[Cite as *HSBC Bank USA Natl. Assn. as Trustee v. Lampron,* 2010-Ohio-5088.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
HSBC BANK USA NATIONAL	:	Hon. Julie A. Edwards, P.J.
ASSOCIATION AS TRUSTEE	:	Hon. W. Scott Gwin, J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	
	:	
-vs-	:	Case No. 10-CA-5
	:	
LAURIE LAMPRON, ET AL	:	
	:	O P I N I O N
Defendants-Appellants		

CHARACTER OF PROCEEDING:	Civil appeal from the Fairfield County Court of Common Pleas, Case No. 09-CV-0778
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 15, 2010

APPEARANCES:

For Plaintiff-Appellee

KIMBERLEE ROHR
M. ELIZABETH HILS
CHRISTOPHER J. MANTICA
LERNER, SAMPSON & ROTHFUSS
P.O. Box 5480
Cincinnati, OH 45202

For Defendants-Appellants

ROBIN L. JINDRA
JAMES R. BILLINGS
ZACKS LAW GROUP LLC
33 South James Road, 3rd Floor
Columbus, OH 43213

Gwin, J.

{¶1} Defendant Laurie Lampron appeals a summary judgment of the Court of Common Pleas of Fairfield County, Ohio, entered in favor of plaintiff-appellee HSBC Bank USA on its complaint for foreclosure. Defendants Brett Lampron, the Melrose Homeowners Association, the Ohio State University, the State of Ohio Department of Taxation, and the Attorney General of the United States were also defendants, but are not parties to this appeal.

{¶2} Appellant assigns a single error to the trial court:

{¶3} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT ON DECEMBER 29, 2009."

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

{¶5} "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."

{¶6} 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.

{¶7} 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.

{¶8} 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.

{¶9} In support of its motion for summary judgment, appellee submitted the affidavit of Kathy Smith, Assistant Secretary for American Home Mortgage, the servicing agent for HSBC. Smith's affidavit stated she had custody of appellant's account, the company's records of its accounts are compiled at or near the time of each occurrence by persons with knowledge of the events, and the records are kept in the course of the company's regularly conducted business activity. Smith's affidavit authenticated the Note, Mortgage, and Assignment of Mortgage and attached them as exhibits to her affidavit. Smith also authenticated a letter sent to appellant on March 10, 2009, giving notice appellant was in default.

{¶10} Appellee also submitted the affidavit of Michelle Halyard, Vice President of appellee's servicing agent. Halyard stated there was a default in payment on the loan and there was due on the account $257,958.17, plus interest at a rate of 5% per year from the date of default, plus advances for taxes and insurance and any other costs which appellee had expended to protect the subject property.

{¶11} Appellant filed a memorandum contra the motion for summary judgment, stating she did not receive a notice of default or a notice of acceleration of the loan. Appellant disputed the amount due under the Note, alleging there was no record of how payments were applied to the principal. Finally, appellant alleged she was not served with a copy of the complaint.

{¶12} The trial court found all necessary parties had been properly served and were before the court. The court found there was no genuine issue as to any material

fact, and there is due and owing to appellee from appellant the principle balance of $257,958.17 on a Promissory Note secured by a mortgage on the property in question. The court found the mortgage was a valid and first lien on the property, and the defendants, other than Brett Lampron, all filed separate answers asserting their interest in the real estate, but those interests are junior in priority to appellee's interest. Brett Lampron filed no responsive pleading and was in default.

{¶13} The court ordered that unless the sums it found to be due appellee and the cost of the action be fully paid within three days from the date of the entry of the decree, appellant's right of redemption of in the real estate shall be foreclosed and the real estate sold.

{¶14} Appellee asserts neither the Note nor the Mortgage contains a provision which requires the lender to give the borrower notice of default or notice of acceleration. Nevertheless, appellee states its servicing agent did send a letter to appellant advising her she was in default under the terms of the Note and the Mortgage.

{¶15} Appellee argues there is no genuine issue of material fact whether appellant received notice of the foreclosure action because she was served via residential service by the sheriff, and failed to contest the sufficiency of the service of process. She filed an answer and other pleadings in the case, and thus, voluntarily submitted to the jurisdiction of the court.

{¶16} An individual may waive personal jurisdiction by voluntarily appearing and submitting to the jurisdiction of the court. *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156, 464 N.E.2d 538. In *American Diversified Developments, Inc. v. Hilti Construction Chemicals, Inc.* (Oct. 29, 1998), Cuyahoga App. Nos.73116 and 73168, the Eighth

Appellate District has held a defendant may waive personal jurisdiction by "actively litigating the suit," even in circumstances where the defense of lack of personal jurisdiction has been properly raised. *Hilti* at p. 9, citations deleted.

{¶17} Appellant cites us to *NovaStar v. Atkins,* 11th Dist. No. 2007-T-0111 and 2007-T-0117, 2008-Ohio-6055. In *NovaStar*, the Court of Appeals for Trumbull County found the Common Pleas Court's judgment entry granting foreclosure was vague and uncertain. The entry ordered the defendant to pay the principal plus interest at the rate of 9.1% per annum from September 1, 2005, plus late charges, costs and advances, as provided in the Note and Mortgage. The trial court also ordered the defendant to pay any advances made on the property for real estate taxes, insurance premiums, and property protection and maintenance by the mortgagee. The trial court in *NovaStar* did not make a finding regarding the actual cost of any such advances, and in fact, the record did not contain any evidence that the mortgagee had actually made any advances.

{¶18} The Trumbull County Court of Appeals found the judgment entry was vague and uncertain because it did not set forth what the appellant's obligation was with reasonable certainty.

{¶19} Appellee reminds us the *NovaStar* court conceded certain of the costs could not be determined until after the property was sold and the final tallies submitted. Appellant did not object to the court's failure to itemize the costs and expenses, and did not bring the matter to the court's attention. Similarly, appellee did not outline any expenses it had advanced to preserve the property during the pendency of the case, so

the court had no evidence before it from which to determine any advances. Neither party fully fulfilled its obligation to the court.

{¶20} Our review of the record leads us to conclude the judgment entry is not void for vagueness. We conclude the trial court was correct in entering summary judgment on behalf of appellee.

{¶21} The assignment of error is overruled.

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

By Gwin, J.,

Edwards, P.J., and

Farmer, J., concur

_____

HON. W. SCOTT GWIN

_____

HON. JULIE A. EDWARDS

_____

HON. SHEILA G. FARMER

WSG:clw 0830

[Cite as *HSBC Bank USA Natl. Assn. as Trustee v. Lampron*, 2010-Ohio-5088.]

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

HSBC BANK USA NATIONAL ASSOCIATION AS TRUSTEE	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
LAURIE LAMPRON, ET AL	:	
Defendants-Appellants	:	CASE NO. 10-CA-5

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

_____
HON. W. SCOTT GWIN

_____
HON. JULIE A. EDWARDS

_____
HON. SHEILA G. FARMER