[Cite as *Deutsche Bank Natl. Trust Co. v. Ayers*, 2020-Ohio-1332.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR AMERICAN HOME MORTGAGE ASSETS TRUST 2007-2, MORTGAGE-BACKED PASS-THROUGH CERTIFICATES SERIES 2007-2,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2019-P-0094**
- vs -	:	
JULIE A. AYERS, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2017 CV 00225.

Judgment: Affirmed.

John R. Wirthlin and *William L. Purtell*, Blank Rome LLP, 1700 PNC Center, 201 East Fifth Street, Cincinnati, Ohio 45202, and *Robert R. Hoose*, The Law Offices of John D. Clunk Co., 4500 Courthouse Boulevard, Suite 400, Stow, Ohio 44224 (For Plaintiff-Appellee).

Grace M. Doberdruk, Law Office of Grace M. Doberdruk, 2000 Auburn Drive, One Chagrin Highlands, Suite 200, Beechwood, Ohio 44122 (For Defendants-Appellants).

MARY JANE TRAPP, J.

{¶1} Appellants, Julie Ayers ("Ms. Ayers") and Richard Paton ("Mr. Paton"), appeal the judgment of the Portage County Court of Common Pleas granting summary judgment and issuing a decree of foreclosure to appellee, Deutsche Bank National Trust

Company, as Trustee for American Home Mortgage Assets Trust 2007-2, Mortgage-Backed Pass-Through Certificates Series 2007-2 ("Deutsche Bank"). Ms. Ayers and Mr. Paton also appeal the trial court's judgment entry dismissing their counterclaims against Deutsche Bank.

{¶2} Ms. Ayers and Mr. Paton argue that the trial court erred by granting Deutsche Bank's motion for summary judgment because: (1) Deutsche Bank inappropriately attempted to introduce new evidence and argument in its reply brief; (2) the affidavit submitted with Deutsche Bank's motion for summary judgment was not made on personal knowledge and did not properly authenticate Ms. Ayers' original note or her loan payment history; (3) genuine issues of material fact exist regarding whether Deutsche Bank had possession of Ms. Ayers' original note when the complaint was filed and whether Deutsche Bank is the holder of the mortgage; and (4) Deutsche Bank did not comply with all conditions precedent to foreclosure. Ms. Ayers and Mr. Paton also argue that the trial court erred by granting Deutsche Bank's motion to dismiss their counterclaims.

{¶3} After a careful review of the record and pertinent law, we find the trial court properly granted summary judgment to Deutsche Bank because: (1) Deutsche Bank's reply brief did not introduce new evidence and argument in its reply brief. Even if it did, Ms. Ayers and Mr. Paton waived this argument by failing to seek leave to file a surreply or to move to strike the reply brief prior to the trial court's granting of summary judgment; and (2) Ms. Ayers and Mr. Paton have not raised genuine issues of material fact regarding the affiant's personal knowledge, authenticity of the note or loan payment history, or Deutsche Bank's possession of Ms. Ayers' original note when the complaint was filed,

status as the holder of the mortgage, or compliance with all conditions precedent to foreclosure. As a result of the trial court's granting of summary judgment to Deutsche Bank and our affirmance, Ms. Ayers' and Mr. Paton's counterclaims are moot.

{¶4} Thus, we affirm the judgments of the Portage County Court of Common Pleas.

Substantive and Procedural History

The Note and Mortgage

{¶5} On December 26, 2006, Ms. Ayers signed a promissory note in the principal amount of $1,481,000, plus interest, payable to American Brokers Conduit ("ABC"). The same day, Ms. Ayers granted a mortgage in the same amount to Mortgage Electronic Registration System ("MERS"), as nominee for ABC and its successors and assigns, on the real property located at 695 Club Drive, Aurora, Ohio. The mortgage was recorded on March 8, 2007 in Portage County. The note contains an undated blank endorsement from ABC.

{¶6} Ocwen Loan Servicing, LLC ("Ocwen") sent Ms. Ayers a "Notice of Default" dated March 22, 2016, informing Ms. Ayers that her payments were past due and she was in default. It listed the total amount past due and informed her that failure to bring her account current may result in acceleration of the note and foreclosure. It also informed her that she "may have the right to reinstate the mortgage loan" after acceleration.

{¶7} MERS assigned Ms. Ayers' mortgage to Deutsche Bank on January 26, 2017, and the assignment was recorded on February 1, 2017. The instrument indicates it was prepared by an individual named Leonora Jones Williams.

The Complaint, Answer, and Counterclaims

{¶8} On March 6, 2017, Deutsche Bank filed a complaint in foreclosure against Ms. Ayers and Mr. Paton, also naming Ms. Ayers' unknown spouse and unknown tenants, if any, and the county treasurer. Deutsche Bank alleged that it was the "person entitled to enforce" and "in lawful possession" of Ms. Ayers note by virtue of the blank endorsement. Attached to the complaint were copies of the note, mortgage, and mortgage assignment.

{¶9} Deutsche Bank's complaint alleged that Mr. Paton has or may claim to have an interest in the real property. The preliminary judicial report lists that a marriage license between Ms. Ayers and Mr. Paton was filed in Portage County in 2008.

{¶10} Ms. Ayers and Mr. Paton filed a joint answer with a jury demand, raising numerous affirmative defenses. They also asserted three counterclaims, alleging that Deutsche Bank violated the Fair Debt Collection Practices Act (Count 1), committed common law fraud (Count 2) and invaded their privacy by filing the foreclosure complaint (Count 3). All three counterclaims are premised on allegations that Deutsche Bank is not entitled to enforce the note and mortgage at issue in this case.

