

[Cite as *CitiMortgage, Inc. v. Potvin*, 2010-Ohio-6561.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CITIMORTGAGE, INC. SUCCESSOR
BY MERGER TO PRINCIPAL
RESIDENTIAL MORTGAGE, INC.

Plaintiff-Appellee

-VS-

MARIA E. POTVIN, ET AL.

Defendants-Appellants

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2010CA00112

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 2009CV01531

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

December 30, 2010

APPEARANCES:

For Plaintiff-Appellee

THOMAS L. HENDERSON
120 East Fourth Street
8th Floor
Cincinnati, OH 45202

For Defendants-Appellants

MARGARET A. MCDEVITT
JULIUS P. AMOURGIS
3200 West Market Street
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Farmer, J.

{¶1} On August 28, 2002, appellant, Maria Potvin, together with her husband, Marc Potvin, executed a mortgage loan and promissory note in the amount of \$155,200.00 from Residential Bancorp to purchase a residence. Mr. Potvin passed away on January 13, 2006.

{¶2} Appellant failed to pay as required. On April 17, 2009, the successor in interest to the promissory note, appellee, CitiMortgage, Inc., filed a foreclosure action against appellant and her deceased husband.

{¶3} On August 19, 2009, appellee filed a motion for summary judgment.

{¶4} On August 20, 2009, appellant requested mediation which the trial court so ordered. Mediation was held on November 5, 2009. By report filed November 25, 2009, the mediator concluded appellant was eligible for the Home Affordable Modification Program (hereinafter "HAMP").

{¶5} Appellant received the HAMP plan on January 22, 2010. The plan indicated she was to accept the plan by December 1, 2009, with payments due December 1, 2009 and January 1, and February 1, 2010. Appellee did not send appellant a revised plan as requested by appellant.

{¶6} On March 15, 2010, appellant requested additional mediation. By judgment entry filed March 24, 2010, the trial court denied the request.

{¶7} On April 6, 2010, appellant filed her response to the motion for summary judgment. By entry filed April 9, 2010, the trial court granted appellee's motion for summary judgment and ordered foreclosure on the property.

{¶8} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶9} "THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO CITIMORTGAGE, INC. AS THERE WERE GENUINE ISSUES OF MATERIAL FACT WHETHER MARIA POTVIN WAS ENTITLED TO MODIFICATION UNDER THE FEDERAL HOME AFFORDABLE MODIFICATION PROGRAM AND FORECLOSURE WAS LEGALLY AND EQUITABLY PRECLUDED."

II

{¶10} "THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO CITIMORTGAGE, INC. AS THERE WERE GENUINE ISSUES OF MATERIAL FACT WHETHER IT WAS EQUITABLE TO ALLOW FORECLOSURE OR WHETHER CITIMORTGAGE SHOULD BE ESTOPPED FROM PROCEEDING WITH FORECLOSURE DUE TO ITS CONDUCT."

III

{¶11} "THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO CITIMORTGAGE AS THERE WERE OTHER GENUINE ISSUES OF MATERIAL FACT AND CITIMORTGAGE WAS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW."

{¶12} Appellant's three assignments of error challenge the trial court's decision to grant summary judgment to appellee.

{¶13} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶14} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (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 nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶15} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

I, II

{¶16} Appellant claims appellee should be estopped from proceeding on the foreclosure action because she is entitled to relief under the federally sponsored HAMP, and appellee at mediation agreed to proceed under the program. In addition, appellant claims despite her failure to pay as required, foreclosure was inequitable. We disagree.

{¶17} On August 20, 2009, appellant specifically requested mediation which the trial court so ordered. Appellee had filed its motion for summary judgment the day

before. The mediation report was filed on November 25, 2009 and stated, "HAMP. Case to remain open until March 1, 2009 (sic). Affidavit of default returns to active docket."

{¶18} On March 23, 2010, the trial court returned the case to the active docket. Appellant had requested additional mediation, but the trial court denied the request. Appellant then filed a response and affidavit to the motion for summary judgment. In her affidavit, appellant averred the following:

{¶19} "(7) I applied for and was approved by the Plaintiff for a trial payment plan under the Federal Home Affordable Modification Plan. At the mediation on November 5, 2009, I was told the terms and accepted the terms.

{¶20} "(8) From November 5, 2009, to January 18, 2010, my attorneys contacted CitiMortgage's attorneys at least five times about when I would receive the written trial plan that CitiMortgage told me I was going to get right after the mediation on November 5, 2009 because I was told the first payment started on December 1, 2009.

{¶21} "(9) On January 22, 2010, the Plaintiff finally sent me the HAMP trial plan documents. I have enclosed a copy of the HAMP documents, and the proof of delivery. No modification documents were sent to me before this.

{¶22} "(10) The Plaintiff sent the HAMP trial plans to me almost two months after the first payment was due so it was impossible for me to comply with the plan.

{¶23} "(11) When I tried to follow up with the Plaintiff about this, neither my attorney or I could get a response."

{¶24} It is appellant's position that appellee failed to inform her of the HAMP plan in a timely manner for her to make the period payments on December 1, 2009, January

1, and February 1, 2010. In her affidavit, appellant claimed she did not receive notice until January 22, 2010. However, appellant did not sign the agreement nor make any payments. We note appellee did not seek to re-activate the case until March 4, 2010.

{¶25} Loc.R. 16.02(A) of the Court of Common Pleas of Stark County, General Division, defines "mediation" as a "non-binding process involving a neutral mediator who acts as a facilitator to assist the parties to craft a mutually acceptable resolution for themselves." Unless otherwise agreed to, mediation is "not binding." Loc.R. 16.09.

{¶26} Despite appellant's argument that somehow the mediation was binding, we find the specific rules and the trial court's order override her argument that is tenuous at best. In a judgment entry filed August 20, 2009, the trial court had specifically ordered that mediation be conducted pursuant to Loc.R. 16:

{¶27} "All counsel and parties are ordered to cooperate with the Mediation Program. Failure to do so may result in sanctions. (See Local Rule 16).

{¶28} ****

{¶29} "All written or verbal communications of any kind made during the mediation process shall be regarded as confidential. (See Local Rule 16) and shall not be admissible or used for any purpose, including impeachment, at any trial or hearing of this cause."

{¶30} Upon review, we find the trial court did not err in rejecting appellant's defenses to the motion for summary judgment.

{¶31} Assignments of Error I and II are denied.

III

{¶32} Appellant claims the affidavit of Kim Kraloviak in support of appellee's motion for summary judgment was insufficient as it was not based on personal knowledge. We disagree.

{¶33} Civ.R. 56 governs motions for summary judgment. Subsection (E) states the following:

{¶34} **"(E) Form of affidavits; further testimony; defense required**

{¶35} "Supporting and opposing affidavits 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. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶36} In her affidavit, Ms. Krakoviak stated the following:

{¶37} "1. Affiant's position is Vice President of CitiMortgage, Inc. successor by merger to Principal Residential Mortgage, Inc. In such job position affiant has the custody of the accounts of said company, including the account of Marc R. Potvin and Maria E. Potvin, defendants herein. Affiant states that the records of the accounts of

said company are compiled at or near the time of occurrence of each event by persons with knowledge of said events, that said records are kept in the course if (sic) its regularly conducted business activity, and that it is the regular practice to keep such records related to the business activity.

{¶38} "3. A copy of the Assignment, which accounts for documented evidence that the Plaintiff is the holder of the note and mortgage which are the subject of the within foreclosure action, is attached hereto as Exhibit 'C'."

{¶39} We find this affirmation was made pursuant to Evid.R.803(6) which states the following:

{¶40} "**(6) Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

{¶41} Further, appellee is successor by merger to principal Residential Mortgage, Inc. who filed an authenticated "Certificate of Merger" with the trial court on August 19, 2009.

{¶42} In *LaSalle Bank National Association v. Street*, Licking App. No. 08CA60, 2009-Ohio-1855, ¶20-23, this court stated the following:

{¶43} " 'To qualify for admission under Rule 803(6), a business record must manifest four essential elements: (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, event or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the "custodian" of the record or by some "other qualified witness." ' *State v. Davis* (2008), 116 Ohio St.3d 404, 429, 880 N.E.2d 31, quoting Weissenberger, *Ohio Evidence Treatise* (2007) 600, Section 803.73.

{¶44} "Ohio courts have defined 'personal knowledge' as 'knowledge gained through firsthand observation or experience, as distinguished from a belief based upon what someone else has said.' *Zeedyk v. Agricultural Soc. of Defiance Cty.* Defiance App.No. 4-04-08, 2004-Ohio-6187, ¶16, quoting *Bonacorsi v. Wheeling & Lake Erie Railway Co.* (2002), 95 Ohio St.3d 314, 320, 767 N.E.2d; *Black's Law Dictionary* (7th Ed. Rev.1999) 875. Affidavits, which merely set forth legal conclusions or opinions without stating supporting facts, are insufficient to meet the requirements of Civ.R. 56(E). *Tolson v. Triangle Real Estate*, Franklin App.No. 03AP-715, 2004-Ohio-2640, ¶12. However, self-serving affidavits may be offered relative to a disputed fact, rather than a conclusion of law. *CitiMortgage, Inc. v. Ferguson*, Fairfield App.No. 2006CA00051, 2008-Ohio-556, ¶29.

{¶45} "Ohio law recognizes that personal knowledge may be inferred from the contents of an affidavit. See *Bush v. Dictaphone Corp.*, Franklin App.No. 00AP1117, 2003-Ohio-883, ¶73, citing *Beneficial Mortgage Co. v. Grover* (June 2, 1983), Seneca

App. No. 13-82-41. Moreover, notwithstanding the purported weaknesses in the Hescott affidavit, the record in the case sub judice contains an additional affidavit prepared by Rick Wilken, also an AVP for Saxon Mortgage, which again alleged an unpaid principal balance of \$116,141.83, plus interest.***Wilken therein averred that he had 'personal knowledge' of the records of Saxon Mortgage, and further averred 'that said account is in default and plaintiff has elected to call the entire balance of said account due and payable in accordance with the terms of the note and mortgage attached to the Complaint.' Affidavit of Status of Account and Military Affidavit, filed April 9, 2008.

{¶46} "Thus, appellee's motion for summary judgment was supported by affidavits and documents establishing that appellants had executed the mortgage and that there was a default on the note signed by Michael.***" (Footnote omitted.)

{¶47} In *CitiMortgage, Inc. v. Hollern*, Delaware App. No. 06CAE080056, 2006-Ohio-6011, ¶20-21, this court found:

{¶48} "In her second assignment of error, appellant maintains the affidavit upon which Citimortgage relied in its motion for summary judgment did not conform to Civ. R. 56(E). Specifically, appellant asserts the statements made in the affidavit of Malinda Caywood, Vice President of Citimortgage, contained inadmissible hearsay statements.

{¶49} "Initially, we note appellant failed to raise this issue before the trial court; therefore, is precluded from raising the issue on appeal. Assuming, arguendo, the issue is ripe for review, we find the statements by Malinda Caywood were based upon business records and fall within the hearsay exception of Evid. R. 803(6)."

{¶50} Accordingly, we find appellant has failed to establish a deficiency in the affidavit or that there exist genuine issues of material fact.

{¶51} Assignment of Error III is denied.

{¶52} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Wise, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ John W. Wise

JUDGES

SGF/sg 1116

