[Cite as *Fed. Natl. Mtge. Assn. v. Brunner*, 2013-Ohio-128.]

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

Federal National Mortgage Association	Court of Appeals No. L-11-1319
Appellee	Trial Court No. CI0201007433
v.	
Robert O. Brunner and Harriett L. Brunner, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: January 18, 2013

* * * * *

Elizabeth S. Fuller, for appellee.

George R. Royer, for appellants.

* * * * *

HANDWORK, J.

{¶ 1} This is yet another appeal from a decision in an action to foreclose on residential property. In this appeal, the borrowers challenge the propriety of the affidavit used by the bank to obtain summary judgment. Finding that the bank's affidavit fails to satisfy the requirements of Civ.R.56(E), we reverse the judgment of the Lucas County Court of Common Pleas.

{¶ 2} On October 27, 2010, CitiMortgage, Inc. ("CitiMortgage") filed a complaint in foreclosure against appellants, Robert O. Brunner, Harriett L. Brunner, Michael B. Brunner, and Anne M. Brunner. In its complaint, CitiMortgage alleged that it was the holder of a note and modification agreement upon which Robert Brunner and Harriett Brunner ("the Brunners") had defaulted, that the loan was accelerated, that all conditions precedent were met, and that the balance due and owing on the note was $94,998.20 together with interest at the rate of 2 percent per year from June 1, 2010. It also alleged that Anne Brunner and Michael Brunner had potential claims of interest in the secured property as titleholders.

{¶ 3} On March 14, 2011, CitiMortgage filed a motion to substitute appellee Federal National Mortgage Association ("FNMA") as plaintiff in the action. The motion was based on a note allonge and mortgage assignment that were executed by CitiMortgage subsequent to the commencement of the action. The trial court granted the motion on March 17, 2011, ordering that FNMA be substituted as party plaintiff in place of CitiMortgage. On May 9, 2011, after obtaining leave to respond out of rule, the Brunners filed separate answers, each raising five affirmative defenses.

{¶ 4} On June 20, 2011, FNMA filed a motion for summary judgment, which included an affidavit signed by Enan Del Rio. In his affidavit, Del Rio averred that he had personal knowledge of the facts and was competent to testify as to the matters contained therein. Del Rio stated that IBM Lender Business Process Services, Inc. ("BPS") is the loan servicer for FNMA, that his "position" gives him "access to" business

records maintained by BPS, and that he personally reviewed the Brunners' loan account. Del Rio then substantiated the default-related allegations made in the complaint, asserted that FNMA is the present holder of the Brunners' note and mortgage, and authenticated the attached exhibits as true and accurate copies of the note, mortgage, modification agreement, and chain of endorsements and assignments.[1]

{¶ 5} On August 1, 2011, appellants filed a motion to strike and a memorandum in opposition to FNMA's motion for summary judgment. Appellants argued that Del Rio's affidavit did not satisfy the personal knowledge and competency requirements of Civ.R. 56(E). Appellants also submitted their own affidavits asserting that they never received notice of default or acceleration as required under the terms of the note. The trial court denied appellants' motion to strike on November 16, 2011, and granted FNMA's motion for summary judgment on November 29, 2011. This appeal followed.

[1] According to the documents attached to Del Rio's affidavit, the Brunners originally executed a promissory note in the amount of $80,000 payable to Midwest Mortgage Investments, Ltd. ("Midwest") on September 27, 2004. The note was secured by a mortgage on the Brunners' residence in favor of Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Midwest. The mortgage was assigned to CitiMortgage on March 13, 2008. The note contains two undated specific endorsements, one from Midwest to Flagstar Bank, FSB ("Flagstar"), which appears on the face of the note, and the other from Flagstar to CitiMortgage, which appears on a separate page appended to the note. It is unclear, however, whether the latter endorsement to CitiMortgage occurred before or after the complaint was filed, since it was not appended to or included with the copy of the note that was attached to the complaint. Nevertheless, on January 14, 2010, the Brunners entered into a loan modification agreement with MERS and CitiMortgage for the principal balance of $95,388.49 payable to CitiMortgage. CitiMortgage then executed a note allonge on January 25, 2011, and a mortgage assignment on February 16, 2011, transferring its interest in the original note and mortgage to FNMA.

{¶ 6} Appellants assert two assignments of error:

(1) The court should not have granted summary judgment motion in this case.

(2) The court erred in that it did not grant defendants' motion to strike plaintiff's affidavit (as sole support of such summary judgment motion).

{¶ 7} Since these assignments of error present a common and dispositive issue with respect to the sufficiency of Del Rio's affidavit, we will consider them together. Essentially, appellants contend that the trial court improperly considered Del Rio's affidavit in rendering summary judgment, since the affidavit failed to comply with the requirements of Civ.R. 56. Specifically, appellants argue that the mere "assertion of competence and personal knowledge" is insufficient under Civ.R. 56(E) where the affidavit does not "set forth a basis of personal knowledge." To the extent that Del Rio's affidavit is devoid of any information concerning the nature of his relationship to BPS and its account-holder records, we are compelled to agree with appellants.

{¶ 8} Since this case was decided by summary judgment, our review is de novo, in accordance with the standard set forth in Civ.R. 56. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, 936 N.E.2d 481, ¶ 29. "Thus, we review the trial court's judgment independently and without deference to its determination." *Ameriquest Mtge. v. Wilson*, 11th Dist. No. 2006-A-0032, 2007-Ohio-2576, ¶ 24. In other words, in considering the propriety of summary judgment, we "stand in the shoes of the trial court."

Johansen v. Ohio Dept. of Mental Health, 10th Dist. No. 12AP-39, 2012-Ohio-4834, ¶ 10.

{¶ 9} Pursuant to Civ.R. 56(C), summary judgment is proper when (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds, after construing the evidence most strongly in favor of the nonmoving party, can only conclude adversely to that party. *Zivich v. Mentor Soccer Club, Inc*., 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201 (1998). The moving party carries the initial burden of affirmatively demonstrating that no genuine issue of material fact remains to be litigated. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988). "To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment." *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). A plaintiff or claimant moving for summary judgment meets its initial burden by presenting or identifying appropriate evidentiary materials in support of the essential elements of its own claim. *See Todd Dev. Co., Inc. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d 88, ¶ 13, 18; *Raymond Builders Supply, Inc. v. Slapnicker*, 11th Dist. No. 2003-A-0040, 2004-Ohio-1437, ¶ 5; *Day, Ketterer, Raley, Wright & Rybolt, Ltd. v. Burns*, 5th Dist. No. 1996CA00132, 1996 WL 490694, *1 (Aug. 26, 1996).

{¶ 10} In order to properly support a motion for summary judgment in a foreclosure action, the bank must produce or identify in the record evidentiary-quality

materials demonstrating: (1) that it is the holder of the note, which is secured by a mortgage, or that it is otherwise entitled to enforce the instrument; (2) that the mortgagor is in default; (3) that all conditions precedent have been met; and (4) the amount of the principal and interest due. *See U.S. Bank Natl. Assn. v. Mitchell,* 6th Dist. No. S-10-043, 2012-Ohio-3732, ¶ 10; *U.S. Bank, N.A. v. Coffey*, 6th Dist. No. E-11-026, 2012-Ohio-721, ¶ 26.

{¶ 11} Civ.R. 56(E) requires that "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." For obvious reasons, the personal knowledge requirement in Civ.R. 56(E) tracks the personal knowledge standard of Evid.R. 602 covering lay witness testimony at trial. *Bonacorsi v. Wheeling & Lake Erie Ry. Co*., 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, ¶ 26. Under both provisions, a witness may not testify to a matter unless evidence is introduced to support a finding that the witness has personal knowledge of the matter. *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn*., 69 Ohio St.3d 217, 223, 631 N.E.2d 150 (1994).

{¶ 12} The foundation for personal knowledge may be furnished by the witness's own testimony. Evid.R. 602. "A mere assertion of personal knowledge satisfies Civ.R. 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." *Residential Funding Co., LLC v. Thorne*, 6th Dist. No. L-09-1324, 2010-

Ohio-4271, ¶ 70. *See also Home S. & L. Co. v. Eichenberger*, 10th Dist. No. 12AP-1, 2012-Ohio-5662, ¶ 18.

{¶ 13} Similarly, in order to properly authenticate business records under Evid.R. 803(6), "the testifying witness must possess a working knowledge of the specific record-keeping system that produced the document * * * [and] 'be able to vouch from personal knowledge of the record-keeping system that such records were kept in the regular course of business.'" *State v. Davis*, 62 Ohio St.3d 326, 343, 581 N.E.2d 1362 (1991), quoting *Del Publishing Co., Inc. v. Whedon*, 577 F.Supp. 1559, 1464 (S.D.N.Y.1982), fn. 5.

