[Cite as *Marietta v. Verhovec*, 2020-Ohio-7020.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

CITY OF MARIETTA,	:	
	:	
Plaintiff-Appellee,	:	Case No. 19CA24
	:	
vs.	:	
	:	
EDWARD VERHOVEC, ET AL.,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellants.	:	

APPEARANCES:

Patrick J. O' Malley, Parma, Ohio, for Appellants.

Donald A. Mausar, Cleveland, Ohio, for Appellee.

Smith, P.J.:

{¶1} Edward and Dorothy Verhovec appeal the September 30, 2019 ruling of the Washington County Court of Common Pleas which granted the City of Marietta's motion for summary judgment. Having reviewed the record, we find merit to Appellants' first assignment of error that Appellee failed to demonstrate each element necessary to warrant the relief sought. Accordingly, the first assignment of error is sustained and the judgment of the trial court is hereby reversed.

FACTS

{¶2} On December 26, 2017, Appellee City of Marietta ("City") filed an action captioned "Creditor's Bill" in the Washington County Court of Common Pleas naming Edward Verhovec and Dorothy Verhovec, husband and wife, ("Appellants") and four other defendants.[1] The City alleged it had obtained a judgment against both Appellants in Washington County Common Pleas Court Case No. 11OT202 in the amount of $274,033.49. The City further alleged that Appellants had no real or personal property sufficient to satisfy the judgment, however they owned rental properties in New Philadelphia, Ohio (Tuscarawas County). The City sought to enjoin Appellants from receiving the rents owed to them from the tenants of the properties and to direct the tenants to pay the rents owed to the City until the City's judgment against Appellants was satisfied.

{¶3} The facts giving rise to the City's obtaining a judgment against Appellants are set forth fully in *State ex rel. Edward Verhovec v. Marietta*, 2013-Ohio-5414 and *State ex rel. Dorothy Verhovec v. Marietta*, 2013-Ohio-5415. Briefly, under the Ohio Public Records Act, public offices are required to make public records available in response to a request from any person. R.C. 149.43(B)(1). Where a public office has destroyed or improperly disposed of public records, an "aggrieved" person can file an action for civil forfeiture and

[1] The other named defendants, Renee Weistener, Ken Sparks, Linda Sparks, and Dan Kohler are persons alleged to have been residing in rental property owned by Appellants in Tuscarawas County. Default judgment was entered against these defendants.

seek an award of damages. R.C. 149.351(B). Prior to obtaining a $274,033.49 judgment against Dorothy Verhovec, the City presented evidence that both Appellants willingly participated in a state-wide scheme to make public records requests of various municipalities and then to "take advantage of the civil forfeiture statute for purely pecuniary gain." *Verhovec,* 2013-Ohio-5414, at ¶ 90. The $274,033.49 judgment against Dorothy Verhovec was issued as a sanction to reimburse the City's costs and attorney fees incurred in defending the frivolous lawsuits she brought. Appellant Dorothy Verhovec's appeal was not accepted for review in the Supreme Court of Ohio. *See State ex rel. Verhovec v. Marietta,* 138 Ohio St. 3d 1470, 2014-Ohio-1674, 6 N.E.3d 1206.

{¶4} In the underlying lawsuit subject of the within appeal on January 29, 2018, counsel filed a notice of appearance on behalf of Appellants and requested an extension of time to respond to the Creditor's Bill. By stipulation, the City's counsel agreed to extend the time for Appellants to answer. Appellants filed an answer on February 28, 2018.

{¶5} The trial court thereafter conducted a series of case management conferences. On March 4, 2019, the City filed a motion for default judgment and a motion for summary judgment. On March 8, 2019, Appellants filed a motion for extension of time to respond. On March 29, 2019, Appellants filed a Brief in Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for

Summary Judgment on Plaintiff's Complaint. On September 30, 2019, the trial court issued its Ruling granting the City's motion for summary judgment and denying Appellants' cross motion for summary judgment.

{¶6} This timely appeal followed.

ASSIGNMENTS OF ERROR

I. THE MOTION FOR SUMMARY JUDGMENT OF APPELLEE CITY OF MARIETTA FAILED TO DEMONSTRATE EACH ELEMENT NECESSARY TO WARRANT THE RELIEF SOUGHT AND SHOULD THEREFORE HAVE BEEN DENIED.

II. APPELLEE CITY OF MARIETTA FAILED TO FOLLOW THE STATUTORY REQUIREMENTS FOR PERFECTING A LIEN OR ENCUMBRANCE IN THE STATE OF OHIO AND THE TRIAL COURT SHOULD HAVE DENIED ITS MOTION FOR SUMMARY JUDGMENT.

III. THE MOTION FOR SUMMARY JUDGMENT OF APPELLEE CITY OF MARIETTA WAS UNTIMELY FILED WITHOUT LEAVE OF COURT AND THEREFORE SHOULD HAVE BEEN DENIED.

{¶7} For ease of analysis, we begin with Appellants' third assignment of error regarding the City's alleged untimely motion for summary judgment.

A. STANDARD OF REVIEW

{¶8} "The trial court's decision regarding whether to permit or reject a filing will not be disturbed on appeal absent an abuse of discretion." *Henrickson v. Grider*, 2016-Ohio-8474, 70 N.E.3d 604, (4th Dist.) at ¶ 37, quoting *Sovey v. Lending Group of Ohio,* 8th Dist. Cuyahoga No. 84823

2005-Ohio-195, at ¶ 10, citing *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.,* 72 Ohio St.3d 464, 650 N.E.2d 1343 (1995). An abuse of discretion connotes more than an error of law or judgment. *Clough v. Watkins*, 4th Dist. Washington No. 19CA20, 2020-Ohio-3446, at ¶ 11. Rather, to find an abuse of discretion, a reviewing court must determine that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. *Clough,* at ¶ 12, citing *AAAA Enterprises, Inc. v. River Place Community Redevelopment Corp.,* 50 Ohio St.3d 157, 161, 553 N.E.2d 597, 601 (1990).

B. LEGAL ANALYSIS

{¶9} The record of the underlying proceedings indicates that on January 25, 2019, a case management conference was held in the Court's chambers. The parties' attorneys participated by telephone. Subsequently, the trial court filed a "Time Frame Order" setting February 25, 2019 as the last day to file dispositive motions.

{¶10} The record further reflects that Plaintiff's Motion for Summary Judgment was file-stamped March 4, 2019. The certificate of service on the motion for summary judgment states "A copy of the foregoing Plaintiff's Motion for Summary Judgment was mailed this 22 day of February, 2019 by Regular U.S. Mail" to Appellants' counsel and the other parties to the proceeding. The date "22" was handwritten. The record next reflects that

on March 8, 2019, Appellants' counsel filed a motion for extension of time to respond to the motion for summary judgment.

{¶11} The motion for extension of time indicated that Appellants' counsel would be out of town on a previously planned vacation and emphasized that no prior continuances had been requested. The motion made no mention of the asserted untimeliness of the City's motion for summary judgment. On March 15, 2019, the record contains a file-stamped copy of "Stipulation for Leave to Plead." This document indicates that the parties had stipulated to an extension of time for Appellants to respond to the motion for summary judgment. The record further reflects that counsel for the City apparently gave telephone approval to the stipulation. It appears the stipulation was signed by Appellants' counsel on behalf of the City's attorney.

{¶12} Appellants filed a brief in opposition to the motion for summary judgment and cross-motion for summary judgment, file-stamped March 29, 2019. On the first page of the brief, Appellants assert that the City's motion for summary judgment was filed untimely without leave of Court and should be denied. On pages 9 and 10 of the brief, Appellants argue the City did not obtain leave of court and that the City's motion for summary judgment contained no demonstration of the requisite cause or

neglect pursuant to Civ.R. 6(B). The trial court's September 30, 2019 Ruling, subject of this appeal, does not address the issue of alleged untimeliness.

{¶13} Summary judgment motions may be filed after a matter is set for pretrial or trial only with leave of court. Civ.R. 56(A). Civ.R. 6(B) states:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Civ.R. 50(B), Civ.R. 59(B), Civ.R. 59(D), and Civ.R. 60(B), except to the extent and under the conditions stated in them.

{¶14} It is undisputed that the City did not seek leave of court. However, we perceive no abuse of discretion in allowing the City's untimely motion for summary judgment to be considered, nor do we perceive that the timing of the motion caused any prejudice to accrue to Appellants. Civ.R. 5(D) states: "Any paper after the complaint that is required to be served shall be filed with the court within three days after service." "Failure to file within the three-day period can result in the court striking the filing." *Sovey v. Lending Group of Ohio,* 8th Dist. Cuyahoga No. 84823, 2005-Ohio-195,

at ¶ 9; accord *Bader v. Ferri*, 3rd Dist. Allen No. 1-13-01, 2013-Ohio-3074, at ¶ 34. However, "[t]he filing of the subsequent pleading, written motion, or other important paper under Rule 5(D), although obviously very important for record purposes, is a secondary act." *Henrickson, supra,* at ¶ 37, quoting, *Nosal v. Szabo,* 8th Dist. Nos. 83974 and 83975, 2004-Ohio-4076, at ¶ 17, quoting 1970 Staff Note, Civ.R. 5 (internal quotation marks omitted).

{¶15} First, while Appellants did raise the issue of untimeliness in their brief in opposition to the motion for summary judgment, they did not pursue a motion to strike. It appears that their first response to the untimely filed motion was to request an extension of time in which to respond. The request for extension of time makes no mention of the issue of untimeliness. Then the record demonstrates a stipulation for extension of time was signed by counsel for both parties. This does not support the conclusion that the untimeliness issue was of paramount importance to Appellants, or that Appellants actively sought a striking of the motion.

{¶16} Furthermore, Appellants did have proper time to respond to the motion for summary judgment. They sought and were granted an extension of 14 days to respond. By contrast, *see Boyle v. Portsmith*, (where trial court allowed appellee to file a late motion for summary judgment and ruled on it

before the deadline for filing a memorandum in opposition to the motion, trial court failed to allow appellants to properly prepare a response and, therefore, abused its discretion.)

¶17} We must afford a presumption of regularity to the trial court's proceedings. *Henrickson, supra,* at ¶ 39; *State v. Raber,* 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684, ¶ 19; *Hartt v. Munobe,* 67 Ohio St.3d 3, 7, 615 N.E.2d 617 (1993); *Shoemaker v. Std. Oil Co.,* 135 Ohio St. 262, 20 N.E.2d 520, 14 O.O. 116 (1939), paragraph two of the syllabus. Indeed, "it is our duty to assume that such court acted in accordance with law unless the record shows the contrary." *Jaffrin v. Di Egidio,* 152 Ohio St. 359, 366, 89 N.E.2d 459, (1949); State ex rel. *Cincinnati Enquirer v. Lyons,* 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d 989, ¶ 35, quoting *State v. Phillips,* 74 Ohio St.3d 72, 92, 656 N.E.2d 643 (1995) (explaining that appellate courts ordinarily presume the regularity of trial court proceedings " 'unless the record demonstrates otherwise' ").

> "No rule with relation to Ohio appellate courts is better settled than the fundamental principle that in appeals on questions of law, all reasonable presumptions consistent with the record will be indulged in favor of the validity of the judgment or decision under review, and of the regularity and legality of the proceedings below. This is in accordance with the old maxim * * * (all things are presumed correctly and with due formality to have been done until it is proved to the contrary)."

Jaffrin, supra, 152 Ohio St. at 366, 89 N.E.2d 459, quoting 2 Ohio Jurisprudence (App. Rev., Pt. 2), 1015, Section 565.

{¶18} Based on the foregoing, we presume the regularity of the trial court's decision to accept the City's summary judgment motion filed March 4, 2019. Even though the certificate of service is dated February 22, 2019, and the last date for filing established by the court's Time Frame Order was February 25, 2019, we find no impropriety with the trial court's decision to allow the untimely filing. The record actually demonstrates that the trial court had earlier allowed Appellants a requested extension of time to respond to the Creditor's Bill. We also find no prejudice occurred to Appellants as a result of the untimely filing. We find no merit to Appellants' third assignment of error. It is hereby overruled.

{¶19} We next turn to consideration of Appellants' first assignment of error. Appellants assert that Marietta's motion for summary judgment failed to demonstrate each element necessary to warrant the relief sought. For the reasons which follow, we agree with Appellants.

A. STANDARD OF REVIEW

{¶20} Appellate courts must conduct a de novo review of trial court summary judgment decisions. *Burris v. Zurich,* 2019-Ohio-5255, 138 N.E.3d 1185 (4th Dist.), at ¶ 9. E.g., *State ex rel. Novak, L.L.P. v. Ambrose,* 156 Ohio St.3d 425, 2019-Ohio-1329, 128 N.E.3d 209, ¶ 8; *Pelletier v.*

Campbell, 153 Ohio St.3d 611, 2018-Ohio-2121, 109 N.E.3d 1210, ¶ 13; *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, an appellate court must independently review the record to determine if summary judgment is appropriate and need not defer to the trial court's decision. *Grafton,* 77 Ohio St.3d at 105, 671 N.E.2d 241.

