

[Cite as *Beneficial Fin. I, Inc. v. Edwards*, 2014-Ohio-5514.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

BENEFICIAL FINANCIAL I, INC.,)	
)	CASE NO. 13 MA 106
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
CLARISSA A. EDWARDS, aka)	
CLARISSA ANN EDWARDS, et al.,)	
)	
DEFENDANTS-APPELLANTS.)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 12 CV 3411.

JUDGMENT: Affirmed.

APPEARANCES:
For Plaintiff-Appellee: Attorney Melissa Zujkowski
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For Defendants-Appellants: Attorney Brian K. Duncan
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JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: December 11, 2014

[Cite as *Beneficial Fin. I, Inc. v. Edwards*, 2014-Ohio-5514.]
DeGenaro, P.J.

{¶1} Defendant-Appellant Clarissa Edwards appeals the June 10, 2013 judgment of the Mahoning County Court of Common Pleas granting summary judgment in favor of Plaintiff-Appellee, Beneficial Financial I, Inc. in a foreclosure action. On appeal, Edwards asserts that the trial court erred in granting summary judgment because there were multiple genuine issues of material fact; and further, because she was not afforded a full and fair opportunity to conduct discovery in order to defend Beneficial's motion.

{¶2} Edwards' arguments are meritless. Beneficial supported its motion for summary judgment by producing evidentiary material demonstrating that it was the holder of the note, Edwards was in default, all of the conditions precedent to foreclosure were satisfied, and the amount of principal and interest due was established. However, Edwards failed to meet her reciprocal burden of demonstrating the existence of a genuine issue of material fact as to any of these elements. Instead, she rested on the allegations made in her pleadings, which is insufficient to demonstrate a genuine issue of material fact. In addition, Edwards never filed a Civ.R. 56(F) motion to continue discovery before the trial court ruled on the summary judgment motion. In the absence of such a motion, the trial court properly exercised its discretion regarding discovery management and proceeded to consider Beneficial's motion. Accordingly, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶3} On November 22, 2006, Beneficial and Edwards executed a loan agreement which was secured by a mortgage. Edwards subsequently defaulted on payments in violation of the terms of the note and mortgage, and on approximately July 14, 2012, Beneficial sent Edwards a notice of default and intent to accelerate the balance owed on the note. Edwards failed to cure the default.

{¶4} On November 5, 2012, Beneficial filed a complaint in foreclosure, alleging that: Plaintiff was the holder and possessor of a note executed by Edwards, the note was in default in violation of the terms of the note and mortgage, Beneficial complied with conditions precedent to foreclosure, and Edwards owed \$87,042.29 plus interest accruing from July 28, 2011 along with fees.

{¶5} On February 7, 2013, Edwards filed an answer to the complaint, asserting numerous defenses: failure to state a claim upon which relief can be granted; insufficient service of process; fraud/duress/illegality; accord and satisfaction; failure to mitigate damages; illusory and voidable contract; Beneficial was not a proper party; unauthorized execution of the mortgage; the mortgage was void ab initio for lack of compliance with the Truth in Lending Act, Regulation Z, and Home Ownership Protection Act; lack of subject matter jurisdiction; failure to state a claim upon which relief can be granted; Beneficial lacked standing; failure to join indispensable parties; and common law fraud.

{¶6} On February 22, 2013, Beneficial filed a motion for summary judgment in the trial court and attached a copy of the mortgage. Edwards filed a brief in opposition to Beneficial's motion, but did not attach any evidence. The trial court granted Beneficial's motion and entered an in rem judgment and decree of foreclosure.

Genuine Issues of Material Fact

{¶7} In her first assignment of error, Edwards asserts:

The Trial Court erred in granting Appellee's Motion for Summary Judgment because there were genuine issues of material fact, including but not limited to, whether Appellee is a holder in due course, whether Beneficial violated the Real Estate Settlement Procedures Act, The Ohio Consumer Sales Practices Act, and/or the Fair Debt Collections Practices Act, allocation of payments, doctrine of unclean hands, equitable estoppel, and whether the mortgage was properly executed.

{¶8} An appellate court reviews summary judgment de novo, applying the same standard used by the trial court. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, 874 N.E.2d 1155, ¶5. Summary judgment is properly granted if, viewing the evidence in a light most favorable to the non-moving party: 1) there are no genuine issues as to any material facts; 2) the movant is entitled to judgment as a matter of law; and 3) the evidence is such that reasonable minds can come to but one conclusion, which is adverse to the opposing party. Civ.R. 56(C); *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶10. The movant bears the initial burden of

stating the basis of the motion and identifying parts of the record demonstrating "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, 296, 662 N.E.2d 264 (1996). A fact is material when it affects the outcome of the suit under the applicable substantive law. *Turner v. Turner*, 67 Ohio St.3d 337, 339, 617 N.E.2d 1123 (1993). The nonmoving party has the reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings; *Dresher* at 293, some evidence that suggests a reasonable fact finder could rule in the non-movant's favor must be produced. *Natl. City Mtge. v. Piccirilli*, 7th Dist. No. 08 MA 230, 2011-Ohio-4312, ¶21.

{¶9} Edwards first argues that Beneficial failed to specify evidence in the record that "support[s] Appellee's ownership of the debt at issue." Beneficial filed an affidavit along with its summary judgment materials in support of its motion. Edwards opposed the motion by merely making legal arguments; she failed to submit any evidentiary materials for the trial court's consideration.

{¶10} A movant must support a motion for summary judgment in a foreclosure action with evidentiary material demonstrating: the movant is the holder of the note and mortgage, the mortgagor is in default, and the amount of principal and interest due. See *Bank of Am. v. Saadey*, 7th Dist. No. 12 MA 196, 2014-Ohio-3569, ¶18-19. Summary judgment may be appropriate where an affidavit demonstrates there is no genuine issue as to any material fact and the opposing party fails to respond and show otherwise. Civ.R. 56(E) states:

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.

Civ.R. 56(E).

{¶11} Absent "proof that the affidavit is insufficient, the general rule applies: a mere assertion of personal knowledge satisfies Civ.R. 56(E) if the nature of the facts in the affidavit combined with the identity of the affiant creates a reasonable inference that the affiant has personal knowledge of the facts in the affidavit." *Saadey*, at ¶14.

{¶12} The affidavit filed in support of Beneficial's motion satisfies the requirements of Civ.R. 56(E). First, the affiant alleged that she has personal knowledge of the loan and related mortgage. Second, the affiant alleged facts in the affidavit that would be admissible evidence under the business records exception to the hearsay rule. To be admissible, the business record must be: 1) transmitted by a person with knowledge, 2) kept in the course of regularly conducted business activity, and 3) made at or near the time of the events recorded, as testified to by a custodian of the business records. Evid.R. 803(6). Third, the affidavit indicates that the affiant was competent to testify regarding the mortgage and the note because she alleged "[i]n the regular course of my job functions, I have access to and am familiar with business records maintained by the Plaintiff for the purpose of servicing mortgage loans." Fourth, sworn copies of documents, including a notice of right to cure default, the loan agreement, mortgage agreement, and records detailing the amount due on the note were attached to the affidavit.

{¶13} Further, Beneficial specified evidentiary material in the record demonstrating that it is the holder of the note and related mortgage. In her affidavit, affiant states: 1) "The Plaintiff is in possession of the original promissory note and/or loan agreement for this Loan, bearing the date of 11/22/2006;" 2) "[t]he payments due have not been made according to the terms of the Note and Mortgage" and "[t]he default has not been cured;" and 3) "there is due and owing on the Loan the sum of \$119,905.47."

{¶14} Because the affidavit Beneficial filed with the trial court met the requirements of Civ.R. 56(E), it was sufficient to support its motion for summary judgment. Thus, Beneficial specified evidentiary material in the record sufficient to satisfy the elements required for summary judgment in a foreclosure action.

{¶15} Edwards, on the other hand, failed to meet her reciprocal burden of demonstrating a genuine issue of material fact as to any element of Beneficial's

foreclosure action. Edwards makes conclusory statements about genuine issues of material fact that exist, but offers no evidence to support her arguments.

{¶16} Accordingly, reasonable minds could come to one conclusion, and that conclusion is adverse to the non-movant, Edwards. Therefore, we hold that there are no genuine issues of material fact precluding summary judgment in favor of Beneficial on its foreclosure claim.

Waiver

{¶17} Edwards also asserts that genuine issues of fact exist regarding whether: Beneficial is a holder in due course; it violated the Real Estate Settlement Procedure Act, the Ohio Consumer Sales Practices Act, and/or the Fair Debt Collections Practices Act; the mortgage was properly executed; and the affirmative defenses of allocation of payments, unclean hands, and equitable estoppel applied. However, these claims and defenses were not raised in the trial court.

{¶18} "An appellate court will not consider an error which could have been brought to the trial court's attention, and hence avoided or otherwise corrected." *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 210, 436 N.E.2d 1001 (1982); *Hill v. Urbana*, 79 Ohio St.3d 130, 140, 679 N.E.2d 1109 (1997) ("A party waives an issue for the purposes of appeal by failing to timely advise a trial court of possible error."); *In re Guardianship of Kalan*, 7th Dist. No. 13 MA 46, 2014-Ohio-4159, ¶29 ("arguments not raised at the trial court level cannot be raised for the first time on appeal.").

{¶19} Edwards waived her RESPA, Ohio CSPA, and FDCPA claims, as well as the affirmative defenses she asserted, and her challenge to Beneficial's status as a holder in due course by failing to raise these issues first in the trial court. Therefore, we will not address them.

{¶20} The only issue Edwards argues on appeal which had been raised in the trial court is whether the mortgage was properly executed. In Edwards' Answer, she states: "An unauthorized party executed the mortgage document." However, Edwards has not identified any evidentiary material in the record that suggests the execution of the mortgage document was unauthorized or improper. Therefore, this argument lacks merit.

{¶21} Accordingly, Edwards' first assignment of error is meritless.

Discovery

{¶22} In her second assignment of error, Edwards asserts:

The trial court erred in granting Appellee's motion for summary judgment because Edwards was neither afforded a full and fair opportunity to conduct discovery on all factual matters in dispute nor verify the merit of Appellee's complaint.

{¶23} Edwards argues that the trial court denied her request, pursuant to Civil Rule 56(F), to extend the time to respond to Beneficial's summary judgment motion. However, a review of the record indicates that Edwards never filed such a motion with the trial court.

{¶24} Civ.R. 56 does not mandate that full discovery be completed before a trial court grants a motion for summary judgment. *Kristian v. Youngstown Orthopedic Assn.*, 7th Dist. No. 03 MA 189, 2004-Ohio-7064, ¶14. In the event that a party has not developed sufficient facts to oppose the motion, Civ.R. 56(F) provides a remedy:

Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

Civ.R. 56(F).

{¶25} If a party does not file a Civ.R. 56(F) motion, a trial court has no alternative but to rule on a motion for summary judgment. *Citibank v. Valentine*, 5th Dist. No. 11CAE100087, 2012-Ohio-2786, ¶27. A trial court has broad discretion in discovery matters and its rulings on such matters are reviewed under an abuse of discretion standard. *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 57-58, 295 N.E.2d 659 (1973).

{¶26} Contrary to Edwards' assertion, she never filed a Civ.R. 56(F) motion with the trial court. In its absence, the trial court properly exercised its broad discretion in discovery management and ruled on Beneficial's motion for summary judgment. Accordingly, Edwards' second assignment of error is meritless.

Conclusion

{¶27} First, Beneficial met its initial burden as movant by specifying evidentiary material in the record sufficient for summary judgment in a foreclosure action, attached to or included in an affidavit that met the requirements of Civ.R. 56(E). Edwards failed to specify evidentiary material in the record demonstrating any genuine issue of material fact as to an element of Beneficial's foreclosure action, and thus failed to meet her reciprocal burden as non-movant. Therefore, the trial court's decision granting summary judgment was proper. Secondly, Edwards never filed a Civ.R. 56(F) motion, and thus did not give the trial court an opportunity to consider granting a continuance for more discovery. Consequently, the trial court did not abuse its discretion by ruling on Beneficial's motion for summary judgment in the absence of such a motion.

{¶28} Accordingly, the trial court's decision granting summary judgment was proper, Edwards' assignments of error are meritless and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.