{¶ 14} In *RBS Citizens NA v. Vernyi*, 9th Dist. No. 26046, 2012-Ohio-2178, ¶ 11, the Ninth Appellate District found:

> In the Bank's motion for summary judgment, it argued that it was entitled to foreclosure, pointing to Grace Smith's February 23, 2010 affidavit, in which she averred that she was a foreclosure specialist and had reviewed Mr. Vernyi's loan file. According to Ms. Smith, Mr. Vernyi owed $125,375.54. Ms. Smith's affidavit consisted of nine paragraphs and did not contain any indication as [to] what connection Ms. Smith had to the Bank; thus, it is unclear whether she had personal knowledge.

See also Maxum Idemn. Co. v. Selective Ins. Co. of South Carolina, 2012-Ohio-2115, 971 N.E.2d 372, ¶ 22 (9th Dist.) (affidavit held insufficient to satisfy personal knowledge requirement in part because it "does not disclose the position [affiant] holds or the scope of his job responsibilities"); *Bank of New York Mellon Trust. Co. Natl. v. Mihalca*, 9th

Dist. No. 25747, 2012-Ohio-567, ¶ 17 (affidavit insufficient in part because affiant "failed to state how her position at Barclay's [the bank's attorney in fact] made her familiar with [the borrowers'] account records"); *Wachovia Bank of Delaware, N.A. v. Jackson*, 5th Dist. No. 2010-CA-00291, 2011-Ohio-3202, ¶ 28 ("Colston's affidavit asserts she has personal knowledge of all the facts contained in her affidavit, but she merely alleges that she is an assistant secretary of Barclay's, without elaborating on how her position with the company relates to or makes her familiar with the appellant's account records"); *TPI Asset Mgt., L.L.C. v. Conrad-Eiford*, 193 Ohio App.3d 38, 2011-Ohio-1405, 950 N.E.2d 1018, ¶ 20-24 (2d Dist.) (affidavits must provide a basis for concluding that affiant's position with the bank made him familiar with account records).

{¶ 15} In this case, Del Rio's affidavit does not identify his connection to FNMA or its account-holder records. In fact, the affidavit seems to take grammatical pains to avoid the subject, which suggests that Del Rio's assertions of personal knowledge may be problematic. Thus, the affidavit begins, "IBM Lender Business Process Services, Inc., as servicer for Fannie Mae ('Federal National Mortgage Association'), substitute Plaintiff herein, and in that capacity I am authorized to execute this Affidavit." Del Rio then asserts:

> The averments provided in this affidavit are within the scope of my duties. In my position, I have access to business records, including loan documents and loan account records maintained by [BPS], and I have

personal knowledge of the operation of and the circumstances surrounding the maintenance and retrieval of records in [BPS's] record keeping systems.

{¶ 16} Nowhere in the affidavit, however, not even on the signature line, is there any indication as to the nature of Del Rio's "capacity," "duties," or "position." Nothing in the affidavit suggests that Del Rio is employed by BPS, or that he was ever employed by BPS. The affidavit does not explain how or in what manner Del Rio's undisclosed "position" gives him "access to" the accounts maintained by BPS or provides him with a working knowledge of its record-keeping system. Indeed, the affidavit does not even reveal what Del Rio does for a living.

{¶ 17} FNMA cites a number of cases for the proposition that affidavits similar to Del Rio's affidavit "are used regularly by plaintiffs in foreclosure cases, and their compliance with evidentiary rules has been continually upheld by Ohio courts." However, all of the affidavits in the cases cited by FNMA clearly identified the nature of the affiant's relationship to the plaintiffs in those cases. For example, in *Countrywide Home Loans, Inc. v. Rodriguez*, 9th Dist. Nos. 03CA008345, 03CA008417, 2004-Ohio-4723, ¶ 15-16, the court explained:

> [T]his Court has previously held that an affiant's mere assertion that he has personal knowledge of the facts asserted in an affidavit can satisfy the personal knowledge requirement of Civ.R. 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.

In the instant matter, the affiant, Olchak, stated that she was an officer of Countrywide and a supervisor of Rodriguez' account. * * * We find that the identity of Olchak as the affiant, combined with the nature of the facts asserted in her affidavit created a reasonable inference that Olchak did in fact have personal knowledge of the amount of money that was due and owing on Rodriguez' account. As such, Olchak's affidavit satisfied the personal knowledge requirement of Civ.R. 56(E).

