**[Cite as *PNC Mtge. v. Kryncik*, 2017-Ohio-808.]**

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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|---|---|---|
| PNC MORTGAGE, A DIVISION OF PNC BANK, NATIONAL ASSOCIATION, | ) | |
| PLAINTIFF-APPELLEE, | ) | CASE NO. 15 MA 0194 |
| V. | ) | OPINION |
| FRANK J. KRYNICKI, ET AL., | ) | |
| DEFENDANTS-APPELLANT. | ) | |

CHARACTER OF PROCEEDINGS: Civil Appeal from Court of Common Pleas of Mahoning County, Ohio
Case No. 2014 CV 00741

JUDGMENT: Reversed

APPEARANCES:

For Plaintiff-Appellee

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For Defendants-Appellant

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JUDGES:

Hon. Gene Donofrio
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: March 1, 2017

**[Cite as *PNC Mtge. v. Kryncik*, 2017-Ohio-808.]**
DONOFRIO, J.

**{¶1}** Defendant-appellant, Frank J. Krynicki, appeals the judgment of the Mahoning County Common Pleas Court granting summary judgment against him.

**{¶2}** On March 20, 2014, PNC Mortgage, A Division of PNC Bank, National Division, filed a complaint in foreclosure against Appellant and others. U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, was substituted as Plaintiff-appellee on April 22, 2015. Appellee asserts that it is the holder of a promissory note and a mortgage deed executed by Appellant. Appellee claims that Appellant breached the terms of the promissory note and the mortgage, that Appellant is in default, that Appellee is entitled to foreclose and to have the property sold, and that all conditions precedent have been satisfied. Attached to the complaint are copies of a note and an open-end mortgage. On September 23, 2014, Appellant filed an answer which includes general denials of the allegations in the complaint and affirmative defenses alleging that Appellee failed to meet certain conditions precedent included in the note and mortgage.

**{¶3}** On April 21, 2015, Appellee filed a motion for summary judgment. Attached to Appellee's motion is the Affidavit of Status of Account signed by Alyssa Salyers. The affidavit states that Salyers is a "Foreclosure Document Specialist II" of Caliber Home Loans, Inc. and that Caliber is the loan servicing agent of Appellee. Attached to the affidavit as Exhibits A, B, and C, respectively, are copies of the note, open-end mortgage, and PNC Mortgage letter to Appellant dated January 3, 2014 notifying Appellant that he is in default. Salyers also states that Appellant is in default as he has not made the required monthly payments. On June 8, 2015, Appellant filed a motion for additional time to provide an affidavit in opposition to Appellee's motion; a motion to strike the Salyers affidavit and objection to the court's consideration of the affidavit; and a memorandum in opposition to Appellee's motion for summary judgment. On June 22, 2015, Appellee filed a reply to Appellant's motion to strike and a motion to strike Appellant's memorandum or, alternatively, for an extension of time to file a response. Appellant filed his affidavit on July 31, 2015.

**{¶4}** On September 29, 2015, the trial court filed a judgment entry which,

inter alia, granted summary judgment to Appellee.

**{¶5}** Appellant filed a timely appeal.

**{¶6}** Appellant's first assignment of error states:

> The trial court erred in failing to strike the affidavit of Alyssa Salyers as she was not a qualified witness capable of authenticating the business records of PNC.

**{¶7}** An appellate court reviews the granting of summary judgment de novo. *Comer v. Risko,* 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper.

**{¶8}** A court may grant summary judgment only when (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. *Mercer v. Halmbacher,* 9th Dist. No. 27799, 2015-Ohio-4167, ¶ 8; Civ.R. 56(C). The initial burden is on the party moving for summary judgment to demonstrate the absence of a genuine issue of material fact as to the essential elements of the case with evidence of the type listed in Civ.R 56(C). *Dresher v. Burt,* 75 Ohio St.3d 280, 292, 1996-Ohio-107, 662 N.E.2d 264. If the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts to show that there is a genuine issue of material fact. *Id.*; Civ.R 56(E). "Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party." *Welco Industries, Inc. v. Applied Cos.,* 67 Ohio St.3d 344, 346, 1993-Ohio-191, 617 N.E.2d 1129.

**{¶9}** Appellant claims that the Salyers affidavit is inadmissible because Salyers is not qualified to authenticate the business records of PNC (the original plaintiff) or the records of U.S. Bank Trust (the substituted plaintiff) because she had no working knowledge of their business records. Appellee responds that the Salyers affidavit meets all the requirements of the business records exception to the hearsay

rule and, alternatively, also meets the requirements of what is referred to as the "adoptive business records exception" which has been accepted by a number of Ohio appellate courts.

**{¶10}** The personal knowledge requirement governing the admissibility of business records as an exception to the hearsay rule is set forth in Evid.R. 803(6):

> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

**{¶11}** According to the Salyers affidavit, PNC, the original holder of the note and mortgage, transferred both the note and the mortgage to Appellee. Salyers Affidavit, ¶ 5. According to the affidavit, Caliber is the loan servicing agent of Appellee. Salyers Affidavit, ¶ 1. The Salyers affidavit further states that she is a "Foreclosure Document Specialist II" of Caliber; that Caliber has custody of and maintains records related to the note and mortgage concerning Appellant; that as the result of the performance of her job duties she knows how Caliber's business records are created and maintained; that PNC's business records relating to Appellant's note and mortgage have been incorporated into Caliber's business records; that Caliber's business records are made at or near the time of the occurrence of the matters recorded by persons with knowledge of the information in the record or from

information transmitted by persons with knowledge; that these records are kept in the regular course of Caliber's business activities; that Caliber creates records such as these as a regular practice; that PNC was the original payee of the note at issue; that the note was subsequently endorsed to Appellee; that both the note and mortgage are in the custody of Caliber; that the note and mortgage are in default; and that all conditions precedent required by the note and mortgage have been satisfied. The affidavit further states that the note, mortgage, and PNC letter attached respectively as Exhibits A, B, and C, are true and accurate copies.

**{¶12}** Appellant, while offering no evidence to the contrary except with regard to Salyers's representations about conditions precedent, complains that the affidavit and attachments are not admissible as Salyers "has no working knowledge of the record keeping system of PNC and therefore is not a qualified witness to authenticate the business records of PNC." Appellant Frank Krynicki's Appellate Brief, p. 7. Appellant relies heavily upon *Ohio Receivables, LLC, v. Williams,* 2nd Dist. No. 25427, 2013-Ohio-960. *Williams* involved a credit card issued by Chase Bank USA, N.A. to Williams. Chase sold the debt on Williams's account to Global Acceptance Credit Company, LP, as part of a 50-page, single-spaced electronic summary spreadsheet listing each account on a separate line. Global sold 429 of the accounts, including Williams's, to Ohio Receivables. The appellate court reversed a trial court award of summary judgment to Ohio Receivables because the two affidavits relied upon by the trial court failed "to establish the hallmark characteristics of a business record: that the documents were kept in the course of a regularly conducted business activity, that a person with knowledge of the transaction(s) created the documents, and that the documents were made at or near the time of the transaction." *Id.* at ¶ 23. While acknowledging that it is not necessary that an employee of Ohio Receivables have knowledge of the creation of Williams's account and the charges and payments on the account, the court nonetheless stated:

> We simply conclude that, in the absence of such knowledge, Ohio Receivables had to prove by some other means that the documents

> upon which it relied were business records of Chase and Global Credit, and that they were thereby entitled to fall within the exception to the hearsay rule for such documents. Chase could have done this very simply by attaching an appropriate affidavit containing the information required by Evid.R. 803(6) to the list of accounts it sold to Global Credit.

*Id.* at ¶ 24. The court notes that the affidavit authorized by Chase included no description of the role of the affiant within Chase, that affiant did not claim to be a custodian of the records or have personal knowledge of transactions or record keeping related to the transactions, and her knowledge seemed to be based on a "review of Chase's records." *Id.* at ¶ 26. The court notes that it also appeared that Ohio Receivables did not, in fact, rely on these records in its business, except to use them for the pending and other lawsuits. *Id.* at ¶ 29. The *Williams* decision takes a more narrow approach to the business records exception than have other decisions. In fact, the concurring opinion in *Williams* suggests that the reasoning of the Tenth District in *State Farm Mut. Auto. Ins. Co. v. Anders,* 197 Ohio App.3d 22, 2012-Ohio-824, 965 N.E.2d 1056 be adopted, although in *Williams* the records of other entities were not adopted by Ohio Receivables as their records except as the basis of the instant litigation. *Id.* at ¶ 32.