Motion to Dismiss Counterclaims and Opposition

{¶11} Deutsche Bank filed a motion to dismiss Ms. Ayers' and Mr. Paton's counterclaims for failure to state claims upon which relief can be granted pursuant to Civ.R. 12(B)(6). Ms. Ayers and Mr. Paton filed a brief in opposition. Deutsche Bank filed a reply memorandum in support of its motion to dismiss. Ms. Ayers and Mr. Paton filed a motion for leave to file a surreply, attaching the original of the proposed surreply. Deutsche Bank filed a brief in opposition to the motion for leave. Approximately one

month later, the trial court issued a judgment entry granting Deutsche Bank's motion to dismiss Ms. Ayers' and Mr. Paton's counterclaims without expressly ruling on Ms. Ayers' and Mr. Paton's motion for leave and without discussing its reasoning.

Motion for Summary Judgment and Opposition

{¶12} A magistrate conducted a status conference and scheduled discovery and dispositive motion deadlines. In April and June of 2018, Deutsche Bank filed notices to stay the deadlines due to Ms. Ayers' pending loan modification application. Ultimately, the parties were not able to reach a settlement. In May 2019, pursuant to Deutsche Bank's request, the trial court lifted the stay and scheduled a dispositive motion deadline. Shortly thereafter, Deutsche Bank filed a motion for summary judgment and an affidavit from Howard R. Handville.

{¶13} With respect to his qualifications and personal knowledge, Mr. Handville's affidavit states: (1) he is a senior loan analyst with Ocwen Financial Corporation, whose indirect subsidiary is Ocwen; (2) his statements are based on his personal knowledge; (3) he is familiar with the business records that Ocwen maintains for the purposes of servicing mortgage loans, collection payments, and pursuing any delinquencies (collectively, "servicing records"); and (4) based on his training and general knowledge of the processes by which Ocwen's servicing records are created and maintained, and by or from information provided by persons with knowledge of the activity and transactions reflected in the records, servicing records relating to Ms. Ayers' loan are kept in the ordinary course of Ocwen's regularly conducted business activities.

{¶14} With respect to the note, Mr. Handville's affidavit states: (1) the note is contained in Ocwen's records; (2) the date of the note's execution and original principal

amount; and (3) a true and accurate copy of the note is attached as Exhibit A and incorporated by reference.

{¶15} With respect to the mortgage, Mr. Handville's affidavit states: (1) the mortgage secured repayment of the note; (2) information regarding the encumbered real property and mortgage recording; and (3) a true and accurate copy of the mortgage is attached as Exhibit B and incorporated by reference.

{¶16} With respect to the mortgage assignment, Mr. Handville's affidavit states MERS assigned its interest to Deutsche Bank and a true and accurate copy of the assignment is attached as Exhibit C and incorporated by reference.

{¶17} Mr. Handville's affidavit furthers states: (1) Ocwen is the attorney-in-fact and servicer of Ms. Ayers' loan and is authorized to act on behalf of Deutsche Bank; and (2) a true and accurate copy of a power of attorney is attached as Exhibit D and incorporated by reference.

{¶18} With respect to possession of the note, Mr. Handville's affidavit states: (1) Deutsche Bank was in possession of the Note, and was the holder thereof, when the foreclosure case was filed on March 6, 2017; (2) Deutsche Bank's record custodian received the original Note on or around February 21, 2007, which it then delivered to Ocwen to hold on its behalf; (3) a copy of the custodial record verifying possession is attached as Exhibit O; and (4) Deutsche Bank is in possession of the Note and is currently the holder thereof.

{¶19} With respect to default, Mr. Handville's affidavit states: (1) the account is in default for the payment date of February 1, 2016 and all subsequent payments; (2) Deutsche Bank elected to call the entire balance due and payable in accordance with the

terms of the note and mortgage; (3) the amount due is $1,428,562.54, plus interest at the rate of 3.935% per annum from January 1, 2016, fees, and expenses; (4) the payoff amount through May 9, 2019 is $1,742,199.14; (5) true and accurate copies of the payoff quote and the payment history are attached as Exhibit E and Composite Exhibit F, respectively; and (6) a true and accurate copy of a notice of default and acceleration mailed to Ms. Ayers by first class mail in accordance with the terms of the note and mortgage is attached as Exhibit G and incorporated by reference.

{¶20} Ms. Ayers and Mr. Paton filed a brief in opposition to summary judgment, contending: (1) a material issue of fact remains for trial regarding whether Deutsche Bank had possession of Ms. Ayers' original note when the complaint was filed; (2) Mr. Handville's affidavit was not made on personal knowledge; (3) Deutsche Bank did not comply with all conditions precedent to foreclosure; (4) Deutsche Bank did not authenticate a proper payment history for the note; and (5) Deutsche Bank is not entitled to judgment as a matter of law and material issues of fact remaining for trial regarding the note, mortgage, and mortgage assignment.

{¶21} Attached to the brief in opposition was an affidavit from their counsel in which she states: (1) based on her internet research, an entity named "American Brokers Conduit Corporation" was not formed until March 16, 2012; (2) based on her internet research, Ms. Williams was not an attorney registered in Ohio; and (3) true and accurate copies of her search results are attached.

Deutsche Bank's Reply Brief

{¶22} Pursuant to an agreed stipulation, Deutsche Bank filed a reply brief in support of their motion for summary judgment and a "supplemental affidavit" from Mr. Handville.

{¶23} With respect to his qualifications and personal knowledge, Mr. Handville's supplemental affidavit states: (1) he is a senior loan analyst with Ocwen Financial Corporation, whose indirect subsidiary is PHH Mortgage Corporation ("PHH"), successor by merger to Ocwen; (2) his statements are based on his personal knowledge; (3) as part of its regular business practices and record keeping system, PHH maintains a computer database ("servicing records") of loan transactions with respect to mortgage loans it services; (4) the matters in the servicing records are entered by persons with knowledge at the time of the transaction, occurrence, or event referred to therein, or were made within a reasonable time thereafter, are maintained in the ordinary course of PHH's regular business activity of mortgage servicing, and reflect regularly conducted business practices of mortgage servicing; (5) individuals maintaining PHH's business records are under a business duty to maintain accurate records; (6) he has access to the servicing records maintained with respect to Ms. Ayers' loan; and (7) his statements are based on his personal knowledge, which is obtained through review of PHH and Ocwen's business records made in the ordinary course of business.

{¶24} Mr. Handville's supplemental affidavit contains information regarding the transfer of servicing records. It states: (1) he has reviewed the servicing records for Ms. Ayers' loan, which reflect that PHH currently services her loan and is responsible for the day-to-day management of the account and for maintaining the services records related

to it; (2) the servicing records reflect that Homeward Residential Inc. fka American Home Mortgage Servicing, Inc. ("Homeward") transferred the servicing rights to Ms. Ayers' loan to Ocwen effective March 1, 2013; (3) a copy of the servicing transfer letter is attached as Exhibit A; (4) Ocwen received servicing documents and information related to Ms. Ayers' loan from Homeward due to the transfer of servicing rights to Ocwen; (5) it is a part of Ocwen's regular course of business to accept and incorporate prior services records, such as Homeward's, into its records when a loan is transferred; (6) Ocwen reviewed and incorporated Homeward's servicing records into its record keeping system; (7) Ocwen routinely relies upon the incorporated records as a matter of practice in continuing to service the loan; (8) Homeward's servicing records were provided to Ocwen in the normal course of business; and (9) it is the normal course of business for a successor servicer to receive and rely on the records of a prior service.

{¶25} Mr. Handville's supplemental affidavit also sets forth information regarding the relationship between Ocwen and Homeward, stating: (1) Ocwen merged with Homeward; (2) he has access to the Homeward's corporate records due to the merger; (3) he is personally familiar with the manner in which Homeward's servicing records were created; (4) the information in Homeward's servicing records was entered by persons with knowledge at the time of the transaction, occurrence, or event referred to therein, or were made within a reasonable time thereafter and are maintained in the ordinary course of Homeward's regular business activity of mortgage servicing and reflect regularly conducted business practices of mortgage servicing; and (5) individuals maintaining Homeward's servicing business records were under a business duty to maintain accurate records.

{¶26} With respect to the possession of the note, Mr. Handville's supplemental affidavit states: (1) he reviewed PHH's and Homeward's servicing records; (2) PHH is the attorney-in-fact and servicer of Ms. Ayers' loan and is authorized to act on behalf of Deutsche Bank; (3) PHH's servicing records indicate that Ocwen received the original note from Deutsche Bank's record custodian, Deutsche Bank National Trust Company, on October 20, 2016; (4) a copy of the screenshot documenting Ocwen's receipt of the original note and the collateral file is attached as Exhibit B; (5) Deutsche Bank was in possession of the note through its servicer Ocwen and was the holder of the note when the case was filed on March 6, 2017; (6) Deutsche Bank has remained in possession of the note through its current servicer PHH and is the current holder; (7) he has personally reviewed the original blue-ink note, which is identical to the copy attached as Exhibit A to his original affidavit; and (8) Ms. Ayers' default occurred when she failed to make the payment due on February 1, 2016 and all payments thereafter, meaning the default occurred three years after Ocwen acquired the servicing rights to her loan.

{¶27} With respect to ABC, the original lender and payee under the note, Mr. Handville's supplemental affidavit states: (1) ABC was a fictitious name registered to American Home Mortgage Corporation as shown on the assumed name registrations attached as Exhibits C and D; and (2) ABC was not a separate corporation but was a "doing business as" name that was formally registered with the New York and Ohio Secretaries of State.

{¶28} Three weeks later, the trial court issued a judgment entry granting summary judgment to Deutsche Bank and issuing a decree of foreclosure.

{¶29} Four days after the filing of the judgment entry/decree of foreclosure, Ms. Ayers filed a motion to strike Mr. Handville's supplemental affidavit. She argued: (1) Mr. Handville's personal knowledge and the accuracy of Ocwen's and PHH's servicing records were questionable and material issues of fact remain for trial based on Mr. Handville's statements that PHH received possession of the original note in 2016 while the mortgage was not assigned until 2017; (2) Mr. Handville lacks personal knowledge to authenticate records from ABC and other servicers; (3) Mr. Handville's supplemental affidavit did not authenticate any record to establish that PHH is the current servicer of Ms. Ayers' loan; and (4) Mr. Handville's supplemental affidavit contradicts information Deutsche Bank previously provided about the assignment of Ms. Ayers' mortgage.

{¶30} Deutsche Bank filed a brief in opposition to Ms. Ayers' motion to strike. A magistrate subsequently issued an order denying Ms. Ayers' motion to strike.

{¶31} Ms. Ayers and Mr. Paton timely appealed the trial court's judgment entries granting Deutsche Bank's motion for summary judgment and motion to dismiss. They present three assignments of error for our review:

{¶32} "[1.] The trial court erred by granting appellee Deutsche Bank's motion for summary judgment.

{¶33} "[2.] The trial court erred by granting appellee's motion for summary judgment when the affidavit of Howard R. Handville was not made upon personal knowledge and did not properly authenticate documents.

{¶34} "[3.] The trial court erred by granting appellee's motion to dismiss the counterclaims."

Motion for Summary Judgment

{¶35} In their first and second assignments of error, Ms. Ayers and Mr. Paton set forth several arguments challenging the trial court's decision granting summary judgment to Deutsche Bank. We will review these assignments of error together.

Standard of Review

{¶36} We review de novo a trial court's order granting summary judgment. (Citation omitted.) *Sabo v. Zimmerman*, 11th Dist. Ashtabula No. 2012-A-0005, 2012-Ohio-4763, ¶9. "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." (Citation omitted.) *Id*.

{¶37} "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 judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt* [75 Ohio St.3d 280 (1996)], 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." *Welch v. Ziccarelli*, 11th Dist. Lake No. 2006-L-229, 2007-Ohio-4374, ¶40.

{¶38} The "portions of the record * * * are those evidentiary materials listed in Civ.R. 56(C) * * * that have been filed in the case," which are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact." *Dresher* at 292; Civ.R. 56(C).

{¶39} "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." *Ziccarelli* at ¶40.

Required Elements for Foreclosure

{¶40} To properly support a motion for summary judgment in a foreclosure action, the mortgage lender must present evidentiary-quality materials showing: (1) it is the holder of the note and mortgage or is a party entitled to enforce them; (2) if it is not the original mortgagee, the chain of assignments and transfers; (3) the borrower is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due. *Portage Cty. Commrs. v. O'Neil*, 11th Dist. Portage No. 2013-P-0066, 2015-Ohio-808, ¶13, citing *Wachovia Bank of Delaware v. Jackson*, 5th Dist. Stark No. 2010-CA-00291, 2011-Ohio-3203, ¶40-45.

{¶41} With respect to the fourth element, a mortgage lender may generally allege that the conditions precedent have been satisfied. *See* Civ.R. 9(C). In order to refute such an allegation and put conditions precedent at issue, the borrower must deny performance of the conditions precedent "specifically and with particularity." *Id*.; *LSF6 Mercury REO Invests. Trust Series 2008-1 c/o Vericrest Fin., Inc. v. Locke*, 10th Dist. Franklin No. 11AP-757, 2012-Ohio-4499, ¶11, *overruled on other grounds*, *U.S. Bank Natl. Assn. v. George*, 10th Dist. Franklin No. 14AP-817, 2015-Ohio-4957. Under such circumstances, mortgage lender's compliance with conditions precedent is put at issue. *Locke* at ¶11. Where the mortgage lender moves for summary judgment, it has the burden of establishing the absence of a genuine issue of material fact regarding compliance by reference to materials set forth in Civ.R. 56. *Id*.

{¶42} In its complaint, Deutsche Bank generally alleged that all conditions precedent had been satisfied. In their joint answer, Ms. Ayers and Mr. Paton specifically denied that Deutsche Bank sent Ms. Ayers a valid notice of default and acceleration letter. Where, as here, prior notice of default and/or acceleration is required by a provision in a note or mortgage instrument, the provision of notice is a condition precedent to foreclosure subject to Civ.R. 9(C). (Citations omitted.) *JPMorgan Chase Bank, Natl. Assn. v. Blank*, 11th Dist. Ashtabula No. 2013-A-0060, 2014-Ohio-4135, ¶23. Thus, Ms. Ayers and Mr. Paton placed Deutsche Bank's compliance with this condition precedent at issue and shifted the burden on summary judgment to Deutsche Bank to demonstrate the absence of a genuine issue of material fact.

Deutsche Bank's Reply Brief

{¶43} As an initial matter, we must determine whether we may properly consider Mr. Handville's supplemental affidavit.

{¶44} In support of its position that the trial court properly granted summary judgment, Deutsche Bank points not only to the Mr. Handville's original affidavit, but also to Mr. Handville's supplemental affidavit submitted in conjunction with its reply in support of its motion for summary judgment. Ms. Ayers and Mr. Paton argue that Deutsche Bank inappropriately attempted to introduce new evidence and argument in its reply brief.

{¶45} It is well-established that a party moving for summary judgment must expressly delineate each basis on which it seeks summary judgment in its motion so as to provide the opposing party a meaningful opportunity to respond. *Hicks v. Cadle Co*., 11th Dist. Trumbull No. 2014-T-0103, 2016-Ohio-4728, ¶18, quoting *Baker v. Coast to Coast Manpower*, *L.L.C*., 3d Dist. Hancock No. 5-11-36, 2012-Ohio-2840, ¶35. The danger in allowing a new argument to be asserted in a reply or a supplemental motion is that the opposing party does not have an opportunity to respond and may be subjected to summary judgment by ambush. *Id*.

{¶46} Ms. Ayers and Mr. Paton cite the Ninth District's decision in *HSBC Bank USA v. Beirne*, 9th Dist. Medina No. 10CA0113-M, 2012-Ohio-1386, ¶18. However, *Beirne* involved a party that attempted to support the trial court's granting of summary judgment by pointing to materials attached to its response to a motion to dismiss. *Id*. at ¶18. Thus, the court held that since the materials were not offered in support of its motion for summary judgment, they could not be relied upon to demonstrate the absence of a genuine issue of material fact. *Id*.

{¶47} Here, Mr. Handville's supplemental affidavit was filed in conjunction with Deutsche Bank's reply in support of its motion for summary judgment following the parties' agreed stipulation for an extension of time. Mr. Handville's supplemental affidavit rebutted arguments set forth in Ms. Ayers' and Mr. Paton's opposition, which is the appropriate purpose of a reply brief. *Lawson v. Mahoning Cty. Mental Health Bd.*, 7th Dist. Mahoning No. 10 MA 23, 2010-Ohio-6389, ¶50 ("Typically reply briefs are restricted to matters in rebuttal, not new arguments").

{¶48} Mr. Handville's supplemental affidavit also sought to clarify the issue of the possession of Ms. Ayers' original note. Courts found that such a practice does not constitute the assertion of a new argument in reply. *See, e.g., Bank of New York Mellon v. Crates*, 5th Dist. Licking No. 15-CA-70, 2016-Ohio-2700, ¶21 (holding that an affidavit submitted with a reply brief that sought to clarify the issue of possession of a note did not assert a new argument).

{¶49} Further, when a new argument is raised in a reply, the proper procedure is to strike the reply or, alternatively, to allow the opposing party to file a surreply. *Hicks* at ¶18, quoting *Baker* at ¶35. Ms. Ayers and Mr. Paton did not seek leave to file a surreply. Although Ms. Ayers filed a motion to strike Mr. Handville's supplemental affidavit, she did so after the trial court had issued a judgment entry granting Deutsche Bank's motion for summary judgment. In her motion to strike, she did not allege being ambushed but instead argued that the supplemental affidavit raised material issues of fact.

{¶50} And to the extent the magistrate's order denying her motion to strike merged into the trial court's final order, Ms. Ayers and Mr. Paton did not appeal it or attach it to the notice of appeal in this case. *See* App.R. 3(D) ("The notice of appeal * * * shall

designate the judgment, order or part thereof ap[p]ealed from"); Loc.R. 3(D)(2) ("The appellant shall attach to the Notice of Appeal, a copy of the judgment entry or entries being appealed"). Thus, in these circumstances we conclude that any objection to the consideration of such evidence has been waived. *See Lewis Potts, Ltd. v. Zordich*, 11th Dist. Trumbull No. 2018-T-0028, 2018-Ohio-5341, ¶42 (objection waived where appellant did not seek leave to file a surreply or move to strike the evidence).

Personal Knowledge

{¶51} We now address the merits of Ms. Ayers and Mr. Paton's appeal. Ms. Ayers and Mr. Paton argue that Mr. Handville's affidavit was not made upon personal knowledge and was therefore deficient to authenticate documents.

{¶52} Civ.R. 56(E) provides in pertinent part that "[s]upporting 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." *See Bank of Am. v. Merlo*, 11th Dist. Trumbull No. 2012-T-0103, 2013-Ohio-5266, ¶24. "Personal knowledge" is defined as "'knowledge of a factual truth which does not depend on outside information or hearsay.'" *O'Neil* at ¶16, quoting *Residential Funding Co., LLC v. Thorne*, 6th Dist. Lucas No. L-09-1324, 2010-Ohio-4271, ¶64.

{¶53} "[The] mere assertion of personal knowledge satisfies the personal knowledge requirement of Civ.R. 56(E) if the nature of the facts in the affidavit combined with the identity of the affiant create a reasonable inference that the affiant has personal knowledge of the facts in the affidavit." *Merlo* at ¶25, quoting *Bank One, N.A. v. Lytle*, 9th Dist. Lorain No. 04CA008463, 2004-Ohio-6547, ¶13. Personal knowledge may also be

inferred from the contents of an affidavit. *Id*. at ¶26, citing *Bush v. Dictaphone Corp*., 10th Dist. Franklin No. 00AP1117, 2003-Ohio-883, ¶73.

{¶54} Further, it is not necessary that the witness authenticating a business record have firsthand knowledge of the transaction giving rise to the record. *Id*. at ¶27, citing *State v. Wagner*, 8th Dist. Cuyahoga No. 93432, 2010-Ohio-2221, ¶25. Rather, the witness must be sufficiently familiar with the operation of the business and with the circumstances of the record's preparation and maintenance that he or she can reasonably testify, on the basis of this knowledge, that the record is what it purports to be and that it was made in the ordinary course of business. *Id*.

{¶55} Ms. Ayers and Mr. Paton argue that Mr. Handville's affidavit relies on records from other servicers and does not state that he has knowledge of the record-keeping systems of those servicers.

{¶56} Whether a loan servicer can testify as to documents created by prior servicers has been the subject of a large amount of litigation in Ohio. *See Bank of New York Mellon for Certificate Holders of CWABS, Inc. v. Kohn*, 7th Dist. Mahoning No. 17 MA 0164, 2018-Ohio-3728, ¶12. Ms. Ayers and Mr. Paton cite the Eighth District's decision in *Bank of New York Mellon v. Roulston*, 8th Dist. Cuyahoga No. 104908, 2017-Ohio-8400. In *Roulston*, the lender submitted an affidavit from an individual employed by the lender's loan servicer. *Id*. at ¶18. The court stated that the affidavit demonstrated that the individual was qualified to authenticate documents that the servicer and lender created and maintained, even if she was not the person who prepared the documents. *Id*. However, the individual's affidavit did not show she was qualified to authenticate

records created by the lender's prior loan servicer because it did not state she had familiarity with the prior loan servicer's records. *Id*. at ¶15, 19.

{¶57} The Eighth District subsequently narrowed its *Roulston* holding in a subsequent case. *See U.S. Bank Natl. Assn. v. O'Malley*, 8th Dist. Cuyahoga No. 108191, 2019-Ohio-5340, ¶57. In addition, this court has not adopted the holding in *Roulston*. Rather, we have consistently held that an employee of a loan servicer had the requisite personal knowledge about the material for which he averred by stating his personal knowledge was based on his position and that he personally reviewed the loan servicer's regularly kept business records. *See O'Neil* at ¶17-18; *U.S. Bank Natl. Assn. v. Martz*, 11th Dist. Portage No. 2013-P-0028, 2013-Ohio-4555, ¶25.

{¶58} Further, Ms. Ayers' and Mr. Paton's argument relates only to Mr. Handville's original affidavit. His supplemental affidavit states that he is an employee of Ocwen Financial Corporation, whose indirect subsidiary is PHH; PHH is the successor by merger to Ocwen and is the current loan servicer; and his statements are based on his personal knowledge obtained through review of PHH and Ocwen's business records made in the ordinary course of business.

{¶59} His supplemental affidavit further states that Ocwen incorporated the records of Homeward, the prior loan servicer, into its record keeping system; Ocwen merged with Homeward; he is personally familiar with the manner in which Homeward's servicing records were created; the information in Homeward's servicing records are maintained in the ordinary course of Homeward's regular business activity of mortgage servicing and reflect regularly conducted business practices of mortgage servicing; individuals maintaining Homeward's servicing business records were under a business

duty to maintain accurate records; and he reviewed PHH's and Homeward's servicing records.

{¶60} The foregoing information is sufficient to create a reasonable inference that Mr. Handville's affidavit was based on personal knowledge under this court's precedent and even under the Eighth District's decision in *Roulston*. As a result, the burden shifted to Ms. Ayers and Mr. Paton to present evidentiary materials demonstrating that Mr. Handville's affidavit was not based on personal knowledge. *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 467 (1981) ("The specific allegation in [an] affidavit that it was made upon personal knowledge is sufficient to meet this requirement of Civ.R. 56(E) and, if the adverse party contends otherwise, an opposing affidavit setting forth the appropriate facts must be submitted"); *see also Bank of Am., N.A. v. Jones*, 11th Dist. Geauga No. 2014-G-3197, 2014-Ohio-4985, ¶33; *Nationstar Mtge., L.L.C. v. Hayhurst*, 11th Dist. Trumbull No. 2014-T-0102, 2015-Ohio-2900, ¶30.

{¶61} Having failed to do so, they did not create a genuine issue of material fact as to whether Mr. Handville's affidavit was made on personal knowledge.

Authentication

{¶62} Ms. Ayers and Mr. Paton argue that Mr. Handville's affidavit was insufficient to authenticate Ms. Ayers' original note.

{¶63} There is no requirement in Civ.R. 56(E) that a party produce the original note to be entitled to summary judgment. *Merlo*, *supra*, at ¶21. In fact, that rule allows copies of documents to be authenticated by affidavit. *Id*. Specifically, Civ.R. 56(E) states "[s]worn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit." This requirement is satisfied by attaching the

papers to the affidavit, coupled with a statement therein that such copies are true copies and reproductions. *Seminatore* at 467.

{¶64} In addition, Evid.R. 901 governs authentication or identification of evidence. This rule provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). Authentication and identification are terms which apply to the process of laying a foundation for the admissibility of such nontestimonial evidence as documents and objects. *Premier Capital, L.L.C. v. Baker*, 11th Dist. Portage No. 2011-P-0041, 2012-Ohio-2834, ¶43.

{¶65} Further, Evid.R. 1003 provides that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine issue is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

{¶66} The party opposing the introduction of the duplicate has the burden of proving that there is a genuine question as to the authenticity of the original or that it would be unfair to admit the duplicate. *Merlo* at ¶19, citing *Natl. City Bank v. Fleming*, 2 Ohio App.3d 50, 57 (8th Dist.1981). The objection must be something more than a frivolous objection. *Id*.

{¶67} Mr. Handville's original affidavit states that a true and accurate copy of Ms. Ayers' note is attached as Exhibit A and incorporated by reference. His supplemental affidavit states that he has personally reviewed the original blue-ink note and it is identical to the copy attached as Exhibit A to his original affidavit. Thus, these affidavits comply with Civ.R. 56(E) and Evid.R. 901(A) for purposes of authentication.

{¶68} Ms. Ayers and Mr. Paton did not present any evidence indicating that the note attached to Mr. Handville's affidavit was inaccurate in any way. They argue that it would be unfair to admit a copy of the note because there are factual issues regarding Deutsche Bank's possession of the original note when the complaint was filed. However, authenticating a note and establishing possession are different issues.

{¶69} Accordingly, Ms. Ayers and Mr. Paton have not raised a genuine issue concerning the authenticity of the note attached to Mr. Handville's affidavit or made a showing that in the circumstances presented here, it would be unfair to admit a copy of the note in lieu of the original.

{¶70} Ms. Ayers and Mr. Paton also argue that Mr. Handville's affidavit does not properly authenticate a proper payment history for Ms. Ayers' note because the payment history does not contain Deutsche Bank's letterhead or any reference to Deutsche Bank. Ms. Ayers and Mr. Paton cite no legal authority imposing this requirement, nor do they present any evidence indicating the payment history attached to Mr. Handville's affidavit is somehow inaccurate. Accordingly, Ms. Ayers and Mr. Paton have also not raised a genuine issue of material fact concerning the authenticity of the payment history attached to Mr. Handville's affidavit.

Holder of the Note

{¶71} Ms. Ayers and Mr. Paton argue that genuine issues of material fact exist as to whether Deutsche Bank was in possession of the note prior to the filing of the complaint on March 6, 2017.

{¶72} A plaintiff in a foreclosure action must have standing at the time it files the complaint in order to properly invoke the jurisdiction of the trial court. *Fed. Home Loan*

Mtge. Corp. v. Schwartzwald, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶41-42. The lender must establish it was the holder of the note or a party entitled to enforce the note at the time the complaint was filed. *O'Neil* at ¶13, citing *Schwartzwald* at ¶3. There is no standing to proceed with the foreclosure if the interest did not exist at the time the foreclosure complaint was filed. *Schwartzwald* at ¶25-27. Although the plaintiff in a foreclosure action must have standing at the time suit is commended, proof of standing may be submitted subsequent to the filing of the complaint. *Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 2015-Ohio-1484, syllabus.

