[Cite as *Bank of Am., N.A. v. Wiggins*, 2015-Ohio-4012.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

BANK OF AMERICA, N.A. Appellee v. AARON D. WIGGINS, et al. Appellants	C.A. No. 14AP0033 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE No. 13CV0618

DECISION AND JOURNAL ENTRY

Dated: September 30, 2015

MOORE, Judge.

{¶1} Defendants-Appellants Aaron D. Wiggins and Donna J. Wiggins appeal from the entry of the Wayne County Court of Common Pleas granting summary judgment to Plaintiff-Appellee Bank of America, N.A. ("Bank of America") and issuing a decree of foreclosure. This Court affirms.

I.

{¶2} In November 2013, Bank of America filed a complaint for foreclosure against Mr. and Mrs. Wiggins and the Treasurer of Wayne County. Bank of America alleged it was the holder of a promissory note, amended and restated note, note loan modification agreement, and mortgage deed. Additionally, it asserted that there had been a default in payment, that it had declared the entire sum of $99,712.27 plus interest due, and that it had complied with all conditions precedent contained in the note, amended and restated note, modification agreement,

and mortgage. Attached to the complaint were copies of the note, amended and restated note, loan modification agreement, open-end mortgage, and the assignment of the mortgage.

{¶3} Mr. and Mrs. Wiggins answered and asserted various "affirmative defenses" including that, "[Bank of America] failed to give the proper and requisite notice prior to acceleration as required under ¶ 13 of the Mortgage, ¶ 8 of the Note, and ¶ 8 of the Amended and Restated Note[,]" and that "[Bank of America] failed to complete all [Housing and Urban Development ("HUD")] servicing requirements prior to initiating this foreclosure action as required pursuant to 24 C.F.R. [] 203.606(a), and also required pursuant to ¶ 9(d) of the Mortgage, ¶ 6(B) of the Note, and ¶¶ 6(B) and 10(D) of the Amended and Restated Note."

{¶4} Bank of America filed a motion for summary judgment asserting it was entitled to judgment as a matter of law and attached evidentiary materials to its motion. Inter alia, it asserted, and submitted evidentiary materials that it alleged evidenced that it was in full compliance with the conditions precedent.

{¶5} Mr. and Mrs. Wiggins responded in opposition. They conceded that Bank of America adequately pleaded compliance with all conditions precedent to acceleration and foreclosure; however, they maintained that the two paragraphs in their answer (quoted above) were not affirmative defenses, but instead were denials of the performance of conditions precedent. Thus, Mr. and Mrs. Wiggins asserted that Bank of America had to prove compliance "with the applicable HUD loan servicing requirements for FHA insured loans such as the home loan evidence[d] by the instant Note and Mortgage." Mr. and Mrs. Wiggins asserted that Bank of America failed to send a notice of deficiency that was in compliance with 24 C.F.R. 206.602 and failed to comply with the face-to-face meeting requirements of 24 C.F.R. 203.604(b),(c) and (d). Mr. and Mrs. Wiggins did not submit any evidentiary materials.

{¶6} Bank of America replied, arguing that the two paragraphs of Mr. and Mrs. Wiggins' answer at issue were not pled with sufficient particularity to satisfy Civ.R. 9(C), that Bank of America complied with 24 C.F.R. 203.602, and that Mr. and Mrs. Wiggins should be deemed to have admitted that Bank of America complied with the conditions precedent due to their failure to specifically and with particularity deny performance of the conditions precedent.

{¶7} The trial court granted Bank of America's motion for summary judgment and issued a decree of foreclosure. Mr. and Mrs. Wiggins have appealed, raising a single assignment of error for our review.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF BANK OF AMERICA [] ON ITS COMPLAINT AS THERE WAS A GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER BANK OF AMERICA [] COMPLIED WITH HUD REGULATIONS REGARDING FHA INSURED HOME LOANS AS CODIFIED UNDER 24 C.F.R. [] 203.602 AND 203.604 AS REQUIRED PURSUANT TO PARAGRAPH 6.(B) OF THE NOTE, PARAGRAPHS 6.(B) AND 10 OF THE RESTATED NOTE AS WELL AS PARAGRAPH 9.(A),(D) OF THE MORTGAGE.

{¶8} Mr. and Mrs. Wiggins argue in their sole assignment of error that the trial court erred in granting summary judgment in favor of Bank of America because there was a genuine issue of material fact with respect to whether it complied with HUD servicing regulations applicable to FHA insured loans.

{¶9} We review an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). 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.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶10} Pursuant to Civ.R. 56(C), summary judgment is proper only 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., 50 Ohio St.2d 317, 327 (1977). 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*, 75 Ohio St.3d 280, 292-93 (1996). "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Id*. at 293. If the moving party fulfills this burden, then the burden shifts to the nonmoving party to prove that a genuine issue of material fact exists. *Id*.

{¶11} Mr. and Mrs. Wiggins assert that compliance with the HUD regulations constitute conditions precedent, that Bank of America sufficiently pleaded compliance with the conditions precedent, that their answer was sufficient to constitute a denial of compliance, that Bank of America had to prove it complied with the conditions, and that a genuine dispute of material fact remains with respect to whether it did.

{¶12} This Court recently held that, "where compliance with HUD regulations is required by a note and mortgage, such compliance is a condition precedent to bringing a foreclosure action." *Wells Fargo Bank, N.A. v. Awadallah*, 9th Dist. Summit No. 27413, 2015-Ohio-3753, ¶ 21. Nonetheless, even assuming that Mr. and Mrs. Wiggins' answer was sufficient under Civ.R. 9(C), and that Bank of America was required to prove compliance with the

conditions precedent to establish its entitlement to judgment as a matter of law, because the record does not contain all of the evidentiary materials submitted by Bank of America in support of its motion for summary judgment, this Court is unable to fully review the merits of Mr. and Mrs. Wiggins' argument. Specifically, the record does not contain the affidavit of Pamela Jean Hunter, which the parties seem to agree relates to whether Bank of America complied with the face-to-face meeting requirement, the payment history, the notice of intent to accelerate, the face-to-face letter, or the settlement statement. These documents were referenced either in the brief in support of the motion for summary judgment or the affidavit of Brenda Swinton; however, they are not in the record. The parties seem to agree that these materials were filed, as both sides reference them in the motions below and in their filings on appeal.

{¶13} Nonetheless, "[a]n appellate court's review is restricted to the record provided by the appellant to the court. *See* App.R. 12(A)(1)(b). Accordingly, the appellant assumes the duty to ensure that the record, or the portions necessary for review on appeal, is filed with the appellate court." *State v. Browne*, 9th Dist. Wayne No. 01CA0056, 2002-Ohio-2434, ¶ 6. We conclude that review of Mr. and Mrs. Wiggins' arguments on appeal necessitates consideration of documents that are not included in the record. Even if we agreed that, under the circumstances, Bank of America was required to demonstrate compliance with the HUD regulations, the record does not contain the documents necessary to determine whether there was compliance. "As we cannot conduct a review on an incomplete record, we must presume regularity in the proceedings below." *State v. Morris*, 9th Dist. Summit No. 25519, 2011-Ohio-6594, ¶ 5. Accordingly, we are required to overrule Mr. and Mrs. Wiggins' assignment of error and affirm the judgment of the trial court.

{¶14} Mr. and Mrs. Wiggins' assignment of error is overruled.

III.

{¶15} The judgment of the Wayne 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 Wayne, 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(C). 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 Appellants.

CARLA MOORE
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

MICHAEL J. LUBES, Attorney at Law, for Appellants.

MIKE L. WIERY and RACHEL M. KUHN, Attorneys at Law, for Appellee.