[Cite as *Keogh v. In-Touch Publishing & Marketing, L.L.C.*, 2018-Ohio-2006.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMES F. KEOGH

Plaintiff-Appellee

-vs-

IN-TOUCH PUBLISHING AND MARKETING, LLC. AKA IN-TOUCH PUBLISHING & MARKETING, LLC. AKA IN-TOUCH PUBLISHING AND MARKETING, LLC, ET AL.

Defendants-Appellants

JUDGES:
Hon. John W. Wise, P.J.
Hon. W. Scott Gwin, J.
Hon. William B. Hoffman, J.

Case No. 2017CA00191

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Common Pleas Court, Case No. 2017CV00364
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	May 21, 2018

APPEARANCES:

For Appellee	For Appellants
LANCE D. GILL 3570 Executive Drive, Suite 201 Uniontown, OH 44685	DANIEL S. WHITE 34 Parmelee Drvie Hudson, OH 44236

Hoffman, J.

{¶1} Appellants In-Touch Publishing and Marketing, L.L.C. aka In-Touch Publishing & Marketing, LLC. aka In-Touch Publishing and Marketing, LLC (hereinafter "In-Touch") and Danielle G. Hayduk appeal the summary judgment of foreclosure entered against them by the Stark County Common Pleas Court. Appellee is James F. Keogh.

STATEMENT OF THE FACTS AND CASE

{¶2} Between the dates of February 13, 2012, and March 17, 2014, Appellants entered into nine loan transactions with Appellee, which were secured by nine properties owned by In-Touch. The cognovit promissory notes executed by Appellants were secured by mortgages on nine properties owned by In-Touch. Appellant Danielle Hayduk was the sole member of the In-Touch Corporation, and guaranteed payment on each of the loans with the exception of one.

{¶3} Appellants defaulted in the payments due under the cognovit notes. Under the terms of the notes, Appellants waived presentment and demand for payment, notice of dishonor, protest and notice of protest, and further confessed judgment in favor of Appellee under the cognovit terms of each note.

{¶4} Appellee filed the instant action in foreclosure on February 21, 2017. The action set forth eighteen counts against the following properties:

Counts One and Two: 1221 14th Street, Canton

Counts Three and Four: 237 Dueber SW, Canton

Counts Five and Six: 1357 Maryland SW, Canton

Counts Seven and Eight: 237 Smith SW, Canton

Counts Nine and Ten: 1355 Ivydale SW, Canton

Counts Eleven and Twelve: 1904 South Freedom, Alliance

Counts Thirteen and Fourteen: 1290 South Linden, Alliance

Counts Fifteen and Sixteen: 123 Ramsey Court, Alliance

Counts Seventeen and Eighteen: 934 Concord SW, Canton

{¶5} Appellee dismissed his complaint with regard to Counts Three and Four, the property located on Dueber Avenue in Canton.

{¶6} As to the remaining counts, Appellee filed a motion for summary judgment on July 11, 2017, attaching his own affidavit. Appellee later discovered errors in his calculations regarding amounts due, and filed a supplement to his motion, including an affidavit of Laura Zietlow, CPA, and his own amended affidavit.

{¶7} Appellants filed their response on August 11, 2017, attaching the affidavit of Appellant Hayduk. Hayduk disputed the amounts due on some of the notes. She further averred the note on 1221 14th Street had been paid by a deed transferring the property to Appellee. She also averred she did not receive notice of default and acceleration of the loan secured by 237 Smith SW, Canton.

{¶8} Appellee filed an affidavit in response. In his affidavit he stipulated to the payoff balances set forth in Hayduk's affidavit as to all properties except the 14th Street property and the Smith property. As to the 14th Street property Appellee agreed to accept delivery of a valid deed transferring the property. As to the Smith property, he set forth a payoff balance, as Hayduk had generally alleged Appellee's amount was inaccurate without alleging a specific balance due under the note.

{¶9} Appellants filed a motion seeking an extension of time to respond to Appellee's supplement to his motion. The trial court denied the motion for failure to

comply with Civ. R. 56(F), but nonetheless afforded Appellants seven additional days to file a response to the supplement to the motion for summary judgment. Appellants did not file an additional response.

{¶10} The court entered summary judgment of foreclosure on all counts on September 15, 2017. It is from this judgment Appellants prosecute their appeal, assigning the following error:

> THE TRIAL COURT'S DECISION TO GRANT THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT CONSTITUTES REVERSIBLE ERROR.

{¶11} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.,* 30 Ohio St.3d 35, 36 (1987). As such, we must refer to Civ. R. 56(C) 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 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.

{¶12} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which 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 a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, *citing Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

{¶13} App. R. 16(A)(7) requires the brief of the appellant to include an argument with respect to each assignment of error, with reasons in support of the contentions and citations to the parts of the record on which the appellant relies. Local Rule 9(A)(2) further requires, in an appeal from a summary judgment, the brief of the appellant to include a statement on a separate page following the assignments of error which sets forth whether the appellant claims summary judgment is inappropriate on the undisputed facts or claims

there is a genuine dispute as to a material fact, with a separate statement of the factual issues claimed in the trial court to have been material and disputed. Appellants did not comply with either rule in the instant case. Appellants argue in conclusory fashion at page eight of their brief, "In the instant case, numerous genuine issues of material fact exist, requiring that the motion for summary judgment be denied," without specifying what such disputed material facts are, and where their claims are demonstrated by the record.

{¶14} However, upon review of the record, we find no error in the summary judgment entered by the trial court. Appellants did not present any evidence disputing the loans were in default. As to the claims in counts five and six and nine through eighteen, Appellee stipulated to accept the amounts due as set forth in Hayduk's affidavit.

{¶15} As to the property at issue in counts one and two, Appellant Hayduk averred the property had been transferred by deed. In his supplemental affidavit, Appellee agreed to accept a valid deed for the property. Thus, no dispute of fact remains with respect to this property.

{¶16} As to the Smith SW property at issue in counts seven and eight, Appellant Hayduk averred she did not receive notice of default and intent to accelerate. However, the cognovit attached to the complaint, as well as the supplemental affidavit of Keogh establish Appellants had waived notice. Appellants have presented no evidence to refute the claim of waiver.

{¶17} Finally, Appellant Hayduk did not assert a specific amount due on the Smith SW note, but averred Appellee's figures were "inaccurate." Appellants presented no evidence to contradict the amount due set forth by Appellee other than a self-serving, conclusory statement the amount was incorrect, without specifically setting forth the

amounts Appellant's claimed remained due or any other evidence of history of payments. Therefore, the record does not demonstrate a genuine issue of material fact as to the amount due on the loan secured by the Smith SW property in counts seven and eight of the complaint.

{¶18} The assignment of error is overruled. The judgment of the Stark County Common Pleas Court is affirmed.

By: Hoffman, J.

Wise, John, P.J. and

Gwin, J. concur