[Cite as *Fifth Third Mtge. Co. v. O'Neill,* 2015-Ohio-3000.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FIFTH THIRD MORTGAGE COMPANY

Plaintiff-Appellee

-vs-

DONALD K. O'NEILL, et al.

Defendants-Appellants

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 14 CA 54

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 12 CV 901

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: July 27, 2015

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellants Donald and Christi O'Neill appeal from the decision of the Court of Common Pleas, Fairfield County, granting summary judgment in favor of Appellee Fifth Third Mortgage Company on its foreclosure claims.

STATEMENT OF THE FACTS AND CASE

{¶2} This case arises from a residential foreclosure action filed in Fairfield County, Ohio. The relevant facts are as follows:

{¶3} In May 2006, Appellant Donald O'Neill obtained a mortgage loan from Fifth Third Mortgage Company. This loan was evidenced by a promissory note. The Note was secured by a Mortgage on the Property located at 8891 Easton Drive, Pickerington, Ohio 43147. Appellant Christi H. O'Neill did not sign, and was not identified as a "Borrower" on the 2006 Note, nor was Mrs. O'Neill listed on the General Warranty Deed to the Property.

{¶4} Approximately four years later, Appellant Donald O'Neill refinanced his loan with Fifth Third. The refinanced loan, which is the loan at issue in this case, was evidenced by a promissory note in the amount of $164,400.00 and dated June 25, 2010. The Note was secured by a mortgage on the Property. As was the case with the 2006 Loan, Mrs. O'Neill did not sign, and is not identified as a "Borrower" on the Note.

{¶5} In the spring of 2012, Appellant Donald O'Neill defaulted on the Note and Mortgage. Fifth Third accelerated the amounts due under the Note and on August 23, 2012, initiated a foreclosure action.

{¶6} On October 30, 2012, the O'Neills filed an answer and counterclaim. The counterclaim was brought pursuant to the Truth In Lending Act (TILA) and contained two counts, one for rescission and one seeking money damages. The O'Neills claimed that they only received three copies of the notice of right to cancel at the loan closing rather than the four copies they maintain they were required to receive under TILA.

{¶7} On January 22, 2013, Fifth Third replied to the counterclaim.

{¶8} On December 3, 2013, Fifth Third filed a motion for summary judgment.

{¶9} On August 14, 2014, Appellants filed a memorandum in opposition to the summary judgment motion and moved to strike the Affidavit of Bradley Taylor.

{¶10} On August 21, 2014, Fifth Third filed a reply memorandum in support of the summary judgment motion and a memorandum opposing the motion to strike the Taylor Affidavit.

{¶11} By Judgment Entries filed August 29, 2014, September 4, 2014, and September 9, 2014, the trial court granted summary judgment in favor of Fifth Third Mortgage Company on Fifth Third's claims and Appellants' counterclaims and entered a decree of foreclosure.

{¶12} Appellants now appeal, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶13} "I. THE TRIAL COURT ERRED WHEN IT GRANTED PLAINTIFF-APPELLEE FIFTH THIRD MORTGAGE COMPANY ("FIFTH THIRD") SUMMARY JUDGMENT ON DEFENDANTS-APPELLANTS DONALD AND CHRISTI O'NEILL ("THE O'NEILLS")'S TRUTH IN LENDING ACT ("TILA") COUNTERCLAIM.

{¶14} "II. THE TRIAL COURT ERRED WHEN IT GRANTED FIFTH THIRD SUMMARY JUDGMENT ON ITS FORECLOSURE CLAIMS.

{¶15} "III. THE TRIAL COURT ERRED WHEN IT DENIED THE O'NEILLS' MOTION TO STRIKE THE AFFIDAVIT OF BRADLEY TAYLOR."

Summary Judgment Standard

{¶16} Civil Rule 56(C) in reviewing a motion for summary judgment which provides, in pertinent part:

> 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 of 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 mostly 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.

{¶17} 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. *Hounshell v. Am. States Ins. Co.,* 67 Ohio St.2d 427, 424 N.E.2d 311 (1981). The court may not resolve any ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning–Ferris Inds. of Ohio, Inc.,* 15 Ohio St.3d 321, 474 N.E.2d 271 (1984). A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.,* 135 Ohio App.3d 301, 733 N.E.2d 1186 (6th Dist.1999).

{¶18} 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.,* 30 Ohio St.3d 35, 506 N.E.2d 212 (1987). This means we review the matter de novo. *Doe v. Shaffer,* 90 Ohio St.3d 388, 2000–Ohio–186, 738 N.E.2d 1243.

{¶19} 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,* 75 Ohio St.3d 280, 662 N.E.2d 264 (1996). Once the moving party meets its initial burden, the burden shifts to the nonmoving 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 materials showing a genuine dispute over material facts. *Henkle v. Henkle,* 75 Ohio App.3d 732, 600 N.E.2d 791 (12th Dist.1991).

I.

{¶20} In their First Assignment of Error, Appellants argue that the trial court erred in granting summary judgment in favor of Appellee on Appellants' counterclaim. We disagree.

{¶21} As set forth above, in their counterclaim, Appellants argue that they only received 3 of the 4 copies of the notice of the right to cancel at the closing of the mortgage loan. Appellants argue that pursuant to TILA, this failure to provide two copies to each borrower extends the three day right to rescind to three years.

{¶22} Under TILA, a borrower has the right to rescind a mortgage loan, but only within a limited period of time. 15 U.S.C. § 1635(a). Section 1635(a) specifies that a borrower seeking to rescind a qualifying transaction must do so by "midnight on the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the [requisite] material disclosures...." *Id.* "However, certain violations of TILA may extend the [borrower's] right to cancel" from three business days to three years. *Lippner v. Deutsche Bank Nat'l Tr. Co.,* 544 F.Supp.2d 695, 700 (N.D.Ill.2008); *see* 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3).

{¶23} Upon review, we find that the right to rescind does not arise from transactions which constitute "a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property." 15 U.S.C. 1635(e)(2). Interpreting this refinancing exemption, 12 C.F.R. 1026.23(f) provides that:

> The right to rescind does not apply to the following:
>
> * * *
>
> (2) A refinancing or consolidation by the same creditor of an extension of credit already secured by the consumer's principal dwelling. The right to rescission shall apply, however, to the extent the new amount financed exceeds the unpaid principal balance, any earned unpaid finance charge on the existing debt, and amounts attributed solely to the costs of the refinancing or consolidation.

{¶24} Put more simply, "a borrower may rescind the 'new money' portion of certain 'refinancings,' but not the 'old money' portion." *In re Porter,* 961 F.2d 1066, 1074 (3d Cir.1992). The reasoning is that "it would be unfair to lenders if, simply by the expedient of seeking refinancing for the same amount, borrowers could gain the right to cancel the earlier loan." *Id.*

{¶25} In this instant case, Appellants never had a right to rescind because the loan transaction at issue was a refinancing of an existing mortgage loan with no new or additional monies advanced.

{¶26} Further, Ohio courts have adopted the minority view that the failure to deliver two copies per consumer does not expand the time period in which to exercise the right to rescind. *Flagstar Bank, FSB v. Cintron,* 2d Dist. No. 25110, 2012–Ohio–5914, ¶ 16, 20; *Residential Funding Co., LLC v. Thorne,* 6th Dist. No. L–09–1324, 2010–Ohio–4271, ¶ 42; *ContiMortgage Corp. v. Delawder,* 4th Dist. No. 00CA28 (July 30, 2001). In adopting the minority view, Ohio courts have reasoned that TILA does not require " 'perfect disclosure,' " but rather " 'meaningful disclosure.' " *Karakus v. Wells*

Fargo Bank, N.A., 941 F.Supp.2d 318, 335 (E.D.N.Y.2013), quoting *Turner v. Gen. Motors Acceptance Corp.,* 180 F.3d 451, 457 (2d Cir.1999) and *Gambardella v. G. Fox & Co.,* 716 F.2d 104, 118 (2d Cir.1983); *accord Kahraman v. Countrywide Home Loans, Inc.,* 886 F.Supp.2d 114, 120 (E.D.N.Y.2012); *Delawder.* These courts eschew a hyper technical approach in favor of reasonably construing and equitably applying TILA's requirements. *Yarney v. Wells Fargo Bank, N.A.,* W.D.Va. No. 3:09–cv–00050 (Aug. 5, 2010); *Byron v. EMC Mtge. Corp.,* E.D.Va. No. 3:09–CV–197–HEH (Aug. 10, 2009).

