[Cite as *Huntington Natl. Bank v. Michel,* 2017-Ohio-9404.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

THE HUNTINGTON NATIONAL BANK, PLAINTIFF-APPELLEE, V. RAQUEL E. MICHEL, DEFENDANT-APPELLANT.	)))))))))	CASE NO. 16 CO 0035 OPINION

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas of Columbiana County, Ohio Case No. 2016 CV 90
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellee	Attorney Matthew G. Burg 323 Lakeside Avenue, Suite 200 Cleveland, Ohio 44113
For Defendant-Appellant	Attorney Christopher A. Maruca Attorney Anthony P. Celo 201 East Commerce Street Suite 316 Youngstown, Ohio 44503

JUDGES:

Hon. Gene Donofrio
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: December 21, 2017

[Cite as *Huntington Natl. Bank v. Michel*, 2017-Ohio-9404.]
DONOFRIO, J.

{¶1} Defendant-appellant, Raquel Michel, appeals from a Columbiana County Court of Common Pleas decision denying her motion to dismiss and granting plaintiff-appellee's, Huntington National Bank, motion for summary judgment.

{¶2} Appellee instituted this action to collect on a promissory note relating to a mortgage signed by appellant and non-party Raquel Neptune, L.L.C. The note's date of creation is in dispute with evidence indicating it was created in either 2006 or 2008. The note was originally between appellant and Sky Bank. In 2007, Sky Bank merged with appellee and appellee became the successor in interest on appellant's note.

{¶3} The property the note pertains to is located in Allegheny County, Pennsylvania. On June 1, 2011, a mortgage foreclosure action was instituted in the Allegheny County Court of Common Pleas, case number GD-11-009885, *Huntington National Bank v. Raquel Neptune, L.L.C.* ("the Allegheny action"). The Allegheny action was officially closed, in appellee's favor, on March 21, 2016.

{¶4} Appellee instituted this action in the Columbiana County Court of Common Pleas seeking payment of money still due and owing on the note on February 16, 2016. Appellant filed a motion to dismiss appellee's action on the basis of res judicata. Appellant argued that any issues raised in this action were barred due to the nature of the Allegheny action. Appellee argued that because the Allegheny action was a foreclosure action and not an action to recover money owed on the note and because appellant was not a party to the Allegheny action, res judicata did not apply. The trial court agreed with appellee and denied appellant's motion to dismiss.

{¶5} After the denial of appellant's motion to dismiss, this case then proceeded to the discovery phase. On June 27, 2016, appellee filed its notice of submission of interrogatories, request for admissions, and request for production of documents propounded to appellant. On October 3, 2016, appellee filed its motion for summary judgment. In its supporting memorandum, appellee argued that it established that appellee was the holder of a valid promissory note signed by appellant, appellant defaulted on the terms of the note, appellant admitted to all of

appellee's requests for admissions by default by failing to timely respond, and that there was no genuine issue of material fact remaining on appellant's default on the note and indebtedness to appellee. In support of its motion, appellee attached a verified affidavit from one of its officers stating appellant had defaulted on the note and appellant was still indebted to appellee, a copy of the note at issue itself, paperwork addressing Sky Bank's merger with appellee, and all of the discovery requests that appellant did not respond to.

{¶6} Appellant argued that summary judgment was not proper for multiple reasons such as: appellant filed responses to the outstanding discovery requests sent by appellee, appellee did not follow proper procedure to have the requests for admission deemed admitted by default, the affidavit attached to appellee's supporting memorandum was insufficient as it failed to specifically state who the affiant was within appellee's organization, appellee was potentially not the true holder of the note, appellant's signature on the note was not her own, appellee did not show an accounting for the amount it claimed it was owed, appellant was never notified of any problems with the loan, and appellee failed to address any of appellant's affirmative defenses. However, appellant's memorandum in opposition to summary judgment contained no exhibits or factual or legal arguments pertaining to several of its affirmative defenses.

{¶7} Appellee filed a reply brief in which it argued that appellant did not respond to discovery requests until October 18, 2016, over 16 weeks after appellee served the discovery requests. Appellee further argued that the affidavit from appellee's officer was sufficient to establish the elements of its breach of contract claim on the note and that appellant presented no evidence to challenge the validity of the affidavit.

{¶8} Appellant then filed a surreply brief in opposition to summary judgment in which she restated her argument that appellee failed to follow the proper procedure for deeming requests for admissions admitted by default. Furthermore, appellant argued that appellee stated, in its reply brief, that the note was executed in

2008 while noting that the note itself stated its creation date was in 2006. Appellant argued that that specific fact, combined with the evidence being subject to other interpretations, created issues of material fact.

{¶9} On November 21, 2016, the trial court granted appellee's motion for summary judgment. Appellant timely filed this appeal on December 21, 2016. Appellant now raises three assignments of error.

{¶10} Appellant's first assignment of error states:

> THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED BY FAILING TO DISMISS THE CASE ON THE GROUNDS OF RES JUDICATA DUE TO A PENNSYLVANIA CASE ON THE SAME ISSUE.

{¶11} Appellant argues that this action is barred under the doctrine of res judicata due to the resolution of the Allegheny action. Specifically, appellant argues that she and the defendant of the Allegheny action, Raquel Neptune, L.L.C., were in privity with each other, appellee was the plaintiff in the Allegheny action, and the Allegheny action settled all issues relating to the note at issue.

{¶12} In her motion to dismiss, appellant did not state with specificity what basis under Civ.R. 12(B) the motion was founded on. As appellant's motion was not challenging personal jurisdiction, subject matter jurisdiction, venue, insufficiency of process, insufficiency of service, or failure to join a party, appellant's motion was therefore rooted in Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted.

{¶13} In order for a complaint to be dismissed under Civ.R. 12(B)(6) for failure to state a claim, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief. *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416, 2002-Ohio-2480, 768 N.E.2d 1136 ¶ 5 citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St. 2d 242, 327 N.E.2d 753 (1975). The reviewing court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Id.* citing *Mitchell v. Lawson*

Milk Co., 40 Ohio St. 3d 190, 192, 532 N.E.2d 753 (1988). Furthermore, as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss. *Id.* citing *York v. Ohio State Hwy. Patrol*, 60 Ohio St. 3d 143, 144, 573 N.E.2d 1063 (1991).

{¶14} Appellee contends that this action is for breach of contract against appellant. In its complaint, appellee alleged that it was the holder of a note made by appellant. The complaint continues by stating that appellant's balance on the note is still outstanding and that appellant has failed and refused to make any payments on the note. Additionally, appellee attached a copy of the note itself signed by appellant and a copy of all relevant paperwork showing the merger between Sky Bank and appellee.

{¶15} However, appellant's motion was on the basis that appellee's claim was barred by the doctrine of res judicata. The defense of res judicata may not be raised by motion to dismiss under Civ.R. 12(B). *State ex rel. Freeman v. Morris*, 62 Ohio St. 3d 107, 579 N.E.2d 702 (1991). Because appellant raised the res judicata defense in a motion to dismiss, the trial court's decision to deny appellant's motion to dismiss on this basis was proper.

{¶16} Moreover, even if appellant properly raised her res judicata argument, such a defense would still lack merit. Analyzing appellant's res judicata claim, res judicata encompasses two concepts: estoppel by judgment (claim preclusion) and collateral estoppel (issue preclusion). *Grava v. Parkman Twp.*, 73 Ohio St. 3d 379, 381, 653 N.E.2d 226 (1995). Focusing on just claim preclusion, a final judgment or decree rendered on the merits by a court of competent jurisdiction is a complete bar to any subsequent action on the same claim between the same parties or those in privity with them. *Brooks v. Kelly*, 144 Ohio St. 3d 322, 2015-Ohio-2805, 43 N.E.3d 385 ¶ 7. Moreover, an existing final judgment or decree between the parties is conclusive as to all claims that were or might have been litigated in a first lawsuit. *Id.* The doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it. *Id.*

{¶17} Appellant argues that there is privity between her and the defendant in the Allegheny action in that appellant was the party who signed the documents giving rise to both cases. Appellee argues that the parties are different because the first action was between appellee and Raquel Neptune, L.L.C. and not between appellee and appellant. In ascertaining the identity of such parties, a court must look behind the nominal parties to the substance of the cause to determine the real parties in interest. *Trautwein v. Sorgengrei*, 58 Ohio St. 2d 493, 391 N.E.2d 326 (1979).

{¶18} Reviewing the copy of the promissory note appellee attached to its complaint in this action, the note itself states that the borrower is Raquel Neptune, L.L.C. as represented by appellant. In fact, appellant is identified in the first line of the note as "borrower." Additionally, the note is signed by appellant twice, individually and as a member of Raquel Neptune, L.L.C. Ultimately, Raquel Neptune, L.L.C. and appellant are in privity with each other satisfying the first element of claim preclusion.

{¶19} Regarding the same claim element of claim preclusion, appellant argues that a final adjudication in the Allegheny action resolved any issue on the note and the trial court, by not dismissing this action, is allowing appellee to recover twice: once on the foreclosure and again on the note. But Ohio law is very clear, an in rem action in foreclosure and an action on a promissory note may be brought separately and do not have to be brought together.

{¶20} For example, the Second District ruled on a similar issue in *Gevedon v. Hotopp*, 2d Dist. No. 20673, 2005-Ohio-4597. In *Gevedon*, plaintiff-appellee Gevedon loaned money to defendants-appellants, the Iveys, to purchase real property. The loan was secured by a promissory note and a mortgage on the property. The next year, the Iveys sold the land to third-party defendants, the Hotopps. The Iveys eventually defaulted on the loan and Gevedon initiated an action to recover on the note. Gevedon was given a default judgment in his favor in the action on the note. The Iveys attempted to discharge the judgment in bankruptcy. Gevedon officially appeared in the Iveys bankruptcy proceeding and the bankruptcy court ruled that the Iveys could not discharge Gevedon's judgment. Eventually, Gevedon filed a

foreclosure action on the property against the Iveys and the Hotopps. The trial court ruled in favor of Gevedon on the foreclosure action and the Hotopps appealed.

{¶21} The Hotopps raised an argument of res judicata on the basis that Gevedon's claims were barred due to the action Gevedon initiated against the Iveys for payment on the promissory note. In overruling the Hotopps argument, the Second District held that "even when a promissory note is incorporated into the mortgage deed, it is still independent of the mortgage and is a separate and enforceable contract." *Id.* at ¶ 27. "A final judgment or decree in an action does not bar a subsequent action where the causes of action are not the same, even though each action relates to the same subject matter." *Id.* at ¶ 26.

{¶22} In addition to the Second District, multiple other districts follow the same or a similar rule as set out in *Gevedon*; an action in foreclosure and an action on a promissory note are two distinct entities that may be brought separately. The Third District in *Union Bank Co. v. North Carolina Furniture Express, L.L.C.*, 189 Ohio App.3d 538, 2010-Ohio-4176, 939 N.E.2d 873 (3rd Dist.), the Fourth District in *Century National Bank v. Gwinn*, 4th Dist. No. 11CA20, 2012-Ohio-768, the Eighth District in *Third Fed. Savs. Bank v. Cox*, 8th Dist. No. 93950, 2010-Ohio-4133, and the Ninth District in *Fifth Third Bank v. Hopkins*, 177 Ohio. App.3d 114, 2008-Ohio-2959, 894 N.E.2d 65 (9th Dist.), have all held the same or similarly to the Second District in *Gevedon*. Furthermore, the Ohio Supreme Court has held that while an action to foreclose a mortgage and an action for personal judgment on the note secured by the mortgage may be brought together, they are separate and distinct. *Carr v. Home Owners Loan Corp.*, 148 Ohio St. 533, 540, 76 N.E.2d 389 (1947). Based on these rulings, appellee was permitted to bring an action in foreclosure against appellant prior to bringing an action on the promissory note against appellant without being subject to the doctrine of res judicata.

{¶23} Accordingly, appellant's first assignment of error is without merit and overruled.

{¶24} Appellant's second assignment of error states:

THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED BY FINDING SUMMARY JUDGMENT IN FAVOR OF APPELLEE EVEN THOUGH THERE WERE GENUINE ISSUES OF MATERIAL FACT ABOUT THE CONTRACT AND ALLEGED BREACH AT ISSUE, SPECIFICALLY INCLUDING, BUT NOT LIMITED TO, THE ADMITTED ISSUE OF FACT CONCERNING THE DATE OF THE CONTRACT'S EXECUTION.

{¶25} Appellant argues that summary judgment was not proper in this case because the date the promissory note at issue in this action was created is in dispute. Moreover, appellant argues that if the promissory note was created in 2006, the statute of limitations defense could potentially apply and bar appellee's action against appellant. Appellant argues that neither the date of the note's creation nor the statute of limitations was fully considered by the trial court.

{¶26} An appellate court reviews a trial court's summary judgment decision de novo, applying the same standard used by the trial court. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, 874 N.E.2d 1155, ¶ 5. A motion for summary judgment is properly granted if the court, upon viewing the evidence in a light most favorable to the nonmoving party, determines that: (1) there are no genuine issues as to any material facts; (2) the movant is entitled to judgment as a matter of law, and (3) the evidence is such that reasonable minds can come to but one conclusion and that conclusion is adverse to the opposing party. Civ. R. 56(C); *Byrd v. Smith*, 110 Ohio St. 3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10.

{¶27} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). The trial court's decision must be based upon "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." Civ. R. 56(C). The

nonmoving party has the reciprocal burden of specificity and cannot rest on the mere allegations or denials in the pleadings. *Id.* at 293.

{¶28} In *Dresher*, the Ohio Supreme Court held that a party who moves for summary judgment need not support its motion with affidavits provided that the party does not bear the burden of proof on the issues contained in the motion. *Dresher* at 277. Further, there is no requirement in Civ. R. 56 that any party submit affidavits to support a motion for summary judgment. *See, e.g.,* Civ. R. 56(A) and (B). *Id.* However, there is a requirement that a moving party, in support of a summary judgment motion, specifically point to something in the record that comports with the evidentiary materials set forth in Civ. R. 56(C). *Id.*

{¶29} Summary judgment is appropriate when there is no genuine issue as to any material fact. A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.,* 104 Ohio App.3d, 598, 603, 662 N.E.2d 1088 (8th Dist. 1995), citing *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

{¶30} Analyzing appellee's claim first, appellee states that this action is one for a breach of contract. The elements of a breach of contract claim are: the existence of a contract, performance by the plaintiff, breach by the defendant, and resulting damage to the plaintiff. *Cook v. Kudlacz*, 7th Dist. No. 11 MA 0034, 2012-Ohio-2999, ¶ 13.

{¶31} In its motion for summary judgment, appellee attached: a copy of the promissory note between Sky Bank and appellant, a copy of all relevant filings showing appellee as the successor in interest to the note, and an affidavit from an officer of appellee stating that appellant still owed money on the note and that appellant refused to make payments on the note. These exhibits are sufficient to establish appellee's breach of contract claim per Civ.R. 56.

{¶32} Addressing appellant's claims, appellant raised the affirmative defense of statute of limitations in her answer. However, at no point in time did appellant file a motion to dismiss or a motion for summary judgment on the basis of the statute of

limitations. Instead, appellant asserts that the discrepancy of the dates on the note is enough to create a genuine issue of material fact regarding her affirmative defense. This argument does not have merit.

{¶33} In a breach of contract action, the cause of action does not accrue on the date the contract came into existence, the cause of action accrues when one party breaches the contract. See *State ex rel. Teamsters Local Union 377 v. City of Youngstown*, 50 Ohio St.2d 200, 364 N.E.2d 18 (1977) (Normally, a cause of action does not accrue until such time as the infringement of a right arises. It is at this point that the time within which a cause of action is to be commenced begins to run), see also *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, 884 N.E.2d 1056, ¶ 28. However, there is no indication from either party concerning when appellant breached the contract. Appellee merely stated that the contract was breached.

{¶34} Appellant attached multiple filings from the Allegheny action to her motion to dismiss. These filings show that the Allegheny action was commenced on June 1, 2011. This is the closest approximation to the date of the actual breach of contract in the record. Appellee argues in its brief on this appeal that the affidavit attached to its motion for summary judgment lists the date of appellant's default as August 1, 2009. However, the affidavit makes no reference to that date.

{¶35} R.C. 2305.06 in its current form, which has been in effect since September 27, 2012, provides that an action upon a contract in writing shall be brought within eight years. The prior version R.C. 2305.06, which was in effect when the note between appellant and appellee was signed and presumably when appellant defaulted on the note, provides for a 15 year statute of limitations. Regardless of which version of R.C. 2305.06 controls the case at bar, appellee initiated this action on February 16, 2016. This is well before either statute of limitations expired. Analyzing the best case scenario for appellant's statute of limitations defense does not help appellant's argument in any way. If the breach of contract occurred on August 1, 2009, and the current version of R.C. 2305.06 applied, appellee would

have until August 1, 2017 to file this action. Appellee filed this action on February 16, 2016 making appellant's statute of limitations argument moot.

{¶36} Moreover, appellant failed to make a proper motion addressing the statute of limitations defense and failed to provide any evidentiary basis other than the date discrepancy between the promissory note and various filings from appellee. Without more evidence, appellant failed to meet her burden.

{¶37} Accordingly, appellant's second assignment of error lacks merit and is overruled.

{¶38} Appellant's third assignment of error states:

> THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED BY FINDING SUMMARY JUDGMENT IN FAVOR OF APPELLEE EVEN THOUGH THERE WAS NO EVIDENCE OF PAYMENT HISTORY OR AMOUNT MITIGATED THROUGH THE PENNSYLVANIA LAWSUIT OR OTHERWISE, TO VERIFY THE AMOUNT OF DEBT STILL DUE AND OWING.

{¶39} Appellant argues that the trial court's granting of summary judgment was error because the summary judgment motion awarded the full amount appellee claimed it was owed. Specifically, appellant argues that amount owed to appellee is in dispute due to the money appellee was able to recoup from the Allegheny action. Additionally, appellant argues that the calculations appellee used to determine the total amount due on the note are in dispute.

{¶40} In its motion for summary judgment, appellee attached exhibit 1 which is a copy of the promissory note at issue. Exhibit 1 states that the principal amount loaned to appellant was $205,000.00 that was subject to an 8.13% rate of interest per annum. The note also states that all late payments were subject to a 5% of the monthly payment due or $60.00 late fee, whichever was greater, if a payment was not made within ten days of its due date. Additionally, the note states that the rate of interest on the note would be increased to 18% per annum upon default by appellant.

{¶41} The affidavit attached to appellee's motion for summary judgment listed the specific amounts appellee claimed it was owed. The amounts were: $189,217.11 due on the principal balance of the note, $94,760.00 due in interest, $1,577.16 due in late fees, and the default interest of 18% per annum. Additionally, appellee was claiming $500.00 in attorney's fees and court costs for filing this action to recover any amounts still due and owing. An affidavit stating the loan is in default is sufficient for purposes of Civ. R. 56(C), in the absence of evidence controverting those averments. *U.S. Bank, Natl. Assn. v. Wigle*, 7th Dist. No. 13 MA 32, 2015-Ohio-2324, ¶ 36. Appellee's affidavit is sufficient to satisfy its burden of showing that no genuine issue of material fact exists per *Dresher* regarding the amount appellee claimed it was owed.

{¶42} With the appellee's burden satisfied, appellant then carried the reciprocal burden of specificity to show that there was a genuine issue of material fact. However, in her brief in opposition to summary judgment, appellant did not attach any affidavits, any proof of payments she made to appellee, any bank statements, any discovery requests sent to and responses from appellee, or any calculations disputing the amount appellee claimed it was owed. Appellant merely denied the amount appellee claimed it was owed in her answer, argued in her brief in opposition to summary judgment that there were "numerous issues of material fact" regarding the amount of money owed but made no specific mention as to what those issues of material fact were, and then argued in her surreply brief that the evidence in the case at bar was unclear.

{¶43} Appellant argues in her brief and reply brief for this appeal that she was not required to submit additional evidence in her brief in opposition to summary judgment. While this is true, Civ. R. 56(C) and *Dresher* state that a party opposing a motion for summary judgment carries a reciprocal burden of pointing to evidence in the record to support its arguments. There is nothing in the record that counters the specific amount appellee claimed it was owed other than appellant's assertions that the amount in controversy is in dispute.

{¶44} In addition, appellant argues that any award given to appellee in summary judgment failed to account for any amount appellee was able to recover in the Allegheny action. Appellant raises this argument specifically for the first time on appeal (Reply Brief of Appellant at 3). Although appellant generally raised this argument in her brief in opposition to summary judgment and her surreply brief in opposition to summary judgment argued that there was an issue of material fact relating to the amount appellee claimed it was owed, appellant only specified what the issue of fact regarding the amount owed was in her reply brief on appeal.

{¶45} The general rule is that "an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Anwan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986) citing *State v. Childs*, 14 Ohio St.2d 83, 236 N.E.2d 545 (1968). Because appellant failed to timely raise this issue with the trial court, it cannot be reviewed for the first time on appeal.

{¶46} For all of the above reasons, appellant's third assignment of error lacks merit and is overruled.

{¶47} For the reasons stated above, the trial court's decision is hereby affirmed.

DeGenaro, J., concurs.

Robb, P.J., concurs.