

[Cite as *Wells Fargo Bank, N.A. v. Walker*, 2010-Ohio-3698.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Wells Fargo Bank, N.A., successor by merger to Wells Fargo Home Mortgage, Inc.,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-947
v.	:	(C.P.C. No. 08CVE 06 8476)
	:	
Gregory L. Walker,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant,	:	
	:	
Lisa G. Walker et al.,	:	
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on August 10, 2010

*Thompson Hine LLP, Scott A. King, and Peter E. Jones, for
appellee.*

*Zacks Law Group LLC, Robin L. Jindra, and James R.
Billings, for appellant.*

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Defendant-appellant, Gregory L. Walker, appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, Wells Fargo Bank, NA ("Wells Fargo"), in the bank's foreclosure action.

{¶2} Wells Fargo filed a complaint in foreclosure on June 12, 2008, naming as defendants Lisa G. Walker, Gregory L. Walker, and various other persons or business entities potentially holding an interest in the subject property. The complaint alleged that the Walkers were signatories on a note secured by a mortgage recorded against the subject property, that the note was in default, and that Wells Fargo was entitled to judgment in the amount of \$237,407.11 plus interest and expenses.

{¶3} Appellant filed an answer generally denying the allegations of the complaint and asserting various defenses including waiver, laches, estoppel, preclusion by effect of the statute of limitations, lack of notice of default and/or acceleration as required by the terms of the note, and lack of consideration. Lisa G. Walker did not file an answer. Various other defendants filed answers contesting only the priority of Wells Fargo's lien.

{¶4} Wells Fargo moved for summary judgment based upon submitted copies of the note, mortgage, and affidavits verifying that the account was in default. Appellant opposed summary judgment primarily on the basis that there remained a genuine issue of material fact regarding whether Wells Fargo had provided timely notice of default and notice of acceleration of the note before proceeding to file the foreclosure action. The trial court entered judgment on September 8, 2009, granting summary judgment in foreclosure to Wells Fargo and setting the priority of the competing liens.

{¶5} Appellant brings the following sole assignment of error on appeal:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY
GRANTING APPELLEE'S MOTION FOR SUMMARY
JUDGMENT.

{¶6} We review a summary judgment de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87

Ohio App.3d 704, 711. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown* at 711. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶7} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶8} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107. Once the moving party meets its initial burden, the non-movant must set forth specific facts demonstrating a genuine issue for trial. *Id.* at 293. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving

all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95, quoting *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

{¶9} Appellant's sole argument on appeal is that Wells Fargo failed to give the proper notice required by the terms of the note and mortgage before declaring it in default and accelerating the debt. Appellant cites *Natl. City Mtge. Co. v. Richards*, 182 Ohio App.3d 534, 2009-Ohio-2556, in which this court set aside a judgment of foreclosure based upon a failure of notice. Although that case is distinguishable in other respects as will be discussed below, there is no dispute as to its underlying premise, that is, that a foreclosure action brought by a lender who has failed to comply with the notice terms embodied in the note executed between the parties may be dismissed.

{¶10} Appellant argues that the pertinent provision of the note requires 50 days notice from the bank before the amounts due under the note may be accelerated. Appellant similarly argues that the parallel provisions of the recorded mortgage require 30 days notice before the amounts due under the instrument secured by the mortgage may be accelerated and the lender can proceed with judicial foreclosure. Appellant does not contest that those instruments allow such notice to be given by first class mail, and that notice is deemed given when mailed. Appellant provided his own affidavit in opposition to summary judgment averring that he had not received any notice of default or acceleration by mail or any other means.

{¶11} Wells Fargo responds by pointing out that it provided in support of summary judgment a copy of a notice of default sent to appellant, and the affidavit of a bank employee averring that the notice was mailed on April 6, 2008, by ordinary U.S. mail. Wells Fargo additionally points to other affidavits in the record demonstrating that

appellant did not cure the deficiency amounts and had not paid any amounts due under the note after February 2008. Wells Fargo points to the record to establish that it filed its complaint on June 12, 2008, 65 days after mailing the notice of default.

{¶12} In examination of the relevant terms of the note and mortgage, sections 1 and 22 of the mortgage and section 6(C) of the note provide, in essence, that Wells Fargo is required to provide only a single notice of default under both instruments, serving as notice of both acceleration and potential foreclosure, and provide the borrowers with a 30-day opportunity to cure. We note that there is a dispute between the parties over whether the note provides a 30 or 50-day notice; in the copies available in the record, this figure is, in fact, poorly legible, perhaps giving rise to the dispute between the parties, and could be either. This difference is not relevant, however, because Wells Fargo in fact did not file for foreclosure until 65 days had passed, a period that exceeds either 30 or 50 days.

{¶13} Finally, while appellant contests his actual receipt of the notice, he does not contest that the terms of the note and mortgage provide both that notice may be given by ordinary mail, and that such notice is deemed received when sent. This distinguishes the case from *Natl. City*, in which this court found that notice had failed when the terms of the instruments required service by certified mail and the certified mail had in fact come back unclaimed. *Id.* at ¶27.

{¶14} Based upon the foregoing, we find that the trial court did not err in concluding that there remains no genuine issue of material fact and that Wells Fargo was entitled to judgment as a matter of law. Wells Fargo has established that the borrowers had defaulted under the terms of the note and mortgage, the borrowers have not contested this evidence of default, and the notice ultimately given prior to foreclosure

complied with the terms of the note and mortgage executed between the parties. Appellant's sole assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.