{¶73} Ohio's version of the Uniform Commercial Code, set forth at R.C. 1301.01 et seq., governs the creation, transfer, and enforceability of negotiable instruments, including promissory notes secured by mortgages on real estate. *Wells Fargo Bank v. Watson*, 11th Dist. Ashtabula No. 2014-A-0062, 2015-Ohio-2599, ¶28. A person entitled to enforce an instrument includes the holder of the instrument. *Id*. at ¶30; R.C. 1303.31(A)(1). To be a "holder," a party must be in possession of the instrument that is either payable to the party in possession (specifically endorsed) or payable to bearer (blank endorsement). *Watson* at ¶33. A person is a holder of a negotiable instrument, and entitled to enforce the instrument, when the instrument is in the physical possession of his or her agent. *U.S. Bank Natl. Assn. v. Gray*, 10th Dist. Franklin No. 12AP-953, 2013-Ohio-3340, ¶25.

{¶74} In the underlying case, there is no dispute that Ms. Ayers' note was endorsed in blank, making it payable to bearer. Thus, the issue is whether Deutsche Bank met its burden on summary judgment to establish its possession of the note prior to the complaint being filed.

{¶75} In his original affidavit, Mr. Handville's states that Ocwen is the attorney-in-fact and servicer of Ms. Ayers' note on behalf of Deutsche Bank; Deutsche Bank was in possession and the holder of the note when the case was filed; and Deutsche Bank's record custodian received the original note on or about February 21, 2007, which it delivered to Ocwen to hold on its behalf.

{¶76} In support of his affidavit, Mr. Handville attaches as "Exhibit O" a copy of "the custodial record verifying possession." Exhibit O appears to be a computer screenshot of comments dated April 9, 2019. The comments do not establish Deutsche Bank's or Ocwen Loan Servicing's possession of the original note on February 21, 2007. Rather, it states "Per review of Deutsche Bank, as the Custodian's business records reflect, initial date of deposit is unavailable [sic] the collateral file including the original note was added into their system on 02/21/2007" and that "Per review of company records Ocwen is currently in possession of this Original Note." Thus, Exhibit O only establishes that Deutsche Bank added the collateral file and original note into their system on February 21, 2007 and that Ocwen was in possession of the original note after the complaint was filed.

{¶77} However, Ms. Ayers and Mr. Paton's argument does not acknowledge Mr. Handville's supplemental affidavit. In his supplemental affidavit, Mr. Handville states Ocwen received the original note from Deutsche Bank's record custodian, Deutsche Bank National Trust Company, on October 20, 2016. In support, Mr. Handville attaches as "Exhibit B" a copy of "the screenshot documenting Ocwen's receipt of the original Note and the collateral file." Exhibit B appears to be a computer screenshot of dated October 20, 2016. This document states: "Collateral file review from Custodian"; "Deutsche Bank

– ORIGINAL MORTGAGE"; "ORIGINAL NOTE RECEIVED." This document supports Mr. Handville's statement in his supplemental affidavit regarding Ocwen's possession of the original note prior to the filing of the complaint,

{¶78} While Mr. Handville's affidavits create an issue of fact as to the exact date Deutsche Bank's agent came into possession, both dates are prior to the filing of the complaint. Thus, this issue of fact is not *material* and does not preclude summary judgment. *See* Civ.R. 56(C).

Holder of the Mortgage

{¶79} Ms. Ayers and Mr. Paton argue that genuine issues of material fact exist as to whether Deutsche Bank is the valid holder of the mortgage.

{¶80} "Holder of the mortgage" means the holder of the mortgage as disclosed by the records of the recorder of the county in which the mortgaged premises are situated. R.C. 5301.232(E)(3). There is no dispute that Ms. Ayers granted a mortgage to MERS, who subsequently assigned it to Deutsche Bank prior to the filing of the complaint. Rather, Ms. Ayers and Mr. Paton challenge MERS' assignment of the mortgage to Deutsche Bank.

{¶81} Ms. Ayers and Mr. Paton first argue that the original lender under the mortgage filed a Chapter 11 bankruptcy, and Deutsche Bank presented no evidence that the original lender retained the loan after termination of the bankruptcy estate. However, Ms. Ayers and Mr. Paton did not assert this argument in their opposition to Deutsche Bank's motion for summary judgment. This court has held that "if during a summary judgment exercise, the nonmoving party fails to raise an issue when responding to the moving party's motion for summary judgment, the nonmoving party has waived that issue

on appeal." *Great Lakes Window, Inc. v. Resash, Inc*., 11th Dist. Trumbull No. 2006-T-0114, 2007-Ohio-5378, ¶24.

{¶82} Ms. Ayers and Mr. Paton also argue that the assignment of Ms. Ayers' mortgage was void because it was drafted by an individual who was not a licensed attorney. We acknowledge that Supreme Court of Ohio has determined the unauthorized practice of law includes the preparation of legal documents on another's behalf, including deeds which convey real property. *See Disciplinary Counsel v. Doan*, 77 Ohio St.3d 236, 237 (1997). However, the Supreme Court of Ohio also has exclusive jurisdiction over the practice of law in Ohio, including the unauthorized practice of law. *See Greenspan v. Third Fed. S. & L. Assn.*, 122 Ohio St.3d 455, 2009-Ohio-3508, paragraph two of syllabus. Ms. Ayers and Mr. Paton cite no legal authority which would permit us to invalidate an assignment of mortgage on the basis that its creation constituted the unauthorized practice of law.

