[Cite as *Wells Fargo Bank v. Rajaie*, 2010-Ohio-2546.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
WELLS FARGO BANK	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 09-CAE-03-0027
SEPEHR RAJAIE, ET AL	:	
	:	
Defendants-Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Delaware County Court of Common Pleas, Case No. 08CVE09 1217
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 3, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
SALLIE CONYERS MATTHEW GLADWELL DANIEL COX 2035 Red Bank Road Cincinnati, Oh 45202	NOURE ALO HARRISON ALO 4249 Easton Way, Ste. 125 Columbus, OH 43219

Gwin, P.J.

{¶1} Defendants Sepehr and Lisa Rajaie appeal a summary judgment of the Court of Common Pleas of Delaware County, Ohio, which denied their application to refer this matter to court-ordered mediation in their foreclosure action with plaintiff-appellee Wells Fargo Bank, National Association as Trustee for Securitized Asset-Backed Receivables, LLC 2005-FR3 Mortgage Pass-Through Certificates Series 2005-F.R.3, hereinafter referred to as "the Bank". The court granted summary judgment in favor of the Bank and ordered the property be sold at sheriff's sale. Appellants assign two errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED IN DENYING APPELLANTS' REQUEST FOR COURT-ORDERED MEDIATION WITH APPELLEE LENDER.

{¶3} "II. THE TRIAL COURT ERRED IN FINDING NO GENUINE ISSUE AS TO ANY MATERIAL FACT."

I.

{¶4} In their first assignment of error, appellants argue the trial court should have referred the matter to court-ordered mediation. Appellants argue they attempted to get permission from the Bank to make a "short sale", but the Bank delayed and failed to cooperate with their request, causing appellants to lose their buyer.

{¶5} Court-ordered mediation is governed by Loc. R. 41 of Delaware County Common Pleas Court. The Rule provides in certain cases, a trial judge may refer a matter to a magistrate, volunteer attorney, or appointed designee for a mediation conference. Although the trial court declined to order mediation, it advised the parties they were free to pursue mediation on their own initiative.

{¶6} The use of the word "may" indicates a court has discretion to take a given action. *State ex rel. Dann v. Coen,* Stark App. No. 2008-CA-00050, 2009-Ohio-4000. Under the canons of construction, "may" is permissive, not mandatory. *Russo v. Chittick* (1988), 48 Ohio App.3d 101, 548 N.E.2d 314.

{¶7} In reviewing a trial court's exercise of its discretion, this court cannot reverse unless we find a trial court abused its discretion. The Supreme Court has repeatedly held the term "abuse of discretion" implies the court's attitude is unreasonable, arbitrary or unconscionable. See, e.g., *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 450 N.E. 2d 1140. In applying the abuse of discretion standard we may not substitute our judgment for that of the trial court. *Pons v. Ohio State Medical Board* (1993), 66 Ohio St. 3d 619, 621, 614, N.E. 2d 748.

{¶8} The trial court found the Foreclosure Mediation Program "is available only to those Defendants who currently reside in the home" and determined appellants did not qualify. We find the trial court did not abuse its discretion in not referring the matter to court-ordered mediation.

{¶9} The first assignment of error is overruled.

II.

{¶10} In their second assignment of error, appellants argue the trial court erred in granting summary judgment because there were material facts in genuine dispute. Appellants argue appellees prevented them from selling the property and avoiding foreclosure.

{¶11} Civ. R. 56 states in pertinent part:

{¶12} "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. No evidence or stipulation may be considered except as stated in this rule. 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶13} A trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St. 2d 427. The court may not resolve ambiguities in the evidence presented, *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App. 3d 301.

{¶14} When reviewing a trial court's decision to grant summary judgment, an appellate court applies the same standard used by the trial court, *Smiddy v. The*

Wedding Party, Inc. (1987), 30 Ohio St. 3d 35. This means we review the matter de novo, *Doe v. Shaffer,* 90 Ohio St.3d 388, 2000-Ohio-186.

{¶15} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St. 3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, Id. The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App. 3d 732.

{¶16} The record indicates appellants did not respond to the motion for summary judgment. The evidence before the trial court presented no genuine dispute of material fact. The trial court thus did not err in granting summary judgment in favor of the Bank.

{¶17} The second assignment of error is overruled.

{¶18} For the foregoing reasons, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Wise, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE

WSG:clw 0519

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IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

WELLS FARGO BANK	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
SEPEHR RAJAIE, ET AL	:	
Defendants-Appellants	:	CASE NO. 09-CAE-03-0027

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

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE