[Cite as *U.S. Bank v. Richardson*, 2022-Ohio-4753.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

U.S. BANK TRUST NATIONAL ASSOCIATION
AS TRUSTEE OF THE TIKI SERIES IV TRUST,

Plaintiff-Appellee,

v.

JOHN A. RICHARDSON AKA
JOHN ALLAN RICHARDSON ET AL.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 21 MA 0093

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2019 CV 2005

BEFORE:
Gene Donofrio, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Ethan A. Hill, Atty. Susan B. Klineman, Sottile & Barile, LLC, 7530 Lucerne Drive, Suite 210, Middleburg Heights, Ohio 44130, for Plaintiff-Appellee and

Atty. David A. Detec, Atty. Karly B. Johnson, Manchester, Newman & Bennett, LPA, The Commerce Building, Atrium Level Two, 201 E. Commerce Street, Youngstown, Ohio 44503, for Defendants-Appellants.

Dated:
December 20, 2022

Donofrio P. J.

{¶1} Defendants-Appellants, John and Joyce Richardson, appeal from a Mahoning County Common Pleas Court judgment granting summary judgment in favor of plaintiff-appellee, U.S. Bank Trust National Association.

{¶2} In 2004, appellants executed a Promissory Note (2004 Note) and a Mortgage (2004 Mortgage). These instruments were executed with the Home Savings and Loan Company of Youngstown (Home Savings) and were obtained for the purpose of developing commercial property in the area. The 2004 Note was secured, in part, by appellants' personal residence.

{¶3} In 2005, appellants entered into an Equity Line of Credit Agreement in the amount of $600,000.00 (2005 LOC Agreement) and an Open-End Mortgage (2005 Mortgage) with Home Savings. The line of credit was secured by appellants' personal residence as well.

{¶4} On or about August 2, 2010, Home Savings filed a complaint for foreclosure on the 2004 Note and 2004 Mortgage (2010 foreclosure action).

{¶5} On December 10, 2012, after the 2004 Note and 2004 Mortgage were assigned to Navy Portfolio, LLC (Navy), Navy was substituted as the plaintiff in the 2010 foreclosure action.

{¶6} On June 10, 2013, the trial court granted a decree of foreclosure. But on or about April 14, 2014, the sale of the property was stayed after the parties reached a settlement agreement. This agreement resolved the 2010 foreclosure action and Navy released the 2004 Mortgage against appellants' real property.

{¶7} The 2005 LOC Agreement and 2005 Mortgage were reassigned six different times, eventually ending up in appellee's possession. Appellants failed to keep up with payments on the 2005 LOC Agreement and 2005 Mortgage. On October 5, 2018, a Notice of Default and Intent to Accelerate was sent to appellants by first class mail to their home address.

{¶8} On October 2, 2019, appellee's predecessor in interest filed a complaint for foreclosure (2019 foreclosure action). Appellee then filed a motion for summary judgment

on February 17, 2020. The trial court stayed the case from July 7, 2020 until January 19, 2021, due to the COVID-19 pandemic.

{¶9} A magistrate then held a hearing on the summary judgment motion. On August 9, 2021, the magistrate granted appellee's summary judgment motion. The magistrate found the obligation that was the subject of the 2019 foreclosure action was not accelerated by the 2010 foreclosure action involving a separate obligation. He noted that the 2019 foreclosure action was brought on October 2, 2019. The magistrate determined that the 2010 foreclosure was irrelevant because it involved a separate obligation and separate mortgage. Finally, the magistrate determined that appellee had six years from the date of the maturity of the 2005 LOC Agreement to enforce the underlying obligation and had brought the actions in a timely manner.

{¶10} Appellants filed an objection to the magistrate's decision on August 23, 2021, arguing a genuine issue of material fact existed as to whether the 2005 Agreement was accelerated. On September 13, 2021, the trial court entered judgment overruling appellants' objection and adopting the magistrate's decision. Appellants filed a timely notice of appeal on October 12, 2021.

{¶11} Appellants now raise a single assignment of error that states:

> THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE THERE WAS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE 2005 AGREEMENT WAS ACCELERATED PRIOR TO OCTOBER 2, 2013.

{¶12} In reviewing a trial court's decision on a summary judgment motion, appellate courts apply a de novo standard of review. *Cole v. Am. Industries & Resources Corp*., 128 Ohio App.3d 546, 552, 715 N.E.2d 1179 (7th Dist.1998). Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *State ex rel. Parsons v. Fleming*, 68 Ohio St.3d 509, 511, 628 N.E.2d 1377 (1994). A "material fact" depends on the substantive law of

the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc*., 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247–248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

{¶13} "[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." Civ.R. 56(C).

{¶14} If the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts to show that there is a genuine issue of material fact. *Id*.; Civ.R. 56(E). "Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party." *Welco Industries, Inc. v. Applied Cos*., 67 Ohio St.3d 344, 346, 617 N.E.2d 1129 (1993).

{¶15} Appellants argue the trial court improperly granted summary judgment in favor of appellee because a genuine issue of material fact existed as to whether the 2005 LOC Agreement was accelerated before October 2, 2013. In making their argument, appellants rely on R.C. 1303.16(A), which provides:

> Except as provided in division E of this section, an action to enforce the obligation to pay a note payable at a definite time shall be brought within six years after the due date or dates stated in the note, or if a due date is accelerated, within six years after the accelerated date.

{¶16} If the 2005 LOC Agreement was accelerated between 2010 and 2012, as appellants allege, appellants contend the instant action would be barred by the above statute of limitations.

{¶17} Appellants' argument fails to recognize a threshold issue that controls this case. The above-cited statute does not apply to the facts of this case.

{¶18} The instrument at issue here is a line of credit. It is not a note. By its terms, R.C. 1303.16(A) only applies to notes.

{¶19} A "note" is "an instrument that is a promise." R.C. 1303.03(E)(1). An "instrument" means "a negotiable instrument." R.C. 1303.03(B). A "negotiable instrument" means "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order" and must meet other certain requirements. R.C. 1303.03(A). The 2005 LOC Agreement in this case does not have a "fixed amount of money" that appellants borrowed. Instead, the amount of money owed depends on the amount appellants borrowed under the line of credit.

{¶20} The Eighth District discussed this issue in detail:

> Case law exists, however, suggesting that an open-end line of credit, or revolving line of credit, is not a negotiable instrument because the amount advanced under the agreement may not be fixed or determined with certainty, or without reference to other documents. See *Yin v. Soc. Natl. Bank Ind*., 665 N.E.2d 58, 62–63 (Ind. App. 1996) (the line of credit at issue was not a negotiable instrument because it lacked an unconditional promise to pay a sum certain); *FDIC v. Musser*, E.D.PA No. 12–7231, 2017 WL 878208 (Mar. 6, 2017) (promissory note supporting a revolving line of credit with a limit of $3 million to draw on but containing no fixed amount is not a negotiable instrument); *Smith v. Palasades Collection, L.L.C*., N.D.Ohio No. 1:07 CV 176, 2007 WL 1039198, at *6 (Apr. 3, 2007) (negotiable instrument is a writing signed by the maker containing an unconditional promise to pay a sum certain in money on demand or at a definite time, to the order of a particular person or entity or to the bearer); *Cadle Co. v. Richardson*, 597 So.2d 1052 (La.App.1992) (holding that a revolving loan account is not a negotiable instrument because it does not contain an unconditional promise to pay a sum certain).
>
> In this regard, a line of credit is based on a contingency—whether the borrower draws on the credit line. Consequently, if the borrower never draws on the line of credit, nothing is owed. If the borrower does draw on the line of credit, in order to ascertain the principal owed, one must look beyond the agreement itself to calculate the amount owed, thus removing it

> from being classified as a negotiable instrument. Accordingly, if the LOC is not a negotiable instrument, it is merely a written contract and enforcement becomes an action on an account or contract (much like a credit card agreement). See *Taylor v. First Resolution Inv. Corp*., 148 Ohio St.3d 627, 2016-Ohio-3444, 72 N.E.3d 573, ¶ 116–119 (Kennedy, J., concurring); *Discover Bank v. Swartz*, 2016-Ohio-2751, 51 N.E.3d 694, ¶ 17 (2d Dist.) (actions based on promissory notes and credit card accounts differ because the note is a separate enforceable contract whereas credit card statements do not demonstrate the underlying contract or agreed upon terms); *Lemke v. Barclays Bank Delaware*, E.D.Mich No. 1:14–CV–14449, 2015 WL 3441145, at *5 (Mar. 31, 2015) (negotiable instrument is an unconditional promise to pay a fixed amount of money; credit card agreement is not a negotiable instrument).
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> In this case, the LOC is an open-end line of credit. No fixed amount is due because the amount is determinable upon whether appellants borrowed under the line of credit. Therefore, in order to determine the amount due, the parties must look beyond the line of credit agreement, and look to the monthly statements provided by the lender. Therefore, the LOC in this case is not a negotiable instrument; thus, the statute of limitations found in R.C. 1303.16(a) does not apply. In this regard, the action becomes an action on an account, to which general contract law principles apply. See *Swartz* at ¶ 17.

SMS Financial 30, L.L.C. v. Frederick D. Harris, M.D., Inc., 8th Dist. Cuyahoga No. 105710, 2018-Ohio-2064, 112 N.E.3d 395, ¶¶ 16-18.

{¶21} As was the case in *SMS Financial 30*, in order to determine the amount due on the 2005 LOC Agreement, the parties here must look beyond the 2005 LOC Agreement. The amount due is not ascertainable by looking at the document itself. Consequently, the 2005 LOC Agreement is not a negotiable instrument. Because it is not a negotiable instrument, the R.C. 1303.16(A) statute of limitations does not apply in this

case. As was the case in *SMS Financial 30*, this action was an action on an account where general contract law principles apply.

{¶22} Instead, the statute of limitations for a written contract applies here. When the 2005 LOC Agreement was executed, the statute of limitations was 15 years. Former R.C. 2305.06. On September 28, 2012, the Legislature amended R.C. 2305.06 changing the statute of limitations for an action on a written contract from 15 years to eight years. R.C. 2305.06. With this change, the General Assembly explained that if the cause of action accrued prior to September 28, 2012, the statute of limitations is the lesser of 15 years from the date of accrual or eight years from September 28, 2012, which was the effective date of the amendment. *SMS Financial 30*, at ¶19, citing 2012 Am.Sub.S.B. No 224, Section 4.

{¶23} Appellants contend the 2005 LOC Agreement was accelerated, at the earliest, on August 2, 2010 (the date of the foreclosure action on the 2004 Note and Mortgage). If this were the case, then the action here would have accrued prior to September 28, 2012. Accordingly, the statute of limitations would be the lesser of 15 years from the date of accrual (August 2, 2025) or eight years from September 28, 2012 (September 28, 2020). Because September 28, 2020 is the lesser statute of limitations, it would apply. Appellee brought this action on October 2, 2019, well within the eight-year statute of limitations. Thus, even applying appellants' interpretation of the evidence, the action in this case was timely filed. Therefore, the trial court properly awarded summary judgment in favor of appellee.

{¶24} Accordingly, appellants' sole assignment of error is without merit and is overruled.

{¶25} For the reasons stated above, the trial court's judgment is hereby affirmed.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the sole assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellants.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.