[Cite as *Lakeview Loan Servicing, L.L.C. v. Dancy*, 2016-Ohio-7106.]

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

LAKEVIEW LOAN SERVICING, LLC	C.A. No. 27889
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
ERIC L. DANCY, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellants	CASE No. CV 2014 08 3991

DECISION AND JOURNAL ENTRY

Dated: September 30, 2016

CARR, Presiding Judge.

{¶1} Appellant, Eric Dancy, appeals the judgment of the Summit County Court of Common Pleas. This Court reverses and remands.

I.

{¶2} In 2009, Dancy executed a note in favor of Fairway Independent Mortgage Corp., for the property located at 558 Baltimore Ave., Akron, Ohio. The note was ultimately assigned to Lakeview Loan Servicing, L.L.C. ("Lakeview Loan"). The note was secured by an open-end mortgage.

{¶3} On August 27, 2014, Lakeview Loan filed a complaint in foreclosure against Dancy. Dancy filed an answer denying the allegations in the complaint. Pursuant to Civ.R. 9(C), Dancy specifically averred that Lakeview Loan failed to complete several HUD servicing requirements, thereby failing to satisfy a condition precedent to acceleration and foreclosure.

{¶4} On May 28, 2015, Lakeview Loan filed a motion for summary judgment. Dancy filed a brief in opposition to the motion, and Lakeview Loan replied thereto. The trial court subsequently granted summary judgment for Lakeview Loan. On July 21, 2015, the trial court issued its judgment entry.

{¶5} On appeal, Dancy raises one assignment of error.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF LAKEVIEW LOAN SERVICING, LLC ("LAKEVIEW"), ON ITS COMPLAINT, AS THERE WAS A GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER LAKEVIEW COMPLIED WITH THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ("HUD") REGULATIONS REGARDING FEDERAL HOUSING ADMINISTRATION ("FHA") INSURED HOME LOANS AS CODIFIED UNDER 24 C.F.R. § 203.602 AS REQUIRED PURSUANT TO PARAGRAPH 6.(B) OF THE NOTE AS WELL AS PARAGRAPH 9.(A),(D) OF THE MORTGAGE.

{¶6} In his sole assignment of error, Dancy contends the trial court erred in granting summary judgment because there is a question of fact regarding whether Lakeview Loan complied with HUD regulations prior to initiating foreclosure proceedings. This Court agrees.

{¶7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court applies the same standard as the trial court, viewing the facts in 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).

{¶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., 50 Ohio St.2d 317, 327 (1977).

{¶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*, 75 Ohio St.3d 280, 292-293 (1996). 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 a moving party satisfies its burden of supporting its motion for summary judgment with acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated at trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996).

{¶10} We note that "[a] foreclosure requires a two[-]step process." (Internal quotations and citations omitted.) *Natl. City Bank v. Skipper*, 9th Dist. Summit No. 24772, 2009-Ohio-5940, ¶ 25. "The prerequisites for a party seeking to foreclose a mortgage are execution and delivery of the note and mortgage; valid recording of the mortgage; default; and establishing an amount due." *CitiMortgage, Inc. v. Firestone*, 9th Dist. Summit No. 25959, 2012-Ohio-2044, ¶ 11. "Once a court has determined that a default on an obligation secured by a mortgage has occurred, it must then consider the equities of the situation in order to decide if foreclosure is appropriate." (Internal quotations and citations omitted.) *Skipper* at ¶ 25.

{¶11} Dancy's loan was insured by the Federal Housing Administration and subject to HUD regulations. This Court has held that where a mortgage mandates compliance with HUD

regulations, such compliance is a condition precedent to bringing a foreclosure action. *Bank of Am., N.A. v. Wiggins*, 9th Dist. Wayne No. 14AP0033, 2015-Ohio-4012, ¶ 12.

{¶12} As an initial matter, we note that Lakeview Loan contends that Dancy cannot challenge Lakeview's compliance with the HUD regulations because he did not plead the failure to satisfy a condition precedent with particularity as required by Civ.R. 9(C). While Dancy addressed this issue in his answer under the heading "Affirmative Defenses," this Court has held that foreclosure actions arise in equity and such mistaken designations do not relieve a plaintiff of its burden to satisfy conditions precedent. *Wells Fargo Bank, N.A. v. Awadallah*, 9th Dist. Summit No. 27413, 2015-Ohio-3753, ¶ 26. A review of Dancy's answer to the complaint reveals that Dancy averred that Lakeview Loan failed to satisfy certain HUD regulations, thereby failing to comply with a condition precedent to acceleration and foreclosure. Dancy specifically alleged that Lakeview Loan failed to complete the HUD servicing requirements set forth in 24 C.F.R. 203.606(a), 24 C.F.R. 203.602, and 24 C.F.R. 203.604. This was sufficient to put Lakeview Loan on notice of Dancy's contention that it had failed to satisfy a specific condition precedent. *Awadallah*, 2015-Ohio-3753, at ¶ 27.

