**[Cite as *Springfield Venture, L.L.C. v. U.S. Bank, N.A.*, 2015-Ohio-1983.]**

**IN THE COURT OF APPEALS OF OHIO**
**SECOND APPELLATE DISTRICT**
**CLARK COUNTY**

| | | |
|---|---|---|
| SPRINGFIELD VENTURE, LLC | : | |
| | : | |
| *Plaintiff-Appellee* | : | Appellate Case No. 2014-CA-74 |
| | : | |
| v. | : | Trial Court Case No. 2012-CV-793 |
| | : | |
| U.S. BANK N.A. | : | (Civil Appeal from |
| | : | Common Pleas Court) |
| *Defendant-Appellant* | : | |
| | : | |

. . . . . .

O P I N I O N

Rendered on the 22nd day of May, 2015.

. . . . . .

JOSEPH A. DUNN, Atty. Reg. No. 0058826, PAUL J. KAVANAGH, Atty. Reg. No. 0065418, 333 North Limestone Street, P.O. Box 1687, Springfield, Ohio 45501
Attorneys for Plaintiff-Appellee

DOUGLAS R. DENNIS, Atty. Reg. No. 0065706, VINCENT E. MAUER, Atty. Reg. No. 0038997, 3300 Great American Tower, 301 East Fourth Street, Cincinnati, Ohio 45202
Attorneys for Defendant-Appellant

. . . . . .

WELBAUM, J.

**{¶ 1}** In this case, Defendant-Appellant, U.S. Bank National Association ("U.S. Bank") appeals from a summary judgment and award of attorney fees rendered in favor of Plaintiff-Appellee, Springfield Venture, LLC. ("Venture"). In support of its appeal, U.S. Bank contends that the trial court erred in concluding that its claim for attorney fees incurred in a prior action involving the same parties was barred by waiver and/or res judicata. U.S. Bank also contends that the trial court erred in alternatively concluding that the bank's claim for attorney fees was not supported by the contractual language of its note and/or mortgage. Finally, U.S. Bank contends that the trial court erred in adopting the magistrate's decision, which granted attorney fees and costs to Venture in connection with the current action.

**{¶ 2}** We conclude that the trial court erred in rendering summary judgment in Venture's favor on the grounds of res judicata, but did not err in rendering summary judgment in Venture's favor under the wavier doctrine. U.S. Bank voluntarily relinquished a known right in the prior action, and waiver may be enforced by the entity –in this case, Venture – who had a duty to perform and who changed its position as a result of the waiver. In view of the waiver, issues concerning the contractual language in the note and mortgage are moot.

**{¶ 3}** We further conclude that the trial court did not err in granting attorney fees to Venture, as U.S. Bank failed to file a transcript of the hearing before the magistrate, and we cannot conclude, without the transcript, that the trial court abused its discretion in awarding fees to Venture. Accordingly, the judgment of the trial court will be affirmed.

## I. Facts and Course of Proceedings

**{¶ 4}** The facts in the case before us are not disputed. In June 2010, the City of Springfield ("City") filed an appropriation action in the Probate Court of Clark County, Ohio, seeking a partial taking of real property located at 401 W. North Street in Springfield, Ohio. Venture owned the property, known as the Rite Aid parcel, and U.S. Bank held a mortgage and security agreement on the parcel, securing a note that had been made by Venture's predecessor in interest, RX Properties – Springfield, Ltd., in the original amount of $2,430,000. The parties to the appropriation action included the City, U.S. Bank, Venture, Rite Aid (which leased the property and operated a Rite Aid pharmacy on the premises), the Clark County Auditor, and the Clark County Treasurer. The taking involved the acquisition of 18 parking spaces in connection with a downtown redevelopment project.

**{¶ 5}** The City estimated the value of the partial taking at $835,846, and deposited that amount with the probate court. Venture filed an answer in August 2010, opposing the taking on substantive grounds. Several days later, U.S. Bank filed an answer through its own counsel, stating that it was the first lienholder on the property and was entitled to all of the proceeds. Rite Aid filed an answer and cross-claim against Venture, seeking a declaratory judgment regarding its rights under the lease, including termination.

**{¶ 6}** During the appropriation proceedings, which lasted about two years, U.S. Bank did not take any depositions, did not hire an independent appraiser or other expert witness, did not file any responsive pleadings other than its answer, and refused Venture's request to share the cost of appraisals.

**{¶ 7}** In March 2011, the probate court released $400,000 of the proceeds,

$250,000 of which was given to Venture, and $150,000 of which was given to U.S. Bank. The court held the remainder in a non-interest bearing account, and indicated it would disburse further funds based on a specific and justifiable need. In January 2012, the probate court filed an entry noting that Rite Aid had exercised its lease option to reduce its rent by $3,500 per month, and that U.S. Bank had applied the $150,000 to the principal on the mortgage. The court then ordered that $2,500 would be disbursed each month to be applied to the mortgage payments to U.S. Bank.

**{¶ 8}** Subsequently, on April 20, 2012, the probate court filed an "Agreed Entry Declaring Value, Vesting Title, and Order to Distribute a Portion of the Deposit." The entry noted that the City, U.S. Bank, Venture, and Rite Aid had agreed to a settlement, and the auditor and treasurer had consented. Under the settlement, the agreed-upon value of the property was $818,345, and the City was entitled to a refund of $17,500, with the remainder to the distributed to the parties. In late April or early May 2012, i.e., after the settlement entry had been filed, U.S. Bank notified Venture that it intended to seek attorney fees from Venture. This occurred during discussions between John Ryan, a U.S. Bank Vice-President, and Thomas Schmidt, a principal of Venture. U.S. Bank's attorney repeated this assertion in an email sent to Schmidt on May 14, 2012. At that time, the probate court had already set a hearing on May 18, 2012, for the final distribution of funds. The amount of attorney fees that U.S. Bank sought was approximately $50,000.

**{¶ 9}** Schmidt forwarded the email to his attorney, and intended to oppose the request for fees, which he anticipated U.S. Bank would raise with the court. U.S. Bank then filed a motion with the probate court on May 16, 2012, seeking payment of the entire amount of the distribution. The motion was supported by an affidavit from John Ryan,

who stated that the balance due on the mortgage was approximately $991,769. U.S. Bank did not ask the court to award attorney fees, nor did it mention attorney fees in the motion or at the hearing. Venture also filed a motion seeking distribution of the entire amount, since it had allegedly suffered the most loss.

**{¶ 10}** After the hearing, the probate court filed an entry on May 29, 2012, awarding Venture $95,000. The court concluded that this amount, together with the $250,000 previously awarded, would compensate Venture for the loss of lease revenue and the taking of the property. The court then awarded the remaining $313,261.50 to U.S. Bank, which, by agreement of counsel, was to be applied to the principal owing on the mortgage. U.S. Bank did not appeal from the probate court's ruling.

**{¶ 11}** Subsequently, on July 20, 2012, counsel for U.S. Bank notified Venture's counsel that U.S. Bank intended to unilaterally increase the outstanding balance of Venture's note by $80,725 to recover attorney fees that U.S. Bank had allegedly expended in the eminent domain case. Venture told U.S. Bank that it disagreed, and after the Bank refused to change its position, Venture filed a complaint for injunctive relief and declaratory judgment in the Clark County Common Pleas Court on July 30, 2012. In the complaint, Venture set forth the general course of events noted above, and requested that the court grant injunctive relief. Venture also asked for a declaration regarding the issue of whether U.S. Bank was entitled to attorney fees.

**{¶ 12}** U.S Bank filed its answer and a counterclaim on August 28, 2012. The counterclaim requested attorney fees for defending the current action, not the eminent domain action. After filing its answer, U.S. Bank included the alleged $80,725.14 in attorney fees on Venture's September 2012 monthly commercial loan invoice. This

increase in the principal balance would result in additional interest of about $22,000 over the life of the loan, for a total alleged economic loss for Venture of about $102,710.

**{¶ 13}** Both sides filed motions for summary judgment in the injunction action, supported by affidavits and certified copies of the probate court proceedings and other relevant documents. In February 2013, a magistrate filed a decision granting Venture's motion for summary judgment and denying U.S. Bank's motion for partial summary judgment. The magistrate concluded that U.S. Bank's claim for attorney fees in the appropriation action was barred by res judicata and waiver. The magistrate further concluded that even if the bank had asserted a timely claim, the note, which was the governing contract, did not support a claim for attorney fees. As a result, the bank was ordered to reverse the $80,725 entry on Venture's commercial loan. After U.S. Bank filed objections to the magistrate's decision, the trial court rejected the objections and adopted the decision.

**{¶ 14}** Because Venture had requested attorney fees against U.S. Bank pursuant to R.C. 2323.51(B)(1), the magistrate held a hearing on the matter. U.S. Bank failed to appear at the hearing, and after considering the testimony and written submissions of the parties, the magistrate awarded Venture $24,485 in costs and fees. The trial court overruled the bank's objections to the magistrate's decision in June 2014, and this appeal followed.

## II. Res Judicata and Waiver

**{¶ 15}** U.S. Bank's First Assignment of Error states that:

> The Trial Court Erred by Adopting the Magistrate's Decision Granting

Summary Judgment to Springfield Venture on the Grounds that U.S. Bank's Claim for Attorney Fees under the Note and/or the Mortgage was barred by waiver and res judicata.

**{¶ 16}** Under this assignment of error, U.S. Bank contends that neither waiver nor res judicata applies because its claim for attorney fees would have been a permissive cross-claim in the appropriation action, and a failure to assert such a claim does not result in res judicata or waiver.

**{¶ 17}** Before addressing this issue, we note that the parties agree that the promissory note and mortgage specify that Texas law applies to the note and loan, except that Ohio law would apply in foreclosure situations. U.S. Bank argues, however, that in choice of law situations, Ohio law applies to procedural matters like res judicata.

**{¶ 18}** As a general rule, choice of law provisions in contracts are enforceable "unless either the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or application of the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties." *Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co.*, 6 Ohio St.3d 436, 453 N.E.2d 683 (1983), syllabus.

**{¶ 19}** In the case before us, the only connection to Texas is that the lending transaction, which occurred in July 1998, involved a lender that was incorporated in Delaware, with a principal office in Texas. Ex. A attached to U.S. Bank's Partial Motion for Summary Judgment, p. 1. However, since that time, the mortgage has been

assigned several times to different parties. It was assigned on July 29, 1998, to an Indiana Life Insurance Company, and on August 19, 2004, to a federal savings bank located in Illinois, before ending up at U.S. Bank on October 30, 2009. See Assignments attached to Ex. A. There is no indication in the record that U.S. Bank has any connection with Texas; in fact, the assignment to U.S. Bank states that U.S. Bank is located in Illinois.

**{¶ 20}** In contrast, the real property and the mortgagor are located in Ohio, the events giving rise to this litigation arose in Ohio, and there is no other reasonable basis for the choice of Texas law. Accordingly, we will apply Ohio law. We also note that there appears to be no difference in Ohio and Texas law with respect to the issues, as is illustrated below.

**{¶ 21}** As was noted, the bank contends that res judicata and waiver cannot apply because Venture was a co-party in the appropriation litigation, and the bank was not required, under Ohio Civ.R. 13(G) to assert a cross-claim against a co-party.

**{¶ 22}** "A waiver is a voluntary relinquishment of a known right." C*hubb v. Ohio Bur. of Workers' Comp*., 81 Ohio St. 3d 275, 278-79, 690 N.E.2d 1267 (1998), citing *State ex rel. Athens Cty. Bd. of Commrs. v. Gallia, Jackson, Meigs, Vinton Joint Solid Waste Mgt. Dist. Bd. of Directors*, 75 Ohio St.3d 611, 616, 665 N.E.2d 202 (1996). "It applies generally to all personal rights and privileges." (Citation omitted.) *Id.* at 278. "Waiver assumes one has an opportunity to choose between either relinquishing or enforcing of the right. A waiver may be enforced by the person who had a duty to perform and who changed his or her position as a result of the waiver." *Id.* at 279, citing *Andrews v. State Teachers Retirement Sys. Bd.*, 62 Ohio St.2d 202, 205, 404 N.E.2d 747 (1980).[1]

[1] Texas follows the same rule with respect to waiver. *See, e.g.*, *Geis v. Colina Del Rio,*

**{¶ 23}** In contrast, " '[*r]es judicata* is a doctrine of judicial preclusion. It states that "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." ' " (Italics added.) *Mega Outdoor, L.L.C. v. Dayton*, 173 Ohio App. 3d 359, 2007-Ohio-5666, 878 N.E.2d 683 (2d Dist.), ¶ 22, quoting *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995), paragraph one of the syllabus. (Other citations omitted.)

**{¶ 24}** We have stressed that "[w]e are particularly persuaded by the supreme court's pronouncements that 'an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in the first lawsuit' and that '[t]he doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.' " *McCory v. Clements*, 2d Dist. Montgomery No. 19043, 2002 WL 857721, *3 (Apr. 26, 2002), quoting *Grava* at 382. *Accord SunTrust Bank v. Wagshul*, 2d Dist. No. 25567, 2013-Ohio-3931, ¶ 8.[2]

**{¶ 25}** " 'Proper application of the doctrine of res judicata requires that the identical cause of action shall have been previously adjudicated in a proceeding with the same parties, in which the party against whom the doctrine is sought to be imposed shall have had a full and fair opportunity to litigate the claim.' " *Wagshul* at ¶ 8, quoting *Brown v. Vaniman*, 2d Dist. Montgomery No. 17503, 1999 WL 957721, *4 (Aug. 20, 1999).

**{¶ 26}** Upon consideration, we conclude that the trial court erred by applying the doctrine of res judicata against U.S. Bank. In *Wagshul*, we considered a similar issue.

---

*LP*, 362 S.W.3d 100, 111 (Tex.Civ.App.2011).

[2] Again, Texas follows essentially the same rules. *See State & County Mut. Fire Ins. Co. v. Miller*, 52 S.W.3d 693, 696 (Tex. 2001)

In that case, a bank sued a property owner in a foreclosure action and also sued another bank (STB) that possessed a mortgage under an equity line of credit. *Id.* at ¶ 2. STB failed to appear in that action, and then brought suit against the property owner several years later. *Id*. at ¶ 2-3. After the trial court refused to apply res judicata against STB, the property owner appealed. *Id.* at ¶ 5-6. We outlined the requirements for res judicata, and then observed that:

> Civ.R. 13 is instructive when determining whether a party was required to assert a claim in a prior action. STB and Wagshul were codefendants in STM's foreclosure action. Therefore, STB could only have asserted a cross-claim against Wagshul. Counterclaims arising out of the same transaction or series of events are compulsory, and the failure to bring such a claim at the appropriate time will bar further litigation. "[W]hile counterclaims are 'compulsory,' such is not the case with respect to a 'cross-claim against co-party' under Civ.R. 13(G)." *Earley v. Joseph*, 5th Dist. Guernsey No. 03 CA 27, 2004-Ohio-1563, ¶ 11, quoting *Yoder v. Yoder*, 5th Dist. Holmes No. CA-335, 1982 Ohio App. LEXIS 13789, 1982 WL 5466 (June 29, 1982).

*Wagshul,* 2d Dist. No. 25567, 2013-Ohio-3931, at ¶ 9.

**{¶ 27}** We, therefore, concluded that the trial court had properly refused to apply res judicata to preclude STB's claims. *Id.* at ¶ 10-12.[3] Applying the same reasoning here, we can only conclude that the trial court erred in rendering summary judgment against U.S. Bank based on the application of res judicata. However, that does not

[3] Texas has a Civil Rule that is identical to Ohio Civ.R. 13(G). *See* Tex. Civ.R. 97(e).

resolve the issue of waiver, which involves somewhat different considerations.

**{¶ 28}** As was noted, waiver involves the voluntary relinquishment of a known right. *Chubb,* 81 Ohio St. 3d at 278-79, 690 N.E.2d 1267. In this regard, U.S. Bank submitted the affidavit of a Vice-President, John Ryan, who stated that U.S. Bank's position has always been that Venture was obligated to pay the reasonable attorney fees and expenses that the Bank incurred in handling the eminent domain case, and that the bank did not intend at any time to release its claim for fees against Ventures.

**{¶ 29}** However, in assessing whether a "known right" was relinquished, we think that U.S. Bank reads the term "right" too narrowly. The bank is referring to its right to attorney fees, in general, but the right that was relinquished in the appropriation action was the right, bestowed by Civ.R. 13(G), to bring a claim for attorney fees in that case. It is true that U.S. Bank was not required to bring the claim, but its actions must be viewed in the framework of what occurred in the appropriation case and the admonition of the Supreme Court of Ohio that "[a] waiver may be enforced by the person who had a duty to perform and who changed his or her position as a result of the waiver." *Chubb* at 279. Under the circumstances, U.S. Bank voluntarily relinquished that known right, and Venture, having changed its position, was entitled to enforce the waiver.

**{¶ 30}** In this regard, we note that a settlement was reached in the appropriation action and was recorded by the probate court on April 20, 2012. By entering into the settlement, Venture gave up its right to advocate for a higher valuation of the property, which would have resulted in a larger monetary benefit to Venture, either directly or through payment on the loan principal. After the settlement was recorded, U.S. Bank made known its desire for attorney fees, but did not communicate it to the probate judge

who had presided over the case and who would have been in the best position to judge whether the amounts claimed were reasonable, given what had occurred in the case.

**{¶ 31}** Instead of making its position known to the judge, U.S. Bank appeared at the hearing in probate court, said nothing, and received a significantly larger sum than Venture ($313,261.50 as opposed to $95,000). Although this sum did indirectly benefit Venture by paying down the loan, a direct sum may have benefitted Venture more, and the probate court may have chosen to award the money directly to Venture if it had known that the bank intended to ask for attorney fees. By failing to advise Venture that it was still seeking attorney fees, the bank also precluded Venture from being able to argue to the probate court that it should directly receive a larger portion of the award, from which it could have paid fees, if warranted.

**{¶ 32}** Again, instead of alerting either the court or Venture, U.S. Bank waited a few months and then told Venture that it was going to unilaterally add more than $80,000 to Venture's loan (an amount that was around $30,000 more in fees than the bank had previously indicated). At that point, Venture had no option but to file a lawsuit to prevent the bank from adding the amount to its loan. And, even after suit was filed, U.S. Bank added the fees to Venture's loan anyway.

**{¶ 33}** As a final matter, we note that U.S. Bank claims that wavier cannot be inferred from silence, where there is no imperative duty to speak. In this regard, U.S. Bank relies on *Allenbaugh v. Canton*, 137 Ohio St. 128, 28 N.E.2d 354 (1940), in which the Supreme Court of Ohio stated that "[b]efore silence will be construed as a waiver of rights expressly conferred by statute, the duty to speak must be imperative." *Id.* at paragraph one of the syllabus.

**{¶ 34}** The "statute" in question is apparently Civ.R. 13(G), which indicates that cross-claims are permissive. Again, without discounting that fact, we find no merit to U.S. Bank's argument. Furthermore, U.S. Bank was not merely "silent"; instead, its actions could reasonably be classified as misleading.

**{¶ 35}** Under the circumstances, we conclude that the trial court did not err in applying the doctrine of waiver against U.S. Bank. In view of this conclusion, any error in granting summary judgment based on res judicata is harmless and did not prejudice U.S. Bank. Accordingly, the First Assignment of Error is sustained in part with respect to the trial court's res judicata holding, with that error being harmless, and is overruled in part, with respect to the court's decision on waiver.

## III. Claims under the Note and Mortgage

**{¶ 36}** U.S. Bank's Second Assignment of Error states that:

> The Trial Court Erred by Adopting the Magistrate's Decision Granting Summary Judgment to Springfield Venture on the grounds that U.S. Bank's claim for attorney fees under the Note and/or the Mortgage was not supported by the contractual language of the Note and/or the Mortgage.

**{¶ 37}** Under this assignment of error, U.S. Bank contends that the trial court erred in concluding that even if the bank had asserted a claim for attorney fees in the appropriation action, the contract language of the note did not support such a claim. In this context, U.S. Bank argues that attorney fees are required under the terms of both the promissory note and the mortgage agreement.

**{¶ 38}** Based on our resolution of the First Assignment of Error, this assignment of

error is moot. Therefore, we decline to address the error, pursuant to App.R. 12(A)(1)(c). *Accord State v. Sowry*, 155 Ohio App.3d 742, 2004-Ohio-399, 803 N.E.2d 867, ¶ 23 (2d Dist.). The Second Assignment of Error is overruled, as moot.

## IV. Attorney fees Awarded to Venture

**{¶ 39}** U.S. Bank's Third Assignment of Error states that:

> The Trial Court Erred by Adopting the Magistrate's Decision Granting Attorney Fees to Springfield Venture, rather than U.S. Bank.

**{¶ 40}** Under this assignment of error, U.S. Bank contends that the trial court failed to conduct an independent review of the magistrate's decision on attorney fees because the court did not conduct a hearing and merely adopted the magistrate's findings. U.S. Bank also contends that the magistrate failed to provide any hints regarding why she concluded that the bank had engaged in frivolous litigation. Finally, U.S. Bank argues that its conduct could not have been frivolous because it was entitled to collect attorney fees under the note and did not waive its rights to do so.

**{¶ 41}** "We review awards of attorney fees for abuse of discretion." (Citations omitted.) *Cartwright v. Batner*, 2014-Ohio-2995, 15 N.E.3d 401, ¶ 105 (2d Dist.) An abuse of discretion " 'implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " (Citations omitted.) *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "[A]n abuse of discretion most commonly arises from a decision that was unreasonable." *Wilson v. Lee*, 172 Ohio App.3d 791, 2007-Ohio-4542, 876 N.E.2d 1312, ¶ 11 (2d Dist.), citing *Schafer v. RMS Realty*, 138 Ohio App.3d 244, 300, 741 N.E.2d 155 (2d Dist.2000). (Other citation omitted.)

"Decisions are unreasonable if they lack a sound reasoning process." *Id.*

**{¶ 42}** As was noted, Venture requested attorney fees in connection with the current action pursuant to R.C. 2323.51(B)(1), which provides, in pertinent part, that:

> [A]t any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct, as provided in division (B)(4) of this section.

**{¶ 43}** In the motion, Venture asked for sanctions pursuant to R.C. 2323.51(A)(2)(a)(ii) and (iii), which define "frivolous conduct" as:

> (a) Conduct of an inmate or other party to a civil action * * * that satisfies any of the following:
>
> * * *
>
> (ii) It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.
>
> (iii) The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

**{¶ 44}** Venture argued in the motion that U.S. Bank had acted frivolously by disregarding a settlement agreement and final appealable order in a case that had been pending two years, and by unilaterally charging its customer attorney fees.

**{¶ 45}** At the hearing, which U.S. Bank did not attend, Venture's counsel testified about a July 24, 2012 letter that he sent to U.S. Bank. The letter informed U.S. Bank that its attempt to unilaterally increase the balance of the note was "unsupportable in fact and law, was in bad faith, would lead to an injunction lawsuit, and would potentially subject U.S. Bank to Sanctions." Doc. #24, August 27, 2013 Magistrate's Decision, p. 3. The magistrate admitted this letter, and concluded, after considering the evidence and argument at the hearing, that U.S. Bank's conduct was frivolous under R.C. 2323.51(A)(2)(a)(ii). *Id.*

**{¶ 46}** With respect to U.S. Bank's first argument, we agree that a trial court is required to " 'undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law.' " *Bennett v. Bennett*, 2012-Ohio-501, 969 N.E.2d 344, ¶ 18 (2d Dist.), quoting Civ.R. 53(D)(4)(d). "That review is the equivalent of a de novo determination." *Id.* (Citation omitted.)

**{¶ 47}** Nonetheless, although U.S. Bank objected to the magistrate's decision, it did not file a transcript of the evidence presented at the hearing. We have held that "[w]hen a party fails to file a transcript or an affidavit as to the evidence presented at the magistrate's hearing, the trial court, when ruling on the objections, is required to accept the magistrate's findings of fact and to review only the magistrate's conclusions of law based upon those factual findings." (Citation omitted.) *Dayton Police Dept. v. Byrd*,

189 Ohio App.3d 461, 2010-Ohio-4529, 938 N.E.2d 1110, ¶ 26 (2d Dist.) Ironically, U.S. Bank argues in its brief that "[t]he trial court did not even review the transcript of [Venture's arguments as to frivolous conduct] as demonstrated by the lack of a transcript in the record." Reply Brief of Defendant/Appellant U.S. Bank National Association, p. 9. However, as was noted, U.S. Bank was responsible for filing the transcript. *See* Civ.R. 53(D)(3)(b)(iii).

**{¶ 48}** Consequently, our review of the record is limited to whether the trial court abused its discretion in adopting the Magistrate's decision. *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 730, 654 N.E.2d 1254 (1995). Without the transcript, we are unable to conclude that the trial court abused its discretion in adopting the Magistrate's decision.[4] Also, there is no indication in the record that the trial failed to comply with the requirement of reviewing the magistrate's conclusions of law.

**{¶ 49}** Based on the preceding discussion, we find no abuse in the trial court's decision to award attorney fees to Venture. Accordingly, the Third Assignment of Error is

---

[4] We do note that a copy of the transcript was filed in the court of appeals on March 2, 2015. However, we cannot consider the transcript, as the trial court did not have access to it. *Duncan* at 730. "We have repeatedly held that ' "[a] reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." ' " *Greenlee v. Greenlee*, 2d Dist. Greene No. 26059, 2014-Ohio-2306, ¶ 35, quoting *Taylor v. Taylor*, 2d Dist. Miami No.2012-CA-16, 2013-Ohio-2341, ¶ 90, which in turn quotes *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. We have also previously held that failure to provide a transcript of evidence upon which the magistrate relied waives "any error assigned on appeal with respect to the trial court's judgment overruling objections to the magistrate's decision when the objections were not supported by a transcript of the proceedings before the magistrate at which evidence relevant to the error assigned on appeal was introduced." *Daniel v. Daniel*, 2d Dist. Miami No. 2005CA9, 2006-Ohio-411, ¶ 17. *Accord Frees v. ITT Technical School*, 2d Dist. Montgomery No. 23777, 2010-Ohio-5281, ¶ 16, *Allread v. Allread*, 2d Dist. Darke No. 2010 CA 6, 2011-Ohio-1271, ¶ 16; and *Podeweltz v. Rieger*, 2d Dist. Montgomery No. 21725, 2007-Ohio-1513, ¶ 73. Finally, as was noted, U.S. Bank failed to appear at the hearing before the magistrate.

overruled.

**{¶ 50}** We note that we recently issued a show cause order, asking U.S. Bank to show cause regarding whether the trial court's order was final and appealable in view of the fact that the order was silent on U.S. Bank's counterclaim for attorney fees. Both sides have responded to the show cause order, and agree that the magistrate's order, which was adopted by the trial court, found against U.S. Bank with respect to the claim for attorney fees under the Note and Mortgage. Accordingly, we deem the show cause order satisfied.

**{¶ 51}** As a final matter, we note that Venture has filed a motion asking us to award attorney fees against U.S. Bank in connection with this appeal. App.R. 23 allows an appellate court to require the appellant to pay reasonable fees if the appellate court determines that an appeal is frivolous. "A frivolous appeal is one that presents no reasonable question for review." (Citation omitted.) *Taylor v. Franklin Blvd. Nursing Home, Inc*., 112 Ohio App.3d 27, 32, 677 N.E.2d 1212 (8th Dist.1996). Applying this standard, we decline to award attorney fees for the appeal. Accordingly, the motion for attorney fees is overruled.

## V. Conclusion

**{¶ 52}** U.S. Bank's First Assignment of Error is sustained in part, with any error being harmless, and is overruled in part. The Second Assignment of Error is overruled as moot, and the Third Assignment of Error is overruled. Therefore, the judgment of the trial court is affirmed. In addition, the Show Cause Order is Deemed Satisfied, and Appellee's Motion for Attorney Fees is Overruled.

. . . . . .

FROELICH, P.J. and DONOVAN, J., concur.

Copies mailed to:

Joseph A. Dunn
Paul J. Kavanagh
Douglas R. Dennis
Vincent E. Mauer
Hon. Richard J. O'Neill