[Cite as *LaSalle Bank v. Tirado,* 2009-Ohio-2589.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
LASALLE BANK, NA	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Julie A. Edwards, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-22
MARY TIRADO, ET AL	:	
	:	
Defendants-Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Delaware County Court of Common Pleas, Case No. 2008CVE 05-0752
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 2, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendants-Appellants
JULIA E. STEELMAN LERNER, SAMPSON & ROTHFUSS Box 5480 Cincinnati, OH 45201	BENJAMIN S. ZACKS JAMES R. BILLINGS ROBIN L. JINDRA 33 South James Road, 3rd Fl. Columbus, OH 43213

Gwin, P.J.

{¶1} Appellant Mary Tirado appeals the decision of the Court of Common Pleas, Delaware County, which granted summary judgment to appellee LaSalle Bank National Association in a foreclosure lawsuit. The relevant facts leading to this appeal are as follows.

{¶2} On November 28, 2006, appellant borrowed $284,000.00 from The CIT Group/Consumer Finance, Inc. to purchase real estate ("Property") located at 7520 Center Green Drive, Westerville, Ohio 43082. She signed a Balloon Note ("Note) in which she promised to repay the loan in monthly installments of $1,942.79 over the course of a thirty-year term. Appellant executed a Real Estate Mortgage ("Mortgage") on the Property to secure the loan. The Mortgage was recorded on December 14, 2006 in the Delaware County real estate records. The Mortgage was formally assigned to the appellee, LaSalle Bank, N.A. ("LaSalle"), by an Assignment of Mortgage recorded on June 5, 2008.

{¶3} Appellant defaulted on the loan on December 1, 2007. On May 30, 2008, appellee filed a Complaint in Foreclosure relating to the Property. The Delaware County Sheriff delivered a Summons and Complaint to appellant at the Property address on June 26, 2008.

{¶4} On July 16, 2008, LaSalle filed an Amended Complaint. Appellant was served with a copy of the Amended Complaint via regular mail. Appellant, through counsel, filed a Stipulated Extension of Time to Move or Plead on July 24, 2008. On August 22, 2008, appellant filed an Answer.

{¶5} On September 19, 2008, LaSalle filed a Motion for Summary Judgment and an Affidavit in Support of Summary Judgment. Appellant filed a Memorandum Contra Plaintiff's Motion for Summary Judgment along with her Affidavit in support of the Memorandum on October 16, 2008. On November 13, 2008, LaSalle filed its Reply in Support of Motion for Summary Judgment.

{¶6} On January 27, 2009, the Court granted LaSalle's Motion for Summary Judgment and entered a Judgment Entry Granting LaSalle's Motion for Summary Judgment and a decree in foreclosure.

{¶7} A Notice of Sheriff's Sale set for April 1, 2009, was issued on March 11, 2009. On March 25, 2009, LaSalle voluntarily withdrew the Property from the Sheriff's sale.

{¶8} Appellant filed a timely Notice of Appeal from the trial court's January 27, 2009 Judgment Entry, raising the following assignment of error:

{¶9} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT."

I. Standard of Review

{¶10} This case comes to us on the accelerated calendar. App. R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

{¶11} "(E) Determination and judgment on appeal. The appeal will be determined as provided by App. R. 11. 1. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form. The decision may be by judgment entry in which case it will not be published in any form."

{¶12} One of the important purposes of accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Assn.* (1983), 11 Ohio App.3d 158.

{¶13} Further, we note a reviewing court is not authorized to reverse a correct judgment merely because it was reached for the wrong reason. *State v.* Lozier (2004), 101 Ohio St.3d 161, 166, 2004-Ohio-732 at ¶46, 803 N.E.2d 770, 775. [Citing State *ex rel. McGinty v. Cleveland City School Dist. Bd. of Edn.* (1998), 81 Ohio St.3d 283, 290, 690 N.E.2d 1273]; *Helvering v. Gowranus* (1937), 302 U.S. 238, 245, 58 S.Ct. 154, 158.

Summary Judgment

{¶14} Our standard of review is de novo, and as an appellate court, we must stand in the shoes of the trial court and review summary judgment on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

{¶15} Civil Rule 56(C) states in part:

{¶16} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

{¶17} Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356.

{¶18} The party seeking summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence that demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280.

{¶19} This appeal shall be considered in accordance with the aforementioned rules.

I.

{¶20} Appellant's sole assignment of error relates to the propriety of the trial court's granting of summary judgment in favor of the appellee. Subsumed within this generalized objection are three challenges to the trial court's ruling. Specifically, appellant contends that: (1) she did not receive notice of her default or notice of acceleration; (2) the affidavit supporting LaSalle's motion for summary judgment was deficient; and (3) she was not served with the process.

