[Cite as *Residential Funding Co., L.L.C. v. Thorne*, 2010-Ohio-4271.]

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

Residential Funding Company, LLC — Court of Appeals No. L-09-1324

Appellee — Trial Court No. CI0200808576

v.

Gary T. Thorne, et al. — **DECISION AND JUDGMENT**

Appellant — Decided: September 10, 2010

* * * * *

Rebecca R. Shrader, for appellee.

George R. Smith, Jr., for appellant.

* * * * *

COSME, J.

{¶ 1} Defendant-appellant, Gary T. Thorne ("Thorne") appeals from a decision of the Lucas County Common Pleas Court that granted summary judgment in favor of plaintiff-appellee, Residential Funding Company, LLC ("Residential"), and the motion to dismiss in favor of third-party defendant-appellee, Cardinal Mortgage Services of Ohio,

Inc. ("Cardinal") in the foreclosure action against him. For the reasons that follow, we affirm.

I. BACKGROUND

{¶ 2} On June 20, 2003, Thorne signed and executed a "Mortgage Brokerage Contract" ("Brokerage Contract") with Cardinal. Pursuant to this Brokerage Contract, Cardinal agreed to procure a mortgage loan commitment on a parcel of residential property Thorne owned. Thorne agreed to pay a mortgage brokerage fee, including the actual costs of the procured loan, to Cardinal. Contemporaneous with the brokerage contract, the parties executed the "Mortgage Loan Origination Agreement" ("Origination Agreement"), in which they set out the nature of their relationship as well as the terms of Cardinal's compensation. The Origination Agreement provided:

{¶ 3} "SECTION 2. OUR [Cardinal's] COMPENSATION. The lenders whose loan products we distribute generally provide their loan products to us at a wholesale rate.

{¶ 4} "* The retail price we offer you - your interest rate, total points and fees - will include our compensation.

{¶ 5} "* In some cases, we may be paid all of our compensation by either you or the lender.

{¶ 6} "* Alternatively, we may be paid a portion of our compensation by both you and the lender. For example, in some cases, if you would rather pay a lower interest rate, you may pay higher up-front points and fees.

{¶ 7} "* Also, in some cases, if you would rather pay less up front, you may be able to pay some or all of our compensation indirectly through a higher interest rate in which case we will be paid directly by the lender.

{¶ 8} "* * *

{¶ 9} "By signing below, the mortgage loan originator and mortgage loan applicant(s) acknowledge receipt of a signed copy of this agreement.

{¶ 10} "* * *."

{¶ 11} On July 29, 2003, Thorne closed on a loan procured by Cardinal through Regions Bank (Residential's predecessor in interest), to refinance the mortgage on the property by executing a note and mortgage.

{¶ 12} Thorne acknowledged that during closing he did not read the documents, relying solely on the loan officer's representations of the terms of the loan documents. Thorne does not recall receiving a full set of the copies he signed at closing. While Thorne admits that he received a copy of the "Notice of Right to Cancel" he insists that he did not receive the "Good Faith Estimate or Itemization of Amount Financed" ("Good Faith Estimate").

{¶ 13} The note and mortgage identifying Thorne as the borrower and Regions Bank as the lender contained an adjustable rate. By May 9, 2008, Thorne had defaulted on the note and mortgage. Thorne failed to cure after he was given written notice of default and an opportunity to bring his payments current. The note was accelerated, making the full amount of principal and interest due. On December 2, 2008, Residential

received the note and mortgage by assignment. Residential recorded the mortgage on December 10, 2008.

{¶ 14} A complaint in foreclosure was filed by Residential on December 9, 2008. Relevant to Thorne's arguments is the fact that a copy of the note was not attached to the complaint because it had been misplaced and could not be found at the time of filing. At no time prior to the filing of the complaint did Thorne attempt to rescind.

{¶ 15} On January 28, 2009, Thorne filed an answer and counterclaim. Thorne alleges that Regions Bank, in concert with Cardinal, understated the cost of the loan and failed to disclose the particular terms of the agreement between Regions Bank and Cardinal whereby Cardinal charged Thorne a higher rate than what Regions Bank was offering. The counterclaim alleged that the mortgage loan transaction was subject to the Truth-in-Lending Act, Section 1601, Title 15, U.S.Code, et seq. ("TILA"), Real Estate Settlement Procedures Act, Pub.L.No. 93-533, 88 Stat. 1724 (1974) (codified as amended at Section 2607, Title 12, U.S.Code Annotated (2001)) ("RESPA"), and that Regions Bank violated TILA when it failed to provide a good faith estimate, itemization of amount financed, or disclose the yield spread premium at closing.

{¶ 16} Also on January 28, 2009, Thorne filed a third-party complaint against Cardinal, alleging that Cardinal had committed violations of the Ohio Mortgage Broker's Act, R.C. Chapter 1322, et seq. ("OMBA"), and RESPA. Specifically, Thorne alleged that Regions and Cardinal had engaged in fraudulent conduct by failing to disclose the fees paid by Regions to Cardinal in return for the delivery of a loan carrying a higher

interest rate. Thorne also alleged that Cardinal committed violations of the OMBA when it: (1) failed to deliver a mortgage loan origination disclosure statement describing the method by which the fee to be paid by Thorne to Cardinal was to be calculated, a good faith estimate of the total amount of that fee, and a statement that the lender may pay compensation to the registrant; (2) failed to give him a Good Faith Estimate; and (3) engaged in conduct that was improper, fraudulent, or dishonest. Finally, Thorne alleged that Regions Bank and Cardinal conspired together to injure him by intentionally concealing the yield spread premium paid by Regions Bank to Cardinal.

{¶ 17} On April 13, 2009, Cardinal filed a motion to dismiss asserting that Thorne had failed to state a claim upon which relief can be granted. On June 18, 2009, Residential filed a motion for summary judgment with supporting affidavits. On November 23, 2009, the trial court granted summary judgment in favor of Residential and granted Cardinal's request for dismissal from the lawsuit. This appeal followed.

II. STANDARD OF REVIEW

{¶ 18} The claims involving Residential were decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶ 19} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Bard v. Soc. Natl. Bank, nka KeyBank* (Sept. 10, 1998), 10th Dist. No. 97APE11-1497. Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445.

{¶ 20} As to Cardinal, "[a] motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs*. (1992), 65 Ohio St.3d 545, 548. When ruling on a Civ.R. 12(B)(6) motion, an appellate court must presume the truth of the factual allegations in the complaint and must make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. Further, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recover. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus.

{¶ 21} When reviewing a judgment entry granting a Civ.R. 12(B)(6) motion to dismiss, an appellate court must independently review the complaint to determine if dismissal was appropriate and need not defer to the trial court's decision. *McGlone v. Grimshaw* (1993), 86 Ohio App.3d 279, 285.

III. STANDING

{¶ 22} In his first assignment of error, Thorne maintains that:

{¶ 23} "The trial court erred in finding plaintiff had standing to prosecute this action and erred in granting summary judgment to plaintiff as the trial court lacked subject matter jurisdiction of this action."

{¶ 24} Thorne contends that Residential was not the real party in interest at the time it filed its complaint in foreclosure and therefore, the trial court lacked subject-matter jurisdiction over this cause of action.

{¶ 25} We disagree.

{¶ 26} Thorne does not dispute that Residential was the holder and owner of the note and mortgage at the time Residential filed for summary judgment. Rather, Thorne contends that when Residential filed its complaint on December 9, 2008, it was not the real party in interest and lacked capacity to sue because it did not have possession of the note.

{¶ 27} Thorne argues that standing is based on the "facts existing at the time the complaint is filed." *In re Foreclosure Cases* (Dec. 27, 2007), S.D.Ohio Nos. 07-cv-166, et. al. Thorne relies on *Everhome Mtge. Co. v. Rowland*, 10th Dist. No. 07AP-615, 2008-Ohio-1282, ¶ 12, which stated:

{¶ 28} "In foreclosure actions, the real party in interest is the current holder of the note and mortgage. * * * A party who fails to establish itself as the current holder is not entitled to judgment as a matter of law." (Citations omitted.)