{¶83} Accordingly, Ms. Ayers and Mr. Paton have not raised a genuine issue of material fact as to whether Deutsche Bank is the holder of the mortgage.

Condition Precedent

{¶84} Finally, Ms. Ayers and Mr. Paton argue that Deutsche Bank failed to satisfy a condition precedent to foreclosure because it did not provide Ms. Ayers with a proper notice of acceleration.

{¶85} On summary judgment, Deutsche Bank provided the affidavit of Mr. Handville, which states (1) Ms. Ayers defaulted on the note and mortgage, (2) Deutsche Bank elected to call the entire balance of the account due and payable, (3) a true and accurate copy of the notice of default and acceleration is attached and incorporated by

reference, and (4) the notice was mailed to Ms. Ayers by first class mail in accordance with the terms of the note and mortgage.

{¶86} Paragraph 22 of Ms. Ayers' mortgage requires the lender to give notice to Ms. Ayers prior to acceleration of the loan. Among other things, the notice "shall further inform" Ms. Ayers of "the right to reinstate after acceleration." Ms. Ayers contends that Deutsche Bank did not properly accelerate the loan because its notice stated Ms. Ayers "*may* have the right to reinstate the mortgage loan, depending on the terms of the note and mortgage" rather than informing her that she did have the right to reinstate. (Emphasis added.) In support, she cites *Fed. Natl. Mtge. Assn. v. Marroquin*, 477 Mass. 82, 89-90 (2017), which is a decision from the Supreme Judicial Court of Massachusetts.

{¶87} In addition to being nonbinding, we find *Marroquin* to be inapposite. Unlike in Ohio, Massachusetts permits foreclosure of mortgages by the exercise of a "power of sale" without "judicial oversight." *See id.* at 86. Because of that "substantial power," the lender must "strictly comply with the terms of a mortgage." *See id*. Apparently, the case on which *Marroquin* relies was decided by a bare majority and has not been followed outside of Massachusetts other than in Alabama. *See Aubee v. Selene Fin., LP*, D.R.I. No. 19-37WES, 2019 WL 7282019, *5 (Dec. 27, 2019).

{¶88} Further, we find that the notice at issue in this case was not deficient. Ms. Ayers' right to reinstate after acceleration is set forth in Paragraph 19 of her mortgage and states she "shall have" such a right if she meets certain specified conditions. Thus, the notice accurately informed her that she "may" have a right to reinstate, because obtaining the right required Ms. Ayers' performance of several conditions. Accordingly,

Ms. Ayers and Mr. Paton have not raised a genuine issue of material fact as to whether Deutsche Bank complied with a condition precedent.

{¶89} Ms. Ayers' and Mr. Paton's first and second assignments of error are without merit.

Motion to Dismiss

{¶90} In their third assignment of error, Ms. Ayers and Mr. Paton argue that the trial grant erred in granting Deutsche Bank's motion to dismiss their counterclaims.

{¶91} Ms. Ayers and Mr. Paton asserted three counterclaims against Deutsche Bank: violations of the Fair Debt Collection Practices Act (Count 1), common law fraud (Count 2), and invasion of privacy by intrusion upon seclusion (Count 3). All three counterclaims are premised on allegations that Deutsche Bank is not entitled to enforce the note and mortgage at issue in this case.

{¶92} Ms. Ayers and Mr. Paton raised many of these arguments in opposition to summary judgment. Thus, the trial court's granting of summary judgment to Deutsche Bank, which we have affirmed above, constituted a ruling on the issues contained the counterclaims, making them either adjudicated or moot. *Wells Fargo Bank, N.A. v. Jarvis*, 7th Dist. Columbiana No. 08-CO-30, 2009-Ohio-3055, ¶27; *Victor Asset Acquisition, L.L.C. v. Woogerd*, 5th Dist. Richland Nos. 15-CA-47 & 15-CA-69, 2016-Ohio-1435, ¶50; *see also Wells Fargo Bank, N.A. v. Dumm*, 4th Dist. Athens No. 13CA5, 2014-Ohio-3124, ¶10 (summary judgment entry in foreclosure that addressed issues raised in cross-claim rendered the cross-claim moot); *Mid-American Natl. Bank & Trust Co. v. Boyer*, 6th Dist. Lucas No. L-83-219, 1983 WL 6986, *1 (Nov. 4, 1983) (granting of summary judgment in foreclosure rendered a counterclaim and cross-claim moot); *Wise v. Gursky*, 66 Ohio

St.2d 241, 243 (1981) (a judgment on a jury verdict determined the claims and issues in a third-party complaint).

{¶93} To the extent Ms. Ayers and Mr. Paton did not raise certain arguments regarding Deutsche Bank's right to enforce the note and mortgage in opposition to summary judgment, they were waived. A party opposing summary judgment must inform the trial court and the other party of the basis of his or her opposition, so that the court and other party are on notice of all potential issues. *Crandall v. Fairborn*, 2d Dist. Greene No. 2002-CA-55, 2003-Ohio-3765, ¶18.

{¶94} Further, to the extent Ms. Ayers and Mr. Paton raised certain arguments in opposition to summary judgment but did not raise them on appeal, they have been abandoned. *See Jarvis* at ¶33 ("Errors not argued in a brief will be regarded as having been abandoned"); *State v. Mangold*, 11th Dist. Portage No. 2008-P-0033, 2008-Ohio-6406, ¶37 ("by failing to make this argument in his brief, it is abandoned on appeal").

{¶95} Accordingly, Ms. Ayers' and Mr. Paton's third assignment of error is dismissed as moot.

{¶96} Based on the foregoing, the judgments of the Portage County Court of Common Pleas are affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.