{¶21} Appellant first argues the terms of the note and "Ohio and Federal law" require the lender to provide the borrower with notice of acceleration before the holder can seek to enforce the acceleration.

{¶22} The mortgage at issue provides:

{¶23} "DEFAULT - If I default in paying any part of the indebtedness secured by this Mortgage or if I default in any other way under this Mortgage or the Note which it secures, or if I default under the terms of any other mortgage covering the Premises, the entire unpaid balance and accrued an unpaid interest and any other amounts I then owe to you under this loan will become immediately due if you desire, *without your advising me....* [Emphasis added.]"

{¶24} Additionally, the Note contains the following waiver of any right to notice of default:

{¶25} "10. WAIVERS

{¶26} "I waive my rights to require you to do certain things. Those things are: (A) to demand payment of amounts due (known as "presentment"); (B) to give notice that amounts due have not been paid (known as "notice of dishonor"); (C) to obtain an official certificate of nonpayment (known as "protest") ...."

{¶27} In her Brief, appellant purports to quote certain provisions from the Note and Mortgage that do not actually appear in these instruments[1]. In overruling this argument, the trial court noted:

{¶28} "The Defendant relies upon Section 8 of the Note, which states:

{¶29} "'Unless applicable law requires a different method, any notice *that must be given to* me under this Note will be given by delivering it or by mailing it by first class mail to me * * *. (Emphasis added.) However, this section provides how notice, which must be provided to the Defendant, shall be provided…" (Judgment Entry Granting Plaintiff's Motion for Summary Judgment, filed January 27, 2009 at 3).

[1] We would caution appellant about misrepresenting the record.

{¶30} In the case at bar, no notice of default is required under the express conditions of either the note or the mortgage. See, e.g. *Columbus Countywide Development, Corp. v. Junior Village of Dublin, Inc.,* Franklin App. No. 03 AP-73, 2003-Ohio-5447 at ¶ 21; *National City Bank v. Camp*(1922), 9th App. Dist. No. 42, 1 Ohio L. Abs. 170.

{¶31} Appellant further contends that LaSalle's failure to provide notice is a violation of "applicable law"; however, appellant cites no statutes or regulations that she believes have been violated.

{¶32} Initially, we note that appellant has failed to properly brief these issues on appeal. App.R. 16(A)(7) states that an appellant shall include in her brief "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contention, with citations to the authorities, statutes and parts of the record on which appellant relies." In this case, appellant has wholly failed to cite any specific rule or regulation that she claims applies to the mortgage in this case and would require appellee to give appellant notice of default as a perquisite to acceleration.

{¶33} "It is the duty of the appellant, not this court, to demonstrate [her] assigned error through an argument that is supported by citations to legal authority and facts in the record." *State v. Taylor* (Feb. 9, 1999), 9th Dist. No. 2783-M, at *3. See, also, App.R. 16(A) (7). "It is not the function of this court to construct a foundation for [an appellant's] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal." *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60.

{¶34} Thus, appellant's objection based upon LaSalle's alleged noncompliance with "applicable law" fails to demonstrate that there is any issue of material fact in dispute.

{¶35} Appellee contends that it did in fact send a letter to appellant notifying her of the default and acceleration. In light of the fact that LaSalle was not required to give notice, appellant's argument that she did not receive the notice of default and acceleration sent on January 6, 2008 is not sufficient to raise any genuine issue of material fact.

{¶36} Next, appellant argues that she was never served with the Complaint or Amended Complaint. However, the record shows that on June 30, 2008, service of LaSalle's original complaint was accomplished by residence service.

{¶37} Civ.R. 5(A) provides, in relevant part, as follows: "[P]leadings asserting new or additional claims for relief or for additional damages against them shall be served upon them in the manner provided for service of summons in Civ. R. 4 through Civ. R. 4.6." See *Household Fin. Loan Corp. of Ohio v. Weisman* (1984), 15 Ohio App.3d 16, 17, 472 N.E.2d 65, 66.

{¶38} Here, LaSalle served appellant with its Amended Complaint by Regular U.S. Mail on July 14, 2008, as evidenced by the Certificate of Service attached to the Amended Complaint. Appellant and appellee entered into a stipulation to give appellant additional time to answer appellant's complaint. Counsel for appellant filed this stipulation on July 24, 2008, after appellant filed the amended complaint. Further, the Amended Complaint does not assert new or additional claims for relief or for additional

damages against appellant. Rather, the following language, which was not contained in the original complaint, was added at paragraph 8 of the Amended Complaint:

{¶39} "8. Plaintiff says that the new party defendant, John Doe, name unknown, spouse of Mary Tirado, may claim an interest in the subject property as the current spouse of the defendant-titleholder, Mary Tirado. Plaintiff states it cannot currently discover the real name of said defendant."

{¶40} In her response to appellee's motion for summary judgment, appellant acknowledged that appellant had filed an amended complaint. Her affidavit is simply a conclusory statement that "I have not been served with a copy of Plaintiff's Complaint, either by personal service, by certified mail or by regular U.S. mail."

{¶41} The First District Court of Appeals addressed this issue in *Ohio Civ. Rights Comm. v. First Am. Properties, Inc.* (1996), 113 Ohio App.3d 233, 239:

{¶42} "Proper service of process is an essential component in the acquisition of personal jurisdiction over a party. *State ex rel. Strothers v. Madden* (Oct. 22, 1998), Cuyahoga App. No. 74547, 1998 WL 741909, (citing *Holm v. Smilowitz* (1992), 83 Ohio App.3d 757, 615 N.E.2d 1047). There is a presumption of proper service when the civil rules governing service are followed, but this presumption is rebuttable by sufficient evidence. Id. (citing *In re Estate of Popp* (1994), 94 Ohio App.3d 640, 641 N.E .2d 739. If service of process has not been accomplished, or otherwise waived, any judgment rendered is void ab initio. *Westmoreland v. Valley Homes Mutual Housing Corp.* (1975), 42 Ohio St.2d 291, 293-294, 328 N.E.2d 406."

{¶43} "The courts are apparently split as to the effect of a defendant's affidavit that, although the Civil Rules were complied with, he or she never actually received

service of process. Some courts have relied on *Rafalski v. Oates* (1984), 17 Ohio App.3d 65, 17 OBR 120, 477 N.E.2d 1212, and *Grant v. Ivy* (1980), 69 Ohio App.2d 40, 23 O.O.3d 34, 429 N.E.2d 1188, for the proposition that an uncontradicted affidavit, alone, is sufficient to require a default judgment to be found void *ab initio.* E.g., *Nationwide Ins. Co. v. Mahn* (1987), 36 Ohio App.3d 251, 522 N.E.2d 1096. The rationale for this position is that there is a preference for cases to be decided on their merits when possible.

{¶44} "This court in *Sec. Natl. Bank & Trust Co. v. Murphy* (July 20, 1989), Clark App. No. 2552, unreported, 1989 WL 80954, and several other courts, however, have held that *Rafalski* and *Grant,* supra, are distinguishable from cases like the present one because, in *Rafalski* and *Grant,* service of process was sent to an address other than the defendant's. In *Murphy,* we distinguished instances where service was sent to an incorrect address, because, in that case, 'the fact that the service of process has been sent to an incorrect address is strong corroboration of the defendant's otherwise unsupported and obviously self-serving testimony that he did not receive service of process.'

{¶45} "We further concluded that when process was sent to a correct address, and the defendant has only his self-serving testimony that he did not receive service of process, the trial court is not required to find that the presumption of service of process has been satisfactorily rebutted. We determined that the trial court must still hold an evidentiary hearing on the matter, but the trial court may properly find that the defendant's testimony that he did not receive service of process is not credible.

{¶46} "The Sixth Appellate District reached the same result in *United Home Fed. v. Rhonehouse* (1991), 76 Ohio App.3d 115, 125, 601 N.E.2d 138, 144. In that case, the court determined that "[w]hile some cases hold that an uncontroverted affidavit is sufficient to require the default judgment to be found void *ab initio,* these holdings do not prohibit the trial court from assessing competency and credibility." With that in mind, the court affirmed the trial court's holding that the appellant's affidavit was not credible in light of the evidence.

{¶47} "Likewise, the Tenth Appellate District recently stated in *Taris v. Jordan* (Feb. 20, 1996), Franklin App. No. 95APE08-1075, unreported, 1996 WL 69717, that '[w]hile *Rafalski* suggests that an uncontroverted affidavit is in itself sufficient to require that a default judgment be found void *ab initio,* other decisions suggest that the trial court must assess competency and credibility of the affiant and determine whether sufficient evidence of non-service was presented.' The court went on to adopt the latter position. The court reasoned that it could take into account the credibility of the affiant and whether there was sufficient proof of non-service, because, otherwise, the only evidence that could contradict a defendant's affidavit would be proof of actual service, which would in effect eliminate all means of serving process other than personal service."

{¶48} See, also, *Graham Dealerships v. Chavero,* Richland App. No. 2007-CA-0098, 2008-Ohio-2966 at ¶ 10-12. ["We agree with the First District the burden rests with Appellee to overcome the presumption of service. The mere filing of a self-serving affidavit, without affording Appellant an opportunity to cross-examine the affiant, does not rebut the presumption."]