{¶27} Additionally, we find that Mrs. O'Neill was not a person with "ownership" in the property and therefore she had no right to rescission or notice thereof. *See* 12 C.F.R. §226.23(A)(1).

{¶28} Appellants' First Assignment of Error is overruled.

II.

{¶29} In their second assignment of error, Appellants argue that the trial court erred in granting summary judgment in favor of Appellee on its foreclosure claims. We disagree.

Standing

{¶30} Appellants argue that Appellee Fifth Third Mortgage Company failed to establish standing to enforce the Note and Mortgage.

{¶31} R.C. §1303.31 provides:

(A) Person entitled to enforce an instrument means any of the following persons:

(1) The holder of the instrument;

(2) A nonholder in possession of the instrument who has the rights of a holder;

(3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 1303.38 or division (D) of section 1303.58 of the Revised Code.

(B) A person may be a "person entitled to enforce" the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

{¶32} Here, Appellants argue that Appellee introduced inconsistent copies of the Note.

{¶33} Upon review we find that the copy of the Note attached to the Complaint did not include the back page, while the copy attached to the Affidavit in support of the Motion for Summary Judgment did include the back page which was indorsed in blank.

{¶34} Further, in addition to establishing that it was the holder of the Note, we find that Fifth Third also had standing herein because it established that it was and always had been the mortgagee in this matter.

{¶35} To have standing to pursue a foreclosure action, a plaintiff "must establish an interest in the note or mortgage at the time it filed suit." *Home Loan Mtge. Corp. v. Schwartzwald,* 134 Ohio St.3d, 2012–Ohio–5017, 979 N.E.2d 1214. The current holder of the note and mortgage is the real party in interest in a foreclosure action. *U.S. Bank Nat'l. Assn. v. Marcino,* 181 Ohio App.3d 328, 2009–Ohio–1178, 908 N.E.2d 1032 (7th Dist.), citing *Chase Manhattan Corp. v. Smith,* 1st Dist. Hamilton No. C061069, 2007–Ohio–5874.

Conditions Precedent

{¶36} Appellants also argue that Appellee failed to establish that it satisfied the conditions precedent of the Note and Mortgage.

{¶37} Appellants argue that Fifth Third failed to send them notice of default pursuant to the Mortgage.

{¶38} Here, the mortgage provided:

> Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means …" Mortgage, Para. 15; Taylor Affidavit.

{¶39} The affidavit of Bradley Taylor, Litigation Portfolio Analyst for Fifth Third Bank, averred that on June 26, 2012, a written notice of default and acceleration was sent to Mr. O'Neill pursuant to the terms of the Note and Mortgage. The written notice of default and acceleration was attached to Taylor's affidavit as Exhibit 6. The notice of default and acceleration was mailed to the mortgage property address. Fifth Third later obtained service of the foreclosure complaint upon Appellant at the same address. The letter was mailed on June 26, 2012, more than 30 days before filing the foreclosure action. We find there is no genuine issue of material fact that Fifth Third satisfied its duty to provide Appellant with notice of default and acceleration pursuant to the terms of the Note and Mortgage. Further, this Court has recently held after interpreting a similarly written notice provision that there was no requirement that the borrower actually receive the notice. *OneWest Bank, FSB v. Albert*, 5th Dist. Stark No.

2013CA00180, 2014-Ohio-2158; *Citimortgage, Inc. v. Cathcart,* 5th Dist. Stark No. 2013CA00179, 2014–Ohio–620.

Affirmative Defenses

{¶40} Lastly, Appellants argue that genuine issues of material fact existed as to their affirmative defenses of failure to mitigate and unclean hands.

{¶41} This Court reviews mortgages under general principles of contract law, and we presume that the parties' intent " 'resides in the language they have chosen to employ in the agreement.' " *SFJV 2005, L.L.C. v. Ream,* 187 Ohio App.3d 715, 933 N.E.2d 819, 2010–Ohio–1615, citing in part *Fountain Skin Care v. Hernandez,* 175 Ohio App.3d 93, 885 N.E.2d 286, 2008–Ohio–489. " 'If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined.' " *Inland Refuse Transfer Co. v. Browning–Ferris Indus. of Ohio, Inc.* (1984), 15 Ohio St.3d 321, 322, 474 N.E.2d 271. *Id.* In such a case, "a court may not go beyond the plain language of the agreement to determine the parties' rights and obligations, and it may not consider parole evidence of the parties' intentions. (Citations omitted)." *Id.* The court, instead, "must give effect to the express terms of the contract." *Id.*

{¶42} The Ohio Supreme Court said in one foreclosure case that "[the lender]'s decision to enforce the written agreements cannot be considered an act of bad faith." *Ed Schory & Sons, Inc. v. Soc. Natl. Bank,* 75 Ohio St.3d 433, 662 N.E.2d 1074, 1996–Ohio–194. The Court then quoted the Seventh Circuit Court of Appeals: " 'firms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of "good faith." ' " *Id.,*

quoting *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting,* 908 F.2d 1351, 1357 (7th Cir.1990). “Indeed,” said the Court, “[the lender] had every right to seek judgment on the various obligations owed to it by [the borrower] and to foreclose on its security.” *Id.* “The bank's decision to pursue its contractual remedies,” said the court, “cannot be considered to be an act of bad faith.” *Id.,* citing *Ed Schory* at 443, 662 N.E.2d 1074.

{¶43} In the Fifth District case *Key Bank Natl. Assoc. v. Bolin,* 5th Dist. Stark No. 2010 CA 00285, 2011–Ohio–4532, the trial court granted summary judgment for the lender on its foreclosure complaint. The borrower argued that the trial court erred and abused its discretion by doing so because the lender acted in bad faith and misrepresented to the borrower that she could participate in a loan modification program. This Court rejected this argument, finding no provision in the mortgage document “prevent[ed] the lender from insisting on the strict performance of the mortgage obligations.” *Key Bank* at ¶ 37.

{¶44} In the case sub judice, no provision of the note or mortgage requires the bank to mitigate its damages by allowing Appellants to participate in a loan modification repayment plan before exercising its right to foreclose. Rather, the mortgage herein gives the bank the right, on Appellants' breach, to pursue full payment and foreclosure without first satisfying any conditions.

{¶45} Based on the foregoing, we find the bank was not required to mitigate its damages and did not act in bad faith in pursuing foreclosure in this case.

{¶46} Appellants’ Second Assignment of Error is overruled.

III.

{¶47} In their Third and final Assignment of Error, Appellants argue that the trial court erred in denying their motion to strike the Affidavit of Bradley Taylor. We disagree.

{¶48} Appellants argue that Mr. Taylor's deposition testimony conflicted with his affidavit and that he failed to demonstrate personal knowledge of the facts to which he attested and, therefore, the affidavit should have been stricken.

{¶49} The first inconsistency referenced by Appellants is premised on Mr. Taylor's statement in his deposition that Fifth Third Bank possessed the original Note whereas he stated in his Affidavit that Fifth Third Mortgage Company possessed the Note.

{¶50} A custodian acting on behalf of Appellee does not destroy Appellee's status as holder of the note. "Constructive possession exists when an agent of the owner holds the note on behalf of the owner * * * consequently, a person is a holder of a negotiable instrument, and entitled to enforce the instrument, when the instrument is in the physical possession of his or her agent." *U.S. Bank, N.A. v. Gray,* 10th Dist. Franklin No. 12AP–953, 2013–Ohio–3340.

{¶51} Upon review, we find that Mr. Taylor testified during his deposition and also stated in his Affidavit that Fifth Third Bank is the servicing agent for Fifth Third Mortgage Company and that Fifth Third Bank had maintained possession of the original Note as servicer.