{¶ 29} Civ.R. 17(A) requires that "a civil action must be prosecuted by the real party in interest", that is, by a party "who can discharge the claim upon which the action

is instituted or is the party who has a real interest in the subject matter of that action." *Discover Bank v. Brockmeier*, 12th Dist. No. CA2006-057-078, 2007-Ohio-1552, ¶ 7 (Citations omitted.) If an individual or one in a representative capacity does not have a real interest in the subject matter of the action, that party lacks the standing to invoke the jurisdiction of the court. *State ex rel Dallman v. Court of Common Pleas, Franklin County* (1973), 35 Ohio St.2d 176, syllabus.

{¶ 30} Applying Civ.R. 17(A), this court in *Countrywide Home Loans, Inc. v. Montgomery*, 6th Dist. No. L-09-1169, 2010-Ohio-693, ¶ 13, rejected the proposition that a mortgagee must prove that it is the holder of a mortgage on the exact date that the complaint in foreclosure is filed. See *U.S. Bank Natl. Assn. v. Bayless*, 5th Dist. No. 09 CAE 01 004, 2009-Ohio-6115, ¶ 22, discretionary appeal not allowed by 124 Ohio St.3d 1509, 2010-Ohio-799; *Deutsche Bank Natl. Trust Co. v. Pagani*, 5th Dist. No. 09CA000013, 2009-Ohio-5665, ¶ 23; *LaSalle Bank Natl. Assn. v. Street*, 5th Dist. No. 08 CA 60, 2009-Ohio-1855, ¶ 28; *Wachovia Bank, N.A. v. Cipriano*, 5th Dist. No. 09CA007A, 2009-Ohio-5470, ¶ 40.

{¶ 31} In this case, there was uncontradicted evidence that Residential was the holder of Thorne's mortgage. The assignment of mortgage from Regions to Residential executed one week prior to the filing of the complaint, on December 2, 2008, was recorded on December 10, 2008. In addition, the affidavit filed in support of Residential's motion for summary judgment reflected that Residential's loan servicing

agent had custody of the note and mortgage prior to the time Residential filed its motion for summary judgment.

{¶ 32} Accordingly, we find Thorne's first assignment of error is not well-taken.

IV. TILA VIOLATIONS

{¶ 33} In his second assignment of error, Thorne maintains that:

{¶ 34} "The trial court erred in finding Thorne's TILA damages claims were barred by the one year statue of limitations and that no TILA violation occurred."

{¶ 35} Thorne asserts that Section 1640(e), Title 15, U.S.Code, does not bar his counterclaim for TILA damages by way of recoupment to Residential's action for foreclosure since Residential's failure to provide him with a copy of the Good Faith Estimate and its failure to make preliminary disclosures as required by state and federal laws are both TILA violations upon which damages can be awarded, and thus, to which recoupment applies.[1]

{¶ 36} While we agree that Thorne's TILA counterclaim is a recoupment and it is not barred by the one-year statute of limitation, we nonetheless find that no TILA violations occurred.

{¶ 37} At the outset, the trial court was correct in holding that Thorne's time for bringing a TILA claim for damages (in an original action) was one year from the date of

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[1]Thorne's affirmative defense alleged that Residential's failure to make disclosures required by TILA gave him rights under Sections 1635 and 1640 to rescind the mortgage agreement and to reduce Residential's claim by the amount of his actual and statutory damages.

closing. The trial court was also correct in holding that Thorne did not have a right to rescind the loan agreement as an affirmative defense under TILA because three years had passed since the loan closed. *Beach v. Ocwen Federal Bank* (1998), 523 U.S. 410, 118 S.Ct. 1408, 140 L.Ed.2d 566.

{¶ 38} However, the trial court did not consider whether Thorne could assert the right to damages as a matter of defense by recoupment or set-off in a collection action brought by the lender even after the one year is up (since Thorne had asserted the defense of Section 1640(e), Title 15, U.S.Code in his counterclaim). Instead, the trial court considered only Thorne's argument that "rescission by way of recoupment * * * is not subject to the 3 year period set forth in TILA."

{¶ 39} According to *Beach v. Ocwen Federal Bank* (1998), 523 U.S. 410, 118 S.Ct. 1408, 140 L.Ed.2d 566, a TILA damages claim may be raised by the defendant by way of recoupment to the creditor's suit on the debt, regardless of the one year statute of limitations. Prior to *Beach*, Ohio courts similarly held that a TILA counterclaim arising out of the same transaction as the claim (the loan agreement) was not barred by the one year statute of limitations since it was a recoupment. TILA rescission, however, is not available by recoupment after the expiration of the three year period of Section 1635(f), Title 15, U.S.Code. See id.

{¶ 40} Thorne's recoupment claim is premised on his allegation that Residential failed to make disclosures required by TILA. As such, Thorne claims that he is entitled to reduce Residential's claim by the amount of his actual and statutory damages.

Specifically, Thorne complained that TILA violations occurred when: (1) he received only one Rescission Notice form, but should have received two; (2) he was not provided with a Good Faith Estimate which would have disclosed the existence of the yield spread premium; and (3) he was given an inaccurate truth-in-lending disclosure.

{¶ 41} We conclude that Thorne's TILA counterclaim is a recoupment because it arises out of the same transaction as Residential's claim, i.e. the promissory note. The counterclaim of recoupment is not barred by the one-year statute of limitations. *Continental Acceptance Corp. v. Rivera* (1976), 50 Ohio App.2d 338, 344.

{¶ 42} Nevertheless, we conclude that the trial court properly granted summary judgment to Residential because no TILA violations occurred. We agree that Thorne was fully informed of his right to rescind even though he had received only one Rescission Notice. "TILA does not require perfect notice; rather, it requires a clear and conspicuous notice of rescission rights." *Contimortgage Corp. v. Delawder* (July 30, 2001), 4th Dist. No. 00CA28, citing *Smith v. Highland Bank* (C.A.11, 1997), 108 F.3d 1325, 1327; *Veale v. Citibank, F.S.B.* (C.A.11, 1996), 85 F.3d 577, 580; *In re Porter*, (C.A.3, 1992), 961 F.2d 1066, 1076. Cf. *Buick v. World Savings Bank* (E.D.CA.2008), 637 F.Supp.2d 765 (technical violations result in liability to the creditor). See *Semar v. Platte Valley Fed. Sav. & Loan Ass'n* (C.A.9, 1986), 791 F.2d 699, 704.

{¶ 43} As to the Good Faith estimate and the claim of an inaccurate truth in lending disclosure, the trial court concluded that Thorne was fully aware of the existence of the yield spread premium. Thorne was provided with a copy of the Origination

Agreement which fully described the compensation from Residential to Cardinal for Cardinal's brokerage services. Additionally, the HUD-1 settlement statement which Thorne received a copy of, identified all settlement (or closing) costs on the mortgage loan and informed him of the fees to be paid in the loan transaction.

{¶ 44} Because we find that Thorne did receive a copy of the Rescission Notice Form and was fully apprised of the existence of the yield spread premium, we conclude that no violations of TILA occurred. Accordingly, Thorne's second assignment of error is not well-taken.

V. FRAUD CLAIM

{¶ 45} In his third assignment of error, Thorne maintains that:

{¶ 46} "The trial court erred in finding Thorne's fraud claim was barred by the statute of limitations."

{¶ 47} Thorne argues that the trial court erred in concluding that Thorne's affirmative defense of fraud was barred by the applicable statute of limitations. Thorne insists that his "fraud claim has a different and much wider focus that [sic] a simple RESPA claim," because "the issue in this case is whether the reference on the HUD [Settlement Statement] to 'Broker Fee Paid by Lender' was sufficient to put a reasonable person on notice of the possibility of fraud." (Bracketed material added.)

{¶ 48} We disagree.

{¶ 49} In his answer, Thorne asserted an affirmative defense of fraud, claiming that Regions understated the costs of the loan, and in return for Cardinal's delivery of a

loan that carried a higher interest rate, paid Cardinal a fee known as a yield spread premium. Thorne contends that Regions and Cardinal intended to mislead him when they concealed the yield spread premium and failed to make preliminary disclosures required by state and federal law.

{¶ 50} A yield-spread premium occurs when a broker causes a borrower to accept an interest rate higher than the rate a lender is willing to offer. In return, the broker receives a payment from the lender (usually a percentage of the difference), sometimes without the knowledge or consent of the borrower. *McClendon v. Challenge Financial Investors Corp.* (Mar. 9, 2009), N.D.Ohio No. 1:08CV1189.

{¶ 51} In his counterclaim, Thorne alleged that in addition to his fraud and TILA claim, the loan transaction was also covered by RESPA, Section 3500.5(a), Title 24, C.F.R. and that compliance with these disclosure requirements was mandatory.

{¶ 52} In its decision, the trial court relied upon *Mills v. Equicredit Corp*. (E.D.Mich.2004), 294 F.Supp.2d 903, and *Anderson v. Wells Fargo Home Mtge., Inc.* (W.D.Wash.2003), 259 F.Supp.2d 1143, in concluding that the plaintiff was not entitled to equitable relief because the yield spread premium was disclosed and there was no "affirmative misrepresentation which prevented Plaintiffs from discovering their RESPA cause of action." The trial court relied on *Mills* and *Anderson* to the extent that disclosure of the yield spread premium in the mortgage closing documents is sufficient to trigger the running of the limitations period. The trial court did not decide whether equitable tolling applied to Thorne's RESPA claim because it concluded that the yield spread premium had

been disclosed. As such, the trial court did not need to consider whether Cardinal's closing agent attempted to hide evidence of the yield spread premium by going through the documents so quickly that Thorne had no time to review them.

{¶ 53} Equitable tolling applies to a statute of limitations period when inequitable circumstances prevent a plaintiff from suing before the statutory period runs. In cases of fraudulent concealment, the statute of limitations can be tolled when the plaintiff demonstrates that "the defendant took affirmative steps to conceal the plaintiff's cause of action" and "the plaintiff could not have discovered the cause of action despite exercising due diligence." *Jarrett v. Kassel* (C.A.6, 1992), 972 F.2d 1415, 1423.

{¶ 54} Concluding that the yield spread premium had been disclosed, the trial court in this case rejected Thorne's claim that he "was an unwitting party to a separate agreement reached by Regions and Cardinal outside of closing." The reference on the HUD settlement statement to the yield spread premium eliminated any argument that Residential or Cardinal took "affirmative steps to conceal" its existence.

{¶ 55} Thorne asserts that his claim is still not barred by the statute of limitations because the fraud could not have been discovered at closing by a reasonable person. Thorne complains that he did not know what a yield spread premium was, or the various terms used to describe this form of compensation to the mortgage broker, and did not realize what he was actually paying for the loan.

{¶ 56} Under R.C. 2305.09, a cause of action for fraud must be brought within four years after the fraud was or should have been discovered. No more than a

reasonable opportunity to discover the fraud is required to start the period of limitation. *Gaudin v. K.D.I. Corp.* (S.D.Ohio 1976), 417 F.Supp. 620, 629, affirmed (C.A.6, 1978), 576 F.2d 708. Information sufficient to alert a reasonable person to the possibility of wrongdoing gives rise to a party's duty to inquire into the matter with due diligence. *Militsky v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.* (N.D.Ohio 1980), 540 F.Supp. 783, 787. Once sufficient indicia of fraud are shown, a party cannot rely on its unawareness or the efforts of the opposition to lull it into a false security to toll the statute. Id. at 786-787. *Au Rustproofing Ctr., Inc. v. Gulf Oil Corp.* (C.A.6, 1985), 755 F.2d 1231, 1237. See *Investors REIT One v. Jacobs* (1989), 46 Ohio St.3d 176, paragraph two of the syllabus.

{¶ 57} In this case, the yield spread premium was specifically disclosed in the HUD settlement statement that Thorne signed at closing on June 20, 2003. The HUD settlement statement is intended to inform borrowers of the fees that they are paying in the loan transaction. See *Mills v. Equicredit Corp*. (E.D.Mich.2004), 294 F.Supp.2d 903, 908. In addition to this form, the Origination Agreement and the Business Contract operated to disclose to Thorne that he would either pay a brokerage fee to Cardinal or Residential could pay that fee on Thorne's behalf in exchange for charging a higher rate. Thorne could have discovered this indirect fee by exercising due diligence in reading the forms. *Ignash v. First Serv. Fed. Credit Union*, 10th Dist. No. 01AP-1326, 2002-Ohio-4395, ¶ 15; *Evans v. Rudy-Luther Toyota, Inc.* (D.Minn.1999), 39 F.Supp.2d 1177, 1184; *Hughes v. Cardinal Fed. Sav. & Loan Assn.* (S.D.Ohio 1983), 566 F.Supp. 834, 838.

{¶ 58} Accordingly, Thorne's third assignment of error is not well-taken.

VI. "ATTESTED" DOCUMENTS

{¶ 59} In his fourth assignment of error, Thorne maintains that:

{¶ 60} "The trial court erred in considering documents on summary judgment the delivery of which was 'attested' to by affiants who had no personal knowledge of delivery and were not competent to testify with regard thereto."

{¶ 61} We disagree.

{¶ 62} We begin our review of Thorne's fourth assignment of error by noting that Thorne has failed to comply with App.R. 16(A)(7) and while appellate courts may disregard any assignments of error that are not separately argued, we believe, however, that the interest of justice requires us to review Thorne's arguments. See App.R. 12(A)(2).

{¶ 63} Pursuant to Civ.R. 56(C), only certain evidence may be considered by the court when deciding a motion for summary judgment. Specifically, the court is only to consider "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence and written stipulations of fact." Civ.R. 56(C). The trial court may also consider a type of document not expressly mentioned in Civ.R. 56(C) if such document is "accompanied by a personal certification that [it is] genuine or [is] incorporated by reference in a properly framed affidavit pursuant to Civ.R. 56(E)." *Modon v. Cleveland* (Dec. 22, 1999), 9th Dist. No. 2945-M, citing *Bowmer v. Dettelbach* (1996), 109 Ohio App.3d 680, 684.

{¶ 64} Civ.R. 56(E) provides that such an affidavit must "be made on personal knowledge, [and] set forth such facts as would be admissible in evidence." Civ.R. 56(E). The rule further provides that a sworn or certified copy of the document referred to in the affidavit must be attached to or served with the affidavit. Id. "'Personal knowledge' has been defined as 'knowledge of factual truth which does not depend on outside information or hearsay.'" *Modon*, supra, quoting *Wall v. Firelands Radiology, Inc*. (1995), 106 Ohio App.3d 313, 335. The requirement that the papers be sworn or certified is satisfied by a certification contained within the paper itself. *Wall*, 106 Ohio App.3d at 334, citing *Olverson v. Butler* (1975), 45 Ohio App.2d 9, 12.

{¶ 65} Thorne suggests that Ugwuadu's affidavit did not comport with Civ.R. 56(E) because Ugwuadu's assertion that Residential, through its loan servicing agent, GMAC, has custody of the promissory note and mortgage, was based on inadmissible hearsay evidence rather than personal knowledge.

{¶ 66} Evid.R. 803(6) governs the admissibility of business records as an exception to the hearsay rule. Specifically:

{¶ 67} "Evid.R. 803(6) excepts from the hearsay rule records kept in the course of a regularly conducted business activity if it was the regular practice of that business to make such records and those records were made by or from information transmitted by a person with knowledge." *Charter One Mtge. Corp. v. Keselica*, 9th Dist. No. 04CA008426, 2004-Ohio-4333, ¶ 19.

{¶ 68} In this case, the affidavit attached to Residential's motion for summary judgment stated in pertinent part: (1) Ugwuadu had personal knowledge of the information being attested to; (2) Ugwuadu is an employee of GMAC; (3) GMAC Mortgage, LLC, was the loan servicing agent for Residential; (4) GMAC has custody of, and maintains records related to, the promissory note and mortgage that are the subject of this foreclosure action; (5) a genuine copy of the original note and mortgage was attached and that the note was currently in default. In the affidavit, Ugwuadu also stated that "true and accurate copies of the original note and mortgage that are the subject of this foreclosure action" were attached to his affidavit.

{¶ 69} Ugwuadu's affidavit clearly refers to business records kept in the ordinary course of GMAC's regularly conducted business activity. It was clearly GMAC's practice to generate and maintain records relating to mortgages and promissory notes it held on behalf of Residential. As a result, the statements in Ugwuadu's affidavit were based on admissible evidence, namely GMAC's business records. See Evid.R. 803(6).

{¶ 70} As for the argument that Ugwuadu's affidavit was not based on personal knowledge, an affiant's mere assertion that he has personal knowledge of the facts asserted in an affidavit can satisfy the personal knowledge requirement of Civ.R. 56(E). See *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14. A mere assertion of personal knowledge satisfies Civ.R. 56(E) if the nature of the facts in the affidavit combined with the identity of the affiant creates a reasonable inference that the affiant has personal knowledge of the facts in the affidavit. Id.

{¶ 71} Here, the affiant, Ugwuadu, stated that he was employed by GMAC and that he handled Residential's account at GMAC. Thorne presented no evidence to refute this claim. In his affidavit, Ugwuadu also stated that GMAC has custody of the note and the mortgage. The identity of Ugwuadu as the affiant, combined with the nature of the facts asserted in his affidavit, created a reasonable inference that Ugwuadu did in fact have personal knowledge that GMAC was currently holding the note and the mortgage on behalf of Residential. As such, Ugwuadu's affidavit satisfied the personal knowledge requirement of Civ.R. 56(E).

{¶ 72} Accordingly, we conclude that Thorne's fourth assignment of error is not well-taken.

VII. CARDINAL MORTGAGE

{¶ 73} In his fifth assignment of error, Thorne maintains that:

{¶ 74} "The trial court erred in finding Thorne's claims against Cardinal Mortgage were barred by the statute of limitations and dismissing Thorne's third-party complaint."

{¶ 75} We disagree.

{¶ 76} Thorne's third-party complaint alleges that: (1) Cardinal and Regions Bank engaged in fraud when they misrepresented to Thorne the true cost of his loan; (2) Cardinal violated the Ohio Mortgage Broker's Act when it failed to provide Thorne with a Mortgage Loan Origination Disclosure Statement and Good Faith Estimate of closing costs; and (3) Cardinal and Regions conspired to commit fraud upon Thorne when they concealed the yield spread premium.

{¶ 77} Cardinal did not file an appellate brief. If an appellee fails to file an appellate brief, App.R. 18(C) authorizes an appellate court to accept an appellant's statement of facts and issues as correct, and then reverse a trial court's judgment as long as the appellant's brief reasonably appears to sustain such action. See *Sprouse v. Miller*, 4th Dist. No. 06CA37, 2007-Ohio-4397, at fn. 1. In other words, an appellate court may reverse a judgment based solely on a consideration of an appellant's brief. See id., citing *Helmeci v. Ohio Bur. of Motor Vehicles* (1991), 75 Ohio App.3d 172, 174; *Ford Motor Credit Co. v. Potts* (1986), 28 Ohio App.3d 93, 96; *State v. Grimes* (1984), 17 Ohio App.3d 71, 71-72. In this case, Thorne's brief does not reasonably appear to support a reversal of the trial court's judgment.

{¶ 78} The gist of the third-party complaint as it pertains to Thorne's fifth assignment of error was that Residential and Cardinal together misrepresented to Thorne the cost of his loan when it intentionally concealed the yield spread premium.

{¶ 79} In Ohio, a cause of action for fraud must be brought within four years after the fraud was or should have been discovered. R.C. 2305.09(C); *Velotta v. Leo Petronizio Landscaping, Inc.* (1982), 69 Ohio St.2d 376, 380. "It is actual discovery, or what might by the exercise of due diligence have been discovered that will cause the statute to begin to run." *City of Kettering v. Berger* (1982), 4 Ohio App.3d 254, 261.

{¶ 80} Consistent with our review of appellant's third assignment of error, we find that Thorne could have discovered the alleged fraud, either actually or constructively, on

or after July 29, 2003. Therefore, any fraud claim should have been brought on or before July 29, 2007. Thorne's January 28, 2009, third-party complaint was clearly untimely.

{¶ 81} Accordingly, Thorne's fifth assignment of error is not well-taken.

VIII. CONCLUSION

{¶ 82} We conclude that Thorne has not established that any genuine issues of material fact exist which would show: (1) Residential was not the real party in interest; (2) Thorne is entitled to recoupment; (3) the fraud claim against Residential was not barred by the statute of limitations; and (4) Ugwuadu's affidavit was not made on personal knowledge. We further conclude that the factual allegations set forth in the complaint require a finding that Thorne's fraud claim against Cardinal was barred by the statute of limitations.

{¶ 83} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Lucas County Common Pleas Court is affirmed. Appellant is 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.

Arlene Singer, J. _______________________
JUDGE

Thomas J. Osowik, P.J.

Keila D. Cosme, J. _______________________
CONCUR. JUDGE

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.