{¶13} In responding to the motion for summary judgment, Dancy argued that there is a question of fact regarding whether Lakeview Loan complied with the HUD servicing requirements prior to initiating foreclosure proceedings. Dancy has renewed this argument on appeal, focusing primarily on whether Lakeview Loan satisfied the notice requirements set forth in 24 C.F.R. 203.602.

{¶14} 24 C.F.R. 203.602 states:

> The mortgagee shall give notice to each mortgagor in default on a form supplied by the Secretary or, if the mortgagee wishes to use its own form, on a form approved by the Secretary, no later than the end of the second month of any delinquency in payments under the mortgage. If an account is reinstated and

> again becomes delinquent, the delinquency notice shall be sent to mortgagor again, except that the mortgagee is not required to send a second delinquency notice to the same mortgagor more often than once each six months. The mortgagee may issue additional and more frequent notices of delinquency at its option.

{¶15} In support of its motion for summary judgment, Lakeview Loan attached the affidavit of Dawn Bechtold. Bechtold identified herself as a "Banking Officer" for M&T Bank, the loan servicing agent for Lakeview Loan. Bechtold averred that M&T Bank sent a compliance letter to Dancy's residence on April 24, 2014, and then subsequently sent a default letter on May 6, 2014. In her affidavit, Bechtold did not address whether the default letter sent to Dancy was "on a form supplied by the Secretary or * * * on a form approved by the Secretary," as mandated by 24 C.F.R. 203.602. Lakeview Loan further attached copies of both the compliance letter and the default letter to the motion. The April 24, 2014 compliance letter merely stated that Dancy may be entitled to a face-to-face meeting regarding his loan delinquency and provided a phone number that would allow him to explore that possibility. The May 6, 2014 default letter stated that Dancy had 30 days to cure his default on his obligation or the entire unpaid balance would be accelerated, but there was no indication that the default letter was on a form supplied by or approved by the Secretary. Both the compliance letter and the default letter were sent from the "Homeowner Assistance Center" at M&T Bank. Neither document contained language signifying that it has been supplied or approved by the HUD Secretary pursuant to 24 C.F.R. 203.602.

{¶16} In responding to the motion for summary judgment, Dancy argued that Lakeview Loan failed to present "any testimonial or documentary evidence to demonstrate its compliance with 24 C.F.R. 203.602." Dancy maintained that while the default letter arguably complied with 24 C.F.R. 203.606(a), there was no evidence that the letter complied with 24 C.F.R. 203.602.

Dancy also argued that the form used by Lakeview Loan was lacking several mandatory components, and he attached a memorandum from the HUD Assistant Secretary for Housing setting forth the minimum information that must be in the written notification of delinquency. In reply, Lakeview Loan asserted that the HUD memorandum presented by Dancy had no bearing on the requirements set forth in 24 C.F.R. 203.602. While Lakeview Loan did not attach any additional evidentiary information, it maintained that the default letter sent on May 6, 2014, was sufficient to comply with 24 C.F.R. 203.602.

{¶17} While the trial court did not analyze whether Dancy complied with specific HUD regulations in its June 19, 2015 summary judgment order, it did state that Lakeview Loan had produced "an Affidavit and other supporting Civ.R. 56(C) documentation to support its claims and to support the finding that it has satisfied all conditions precedent prior to declaring [Dancy's] default."

{¶18} Our review of the summary judgment materials reveals that Lakeview Loan failed to meet its initial *Dresher* burden to demonstrate that it satisfied the condition precedent of complying with the pertinent HUD regulations. Lakeview Loan did not present any evidence in support of its motion to demonstrate that the default letter sent to Dancy was on a "on a form supplied by the Secretary or * * * on a form approved by the Secretary" pursuant to 24 C.F.R. 203.602. Moreover, this Court has consistently held that because Civ.R. 56(C) mandates the absence of a genuine issue as to any material fact in order to grant summary judgment, it is improper for a trial court to make findings of fact in order to resolve a disputed issue during a summary judgment proceeding. *Delker v. Ohio Edison Co.*, 47 Ohio App.3d 1, 2 (9th Dist.1989), fn. 1. Here, the trial court made a finding that Lakeview Loan had satisfied all conditions precedent despite the fact that Dancy presented evidence to dispute Lakeview Loan's

assertion that the May 6, 2014 default letter did not satisfy 24 C.F.R. 203.602. Under these circumstances, where there remains an issue of material fact as to whether Lakeview Loan complied with 24 C.F.R. 203.602, it was improper for trial court to grant summary judgment in favor of Lakeview Loan.

{¶19} Dancy's sole assignment of error is sustained.

III.

{¶20} Dancy's assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed and the cause remanded for further proceedings consistent with this decision.

Judgment reversed,
and cause remanded.

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(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 Appellee.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
HENSAL, J.
CONCUR.

APPEARANCES:

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

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