B. LEGAL ANALYSIS

{¶21} Appellate review of summary judgment decisions is governed by the standards of Civ.R. 56. *See Turner v. Dimex,* 4th Dist. Washington No. 19CA3, 2019-Ohio-4251, at ¶ 6; *Vacha v. N. Ridgeville,* 136 Ohio St.3d 199, 2013-Ohio-3020, 992 N.E.2d 1126, ¶ 19; *Citibank v. Hine,* 4th Dist. Ross, 2019-Ohio-464, 130 N.E.3d 924, at ¶ 27. Summary judgment is appropriate if the party moving for summary judgment establishes that (1) there is no genuine issue of material fact, (2) reasonable minds can come to but one conclusion, which is adverse to the party against whom the motion is made and, (3) the moving party is entitled to judgment as a matter of law. *See Capital One Bank (USA) N.A. v. Rose*, 4th Dist. Ross No. 18CA3628, 2018-Ohio-2209, 2018 WL 2749510, at ¶ 23; Civ.R. 56; *New Destiny Treatment Ctr., Inc. v. Wheeler,* 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 24; *Chase Home Finance, LLC v. Dunlap,* 4th Dist. Ross No. 13CA3409, 2014-Ohio-3484, at ¶ 26.

{¶22} The moving party has the initial burden of informing the trial court of the basis for the motion by pointing to summary judgment evidence and identifying parts of the record that demonstrate the absence of a genuine issue of material fact on the pertinent claims. *See Turner, supra,* at ¶ 7; *Dresher v. Burt,* 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *Chase Home Finance* at ¶ 27; *Citibank, supra,* at ¶ 28. Once the moving party meets this initial burden, the non-moving party has the reciprocal burden under Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue remaining for trial. *See Dresher,* 75 Ohio St.3d at 293, 662 N.E.2d 264. *See also Rose, supra,* at ¶ 24.

{¶23 Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. *See Turner, supra,* at ¶ 8; *Ball v. MPW Indus. Servs., Inc.,* 2016-Ohio-5744, 60 N.E. 3d 1279 (5th Dist.) at ¶ 29, citing *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997), citing *Dresher v. Burt,* 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

{¶24} In this case the City filed a "Creditor's Bill" in the Washington County Court of Common Pleas, requesting the court to enjoin Appellants from receiving rents due them from the co-defendants and directing the co-defendants to pay their rents to the City until the judgment is fully satisfied. An action for a

creditor's bill pursuant to R.C. 2333.01 is equitable in nature. *See Graybar Elec. Co. v. Keller Elect. Co.,* 113 Ohio App. 3d 172, 176, 680 N.E.2d 687, (9th Dist.1996); *Gaib v. Gaib,* 14 Ohio App. 3d 97, 99, 470 N.E.2d 189 (10th Dist.1983) R.C. 2333.01, "equitable and certain other assets" provides in pertinent part:

> When a judgment debtor does not have sufficient personal or real property subject to levy on execution to satisfy the judgment, * * * any interest which he has * * * in a money contract, claim, or chose in action, due or to become due to him * * * shall be subject to the payment of the judgment by action.

{¶25} "There are three elements to a claim for a creditor's bill under R.C. 2333.01: (1) the existence of a valid judgment against a debtor, (2) the existence of an interest in the debtor of the type enumerated in the statute, and (3) a showing that the debtor does not have sufficient assets to satisfy the judgment against him." *Capital One Bank (USA) v. Caspary,* 2018-Ohio-358, 104 N.E. 3d 276 (7th Dist.), at ¶11; *Rhodes v. Sinclair,* 7th Dist. No. 11 MA 181, 2012-Ohio-5603, at ¶ 13 citing *Am. Transfer Corp. v. Talent Transp., Inc.,* 8th Dist. No. 94980, 2011-Ohio-112, at ¶ 9.