{¶ 18} In fact, our research discloses that Ohio appellate courts have invariably considered evidence of the affiant's position, title, or other working relationship with the bank or its servicing agent as a sine qua non of compliance with the personal knowledge requirement of Civ.R. 56(E). *See, e.g., U.S. Bank N.A. v. Wilkens*, 8th Dist. No. 96617, 2012-Ohio-1038, ¶ 44-45 (averment of personal knowledge sufficient where affiant identified her position with bank's loan servicer); *Bass-Fineberg Leasing, Inc. v. Keller*, 8th Dist. No. 96107, 2011-Ohio-3989, ¶ 17 (averment of personal knowledge sufficient where affiant identified her position with lender's business manager); *CitiMortgage, Inc. v. Stevens*, 9th Dist. No. 25644, 2011-Ohio-3944, ¶ 16 (on cross-claim in forfeiture action, court found affidavit of condominium association sufficient because affiant averred personal knowledge of the facts, as well as her title with the association); *Central Mtge. Co. v. Elia*, 9th Dist. No. 25505, 2011-Ohio-3188, ¶ 9 (affiant's "assertion of

personal knowledge after a review of the loan documents, coupled with her position at Central Mortgage and role as records custodian, satisfies Rule 56(E)"); *Beneficial Ohio, Inc. v. Hadbavny*, 11th Dist. No. 2010-G-2944, 2010-Ohio-6062, ¶ 20 ("The identity of [affiant] as a Senior Foreclosure Specialist employed by appellee, combined with the nature of the facts set forth in the affidavit, permits the reasonable inference that [she] did possess personal knowledge").

{¶ 19} FNMA also contends that Del Rio's affidavit is "quite similar to" the affidavit considered by this court in *Natl. City Bank v. TAB Holdings, Ltd.*, 6th Dist. No. E-10-060, 2011-Ohio-3715. However, in finding that the affidavit in *Natl. City* comported with Civ.R. 56(E), we specifically pointed to the affiant's averment that "he is the vice president of [the bank's] Asset Resolution Team." *Id.* at ¶ 14. Clearly, the identity of affiant's employment position was critical to our decision, since we explained:

> In determining the propriety of summary judgment in foreclosure actions, courts have consistently held that an averment of outstanding indebtedness *made in the affidavit of a bank loan officer* with personal knowledge of the debtor's account is sufficient to establish the amount due and owing on the note, unless the debtor refutes the averred indebtedness with evidence that a different amount is owed. (Emphasis added.) *Id.* at ¶ 12.

{¶ 20} We find, therefore, that Del Rio's affidavit did not comport with Civ.R. 56(E). Further, because Del Rio's affidavit was the only evidence to which FNMA

pointed in support of its motion for summary judgment, we must conclude that FNMA did not satisfy its initial burden as movant under Civ.R. 56. Thus, the trial court erred by overruling appellants' motion to strike and awarding summary judgment in favor of FNMA.

{¶ 21} Given our disposition of the matter, it is unnecessary for this court to address the procedural propriety of appellants' post-pleading defense that they never received notice of default or acceleration. That issue will have to be evaluated by the trial court in light of further proceedings. However, in the interest of judicial economy, we do find error in the trial court's conclusion that notice is not a condition precedent to accelerating the loan under the terms of the note.

{¶ 22} The acceleration clause in the note provides, "If I am in default, the Note Holder may send me a written notice [of acceleration]." It then states that the date for payment of the accelerated amount "must be at least 30 days after the date on which the notice is mailed to me or delivered by other means." Contrary to the trial court, we find it rather obvious that the permissive term "may" in this provision relates to the right of acceleration, not to the giving of notice. In other words, the provision gives the note holder a choice between accelerating the loan with notice or not accelerating the loan. It does not give the note holder the option of either accelerating the loan with notice or accelerating the loan without notice. If that were the case, the clause could easily have stated that the loan my be accelerated upon default without notice to the borrowers. Accordingly, appellants' assignments of error are well-taken.

{¶ 23} The judgment of the Lucas County Court of Common Pleas is reversed. This cause is remanded to said court for further proceedings consistent with this decision.

Costs of this appeal are assessed against appellee pursuant to App.R. 24(A).

Judgment reversed.

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

Thomas J. Osowik, J. _____
CONCUR.
JUDGE