documents related to this property in detail and have possession of those documents and my husband and I are the custodians of those real estate records, and in reliance on that review of those records, and my directly witnessing events related to the Note and Mortgage and other documents and events related to our purchase of this property, offer the following testimony:

5. We purchased 5711 Pennywell Drive, Dayton, Ohio as a real estate investment, intending to rent the property as a source of income.

6. In July of 2005, we entered into a financing agreement with Huntington National Bank and executed a Note. In July of 2005, we entered into a financing agreement with Huntington National Bank NC1N04 and executed a mortgage. We have not entered into any financing or other real estate arrangement with Huntington National Bank NC2W42, the Plaintiff in this lawsuit.

7. We have kept our agreement with Huntington National Bank and Huntington National Bank NC1N04 and have made our mortgage payments.

8. I have never been notified of any assignment or transfer of the Note and Mortgage to any other party or entity and have never been notified of any merger of Huntington National Bank or Huntington National Bank NC1N04 with Huntington National Bank NC2W42 or with anyone else.

9. Neither I nor my husband was ever notified that we were in default of any mortgage and were not given any notice of acceleration. I reviewed the records of Plaintiff supplied to my attorney after the summary judgment motion was filed, and could find no evidence that Plaintiff has any record whatsoever, by certified mail or personal service or other means, that either I or my husband ever received notification of default in this matter. My attorney specifically requested documentation from Plaintiff in our First Documents Request to prove that we were served with such notification. My

review of the records provided clearly discloses there is no proof in Plaintiff's possession or control.

10. Neither I nor my husband are in default of the note or mortgage in this case related to the 5711 Pennywell Drive, Dayton, Ohio property.

11. At no time did we sign any document making Huntington National Bank NC2W42 the note holder or the mortgage holder of this property.

12. At the closing on this Note and Mortgage my husband and I were not given any notice that Huntington National Bank NC2W42 would be involved with us in this transaction.

13. After searching my real estate records and searching my memory I can state that I have not made any financial arrangements with Huntington National Bank NC2W42 related to this property. My only financial arrangement related to this property was with Huntington National Bank and Huntington National Bank NC1N04.

14. Upon checking bank records, I state that I paid on my mortgage as required.

15. Upon review of my records, I have determined that I have been overcharged for late fees and have not been correctly credited for payments on account that I have made. Consequently, the $70,358.70 claimed as the balance on my mortgage is incorrect and I deny owing that amount on the mortgage.

16. I have not been served with any notice of default by the Plaintiff, and the Plaintiff has my correct residential address.

17. I deny that I defaulted on the note and mortgage in this case.

CA 26193 Dkt. at 106.

{¶ 9} Payson's affidavit in response to the motion for summary judgment failed to contain any attachments to support her averments that she had made every payment and was not in default of the loan. Huntington National Bank did not file a response to Payson's affidavit, so no documents were submitted in evidence to rebut the averments made in Payson's affidavit that Payson and Hennessey were not in default and were not served with a notice of acceleration or notice of default. Also, Huntington Bank did not respond or provide any documentary evidence to explain the discrepancy between the NC1N04 or NC2W42 in the address listed in the caption of the complaint and the address listed in the first paragraph of the mortgage, attached to the complaint as Ex. B, but not attached or authenticated by affidavit in their motion for summary judgment.

{¶ 10} On March 27, 2014 the trial court granted the motion for summary judgment in favor of Huntington Bank, finding no genuine issue of fact that Huntington Bank is the holder of the note and mortgage executed by Payson and Hennessey. The trial court acknowledged that neither the note nor the mortgage was authenticated by admission in the answer or by the affidavit filed in support of the bank's summary judgment motion, but found these deficiencies harmless because Payson admitted in her affidavit that she did sign a note and mortgage with Huntington Bank. Although the trial court found the Maki affidavit admissible, the decision made no findings of fact as to whether Payson and Hennessey were in default, or the amount in default. In the summary judgment decision, the trial court noted that the complaint alleges a balance owed of $75,625.00, but no factual finding was made that the Maki affidavit establishes a

balance of $70,358.70, plus interest of 6.25% per annum from October 3, 2012. Neither the Maki affidavit, nor the summary judgment decision, discusses the contractual authority or evidentiary support for any additional sums due for late charges, insurance, property protection fees, or any other fees or costs advanced by the mortgagor during the foreclosure process.