**{¶13}** *Anders* explains the oft stated reason for the so-called business records exception to the hearsay rule. It "is based on the assumption that the records, made in the regular course of business by those who have a competent knowledge of the facts recorded and a self-interest to be served through the accuracy of the entries made and kept with knowledge that they will be relied upon in a systematic conduct of such business, are accurate and trustworthy." *Id.* at ¶ 11 quoting *Weis v. Weis,* 147 Ohio St. 416, 425-426, 72 N.E.2d 245 (1947). However, even if the requirements of Evid.R. 803(6) are met, a trial court can exclude the records if the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness. *Anders* at 12. In *Anders,* plaintiff's expert witness testimony was challenged because the witness relied upon the estimate of another individual

without testimony from a record custodian or other witness concerning the preparation, maintenance, or retrieval of the estimate. *Id.* at ¶ 13. The *Anders* court observed that it had previously concluded that requiring a foundational witness to have personally participated in the creation of the document would "eviscerate the business records exception." *Id.* at ¶ 16, citing *State v. Goines,* 10th Dist. No. 89AP-916, 1990 WL 210706 (Dec. 20, 1990), quoting *United States v. Keplinger,* 776 F.2d 678, 693-692 (7th Cir. 1985). Applying such a rule, the court said, would result in no document being admitted unless the preparer personally testified as to its creation. *Id.* Noting the similarity of Ohio's business records exception to the hearsay rule and the federal rule, the court observed that the interpretation of the federal rule suggested that Rule 803(6) did not require that the document actually be prepared by the business entity proffering it. *Id.* at ¶ 22. *Anders* explained that some federal courts interpreting the business records exception concluded that the requirements of the rule are met where a business incorporates the records of another entity into its own, relies upon those records in its day-to-day operations, and there are other strong indicia of reliability. *Id.* citing *Air Land Forwarders, Inc., v. United States,* 172 F. 3d 1338 (Fed. Cir. 1999). See, also, e.g., *Ohio Receivables v. Dallariva,* 10th Dist. No. 11AP-951, 2012-Ohio-3165. One circumstance that indicates the trustworthiness of such a document proffered as a business record might be the ongoing relationship between the business creating the document and the incorporating business. *Anders* at ¶ 24. Furthermore, the affidavit of a loan servicing agent, such as Caliber, can provide the foundation for the admissibility of relevant loan documents as business records. *Fannie Mae v. Bylik,* 10th Dist. Franklin No. 15AP-11, 2015-Ohio-5544, ¶ 17, *U.S. Bank v. Martin,* 7th Dist. No. 13 MA 107, 2014-Ohio-3874, ¶ 34.

**{¶14}** The admission or exclusion of relevant evidence lies within the sound discretion of the trial court. *State v. Sage,* 31 Ohio St.3d 173, 510 N.E.2d 343 (1987). In order to find an abuse of discretion, a reviewing court must find that the trial court's decision was arbitrary, unconscionable, or unreasonable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "Even upon a showing of an abuse of

discretion, a reviewing court will uphold a trial court's evidentiary ruling unless the appellant also establishes that the abuse of discretion caused material prejudice to him or her." *Anders* at ¶ 9, citing *Banford v. Aldrich Chem. Co., Inc.,* 126 Ohio St.3d 210, 2010-Ohio-2470, 932 N.E.2d 313, ¶ 38.

**{¶15}** Here, Salyers testified that PNC's records with regard to Appellant's note and mortgage were transferred to Appellee; that she was an employee of Appellee's loan servicing agent, Caliber; that Caliber obtained the records in the regular course of its business; that Caliber had possession of the note and mortgage; and that the note and mortgage were in default. Appellant has not asserted or offered any evidence to suggest that the records are not what they appear to be or are in any way inaccurate. Based upon this record, we cannot conclude that the trial court abused its discretion in considering the affidavit and the note, mortgage, and letter attached as exhibits to the affidavit. *Anders; Bylik; Martin.* Thus, Appellant's first assignment of error is without merit and is overruled.

**{¶16}** Appellant's second assignment of error states:

> The trial court erred in granting summary judgment as there was a genuine issue of material fact that remained in dispute as to whether Appellee fulfilled the conditions precedent to the acceleration of the debt and the filing of the foreclosure complaint.

**{¶17}** Appellant complains that Appellee failed to satisfy certain conditions precedent before filing its complaint in foreclosure. Appellant asserts that the conditions precedent are set forth in paragraphs 6(B) of the promissory note and paragraph 9 of the mortgage. Those paragraphs require that Appellee comply with applicable regulations of the Secretary of Housing and Urban Development ("HUD"). Appellee responds indicating it has complied with the applicable regulations and has submitted Civ.R. 56(E) evidence to prove that the conditions were satisfied, that Appellant's affidavit to the contrary is self-serving and cannot be considered in opposition to a motion for summary judgment, and that there is additional evidence

available to prove Appellee satisfied all conditions precedent.

**{¶18}** The parties do not dispute that the regulations at issue are set forth in 24 C.F.R. Part 203, Subpart C, titled "Servicing Responsibilities." Among the requirements with which Appellant complains Appellee failed to comply, before instituting this action in foreclosure, was a face-to-face interview with Appellant or a reasonable effort to arrange such an interview before three full monthly installments are unpaid. 24 C.F.R. 203.604(b). A face-to-face meeting is not required if the mortgagor does not reside in the mortgaged property; the mortgaged property is not within 200 miles of the mortgagee, its servicer, or a branch of either; the mortgagor has clearly indicated he will not cooperate in the interview; a repayment plan consistent with the mortgagor's circumstances is entered into to bring the mortgagor's account current thus making a meeting unnecessary, and payments thereunder are current; or a reasonable effort to arrange a meeting is unsuccessful. 24 C.F.R. 203.604(c). A reasonable effort to arrange a face-to-face meeting consists, at a minimum, of one certified letter to the mortgagor certified by the Postal Service. 24 C.F.R. 203.604(d). A reasonable effort to arrange a face-to-face meeting also includes at least one trip to see the mortgagor at the mortgaged property. *Id.* 24 CFR 203.605(a) also requires Appellee to mitigate losses before four monthly installments become unpaid per the provisions of 24 C.F.R. 203.501, which requires mortgagees to consider deeds in lieu of foreclosure, a pre-foreclosure sale, a partial claim, an assumption, special forbearance, and/or recasting of the mortgage. Each of these possible considerations has a corresponding section in the Code of Federal Regulations. Appellant complains that Appellee failed to satisfy these conditions precedent.

**{¶19}** The only evidence offered by Appellee in support of its motion for summary judgment is the Salyers' affidavit. With regard to the conditions precedent, Salyers states:

> Based upon my review of Caliber Home Loans, Inc.'s business records, Plaintiff satisfied all conditions precedent pursuant to the Note and

Mortgage.

Affidavit of Status of Account, Alyssa Salyers, ¶ 8. Attached to the affidavit are a copy of the note, the mortgage, and a letter dated January 3, 2014, from PNC Mortgage. The letter states that the payment due October 1, 2013 and all subsequent payments have not been made. The letter threatens foreclosure but makes no mention of any request for a meeting. Further, there is nothing in the record which suggests that the letter was certified by the Postal Service.

**{¶20}** On July 31, 2015, Appellant filed his affidavit. In his affidavit, Appellant specifically states that he did not receive a letter from PNC or any representative of the lender requesting or attempting to arrange a face-to-face meeting to discuss his options to avoid foreclosure or "anything else regarding the status of my loan." Affidavit of Frank J. Krynicki, ¶ 3 ("Krynicki Affidavit"). Appellant further states that he received no slip in the mail that the Postal Service had certified mail for him. *Id.* at ¶ 4. The balance of Appellant's affidavit essentially denies that any of the HUD provisions discussed above were met. *Id.* at ¶¶ 5-8. Appellant concludes his affidavit indicating he wants to keep his house and would be fully cooperative in any endeavor that would accomplish the same. *Id.* at ¶ 9.

**{¶21}** As Appellant notes, where there is a genuine issue of material fact as to whether a condition precedent has been satisfied, summary judgment is inappropriate. *Bank of New York Mellon v. Roarty,* 7th Dist. No. 10 MA 42, 2012-Ohio-1471. Appellant also draws our attention to our decision in *Wells Fargo Bank, N.A. v. Aey,* 7th Dist. No. 12 MA 178, 2013-Ohio-5381 where we observed that courts regularly hold that failure to comply with the HUD regulations can be used defensively in an action on a note and mortgage, *"especially where they are said to apply in the contract." Id.* at 38 (emphasis in original). Further, in *Aey,* we held that once the borrower responds by stating in an affidavit the he was not provided with an offer of a face-to-face meeting, the burden of proving the existence of an exception to this requirement shifts to the lender. *Id.* at 47. Since the lender in *Aey* failed to provide evidence of the existence of an exception, we reversed summary judgment in

favor of the lender as we concluded a genuine issue of material fact existed. In addition, Appellant argues that Salyers' statement in her affidavit that all conditions precedent have been met is no more than an unsupported legal conclusion.

**{¶22}** In response, Appellee first argues that the Salyers' affidavit is sufficient evidence that it has satisfied all conditions precedent. It argues that Appellant has provided no evidence other than his self-serving affidavit. Appellee argues that a face-to-face meeting was attempted prior to the filing of this action. However, Appellee points to no evidence in the record to support its assertion. Instead, Appellee states:

> Unfortunately, U.S. Bank was unable to file the necessary supplemental affidavit * * * before the court granted summary judgment * * *.
>
> If necessary, U.S. Bank Trust is able to provide evidence that there was a reasonable effort to arrange a face-to-face meeting prior the filing of this foreclosure action.

Brief of Appellee, PNC Mortgage, pp. 15-16.

**{¶23}** Next, Appellee argues that Appellant's affidavit is insufficient to demonstrate a genuine issue of material fact because it is self-serving and provides no "collaborating [sic] evidence in support of his allegations." Brief of Appellee, PNC Mortgage, p. 16. Appellee cites this court's decisions essentially holding that unsupported self-serving affidavits, standing alone, without corroborating evidence, are insufficient to demonstrate a material issue of fact. However, the affidavits in the cases relied upon by Appellee are different than Appellant's affidavit here. In *Bangor v. Amato,* 7th Dist. No. 14 CO 9, 2014-Ohio-5503, ¶ 44, we concluded that an affidavit asserting that the representation of one party with regard to marital debt was "fabricated and inflated as many were outdated" without more did not create a genuine issue of material fact. In *Durick v. eBay, Inc.,* 7th Dist. No. 05 MA 0198, 2006-Ohio-4861, ¶¶ 29-30, we concluded that plaintiff, despite his affidavit that the

value of items offered for sale were “purely nostalgic”, nonetheless violated a user agreement because the items offered for sale were prescription drugs and hazardous materials. Appellee’s argument that Appellant’s affidavit is self-serving because it is not supported by corroborating evidence would be the classic scenario of asking Appellant to prove a negative. Appellant’s affidavit is quite specific. It is no more self-serving than the Salyers affidavit. The Salyers affidavit sets forth no facts demonstrating that any of the conditions precedent were met. It appears that Appellee all but acknowledges the same by arguing that “if necessary” it can provide evidence that a reasonable effort was made to arrange a face-to-face meeting with Appellant.

**{¶24}** Appellee also argues that a face-to-face meeting is not always required. This is accurate. See discussion above regarding 24 C.F.R. 604(c). Appellee again argues that, “As explained above, U.S. Bank Trust is able to provide evidence that there was a reasonable effort to arrange a face-to-face meeting prior to the filing of this foreclosure action.” Brief of Appellee, PNC Mortgage, p. 18. Appellee then represents that there was a letter sent to Appellant to arrange a meeting in May 2013 and a visit to the property on May 16, 2013. But, as Appellee acknowledges, there is no evidence in the record to support Appellee’s arguments. Appellee then argues that whether there was a meeting is irrelevant because, during the pendency of this action, Appellant was “twice offered a trial loan modification agreement and choose [sic] to not accept it.” Brief of Appellee, PNC Mortgage, p. 19, citing Substituted Plaintiff’s Reply in Opposition to Defendant’s Motion to Stay Execution Pending Appeal, page 4 [filed after summary judgment was granted and not part of the record on appeal]. Appellee then refers to numerous facts to support its argument. For example, Appellee refers to communications between the parties’ counsel about a streamline trial loan modification offer. Brief of Appellee, PNC Mortgage, p. 20. But, again, Appellee cites to no evidence which complies with Evid.R. 56. Instead, Appellee, with regard to this argument, reiterates – “Unfortunately, U.S. Bank Trust was unable to file the necessary supplemental affidavit in support of its motion for

summary judgment." Brief of Appellee, PNC Mortgage, p. 19.

**{¶25}** In summary, the only evidence offered by Appellant that the conditions precedent were met is the Salyers affidavit which consists of a legal conclusion, i.e., the conditions precedent had all been met. This is contradicted by the affidavit of Appellant stating, e.g., that no effort was made to arrange a face-to-face meeting and he received no certified mail regarding the same. Appellee contends it can produce proof that it has met this condition precedent as well as any others required, but it did not offer that evidence. This creates a genuine issue of material fact. *Aey; Roarty.* Appellant's second assignment of error has merit. The trial court's award of summary judgement is reversed.

DeGenaro, J., concurs.

Robb, P.J., concurs.