

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

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| JOHN C. L. JACKSON, | : | OPINION |
| Plaintiff-Appellee, | : | |
| - vs - | : | CASE NO. 2012-G-3070 |
| PETER MOISSIS, | : | |
| Defendant-Appellant, | : | |
| GEAUGA COUNTY TREASURER, et al., | : | |
| Defendants-Appellees. | : | |

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 11 F 000401.

Judgment: Affirmed.

Douglas A. King, 34 South Main Street, Chagrin Falls, OH 44022 (For Plaintiff-Appellee).

Stephen J. Futterer, Willoughby Professional Building, 38052 Euclid Avenue, #105, Willoughby, OH 44094 (For Defendant-Appellant).

David P. Joyce, Geauga County Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Appellees-Geauga County Treasurer and Geauga County Clerk of Court).

Marlon A. Primes, Office of the U.S. Attorney, 801 W. Superior Avenue, Suite 400, United States Courthouse, Cleveland, OH 44113 (For Appellee-United States Department of Treasury, Internal Revenue Service).

American Express Centurion Bank, pro se, World Financial Center, 200 Vesey Street, New York, NY 10285 (Appellee).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Peter Moissis, appeals the decisions of the Geauga County Court of Common Pleas, granting summary judgment in favor of plaintiff-appellee, John C.L. Jackson and entering a judgment of foreclosure. The issues before this court are whether a trial court may grant summary judgment in a foreclosure action, where the non-moving party contends that genuine issues of material fact exist as to whether the terms of mortgage have been waived and proper notice of default was given; and whether the failure to file the final judicial report prior to the submission of the judgment of foreclosure constitutes reversible error. For the following reasons, we affirm the judgment of the court below.

{¶2} On April 14, 2011, Jackson filed a Complaint for Money, Foreclosure and Other Equitable Relief in the Geauga County Court of Common Pleas, against Moissis, the Geauga County Treasurer, the United States Department of Treasury - Internal Revenue Service, American Express Centurion Bank, and the Geauga County Clerk of Court. The Complaint alleged that Jackson was the holder of a Promissory Note secured by a Mortgage and that Moissis, the maker of the Note, was in default thereof. The Complaint alleged that the other defendants might have an interest in the real property that was the subject of the Mortgage.

{¶3} On October 27, 2011, Jackson filed a Motion for Summary Judgment against all defendants. In support of the Motion, Jackson submitted an affidavit and exhibits attesting to the following: In December 2000, Jackson sold Moissis the real property and residence known as 116 Spring Drive, in the Village of South Russell, Ohio, taking back a Security Installment Promissory Note and Mortgage Deed in the

amount of \$225,000. Pursuant to the Note and Deed, Moissis would pay Jackson the principal amount of \$225,000, plus interest at the rate of 8.5% per annum, amortized over a 30 year period. The Note contained the following anti-waiver provision:

{¶4} If after any default hereunder shall occur, the Holder shall waive any of the Holder's power or rights arising hereunder, such waiver shall not be deemed to waive any of the Holder's power or rights upon the later occurrence or recurrence of any default. Delay or failure by the Holder to exercise or claim, in whole or in part, any such power or right shall not be deemed a waiver of such power or right nor shall any single or partial exercise of any power or right hereunder preclude any other power or right.

{¶5} In September 2003, the parties executed an Agreement to Modify Promissory Note, reducing the interest payable on the underlying obligation from 8.5% to 7% per annum. Payments were to be made on the first day of each month. The Agreement further provided:

{¶6} If any payment of principal or interest provided for herein, or any part thereof, is not paid within ten (10) days after the due date, a late charge equal to Five Percent (5%) of the payment due shall attach. Moissis' failure to pay within twenty (20) days thereafter, or failure to keep any of the covenants and conditions of the referenced Mortgage Deed shall, at the election of Jackson, constitute a default hereunder, and the entire unpaid principal balance of this Note and the entire amount of any defaulted interest

payment shall become due upon notice to Moissis and bear interest computed at a rate of Five Percent (5%) per annum over the rate of non-default interest.

{¶7} * * *

{¶8} The parties hereto acknowledge that any claims of any nature that either may have had against the other arising from the original sale agreement between them, or arising from the payments made or not from the date thereof to the present, shall be waived and merged into this Agreement and shall not survive the execution hereof.

{¶9} In September 2010, the parties executed a Second Agreement to Modify Promissory Note, acknowledging the prior modification “due to circumstances of Moissis not being able to meet his obligation on a timely basis.” The Second Agreement further reduced the interest rate from 7% to 6% per annum. “Delinquent payments after 10 days will accrue interest at a rate of 12%. All other terms and conditions as stated in the original note and agreement to modify will remain.”

{¶10} Jackson also provided the trial court with an accounting of Moissis’ payment history. Jackson’s affidavit states: “The said accounting shows that, with few exceptions, Moissis’ payments were late every month since the inception of his obligation and during the past eight months, i.e., March through October, 2011, Moissis has failed to make any payment whatsoever pursuant to the Promissory Note, the Mortgage Deed, or otherwise. Despite demand for Moissis’ default to be cured, no payment has been forthcoming.”

{¶11} On December 22, 2011, Moissis filed a Brief in Opposition to Plaintiff's Motion for Summary Judgment. Moissis argued that genuine issues of material fact existed as to whether Jackson has waived his right to assert default for late payments and whether Jackson gave proper notice of acceleration and/or default. In the affidavit attached to his Brief in Opposition, Moissis asserted that "payments were always made within 30 days [of the due date] and Plaintiff accepted them every time." Furthermore, Jackson "received payment for March plus a late fee at the end of March," so that "there was not a gap of 30 days in payment when this foreclosure was filed." Moissis asserted that after the foreclosure was filed, Jackson would not accept payments.

{¶12} Moissis disputed the assertion in Jackson's affidavit that he made a "demand for Moissis' default to be cured." Rather, Moissis "received no notice of acceleration of the debt from Plaintiff prior to the foreclosure being filed."

{¶13} On February 22, 2012, the trial court entered a Judgment Entry, granting summary judgment in Jackson's favor. The court found Moissis to be in default for failing to timely make a required payment.¹ The court rejected Moissis' waiver argument based on the anti-waiver provision in the original Promissory Note. The court rejected Moissis' notice argument based on case law holding that the filing of a foreclosure is sufficient notice of the lender's option to accelerate where the loan documents do not require "advance" notice. The court ordered Jackson's counsel to prepare an appropriate Judgment Entry of Foreclosure.

1. The court specifically identified the April payment as untimely. This is incorrect inasmuch as Jackson filed his Complaint on April 14 and the parties' agreement provided that failure to pay within twenty days of the due date constituted default. Rather, the evidence indicates that it was the March payment that was untimely, i.e., not paid until the end of the month.

{¶14} On March 20, 2012, the trial court entered the Judgment Entry of Foreclosure.

{¶15} On March 26, 2012, the United States filed an Objection to Judgment Entry of Foreclosure, on the grounds that the Entry failed to include “the equity of redemption language set forth in 28 U.S.C. § 2410(c).”

{¶16} On March 29, 2012, Moissis filed a Motion for Relief from Judgment, on the grounds that a final judicial report had not been filed, as required by R.C. 2329.191(B), and that genuine issues of material fact existed regarding the issues of waiver, acceptance of late payments, and notice of default.

{¶17} On April 11, 2012, Moissis filed Notice of Appeal from the February 22 and March 20 Judgments. On appeal, Moissis raises the following assignments of error:

{¶18} “[1.] The trial court erred in granting plaintiff-appellee’s Motion for Summary Judgment because genuine issues of material fact exist as to the installment payment requirements, grace periods, and late vs. default provisions of the Note, Mortgage and Modification Agreements; the question of waiver; the question of alleged default; the question of prerequisite notices of default and acceleration of debt; and the question of payment and 10 ½ years of accepted payment practice between the parties, and defendant appellant met his burden under Ohio Civil Rule 56(E) in the Affidavit and Brief showing that there are genuine material issues for trial.”

{¶19} “[2.] The trial court has erred in entering the Judgment Entry of Foreclosure prior to the filing of a Final Judicial Report pursuant to O.R.C. 2329.191(B).”

{¶20} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows “that there is no genuine issue as to any material fact” to be litigated,

(2) “the moving party is entitled to judgment as a matter of law,” and (3) “it appears from the evidence * * * that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence * * * construed most strongly in the party’s favor.” A trial court’s decision to grant summary judgment is reviewed by an appellate court under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Under this standard, the reviewing court conducts an independent review of the evidence before the trial court and renders a decision de novo, i.e., as a matter of law and without deference to the conclusions of the lower court. *Bd. of Rootstown Twp. Trustees v. Rootstown Water Serv. Co.*, 11th Dist. No. 2011-P-0084, 2012-Ohio-3888, ¶ 19.

{¶21} Under the first assignment of error, Moissis raises several arguments as to why summary judgment was improperly rendered in the present case.

{¶22} Moissis argues that a genuine issue of material fact exists as to whether Jackson waived his contractual right to accelerate the Note upon default by accepting delinquent payments for over ten years. This argument fails, as noted by the trial court, in light of the anti-waiver provision contained in the Promissory Note. *First Natl. Bank of Am. v. Pendergrass*, 6th Dist. No. E-08-048, 2009-Ohio-3208, ¶ 25 (“it has repeatedly been held that a mortgagee’s previous acceptance of late loan payments does not constitute a waiver of the mortgagee’s right to accelerate and foreclose on a loan following a subsequent default where * * * the relevant loan documents contain ‘anti-waiver’ provisions”) (cases cited).

{¶23} Moissis argues that a genuine issue of material fact exists as to whether he was in default. As subsequently amended, the Note provided that payments would be “delinquent,” if “not paid with ten (10) days after the due date [the first of the month].” “[F]ailure to pay within twenty (20) days thereafter * * * shall * * * constitute a default hereunder * * *.” Moissis construes “thereafter” to mean twenty days after the ten-day grace period during which payment may be made without penalty. According to Moissis’ formula, a late payment does not constitute default unless it is made twenty days after the penalty-free grace period, i.e., thirty days after the due date. Jackson contends that “thereafter” means twenty days after the due date.

{¶24} Jackson’s interpretation of the contract is reasonable and supported by the language employed in the contract. There is a grace period of ten days after the due date of the first of the month, and twenty days “thereafter,” i.e., after the due date, Jackson could declare the Note in default. As Jackson argues in his appellate brief, if Moissis’ interpretation were correct, “it would be nonsensical for the Note to first specify a 10 day grace period following the due date, and then specify a contiguous date 20 more days past the due date, claiming that the numbers should be totaled together to yield a 30 day grace period, (a calendrical Catch-22), before default each month.” Moissis conceded in his affidavit that the March 2011 payment was not made until “the end of March.” Thus, reasonable minds could only conclude that Moissis was in default under the terms of the Note.

{¶25} Moissis further argues that Jackson’s failure to provide notice of default/acceleration precludes a grant of summary judgment. We disagree. As noted by the trial court, “[i]f the loan documents do not require advance notice of default, filing

a foreclosure is sufficient notice of a lender's option to render the note due and the mortgage enforceable."

{¶26} "Where a negotiable instrument is payable on demand, the instrument is construed to be due upon delivery, and actual demand is not necessary before action may be commenced upon it." (Citation omitted.) *Croghan Colonial Bank v. Lepley Farm Lines, Inc.*, 6th Dist. No. H-10-013, 2011-Ohio-3493, ¶ 27. "The sufficiency of notice depends upon the terms of the mortgage note." *Natl. City Bank v. Abdalla*, 131 Ohio App.3d 204, 211, 722 N.E.2d 130 (7th Dist.1999). "Where the note is payable on demand, the action is on the mortgage, and no demand for payment preceding the action is necessary," since "[t]he action itself is sufficient notice of demand." *Id.*, citing *Union Cent. Life Ins. Co. v. Curtis*, 35 Ohio St. 357, 359 (1880).

{¶27} In the present case, the Promissory Note provided for default and acceleration "upon notice to the Maker." The Note did not specify that it was necessary for any period of time to elapse before a cause of action could be initiated, did not provide for any opportunity to cure the default, and did not specify how notice was to be given. It is undisputed that the filing of the Foreclosure Complaint provided Moissis with notice of default and acceleration. Since this method of notice does not violate any of the terms of the Mortgage or Note, there is no genuine issue of material fact as to whether Jackson provided Moissis with sufficient notice of the default and acceleration.

{¶28} The lack of any provision in the Note that would allow Moissis to cure the default upon notice renders his position on the necessity of advance notice untenable. As argued by Moissis, there is no practical purpose to be served by requiring Jackson to give notice prior to filing suit. Assuming, arguendo, that Jackson had to give formal

notice before filing suit, there would be nothing to prevent him from filing suit immediately upon the issuance of notice. The courts must interpret contracts to avoid constructions that are meaningless or unnecessary. *Wohl v. Swinney*, 118 Ohio St.3d 277, 2008-Ohio-2334, 888 N.E.2d 1062, ¶ 22. Moissis' interpretation of the notice provision produces such a result.

{¶29} The first assignment of error is without merit.

{¶30} In the second assignment of error, Moissis argues that the trial court erred by entering the Judgment Entry of Foreclosure prior to the filing of the final judicial notice, required by R.C. 2329.191(B) (“[p]rior to submitting any order or judgment entry to a court that would order the sale of the residential real estate, the party submitting the order or judgment entry shall file with the clerk of the court of common pleas a final judicial report”).

{¶31} “In light of the mandatory language contained in R.C. 2329.191,” it has been held that, “where a party submitting the order or judgment entry of foreclosure fails to file a final judicial report, the trial court commits reversible error in entering a decree of foreclosure.” *GMAC Mtge., LLC v. Jacobs*, 196 Ohio App.3d 167, 2011-Ohio-1780, 962 N.E.2d 838, ¶ 23 (9th Dist.).

{¶32} Jackson argues that Judgment Entry of Foreclosure in the present case is not the final Entry, inasmuch as the defendant, United States, filed an objection to the Entry and the trial court ordered further action to be taken on the objection. But for Moissis' filing of an appeal, the lower court would have modified the Foreclosure Entry to include certain federally mandated language. Since the court's Entry of Foreclosure

is subject to further revision, it is not necessary to reverse the lower court to allow for Jackson to file the final judicial report.

{¶33} The second assignment of error is without merit.

{¶34} For the foregoing reasons, the Judgment Entries of the Geauga County Court of Common Pleas, granting summary judgment in favor of Jackson and foreclosing the subject property, are affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.