[Cite as *BAC Home Loans Servicing, L.P. v. Peters*, 2010-Ohio-6464.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
BAC HOME LOANS SERVICING, L.P.	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
	:	Hon. Patricia A. Delaney, J.
Plaintiff-Appellee	:	
	:	
-vs-	:	Case No. 10-CA-000013
	:	
JERRY A. PETERS, ET AL	:	
	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Civil appeal from the Knox County Court of Common Pleas, Case No. 10FR10052
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 28, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
BRIAN L. BLY 24755 Chagrin Boulevard, Ste. 200 Cleveland, OH 441122	THOMAS J. CONKLE 4656 Executive Drive Columbus, OH 43220

Gwin, J.

{¶1} Defendants-appellants Jerry A. and Angela Peters appeal a summary judgment of the Court of Common Pleas of Knox County, Ohio, which entered a decree in foreclosure in favor of plaintiff-appellee BAC Home Loans Servicing, L.P. Appellants assign two errors to the trial court:

{¶2} "I. PLAINTIFF-APPELLEE, BAC HOME LOANS SERVICING, L.P. ("BAC"), SHOULD BE EQUITABLY ESTOPPED FROM OBTAINING AN ENTRY OF FORECLOSURE AGAINST THE DEFENDANTS/APPELLANTS, JERRY AND ANGELA PETERS, BASED ON THEIR PATTERN OF INCONSISTENT, CONFUSING, AND PEREMPTORY STATEMENTS REGARDING THE PETERS' LOAN AND SETTLING THE LAWSUIT, THEN SUBMITTING AN ENTRY OF JUDGMENT.

{¶3} "II. PLAINTIFF-APPELLEE BAC'S COUNSEL, ON NOTICE THAT DEFENDANTS' COUNSEL WAS OBTAINING AFFIDAVITS TO OPPOSE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, SUBMITTED A JUDGMENT ENTRY TO DEFENDANTS' COUNSEL, RECEIVED BY HIM ON MAY 17, 2010, OSTENSIBLY REQUESTING DEFENDANTS' COUNSEL'S APPROVAL. MEANWHILE, AN UNNAMED ATTORNEY SUBMITTED A JUDGMENT ENTRY TO THE COURT ON MAY 14, 2010. THE SIGNATURE BLOCK FOR DEFENDANTS' COUNSEL WAS STAMPED "SUBMITTED 5-14-2010". DEFENDANTS-APPELLANTS PLEAD THAT THIS COMMUNICATION WITH THE COURT, WITH THE STAMP "SUBMITTED", WHEN IN ACTUALITY DEFENDANTS' COUNSEL DID NOT RECEIVE IT UNTIL May 17, 2010 AND WAS GIVEN NO TIME TO REPLY OR STATE HIS OBJECTIONS, WHICH WERE KNOWN, WAS MISLEADING TO THE COURT."

{¶4} The record indicates appellee filed its complaint on January 26, 2010, alleging appellants had signed a promissory note and mortgage. Appellee alleged appellants were in default of payment. Appellants filed an answer on March 29, 2010, admitting appellee is the holder of the mortgage on their home secured by their promissory note, and admitting there are amounts due and owing on the note.

I & II

{¶5} Appellants asked this court to vacate the trial court's judgment entry in order to achieve a more equitable resolution. They assert appellee sent inconsistent communications through multiple channels during the pendency of litigation, essentially cutting their counsel out of the discussion and lulling them into a sense that the matter could be settled by a reinstatement agreement on their loan, instead of foreclosure. Appellants attach numerous letters and other documents to their brief; however, it appears none of the communications, or the affidavit of the attorney, were presented to the trial court, nor did appellants ask this court to supplement the record. We cannot consider them. *Price v. Carter Lumber Co.*, Summit App. No. 24991, 2010 -Ohio- 4328 at paragraph 36 , citing *In re J.C.*, 186 Ohio App.3d 243, 2010-Ohio-637, at paragraphs 13-15 (Belface, J., concurring in part and dissenting in part).

{¶6} Civ. R. 56 (C) states in pertinent part:

{¶7} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, 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. No evidence or stipulation may be considered except as

stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶8} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

{¶9} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v. Shaffer,* 90 Ohio St.3d 388, 2000-Ohio-186.

{¶10} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the

moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, Id. The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute of material fact, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

{¶11} The trial court scheduled a non-oral hearing on this matter for May 10, 2010. Pursuant to Civ. R. 56 (C) the party opposing the motion may serve and file opposing affidavits prior to the day of hearing. Civ. R. 56 (F) provides if it appears from the opposing party's affidavit that the party cannot for sufficient reason present the essential facts, the court may extend the time for filing opposing affidavits. Although appellants assert appellee was aware they were preparing affidavits, it does not appear appellants ever asked the court to extend the deadline for filing. Appellants' affidavits were due on or before May 9. The court did not err in entering judgment on May 18.

{¶12} Inasmuch as appellants did not respond to the motion for summary judgment or ask the court to allow them more time to respond, and admitted in their answer there was a promissory note and mortgage upon which the payment was due, we find the trial court did not err in finding reasonable minds could come to but one conclusion on the record before it.

{¶13} Both assignments of error are overruled.

{¶14} For the foregoing reasons, the judgment of the Court of Common Pleas of Knox County, Ohio, is affirmed.

By Gwin, J.,

Edwards, P.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 1130

[Cite as *BAC Home Loans Servicing, L.P. v. Peters*, 2010-Ohio-6464.]

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

BAC HOME LOANS SERVICING, L.P.	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JERRY A. PETERS, ET AL	:	
Defendant-Appellant	:	CASE NO. 10-CA-000013

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Knox County, Ohio, is 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