**[Cite as *TD REO Fund, L.L.C. v. Citadel Analytics Group, L.L.C.*, 2019-Ohio-939.]**

# IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

TD REO FUND, LLC.,

Plaintiff-Appellee,

v.

CITADEL ANALYTICS GROUP, LLC et al.,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**
**Case No. 18 MA 0072**

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Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2016 CV 02758

**BEFORE:**
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

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**JUDGMENT:**
Affirmed.

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*Atty. Suzana Krasnicki*, Keith D. Weiner & Associates Co., LPA, 75 Public Square, 4th Floor, Cleveland, Ohio 44113 for Plaintiff-Appellee and

*Atty. Steven S. Fannin*, Cole Co., LPA, 863 N. Cleveland-Massillon Road, Akron, Ohio 44333 for Defendant-Appellant.

Dated: March 7, 2019

**Robb, J.**

**{¶1}** Defendant-Appellant Citadel Analytics Group, LLC appeals the decision of the Mahoning County Common Pleas Court entering judgment on a note and ordering foreclosure of the mortgaged property, as sought in a motion for summary judgment filed by Plaintiff-Appellee TD REO Fund, LLC. Appellant alleges the judgment was not a final order because a portion of the damage award was indefinite. Appellant also contends there were genuine issues of material fact as to the calculation of damages. For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

**{¶2}** In April 2013, Appellant borrowed $312,000 by executing a promissory note with interest-only monthly payments at a rate of 14% per annum, plus $464 for any late payments. If the balance was not paid on the maturity date of November 30, 2014, the note imposed a late charge of 10% on the entire balance owed. Upon default, the lender could declare all owed amounts immediately due and all sums owing would bear interest at the rate of 25% per annum. The note was secured by a mortgage on property at 1630 Blueberry Trail in Youngstown. The mortgage provided the lender could advance sums to pay real estate taxes, hazard insurance premiums, property protection, and property maintenance.

**{¶3}** The mortgage was assigned and the note was negotiated to Appellee. After Appellant defaulted on the note, a May 26, 2015 notice of default and acceleration demanded full payment by June 30, 2015. Appellant did not do so. On October 14, 2016, Appellee filed suit seeking foreclosure, recovery on the note, and other relief. The complaint sought judgment for the following unpaid amounts: $311,949.30 in principal; $1,749.66 for the negative escrow balance; $116,981.01 for interest through June 30, 2016, with additional interest accruing at a rate of 25%; $46,173.63 in fees, late payments, and escrow advances; and sums subsequently advanced for taxes, insurance, and property protection and maintenance. Appellant filed an answer and counterclaim.

**{¶4}** Appellee filed a motion for summary judgment arguing Appellee was entitled to judgment as a matter of law on the complaint and the counterclaim. An affidavit was filed attesting to the pertinent documents, establishing the default, and verifying the unpaid amounts set forth in the complaint. Appellant's response argued there remained genuine issues of material fact on damages, including the calculation and propriety of interest, additional interest, and fees. The response did not appear to contest summary judgment as to the default, the right to foreclose, or the counterclaim.

**{¶5}** On June 5, 2018, the trial court granted Appellee's motion for summary judgment. The court ordered foreclosure on the property and entered judgment for Appellee in the specific amounts set forth in the complaint and summary judgment motion plus certain advances. Appellant filed a timely notice of appeal.[1]

FINAL ORDER

**{¶6}** Appellant sets forth two assignments of error. As the second assignment of error contests the finality of the trial court's order, we address it first. This assignment alleges:

"The lower court erred as a matter of law when it calculated damages. Such calculations are overly vague and indefinite, do not provide a final order of the court, and require further proceedings consistent therewith."

**{¶7}** The trial court's judgment listed certain specific amounts due to Appellee in the following categories: the principal sum due; the current negative escrow balance; interest through June 30, 2016; fees, late payments, and escrow advances; and "advances for taxes, insurance, or otherwise expended to protect the property." As to the latter category, the court found "there may be due to Plaintiff, sums advanced by it under the terms of the Note and Mortgage to pay real estate taxes, hazard insurance premiums, and property protection, which sums are to be determined by further Order of this Court." Appellant contends the failure to set forth a definite amount for these further advanced

[1] We note a transcript was submitted to this court from a magistrate's hearing where Appellee presented testimony on the amounts due. No magistrate's decision was issued as a result of that proceeding. We are reviewing the trial court's decision to grant Appellee's summary judgment motion. *See Capital One Bank v. Toney*, 7th Dist. No. 06 JE 28, 2007-Ohio-1571, ¶ 22 ("Where a case has been referred to a magistrate, "there is no inherent problem with a judge subsequently ruling on the purely legal matter of the summary judgment motion instead of leaving it for the magistrate.").

sums, along with the failure to finalize the amounts due to other lienholders, resulted in the lack of a final, appealable order.

**{¶8}** Regarding the Defendant-Treasurer of Mahoning County, the court found due: "taxes, accrued taxes, assessments, and penalties on the premises hereinafter described, as shown on the Mahoning County Treasurer's tax duplicate, the exact amount being unascertainable at the present time, but which amount will be ascertainable at the time the Deed transfers following the sale, which is a valid and subsisting lien thereon for that amount so owing." Appellee was named the first and best lienholder, subject only to the lien of the Treasurer for taxes.

**{¶9}** As for the only other defendant, Mortgage Electronic Registration Systems, Inc., acting solely as a nominee for The Huntington National Bank, the court granted Appellee's motion for default judgment. The court's order barred this defendant from asserting any interest in the premises. There were no other defendants named in the action, and no other lienholders were otherwise indicated.

**{¶10}** A foreclosure order which leaves merely mechanical or ministerial damage calculations for the confirmation stage is a final order. *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, ¶ 13. In *LaSalle Bank*, this court rejected arguments akin to those Appellant now makes. The order in that case contained similar findings: amounts due to the Treasurer were not yet ascertainable; the lender had the first and best lien for any amounts expended as advances for taxes, insurance, and property protection, which would be set forth in the future confirmation order; and the other defendants had no interest (as they disclaimed any interest in the premises). *LaSalle Bank Natl. Assn. v. Smith*, 7th Dist. No. 11 MA 85, 2012-Ohio-4040, ¶ 15. Due to the latter finding, we distinguished a prior case where the number, priority, and value of outstanding liens had not been determined. *Id.* at ¶ 16, distinguishing *Second Nat. Bank of Warren v. Walling*, 7th Dist. No. 01 CA 62, 2002-Ohio-3852, also distinguishing *PHH Mtge. Corp. v. Albus*, 7th Dist. No. 09 MO 9, 2011-Ohio-3370 (where the order said a final foreclosure decree "to be submitted" in the future).

**{¶11}** Concerning the unknown amount of taxes due to the Treasurer or the unspecified amount of advances for taxes, insurance, and property protection, this court reasoned that such total was not ascertainable at the time of the foreclosure order

because it was unknown how long it would take to sell the property. *LaSalle Bank*, 7th Dist. No. 11 MA 85 at ¶ 18. We pointed out there is a second stage in a foreclosure case where a confirmation order is issued and can be appealed. *Id.* at ¶ 20-21 ("if the advances made for taxes, insurance and property protection are determined at the time of the confirmation of the sale, any amount in dispute is subject to an appeal of the confirmation of the sale order"). Accordingly, the entry of judgment for unspecified amounts for advanced taxes, insurance, and property protection did not destroy the foreclosure order's finality. *Id.* at ¶ 21-22. *See also Bank of Am. v. Laster*, 8th Dist. No. 100606, 2014-Ohio-2536, ¶ 25 ("the trial court's judgment that allowed for taxes, insurance premiums, and property protection, but did not include a specific itemization for those amounts is a final, appealable order").

**{¶12}** In *Roznowski*, the Fifth District agreed the portion of the foreclosure judgment for amounts advanced for taxes and insurance merely involved mechanical calculations but refused to extend this analysis to the portion of the judgment for amounts advanced for property protection (where the trial court entered judgment for amounts advanced for "inspection, appraisal, preservation, and maintenance"). After a conflict was certified with this court's *LaSalle Bank* case, the Supreme Court agreed with our decision and reversed the Fifth District. *See Roznowski*, 139 Ohio St.3d 299 at ¶ 14-21, 44.

**{¶13}** Recognizing the foreclosure judgment must address the rights of the lienholders and the responsibilities of the mortgagor, the Supreme Court explained the key is "what the mortgagors would be liable for" not a specification of the actual amounts due. *Id.* at ¶ 20 (citing *LaSalle Bank*'s distinguishing of *Walling* and *PHH*). The Court concluded: "A judgment decree in foreclosure that allows as part of recoverable damages unspecified amounts advanced by the mortgagee for inspections, appraisals, property protection, and maintenance is a final, appealable order pursuant to R.C. 2505.02(B)(1)." *Roznowski*, 139 Ohio St.3d 299 at paragraph one of syllabus.

**{¶14}** The lack of "specific itemization of those amounts" in the foreclosure judgment does not affect finality. *Id.* at ¶ 19, 22, 30 (the order is final where "all damages for which the [mortgagors] are responsible are established, and only the amounts subject to clarification"). "A court in a foreclosure suit cannot state with certainty how much expense a mortgagee might have to advance before a sheriff's sale has occurred and is

confirmed, since interest continues to accrue and unforeseen new costs might arise." *Id.* at ¶ 24.

**{¶15}** "For an order to determine the action and prevent a judgment for the party appealing, it must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the trial court." *Id.* at ¶ 25. "Liability is fully and finally established when the court issues the foreclosure decree and all that remains is mathematics, with the court plugging in final amounts due after the property has been sold at a sheriff's sale." *Id.*

**{¶16}** The Supreme Court concluded the mortgagor can contest the unspecified amounts (such as those advanced for property protection) during the proceeding confirming the foreclosure sale and can then appeal the confirmation order to contest adverse rulings on the "computation of the final total owed by the mortgagor, accrued interest, and actual amounts advanced" on the previously-uncalculated categories. *Id.* at ¶ 31, 35, 40 ("We agree with the Seventh District in *LaSalle* that two judgments are appealable in foreclosure actions: the order of foreclosure and sale and the order of confirmation of sale.").

**{¶17}** Here, the trial court evaluated the summary judgment evidence, foreclosed on the mortgage, accounted for each party's interest, and set forth the mortgagor's responsibilities. The judgment: recited the principal due on the note; listed the interest accrued (as of the date specified in the affidavit supporting the summary judgment motion) and the continuing interest rate thereafter; provided the amount of the current negative escrow balance and the amount owed for fees, late payments, and escrow advances; and set forth the categories of future obligations of the mortgagor. The priority of liens was established, and the rights of each defendant were addressed. Pursuant to precedent, such a foreclosure judgment specifying the amounts due as of a certain date does not lack finality because it further enters judgment for amounts owed to the Treasurer and to the lender for advances for taxes, insurance, or property protection without specifying these amounts. In accordance, the trial court's judgment was a final, appealable order, and Appellant's second assignment of error is overruled.

SUMMARY JUDGMENT ON DAMAGES

**{¶18}** Appellant's remaining assignment of error contends:

"The lower court erred as a matter of law in granting the Appellee's Motion for Summary Judgment. Genuine issues of material fact remained to be decided at the time the order was granted."

**{¶19}** Summary judgment can be granted when no genuine issue of material fact remains and reasonable minds can only conclude the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). The movant has the initial burden to show there is no genuine issue of material fact. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996). The non-moving party then has a reciprocal burden. *Id.* The non-movant's response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing there is a genuine issue for trial; the non-movant may not rest upon mere allegations or denials in the pleadings. Civ.R. 56(E).

**{¶20}** Civ.R. 56 must be construed in a manner that balances the right of the non-movant to have a jury try claims adequately based in fact with the right of the movant to demonstrate, prior to trial, that the claims and defenses have no discernible factual basis. *Byrd*, 110 Ohio St.3d 24 at ¶ 11, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The court is to consider the evidence and reasonable inferences in the light most favorable to the non-movant. *See, e.g., Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 11. Still, the material issues of each case depend on the arguments specified and the substantive law applicable to the case. *See Byrd*, 110 Ohio St.3d 24 at ¶ 12. We review the granting of summary judgment de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8.

**{¶21}** The note and mortgage were provided as summary judgment evidence. This was an interest-only loan, i.e., the monthly payments paid only the interest and did not lower the principal. The annual interest rate was 14%, with a late fee of $464 for any failure to timely pay a monthly payment, a 10% late payment charge for failure to pay all amounts payable at maturity, and an interest rate of 25% on all sums owing upon default. The mortgagor was liable for escrow advances for items such as taxes, insurance, and property protection. An affidavit was submitted with the summary judgment motion. Various relevant business documents were incorporated into the affidavit as proper

summary judgment evidence. The affidavit established the amounts owed, including the interest accrued as of June 30, 2016.

**{¶22}** Appellant's response to this motion for summary judgment contained speculative queries and non-specific, conclusory statements. For instance, Appellant's response disputed whether interest at the higher rate was proper *without disclosing an argument as to why* it would be improper to impose a rate contained in the parties' agreement. "[A] nonmovant does not meet their reciprocal burden by merely denying that they owe the amount claimed to be due." *Target Natl. Bank v. Loncar*, 7th Dist. No. 12 MA 104, 2013-Ohio-3350, ¶ 25. Regardless, this argument is not maintained on appeal.

**{¶23}** Appellant's response also inquired as to how the interest was listed as $18,850 in a February 2015 letter but increased to $116,981.01 by the end of June 2016. However, this general observation seemingly failed to recognize: sixteen months passed between the dates of the documents utilized by Appellant; the February 2015 letter was provided during a period of forbearance; the note explains that the option of acceleration can be exercised regardless of any prior forbearance; the notice of default and acceleration was provided in March 2015; the interest rate thereby increased from 14% to 25% as of the date of the default; and the new rate would apply to all sums due.

**{¶24}** Notably, upon the mortgagee-movant providing an affidavit showing the amounts due under the note and the right to foreclose on the property, the burden shifts to the non-movant, who must set forth specific facts to support the argument made. *See* Civ.R. 56(E). *See also Loncar*, 7th Dist. No. 12 MA 104 at ¶ 28-29 (a creditor cannot avoid summary judgment by merely responding that there is a genuine issue on damages and alleging the amount may be in dispute without offering evidence of what amount was due); *Herald v. Ohio Valley Bank*, 4th Dist. No. 00CA28, 2001-Ohio-2632 (conclusory statements on miscalculated interest are insufficient; "If the bank's calculations are inaccurate, as appellant contends, it is incumbent on appellant to highlight those inaccuracies and propose his own alternative figures").

**{¶25}** Under the circumstances of this case, the mere submission to the trial court of letters showing two totals at two different points in time is not akin to specifying the calculation issue for the court's consideration. Appellant's response did not explain what the allegedly correct calculation should be or what error allegedly occurred in the

calculation. Moreover, Appellant's response was not supported by an affidavit or other proper summary judgment evidence to support the unspecified miscalculation issue. It is not a trial court's duty to calculate all of the past figures attested to in an affidavit submitted in support of a summary judgment motion; this is the obligation of the non-movant by responding with specific dates and figures to be used to reach an alternate calculation. The place for asking the plaintiff questions is discovery rather than in a response to summary judgment.

**{¶26}** We also note Appellant's response to summary judgment questioned why fees increased to $46,173.63 if they only amounted to $32.00 in the February 2015 letter. However, the letter relied upon by Appellant specifically listed "Overdue Payment Charges – Maturity Fee $32,715.99" after the handling fee of $32.00. As for the remainder of the amount, the category totaling $46,173.63 in Appellee's summary judgment motion (and the court's judgment) was not only for fees and late payments but was also for escrow advances. The affidavit filed in support of Appellee's summary judgment motion incorporated the payment history on the loan showing sums advanced after the February 2015 letter.

**{¶27}** In any event, Appellant's brief merely states the response to the motion for summary judgment "disputed the calculation of interest, the calculation of taxes and the calculation of additional penalties and compound interest" and generally contends "These were genuine issues of material fact that went unaddressed by the trial court's decision."[2] It is claimed the arguments in response to summary judgment shifted the burden back to Appellee. Appellant summarily concludes the case should be "remanded on the proper calculation of interest and damages * * *."

**{¶28}** No calculations were performed, and no law regarding the calculations was set forth. "The burden of affirmatively demonstrating error on appeal rests with the plaintiff." *Miller v. Johnson & Angelo*, 10th Dist. No. 01AP-1210, 2002-Ohio-3681, ¶ 2. An appellant's brief must include: "An argument containing the contentions of the

[2] Appellant's response did not in fact mention taxes. To the extent this assignment of error intended to rely on arguments presented in the other assignment of error concerning indefinite damages, such arguments are overruled under the analysis set forth above. That is, it was not necessary for the foreclosure judgment to specify the taxes due to the Treasurer (or the sums advanced for taxes, hazard insurance, and property protection) after the date utilized in the summary judgment motion and affidavit.

appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." App.R. 16(A)(7). *See also* App.R. 12(A)(2).

**{¶29}** To the extent Appellant's brief intended to suggest it was incorporating the arguments presented in the trial court, rather than presenting and explaining the arguments in the filing required in this court: it is well-established that a party's appellate brief cannot merely "incorporate by reference" arguments made to the trial court by directing the appellate court to read the filings made below. *Young v. Kaufman*, 8th Dist. No. 104990, 2017-Ohio-9015, 101 N.E.3d 655, ¶ 44; *Deutsche Bank Natl. Trust Co. v. Taylor*, 9th Dist. No. 28069, 2016-Ohio-7090, ¶ 14. Appellant's brief does not specify the reasons the calculation of interest or penalties was improper (or mention how this was properly established to the trial court below). "It is not the duty of this court to search the record for evidence to support an appellant's argument as to alleged error." *Abraham v. BP Exploration & Oil, Inc.*, 149 Ohio App.3d 471, 2002-Ohio-4392, 778 N.E.2d 48, ¶ 33 (10th Dist.).

**{¶30}** For all of the foregoing reasons, this assignment of error is overruled, and the trial court's judgment is affirmed.

Donofrio, J., concurs.

Waite, P.J., concurs.

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For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

**NOTICE TO COUNSEL**

**This document constitutes a final judgment entry.**