[Cite as *CitiMortgage, Inc. v. Shupe*, 2012-Ohio-4485.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

CitiMortgage, Inc.

Appellant

v.

Cary A. Shupe, et al.

Appellees

Court of Appeals No. E-11-075

Trial Court No. 2008 CV 1156

DECISION AND JUDGMENT

Decided: September 28, 2012

* * * * *

Darryl E. Gormley, for appellant.

Daniel L. McGookey, Kathryn M. Eyster and Lauren McGookey, for appellee.

* * * * *

SINGER, P.J.

{¶ 1} Appellant mortgage lender appeals a judgment of the Erie County Court of Common Pleas denying its motion for summary judgment for foreclosure and granting the mortgagors' motion to dismiss for failure to state a claim upon which relief may be granted. Because we conclude that the trial court erred in granting appellees' motion to

dismiss, but properly denied appellant's summary judgment motion, we reverse and remand for further proceedings.

{¶ 2} On August 8, 2002, appellee Cary A. Shupe borrowed $95,719 from The American Eagle Mortgage Company. As security, Cary Shupe executed a mortgage on real property in Berlin Heights, Ohio, in favor of the lender. Cary Shupe's wife, appellee Laura R. Shupe, signed the mortgage for release of dower only. On August 22, 2002, American Eagle assigned the original note and mortgage to appellant, CitiMortgage, Inc.

{¶ 3} On December 30, 2008, appellant filed a complaint in the trial court alleging appellees' default for non-payment of the note and seeking to foreclose the mortgage. Appellant alleged that it was the holder of both the note and the mortgage and attached the note, mortgage and assignment of mortgage to the complaint. Appellees answered with a general denial.

{¶ 4} On July 16, 2009, appellant moved for summary judgment supported by the affidavit of one of appellant's vice presidents who averred that appellees were in default with a balance due of $89,110.87 plus interest from March 1, 2008. Attached to the motion was an account report detailing the transactions from which the balance was derived.

{¶ 5} Appellees filed a memorandum in opposition accompanied by correspondence between appellees and appellant and between appellees' attorney and appellant. In support on the memorandum was a lengthy affidavit from appellee Laura Shupe reporting a prolonged attempt to rectify misapplied or unapplied payments,

improper late fees and inappropriately increased escrow amounts. According to Laura Shupe's affidavit, appellees made payments until August 2008, when appellant's agents informed her that the bank would no longer accept payments because of three missing payments and late charges. Laura Shupe avers that the payments were made, but misapplied.

{¶ 6} Appellant filed a responsive memorandum characterizing appellees as having "issues with [appellant's] accounting, but not disputing that they are in arrears.

{¶ 7} On January 18, 2011, appellees, through new counsel, filed a motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Civ.R. 12(B)(6). Appellees argued appellant's complaint was deficient in that it failed to allege that appellant was both the holder and the owner of the note at issue. Eventually, the trial court granted appellees' motion to dismiss and denied appellant's motion for summary judgment. From this judgment appellant now brings this appeal. Appellant sets forth the following two assignments of error:

> I. The trial court erred in granting appellees' motion to dismiss based on the argument that Citi must plead that it is both the holder and owner in the complaint.
>
> II. The trial court erred in denying Citi's motion for summary judgment.

I. Dismissal for Failure to State a Claim

{¶ 8} In *U.S. Bank Natl. Assn. v. Liphart*, 6th Dist. No. E-11-033, 2012-Ohio-1994, ¶ 9, we addressed this exact issue and concluded that Ohio law did not require the specificity in pleading that the trial court demanded. On authority of that case, appellant's first assignment is well-taken.

II. Summary Judgment

{¶ 9} In its second assignment of error, appellant asserts that it was entitled to summary judgment.

{¶ 10} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 11} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

{¶ 12} Construing the evidence most strongly in favor of the non-moving party, we must conclude that there is a question of fact as to whether appellees were in default at the time appellant refused to accept further payments. Consequently, summary judgment would be inappropriate in this matter. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 13} On consideration whereof, the judgment of the Erie County Court of Common Pleas is reversed, in part, and affirmed, in part. This matter is remanded to said

court for further proceedings consistent with this decision. It is ordered that the parties share equally the cost of this appeal pursuant to App.R. 24.

Judgment reversed, in part,
and affirmed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE