

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

BANK OF AMERICA, N.A.,	)	CASE NO. 13 MA 119
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	OPINION
	)	
RICHARD N. MILLER, ET AL.,	)	
	)	
DEFENDANTS-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court  
Case No. 12-CV-1745

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Attorney Gregory Melick  
Attorney John Leach  
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Columbus, Ohio 43215

For Defendant-Appellant: Attorney Bruce Broyles  
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JUDGES:

Hon. Mary DeGenaro  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite

Dated: June 9, 2015

DeGENARO, J.

{¶1} Defendant–Appellant, Richard Miller, appeals the July 23, 2013 judgment of the Mahoning County Court of Common Pleas overruling his objections to a magistrate's decision and granting summary judgment in favor of Plaintiff–Appellee, Bank of America N.A. (“BOA”), in a foreclosure action. On appeal, Miller asserts that summary judgment was improper because there are genuine issues of material fact about whether BOA complied with the face-to-face meeting requirements in 24 C.F.R. 203.604 prior to initiating foreclosure.

{¶2} Upon review, Miller's arguments are meritless. This court has recently held in *PNC Mtge. v. Garland*, 7th Dist. No. 12 MA 222, 2014-Ohio-1173, ¶2, that 24 C.F.R. 203.604 creates a condition precedent to foreclosure, not an affirmative defense, and is therefore subject to the pleading requirements contained in Civ.R. 9(C). Like the defendant in *Garland*, Miller has waived his HUD violation arguments by failing to plead them with particularity in his Answer pursuant to Civ.R. 9(C). Accordingly, the judgment of the trial court is affirmed.

#### **Facts and Procedural History**

{¶3} On May 13, 2008, Miller and his now-deceased wife executed and delivered a promissory note in the amount of \$91,603.00 to Countrywide Bank, FSB, which was insured by the FHA. The note was secured by a mortgage on the property located 751 S. 14th Street in Sebring. BOA is successor by merger to BAC Home Loans Servicing LP, which was formerly known as Countrywide Bank.

The note provides the following with regard to default:

If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. \* \* \* In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted

by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

Similarly the Mortgage provides the following:

9. Grounds for Acceleration of Debt.

(a) Default. Lender may, except as limited by regulations issued by the Secretary, in the case of payment defaults, require immediate payment in full of all sums secured by this Security Instrument if:

(i) Borrower defaults by failing to pay in full any monthly payment required by this Security Instrument prior to or on the due date of the next monthly payment, or

(ii) Borrower defaults by failing, for a period of thirty days, to perform any other obligations contained in this Security Instrument.

\* \* \*

(d) Regulations of HUD Secretary. In many circumstances regulations issued by the Secretary will limit Lender's rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary.

{¶14} On June 6, 2012, BOA filed a complaint against Miller for judgment on the note and/or foreclosure of the mortgage. BOA asserted that terms of the note had been breached and that it was entitled to judgment in the amount of \$77,121.81 plus interest, costs, and other expenses. Attached to the complaint were, inter alia: the note and mortgage. BOA generally pled that it had "satisfied all conditions precedent \* \* \* ."

{¶15} On October 24, 2012, as no answer had been filed, BOA filed a motion for default judgment, supported by the affidavit of Dawn Marie Stettner, an assistant vice president at BOA. Stettner averred that BOA held a promissory note executed by the Millers, with \$77,121.181 at an interest rate of 5.875% still due, and that Miller had failed to make any payments due on or after December 1, 2011. She further averred

that BOA had elected to accelerate the note. She authenticated an attached business record, which demonstrated the note was in default and how much was owed.

{¶16} On November 4, 2012, Miller filed a motion for leave to file an answer *instanter*. As cause for his untimely answer, he alleged that following service of the complaint, he was in discussions with BOA about a potential loan modification and believed the matter was going to be resolved via loan modification.

{¶17} The trial court granted Miller's leave to file an Answer and denied BOA's default judgment motion.

{¶18} In his answer, Miller generally raised a number of defenses, including that BOA failed to comply with "the regulations issued by the Secretary of Housing and Urban Development" or "HUD regulations" prior to accelerating the note and initiating foreclosure.

{¶19} On January 23, 2013, BOA filed a motion for summary judgment, referencing the affidavit of Stettner along with the note and mortgage to demonstrate there were no genuine issues of material fact that Miller was in default of his obligations under the note and that judgment in its favor was proper. BOA further argued that Miller failed to set forth any facts in support of his alleged defenses.

{¶110} On February 13, 2013, Miller filed a brief in opposition to BOA's motion for summary judgment. Miller argued that BOA failed to fulfill conditions precedent to the acceleration of the note and foreclosure of the mortgage, specifically that the bank failed to follow 24 C.F.R. 203.604, which requires that the mortgagee have a face-to-face meeting with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments of the mortgage are unpaid. In his attached affidavit, Miller averred that at no time prior to the initiation of the foreclosure did BOA attempt to arrange a face-to-face meeting.

{¶111} On March 14, 2013, BOA filed a reply in support of summary judgment. It attached an exhibit purporting to be "collection notes" from the bank indicating that an agent from BOA made a field visit to the subject property to comply with the face-to-face meeting requirement.

{¶112} On March 20, 2013, the magistrate issued a decision, including findings

of fact and conclusions of law, denying BOA's motion for summary judgment. The magistrate found that BOA's exhibit to its reply brief was not properly authenticated or accompanied by an affidavit as required by Civ. R. 56(C) and therefore BOA failed to establish that they are business records kept in the ordinary course of its business. Accordingly, the magistrate found there were genuine issues of material fact precluding summary judgment. No objections were filed and the trial court adopted the decision as its own.

{¶13} On April 26, 2013, BOA filed an amended motion for summary judgment. BOA attached the note, mortgage, November 28, 2011 assignment of mortgage transferring the rights to the mortgage to BOA, and the collection notes maintained by BOA. Those exhibits were authenticated by a supplemental affidavit of Stettner.

{¶14} On May 2, 2013, Miller's counsel filed an affidavit of counsel pursuant to Civ.R. 56(F), averring that in order to oppose the motion for summary judgment there was the need to conduct additional discovery on the matter. Counsel complained that the collection notes and affidavit referenced in BOA's amended motion for summary judgment had not been served upon counsel.

{¶15} On June 5, 2013, BOA filed a notice with the court indicating it had served Miller's counsel with the documents in question.

{¶16} On June 18, 2013, the magistrate issued a decision, including findings of fact and conclusions of law. The decision noted that Miller had failed to file a memorandum in opposition to BOA's amended motion for summary judgment, instead choosing to rely upon the arguments and evidentiary material previously submitted in the opposition to BOA's original motion for summary judgment. The magistrate noted that BOA did not object to the magistrate's consideration of this prior memorandum and waived its right to file a reply thereto.

{¶17} Ultimately, the magistrate granted BOA's amended motion for summary judgment, concluding that while BOA alleged in its complaint that it had satisfied all conditions precedent, Miller failed to deny the performance or occurrence of the conditions precedent "specifically and with particularity" as required by Civ. R. 9(C), and that his failure to do so constitutes an admission of compliance under Civ. R. 8(D). Accordingly, the magistrate found Miller's argument about BOA's failure to have a

face-to-face meeting (a condition precedent) meritless. Moreover, the magistrate found that the evidentiary material submitted by BOA in support of its amended motion demonstrated that a face-to-face meeting, did, in fact, occur on August 2, 2011 prior to commencement of this foreclosure proceeding, and further, that Miller failed to cite any statute or regulation requiring a bank to notify the homeowner by regular or certified mail prior to initiating the face-to-face meeting. (*Id.*)

**{¶18}** The 14-day period for filing objections under Civ.R. 53, ran on July 2, 2013. On July 5, 2013, Miller filed a motion for leave to file objections to the magistrate's decision *instanter*. He explained that a calendaring error by counsel constituted good cause for the delay, and the trial court sustained the motion on July 9, 2013.

**{¶19}** Substantively, Miller's objections first argued that the magistrate erred as a matter of law in finding that Miller failed to submit any authority that requires a bank to provide notice of the face-to-face arrangement by certified mail. Second, Miller argued the magistrate erred as a matter of law in finding that Miller failed to preserve the defense set forth in 24 C.F.R. 203.604(d) by failing to plead it with specificity as required by Civil Rule 9.

**{¶20}** BOA filed a brief in opposition to the objections on July 17, 2013. It argued that under 24 C.F.R. 203.604(b), the *minimum* requirement is that the lender send a certified letter attempting to arrange a face-to-face meeting. BOA noted that here it exceeded the minimum requirement because its agent actually went to the property to conduct the face-to-face meeting. Second, BOA argued that the magistrate was correct in concluding that Miller waived his 24 C.F.R. 203.604 argument for failing to plead it with particularity in his answer.

**{¶21}** On July 23, 2013, the trial court overruled the objections, ruling that the magistrate had properly determined factual issues and appropriately applied the law. Accordingly, the trial court adopted the magistrate's decision and granted summary judgment in favor of BOA, finding no just cause for delay.

### Summary Judgment

{¶22} Both of Miller's assignments of error concern the trial court's summary judgment ruling and will be discussed together and/or out of order for ease of analysis. They assert, respectively:

{¶23} "The trial court erred in granting summary judgment to Appellee when there were genuine issues of material fact still in dispute."

{¶24} "The trial court erred in finding that Appellant failed to preserve the condition precedent/ affirmative defense set forth in 24 C.F.R. 203.604(d) by failing to plead it with specificity as required by Civil Rule 9."

{¶25} When reviewing a trial court's decision to adopt, reject, or modify a magistrate's decision, appellate courts examine the case for abuse of discretion. \* \* \* However, when reviewing a trial court's decision to grant summary judgment, appellate courts review the case de novo." (Internal citations omitted.) *Long v. Noah's Lost Ark, Inc.*, 158 Ohio App.3d 206, 2004-Ohio-4155, 814 N.E.2d 555, ¶17 (7th Dist.) "This court has previously reviewed cases de novo when magistrates have determined that summary judgment was appropriate and the trial court adopted the magistrates' decisions awarding summary judgment." *Id.* (citing cases).

{¶26} Under Civ.R. 56, summary judgment is only proper when the movant demonstrates that, viewing the evidence most strongly in favor of the nonmovant, reasonable minds must conclude no genuine issue as to any material fact remains to be litigated and the moving party is entitled to judgment as a matter of law. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 (2000). A fact is material when it affects the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999).

{¶27} When moving for summary judgment, a party must produce some facts that suggest a reasonable fact-finder could rule in its favor. *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997). "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate 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). The trial court's decision

must be based upon "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." *Id.*, citing Civ.R. 56(C). The nonmoving party has the reciprocal burden of specificity and cannot rest on the mere allegations or denials in the pleadings. *Id.* at 293.

{¶28} Miller asserts there are genuine issues of material fact concerning whether BOA complied with certain HUD regulations, which were conditions precedent in the note and mortgage, prior to accelerating the balance of the note and initiating foreclosure proceedings. Specifically, Miller asserts that BOA failed to attempt to arrange a face-to-face meeting with him prior to filing its complaint pursuant to 24 C.F.R. 203.604.

{¶29} BOA counters that Miller failed to preserve his condition precedent argument by failing to plead it with particularity in his answer pursuant to Civ.R. 9(C).

{¶30} In *Garland, supra*, this court recently held that 24 C.F.R. 203.604 creates a condition precedent to foreclosure, not an affirmative defense, and is therefore subject to the pleading requirements contained in Civ.R. 9(C). *Garland* at ¶2.

{¶31} Civ.R. 9(C) provides: "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred." By contrast, "[a] denial of performance or occurrence shall be made *specifically and with particularity*." (Emphasis added.) *Id.* "Conditions precedent that are not denied in the manner provided by Civ.R. 9(C) are deemed admitted." *Garland* at ¶32, citing *Fifth Third Mtge. Co. v. Orebaugh*, 12th Dist. No. CA2012-08-153, 2013-Ohio-1730, ¶ 29, citing *First Financial Bank v. Doellman*, 12th Dist. No. CA2006-02-029, 2007-Ohio-222, ¶2; see also Civ.R. 8(D); *Huntington Bank v. Popovec*, 7th Dist. No. 12 MA 119, 2013-Ohio-4363, ¶15.

{¶32} In *Garland*, the bank generally alleged in its complaint that it had satisfied all conditions precedent pursuant to the note and mortgage, which under Civ.R. 9(C) shifted the burden to Garland to assert non-compliance with specific HUD regulations. *Garland* at ¶33. In her answer, Garland stated:

11. Plaintiff failed to comply with the regulations issued by the Secretary of Housing and Urban Development in order to require



immediate payment in full and Plaintiff failed to comply with HUD regulations prior to acceleration of the amounts due under the promissory note.

12. Plaintiff failed to comply with the regulations issued by the Secretary of Housing and Urban Development in order to require immediate payment in full and Plaintiff failed to comply with HUD regulations prior to acceleration of the amounts due under the mortgage.

*Id.* at ¶34.

{¶33} This court concluded that Garland's allegations regarding non-compliance with HUD regulations were general in nature; she did not cite to any specific regulations." *Id.* Thus, this court held that "[b]ecause Garland failed to state with the specificity required by Civ.R. 9(C), precisely which HUD regulations PNC Mortgage failed to comply with before filing the instant foreclosure action, she was barred from later contesting the noncompliance in her brief in opposition to summary judgment, and consequently, now on appeal." *Id.* at ¶35.

{¶34} This case presents an almost identical situation. BOA generally alleged in its complaint that it had satisfied all conditions precedent. This is sufficient under Civ.R. 9(C) to shift the burden to Miller to assert non-compliance with specific HUD regulations.

{¶35} In his answer, Miller's allegations regarding non-compliance with HUD regulations were general in nature; like Garland, he did not cite to any specific regulations:

9. Plaintiff failed to comply with the regulations issued by the Secretary of Housing and Urban Development in order to require immediate payment in full and Plaintiff failed to comply with HUD Regulations prior to acceleration of the amounts due under the promissory note.

10. Plaintiff failed to comply with the regulations issued by the Secretary of Housing and Urban Development in order to require

immediate payment in full and Plaintiff failed to comply with HUD regulations prior to acceleration of the amounts due under the mortgage.

{¶36} Miller's answer with regard to the HUD regulation defenses is identical to Garland's. Thus, pursuant to *Garland*, ¶35, *supra*, because Miller failed to state with the specificity required by Civ.R. 9(C) precisely which HUD regulations BOA failed to comply with before filing the instant foreclosure action, he is barred from later contesting the noncompliance in his brief in opposition to summary judgment, and consequently, now on appeal. Accordingly, Miller's assignments of error are meritless and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Waite, J., concurs.