**[Cite as *Natl. City Mtge. v. Skipper*, 2009-Ohio-5940.]**

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| STATE OF OHIO | ) | IN THE COURT OF APPEALS |
| | )ss: | NINTH JUDICIAL DISTRICT |
| COUNTY OF SUMMIT | ) | |

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| NATIONAL CITY BANK<br><br>Appellee<br><br>v.<br><br>DARNELL L. SKIPPER, et al.<br><br>Appellant | C.A. No. 24772<br><br><br><br>APPEAL FROM JUDGMENT<br>ENTERED IN THE<br>COURT OF COMMON PLEAS<br>COUNTY OF SUMMIT, OHIO<br>CASE No. CV 2008-03-2063 |

DECISION AND JOURNAL ENTRY

Dated: November 10, 2009

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MOORE, Presiding Judge.

**{¶1}** Appellant, Darnell Skipper, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

**{¶2}** On October 5, 2007, Darnell Skipper and Appellee, National City Mortgage, executed a promissory note. The note was secured by a mortgage held by National City. Pursuant to the note, Skipper was required to make the first payment on December 1, 2007. The parties agree that Skipper did not make a payment in December. Skipper contends that he made a payment on January 15, 2008 through Huntington Bank's online bill payment service. Skipper could not verify that National City received this payment. On January 25, 2008, National City sent Skipper a notification that he was in default of the mortgage and that if he did not make the loan current by February 1, 2008, including the penalties, National City would accelerate the

payments and institute a foreclosure action. National City did not receive payment and on March 10, 2008, filed the instant foreclosure action.

**{¶3}** After requesting, and receiving, leave to plead, Skipper filed an answer along with several affirmative defenses. On June 16, 2008, National City filed its motion for summary judgment. On August 1, 2008, Skipper responded with his brief in opposition and cross-motion for summary judgment. From August 2008 to December 2008, the parties attended several mediation sessions, but were unable to reach an agreement. On November 20, 2008, Skipper filed a motion for leave to file an amended answer and counterclaim. On April 28, 2009, the trial court granted National City's summary judgment motion and denied Skipper's motion for summary judgment. On April 29, 2008, the trial court entered its final order and decree of foreclosure. Skipper timely appealed. He has raised three assignments of error for our review.

II.

**ASSIGNMENT OF ERROR I**

> "THE TRIAL COURT ERRED BY FAILING TO RULE ON AND IN EFFECT DENYING [] SKIPPER'S MOTION FOR LEAVE TO FILE AN AMENDED ANSWER AND COMPULSORY COUNTERCLAIM WHEN HE DID NOT UNDULY DELAY IN THE FILING OF THE MOTION AND THERE WAS NO ACTUAL PREJUDICE TO NATIONAL CITY MORTGAGE."

**{¶4}** In his first assignment of error, Skipper contends that the trial court erred by denying his motion for leave to file an amended answer and compulsory counterclaim. We do not agree.

**{¶5}** Civ.R. 15 governs a motion for leave to amend the pleadings. We review the trial court's determination under this Rule for an abuse of discretion. See *RPM, Inc. v. Oatey Co.*, 9th Dist. No. 3282-M, 3289-M, 2005-Ohio-1280, at ¶55-58. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in

its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

**{¶6}** Pursuant to Civ.R. 15(A), if a party seeks to amend a pleading

> "to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires."

**{¶7}** Because Civ.R. 15(A) contains a liberal amendment policy, "'a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party.'" *L.E. Sommer Kidron, Inc v. Kohler*, 9th Dist. No. 06CA0044, 2007-Ohio-885, at ¶35, quoting *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1, 6. A party may be prejudiced when an opposing party seeks to assert defenses at a time when the party could not adequately prepare to litigate them. Id. at ¶36, citing *St. Mary's v. Dayton Power & Light Co*. (1992), 79 Ohio App.3d 526.

**{¶8}** We initially note that at the commencement of this case, Skipper requested, and was granted, an additional 21 days to answer National City's complaint. See *Merrill Lynch Mtge. Lending, Inc. v. 1867 West Market, L.L.C.*, 9th Dist. No. 23443, 2007-Ohio-2198, at ¶12. On May 19, 2008, Skipper filed his answer. On June 16, 2008, National City filed its motion for summary judgment. Skipper again requested, and was granted, an additional 30 days to file a response to this motion. In July of 2008, the matter was referred to a foreclosure specialist. Despite the referral, on August 1, 2008, Skipper filed his response to National City's summary judgment along with a cross-motion for summary judgment. On November 20, 2008, over 150 days after NCM filed its motion for summary judgment, and over 100 days after he filed his

cross-motion for summary judgment, Skipper filed his motion for leave to amend his answer and counterclaim. We have determined that "an attempt to amend a complaint following the filing of a motion for summary judgment raises the spectre of prejudice. Therefore, plaintiffs should not be permitted to sit by for this period and bolster up their pleadings in answer to a motion for summary judgment." (Internal citations and quotations omitted.) *Cunningham v. Cunningham*, 9th Dist. No. 01CA007938, 2002-Ohio-2647, at ¶16. Because Skipper failed to timely file his motion to amend his answer and counterclaim, we conclude that the trial court did not abuse its discretion in denying the same. Id. at ¶17, citing *Johnson v. Norman Malone & Assoc., Inc.* (Dec. 20, 1989), 9th Dist. No. 14142, at *5 (concluding that trial court did not abuse its discretion in denying plaintiff's motion to amend when plaintiff filed this motion almost twenty months after the original complaint, and three weeks after both parties had filed motions for summary judgment). Accordingly, Skipper's first assignment of error is overruled.

**ASSIGNMENT OF ERROR II**

> "THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO NATIONAL CITY MORTGAGE BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACT WITH RESPECT TO ITS CAPACITY TO SUE SINCE NATIONAL CITY MORTGAGE IS AN UNREGISTERED FICTITIOUS ENTITY WITHOUT AUTHORITY TO CONDUCT BUSINESS OR SUE IN THE STATE OF OHIO."

**{¶9}** In his second assignment of error, Skipper contends that the trial court erred when it granted National City's summary judgment motion because there was a genuine issue of material fact with respect to its capacity to sue because National City is an unregistered fictitious entity without authority to conduct business or sue in Ohio. We do not agree.

**{¶10}** While Skipper mentions capacity to sue in his assignment of error, he states in his supporting argument that "there was a genuine issue of material fact regarding [National City's] standing to bring a foreclosure action, an issue raised in Mr. Skipper's answer[.] *** [National

City], an apparent trade name, was not registered with the Ohio Secretary of State of State, a fact not contested by [National City] in this litigation."

**{¶11}** Standing is a "question of whether the plaintiff can show an injury traceable to the conduct of the defendant[.]" *Country Club Townhouses-North Condominium Unit Owners Assn. v. Slates* (Jan. 24, 1996), 9th Dist. No. 17299, at *2. Skipper "and the trial court seem to confuse 'standing' with the concept of 'capacity,' which concerns a determination as to whether a party may properly sue, either as an entity or on behalf of another." Id. "Capacity to sue or be sued does not equate with the jurisdiction of a court to adjudicate a matter; it is concerned merely with a party's right to appear in a court in the first instance." Id. at *3. Skipper's argument on appeal that National City was a fictitious entity and could not bring suit against Skipper is an argument regarding capacity, not standing. Therefore, we do not address any potential argument regarding National City's standing in this case.

**{¶12}** Lack of capacity is an affirmative defense. See *Country Club Townhouses-North Condominium Unit Owners Assn.*, supra; Civ.R. 8(C) ("In pleading to a preceding pleading, a party shall set forth affirmatively *** any other matter constituting an avoidance or affirmative defense.") Civ.R. 9(A) requires special matters such as a party's lack of capacity to be raised in the pleadings by "specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge." Finally, Civ.R. 12 mandates that "[e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto[.]"

**{¶13}** A review of the record reveals that Skipper failed to raise National City's alleged lack of capacity at any time prior to the summary judgment motion. Although we recognize that he did file a motion for leave to file an amended answer and counterclaim, he did not seek to

amend his answer on this specific ground. Further, his motion for leave to file an amended answer was filed on November 20, 2008, nearly three months after he raised the argument in his response to National City's summary judgment motion. Accordingly, the affirmative defense of lack of capacity is forfeited. *Baraby v. Swords*, 166 Ohio App.3d 527, 2006-Ohio-1993, at ¶34. Skipper's second assignment of error is overruled.

**ASSIGNMENT OF ERROR III**

> "THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO NATIONAL CITY MORTGAGE BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACT REGARDING THE NOTICE OF DEFAULT PRIOR TO ACCELERATION AND NATIONAL CITY MORTGAGE'S IMPROPER REJECTION OF PAYMENTS."

**{¶14}** In his third assignment of error, Skipper contends that the trial court erred when it granted National City's summary judgment motion because there were genuine issues of material fact regarding the notice of default and National City's improper rejection of payments. We do not agree.

**{¶15}** This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co*. (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

**{¶16}** Pursuant to 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." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

**{¶17}** The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id., at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

**{¶18}** Initially, Skipper contends that because he provided admissible evidence that raised a genuine issue of material fact regarding the notice of acceleration required before the foreclosure could be initiated, summary judgment was not proper. Specifically, he contends that the notice from National City incorrectly stated that he had failed to make any payments and owed National City $1,982.43. He contends this is incorrect because he made a payment on January 15, 2008, and that National City was in receipt of this payment. Because the notice was inaccurate, it was not proper notice and therefore, pursuant to the mortgage agreement, National City could not proceed with foreclosure.

**{¶19}** In its motion for summary judgment, National City argued that it had satisfied all the conditions precedent to foreclose on the property. National City attached affidavits from Laura Cauper and Teresa Clopp, Authorized Signers of National City. Cauper averred that she was in custody of Skipper's account and that the records of the account were kept in the course of its regularly conducted business activity. They averred that National City was the holder of the note, mortgage and demand letter that are the subject of the suit and that true and accurate

reproductions of the documents were attached to the motion. It attached the documents to its motion. Paragraph 22 of the mortgage states, in pertinent part:

> "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."

**{¶20}** Both Cauper and Clopp reference an attached letter, sent to Skipper on January 25, 2008, notifying him of the default and National City's intent to accelerate the maturity date of the Note in the event Skipper failed to cure the default. According to the letter, "[m]onthly installment payments have not been made including the payment for December 01, 2007." The letter further stated that the action required to cure the default was "[p]ayment in certified funds of $1,982.43 which includes the 2/1/2008 installment and applicable late charges, property inspection and non-sufficient funds fees." This payment was to be made no later than February 24, 2008. Finally, the letter stated that any "[p]ayments applied to your loan after the date of this notice, will not delay any proceedings on the part of [National City], unless the action required to cure this default, as outlined above, has been performed." Cauper explained that Skipper had not made the first payment on the loan, due December 1, 2007, or any payments thereafter as of January 25, 2008, the date of the letter.

**{¶21}** Skipper first argued below that he had not received the notification of acceleration. However, on appeal, Skipper abandoned that argument. Regardless, we note that paragraph 15 of the mortgage states that "[a]ny notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail[.]" National City presented the affidavit of Brian Arthur, Assistant Vice President of

National City, who averred that the acceleration notice was sent via first class mail. Therefore, there is no genuine issue of material fact regarding Skipper's receipt of the notice of acceleration.

**{¶22}** The basis for his appeal is that the notice was incorrect because he made a payment on January 15, 2008 and that National City was in receipt of the payment, and therefore, foreclosure was improper. In his affidavit in support of his response to National City's motion for summary judgment, Skipper stated that he believed that "I was only one (1) payment behind plus late fees at the time of the filing of this foreclosure." Regardless of this contention, Skipper does not provide any Civ.R. 56(C) evidence that would rebut National City's assertion that it never received the alleged January 15, 2008 payment. In his affidavit he contends that "[a]t the time the Plaintiff alleges it sent me a notice of right to cure prior to acceleration which said I owed $1,982.43, the Plaintiff was in possession of the payment for December 2007 in the amount of $660.81. This payment was sent on January 15, 2008 *and received by the Plaintiff."* (Emphasis added.) Civ.R. 56(E) requires that "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." (Emphasis added.) Skipper does not allege any personal knowledge on National City's business practices or mailroom practices. Therefore, it does not appear that he had personal knowledge that the check was actually received. Further supporting a determination that Skipper lacked personal knowledge, in the same affidavit, he stated that from January 2008 "[w]henever I talked to someone at the Plaintiff, I could not verify that Plaintiff had my payments or find out what I should do." A careful reading of this statement reveals that Skipper admits that he could not confirm that National City received his payments.

**{¶23}** Skipper attempts to support his contention that National City received the check by stating that the check, dated January 15, 2008, was returned to him, therefore supporting his theory that National City must have received the check. The January 15, 2008 check was attached to his response. However, this check does not indicate that it was received and subsequently returned by National City, and therefore does not support his claim. Because Skipper failed to point to any evidentiary material that would show a genuine dispute existed regarding National City's contention that it did not receive the check, he failed to satisfy his summary judgment burden. *Henkle,* 75 Ohio App.3d at 735. This portion of Skipper's argument is without merit.

**{¶24}** Skipper contends that National City improperly rejected payments. Although Skipper's affidavit contends that he made all the monthly payments except for one, our review of the record reveals that he did not develop an argument below that National City improperly rejected these payments. "When reviewing arguments on appeal, this Court cannot consider issues that are raised for the first time on appeal. The Ohio Supreme Court has stated that other than issues of subject matter jurisdiction, 'reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed.'" *Harris v. Akron*, 9th Dist. No. 24499, 2009-Ohio-3865, at ¶9, quoting *Goldberg v. Indus. Comm*. (1936), 131 Ohio St. 399, 404. Accordingly, Skipper has forfeited this argument on appeal.

**{¶25}** Lastly, Skipper contends that "foreclosure is an equitable remedy involving the deprivation of real property and Mr. Skipper has provided evidence to show that [National City] has failed to demonstrate good faith in its dealing with him." We note that "[a] foreclosure requires a two step process. 'Once a court has determined that a default on an obligation secured by a mortgage has occurred, it must then consider the equities of the situation in order to decide

if foreclosure is appropriate.'" *First Knox Natl. Bank v. Peterson*, 5th Dist. No. 08CA28, 2009-Ohio-5096, at ¶18, quoting *Rosselot v. Heimbrock* (1988), 54 Ohio App.3d 103, 105-106.

**{¶26}** Skipper does not mention equities or make an argument regarding National City's good faith in his response to National City's motion for summary judgment. While he stated efforts he made to contact National City in his affidavit, he did not develop an argument or explain why he believed these efforts raised a genuine issue of material fact regarding whether the foreclosure was equitable. Therefore, the issue was not before the trial court to consider, and we will not consider it here. *Harris*, supra, at ¶9, quoting *Goldberg*, 131 Ohio St. at 404.

**{¶27}** As we explained above, the trial court, despite Skipper's failure to properly argue the issue, was required to consider the equities of the foreclosure. *Peterson*, supra, at ¶18, quoting *Heimbrock*, 54 Ohio App.3d at 105-106. In the absence of an affirmative demonstration to the contrary, we presume the trial court properly considered the equities in the instant case. *Peterson*, supra, at ¶22.

**{¶28}** For the foregoing reasons, we conclude that there were no genuine issues of material fact and that National City was entitled to judgment as a matter of law. Accordingly, Skipper's third assignment of error is overruled.

III.

**{¶29}** Skipper's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

DICKINSON, J.
BELFANCE J.
CONCUR

APPEARANCES:

MARGARET A. MCDEVITT and JULIUS P. AMOURGIS, Attorneys at Law, for Appellant.

RACHEL K. PEARSON, Attorney at Law, for Appellee.