{¶52} Appellants also argue that Taylor failed to substantiate his personal knowledge of the pertinent facts and further failed to explain how his job duties gave him personal knowledge of the facts.

{¶53} In *Wachovia Bank Delaware, N.A. v. Jackson,* we detailed the requirements necessary for an affidavit in support of a motion for summary judgment in a foreclosure case. 5th Dist. Stark No.2010–CA–00291, 2011–Ohio–3202. The affidavit must show:

> (1) the affiant is competent to testify;
>
> (2) the affiant has personal knowledge of the facts, as shown by a statement of the operant facts sufficient for the court to infer the affiant has personal knowledge;
>
> (3) the affiant must state he or she was able to compare the copy with the original and verify the copy is accurate, or explain why this cannot be done;
>
> (4) the affidavit must be notarized; and
>
> (5) any documents the affidavit refers to must be attached to the affidavit or served with the affidavit. *Id.*

{¶54} Personal knowledge is required to qualify the records of an affidavit under the business records hearsay exception of Evid.R. 803(6). 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.'

Citimortgage, Inc. v. Cathcart, 5th Dist. Stark No. 2013CA00179, 2014–Ohio–620.

{¶55} The phrase "other qualified witness" should be broadly interpreted and it is not a requirement that the witness had firsthand knowledge of the transaction giving rise to the business record. *Id.* "Rather, it must be demonstrated that: the witness is sufficiently familiar with the operation of the business and with the circumstances of the record's preparation, maintenance and retrieval, that he can reasonably testify on the basis of this knowledge that the record is what it purports to be, and that it was made in the ordinary course of business consistent with the elements of Rule 803(6)." *Id.*

{¶56} Affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civil Rule 56(E). *Tolson v. Triangle Real Estate,* 10th Dist. Franklin No. 03AP–715, 2004–Ohio–2640.

{¶57} However, Ohio law recognizes that personal knowledge may be inferred from the contents of an affidavit. *Wells Fargo Bank, N.A. v. Dawson,* 5th Dist. Stark No. 2013CA00095. The assertion of personal knowledge in an affidavit satisfies Civil Rule 56(E) if the nature of the facts in the affidavit combined with the identity of the affiant creates a reasonable inference that the affiant has personal knowledge of the facts in the affidavit. *Id.*

{¶58} In this case, Taylor avers that the statements made in the affidavit are based on personal knowledge and his personal review of the business records for the loan which is the subject of the action. The affidavit provides that Taylor, as Litigation Portfolio Analyst for Fifth Third Bank, had direct access to the loan documents and account records of Fifth Third Mortgage Company and his affidavit is based on personal knowledge obtained from review of the records and from his personal knowledge of the manner in which the Bank's records are kept and maintained. He testified that Fifth Third Bank's business records include data compilations, electronically imaged documents, and payment records and that such records are maintained electronically. The affidavit also states the loan account records are compiled and recorded by Fifth Third Bank in the course of its regularly conducted business activities and the loan account records are compiled and recorded at or near the time of the occurrence of each act or event affecting the account by persons with knowledge of said act or event, or from information transmitted by a person with knowledge of acts or events described with the loan account records. Taylor averred the records are kept, maintained, and relied upon in the course of ordinary and regularly conducted business activity.

{¶59} From his position and his statement that he reviewed the documents in the instant case, it may be reasonably inferred that Taylor has personal knowledge to qualify the documents as an exception to the hearsay rule as a business document. We find Taylor's affidavit meets the requirements set forth in *Wachovia Bank v. Jackson.* The affidavit is properly admissible Civil Rule 56 evidence and Appellants fail

to submit any Civil Rule 56 evidence to contradict the affidavit. The trial court did not err in granting summary judgment based on Taylor's affidavit.

{¶60} Appellants' Third Assignment of Error is overruled.

{¶61} For the forgoing reasons, the judgment of the Court of Common Pleas of Fairfield County, Ohio, is affirmed.

By: Wise, J.

Farmer, P. J., and

Delaney, J., concur.

JWW/d 0626