{¶26} Appellants' argument is three-part. First Appellants assert that the City's motion for summary judgment contained an affidavit by counsel for the City which made no mention the extent to which Appellants may have or have not sufficient personal or real property subject to levy to satisfy the judgment. Thus,

Appellants argue that the City has not set forth sufficient evidence, pursuant to Civil R. 56(C) to meet its burden of demonstrating that they have insufficient assets to satisfy the judgment. Secondly, Appellants assert that the rental payments the City seeks to attach to satisfy the judgment are already the subject of an assignment of rents to secure payment of indebtedness. Third, Appellants contend that the City failed to join a necessary and indispensable party for just adjudication pursuant to Civil R. 19(A), namely Cambridge and MacMillan Company, the entity entitled to receive the assignment of rents from Appellants' tenants. Appellants' first argument is dispositive of this assignment of error.

1. Did Marietta provide sufficient undisputed evidence to support the motion for summary judgment?

{¶27} Civil Rule 56(E) provides:

> 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 therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

{¶28} In *Bank of New York Mellon v. Bobo,* 2015 Ohio-4601, 50 N.E.3d 229 (4th Dist.), this court discussed the applicable rules governing the Civ.R. 56(E) requirement that an affidavit be made on personal knowledge. " 'To be considered in a summary judgment motion, Civ.R. 56(E) requires an affidavit to be made on personal knowledge, set forth such facts as would be admissible in evidence, and

affirmatively show that the affiant is competent to testify to the matters stated in the affidavit.' " *Bobo, supra*, at ¶ 35, quoting *Fifth Third Mtge. Co. v. Bell,* 12th Dist. Madison No. CA2013-02-003, 2013-Ohio-3678, ¶ 27, citing Civ.R. 56(E); *see also Wesley v. Walraven,* 4th Dist. Washington No. 12CA18, 2013-Ohio-473, ¶ 24. " ' "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirement of Civ.R. 56(E)." ' " *Bobo, supra,* quoting *Bell* at ¶ 27, quoting *Wells Fargo Bank v. Smith*, 12th Dist. Brown No. CA2012-04-006, 2013-Ohio-855, ¶ 16. "Additionally, documents referred to in an affidavit must be attached and must be sworn or certified copies." *Id*., citing Civ.R. 56(E). "Verification of these documents is generally satisfied by an appropriate averment in the affidavit, for example, that 'such copies are true copies and reproductions.' " *Id*., quoting *State ex rel. Corrigan v. Seminatore,* 66 Ohio St.2d 459, 467, 423 N.E.2d 105 (1981); *see also Walraven* at ¶ 31 ("Civ.R. 56(E)'s requirement that sworn or certified copies of all papers referred to in the affidavit be attached is satisfied by attaching the papers to the affidavit with a statement contained in the affidavit that the copies are true and accurate reproductions.") *JPMorgan Chase Bank, Natl. Assn. v. Fallon,* 4th Dist. Pickaway No. 13CA3, 2014-Ohio-525, ¶ 16.[2]

{¶29} Attached to the city's motion for summary judgment, counsel's

[2] We note the affidavit attached to the City's motion for summary judgment is problematic for several reasons. The affiant failed to aver that the information contained in the affidavit was based on personal knowledge. Additionally, there were no supporting documents attached. However, these defects were not raised in the trial court or here.

brief affidavit states as follows:

> AFFIANT FURTHER STATES that a Judgment was rendered in favor of the Plaintiff against the Defendants, Edward Verhovec and Dorothy Verhovec, in the Washington County Common Pleas Court under case number 11 OT 202 on December 19, 2012 in the amount of $274,033.49, together with interest and costs and that said Judgment remains in full force and effect.
>
> AFFIANT FURTHER STATES that currently there remains due and owing a Judgment balance of $315, 310.98.

{¶31} In *Bennett v. Mechell,* 4th Dist. Meigs No. 07CA2, 2008-Ohio-1287, this court observed that even where a nonmoving party fails completely to respond to the motion, summary judgment is improper unless reasonable minds can come to only one conclusion and that conclusion is adverse to the nonmoving party. As the burden is upon the moving party to establish the non-existence of any material factual issues, the lack of a response by the opposing party cannot, of itself, mandate the granting of summary judgment. Therefore, movants are not entitled to summary judgment absent proof that such judgment is, pursuant to Civ.R. 56(C), appropriate. *Bennett, supra,* at ¶ 13. *See Morris v. Ohio Cas. Ins. Co.*, 35 Ohio St.3d 45, 47, 517 N.E.2d 904, 907 (1988).

{¶32} Here, we must determine whether the City met its initial burden to demonstrate the absence of a genuine issue of material fact regarding the claims in the creditor's complaint. Appellants have directed us to *Graybar Elec. Co. v. Keller Elec. Co.,* 113 Ohio App.3d 172, 680 N.E.2d 687(9th Dist. 1996). In

Keller, the sole issue presented on appeal was whether appellee had produced sufficient evidence to establish each of the elements required for a creditor's bill; specifically, whether appellee proved that appellant did not have sufficient personal or real property to satisfy the judgment in the underlying action. The *Keller* court observed that in a complaint for a creditor's bill, the complainant must aver generally that the judgment debtor does not have sufficient personal or real property subject to levy on execution to satisfy the judgment. *See Bomberger v. Turner*, 13 Ohio St. 263, 270, 1862 WL 15 (1862); *Huston Assoc. v. VWV, Inc.,* 11th Dist. Lake No. 92-L-050, 1992 WL 387351 (Dec. 18, 1992), at *2. When the judgment debtor, in its answer, denies the complainant's averment, the plaintiff must offer evidence that the judgment debtor lacks sufficient property on which to levy execution. *See Bomberger, supra*; *Gaib v. Gaib*, 14 Ohio App.3d 97, 99, 470 N.E.2d 189 (10th Dist.).

{¶33} In *Keller,* the judgment creditor stated in its complaint that it had "made a diligent search for goods and assets of [appellant] subject to attachment and can find no assets in the State subject to attachment." The Appellant-judgment debtor stated in the answer to the complaint that "it is without sufficient information to form a belief" with respect to this allegation. The *Keller* court pointed out that Civ.R. 8(B) provides that in answering a complaint, "[i]f the party is without knowledge or information sufficient to form a belief as to the truth of an

averment, the party shall so state and this has the effect of a denial." (Emphasis added.) Thus, the *Keller* court concluded that the judgment debtor was entitled to a directed verdict, given the judgment creditor's failure, following the denial of judgment creditor's allegations as to sufficiency of judgment debtor's assets, to produce evidence that judgment debtor had no real or personal property from which it could satisfy its judgment. The *Keller* decision is instructive.

{¶34} Similarly as in *Keller,* in our case, the City averred in its complaint at Paragraph 2 that, "The Defendants, Edward Verhovec and Dorothy Verhovec, have no real or personal property sufficient to satisfy said Judgment." In Appellants' answer, Appellants denied the allegations contained in Paragraph 2. In the motion for summary judgment, the City emphasized its initial allegation, Appellants' denial, and pointed out that Appellants "have not submitted any information to Plaintiff or this court that sufficient assets exist with which to satisfy the outstanding Judgment." In Appellants' Brief in Opposition to Plaintiff's Motion for Summary Judgment, Appellants argued that the City failed to establish the second and third elements required to prove equitable relief to a creditor's bill. Appellants pointed out that the City's motion for summary judgment made no mention of the extent to which Appellants may have sufficient personal or real property subject to levy and satisfy the judgment. Based on the record before us, we must agree.

{¶35} As evidenced by counsel's affidavit set forth fully above, the City's motion for summary judgment does not set forth evidence demonstrating that Appellants lack sufficient property on which to levy execution. While the motion for summary judgment makes the required argument, we are mindful that a pleading and its attached exhibits are not admissible into evidence at trial to prove a party's allegations. *See Lucas v. Erlich,* 4th Dist. Lawrence No. 92CA17, 1993 WL 235583 (June 23, 1993), at *4, citing *State, ex rel. Copeland v. State Medical Board*, 107 Ohio St. 20, 140 N.E.660, (1923), at paragraph two of the syllabus; *Hocking Valley Ry. Co. v. Helber*, 91 Ohio St. 231, 110 N.E.481 (1915), at paragraph three of the syllabus; *also see Farmers Production Credit Assn. of Ashland v. Stoll,* 37 Ohio App.3d 76, 77, 523 N.E.2d 899 (9th Dist. 1987).

{¶36} Thus, we find merit to Appellants' argument that the City failed to provide evidence on a required element for proof of a creditor's bill. For this reason, we must sustain Appellants' first assignment of error. Appellants' remaining arguments asserted under this assignment of error have become moot and we decline to address them. Similarly, we need not address Appellants' second assignment of error.

{¶37} Having found merit to Appellants' first assignment of error, the judgment of the trial court granting summary judgment to the City is reversed.

JUDGMENT REVERSED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. and Hess, J. concur in Judgment and Opinion.

For the court,

_____
Jason Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.