[Cite as *First Natl. Bank of Am. v. Pendergrass*, 2009-Ohio-3208.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

First National Bank of America	Court of Appeals No. E-08-048
Appellee	Trial Court No. 2007-CV-0423
v.	
Susan E. Pendergrass, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: June 30, 2009

* * * * *

Michael L. Close and Dale D. Cook, for appellee.

David N. Patterson, for appellants.

* * * * *

SINGER, J.

{¶ 1} Appellants, Susan E. Pendergrass and Discount Muffler & Brake, Inc. ("Discount Muffler"), appeal the following: (1) the trial court's entry of summary judgment in favor of appellee, First National Bank of America ("First National"); and (2) the trial court's denial of appellants' Civ.R. 60(B) motion to vacate the entry of summary judgment. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} Appellant Pendergrass is the president of appellant Discount Muffler. On February 1, 2001, appellant, in her capacity as president of Discount Muffler, executed a note and mortgage to First National to secure a business loan of approximately $117,950. Discount Muffler is listed as the borrower on the note. The note provides for joint and several liability.

{¶ 3} Regarding payment on the loan, the note relevantly provides:

{¶ 4} "PAYMENT. Borrower will pay this loan on demand. Payment in full is due immediately upon Lender's demand. If no demand is made, Borrower will pay this loan in 59 regular payments of $1,323.82 each and one irregular last payment estimated at $114,817.42. * * * Borrower's final payment is due February 1, 2006, and will be for all principal and all accrued interest not yet paid. * * *"

{¶ 5} The terms of the note specify that default occurs where the borrower "fails to make any payment when due under this Note." The note further provides that "upon default, including failure to pay upon final maturity, Lender, at its option, may, if permitted under applicable law, increase the interest rate on this Note 5.000 percentage points."

{¶ 6} Pendergrass made 59 regular monthly payments of $1,323.82, at the original interest rate of 12.750 percent. However, no balloon payment was ever made. The evidence in the record reveals that after Pendergrass made the first 59 payments, "the interest rate did increase" and she continued (apparently for a period of several months) to make payments to First National. Pendergrass alleges that First National "began

increasing the note payments monthly until the payments finally tripled in December 2006."[1] It is undisputed that First National subsequently made a demand for payment on the note.

{¶ 7} On May 11, 2007, First National filed a complaint in foreclosure. Pendergrass, pro se, filed an answer and counterclaim, purportedly on behalf of both herself and Discount Muffler.[2] Discount Muffler never properly opposed the motion for summary judgment.

{¶ 8} On November 6, 2007, First National filed a motion for summary judgment against Pendergrass and Discount Muffler. Pendergrass, again pro se, and again purportedly on behalf of herself and Discount Muffler, filed an objection to the motion for summary judgment. On January 10, 2008, the trial court granted the motion for summary judgment as against Pendergrass and, further, issued a default judgment as against Discount Muffler.

{¶ 9} On February 15, 2008, Pendergrass and Discount Muffler, this time represented by counsel, filed a "Motion to Vacate the Summary Judgment and Brief in Opposition to the Motion for Summary Judgment." First National filed an opposition to the motion.

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[1]We note that First National, in its complaint, requested judgment on the note in the amount of $114,896.69 with interest at the rate of 17.75 percent per annum, from the first day of November 2006.

[2]Although Pendergrass attempted to object on behalf of Discount Muffler, Ohio law clearly establishes that "a corporation can maintain litigation or appear in court only through an attorney admitted to the practice of law and may not do so through an officer of the corporation or some other appointed agent." *Sheridan Mobile Village, Inc. v. Larsen* (1992), 78 Ohio App.3d 203, 205.

{¶ 10} On May 6, 2008, the trial court denied the motion to vacate, holding that Pendergrass and Discount Muffler had failed to show entitlement to relief pursuant to Civ.R. 60(B) and, further, had failed to demonstrate the existence of a meritorious defense to the foreclosure action. Pendergrass and Discount Muffler timely appealed the trial court's judgment entry, raising the following assignments of error:

{¶ 11} "I. THE LOWER COURT ERRED TO THE PREJUDICE OF THE APPELLANTS BY GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLEE AND DENYING APPELLANTS' MOTION TO VACATE THE SUMMARY JUDGMENT.

{¶ 12} "A. APPELLEE WAS NOT ENTITLED TO SUMMARY JUDGMENT AND APPELLANTS WERE ENTITLED TO HAVE THE SUMMARY JUDGMENT VACATED AS THE MERITORIOUS DEFENSE OF ESTOPPEL AND WAIVER CREATED GENUINE ISSUES OF MATERIAL FACT.

{¶ 13} "B. THE AFFIDAVIT SUBMITTED BY APPELLEE WAS INSUFFICIENT TO WARRANT SUMMARY JUDGMENT AS SUCH IS SELF-SERVING AND UNSUBSTANTIATED WITH REGARD TO DEFAULT AND PAYMENT HISTORY.

{¶ 14} "C. APPELLEE WAS NOT ENTITLED TO SUMMARY JUDGMENT AND APPELLANTS WERE ENTITLED TO HAVE THE SUMMARY JUDGMENT VACATED AS THE LOWER COURT FAILED TO ADDRESS AND RULE UPON APPELLANTS' COUNTERCLAIM.

{¶ 15} "II. THE LOWER COURT ERRED TO THE PREJUDICE OF APPELLANTS BY DENYING APPELLANTS' MOTION TO VACATE THE SUMMARY JUDGMENT WITHOUT THE BENEFIT OF A HEARING."

{¶ 16} Appellants' first assignment of error contains arguments addressing both the trial court's granting of summary judgment and the trial court's denial of the Civ.R. 60(B) motion. We will discuss each of these arguments separately.

{¶ 17} An appellate court reviewing a trial court's granting of summary judgment does so de novo, applying the same standard used by the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Civ.R. 56(C) provides:

{¶ 18} "* * * 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 considered in this rule. * * *"

{¶ 19} Summary judgment is proper where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) when the evidence is viewed most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, a conclusion adverse to the nonmoving party. *Ryberg v. Allstate Ins. Co.* (July 12, 2001), 10th Dist. No. 00AP-1243, citing *Tokles & Son, Inc. v. Midwestern Indemnity Co.* (1992), 65 Ohio St.3d 621, 629.

{¶ 20} The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of fact as to an essential element of one or more of the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. Once this burden has been satisfied, the non-moving party has the burden, as set forth at Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. Id.

{¶ 21} The prerequisites for a party seeking to foreclose a mortgage are execution and delivery of the note and mortgage; valid recording of the mortgage; default; and establishing an amount due. *Neighborhood Housing Services of Toledo, Inc. v. Brown*, 6th Dist. No. L-08-1217, 2008-Ohio-6399, ¶ 16. All of these elements have been established in this case, including default. Pursuant to the express terms of the note, appellants defaulted when they failed to timely make the balloon payment on February 1, 2006.

{¶ 22} Notwithstanding our acknowledgment that the elements for a foreclosure have been met in this case, we remain mindful that a foreclosure action is equitable in nature and, thus, "the simple assertion of the elements of foreclosure does not require, as a matter of law, the remedy of foreclosure." *Equitable Fed. S. & L. Assn. v. Hopton* (Oct. 28, 1985), 5th Dist. No. CA-6664.

{¶ 23} As an equitable action, a foreclosure action should be reviewed for abuse of discretion. See *Buckeye Retirement Co., LLC v. Walling*, 2d Dist. No. 05 MA 119, 2006-

Ohio-7059, ¶ 16. "Abuse of discretion" connotes more than an error of law or judgment; rather, it implies an unreasonable, arbitrary or unconscionable attitude. Id.

{¶ 24} Appellants argue in the instant case that the fact that First National allowed appellants to continue making payments with a 5 percent increase in the interest rate for some months after the balloon payment became due was sufficient to establish a genuine issue of material fact as to whether First National waived appellant's default.

{¶ 25} Although it has repeatedly been argued that a mortgagee can waive its right to accelerate and foreclose on a loan by accepting payments by the mortgagor following default, it has repeatedly been held that a mortgagee's previous acceptance of late loan payments does not constitute a waiver of the mortgagee's right to accelerate and foreclose on a loan following a subsequent default where, as here, the relevant loan documents contain "anti-waiver" provisions. *Buckeye Retirement*, supra, at ¶ 24; see also, *Metropolitan Life Ins. Co. v. Triskett Illinois, Inc.* (1994), 97 Ohio App.3d 228; *Gaul v. Olympia Fitness Ctr., Inc.* (1993), 88 Ohio App.3d 310.

{¶ 26} The anti-waiver provision in the subject note relevantly provides as follows:

{¶ 27} "GENERAL PROVISIONS. This note is payable on demand. The inclusion of specific default provisions or rights of Lender shall not preclude Lender's right to declare payment of this Note on its demand. Lender may delay or forgo enforcing any of its rights or remedies under this Note without losing them. Borrower and any other person who signs, guarantees or endorses this Note, to the extent allowed

by law, waive presentment, demand for payment, and notice of dishonor. Upon any change in the terms of this Note, and unless otherwise expressly stated in writing, no party who signs this Note, whether as maker, guarantor, accommodation maker or endorser, shall be released from liability. All such parties agree that Lender may renew or extend (repeatedly and for any length of time) this loan or release any party or guarantor or collateral; or impair, fail to realize upon or perfect Lender's security interest in the collateral; and take any other action deemed necessary by Lender without the consent of or notice to anyone. * * *"

{¶ 28} As stated by the court in *Buckeye Retirement*, supra, "Although an anti-waiver clause is not the only factor to consider when weighing the equities in a foreclosure action, it is a crucial part of the analysis and generally weighs very strongly in favor of the lender's decision to declare default and proceed with foreclosure." Id. at ¶ 33.

{¶ 29} In the instant case, appellants have presented no evidentiary material that might give rise to a material question of fact. For instance, there is no evidence or allegation that appellants have made any payments on the loan since November 2006, nor is there any evidence or allegation that they have made alternate arrangements to keep current with the loan.

{¶ 30} Further, there is no question that appellants were in default when the foreclosure action was filed and that First National had not waived any right to act upon that default (despite the fact that it had apparently accepted several late payments).

Based on both the clear language of the note document and on the circumstances of this case, we conclude that the trial court was within both its equitable and legal authority to grant summary judgment to First National.

{¶ 31} We next consider appellants' assertion that the affidavit submitted by First National was insufficient to support summary judgment. Specifically, appellants assert that the affidavit submitted by First National failed to sufficiently state "how appellants were in fact in default."

{¶ 32} The requirements for an affidavit in the context of a summary judgment motion, pursuant to Civ.R. 56(E), are as follows: (1) it must be made on personal knowledge; (2) it must set forth facts which would be admissible in evidence, and (3) it must affirmatively show the affiant to be competent to testify to the matters stated. Civ.R. 56(E); *State ex rel. Corrigan v. Seminatore* (1981), 66 Ohio St.2d 459, 467; *Crowl Lumber Co. v. Wallace*, 7th Dist. No. 08 CA 851, 2008-Ohio-5733, ¶ 14.

{¶ 33} The affidavit to which appellants refer is the June 27, 2007 affidavit of Lori L. Coffin, Asset Manager of First National Bank of America. In the affidavit, she states that in her position as Asset Manager, she has the custody of and is familiar with the accounts of First National, based on her own knowledge, and, specifically, with the account of appellant Pendergrass. This statement serves to meet both the first and third requirements under the rule. See *Crowl Lumber*, supra, at ¶ 15.

{¶ 34} The second requirement is also met in that the affidavit sets forth facts concerning the Pendergrass account that would be admissible in evidence. For instance,

Coffin relevantly states that Pendergrass's account is in default for the payment due the first day of December 2006, with interest from the first day of November 2006, and all subsequent payments thereto, and that First National has elected to call the entire balance of that account due and payable in accordance with the terms of the note and mortgage. In addition, Coffin states that the balance due under the note as of June 27, 2007 is as follows: Principal, $114,896.69; Interest, $13,304.22; Escrow Deficit, $1,045.88; Total, $129,246.79.

{¶ 35} We note, in reviewing this portion of appellants' first assignment of error, that appellants make no objection to Coffin's competency as a witness or to her testimony as to the total amount due. Apparently, appellants' dispute goes only to the issue of whether, in light of First National's having accepted payments after the February 1, 2006 balloon payment was due, appellants were "truly in default." As indicated in our discussion above, we have concluded that appellants were, in fact, in default.

{¶ 36} Appellants next argue that the trial court erred by not ruling on their counterclaim. This court, in its September 10, 2008 decision dealing with a motion to dismiss this appeal, has previously rejected this argument as meritless. Pursuant to that decision, we find this portion of appellants' argument to be moot.

{¶ 37} Lastly, we consider appellants' argument that the trial court erred in denying appellants' Civ.R. 60(B) motion.

{¶ 38} Civ.R. 60(B) provides relief from a final judgment for the following reasons: "(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered

evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud * * *, misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment."

{¶ 39} In order to prevail on a Civ.R. 60(B) motion, a movant must demonstrate: (1) that the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); (2) that the party has a meritorious defense or claim to present if relief is granted; and (3) that the motion is made within a reasonable time, and, where the grounds for relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken. Civ.R. 60(B); see also, *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus.

{¶ 40} A trial court's decision to grant or deny a Civ.R. 60(B) motion is subject to an abuse of discretion standard of review. *Scheper v. McKinnon*, 177 Ohio App.3d 820, 2008-Ohio-3964, ¶ 8. If the movant fails to satisfy any of the three *GTE* requirements, the trial court should overrule the motion. *Vaughan v. Vaughan* (1988), 131 Ohio App.3d 364, 369.

{¶ 41} In the 60(B) motion, appellants set forth no new evidence, relying solely on Pendergrass's February 15, 2008 affidavit, whose averments were no different from, and added nothing to, the basic facts that were before the trial court when it decided the

motion for summary judgment. Neither the motion nor the affidavit asserted any of the grounds for relief stated in Civ.R. 60(B)(1) through (5). In addition, the motion failed to allege a meritorious defense. Instead, it merely repeated appellants' earlier allegation that they were entitled to make payments even after the balloon payment was due and a demand for payment had been made. As indicated several times previously in this decision, we reject this allegation as meritless.

{¶ 42} For all of the foregoing reasons, appellants' first assignment of error is found not well-taken.

{¶ 43} Appellants argue in their second assignment of error that the trial court erred to their prejudice by denying their Civ.R. 60(B) motion without a hearing. As stated above, appellants have failed to present allegations of operative facts that would warrant relief under Civ.R. 60(B). As a result, an evidentiary hearing is simply not required. See, *Packard v. Packard*, 4th Dist. No. 07CA3165, 2008-Ohio-3007, ¶ 9. Accordingly, appellants' second assignment of error is found not well-taken.

{¶ 44} For all of the foregoing reasons, the judgment of the Erie County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE