

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
ERIE COUNTY

National City Bank

Court of Appeals No. E-10-060

Appellee

Trial Court No. 2009-CV-0699

v.

TAB Holdings, Ltd., etc., et al.

**DECISION AND JUDGMENT**

Appellant

Decided: July 29, 2011

\* \* \* \* \*

Charles J. Palmeri and Christopher D. Yugulis, for appellee.

D. Jeffery Rengel and Thomas R. Lucas, for appellant.

\* \* \* \* \*

HANDWORK, J.

{¶ 1} This is an appeal from a summary judgment entered in favor of plaintiff-appellee, PNC Bank ("PNC"), successor in interest to National City Bank, in an action for foreclosure filed against defendant-appellant, TAB Holdings, Ltd. ("TAB"). TAB challenges the trial court's judgment as it relates to the amount of indebtedness. For the following reasons, we affirm the judgment of the Erie County Court of Common Pleas.

{¶ 2} Despite the frenetic procedural history in this case, only the following facts are relevant to the matters raised in this appeal. On May 23, 2005, TAB executed a promissory note in favor of National City Bank in the amount of \$1,620,000, along with an open-end mortgage on certain commercial property in Sandusky, Ohio. The note was modified on three successive occasions between January 4, 2006, and December 30, 2008. In the second modification, executed on June 1, 2006, TAB agreed to a "Funding Cost Recovery Charge Addendum," which provided for a prepayment premium under certain conditions where the note is accelerated after default.

{¶ 3} On August 20, 2009, National City filed a complaint for foreclosure of mortgage and judgment lien against TAB. In its complaint, National City alleged that TAB had defaulted on the note, that the loan was accelerated, and that the balance due and owing on the note "is \$1,014,536.32 plus interest at the rate of 8.00% per annum on \$892,260.82 from August 4, 2009." The complaint also alleged that the stated indebtedness had been reduced to cognovit judgment in a companion case against TAB and others, entitled *Natl. City Bank v. TAB Holdings, Ltd.*, Erie County Court of Common Pleas case No. 2009-CV-0676.

{¶ 4} On October 21, 2009, National City moved for summary judgment and supported its motion with the loan documents and the affidavit of Richard Wendell, vice president of the bank's Credit Policy Department. In his affidavit, Wendell attested that "there is due on the Note the sum of \$1,014,536.32 plus interest at the rate of 8.00% per annum on \$892,260.82 from August 4, 2009." On November 16, 2009, the trial court

dismissed that motion for having been filed without leave of court after the action had been set for pretrial. On November 18, 2009, the trial court granted leave to National City to file another motion for summary judgment.

{¶ 5} On February 26, 2010, National City, now PNC, filed a renewed motion for summary judgment and attached the revised affidavit of Richard Wendell, now vice president of PNC's Asset Resolution Team. In his revised affidavit, Wendell attached and authenticated the note, mortgage, and modification agreements, and attested that TAB's loan account had been and remains in default. However, Wendell adjusted the amount originally alleged to be due and owing on the note to \$1,008,353.73. In so doing, he explained in his affidavit, "I have examined the business records of PNC Bank, \* \* \* and I find from such records that there is due on the Note \* \* \* the sum of \$1,008,353.73 (consisting of principal of \$892,260.82; unpaid interest of \$32,517.95; late charges of \$2,760.75; and the prepayment charge of \$86,996.80 *less a credit of \$6,182.59 to correct the mathematical error in the original Judgment calculation*) plus ongoing interest \* \* \*." (Emphasis added.)

{¶ 6} On March 26, 2010, TAB filed a combined brief in opposition to summary judgment and motion to continue the proceedings for further discovery pursuant to Civ.R. 56(F). In its motion, TAB maintained that "substantial discovery has not been conducted regarding the miscalculations of the amounts owed to plaintiff from defendants [sic] (if any)." On the merits of PNC's motion, TAB argued that Wendell's initial calculations "have been shown to be erroneous" and that "the parties do not agree factually on what

amount, if any, is owed to plaintiff by defendants [sic]." TAB supported its motion and brief with the affidavit of Tammy A. Billings, a principal and agent of TAB. In her affidavit, Billings stated, "I believe the amount \* \* \* owed [on the note] is an amount less than \* \* \* the \$1,008,353.73 cited by plaintiff." She explained that a "review of records available to me indicate[s] that [the amount owed] is less than \$1,008,353.73," but that "considerable discovery has not yet been answered by plaintiff \* \* \* and the true amount owed (if any) cannot be known with certainty prior to the completion of additional discovery to that end." On May 21, 2010, TAB also filed a motion to compel responses to discovery requests that it had previously directed to National City.

{¶ 7} On June 25, 2010, the trial court issued a judgment partially granting TAB's motions to compel and for further discovery. In that judgment, the trial court noted that TAB "is not specific as to what further discovery is needed to be able to clarify the amount owed or to be able to oppose Wendell's Affidavit as to [the] amount owed." Nevertheless, "in an effort to conserve further time, expense and judicial resources," the trial court continued the summary judgment proceedings until August 16, 2010, ordered PNC to "respond to all outstanding discovery, which pertains to, or is arguably related to, the amount TAB owes," and granted TAB until July 30, 2010, to file any supplemental memorandum in opposition to summary judgment.

{¶ 8} On July 9, 2010, PNC responded to TAB's discovery requests as ordered, including producing documents that showed the method and manner by which the funding cost recovery formula was applied to arrive at the original and corrected

prepayment charge. TAB did not file any further motion or memorandum with respect to discovery or summary judgment.

{¶ 9} On October 7, 2010, the trial court granted summary judgment to PNC in the amount of \$1,008,353.73 plus interest at eight percent from August 4, 2009. In its judgment entry, the trial court noted that the cognovit judgment in case No. 2009-CV-0676 had been vacated because of the \$6,182.59 error that was made by PNC in calculating the prepayment charge in that case. The court then found:

{¶ 10} "There is no genuine issue of material fact here. Plaintiff met its burden in [proving] the amount owed and the prior error in calculation was acknowledged. Defendant, on the other hand, has despite complaining about the calculation for approximately a year, failed to demonstrate that the amount claimed, as adjusted for the prior mathematical error, is inaccurate."

{¶ 11} In its sole assignment of error, TAB asserts that "[t]he trial court erred when it entered summary judgment against appellant and in favor of appellee in the amount of \$1,008,353.73." TAB does not contest that the note was in default and properly accelerated pursuant to its terms. Its arguments rest exclusively on the purported insufficiency of Wendell's affidavit to establish the amount due on the note and, in particular, the funding cost recovery charge. Specifically, TAB argues that because the formula for calculating the prepayment premium is "practically incomprehensible," expert testimony should be required to establish the amount of the prepayment premium. Since Wendell was not qualified as an expert in such matters,

TAB maintains that the trial court should not have considered his affidavit as evidence of the outstanding amount of the debt. We do not agree.

{¶ 12} Civ.R. 56(E) requires that "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." In determining the propriety of summary judgment in foreclosure actions, courts have consistently held that an averment of outstanding indebtedness made in the affidavit of a bank loan officer with personal knowledge of the debtor's account is sufficient to establish the amount due and owing on the note, unless the debtor refutes the averred indebtedness with evidence that a different amount is owed. *La Salle Bank, NA v. Tirado*, 5th Dist. No. 2009-CA-22, 2009-Ohio-2589, ¶ 57-58; *Fifth Third Bank v. Mufleh*, 6th Dist. Nos. L-04-1188, L-04-1157, L-04-1262, 2005-Ohio-2351, ¶ 13-18; *Natl. City Bank v. Abundant Life Apostolic*, 9th Dist. No. 04CA008447, 2004-Ohio-5372, ¶ 12; *Charter One Mtge. Corp. v. Keselica*, 9th Dist. No. 04CA008426, 2004-Ohio-4333, ¶ 6, 16-18; *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 16. See, also, *Am. Express Centurian Bank v. Banaie*, 7th Dist. No. 10 MA 9, 2010-Ohio-6503, ¶ 17-19 (holding that affidavit of authorized agent for credit card company was sufficient evidence of amount owed by debtor for summary judgment purposes).

{¶ 13} TAB has not advanced any authority or cogent rationale to support the theory that expert testimony is required to establish the amount owed by the debtor, where a prepayment charge is a component of the alleged indebtedness. Prepayment

premiums are common practice in the lending industry, and nothing in the case law suggests that their calculation lies beyond the ability of the lending institutions that regularly employ them. See *Chillicothe Tel. Co. v. Variable Annuity Life Ins. Co.* (Jan. 31, 2007), S.D.Ohio No. 2:05-CV-00973. Indeed, this court has rejected the argument that a similar prepayment provision was incomprehensible, holding that "although the manner of calculating the prepayment penalty is certainly complex, it is clearly set out in the note document and is in no way ambiguous." *Bay Coast Properties, Inc. v. Natl. City Bank*, 6th Dist. No. H-05-015, 2006-Ohio-2348, ¶ 26.

{¶ 14} In his revised affidavit, Wendell averred that he is the vice president of PNC's Asset Resolution Team, that PNC is the successor in interest to National City by virtue of merger, that his statements are based on personal knowledge, that he personally examined and relied on records kept by PNC in the regular course of its banking business, and that the note, mortgage, and modification agreements attached to his affidavit are true and accurate copies of the original instruments. Thus, Wendell's affidavit comports with Civ.R. 56(E) and was properly considered by the trial court.

{¶ 15} TAB, on the other hand, did not meet its reciprocal summary judgment burden of refuting the averred indebtedness with evidence that a different amount was owed. Although TAB submitted an opposing affidavit by Billings, that affidavit does not identify an error in Wendell's calculations or indicate what the amount of the outstanding debt should be. See *Banaie*, supra, at ¶ 17. To the contrary, Billings' affidavit was clearly designed to persuade the trial court that TAB needed additional documentation

from PNC in order to test the correctness of Wendell's calculations in regard to the prepayment premium. Indeed, TAB has not argued in its appellate brief that Billings' affidavit suffices to create a genuine issue of fact with respect to the amount owed on the note. Instead, TAB suggests that "[a] trial is necessary to provide [it] with the opportunity to cross examine Wendell and determine how he specifically reached his conclusions" in regard to the amount of the prepayment premium. However, TAB never objected to PNC's supplemental discovery responses, which included the method and manner by which the prepayment charge was calculated, and there is no indication in the record that TAB was prevented from deposing Wendell or retaining an expert to dispute his calculations.

{¶ 16} For the foregoing reasons, we find that the trial court properly awarded summary judgment to PNC in the amount of \$1,008, 353.73 plus interest at eight percent from August 4, 2009. Accordingly, TAB's single assignment of error is not well-taken.

{¶ 17} The judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.