[Cite as *CitiMtge., Inc. v. Byington*, 2013-Ohio-3950.]

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

CitiMortgage, Inc. — Court of Appeals No. E-12-003

Appellee — Trial Court No. 2010-CV-1061

v.

Jeffrey Byington, etc., et al. — **DECISION AND JUDGMENT**

Appellants — Decided: September 13, 2013

* * * * *

Harry J. Finke, IV, Harry W. Cappel, and Brittany L. Griggs,
for appellee.

Jeffrey Byington, Kenneth Jensen, and Patricia Jensen, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶1} This is an appeal from a judgment of the Erie County Court of Common Pleas which granted summary judgment in favor of plaintiff-appellee, CitiMortgage, Inc.,

in its foreclosure action against defendant-appellant, Jeffrey Byington. Appellant now challenges that judgment through the following assignment of error:

> The trial court erred to the prejudice of the defendant-appellant in granting the plaintiff's motion for summary judgment.

{¶2} The undisputed facts of this case are as follows. On November 8, 2007, appellant borrowed $48,800 from appellee for the purchase of a property located at 1210 West Madison Street, in Sandusky, Ohio. Appellant executed a promissory note for that amount and secured the note with a mortgage on the premises. The promissory note identified CitiMortgage as the "lender" and "note holder." The mortgage further identified CitiMortgage as the "lender," and granted the mortgage on the premises to the Mortgage Electronic Registration System, Inc. ("MERS") "solely as nominee for Lender and Lender's successors and assigns." On December 22, 2010, MERS executed an assignment of mortgage, transferring its interest in the mortgage to CitiMortgage. The assignment was recorded on December 28, 2010.

{¶3} On December 30, 2010, CitiMortgage filed a complaint in foreclosure against appellant, alleging that it was the holder of a promissory note and the securing mortgage deed on a home located at 1210 West Madison Street, in Sandusky, Ohio, that appellant was in default for failure to pay on the note, and that there was due and owing as of July 1, 2010, the sum of $47,643.77 plus interest at the rate of 8.25 percent per year. CitiMortgage therefore demanded judgment in that amount, foreclosure of the mortgage and sale of the property.

{¶4} Following appellant's answer, CitiMortgage filed a motion for summary judgment in which it asserted that because it was undisputed that appellant had defaulted on the note, CitiMortgage was entitled to a judgment in foreclosure as a matter of law. CitiMortgage supported its motion with the affidavit of Janet Latessa, its document control officer. Latessa stated that in her capacity as the document control officer she has access to CitiMortgage's business records, including the records relating to appellant's loan, that the affidavit was based on her review of those records and from her own personal knowledge of how those records are kept, and that the loan records relating to appellant's loan are maintained by CitiMortgage in the course of its regularly conducted business activities. She further stated CitiMortgage's records regarding appellant's loan include the note and mortgage, true and exact copies of which were attached to the affidavit, and that she had reviewed those records as well as CitiMortgage's electronic servicing system. Based on her review of those records, Latessa stated that appellant was in default of the terms of the note and mortgage and that he owed the entire balance of $47,643.77 as of August 1, 2011, plus interest of 8.25 percent per year from July 1, 2010. In addition to the Latessa affidavit, note and mortgage, CitiMortgage attached to its summary judgment motion a certified copy of the assignment of mortgage that had been filed with the Erie County Recorder.

{¶5} In his memorandum in opposition to summary judgment, appellant asserted that CitiMortgage had not established that it was the holder and owner of the note and mortgage. He further argued that given his efforts to reach a loan modification

agreement with CitiMortgage, it would be inequitable to order a foreclosure on his property. He supported his motion with his own affidavit in which he stated that he has always been ready, willing and able to enter into a good faith loan modification to allow him to save his property but that CitiMortgage has been unwilling to work with him.

{¶6} The trial court granted CitiMortgage's motion for summary judgment. In particular, the court determined that the undisputed facts established that CitiMortgage was the holder and owner of the note and mortgage at the time that the complaint in foreclosure was filed. The court further determined that there was no question as to the existence of the debt, the fact that appellant had defaulted and the amount owed. Finally, the court determined that appellant had failed to set forth facts showing that it would be inequitable to grant the foreclosure. The court therefore ruled that CitiMortgage was entitled to judgment as a matter of law.

{¶7} In his sole assignment of error, appellant contends that the lower court erred in granting CitiMortgage summary judgment because he had presented sufficient evidence to raise genuine issues of material fact.

{¶8} Appellate review of a trial court's grant of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, we review the trial court's grant of summary judgment independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993). Summary judgment will be granted only when there remains no genuine issue of material fact and,

when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996). However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E).

{¶9} To properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials showing: (1) the movant is the holder of the note and mortgage, or is a party entitled to enforce the instrument; (2) if the movant is not the original mortgagee, the chain of assignments and transfers; (3) the mortgagor is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due. *U.S. Bank, N.A. v. Coffey*, 6th. Dist. Erie No. E-11-026, 2012-Ohio-721, ¶ 26, citing *Wacovia Bank of Delaware, N.A. v. Jackson*, 5th Dist. Stark No. 2010-CA-00291, 2011-Ohio-3202, ¶ 40-45.

{¶10} A "holder" of a negotiable instrument means either of the following: (a) If the instrument is payable to bearer, a person who is in possession of the instrument; (b) If the instrument is payable to an identified person, the identified person when in possession

of the instrument. R.C. 1301.01(T). R.C. 1301.01 was replaced by Am.H.B. No. 9, 2011 Ohio Laws File 9, effective June 29, 2011, and renumbered as R.C. 1301.201. Because 1301.201 only applies to transactions entered on or after June 29, 2011, we apply former R.C. 1301.01 to this appeal.

{¶11} In the proceedings below, the Latessa affidavit and attached documents established that CitiMortgage was the holder of the note and mortgage on the date that the complaint was filed, that appellant was in default and that the amount due was $47,643.77 plus interest. In addition, on the issue of conditions precedent, CitiMortgage averred in its complaint that it had complied with all conditions precedent set forth in the note and mortgage. In his answer, appellant generally denied all of the allegations in the complaint except to admitting to having an interest in the property.

> Where a cause of action is contingent upon the satisfaction of some condition precedent, Civ.R. 9(C) requires the plaintiff to plead that the condition has been satisfied, and permits the plaintiff to aver generally that any conditions precedent to recovery have been satisfied, rather than requiring plaintiff to detail specifically how each condition precedent has been satisfied. In contrast to the liberal pleading standard for a party alleging the satisfaction of conditions precedent, a party denying the performance or occurrence of a condition precedent must do so specifically and with particularity. Civ.R. 9(C). A general denial of performance of conditions precedent is not sufficient to place performance of a condition

> precedent in issue. * * * The effect of the failure to deny conditions precedent in the manner provided by Civ.R. 9(C) is that they are deemed admitted. *Lewis v. Wal-Mart, Inc.*, 10th. Dist. Franklin No. 93AP-121 (Aug. 12, 1993).

{¶12} Because appellant only generally denied the performance of the conditions precedent, and never denied them specifically or with particularity, the performance of those conditions is deemed admitted.

{¶13} Accordingly, given the undisputed facts, CitiMortgage was entitled to judgment as a matter of law.

{¶14} Appellant further asserts, however, that even if the elements of a default have been established, CitiMortgage was not entitled to foreclose the mortgage based on principles of equity.

{¶15} In *First Natl. Bank of Am. v. Pendergrass*, 6th Dist. Erie No. E-08-048, 2009-Ohio-3208, ¶ 22-23, we explained the principles of equity with regard to foreclosure actions:

> Notwithstanding our acknowledgement that the elements for a foreclosure have been met in this case, we remain mindful that a foreclosure action is equitable in nature and, thus, "the simple assertion of the elements of foreclosure does not require, as a matter of law, the remedy of foreclosure." *Equitable Fed. S. & L. Assn. v. Hopton* (Oct. 28, 1985), 5th Dist. No. CA-6664.

> As an equitable action, a foreclosure action should be reviewed for abuse of discretion. See *Buckeye Retirement Co., LLC v. Walling*. 2d Dist. No. 05 MA 119, 2006-Ohio-7059, ¶ 16. "Abuse of discretion" connotes more than an error of law or judgment; rather, it implies an unreasonable, arbitrary or unconscionable attitude. *Id.*

{¶16} Following its determination that appellant was in default, the lower court further determined that there was no equitable impediment to foreclosure in this case. In reaching that conclusion, the court noted that appellant had insufficient income to qualify for some form of loan modification.

{¶17} Appellant asserts that because he submitted an affidavit to the court below in which he indicated that he has expressed his willingness to CitiMortgage to work toward a loan modification, but that CitiMortgage has been unwilling to work with him, there remain genuine issues of material fact as to whether foreclosure in this case would be equitable.

{¶18} There is nothing in the note and mortgage, or any law, that requires CitiMortgage to work toward a loan modification in the case of a default. The cases which support what is essentially an equitable estoppel defense to foreclosure, regard situations where, following a default, a lender sets new terms for the loan, then proceeds with the foreclosure action under the previous terms. *See PHH Mtge. Corp. v. Barker*, 190 Ohio App.3d 71, 2010-Ohio-5061, 190 N.E.2d. 662 (3d.Dist.2010).

{¶19} Given the facts of this case, we cannot find that the lower court erred in ordering a foreclosure of the mortgage at issue.

{¶20} Accordingly, the sole assignment of error is not well-taken.

{¶21} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Erie County Court of Common Pleas is affirmed. Court costs are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

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

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE