[Cite as *Portage Cty. Commrs. v. O'Neil,* 2015-Ohio-808.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

PORTAGE COUNTY COMMISSIONERS c/o PORTAGE AREA DEVELOPMENT CORP.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2013-P-0066**
- vs -	:	
VALERIE R. O'NEIL, et al.,	:	
Defendant-Appellant,	:	
- vs -	:	
KEYBANK NATIONAL ASSOCIATION,	:	
Defendant-Appellee.	:	

Civil Appeal from the Portage County Court of Common Pleas.
Case No. 2011 CV 1428.

Judgment: Affirmed in part, reversed in part, and remanded.

Amanda J. Lewis and *Robert J. Paoloni*, Paoloni & Lewis, 250 South Water Street, P.O. Box 762, Kent, OH 44240 (For Plaintiff-Appellee).

Mark E. Owens, J.P. Amourgis & Associates, 3200 West Market Street, Suite 106, Akron, OH 44333 (For Defendant-Appellant).

Colette S. Carr and *Barbara A. Borgmann*, Laurito & Laurito, LLC, 7550 Paragon Rd., Centerville, OH 45459 (For Defendant-Appellee).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Valerie R. O'Neil, appeals from the June 20, 2013 judgments of the Portage County Court of Common Pleas, granting the motions for summary judgment and decrees in foreclosure filed by appellees, Portage County Commissioners c/o Portage Area Development Corp. ("Portage County Commissioners") and KeyBank National Association ("KeyBank").

{¶2} Appellant executed a note and mortgage to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for KeyBank, for property located at 6672 Cleveland Road, Ravenna, Portage County in the amount of $70,000. The mortgage was recorded with the Portage County Recorder, Instrument No. 200200424. This mortgage was later assigned from MERS to KeyBank, which was recorded with the Portage County Recorder, Instrument No. 201021666.

{¶3} The next day, appellant executed two notes and mortgages to Portage County Commissioners, in the amounts of $11,684 and $3,000. These mortgages were placed on the property and recorded with the Portage County Recorder, Instrument Nos. 200200425 and 200200426, respectively.

{¶4} KeyBank filed a "Complaint in Foreclosure" against appellant alleging she had defaulted and demanded judgment in the amount of $63,619.21 plus interest, at the rate of 6.875 percent per annum from February 1, 2009, and costs. Portage County Commissioners filed a cross-claim. The trial court dismissed without prejudice, by agreement of the parties, both KeyBank's complaint and Portage County Commissioners' cross-claim.

{¶5} Portage County Commissioners subsequently filed a "complaint in foreclosure with notice under the Fair Debt Collection Practices Act" against appellant and, inter alia, KeyBank. Portage County Commissioners alleged that appellant defaulted on the terms and payment of the notes and mortgages on the property at issue. Portage County Commissioners sought a monetary judgment as well as the equity of redemption of all defendants to foreclose, have the premises sold, and apply the proceeds from the sale to its claim for monetary damages.

{¶6} Answers were filed by appellant and KeyBank. KeyBank also filed a cross-claim for an in rem judgment and decree in foreclosure. KeyBank sought a monetary judgment in the amount of $63,523.84 together with interest at the rate of 6.875 percent per annum from March 1, 2009, plus other costs. KeyBank also sought the equity of redemption of all defendants to foreclose, have the premises sold, and apply the proceeds to its claim for monetary damages.

{¶7} In her answer to KeyBank's cross-claim, appellant denied ever receiving the proper and requisite notice of default pursuant to the terms of the note and mortgage.

{¶8} Both the Portage County Commissioners and KeyBank filed motions for summary judgment, and appellant filed briefs in opposition to both motions. KeyBank filed a reply.

{¶9} In two separate entries, the trial court granted Portage County Commissioners' and KeyBank's motions for summary judgment and decrees in foreclosure.

{¶10} Appellant filed a timely notice of appeal from both entries.

{¶11} Before we address appellant's assigned errors, we recognize that this court reviews 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, quoting *Temple v. Wean United, Inc*., 50 Ohio St.2d 317, 327 (1977).

{¶12} 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, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996).

{¶13} To properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials showing: (1) the movant is the holder of the note and mortgage, or is a party entitled to enforce it; (2) if the movant is not the original mortgagee, the chain of assignments and transfers; (3) the mortgager is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due. *Wachovia Bank of Delaware v. Jackson*, 5th Dist. Stark No. 2010-CA-00291, 2011-Ohio-3203, ¶40-45. With regard to the first requirement, the movant must establish it was the holder or entitled to enforce the note as of the time the complaint was filed. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶3. "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)." *Zuga, supra*, at ¶12.

KeyBank's Motion for Summary Judgment

{¶14} With respect to the trial court's granting of KeyBank's motion for summary judgment, appellant assigns the following errors:

> [1.] The trial court erred when it granted summary judgment to the Cross-Complainant Key Bank, as there was a genuine issue of material fact as to whether Key Bank had provided the proper notice of default prior to acceleration, as required under the mortgage and applicable federal law.
>
> [2.] The trial court erred when it granted summary judgment to the plaintiff Key Bank, as there were genuine issues of material fact remaining and the plaintiff was not entitled to summary judgment as a matter of law.

{¶15} We first address appellant's second assignment of error wherein appellant maintains the affidavit of Elliot Kindler, attached to KeyBank's motion for summary judgment, was deficient.

{¶16} Pursuant to Civ.R. 56(E), 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." ""Personal knowledge" has been defined as "knowledge of factual truth which does not depend on outside information or hearsay."" *Residential Funding Co., LLC v. Thorne*, 6th Dist. Lucas No. L-09-1324, 2010-Ohio-4271, ¶64, quoting *Madon v. Cleveland*, 9th Dist. Medina No. 2945-M, 1999 Ohio App. LEXIS 6147, *6 (Dec. 22, 1999). Additionally, "[c]opies of all papers referred to in the affidavit are acceptable if the affidavit indicated that the copies submitted are true and accurate reproductions of

the originals." *Fed Home Loan Mtge. Corp. v. Zuga*, 11th Dist. Trumbull No. 2012-T-0012, 2013-Ohio-2838, ¶15.

{¶17} KeyBank's affidavit, made by Mr. Kindler, stated that (1) he is an officer of Bank of America N.A.; (2) Bank of America N.A. services appellant's loan on behalf of KeyBank; (3) the affidavit is based on Bank of America N.A.'s regularly kept business records; (4) appellant has defaulted on the note by failing to make payments; (5) the indebtedness has been accelerated; and (6) the total due and owing to KeyBank is $63,523.84.

{¶18} The affidavit states it was based on personal knowledge ascertained through Mr. Kindler's position with Bank of America, which services appellant's loan on behalf of KeyBank. Additionally, Mr. Kindler states he personally reviewed Bank of America's business records. As such, he has the requisite personal knowledge about the material for which he avers; the affidavit filed by KeyBank in support of its motion for summary judgment complies with Civ.R. 56(E).

{¶19} Appellant's second assignment of error is without merit.

{¶20} Finding the affidavit of Mr. Kindler was in compliance with Civ.R. 56(E), we now address appellant's first assignment of error; namely, whether KeyBank failed to comply with notice provisions, both under federal law and the terms of the note.

{¶21} First, appellant argues that 24 C.F.R. 201.50 and 24 C.F.R. 203.604 require that a lender (1) provide written notice to a borrower by certified mail and (2) contact the borrower, either face-to-face or by telephone, before acceleration and foreclosure or before repossession. Appellant's argument, however, has been rejected multiple times by this court and other appellate courts throughout this state. The

requirements of 24 C.F.R. 201.50 and 24 C.F.R. 203.604(d) apply only to specific, federally-insured mortgages.

{¶22} This court has established that the code provisions requiring face-to-face meetings apply only if the subject property's mortgage is guaranteed by the Department of Housing and Urban Development. *U.S. Bank Natl. Assn. v. Martz*, 11th Dist. Portage No. 2013-P-0028, 2013-Ohio-4555, ¶14. This is the same position taken by appellate courts throughout the state. *OneWest Bank, FSB v. Albert*, 5th Dist. Stark No. 2013CA00180, 2014-Ohio-2158, ¶17; *JPMorgan Chase Bank, Natl. Assn. v. Burden*, 9th Dist. Summit No. 27104, 2014-Ohio-2746, ¶20; *Fifth Third Mtge. Co. v. Orebaugh*, 12th Dist. Butler No. CA2012-08-153, 2013-Ohio-1730, ¶31.

{¶23} "The recognition of the fact that the mortgage * * * is subject to federal law does not demonstrate that the mortgage is federally insured or that federal housing regulations have otherwise been incorporated into the agreement." *Martz, supra,* at ¶16. As KeyBank correctly asserts, nothing in the note or mortgage gives any indication that the mortgage was federally insured. There is simply no factual basis for the proposition that federal housing regulations regarding notice, default, and acceleration apply in this case.

{¶24} Nevertheless, summary judgment in favor of KeyBank was inappropriate because KeyBank failed to demonstrate compliance with the notice provisions of appellant's note and mortgage.

{¶25} Appellant contends that a genuine issue of material fact exists as to whether KeyBank satisfied the conditions precedent to foreclosing on the loan. Specifically, appellant argues that KeyBank failed to provide proper notice in

accordance with the terms of the note and accompanying mortgage. Instead of offering any evidence that it did comply with the notice requirements, KeyBank instead argues that appellant failed to raise lack of notice in her answer.

{¶26} In her answer to KeyBank's cross-complaint, however, appellant stated: "[KeyBank] failed to give the proper and requisite notice to [appellant] pursuant to the * * * terms of the Note and Mortgage before the Plaintiff filed this action." This response is more than adequate to comply with the Civ.R. 9(C) requirement that a denial of performance be made with particularity. *See* Civ.R. 9(C) ("A denial of performance or occurrence shall be made specifically and with particularity."). Nowhere in KeyBank's affidavit did it claim to have complied with any conditions precedent, including any required notice, nor did KeyBank attach any record of notice of default or intent to accelerate sent to appellant. Accordingly, a genuine issue of fact remains as to whether KeyBank complied with the notice requirements of the note and mortage.

{¶27} Appellant's first assignment of error has merit.

Portage County Commissioners' Motion for Summary Judgment

{¶28} Appellant's third assignment of error, which relates to the trial court's granting of summary judgment to Portage County Commissioners, alleges:

{¶29} "The trial court erred when it granted summary judgment to the plaintiff Portage County, as there were genuine issues of material fact remaining and the plaintiff was not entitled to summary judgment as a matter of law."

{¶30} Appellant contends the affidavit of C. David Vaughan, attached to the Portage County Commissioners' motion for summary judgment, failed to satisfy Civ.R. 56. We disagree.

{¶31} As previously discussed, Civ.R. 56(E) requires that affidavits be made on personal knowledge and rely on facts that would be admissible in evidence. In the present case, appellant contends that Mr. Vaughn's affidavit was not based on personal knowledge and that Mr. Vaughn "provided no basis for how he was familiar with the business practices or records of Portage County."

{¶32} In the affidavit filed by Portage County Commissioners, Mr. Vaughn avers that the following: (1) his affidavit is based on personal knowledge; (2) he is the executive director of Neighborhood Development Services, Inc.; (3) he is the custodian of all records attached to the affidavit, which are records kept in the ordinary course of Neighborhood Development Services' business; (4) Neighborhood Development Services is a community development corporation that serves as the administrator for U.S. Department of Housing and Urban Development grant monies given to the Ohio Department of Development; (5) Neighborhood Development Services is the administrator of the promissory notes and mortgages signed by appellant; (6) appellant has failed to make payments, the loan is in default, and the entire balance is due and owing; and (7) the total due and owing to Neighborhood Development Services is $14,042.75.

{¶33} Mr. Vaughn's affidavit sufficiently details how his position with Neighborhood Development Services provides him with personal knowledge of Portage County Commissioners' account records. It also makes clear that Mr. Vaughn had the requisite personal knowledge as to whether appellant failed to make payments in accordance with the terms of the promissory note and mortgage. Additionally, the affidavit declares that these records were regularly kept by Neighborhood Development

Services on behalf of Portage County Commissioners. Accordingly, the trial court did not err by relying on Mr. Vaughn's affidavit in granting Portage County Commissioners' motion for summary judgment.

{¶34} Appellant's third assignment of error is without merit.

{¶35} Based on the opinion of this court, the judgment of the Portage County Court of Common Pleas is hereby affirmed in part and reversed in part. The trial court's grant of summary judgment and decree in foreclosure in favor of Portage County Commissioners is affirmed, and the foreclosure shall proceed on that mortgage. The trial court's grant of summary judgment and decree in foreclosure in favor of KeyBank is hereby reversed as there is a genuine issue of fact as to whether KeyBank complied with the notice requirements of the note and mortage, and remanded for proceedings consistent with the opinion of this court.

THOMAS R. WRIGHT, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part with a Concurring/Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part with a Concurring/Dissenting Opinion.

{¶36} Although I agree with the majority that appellant's first assignment of error has merit, I disagree that appellant's second and third assignments do not. Therefore, I concur in part and dissent in part.

{¶37} In her first assignment of error, appellant argues the trial court erred in granting summary judgment to KeyBank. She maintains there is a genuine issue of material fact as to whether KeyBank provided proper notice prior to acceleration, as required under the note and mortgage as well as applicable federal law.

{¶38} The loan documents that KeyBank seeks to enforce have certain notice provisions which create conditions precedent to foreclosure. Specifically, paragraph 7 of the note states:

{¶39} "**7. GIVING OF NOTICES**

{¶40} "Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

{¶41} "Any notice that must be given to the Note Holder under this Note will be given by delivering it or by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address."

{¶42} Similarly, paragraph 15 of the mortgage provides in part:

{¶43} "**15. Notices.** All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. * * * The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender."

{¶44} Regarding acceleration, paragraph 22 of the mortgage states in part:

{¶45} "**22. Acceleration; Remedies.** Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument * * *. The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property."

{¶46} KeyBank asserts that federal law does not apply here. However, paragraph 16 of the mortgage states in part:

{¶47} "16. Governing Law; Severability; Rules of Construction. This Security Instrument *shall be governed by federal law* and the law of the jurisdiction in which the Property is located." (Emphasis added.)

{¶48} The Code of Federal Regulations, dealing with mortgage and loan insurance programs under the National Housing Act and other authorities, provides in part at 24 C.F.R. 201.50:

{¶49} "Lender efforts to cure the default.

{¶50} "(a) * * * Before taking action to accelerate the maturity of the loan, the lender or its agent shall contact the borrower and any co-maker or co-signer, either in a face-to-face meeting or by telephone, to discuss the reasons for the default and to seek its cure. * * *

{¶51} (b) * * * Unless the borrower cures the default or agrees to a modification agreement or repayment plan, the lender shall provide the borrower with written notice

that the loan is in default and that the loan maturity is to be accelerated. In addition to complying with applicable State or local notice requirements, the notice shall be sent by certified mail and shall contain:

{¶52} "(1) A description of the obligation or security interest held by the lender;

{¶53} "(2) A statement of the nature of the default and of the amount due to the lender as unpaid principal and earned interest on the note as of the date 30 days from the date of the notice;

{¶54} "(3) A demand upon the borrower either to cure the default (by bringing the loan current or by refinancing the loan) or to agree to a modification agreement or a repayment plan, by not later than the date 30 days from the date of the notice;

{¶55} "(4) A statement that if the borrower fails either to cure the default or to agree to a modification agreement or a repayment plan by the date 30 days from the date of the notice, then, as of the date 30 days from the date of the notice, the maturity of the loan is accelerated and full payment of all amounts due under the loan is required;

{¶56} "(5) A statement that if the default persists the lender will report the default to an appropriate credit reporting agency; and

{¶57} "(6) Any other requirements prescribed by the Secretary."

{¶58} In addition, 24 C.F.R. 203.604 states in part:

{¶59} "(b) The mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid. If default occurs in a repayment plan arranged other than during a personal interview, the mortgagee must have a face-to-

face meeting with the mortgagor, or make a reasonable attempt to arrange such a meeting within 30 days after such default and at least 30 days before foreclosure is commenced * * *.

{¶60} "* * *

{¶61} "(d) A reasonable effort to arrange a face-to-face meeting with the mortgagor shall consist at a minimum of one letter sent to the mortgagor certified by the Postal Service as having been dispatched. Such a reasonable effort to arrange a face-to-face meeting shall also include at least one trip to see the mortgagor at the mortgaged property, unless the mortgaged property is more than 200 miles from the mortgagee, its servicer, or a branch office of either, or it is known that the mortgagor is not residing in the mortgaged property."

{¶62} Ohio case law similarly provides the following:

{¶63} "'* * * [W]here the note or mortgage instrument requires prior notice, the provision of this notice is a condition precedent that must be demonstrated by the moving party under Civ.R. 56.' [*LaSalle Bank, N.A. v. Kelly*, 9th Dist. Medina No. 09CA0067-M, 2010-Ohio-2668,] ¶13-14. * * * [W]hen a loan is subject to [federal] regulations, those regulations create conditions precedent to foreclosure. * * *

{¶64} "* * * [I]f the terms of the note and mortgage subject it to [federal] regulations regarding default and acceleration, then a homeowner may use a servicer's failure to comply with those regulations to defend a foreclosure action. * * * [A] bank's noncompliance with [federal] regulations may bar a foreclosure action if the bank fails to meet its burden under Civil Rule 56 to support its summary judgment motion with acceptable evidence that it satisfied the [federal] regulations applicable to default and

acceleration. * * *" *BAC Home Loans Servicing, LP v. Taylor*, 9th Dist. Summit No. 26423, 2013-Ohio-355, ¶13-14. (Citations omitted.)

{¶65} As evidenced above, the terms of the note and mortgage require that any notice prior to acceleration be given by delivering it or by mailing it via first class mail, "unless applicable law requires a different method." The mortgage further provides that the security instrument "shall be governed by federal law," which requires that any notice be sent via certified mail. As federal law applies here, any notice should have been sent via certified mail and a face-to-face interview should have been conducted prior to foreclosure.

{¶66} In this case, KeyBank alleges that appellant did not initially plead with specificity that KeyBank did not comply with all conditions precedent prior to foreclosure. However, appellant properly indicated below that she did not receive proper notice, according to the terms of the note and mortgage, as well applicable federal law, prior to the acceleration by KeyBank. Upon consideration, appellant is correct.

{¶67} In addition, the record reveals that KeyBank made no attempt to establish that it complied with the foregoing regulations as no face-to-face interview with appellant was conducted, nor was any reasonable effort made to arrange an interview, prior to bringing the foreclosure action. In fact, at a minimum, there is no evidence to show that any certified letter was sent by KeyBank to appellant in order to arrange a face-to-face meeting.

{¶68} As stated, "[t]he mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full

monthly installments due on the mortgage are unpaid." 24 C.F.R. 203.604(b). A "reasonable effort" "shall consist at a minimum of one letter sent to the mortgagor certified by the Postal Service * * * [and] shall also include at least one trip to see the mortgagor at the mortgaged property * * *." 24 C.F.R. 203.604(d). The requirements contained in 24 C.F.R. 201.50 similarly include the "face-to-face meeting" and "certified mail" language.

{¶69} The evidence in the record fails to establish that KeyBank satisfied all conditions precedent prior to initiating foreclosure. Because a disputed issue of material fact remains under this assignment, summary judgment in favor of KeyBank was not proper.

{¶70} Appellant's first assignment of error is with merit.

{¶71} In her second assignment of error, appellant again contends the trial court erred in granting summary judgment to KeyBank. She further asserts there are genuine issues of material fact remaining and that KeyBank is not entitled to summary judgment as a matter of law. Specifically, appellant maintains the affidavit submitted by KeyBank in support of its motion for summary judgment as well as her brief in opposition and affidavit show there are genuine issues of material fact in this case.

{¶72} Civ.R. 56(E) states in part: "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."

{¶73} In support of its motion for summary judgment, KeyBank attached an affidavit of Elliot Kindler. Mr. Kindler, an officer of Bank of America N.A. ("BANA") in

Allegheny County, Pennsylvania, averred that he was authorized to sign the affidavit on behalf of KeyBank, as BANA serviced the subject loan. Upon review, Mr. Kindler's affidavit is insufficient under Civ.R. 56(E). *See also Tolson v. Triangle Real Estate*, 10th Dist. Franklin No. 03AP-715, 2004-Ohio-2640, ¶12 (holding that "[a]ffidavits, which merely set forth legal conclusions or opinions without stating supporting facts, are insufficient to meet the requirements of Civ.R. 56(E)").

{¶74} Mr. Kindler's affidavit contains conclusory language. His exact duties are vague and he does not detail why his position with BANA qualifies him to testify in this matter. Although Mr. Kindler avers having "personal knowledge," he fails to detail how he has personal knowledge of KeyBank's business records. Personal knowledge is required to qualify the records of an affidavit under the business records hearsay exception. He fails to explain and describe the records used in his review of the loan at issue. The information KeyBank desires to use was taken from BANA's business records, rather than from Mr. Kindler's personal knowledge. *See* Evid.R. 803(6) (personal knowledge is required to qualify the records of an affidavit under the business records hearsay exception). Mr. Kindler based his "personal knowledge" on information that he had received, i.e., from KeyBank, which constitutes inadmissible hearsay.

{¶75} Even assuming arguendo that Mr. Kindler's affidavit is sufficient under Civ.R. 56(E), genuine issues of material fact remain. Appellant, in her affidavit attached to her brief in opposition to KeyBank's motion for summary judgment, averred the following: (1) she resides at the subject property; (2) she based her affidavit on her personal knowledge; (3) she did not recognize the officer associated with KeyBank; (4) she did not receive notice regarding acceleration of her mortgage and/or note; (5) she

did not receive a notice of default from KeyBank or any other company, and KeyBank did not provide an affidavit attesting to the authenticity of or mailing of any notice of default to her prior to foreclosure; (6) she did not receive a notice giving her the opportunity to cure any deficiency prior to acceleration, and KeyBank did not provide an affidavit attesting to the authenticity of or mailing of any notice of default prior to acceleration; (7) she did not receive any offer or notice to meet face-to-face to discuss her situation; (8) she never refused receipt of any certified mail; and (9) KeyBank failed to satisfy all conditions precedent prior to the foreclosure.

{¶76} This writer determines that Mr. Kindler's affidavit on behalf of KeyBank and the attestations in appellant's affidavit establish that genuine issues of material fact remain. Thus, under this assignment, I believe the trial court erred in granting KeyBank's motion for summary judgment.

{¶77} I believe appellant's second assignment of error is with merit.

{¶78} In her third assignment of error, appellant alleges the trial court erred in granting summary judgment to Portage County Commissioners. She argues there are genuine issues of material fact remaining and Portage County Commissioners is not entitled to summary judgment as a matter of law. Specifically, appellant maintains the affidavit submitted by Portage County Commissioners in support of its motion for summary judgment as well as her brief in opposition and affidavit show there are genuine issues of material fact in this case.

{¶79} In support of its motion for summary judgment, Portage County Commissioners attached an affidavit of C. David Vaughn. Mr. Vaughn, executive director of NDS, averred that he was the custodian of all records for Portage County

Commissioners. Upon review, Mr. Vaughn's affidavit is insufficient under Civ.R. 56(E). *See also Tolson, supra,* at ¶12.

{¶80} Similar to the foregoing affidavit of Mr. Kindler submitted by KeyBank, Mr. Vaughn's affidavit also contains conclusory language. Mr. Vaughn's exact duties are vague and he does not detail why his position with NDS qualifies him to testify in this matter. Although Mr. Vaughn avers having "personal knowledge," he fails to detail how he has personal knowledge of any particular business records of Portage County Commissioners. He fails to explain and describe the records used in his review of the loan at issue. *See* Evid.R. 803(6) (personal knowledge is required to qualify the records of an affidavit under the business records hearsay exception). Notwithstanding that NDS is not the plaintiff in this action, Mr. Vaughn based his "personal knowledge" on information that he had received, i.e., from Portage County Commissioners, which constitutes inadmissible hearsay.

{¶81} Even assuming arguendo that Mr. Vaughn's affidavit is sufficient under Civ.R. 56(E), genuine issues of material fact remain. Appellant, in her affidavit attached to her brief in opposition to Portage County Commissioners' motion for summary judgment, averred the following: (1) she resides at the subject property; (2) she based her affidavit on her personal knowledge; (3) she did not default on her obligations to Portage County Commissioners; (4) Portage County Commissioners failed to satisfy all conditions precedent to accelerate the notes and foreclose on the property; (5) she did not receive notice regarding acceleration; (6) she did not receive a notice of default regarding the debt from Portage County Commissioners or from any other company, and Portage County Commissioners did not provide an affidavit attesting to the

authenticity of or mailing of any notice of default prior to foreclosure; (7) she did not receive a notice giving her the opportunity to cure any deficiency prior to acceleration, and Portage County Commissioners did not provide an affidavit attesting to the authenticity of or mailing of any notice of default prior to acceleration; (8) she did not receive any offer or notice to meet face-to-face with Portage County Commissioners to discuss her situation; (9) she never refused receipt of any certified mail; (10) she intended on satisfying all remaining conditions; and (11) she believed that she had not defaulted and that acceleration was premature and improper.

{¶82} This writer determines that Mr. Vaughan's affidavit on behalf of Portage County Commissioners and the attestations in appellant's affidavit establish that genuine issues of material fact remain. Thus, I believe the trial court erred in granting Portage County Commissioners' motion for summary judgment.

{¶83} I believe appellant's third assignment of error is with merit.

{¶84} For the foregoing reasons, because this writer believes that appellant's assignments of error are well-taken, I would reverse and remand on all three assignments. Accordingly, I concur in part and dissent in part.