[Cite as *Fed. Deposit Ins. Corp. v. Traversari,* 2010-Ohio-2406.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF WASHINGTON MUTUAL BANK,	:	**O P I N I O N**
	:	**CASE NO. 2008-G-2859**
Plaintiff-Appellee,	:	
- vs -	:	
ROBERT TRAVERSARI, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 07 M 000024.

Judgment: Reversed and remanded.

Karen L. Giffen and *Kathleen A. Nitschke*, Giffen & Kaminski, L.L.C., 1300 East Ninth Street, #1600, Cleveland, OH 44114 and *Donald Swartz*, Lerner, Sampson & Rothfuss, P.O. Box 580, Cincinnati, OH 45210-5480 (For Plaintiff-Appellee).

Edward T. Brice, Newman & Brice, L.P.A., 214 East Park Street, Chardon, OH 44024 (For Defendants-Appellants).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellants, Robert Traversari ("Traversari") and B & B Partners ("B & B"), appeal from the August 5, 2008 judgment entry of the Geauga County Court of Common Pleas, granting summary judgment in favor of appellee, Washington Mutual Bank, and entitling appellee to a judgment and decree in foreclosure.

{¶2} In 1994, appellant Traversari borrowed $190,000 from Loan America Financial Corporation which was memorialized by a promissory note and further secured by a mortgage on property located at 9050 Lake-in-the-Woods Trail, Bainbridge Township, Geauga County, Ohio. Appellant Traversari obtained the loan individually and/or in his capacity as the sole member and principal of appellant B & B, a real estate based company. The mortgage at issue was subsequently assigned to appellee.

{¶3} On January 8, 2007, appellee filed a complaint in foreclosure against appellants and defendants, JP Morgan Chase Bank, N.A., Charter One Bank, N.A., Jesse Doe, and Geauga County Treasurer.[1] In count one of its complaint, appellee alleges that it is the holder and owner of a note in which appellant Traversari owes $149,919.96 plus interest at the rate of 7.75 percent per year from September 1, 2006, plus costs. In count two of its complaint, appellee alleges that it is the holder of a mortgage, given to secure payment of the note, which constitutes a valid first lien upon the real estate at issue. Appellee maintains that because the conditions of defeasance have been broken, it is entitled to have the mortgage foreclosed. Appellee indicated that appellant B & B may have claimed an interest in the property by virtue of being a current titleholder.

{¶4} Appellants filed an answer and counterclaim on February 16, 2007. In their defense, appellants maintain that appellee failed to comply with Civ.R. 10(D) and is estopped from asserting a foreclosure by its waiver of accepting payment. According to their counterclaim, appellants allege the following: on or about September 25, 2006, appellant Traversari sent a check in the amount of $150,889.96 to appellee for payment

1. Defendants are not named parties to the instant appeal.

in full on the loan, which included the principal of $149.919.96 plus $970 of interest; on or about November 17, 2006, appellee issued a new home loan statement to appellant Traversari indicating the amount due was $5,608.95; appellant Traversari contacted appellee stating that a check had been sent for payment in full; appellee failed to respond; appellant Traversari mailed a check to appellee in the amount of $155,000; no stop payment was issued on the first check; because the house was vacant, appellant Traversari went to check the residence on December 26, 2006, and discovered that it had been broken into; an orange placard was placed on the premises indicating that a representative from appellee would secure the home; appellant Traversari immediately purchased new lock sets, secured the premises, and called and left a message for appellee to inform them to not enter the home; on December 31, 2006, electronic transmission was sent to appellee concerning the break-in and requested appellee to stop breaking into the home as well as to locate the two checks and to send a copy of a letter to a credit bureau; appellee did not respond; appellant Traversari then mailed a check from a separate account in the amount of the last payment demanded by appellee; appellee sent the $155,000 check back with a form letter to the address of the vacant property stating that personal checks were not accepted for payoff; appellee also rejected the $5,674.41 check; appellant Traversari then contacted appellee regarding the rejected checks; on January 11, 2007, appellant Traversari went to the home again, finding the kitchen door open, furnace running, new lock set taken out, garage door openers unplugged, and worse dings in the steel door; and appellant Traversari emailed appellee again, however, appellee indicated it could not give appellants any information because the case had been moved to foreclosure.

{¶5} Appellee filed a reply to appellants' counterclaim on March 19, 2007, and an amended reply on September 6, 2007.

{¶6} According to the deposition of Maritza Torres ("Torres"), an employee of appellee in its senior asset recovery, loss prevention department, she was assigned to appellants' case. Torres testified that appellee has no record of having received a check in the amount of $150,889.96 from appellant Traversari on September 25, 2006. However, she indicated that appellee received a check from appellant Traversari on September 30, 2006, in the amount of $102,538.74 ("Check #1"), which was returned to him due to appellee's policy not to accept checks for early payoffs that are not certified funds.

{¶7} According to the deposition of Linda Rae Traversari ("Linda"), appellant Traversari's wife, she is the handler of the family assets. Following the return of Check #1, appellee forwarded a delinquency letter to appellant Traversari in early November of 2006. Later that month, appellee sent a second default letter to him. Linda testified that on or around November 30, 2006, appellant Traversari sent another personal check for early payoff to appellee in the amount of $155,000 ("Check #2"). Appellee returned Check #2 with a letter explaining that noncertified funds are not accepted for early payoff. Linda stated that on January 2, 2007, appellant Traversari sent a third personal check via certified mail to appellee in the amount of $5,674.41 ("Check #3"). By the time appellee received Check #3, the loan had been referred to foreclosure. Check #3 was returned to appellant Traversari as "insufficient."

{¶8} On March 14, 2008, appellee filed a motion for summary judgment pursuant to Civ.R. 56(b). Appellants filed a response on April 21, 2008.

{¶9} In its July 3, 2008 order, the trial court found, inter alia, that appellee was within its legal rights to reject the personal checks; appellee had the right to institute and maintain the foreclosure because appellants did not cure their default; and appellee had the right to enter the premises. Thus, the trial court indicated that appellee's motion for summary judgment would be granted in its favor as to all issues and claims against appellants upon appellee's presentation of an appropriate entry to be provided to the court.

{¶10} Appellee filed a "Motion For Submission Of Its Entry Granting Motion For Summary Judgment And Decree In Foreclosure" on July 11, 2008, and an amended entry on July 21, 2008. Appellants filed objections to appellee's proposed amended entry the following day.

{¶11} Pursuant to its August 5, 2008 "Amended Entry Granting Summary Judgment And Decree In Foreclosure," the trial court granted summary judgment in favor of appellee, entitling appellee to a judgment and decree in foreclosure. The trial court ordered, inter alia, that unless the sums found due to appellee are fully paid within 3 days from the date of the decree, the equity of redemption shall be foreclosed, the property sold, and an order of sale issued to the Sheriff directing him to appraise, advertise, and sell the property. The trial court further ordered that the proceeds of the sale follow the following order of priority: (1) to the Clerk of Courts, the costs of the action, including the fees of appraisers; (2) to the County Treasurer, the taxes and assessments, due and payable as of the date of transfer of the property after Sheriff's Sale; (3) to appellee, the sum of $149,919.96, with interest at the rate of 7.75 percent per annum from September 1, 2006 to February 29, 2008, and 7.25 percent per annum

from March 1, 2008 to present, together with advances for taxes, insurance, and costs; and (4) the balance of the sale proceeds, if any, shall be paid by the Sheriff to the Clerk of Court to await further orders.[2] It is from that judgment that appellants filed the instant appeal, raising the following assignment of error for our review:

{¶12} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANTS-APPELLANTS IN ITS ORDER GRANTING IN PLAINTIFF-APPELLEE'S FAVOR AS TO ALL ISSUES AND CLAIMS AND AGAINST DEFENDANTS, AND ITS AMENDED ENTRY GRANTING SUMMARY JUDGMENT AND DECREE IN FORECLOSURE TO PLAINTIFF-APPELLEE AGAINST DEFENDANTS-APPELLANTS."

{¶13} In their sole assignment of error, appellants argue that the trial court erred by granting summary judgment in favor of appellee, and entitling appellee to a judgment and decree in foreclosure.

{¶14} "This court reviews de novo a trial court's order granting summary judgment." *Hudspath v. Cafaro Co.*, 11th Dist. No. 2004-A-0073, 2005-Ohio-6911, at ¶8, citing *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, at ¶13. "'A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law.'" Id.

{¶15} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary

2. The matter was stayed. On November 26, 2008, the Federal Deposit Insurance Corporation was substituted for appellee Washington Mutual Bank. This court instructed the Clerk of Courts to correct the docket by removing "Washington Mutual Bank" and substituting "Federal Deposit Insurance Corporation, as Receiver of Washington Mutual Bank" as appellee in this appeal. The stay order automatically dissolved on August 29, 2009.

judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [(1996), 75 Ohio St.3d 280, 296,] the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112 ***." *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶40.

{¶16} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108 ***, is too broad and fails to account for the burden Civ.R. 56 places upon a *moving* party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff.* (Emphasis added.)" Id. at ¶41.

{¶17} "The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled a judgment as a matter of law as the 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.' Id. at 276. (Emphasis added.)" Id. at ¶42.

{¶18} In the case at bar, the record establishes that appellant Traversari sent personal checks to appellee for payment on the loan at issue. However, appellee returned the checks with letters indicating they would not be accepted as payment because they were not certified, and foreclosure proceedings commenced.

{¶19} There is no genuine issue of material fact that appellants executed and delivered a note and mortgage to appellee. However, a genuine issue of material fact does exist with regard to the fact that appellant Traversari tendered the entire principal payment and appellee rejected it because the payment was made by personal check. See *Chase Home Fin., LLC v. Smith*, 11th Dist. No. 2007-P-0097, 2008-Ohio-5451, at ¶19. The dates and amounts of the personal checks are conflicting due to the testimony and/or evidence submitted by the parties.

{¶20} "A cause of action exists on behalf of a damaged mortgagor when, in conformity with the terms of his note, he offers to the mortgagee full payment of the balance of the principal and interest, and the mortgagee refuses to present the note and mortgage for payment and cancellation." *Cotofan v. Steiner* (1959), 170 Ohio St. 163, paragraph one of the syllabus.

{¶21} Appellant Traversari did not place any conditions on the personal checks tendered to appellee. We note that "[t]he essential characteristics of a tender are an *unconditional* offer to perform, coupled with ability to carry out the offer and production of the subject matter of the tender." *Walton Commercial Enterprises, Inc. v. Assns. Conventions, Tradeshows, Inc.* (June 11, 1992), 10th Dist. No. 91AP-1458, 1992 Ohio App. LEXIS 3081, at 5. (Emphasis sic.)

{¶22} "It is an implied condition of every contract that one party will not prevent or impede performance by the other. If he does prevent or impede performance, whether by his prior breach or other conduct, he may not then insist on performance by the affected party, and he cannot maintain an action for nonperformance if the promises are interdependent." *Fed. Natl. Mtge. Assns. v. Banks* (Feb. 20, 1990), 2d Dist. No. 11667, 1990 Ohio App. LEXIS 638, at 8-9, citing 17 American Jurisprudence 2d, Contracts, Sections 425, 426.

{¶23} In the instant matter, paragraph 3 of the Open-End Mortgage provides:

{¶24} "3. Application of Payments. Unless applicable law provides otherwise, all payments received by Lender under paragraphs 1 and 2 shall be applied: first, to any prepayment charges due under the Note; second, to amounts payable under paragraph 2; third; to interest due; fourth, to principal due; and last, to any late charges due under the Note."

{¶25} Here, there was no new note and mortgage, nor agreement for application of payments, when the mortgage at issue was subsequently assigned from Loan America Financial Corporation to appellee. Rather, it was the policy of appellee to require mortgagors to pay by certified check for any amounts over $5,000. According to

appellee's employee, Torres, she indicated that any amount over $5,000 not paid by certified funds puts the company at risk because it can take anywhere between 7 to 10 days for a personal check to clear. We note, however, that the mortgagee has up to 90 days to verify the sufficiency of the underlying funds before satisfying and releasing its recorded mortgage. R.C. 5301.36(B). In the instant case, it would have been reasonable for appellee to have either waited 7 to 10 days for appellant Traversari's checks to clear or to have inquired with his bank, see, generally, *Hunter Sav. Assn. v. Kasper* (Sept. 25, 1979), 10th Dist. No. 78AP-774, 1979 Ohio App. LEXIS 11777, at 13, if there were sufficient funds before returning any of his 3 personal checks and commencing foreclosure proceedings.

{¶26} The lender in this case unilaterally refused the debtor's payment by check due to its *internal policy* that an amount over $5,000 had to be made by certified check. The terms and conditions of the mortgage, however, do not impose such a requirement. Under paragraph 3 of the Open-End Mortgage, it appears the lender had an obligation to apply the payment tendered, by personal check or otherwise. Its refusal to present the check for clearance and apply the payment on the ground of internal policy appears to have violated the debtor's rights.

{¶27} Construing the evidence submitted most strongly in favor of appellants, we must conclude that genuine issues of material fact remain. Again, a genuine issue of material fact exists with regard to the fact that appellant Traversari tendered the entire principal payment and appellee rejected it because the payment was made by personal check. Also, the dates and amounts of the personal checks are conflicting due to the

testimony and/or evidence submitted by the parties. Thus, the trial court erred by granting appellee's motion for summary judgment.

{¶28} For the foregoing reasons, appellants' sole assignment of error is well-taken. The judgment of the Geauga County Court of Common Pleas is reversed and the matter is remanded for further proceedings consistent with this opinion. It is ordered that appellee is assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.