{¶49} In the case at bar, the trial court found,

{¶50} "The record indicates that on June 10, 2008, the Defendant spoke with a process server who was attempting to serve her and Defendant Rudy Tirado at 7520 Center Green Dr., Westerville, Ohio. At that time, the Defendant refused service. The record also establishes that on June 18, 2008, the Plaintiff requested the clerk of courts to issue service on the Defendant by certified mail, personal service and residence service. All attempts to serve the Defendant by certified mail were returned unclaimed. The record shows that on June 30, 2008, service was effectuated on the Defendant by residence service… Although the Defendant asserts that she never received a copy of either the Complaint or the Amended Complaint, the record reflects that she was properly served with the documents. Therefore, the Court finds that the Plaintiff has properly complied with both Civ.R. 4 and 5, and that the Defendant has been properly served with both the Complaint and the Amended Complaint."

{¶51} We agree with the trial court. The appellant asked for, and received additional time to respond to appellee's complaint. The appellant responded to the motion for summary judgment. A party cannot avoid summary judgment solely by submitting a self-serving affidavit containing nothing more than bare contradictions of the evidence offered by the moving party. *Bell v. Beightler,* Franklin App. No. 02AP-569, 2003-Ohio-88. Her response does not dispute the existence of the mortgage, the note or that she is in default.

{¶52} Accordingly, appellant has failed to raise a genuine issue of material fact concerning service of the original or the amended complaint.

{¶53} Finally, the appellant argues that the Affidavit offered by the appellee in support of its motion for summary judgment must fail because it is not based upon personal knowledge.

{¶54} "To qualify for admission under Rule 803(6), a business record must manifest four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, event or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the 'custodian' of the record or by some 'other qualified witness.' "*State v. Davis* (2008), 116 Ohio St.3d 404, 429, 880 N.E.2d 31, quoting Weissenberger, Ohio Evidence Treatise (2007) 600, Section 803.73.

{¶55} Ohio courts have defined "personal knowledge" as "knowledge gained through firsthand observation or experience, as distinguished from a belief based upon what someone else has said." *Zeedyk v. Agricultural Soc. of Defiance Cty.* Defiance App. No. 4-04-08, 2004-Ohio-6187, ¶ 16, quoting *Bonacorsi v. Wheeling & Lake Erie Railway Co.* (2002), 95 Ohio St.3d 314, 320, 767 N.E.2d; Black's Law Dictionary (7th Ed. Rev.1999) 875. Affidavits, which merely set forth legal conclusions or opinions without stating supporting facts, are insufficient to meet the requirements of Civ.R. 56(E). *Tolson v. Triangle Real Estate,* Franklin App.No. 03AP-715, 2004-Ohio-2640, ¶ 12. However, self-serving affidavits may be offered relative to a disputed fact, rather than a conclusion of law. *CitiMortgage, Inc. v. Ferguson,* Fairfield App. No.2006CA00051, 2008-Ohio-556, ¶ 29.

{¶56} Ohio law recognizes that personal knowledge may be inferred from the contents of an affidavit. See *Bush v. Dictaphone Corp.,* Franklin App. No. 00AP1117,

2003-Ohio-883, ¶ 73, citing *Beneficial Mortgage Co. v. Grover* (June 2, 1983), Seneca App. No. 13-82-41

{¶57} The affidavit attached to appellee's motion for summary judgment stated that the affiant is a Foreclosure Specialist for appellee, that in such position she has access to the accounts of the company, including appellant's, and that the note and mortgage attached to the complaint are accurate copies of the original instruments, which were compiled at or near the time of the occurrence by individuals with knowledge of the events. The affiant further noted that the records are kept in the ordinary course of appellee's business. Consequently, the affidavit was not in violation of the hearsay rules and was properly admitted. See Evid.R. 803(6); *Charter One Mort. Corp. v. Keselica*, Lorain App. No. 04CA008426, 2004-Ohio-4333 at ¶ 22.

{¶58} A review of the record shows appellant has not produced any contrary evidence in response to appellee's motion for summary judgment, other than her statement disputing the amount of the outstanding debt. Accordingly, appellant has not met the requirements of Civ.R. 56(E). *Fifth Third Bank v. Mufleh*, Lucas App. Nos. L-04-1188, L-04-1157, L-04-1262, 2005-Ohio-2351 at ¶ 18.

{¶59} The affidavit was properly admitted and considered by the trial court.

{¶60} We therefore find that summary judgment in favor of appellee was not erroneous under the facts and circumstances presented.

{¶61} Appellants' Sole Assignment of Error is overruled.

{¶62} For the reasons stated in the foregoing opinion, the decision of the Court of Common Pleas, Delaware County, Ohio, is hereby affirmed.

By Gwin, P.J.,

Edwards, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY

WSG:clw 0512

[Cite as *LaSalle Bank v. Tirado,* 2009-Ohio-2589.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

LASALLE BANK, NA	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MARY TIRADO, ET AL	:	
Defendant-Appellant	:	CASE NO. 2009-CA-22

For the reasons stated in our accompanying Memorandum-Opinion, the decision of the Court of Common Pleas, Delaware County, Ohio, is hereby affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY