[Cite as *Bank of Am., Natl. Assn. v. Ly*, 2011-Ohio-437.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
BANK OF AMERICA, NATIONAL ASSOCIATION, AS TRUSTEE Appellee v. HOANG M. LY, et al. Appellants	C.A. No. 25360 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2009-03-1928

DECISION AND JOURNAL ENTRY

Dated: February 2, 2011

MOORE, Judge.

{¶1} Appellant, Hoang M. Ly, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On December 22, 2006, Ly executed an adjustable rate note in the amount of $305,000 from Mortgage Electronic Registration Systems, Inc. as nominee for the lender, First Franklin, a division of National City Bank. The note was secured by a mortgage on the home located at 10210 Pratt Lane, Twinsburg, Ohio, 44087. First Franklin subsequently assigned the note and mortgage to LaSalle Bank, National Association. LaSalle Bank in turn assigned the note and mortgage to appellee, Bank of America, National Association. The loan was serviced by Home Loan Services, Inc. (hereinafter "Home Loan"). As of October 1, 2008, Ly was in default of his monthly payment obligations.

{¶3} On March 10, 2009, Bank of America filed a complaint for foreclosure in the Summit County Court of Common Pleas. On May 29, 2009, Ly filed an answer and counterclaims on the grounds of fraud in the inducement and concealment, as well as deceptive practices. On September 16, 2009, Bank of America filed a motion for summary judgment on Ly's counterclaims. On October 7, 2009, the trial court granted summary judgment to Bank of America on Ly's counterclaims. On October 28, 2009, Bank of America filed a motion for summary judgment on its claim for foreclosure. On November 13, 2009, Ly filed a brief in opposition. On November 24, 2009, Bank of America filed a motion for leave to attach evidentiary materials, including the affidavit of Andrew Miller, to its simultaneously filed reply in support of summary judgment. Although he had ample opportunity to do so, Ly did not oppose the motion. On March 30, 2010, fully four months after the motion for leave to attach evidentiary materials was filed, the trial court granted to Bank of America summary judgment, a decree of foreclosure and an order of sale. In its judgment, the trial court implicitly granted the motion for leave to attach additional materials when it noted that it considered, among others, Plaintiff's Reply in Support of Motion for Summary Judgment and Plaintiff's Motion for Leave to Attach Evidentiary Materials to its Reply.

{¶4} Ly timely filed a notice of appeal. He has raised two assignments of error for our review.

II.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO [] BANK OF AMERICA, NATIONAL ASSOCIATION AS THERE WERE GENUINE ISSUES OF MATERIAL FACT AND [BANK OF AMERICA] WAS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW."

{¶5} In his second assignment of error, Ly contends that neither of the affidavits in support of summary judgment demonstrated the personal knowledge or competency of the affiants to testify. Consequently, he contends that the affiants' averments and the attached documents constitute inadmissible hearsay. We do not agree.

{¶6} Initially, we observe that Ly neither objected to the contents of Miller's affidavit attached to Bank of America's reply nor to the trial court's consideration of Miller's affidavit. We therefore limit our discussion of personal knowledge and competency to testify to the affidavit attached to Bank of America's original motion for summary judgment. See *Cheriki v. Black River Industries, Inc.*, 9th Dist. No. 07CA009230, 2008-Ohio-2602, ¶6.

{¶7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶8} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶9} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party

bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶10} Evid.R. 803(6) governs the admissibility of business records as an exception to the hearsay rule. "Evid.R. 803(6) excepts from the hearsay rule records kept in the course of a regularly conducted business activity if it was the regular practice of that business to make such records and those records were made by or from information transmitted by a person with knowledge." *Charter One Mtge. Corp. v. Keselica*, 9th Dist. No. 04CA008426, 2004-Ohio-4333, ¶19.

{¶11} In support of its summary judgment motion, Bank of America attached the affidavit of Bryan Kusich, Vice President of Default Servicing for Home Loan. After reviewing the affidavit, we are convinced that the statements contained in the affidavit refer to business records kept in the course of Home Loan's business as a loan servicer. As a loan servicer, Home Loan was responsible for keeping records of the loan history, including payments and the balance due. Home Loan was also responsible for keeping copies of the note, mortgage and assignments. Kusich averred that he had reviewed the loan history and its relevant documents. Kusich's averments did not, therefore, constitute inadmissible hearsay.

{¶12} Affidavits submitted under Civ.R. 56 "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. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit." Civ.R. 56(E). "[W]here the nature of the facts contained in the affidavit, together

with the identity of the affiant, creates a reasonable inference that the affiant has knowledge of the facts therein," an affiant need only state that he has personal knowledge of the matter to satisfy Civ.R. 56(E). *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, at ¶14, quoting *Merchants Natl. Bank v. Leslie* (Jan. 21, 1994), 2d Dist. No. 3072.

{¶13} Kusich averred based on personal knowledge that Home Loan was the servicing agent for Ly's loan and that he had reviewed the loan history and relevant documents, all of which were records maintained in the ordinary course of business. He attached to the affidavit copies of the note, mortgage and assignments. He further averred that Ly had not made monthly payments since October 1, 2008, and that he was in default. He also averred that "[p]ursuant to the terms and conditions of the Note and Mortgage, the balance due and owing has been accelerated." He averred that the principal balance due on the note and mortgage was $300,619.56, plus interest at the variable rate determined by the terms of the note, plus late charges, advances or other costs incurred for the protection of the property. Lastly, Kusich averred that the documents attached to his affidavit were true and accurate copies of the documents in his files and that the documents were maintained in the ordinary course of business.

{¶14} Kusich averred personal knowledge of the facts contained in his affidavit. He also averred that his title was "Vice President, Default Servicing" for Home Loan. He included in his affidavit the date of Ly's default, the fact that the loan balance had been accelerated pursuant to the terms of the mortgage and note and the principal balance due and owing. He also attached to his affidavit a copy of the note, the mortgage and the assignments demonstrating that Bank of America held the note. Accordingly, Kusich's affidavit created a reasonable inference that he had knowledge of the facts therein and he stated that he had personal knowledge of the

matter. *Bank One* at ¶14. Moreover, his averments and the attached documents did not constitute inadmissible hearsay. *Charter One* at ¶19. Ly's second assignment of error is overruled.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO [] BANK OF AMERICA, NATIONAL ASSOCIATION AS THERE WAS A GENUINE ISSUE OF MATERIAL FACT WHETHER [BANK OF AMERICA] PROVIDED NOTICE OF DEFAULT PRIOR TO ACCELERATION AS REQUIRED UNDER THE MORTGAGE."

{¶15} In his first assignment of error, Ly contends that the trial court erred in granting summary judgment to Bank of America because there was a genuine issue of material fact as to whether Bank of America provided notice of default prior to acceleration as required under the mortgage. We do not agree.

{¶16} Ly contends that Bank of America "failed to provide admissible evidence of a notice of default and right to cure prior to acceleration that complies with paragraph 22 of the mortgage." This argument has at its core the fact that an employee of Home Loan provided an affidavit averring knowledge of breach letters sent by First Franklin Loan Services. Ly believes that the affiant failed to explain how the letters were prepared or mailed.

{¶17} Paragraph 22 of the mortgage agreement states that:

> "Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument * * * The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by the Security Instrument, foreclosure by judicial proceeding and sale of the Property."

Paragraph 15 of the mortgage provides that: "Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means."

{¶18} In support of its motion for summary judgment, Bank of America attached Kusich's affidavit, which, with regard to notice, included the averment that "[p]ursuant to the terms and conditions of the Note and Mortgage, the balance due and owing has been accelerated."

{¶19} In support of his opposition to summary judgment, Ly attached an affidavit of his own testimony in which he averred that he never received notice of acceleration or an opportunity to redeem.

{¶20} On November 24, 2009, Bank of America filed a motion for leave to attach evidentiary materials to its reply in support of the motion for summary judgment. Ly did not oppose the motion even though the trial court did not enter summary judgment in Bank of America's favor until March 30, 2010. The evidentiary materials included Miller's affidavit. Miller averred on the basis of personal knowledge that he was responsible for all breach letters sent to borrowers on loans serviced by Home Loan. He averred that he was one of the custodians of the acceleration letters sent to Ly. He further averred that the letters were maintained in the ordinary course of business. He attached to the affidavit four letters addressed to Ly that provided notice that he was in default, provided a manner to cure the default and provided a date thirty days in the future by which default must be cured. The letters notified Ly that failure to cure the default would provide the holder with the right to accelerate the balance due and foreclose on the property. Lastly, Miller averred that Home Loan sent each of the letters to Ly via first class mail.

{¶21} Assuming without deciding that Kusich's averment was insufficient to properly demonstrate that Ly received notice, Miller's affidavit establishes that Ly was given notice. Miller's affidavit was attached to Bank of America's motion for leave to attach additional summary judgment materials. Although Ly had ample opportunity, four months, to respond to the motion to attach additional summary judgment materials between the time it was filed on November 24, 2009, and the date the court entered summary judgment, March 30, 2010, he did not do so. The trial court implicitly granted the motion for leave to attach additional summary judgment materials when it noted in its entry granting summary judgment that it considered Plaintiff's Reply in Support of Motion for Summary Judgment and Plaintiff's Motion for Leave to Attach Evidentiary Materials to its Reply. Accordingly, the trial court could consider Miller's affidavit.

{¶22} Miller's uncontested affidavit averred that Home Loan sent four different notices to Ly via first class mail. Thus, the affidavit did explain how the notices were mailed. Miller attached copies of the notices to his affidavit. Paragraph 15 of the mortgage provides that notice is deemed to have been given when it is sent by first class mail. Miller was responsible for every breach letter sent by Home Loan. Under the terms of the mortgage he signed, Ly was given notice of default and the terms to cure the default, as well as Bank of America's right to accelerate the balance and foreclose on his home should he fail to cure the default. Ly's first assignment of error is overruled.

III.

{¶23} Ly's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

MARGARET A. MCDEVITT, and JULIUS P. AMOURGIS, Attorneys at Law, for Appellant.

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