**[Cite as *Wachovia Mtge. Corp. v. Aleshire* , 2009-Ohio-5097.]**

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| WACHOVIA MORTGAGE CORPORATION<br><br>Plaintiff-Appellee<br><br>-vs-<br><br>SUSAN R. and LONNY J. ALESHIRE, JR., et al.<br><br>Defendants-Appellants | JUDGES:<br>Hon. Sheila G. Farmer, P. J.<br>Hon. John W. Wise, J.<br>Hon. Julie A. Edwards, J.<br><br>Case No. 09 CA 4<br><br>O P I N I O N |

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| CHARACTER OF PROCEEDING: | Civil Appeal from the Court of Common Pleas, Case No. 08 CV 1835 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | September 28, 2009 |

APPEARANCES:

| For Plaintiff-Appellee | For Defendants-Appellants |
|---|---|
| M. ELIZABETH HILS<br>LERNER SAMPSON & ROTHFUSS<br>120 East Fourth Street, Suite 800<br>Cincinnati, Ohio 45202 | SUSAN R. ALESHIRE, PRO SE<br>LONNY J. ALESHIRE, JR., PRO SE<br>503 East Main Street<br>Hebron, Ohio 43025 |

*Wise, J.*

**{¶1}** Appellants Susan R. Aleshire and Lonny J. Aleshire, Jr. appeal the decision of the Licking County Court of Common Pleas, which granted summary judgment in favor of Appellee Wachovia Mortgage Corporation in a foreclosure action. The relevant facts leading to this appeal are as follows.

**{¶2}** On or about February 27, 2006, appellants obtained a $155,500.00 mortgage from Appellee Wachovia on their principal residence. The note set forth terms of repayment by appellants of $982.86 per month for thirty years.

**{¶3}** On June 1, 2008, appellants went into default. Appellee asserts that on August 4, 2008, it sent two notices to appellants of default/intent to accelerate. One notice was sent to appellants' "property address" of 503 East Main Street, Hebron, Ohio 43025. The other notice was sent to appellants' "mailing address" of P.O. Box 1311, Hebron, Ohio 43025.

**{¶4}** On September 24, 2008, appellee filed a complaint in foreclosure against appellants, further naming the Licking County Treasurer as a defendant. Certified mail service on appellants was accomplished both at the aforecited "property address" and "mailing address." In addition, the Licking County Sheriff delivered a summons and complaint to appellants' "property address."

**{¶5}** On October 20, 2008, appellants filed an answer to the complaint and a motion to dismiss. On November 3, 2008, appellee responded with a memorandum in opposition to the motion to dismiss.

**{¶6}** On November 14, 2008, appellants filed a "notice of failure to provide service" concerning appellee's memorandum in opposition to appellants' motion to

dismiss. On November 19, 2008, appellants also filed a motion to strike said memorandum in opposition to the motion to dismiss. However, on the same date, the trial court denied appellants' motion to dismiss.

**{¶7}** On December 10, 2008, appellee filed a motion for summary judgment with a supporting affidavit.

**{¶8}** On January 8, 2008, appellants filed a response to appellee's motion for summary judgment.

**{¶9}** On January 9, 2009, the trial court entered summary judgment in favor of appellee and issued a decree of foreclosure.

**{¶10}** On January 16, 2009, appellants filed a notice of appeal.[1] They herein raise the following three Assignments of Error:

**{¶11}** "I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANTS' 'MOTION TO STRIKE PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS.

**{¶12}** "II. THE TRIAL COURT ERRED IN DENYING THE DEFENDANTS' MOTION TO DISMISS.

**{¶13}** "III. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT."

I., II.

**{¶14}** In their First Assignment of Error, appellants maintain the trial court erred in denying their motion to strike appellee's memorandum in opposition to appellants'

[1] Appellee indicates it voluntarily withdrew the property at issue from foreclosure sale pending this appeal.

motion to dismiss. In their Second Assignment of Error, appellants contend the trial court erred in denying the motion to dismiss itself. We disagree on both counts.

**{¶15}** Civ.R. 5(D) states in pertinent part: " *** Papers filed with the court shall not be considered until proof of service is endorsed thereon or separately filed. The proof of service shall state the date and manner of service and shall be signed in accordance with Civ.R. 11."

**{¶16}** In support of their present argument, appellants correctly point out that appellee's memorandum of November 3, 2008, opposing appellants' motion to dismiss, failed to include a proof of service under Civ.R. 5(D). However, in addressing appellants' claim that the trial court should have stricken appellee's said memorandum, we must be mindful of the " *** elementary proposition of law that an appellant, in order to secure reversal of a judgment against him, must not only show some error but must also show that that error was prejudicial to him." See *Ames v. All American Truck & Trailer Service* (Feb. 8, 1991), Lucas App. No. L-89-295, quoting *Smith v. Flesher* (1967), 12 Ohio St.2d 107, 110, 233 N.E.2d 137. See, also, App.R. 12(D).

**{¶17}** In order to review for prejudicial error under these circumstances, it is incumbent that we turn to appellants' dismissal motion. Appellants have not, either before the trial court in said motion or in this appeal, identified the section of the Ohio Civil Rules on which they rely to support dismissal of the foreclosure complaint. They presently assert that their motion to dismiss "was jurisdictional in nature as it contested that Wachovia had not met all conditions precedent [for a legal action]." Appellants' Brief at 5. We will thus construe appellants' motion to dismiss as one based on a theory of

lack of standing to sue by appellee. Cf. *State ex rel. Shulman v. City of Cleveland* (Nov. 13, 1980), Cuyahoga App.No. 41600.

**{¶18}** Nonetheless, because appellants, in their response to appellee's motion for summary judgment, again raised the argument that appellee had not properly provided notice of default under the terms of the mortgage and note prior to commencing legal action, the trial court was able to conduct a more informed analysis, in its summary judgment review, of the "condition precedent" argument advanced by appellants. We thus hold appellants have failed to demonstrate prejudicial error as to the denial of their motion to strike appellee's memorandum in opposition to appellants' motion to dismiss and the denial of their motion to dismiss.

**{¶19}** Appellants' First and Second Assignments of Error are therefore overruled.

III.

**{¶20}** In their Third Assignment of Error, appellants contend the trial court erred in granting summary judgment in favor of appellee. We disagree.

**{¶21}** As an appellate court reviewing summary judgment issues, we must stand in the shoes of the trial court and conduct our review on the same standard and evidence as the trial court. *Porter v. Ward,* Richland App.No. 07 CA 33, 2007-Ohio-5301, ¶ 34, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212.

**{¶22}** Civ.R. 56(C) provides, in pertinent part:

**{¶23}** "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of

evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. * * * ”

**{¶24}** Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt,* 75 Ohio St.3d 280, 1996-Ohio-207.

**{¶25}** The focus of this assigned error is again the issue of appellee’s notice to appellants prior to the commencement of the foreclosure action. It appears undisputed that sections 20 and 22 of the mortgage document, read together, prohibit the lender (herein appellee) from commencing any legal action against the borrowers without prior

written notice and the allowance of thirty days to cure an alleged default. The note at issue contains the following notice provision:

**{¶26}** "**7. GIVING OF NOTICES**.

**{¶27}** "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."

**{¶28}** The mortgage at issue contains the following notice provision:

**{¶29}** "**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. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security instrument at any one time. ***."

**{¶30}** In their response to summary judgment, appellants attached affidavits that they did not receive written notice of the default, and that "at all times relevant to the complaint" the U.S. Postal Service did not deliver any mail at all to the property address of 503 East Main Street, Hebron, Ohio.

**{¶31}** Nonetheless, a review of the record demonstrates that attached to appellee's motion for summary judgment is an affidavit from Theresa Morgan Walser, a foreclosure specialist for Appellee Wachovia, who avers that appellants were sent notice of default by letter. A copy of said letter to the P.O. Box "mailing address" is attached to Walser's affidavit as "Exhibit D."[2] Said letter is dated August 4, 2008, well over a month prior to appellee's court action.

**{¶32}** Upon review, we find appellants supplied no evidence in response that would contradict the information supplied in the Walser affidavit or that would show any issue of material fact in dispute concerning notice of default.

**{¶33}** We therefore hold that summary judgment in favor of appellee was not erroneous under the facts and circumstances presented.

**{¶34}** Appellant's Third Assignment of Error is therefore overruled.

**{¶35}** For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Licking County, Ohio, is hereby affirmed.

By: Wise, J.
Farmer, P. J., and
Edwards, J., concur.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ JULIE A. EDWARDS_____

JUDGES

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[2] Appellants do not herein propose that the P.O. Box address was incorrect per se. See "Defendant's Response to Plaintiff's Motion for Summary Judgment" at 3.

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
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| WACHOVIA MORTGAGE CORPORATION | : | |
| Plaintiff-Appellee | : | |
| -vs- | : | JUDGMENT ENTRY |
| SUSAN R. and LONNY J. ALESHIRE, JR., et al. | : | |
| Defendants-Appellants | : | Case No. 09 CA 4 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

Costs assessed to appellants.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ JULIE A. EDWARDS_____

JUDGES