[Cite as *Wells Fargo Fin. Ohio 1, Inc. v. Robinson*, 2017-Ohio-2888.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CHAMPAIGN COUNTY

WELLS FARGO FINANCIAL OHIO 1, INC.	:	
Plaintiff-Appellee	:	Appellate Case No. 2016-CA-23
v.	:	Trial Court Case No. 15-CV-104
VERA J. ROBINSON, et al.	:	(Civil Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 19th day of May, 2017.

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HALL, P.J.

{¶ 1} Vera and Jeff Robinson appeal from a summary judgment and decree of foreclosure entered for Wells Fargo Financial Ohio 1, Inc.[1] The Robinsons contend that the trial court erred in granting summary judgment for Wells Fargo because the supporting affidavit is insufficient to show default. They also argue that it is inequitable to order foreclosure on the encumbered property.

{¶ 2} We conclude that the affidavit is sufficient. And we conclude that the trial court reasonably found that the balance of equities favors foreclosure. Consequently we affirm.

I. Background

{¶ 3} In 2005, the Robinsons executed a note for $186,597.42 and a mortgage in favor of Wells Fargo Financial. The terms of the loan were partially modified in 2009. In 2014, after falling behind in their payments, the Robinsons applied to Wells Fargo Bank (WFB), the servicing agent for Wells Fargo Financial, for assistance through the federal government's Home Affordable Modification Program (HAMP). The aim of HAMP was to "help[] homeowners who were in or were at immediate risk of being in default on their home loans by reducing monthly payments to sustainable levels," *Costigan v. Citimortgage, Inc.* S.D. N.Y. No. 10 Civ 8776, 2011 WL 3370397, *1 (Aug. 2, 2011).

{¶ 4} By letter dated March 24, 2014, WFB informed the Robinsons that they had been approved to enter a Trial Period Plan (TPP) under HAMP. The letter says that instead of their normal monthly mortgage payment, the Robinsons should send three

[1] During this action, the mortgage was assigned to U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust. On September 8, 2016, after the court had entered summary judgment, U.S. Bank was substituted as the plaintiff in this case.

reduced trial-period payments, one by May 1, one by June 1, and the last by July 1. The Robinsons made each of these payments and made no further payments. By letter dated December, 30, 2014, WFB informed the Robinsons that they were in default. The letter states that they are delinquent by $9,438.61 and gives them until February 3, 2015, to cure the default.

{¶ 5} By letter dated February 5, 2015, WFB offered the Robinsons a second TPP, with a slightly higher monthly payment. In another letter, dated March 12, 2015, WFB for the first time tells the Robinsons that because they failed to continue making payments they are no longer eligible for HAMP under the first TPP. The letter reminds them, though, that they were approved for a second TPP. The Robinsons did not accept the second TPP offer.

{¶ 6} In June 2015, Wells Fargo filed the present foreclosure action, claiming that the amount due is $185,863.97. In March 2016, Wells Fargo moved for summary judgment, supporting its motion with an affidavit from a WFB vice president. Attached to the affidavit are the note, mortgage, notice of default, and a "Substitution of Loan Terms Agreement." The Robinsons opposed summary judgment with an affidavit from each of them. Each avers that a WFB representative instructed them not to make the August 2014 payment. Later, the Robinsons filed internal WFB emails, which they had obtained in discovery, in which WFB employees admit that they mishandled the Robinson's account.

{¶ 7} The trial court sustained Wells Fargo's summary-judgment motion. The court concluded that Wells Fargo showed that it owned the note and mortgage and that the Robinsons are in default. And the court determined that foreclosure is an equitable remedy.

{¶ 8} The Robinsons appealed.

II. Analysis

{¶ 9} The Robinsons assign three errors to the trial court, all of which target the summary judgment. Their first two assignments of error challenge foreclosure as an equitable remedy. The third assignment of error challenges the finding of default.

{¶ 10} Under Civ.R. 56, a trial court may enter summary judgment for the moving party "if there are no genuine issues of material fact remaining to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor." (Citation omitted.) *Smith v. Five Rivers MetroParks,* 134 Ohio App.3d 754, 760, 732 N.E.2d 422 (2d Dist.1999). "We review summary judgment decisions de novo, which means that we apply the same standards as the trial court." (Citations omitted.) *GNFH, Inc. v. W. Am. Ins. Co.,* 172 Ohio App.3d 127, 2007-Ohio-2722, 873 N.E.2d 345, ¶ 16 (2d Dist.).

{¶ 11} " 'An action praying for judgment on a note and foreclosure on a mortgage raises two issues. The first issue presents the legal question of whether the mortgagor has defaulted on the note. The second issue entails an inquiry into whether the mortgagor's equity of redemption should be foreclosed.' " *Gevedon v. Hotopp*, 2d Dist. Montgomery No. 20673, 2005-Ohio-4597, ¶ 28, quoting *Metropolitan Life Ins. Co. v. Triskett Illinois, Inc.*, 97 Ohio App.3d 228, 234, 646 N.E.2d 528 (1st Dist.1994). Because the third assignment of error here raises issues related to default, that's where we begin.

A. Default

{¶ 12} Wells Fargo supports its summary-judgment motion with an affidavit from

Jai Cha Vang, who identified herself as "Vice President Loan Documentation with Wells Fargo Bank, N.A." The Robinsons argue in the third assignment of error that Vang's affidavit is insufficient to support summary judgment because it fails to satisfy several aspects of Civ.R. 56(E).

{¶ 13} First, the Robinsons contend that Vang's affidavit does not show that she has personal knowledge about their account. Civ.R. 56(E) requires that a supporting affidavit "be made on personal knowledge." But " '[a] flat statement by the affiant that he had personal knowledge is adequate to satisfy Civ.R. 56(E).' " *Fifth Third Mtge. Co. v. Campbell,* 2d Dist. Montgomery No. 25458, 2013-Ohio-3032, ¶ 6, quoting *Bank One, N.A. v. Swartz,* 9th Dist. Lorain No. 03CA008308, 2004-Ohio-1986, ¶ 14. Vang states, in paragraph two of her affidavit, that she is "familiar with business records maintained by Wells Fargo for the purpose of servicing mortgage loans" and has "acquired personal knowledge of the matters stated herein by examining these business records." Nothing in the affidavit suggests that this is incorrect.

{¶ 14} Second, the Robinsons argue that the documents attached to Vang's affidavit are not verified or authenticated. Civ.R. 56(E) also requires that "[s]worn or certified copies of all papers or parts of papers referred to in an affidavit * * * be attached to or served with the affidavit." In other words, "attached documents must be verified." *Campbell* at ¶ 7. The verification requirement "is satisfied by an appropriate averment in the affidavit itself." *Swartz* at ¶ 14, citing *State ex rel. Corrigan v. Seminatore,* 66 Ohio St.2d 459, 423 N.E.2d 105 (1981), paragraph three of the syllabus. Authentication of documentary evidence "is a condition precedent to admissibility of that matter in evidence." *Royse v. Dayton*, 195 Ohio App.3d 81, 2011-Ohio-3509, 958 N.E.2d 994, ¶ 27

(2d Dist.), citing Evid.R. 901(A). Business records can be authenticated " 'by evidence sufficient to support a finding that the matter in question is what its proponent claims.' " *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 30, quoting Evid.R. 901(A). "Authenticating a business record 'does not require the witness whose testimony establishes the foundation for a business record to have personal knowledge of the exact circumstances of preparation and production of the document.' " *Jefferson v. CareWorks of Ohio, Ltd.*, 193 Ohio App.3d 615, 2011-Ohio-1940, 953 N.E.2d 353, ¶ 11 (10th Dist.), quoting *State v. Myers*, 153 Ohio App.3d 547, 2003-Ohio-4135, 795 N.E.2d 77, ¶ 60 (10th Dist.). But the witness " 'must be able to vouch from personal knowledge of the record-keeping system that such records were kept in the regular course of business.' " *State v. Davis,* 62 Ohio St.3d 326, 342, 581 N.E.2d 1362 (1991), quoting *Dell Publishing Co., Inc. v. Whedon,* 577 F.Supp. 1459, 1464, fn. 5 (S.D.N.Y.1984).

{¶ 15} Here, Vang avers that she is familiar with the business records maintained by WFB, the servicer of the Robinsons' loan. Vang's title of Vice President Loan Servicing also suggests that she has a working knowledge of these records. We note too that Vang indicates that she examined the business records associated with the Robinsons. She states that the records were made at or near the time of the transaction by persons with knowledge of the transaction and that these records are kept in the ordinary course of business by WFB. The affidavit incorporates by reference the attached documents and specifically lists them as exhibits in the last paragraph: "Attached as exhibits hereto are copies of the Promissory Note (Exhibit A) with any applicable endorsements and the Mortgage (Exhibit D) with any applicable Assignments, and the Notice of Default letter

(Exhibit E), and the Loan Modification Agreement (Exhibit B and Exhibit C) redacted solely to protect any private, personal, financial information."

{¶ 16} We conclude that the documents attached to Vang's affidavit are verified and authenticated. By averring that the exhibits are copies of the documents that she examined, Vang adequately implies that the documents are accurate copies of the originals. *Compare U.S. Bank Natl. Assn. v. Crow*, 7th Dist. Mahoning No. 15 MA 0113, 2016-Ohio-5391, ¶ 28 (concluding the same on a similar averments). Also, her averment that she examined the relevant records, which it may be inferred includes the documents attached to the affidavit, is sufficient to authenticate those documents. *Compare Campbell*, 2013-Ohio-3032, at ¶ 8 (concluding that a statement in the affidavit that the affiant personally examined the attached documents was sufficient authenticate the note and mortgage). Finally, we note that the Robinsons do not dispute the authenticity of any of the documents attached to Vang's affidavit.

{¶ 17} Lastly, the Robinsons contend that, though Vang refers to payment history in her affidavit, no such history is attached to the affidavit. In a foreclosure action, a plaintiff is not required to provide a complete "payment history" to receive summary judgment. "An affidavit stating that the plaintiff is the owner of the note and mortgage and that the loan is in default generally is sufficient to permit a trial court to enter summary judgment and order foreclosure, unless there is evidence that controverts the averments." *JP Morgan Chase Bank, N.A. v. Johnson,* 2d Dist. Champaign No. 2014-CA-27, 2015-Ohio-1939, ¶ 10. The Robinsons did not present controverting evidence and do not dispute their failure to pay.

{¶ 18} The third assignment of error is overruled.

B. The equitability of foreclosure

{¶ 19} "[B]ecause foreclosure is equitable relief, 'the simple assertion of the elements of foreclosure does not require, as a matter of law, the remedy of foreclosure.' " *PHH Mtge. Corp. v. Barker*, 190 Ohio App.3d 71, 2010-Ohio-5061, 940 N.E.2d 662, ¶ 35 (3rd Dist.), quoting *First Natl. Bank of Am. v. Pendergrass,* 6th Dist. No. E-08-048, 2009-Ohio-3208, ¶ 22. Having established that the Robinsons defaulted on their note, the question becomes whether foreclosure is a proper remedy.

1. *A "clear and unambiguous" promise*

{¶ 20} The Robinsons argue in the first assignment of error that foreclosure is not equitable in this case because WFB promised to modify their loan if they made the required trial-period payments.

{¶ 21} The Robinsons say that the evidence shows that WFB promised to modify their loan. In a claim for promissory estoppel, "a plaintiff may enforce a clear and unambiguous promise, even in the absence of the consideration necessary to form a contract, if the plaintiff reasonably relies on the promise to his or her detriment." (Citation omitted.) *Americana Invest. Co. v. Natl. Contracting & Fixturing, L.L.C.*, 10th Dist. Franklin No. 15AP-1010, 2016-Ohio-7067, ¶ 12. "The issue of whether the plaintiffs made a clear and unambiguous promise is a question of fact." (Citation omitted.) *Mishler v. Hale*, 2014-Ohio-5805, 26 N.E.3d 1260, ¶ 28 (2d Dist.). The question here is whether the evidence shows a "clear and unambiguous" promise.

{¶ 22} The Robinsons rely primarily on the March 24, 2014 letter as stating a promise to modify their loan. This letter tells the Robinsons that they had been approved

to enter a TPP, which the letter calls, "the first step toward qualifying for more affordable mortgage payments." The Robinsons say that the letter makes a promise when it states: "Once you make all of your trial period payments on time, we will send you a modification agreement detailing the terms of the modified loan." But the letter also states that the trial period may be extended:

> Please note that your trial period may extended beyond the dates provided. For that reason, continue making your trial period payments in the same amount by the same day of each month you currently make your trial period payments until your home preservation specialist advises that you may move forward with a final modification or that you are no longer eligible for HAMP.

The letter warns that "failure to make all trial period payments as outlined above, including if your trial period payments were extended will result in your Trial Period Plan being denied." We note finally that the letter says that the loan will not be modified, if at all, until everything is said and done:

> After all trial period payments are timely made and you have submitted all the required documents, your mortgage may be modified. (Your existing loan and loan requirements remain in effect and unchanged during the trial period.) If each payment is not received by Wells Fargo in the month in which it is due, this offer will end and your loan will not be modified under the terms described in this offer.

{¶ 23} We do not think that this letter clearly and unambiguously promises to modify the Robinsons' loan to support promissory estoppel. Indeed, entry into a TPP

typically does not create a promise or a binding agreement but simply "memorializes only a temporary deviation from the payment terms of the Note and Mortgage pending approval of a permanent modification of the Note and Mortgage." *Wells Fargo Bank, N.A. v. Bielec,* 10th Dist. Franklin No. 13AP-330, 2014-Ohio-1805, ¶ 18. That is the case here. A plain reading of the March 24, 2014 letter shows that the TPP was the first step to complete before the loan potentially could be modified. The letter here states that, although Wells Fargo would accept reduced payments during the effective period of the plan, the original loan remained "in effect and unchanged." The letter is clear that the TPP is not a permanent agreement, that the original loan and mortgage are still in effect, and that for the TPP payments to become permanent a "final modification" is needed. That a modification would not necessarily happen is further shown by the "Substitution of Loan Terms Agreement (Step One of Two-Step Documentation Process)" that the Robinsons signed in April 2014. The agreement pertinently states:

> Entry into a trial period and successful completion of a trial period plan (the "Plan") is a condition to qualifying for the Program [HAMP]. I understand that should I fail to enter into the Plan, the Loan Documents and all their terms and conditions shall remain in full force and effect. I further understand that should I fail to qualify for the Program, the changes made by this Agreement to the terms of the Loan Documents will remain in effect.

{¶ 24} The Robinsons also point to the WFB internal emails as evidence of WFB's promise to modify their loan. In the emails, exchanged in February and March 2015, WFB employees admit that they failed to follow up with the Robinsons in July 2014, after they made their third trial-period payment. Instead, WFB dropped the Robinsons from the

HAMP in December 2014, without notifying them. It appears that offering the second TPP was WFB's attempt to remedy its mistakes. While these emails show that WFB mishandled the Robinsons' account, they do not show a "clear and unambiguous" promise to modify the Robinsons' loan.

2. *The Robinsons' affidavits*

{¶ 25} The Robinsons argue in the second assignment of error that the trial court erred by rejecting the statement in their affidavits that a WFB representative told them not to make the August 2014 payment. The trial court called the statement a self-serving assertion that is not corroborated by any other evidence.

{¶ 26} " '[A] non-movant's own self-serving assertions, whether made in an affidavit, deposition or interrogatory responses, cannot defeat a well-supported summary judgment when not corroborated by any outside evidence.' " *Schlaegel v. Howell*, 2015-Ohio-4296, 42 N.E.3d 771, ¶ 23 (2d Dist.), quoting *White v. Sears, Roebuck & Co.*, 10th Dist. Franklin No. 10AP-294, 2011-Ohio-204, ¶ 9. The Robinsons' state in their affidavits that "[w]hile communicating with Plaintiffs representative(s), we were instructed not to make any payments in August, 2014." And they say that the March 12, 2015 letter from WFB corroborates their claim. They say that WFB admits that one of its representatives told them not to send the August payment when it said in the letter: "Although your correspondence indicates you were informed to stop making payments after the third trial payment, the terms of the HAMP TPP indicate that you were required to continue making trial payments until your modification was finalized." WFB's statement here is not an admission. Plainly, WFB is referring to correspondence that the Robinsons sent it claiming that they were told to stop making payments. Indeed, in the letter's next

paragraph, WFB says, “If you are able to provide additional information regarding this conversation, including when and with whom you spoke, we will look into this matter further.”

{¶ 27} While it is undisputed that Wells Fargo never contacted the Robinsons about their HAMP status, it is also undisputed that the Robinsons made no payments after July 2014, even though the March 24, 2014 letter unambiguously instructs them to continue paying. WFB’s failure to follow up with the Robinsons did not abate the Robinson’s obligation to pay. We agree with the trial court’s summary of the situation and conclusion:

> Quite simply, the Robinsons have not made a mortgage payment since July 2014. They have also declined two opportunities since that time to cure their default. The Robinsons, upon the receipt of the notice of default letter, dated December 30, 2014, did not pay the amount demanded therein. They also declined the second TPP offered to them in February 2015, after Wells Fargo realized that it had not followed up with the couple after their third TPP payment in July 2014. Given these circumstances, the equities of this case do not warrant delaying the entry of summary judgment in favor of Wells Fargo.

{¶ 28} The first and second assignments of error are overruled.

III.

{¶ 29} We have overruled each of the assignments of error presented. The trial court’s judgment is affirmed.

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DONOVAN, J. and WELBAUM, J., concur.

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