[Cite as *Bank of Am., N.A. v. Gaizutis,* 2014-Ohio-4310.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

BANK OF AMERICA, N.A.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
		CASE NO. 2014-G-3176
- vs -	:	
CYNTHIA A. GAIZUTIS, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 12 F 000790.

Judgment: Affirmed.

Sarah E. Leibel, Reisenfeld & Associates, 3962 Red Bank Road, Cincinnati, OH 45227 (For Plaintiff-Appellee).

John A. Hallbauer, Buckley, King L.P.A., 1400 Fifth Third Center, 600 Superior Avenue, East, Cleveland, OH 44114-2652 (For Defendants-Appellants).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants, Petras V. Gaizutis and Cynthia A. Gaizutis, appeal the judgment of the Geauga County Court of Common Pleas which granted summary judgment and decree of foreclosure in favor of appellee, Bank of America, N.A. For the reasons stated in this opinion, the judgment of the trial court is affirmed.

{¶2} Mr. Gaizutis signed a promissory note payable to Countrywide Bank, FSB, dated May 13, 2008, in the amount of $180,000. The note was secured by a mortgage on real property in Russell Township. The mortgage was executed by Mr. Gaizutis and

his wife Mrs. Gaizutis. On January 12, 2009, the mortgage was assigned to appellee who duly recorded the assignment. Appellee is also the holder of the May 13, 2008 note.

{¶3} The instant complaint is the fourth complaint in foreclosure and reformation of the mortgage filed by appellee, and its corporate predecessors, with respect to the aforementioned note and mortgage.

{¶4} On October 17, 2008, appellee filed the first complaint in foreclosure and reformation of the mortgage in Geauga County Court of Common Pleas, which was assigned Case No. 08F1155. Appellee, invoking the note's acceleration clause, declared all sums secured by the mortgage to be immediately due. Appellee sought judgment in the amount of $180,000, plus interest, from June 1, 2008. On February 4, 2009, appellee filed a notice of dismissal pursuant to Civ.R. 41(A)(1).

{¶5} On November 19, 2009, appellee filed the second complaint in foreclosure and reformation of the mortgage in Geauga County Court of Common Pleas, which was assigned Case No. 09F1371. Appellee, again invoking the note's acceleration clause, declared all sums secured by the mortgage to be immediately due. Appellee sought judgment in the amount $177,965.12, plus interest, from July 1, 2009. On March 14, 2011, appellee filed a notice of dismissal pursuant to Civ.R. 41(A)(1).

{¶6} On July 6, 2011, appellee filed the third complaint in foreclosure in the Geauga County Court of Common Pleas, which was assigned Case No. 11F0705. Similar to the first two complaints, appellee again invoked the note's acceleration clause, thereby declaring all sums secured by the mortgage to be immediately due.

Appellee sought judgment in the amount $177,965.12, plus interest, from July 1, 2009. On December 22, 2011, the court dismissed appellee's complaint on its own motion.

{¶7} The present complaint, filed August 6, 2012, sought judgment in the amount of $177,965.12, plus interest, from July 1, 2009. Appellee sought all sums secured by the mortgage to be immediately due.

{¶8} Appellants filed an answer and counterclaim. In their counterclaim, appellants asserted: (1) the second previous dismissal constituted res judicata; (2) statutory penalties for failure to satisfy the mortgage of record; and (3) bad faith and frivolous conduct supporting a claim for fees and expenses. Appellants also sought declaratory relief that there was no indebtedness on the note and mortgage.

{¶9} Both parties filed opposing motions for summary judgment. With its motion for summary judgment, appellants also filed a motion to compel discovery. The motion to compel sought correspondence to support appellants' counterclaims, namely that appellee filed multiple actions on claims barred by res judicata. Appellants also sought e-mails referenced on the produced accounting materials, a copy of appellee's e-mail destruction policy, and the use and meaning of "Warning Code 5" – a code that frequently appears on internal documentation of appellee. Appellee filed a response to appellants' motion to compel. The pending motions were set for hearing on September 20, 2013.

{¶10} In their motion for summary judgment, appellants argued they were entitled to judgment under the double-dismissal rule found in Civ.R. 41. Appellants contend that the current complaint in foreclosure and reformation of the mortgage is precluded because the first two complaints were voluntarily dismissed by appellee.

Attached to their motion for summary judgment is the affidavit of Attorney John A. Hallbauer, who averred that there "was no agreement made to amend the loan documents or for any other purpose at the time of termination of Case No. 08 F 1155." Appellee responded that the double-dismissal rule is inapplicable in this case because the 2009 complaint was not a re-filing of the 2008 complaint, but instead, a separate and distinct lawsuit.

{¶11} Appellee also filed its own motion for summary judgment on its claims and the counterclaims of appellants. Along with its motion for summary judgment, appellee submitted the affidavit of Justi Nicole Hillberry. Ms. Hillberry averred that appellants were in default on their obligations under the note and mortgage; appellants failed to make payments due for August 1, 2009 or any subsequent installment, now owing the principal sum of $177,965.12, plus interest from July 1, 2009. Appellee also submitted copies of appellants' payment history and a notice of intent to accelerate sent to appellants in September 2009. Appellants filed a brief in opposition to appellee's motion for summary judgment.

{¶12} A hearing was held on the pending cross-motions for summary judgment, as well as any other outstanding motions. During the course of the hearing, several additional exhibits were marked and agreed to be available for consideration by the court. These exhibits include two screen shots of comments entered by appellee regarding the history of appellants' home loan, and a letter, dated January 23, 2009, authored by appellants' attorney, John Hallbauer, to appellee's then-attorney referencing payment tendered by appellants on the loan.

{¶13} On December 17, 2013, the trial court granted appellee's motion for summary judgment in its entirety and entered a judgment entry and decree of foreclosure. In its judgment entry and decree of foreclosure, the trial court reformed the mortgage due to a scrivener's error. The trial court's judgment entry did not specifically rule on appellants' motion to compel.

{¶14} Appellants' filed a timely notice of appeal, assigning four assignments of error for our consideration. As both appellants' first and second assignments of error relate to the trial court's granting of appellee's motion for summary judgment, they will be considered together.

{¶15} Appellants' first assignment of error states:

{¶16} "The trial court erred in granting the summary judgment motion of the Plaintiff-Appellee Bank and denying that of Defendants-Appellants Gaizutis, and in holding that '[m]aking a payment causes the amount due and the default date to change, resulting in a new claim."

{¶17} Appellants' second assignment of error states:

{¶18} "The trial court erred in ordering the mortgage 'reformed' to change the legal description after the identical claim by the Plaintiff-Appellee Bank and its predecessors had previously been twice dismissed pursuant to Civil Rule 41(A) Notices."

{¶19} We review a trial court's decision on a motion for summary judgment de novo. *Fed. Home Loan Mtge. Corp. v. Zuga*, 11th Dist. Trumbull No. 2012-T-0038, 2013-Ohio-2838, ¶13. Under Civil Rule 56(C), summary judgment is proper if:

> (1) No genuine issue as to any material fact remains 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 viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Id. at ¶10-11, citing *Temple v. Wean United, Inc*., 50 Ohio St.2d 317, 327 (1977).

{¶20} The moving party bears the initial burden to demonstrate from the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, that there is no genuine issue of material fact to be resolved in the case. *Id*. at ¶12. "If this initial burden is met, the nonmoving party then bears the reciprocal burden to set forth specific facts which prove there remains a genuine issue to be litigated, pursuant to Civ.R. 56(E)." *Id.*, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 283 (1996).

{¶21} Appellants claim the trial court erred in granting appellee's motion for summary judgment. Appellants allege that because appellee voluntarily dismissed the first two actions—Case Nos. 08F1155 and 09F1371—the fourth complaint is barred by the doctrine of res judicata based on the double-dismissal rule contained in Civ.R. 41(A)(1). Appellants do not contend that the third foreclosure complaint triggers the double dismissal rule, as it was dismissed by an order of court. *See Olynyk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878, ¶31 (holding that "the double-dismissal rule of Civ.R. 41(A)(1) applies only when both dismissals were notice dismissal under Civ.R. 41(A)(1)(a)").

{¶22} The double-dismissal rule, Civ.R. 41(A)(1), provides:

> [A] plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:
>
> (a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain

> pending for independent adjudication by the court has been served by that defendant[.]
>
> * * *
>
> Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.