{¶ 11} On August 16, 2014, Payson and Hennessey moved to enforce settlement and requested a hearing. Counsel for Payson and Hennessey presented evidence that during the foreclosure process, Huntington Bank sent Payson and Hennessey two different "Delinquency Notices" informing them on January 24, 2014 that they could bring their account current with a payment of $8484.92, and on April 23, 2014 that they could bring their account current with a payment of $3635.73. Dkt. at 4. Huntington Bank did not reply to the motion to explain how these notices related to the pending foreclosure action. The trial court did not rule on this motion. On September 4, 2014, Payson and Hennessey moved to vacate judgment and for a stay of execution, raising all the same issues raised in this appeal. Huntington Bank did not reply to the motion, which was not ruled on by the trial court.

{¶ 12} Neither the summary judgment decision nor any other motion or ruling addresses the rights of the tenant, Joanna Lewis, pursuant to the federally mandated PFTA, Protecting Tenants at Foreclosure Act,[1] or the pending cross-claim of Tax Ease Ohio, LLC. On August 22, 2014, the final judgment entry and decree in foreclosure was entered specifically acknowledging that Tax Ease Ohio, LLC had filed an answer and

[1] Protecting Tenants at Foreclosure Act, 12 U.S.C 5201, was in effect at the time the decree was issued and provided the tenant with a continuing possessory interest in the property.

crossclaim, but the amount of its claim or the priority of its lien was not specified. The foreclosure decree declares that the tenant, Joanna Lewis, was properly served and as a result of her default of answer, she was forever barred from asserting any right, title or interest in the premises. The decree declares that Payson and Hennessey did execute the note and mortgage attached to the complaint and that they owe the sum of $70,358.70, plus 6.25% per annum from September 3, 2012, plus late charges. The issue of late charges after acceleration was not raised in the motion for summary judgment, and the terms of the note do not refer to late charges after acceleration. The date of September 3, 2012, is not supported by any document in the record. The decree also refers to an attachment, Exhibit A, for a legal description of the property, but the record does not reflect that any document or exhibit was attached to the final entry.

II. Genuine Issues of Material Fact Preclude Summary Judgment

{¶ 13} In Payson and Hennessey's first five assignments of error, and in their eleventh assignment of error, they argue that summary judgment was improperly rendered, because genuine issues of material exist as to: 1) whether Plaintiff is the real party in interest and had standing to file the action, 2) whether Plaintiff is the holder of the note upon which judgment was sought, 3) whether the Plaintiff is the successor in interest to the original payee of the note and mortgage, 4) whether Plaintiff complied with conditions precedent required by the terms of the mortgage, 5) whether defendants were in default, and 6) the balance due.

{¶ 14} 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 nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc*., 127 Ohio St.3d 54, 2010-Ohio-4505, 936 N.E.2d 481, ¶ 29; *Sinnott v. Aqua–Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217, ¶ 29. When reviewing a summary judgment, an appellate court conducts a de novo review. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). "De Novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. of Edn*., 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997), citing *Dupler v. Mansfield Journal Co*., 64 Ohio St.2d 116, 119–20, 413 N.E.2d 1187 (1980). Therefore, the trial court's decision is not granted deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs*., 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

{¶ 15} "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 mortgagor is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due." *JPMorgan Chase Bank, N.A. v. Chenoweth*, 2d Dist. Montgomery No. 25923, 2014-Ohio-3507, ¶ 20; *Nationstar Mortgage, LLC v West*, Montgomery Nos. 25813, 25837, 2014-Ohio-735, ¶ 16; *JPMorgan Chase Bank, N.A. v. Massey*, 2d Dist. Montgomery No. 25459, ¶ 20.

{¶ 16} The moving party bears the initial burden to demonstrate the absence of a genuine issue of material fact for each of the elements of its claim. *Mitseff v. Wheeler,* 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988); *Wells Fargo Bank, N.A. v. Goebel*, 2d Dist. Montgomery No. 26244, 2015-Ohio-38, ¶ 16. Only if this burden is met, the non-moving party then has the burden of providing sufficient evidence to prove that there are material issues of fact that are genuinely contested. *Goebel* at ¶ 17. "Throughout, the evidence must be construed in favor of the nonmoving party." *Id.* In a foreclosure proceeding, when the defendant submits an affidavit averring that he or she has made regular payments and is not in default, the court must view this evidence in the light most favorable to the defendant and find that there is a genuine issue of material fact as to whether he or she is in default. *RBS Citizens, N.A. v. Vernyi*, 6th Dist. Summit No. 26046, 2012-Ohio-2178, ¶ 13.

{¶ 17} We first address the issue of whether the motion for summary judgment should have been denied on the basis that a genuine issue of fact exists as to Huntington Bank's compliance with the conditions precedent set forth in the note and mortgage. In its initial complaint, Huntington Bank alleged, in paragraph 4, that "Plaintiff has fulfilled all applicable conditions precedent." The note, attached to the complaint, specifically provides for the right of acceleration upon default "after giving you notice of default and right to cure to the extent required by law." Similarly, the mortgage agreement provides that upon breach or default, "following any notice and/or the expiration of any time period required by law," the mortgagee may accelerate all amounts due and foreclose the mortgage by judicial proceedings. In their answer, Payson and Hennessey specifically deny the allegations in paragraph 4 of the complaint, and raise the bank's failure to

comply with conditions precedent as both a defense and a counterclaim. In their affidavit, in response to the summary judgment motion, Payson and Hennessey specifically deny receiving any notice of acceleration or notice of default before the foreclosure action was commenced.

{¶ 18} Regardless whether the conditions precedent issue was properly designated in the answer and counterclaim, which we discuss below, the plaintiff in a foreclosure action must prove that all conditions precedent have been met in order to meet its burden of proof for summary judgment. *JPMorgan Chase Bank, N.A. v. Chenoweth*, 2d Dist. Montgomery No. 25923, 2014-Ohio-3507, ¶ 20; *Nationstar Mortgage, LLC v West*, 2d. Dist. Montgomery Nos. 25813, 25837, 2014-Ohio-735, ¶ 16; *JPMorgan Chase Bank, N.A. v. Massey*, 2d Dist. Montgomery No. 25459, 2013-Ohio-5620, ¶ 20. Huntington Bank did not address any conditions precedent in its motion for summary judgment or its supporting affidavit.

{¶ 19} Huntington Bank argues that the issue of whether it met conditions precedent is not a material issue and needs not be addressed in summary judgment. Huntington relies on the trial court's ruling dismissing the counterclaim, which alleged a breach of contract based on its non-compliance with conditions precedent. We agree that any unmet conditions precedent must be specifically identified to constitute a valid defense in an answer, as required by Civ. R. 9(C). *U.S. Bank v. Stanze*, 2d Dist. Montgomery No. 25554, 2013-Ohio-2474, ¶13-18. However, the trial court failed to consider Civ. R. 8(C) which provides, "when a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, *if justice so requires***,** shall treat the pleading as if there had been a proper designation." (Emphasis added.) As

we have previously discussed, with respect to conditions precedent to foreclosure, "actions in foreclosure arise in equity" and "[w]hen a party raises an equitable defense, it is the responsibility of the court to weigh the equitable considerations." *Wells Fargo Bank, N.A. v. Goebel,* 2014-Ohio-472, 6 N.E.3d 1220, ¶ 22-23 (2d Dist.). The well-established maxim that "equity regards substance rather than form" also directs the court to address the equitable defenses specifically raised in an answer to a foreclosure complaint regardless of the form in which they are presented. "The eyes of the court may not be closed by mere technical adherence to strict legal procedure." 41 Ohio Jur. 3d Equity § 58.

{¶ 20} We conclude that in a foreclosure proceeding justice and equity requires that all defenses sufficiently pled should be considered. In the answer, the specificity of the conditions precedent defense was sufficient to meet the requirements of Civ. R. 9(C); the only problem being that the defense was set forth in the portion of the answer with a designation of counterclaim. Regardless of how the defense was titled, the specificity of the conditions precedent defense put the bank on notice of the defense, and should not have been considered waived or admitted. Accordingly, Huntington Bank was required to establish that it met all conditions precedent as an essential element of its claim before summary judgment could properly be rendered.

{¶ 21} Payson and Hennessey also argue that summary judgment should not have been granted because other genuine issues of fact remain unresolved, including whether Huntington Bank was the holder of the note, with standing to pursue foreclosure. Payson and Hennessey also point to a factual dispute over a numerical difference in the address for Huntington Bank from the documents attached to the complaint and the

caption of the complaint. The affidavit of Payson also disputes that they were in default of payment and the balance due. As we discuss below, these are factual issues that are appropriate for further discovery.

{¶ 22} We conclude that Huntington Bank failed to meet its burden of proof to establish that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law. Thus, the first, second, third, fourth, fifth and eleventh assignment of errors are sustained.

II. The Trial Court Was Not Required to Hold a Hearing on the Motion to Enforce Settlement

{¶ 23} For their Sixth Assignment of Error, Payson and Hennessey allege as follows:

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO CONDUCT AN EVIDENTIARY HEARING ON DEFENDANTS' MOTION TO ENFORCE SETTLEMENT AGREEMENT AND REQUEST FOR HEARING

{¶ 24} When a settlement agreement is extrajudicial, it may be enforced only if a binding contract exists. *Hamlin v. Hamlin,* 2d Dist. Darke No. 1629, 2004-Ohio-2742, ¶ 21. We review the trial court's decision to grant or deny a motion to enforce a settlement agreement for an abuse of discretion. *Apple v. Hyundai Motor Corp.,* 2d Dist. Montgomery No. 23218, 2010-Ohio-949, ¶ 11.

{¶ 25} The communications directed by counsel for Payson and Hennessey indicated that he expected plaintiff's counsel to transmit a proposed settlement

agreement. Dkt. at 4, Payson affidavit ¶ 6. The affidavit further acknowledges that the only written reply from Huntington's counsel denied the existence of any settlement. *Id.* at ¶ 9. The trial court could have reasonably concluded that the parties had not come to an agreement. We cannot find that a trial court abuses its discretion by not holding a hearing when a motion lacks sufficient merit to warrant a hearing. *Seitz v. Harvey*, 2d Dist. Montgomery No. 25867, 2015-Ohio-122, ¶ 61.

IV. The Trial Court Did Not Have Jurisdiction to Rule on the Motion to Vacate Judgment

{¶ 26} For their Seventh Assignment of Error, Payson and Hennessey allege as follows:

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY REFUSING TO RULE ON DEFENDANTS' MOTION TO VACATE JUDGMENT AND MOTION FOR STAY OF EXECUTION.

{¶ 27} Payson and Hennessey moved to vacate judgment two weeks after the trial court entered judgment. Two weeks after that, Payson and Hennessey filed this appeal. "Absent a remand from the appellate court, an appeal divests trial courts of jurisdiction to consider Civ.R. 60(B) motions for relief from judgment." See *Howard v. Catholic Social Servs. of Cuyahoga Cty., Inc.,* 70 Ohio St.3d 141, 147, 1994-Ohio-219, 637 N.E.3d 890, citing *State, ex rel. East Mfg. Corp. v. Ohio Civ. Rights Comm.* (1992), 63 Ohio St.3d 179, 181, 586 N.E.2d 105. Once a case has been appealed, " the trial court is divested of jurisdiction except 'over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment, such as the collateral issues

like contempt * * *.' " *State ex rel. State Fire Marshall v. Curl,* 87 Ohio St.3d 568, 570, 2000-Ohio-248, 722 N.E.2d 73, quoting *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas, 55 Ohio St. 2d 94,* 97, 378 N.E.2d 162. See also, *Farm Credit Servs. of Mid-Am. v. Pertuset*, 2014-Ohio-1289, 10 N.E.3d 769, ¶ 12 (4th Dist.) *appeal not allowed sub nom. Farm Credit Servs. of Mid-Am. PCA v. Pertuset*, 140 Ohio St.3d 1497, 2014-Ohio-4845, 18 N.E.3d 1251 (2014).

{¶ 28} With respect to the motion to stay execution, Civ. R. 62 specifically provides that the trial court is not divested of jurisdiction to grant a stay of execution. Civ. R. 62(B) states that a stay upon appeal may be granted by posting a supersedeas bond at or after the time of filing the notice of appeal. Had the trial court stayed the judgment, the stay would have been in effect during the pendency of this appeal. With our judgment herein, this appeal is no longer pending. Therefore, the issue of the stay is moot. The seventh assignment of error is overruled.

V. Payson and Hennessey Were Properly Served

{¶ 29} For their Eighth Assignment of Error, Payson and Hennessey allege as follows:

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY OVERRULING DEFENDANT'S MOTION TO DISMISS COMPLAINT; THUS NEVER ATTAINING IN PERSONAM JURISDICTION; MAKING ALL SUBSEQUENT DECISIONS VOID AB INITIO.

{¶ 30} The basis of the motion to dismiss was Payson and Hennessey's

argument that service was not perfected on them, because service was obtained by mailing the complaint and summons to a business address instead of a residential address. Civ. R. 4.1, which specifies acceptable methods of service, does not require that service only be made at the residence of an individual. Payson and Hennessey do not deny that the post office box where the complaint and summons was delivered is assigned to them and is used for business purposes. Although they claim that they only occasionally pick up the mail at their post office box, they do not claim that they never receive mail at that address. In fact, they specifically admit that the post office box is regularly used for correspondence and billing related to their rental property that is the subject of the foreclosure.

{¶ 31} In *Bell v. Midwestern Educational Services, Inc*., 89 Ohio App. 3d 193, 624 N.E. 2d 196 (2d. Dist 1983), we held that "certified mail service sent to a business address can comport with due process if the circumstances are such that successful notification could reasonably be anticipated." *Id*. at 199. We also noted "that the determination by the trial court of the question of sufficiency of service of process is a matter in its sound discretion." *Id.* at 203. In light of the fact that Payson and Hennessey admitted that they used the post office box for correspondence regarding the rental property, the trial court properly concluded that successful notification of service could reasonably be anticipated at the address where they choose to receive mail regarding the property.

{¶ 32} We conclude that the trial court did not abuse its discretion in finding that service was proper at the business address set up for the rental property. Therefore, the Eighth Assignment of error is overruled.

VI. Any Alleged Error Caused by the Trial Court's Refusing to Extend Discovery Deadlines Is Moot

{¶ 33} For their Ninth Assignment of Error, Payson and Hennessey allege as follows:

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT OVERRULED DEFENDANTS' MOTION TO COMPEL AND FOR SANCTIONS, WHICH DENIED DEFENDANTS THE RIGHT TO DEPOSE PLAINTIFF'S CORPORATE REPRESENTATIVE, AS WELL AS ITS SUMMARY JUDGMENT AFFIANT, PRIOR TO HAVING TO RESPOND TO PLAINTIFF'S SUMMARY JUDGMENT MOTION.

{¶ 34} In light of our holding that summary judgment was improper, the issue of whether the trial court erred in refusing to allow additional time for discovery is now moot. Accordingly, the assignment of error alleging that the trial court abused its discretion in denying the motion to compel is overruled.

{¶ 35} However, we note that a trial court's discretion to control discovery "is not without limits." *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 592, 1996-Ohio-265, 664 N.E.2d 1272, 1283, (1996). "Although unusual, appellate courts will reverse a discovery order when the trial court has erroneously denied or limited discovery*** [t]hus, an appellate court will reverse the decision of a trial court that extinguishes a party's right to discovery if the trial court's decision is improvident and affects the discovering party's substantial rights." *Id.* (citations omitted). "Trial courts abuse their discretion when they reward a party willfully noncomplying with discovery by disposing of the case without ordering the noncomplying party to provide the requested discovery." *Biddle v. Biddle*, 2d

Dist. Clark No. 2000CA67, 2000 WL 1803573 (Dec. 8, 2000). Upon remand, the trial court must exercise its discretion when reopening the summary judgment process to allow both parties to discover and examine the documents relied upon by, but not attached to, their respective summary judgment pleadings. Payson and Hennessey are also entitled to depose the bank representatives to inquire about the purpose and intent of the delinquency notices, which contain conflicting balance due amounts. Payson and Hennessey are also entitled to depose the affidavit signer, to examine his connection to Huntington Bank and to Huntington's records. When an affiant refers to reviewing records as part of his job, but does not identify where he works, his job title, his position, the nature of his job, or any other facts to explain how or why he is familiar with how business records are recorded or maintained at the bank, why he has access to those records, or who authorized him to be the "authorized signer" of the affidavit, the opposing party should be given the opportunity to discover these details.

{¶ 36} Although the ninth assignment of error is overruled as moot, upon remand, new discovery deadlines should be established to allow both parties to complete discovery.

VII. The Trial Court Had Discretion to Control Filing Deadlines

{¶ 37} For their Tenth Assignment of Error, Payson and Hennessey allege as follows:

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN REFUSING TO STRIKE PLAINTIFF'S SUMMARY JUDGMENT MOTION; WHICH WAS NOT IN COMPLIANCE WITH THE COURT'S OCTOBER 7,

{¶ 38} Payson and Hennessey made their first appearance in the case, through counsel, when they filed their motion to dismiss on April 25, 2013. Huntington Bank began the discovery process a month later, when it filed its first set of interrogations on May 24, 2013. After the motion to dismiss was overruled, Payson and Hennessey filed a timely answer on September 22, 2013. The trial court conducted a scheduling conference on October 4, 2013, during which counsel for both parties were given input to establish discovery and motion deadlines. The pretrial order was issued on October 7, 2013, in which the court set a deadline for all discovery to be completed by February 10, 2014, and for any motions for summary judgment to be filed by December 10, 2013. Without leave of court, Huntington Bank filed its motion for summary judgment one day after the deadline established in the pretrial order.

{¶ 39} "Absent an abuse of discretion, a lower court's decision to accept such a motion -- even if the motion is untimely -- will not be reversed on appeal." *State ex rel. Avalon Precision Casting Co. v. Indus. Comm.*, 109 Ohio St.3d 237, 238, 2006-Ohio-2287, 846 N.E.2d 1245, ¶ 7 (2006).

{¶ 40} We conclude that the trial court did not abuse its discretion by allowing Huntington Bank to file its motion for summary judgment one day after the deadline established in the pretrial order. The tenth assignment of error is overruled.

VIII. Conclusion

{¶ 41} The first, second, third, fourth, fifth and eleventh assignment of errors having been sustained, and the sixth, seventh, eighth, ninth and tenth assignments of error having been overruled, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

. . . . . .

FROELICH, P.J., and HALL, J., concur.

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