{¶23} In discussing the res judicata effect of two Civ.R. 41(A) voluntary dismissals on a third complaint filed by the same plaintiff against the same defendant, the Ohio Supreme Court has stated:

> 'It is well established that when a plaintiff files two unilateral notices of dismissal under Civ.R. 41(A)(1)(a) regarding the same claim, the second notice of dismissal functions as an adjudication of the merits of that claim, regardless of any contrary language in the second notice stating that the dismissal is meant to be without prejudice. * * * In that situation, the second dismissal is with prejudice under the double-dismissal rule, and res judicata applies if the plaintiff files a third complaint asserting the same cause of action. See 1970 Staff Note to Civ.R. 41 (when a dismissal is with prejudice, "the dismissed action in effect has been adjudicated upon the merits, and an action based on or including the same claim may not be retried")."

U.S. Bank Natl. Assoc. v. Gullotta, 120 Ohio St.3d 399, 2008-Ohio-6268, ¶25, quoting *Olynyk v. Scoles*, *supra*, at ¶10.

{¶24} A third complaint would be barred by the doctrine of res judicata if it arises out of the same transaction or occurrence that was the subject of the previous action; "transaction" is defined as a "common nucleus of operative facts." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, quoting 1 Restatement of the Law 2d, Judgments (1982) 198-199, Section 24, Comment b.

{¶25} Here, the trial court determined that appellants failed to show appellee's current lawsuit was barred by the double-dismissal rule. The trial court reasoned that

the operative facts of the first complaint are different than the current complaint – the first complaint sought a different balance and different default date than the current complaint.

{¶26} In *Gullotta*, *supra*, at ¶16-17, the Fifth Appellate District certified the following question to the Ohio Supreme Court: "Whether or not each missed payment under a promissory note and mortgage yields a new claim such that any successive actions on the same note and mortgage involve different claims and are thus exempt from the 'two-dismissal rule' contained in Civ.R. 41(A)(1)."

{¶27} The homeowner in *Gullotta* had executed a note with an acceleration clause and mortgage. As the holder of the note, U.S. Bank filed a complaint in foreclosure, praying for the entire principal amount due on the note, plus interest, from November 1, 2003. U.S. Bank voluntarily dismissed the complaint pursuant to Civ.R. 41(A)(1).

{¶28} Thereafter, U.S. Bank filed another complaint alleging default on the note and mortgage and prayed for the entire principal amount on the note, plus interest, from December 1, 2003. U.S. Bank again voluntarily dismissed the complaint pursuant to Civ.R. 41(A)(1).

{¶29} U.S. Bank filed a third complaint alleging default on the note and mortgage and prayed for the entire principal on the note, plus interest, from November 1, 2003. Gullotta filed a motion to dismiss the third action, arguing that pursuant to Civ.R. 41(A), the bank's second dismissal constituted an adjudication on the merits, rendering the third complaint barred by res judicata.

{¶30} The *Gullotta* Court held: "[E]ach missed payment under the promissory note and mortgage did not give rise to a new claim and that Civ.R. 41(A)'s two-dismissal rule does apply. Thus, res judicata barred U.S. Bank's third complaint." *Id.* at ¶18. The Court focused on the specific facts of *Gullotta* when rendering its decision. The Court noted: "[T]he underlying note and mortgage never changed, that upon initial default, the bank accelerated the payments owed and demanded the same principal payment that it demanded in every complaint, that Gullotta never made another payment after the initial default, and that U.S. Bank never reinstated the loan." *Id.* at ¶19. In its analysis of whether the claims arose from a common core nucleus of operative facts, the Court reasoned that all of the complaints arose from the same note and mortgage – none of the terms had been changed, the same default, and Gullotta did not make a single payment after the debt was first declared. *Id.* at ¶36. The loan agreement in *Gullotta* contained an acceleration clause which, upon one payment missed and the enforcement of such clause by U.S. Bank, made the entire balance on the note due. *Id.* at ¶31.

{¶31} The trial court found *Gullotta* instructive, stating: "[u]nlike the defaulting homeowner in *Gullotta*, the Gaizutis' made payments after the first dismissed foreclosure. Making a payment causes the amount due and the default date to change, resulting in a new claim."

{¶32} The trial court's judgment entry stated "[t]he double dismissal rule applies only if the operative facts supporting each claim are identical and plaintiff has twice dismissed. *See* Civ.R. 41(A)(1). Operative facts include the alleged default date and principal owed. *See Gullotta*, ¶28."

{¶33} Appellee claims that *Gullotta* is distinguishable from the instant case. At the hearing on the cross-motions for summary judgment, appellee argued that appellants' payment after the filing of the first foreclosure complaint resulted in reinstatement of the loan; a subsequent default under the reinstated loan does not trigger Civ.R. 41(A)(1)(a) because it constitutes an entirely new claim.

{¶34} We note that *Gullotta* states: "[h]ad there been any change as to the terms of the note or mortgage, had any payments been credited, or had the loan been reinstated, then this case would concern a different set of operative facts, and res judicata would not be in play." *Id.* at ¶38. However, the Fourth Appellate District, recognized this statement in *Gullotta* as dicta because the homeowner in Gullotta never made *any* payments after U.S. Bank filed the first complaint. *Beneficial Ohio, Inc. v. Parish,* 4th Dist. Ross No. 3210, 2012-Ohio-1146, ¶16.

{¶35} On appeal, therefore, this court must determine whether there is a genuine issue of material fact about whether appellee's complaints arose out of the same transaction or occurrence. In its analysis, the trial court reasoned that because appellants made a payment after the first dismissed foreclosure – thereby changing both the amounts due and default date in the subsequent complaint – appellee's complaints did not arise out of the same transaction or occurrence.

{¶36} In *Parish*, the court discussed whether payments by the borrower after the holder files each suit prevented the application of res judicata. The *Parish* court concluded the trial court erred when it found the foreclosure complaints arose from a different set of operative facts as a result of the borrower making payments after the filing of each of the first two complaints. The *Parish* court reasoned:

> [W]hen a borrower defaults on a note and the holder invokes the acceleration clause, the holder cannot file and dismiss an unlimited number of lawsuits *solely* because the borrower makes payments after the holder files each suit. In this scenario all claims would still arise from 'the same note, the same mortgage, and the same default.' The note and mortgage would not have been amended in any way. In addition, all claims would arise from the default that occurred when the borrower initially breached the terms of the agreement and the holder invoked the acceleration clause, making the entire balance due — whatever that amount may be. Thus, the fact that the borrower made additional payments is not an operative fact that would prevent the application of res judicata. The common nucleus of operative facts supporting the claims — the agreement and default — has not changed. Additional payments merely decrease the amount of relief the holder is entitled to, and '[t]hat a plaintiff changes the relief sought does not rescue the claim from being barred by res judicata * * *.'

(Citations omitted.) *Id.* at ¶18.

{¶37} In *Parish*, the court noted that if the parties agreed to a change in the terms of the note or mortgage or successfully reinstated their original agreement, the lender's complaints would involve a different set of operative facts. *Id.* at ¶19. "[T]here are examples from Ohio courts where successive foreclosure actions were indeed considered to be different claims. In those cases, however, the underlying agreement had significantly changed or the mortgage had been reinstated following the earlier default." *Gullotta, supra*, at ¶33, citing *EMC Mtge. Corp. v. Jenkins*, 164 Ohio App.3d 240, 2005-Ohio-5799 (10th Dist.).

{¶38} In *Wells Fargo Bank v. Bischoff*, 6th Dist. Wood No. WD-13-045, 2014-Ohio-967, ¶21, the Sixth Appellate District concluded the lender did not violate the double-dismissal rule because the complaint at issue was different than the first complaint. After the first complaint was filed, lender entered into a loan modification agreement with borrower and the loan was reinstated under new terms. *Id*. The court

reasoned that the dismissal of the first action resulted in the modification and reinstatement of the note and mortgage and, thus, the subject of the present complaint was on the "*modified* note and mortgage," thereby precluding application of the double-dismissal rule. (Emphasis sic.) *Id*.

{¶39} This is the argument taken by appellee in the instant case. Appellee claims that appellants made a payment after appellee filed the first foreclosure complaint, thereby reinstating the loan. Appellee claims the first case was dismissed only because appellants reinstated the loan and, as a result, were no longer in default. The second foreclosure complaint was, therefore, based on appellants' default of the reinstated note and mortgage. This second foreclosure complaint was voluntarily dismissed on March 11, 2011 and remains the only voluntarily dismissal based on the 2009 default. As a result, appellee contends the instant foreclosure complaint does not arise from the same default as the first foreclosure.

{¶40} The mortgage at issue, at paragraph 19, outlines "Borrower's Right to Reinstate After Acceleration." It provides, in part, that if the borrower meets certain conditions, reinstatement may occur. Upon reinstatement by borrower, "this Security Interest and obligations secured hereby shall remain fully effective as if no acceleration had occurred." Those conditions include, inter alia, the payment of all sums due under the note and mortgage as if no acceleration had occurred and "such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged."

{¶41} Appellants maintain that although they made a payment after the first complaint in foreclosure, the loan was not reinstated. Attorney for appellants, John A. Hallbauer, authenticated all of the documents from the previous cases which were attached as exhibits to appellants' answer and counterclaim. Accompanying appellants' brief in opposition to appellee's motion for summary judgment is the affidavit of Mr. Gaizutis, who averred that he never signed any modification or other subsequent agreement with Countrywide Bank or any successor. He also averred that the loan was never set up for routine monthly payments by Countrywide Bank; Mr. Gaizutis never received a routine monthly statement. In his affidavit, Attorney Hallbauer stated there was no agreement to amend the loan documents or for any other purpose at the time of termination of Case No. 08F1155. Attorney Hallbauer noted that appellee's "[f]ormer counsel for [lender] simply 'grabbed' a check submitted on conditions that were not met and filed a unilateral Civil Rule 41(A) Notice of Dismissal."

{¶42} Appellee maintains that appellant's mortgage was reinstated after they made a single large payment of $10,023.65 in January 2009. Record of the payment and the accompanying letter were made part of the record before the trial court. This amount was applied to the amount then due. This January 2009 payment was accompanied with a letter from appellant's attorney, Attorney Hallbauer. The content of this letter clearly states the payment of said amount should function to reinstate the mortgage, as though the acceleration had not occurred. The letter, addressed to appellee's attorney, stated that appellants are enclosing the amount of $10,023.65, which is – "the amount set out in your firm's reinstatement form dated January 15, 2009."

{¶43} The January 2009 letter from Attorney Hallbauer stated that the "enclosed amount is tendered to bring Mr. Gaizutis' loan to a current and 'as agreed' status, covering all payments and charges on the promissory note through January 21, 2009[.] Countrywide is to issue bill to Mr. Gaizutis for February 1, 2009 and, on the first of every month thereafter, billing for the monthly payment due, together with payment instructions, including a preaddressed envelope." The letter also stated that some of the costs delineated in appellee's letter were inappropriate and rejected; if the costs are not actually and finally incurred, appellants' attorney demanded the funds be returned to Mr. Gaizuits. The letter ends by stating:

{¶44} "[Y]ou may process the enclosed check, and distribute the appropriate portion thereof to Countrywide for application against Mr. Gaizutis' note, when you have executed and deposited in the mail for return for me for filing with the Court the enclosed agreed dismissal entry."

{¶45} The dismissal entry was signed by Attorney Hallbauer, with signature lines for appellee's attorney, the assistant prosecuting attorney, and the judge. The judgment entry of dismissal stated that the Gaizutis' have "resolved all issues and disputes between them existing through January 31, 2009, and Defendants Gaizutis have made all payments necessary to fully reinstate their loan and to bring it to an 'as agreed' status through January 31, 2009."

{¶46} Instead of filing the agreed judgment entry of dismissal signed by appellant's attorney, appellee's then-attorney filed a unilateral dismissal, pursuant to Civ.R. 41(A)(1). However, if there was a claim that a material term of the letter agreement had been breached, no such claim appears in this record. The one thing

that *is* clear from the correspondence is that the parties agreed to have the suit dismissed upon payment of a significant lump sum that would be applied to the amount due on the loan. While the documentation suggests a clear intention to "reinstate" the loan, based on the discussion from the Supreme Court in *Gullotta, supra*, whether it was actually reinstated or not matters little. The amount of the payment and documentation contained in the record reflects the parties' desire to have the foreclosure dismissed and the appellants back to a position where they could remain in their home. Further, the mortgage at issue contemplates the right of a borrower to reinstate the mortgage after acceleration contingent upon the borrower meeting certain conditions outlined in the mortgage. The mortgage further states that upon reinstatement by the borrower, "this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred."

{¶47} Moreover, the $10,023.65 payment in January 2009 was applied to a portion of the principle balance due; when the second foreclosure was filed, the default date and amount due were different than those stated in the first complaint. These factors, together with the documentation between the parties at the time of the first dismissal, and the clear intention of the parties, distinguish this case from *Parish*. In *Parish*, there was a payment recorded, but apparently little else to indicate the parties' intentions and treatment of the tendered payment.

{¶48} Accordingly, we find no merit to appellants' first and second assignments of error.

{¶49} Appellants' third assignment of error alleges that "[t]he trial court erred in ignoring significant issues of material fact affecting all claims under any applicable legal

principles." Under this assignment of error, appellants maintain that the affidavit of Justi Nicole Hillberry, attached to appellee's motion for summary judgment, does not comply with Civ.R. 56(E). We disagree.

{¶50} Civ.R. 56(E) states that:

> 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. * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

{¶51} On the issue of personal knowledge, appellant relies on the decisions reached in *Bendele v. Geise*, 3rd Dist. Putnam No. 12-02-05, 2002-Ohio-6272 and Olverson v. Butler, 45 Ohio App.2d 9 (10th Dist.1975). *Geise* holds that when an "affidavit fails to show that it was made by 'a person with knowledge' of the business records in question, it cannot fall within the ambit of Evid.R. 803(6)." *Geise, supra*, ¶17. Similarly, *Butler* also holds that an affiant needs to show personal knowledge. *Butler, supra*, at 12.

{¶52} In this case, Ms. Hillberry averred that she is an officer with BANA and is "able to testify to the matters stated herein because I have personal knowledge of BANA's procedures for creating these records. As part of my job responsibilities for BANA, I am familiar with the type of records maintained by BANA in connection with the Loan." Ms. Hillberry also averred that she has personally reviewed BANA's business records which are "kept in the course of BANA's regularly conducted business

activities." Accordingly, Ms. Hillberry's affidavit is sufficient for the trial court to have determined that the affiant had sufficient personal knowledge with regard to the business records. *See, e.g., Citimortgage, Inc. v. Hijjawi*, 11th Dist. Lake No. 2013-L-105, 2014-Ohio-2886, ¶14 (finding affidavit sufficient when affiant averred to having personal knowledge based on her review of bank's records)*; see also M & T Bank v. Strawn*, 11th Dist. Trumbull No. 2013-T-0040, 2013-Ohio-5845, ¶16-20 (finding affidavit sufficient when affiant stated that he had personal knowledge and that the business records were 'created at or near the time of the relevant occurrences')*.*

{¶53} Accordingly, we find no merit to appellants' third assignment of error.

{¶54} Appellants' fourth assignment of error alleges that "[t]he trial court erred in overruling Gaizutis' motion to compel discovery."

{¶55} As previously stated, the trial court did not expressly rule on appellants' motion to compel discovery. Therefore, it has effectively overruled the motion. *See, e.g. Geygan v. Geygan*, 10th Dist. Franklin No. 11AP-626, 2012-Ohio-1965, ¶30. Motions regarding discovery are placed in the sound discretion of the trial court and will not be disturbed on appeal unless the trial court abused that discretion. *Novy v. Ferrara*, 11th District Portage No. 2013-P-0063, 2014-Ohio-1776, ¶62. In their third counterclaim, appellants argued that they were entitled to fees and expenses for appellee's bad faith in failing to disclose any of the three prior suits and for frivolous conduct under R.C. 2323.51. Appellants also sought, inter alia, appellee's electronic records retention and destruction policy because they claimed that potentially relevant evidence with respect to this claim had been deleted by appellee pursuant to such policies. However, the trial court did not err in overruling the request because the trial

court found the complaint in this case was not barred by the double-dismissal rule. Additionally, the trial court's overruling of appellants' request for appellee's electronic records retention and destruction policy is not determinative of this action. Because we arrive at the same conclusion, we cannot say the trial court abused its discretion.

{¶56} Accordingly, appellants' fourth assignment of error is not well taken.

{¶57} For the reasons stated in this opinion, the judgment of the Geauga County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.