[Cite as *Bank of Am., N.A. v. Levy*, 2015-Ohio-800.]

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

Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, L.P., fka Countrywide Home Loans Servicing, L.P.	Court of Appeals No. L-13-1082 Trial Court No. CI0201202478
Appellee	
v.	
Laurence A. Levy, et al.	**DECISION AND JUDGMENT**
Appellant	Decided: March 6, 2015

* * * * *

Eric T. Deighton, for appellee.

Salvatore C. Molaro, Jr., for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Laurence A. Levy, appeals the granting of summary judgment against him by the Lucas County Court of Common Pleas. For the reasons that follow, we affirm.

{¶ 2} Appellant appeals the April 24, 2013 judgment of the Lucas County Court of Common Pleas entered against him in a foreclosure brought by appellee, Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, L.P., fka Countrywide Home Loans Servicing, L.P. ("the Bank"). The judgment granted the Bank's motion for summary judgment in the action for foreclosure and issued a decree in foreclosure and an order of sale.

{¶ 3} It is undisputed that appellant entered into a mortgage loan agreement with the Bank to refinance his home on July 2, 2003. Under the agreement, appellant executed a fixed rate note in the principal amount of $130,600 on the property located at 2317 Orchard Road, Toledo, Ohio. One the same date, appellant executed the mortgage and secured the note.

{¶ 4} It is also undisputed that appellant entered into a loan modification agreement with the Bank to modify the previously executed mortgage on June 9, 2004. Under the agreement, the Bank modified the fixed rate note in the new principal amount of $127,867.09. The modification was executed by both parties on the same day. Appellant made payments in accordance with the modification from the time of the execution until September 2008. Appellant resumed making full payments again in March 2009.

{¶ 5} On July 28, 2009, appellant attempted to enter into a second loan modification agreement with the Bank and stopped making payments between August 2009 and October 2009. Appellant began making payments according to the

modification in October 2009 and continued with those payments until July 2010 when he was notified that he was not making full payments. The Bank informed appellant on December 1, 2009 that the second loan modification was not approved. Appellant has not made payments since July 2010.

{¶ 6} Appellant asserted the affirmative defense of estoppel, and noted that his payments between October 2009 and July 2010 were amounts agreed upon in the second loan modification. Appellant also does not dispute that he was in default for eight months prior to July 2010, and did not make any additional payments between July 2012 and when the complaint was filed, nearly two years later.

{¶ 7} On March 27, 2012, the Bank filed a complaint for judgment on the note and foreclosure of the mortgage against appellant in the Lucas County Court of Common Pleas, alleging that it is the holder of the note and that the note and mortgage are in default. The Bank claimed that the principal amount of $113,609.45, plus interest at the rate of 5.50 percent per annum from May 1, 2009, was due upon the note, plus late charges. The Bank alleged that by reason of the default, it was entitled to a decree foreclosing on the mortgage.

{¶ 8} Appellant filed an answer to the complaint on March 26, 2013. In his answer appellant also pled an affirmative defense that a second loan modification had been entered into between the parties in August 2009 and is still in effect. On January 6, 2013, the Bank filed a motion for summary judgment on its action for foreclosure. It is

from the trial court's judgment of April 24, 2013, granting the Bank's motion for summary judgment that appellant has brought this appeal.

{¶ 9} Appellant sets forth the following assignment of error:

> I. The trial court erred by granting summary judgment to appellee on the basis that no genuine issue of material fact exists.

{¶ 10} The standard of review for this court is de novo on motions for summary judgment, and appellate courts should apply the same standards as the trial court in determining if summary judgment should be granted. *Richards v. Wasylyshyn*, 2012-Ohio-3733, 977 N.E.2d 1053, ¶ 11 (6th. Dist.), citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶ 11} A motion for summary judgment, as defined in Civ.R. 56, can only prevail if

> "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Richards* at ¶ 12, citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 12} In his sole assignment of error, appellant argues that the trial court should not have granted summary judgment in favor of the Bank, because appellant can prove a

genuine issue of material fact. Specifically, appellant argues the affirmative defense of accord and satisfaction. Appellant claims that when the Bank accepted and deposited his payments made between October 2009 and July 2012, they entered into an accord and satisfaction with appellant.

{¶ 13} This court has recently decided on elements that must be proven to prevail on a motion for summary judgment in a foreclosure issue.

> To support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials showing: (1) The movant is the holder of the note and mortgage, or is a party entitled to enforce the instrument; (2) if the movant is not the original mortgagee, the chain of assignments and transfers; (3) the mortgager is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due. (Citation omitted.) *PNC Bank v. Bhandari*, 6th Dist. Lucas No. L-12-1335, 2013-Ohio-2477, ¶ 10.

{¶ 14} The Bank submits in its brief that it has satisfied all five elements. It claims that the Bank is the holder of the note and mortgage, it has recorded the assignment, appellant defaulted when he did not pay from September 2008 to March 2009, and August 2009 to October 2009, the Bank has met all conditions precedent, and the Bank has stated the amount and interest due in its complaint.

{¶ 15} Appellant claims that the Bank entered into an accord, and that the issue of accord and satisfaction is an affirmative defense against summary judgment. This court has previously defined accord and satisfaction:

> [F]or an accord and satisfaction to be established, it must be shown (1) that "the parties went through a process of offer and acceptance—an accord," (2) that the accord was "carried out—a satisfaction," and (3) that the agreement was "supported by consideration." *Citibank (South Dakota), N.A. v. Perz*, 191 Ohio App.3d 575, 947 N.E.2d 191, 2010-Ohio-5890, ¶ 42, citing *Allen v. R.G. Indus. Supply*, 66 Ohio St.3d 229, 231-232, 611 N.E.2d 794 (1993).

{¶ 16} Appellant argues that when the Bank accepted the partial payments dated after October 2009, accord and satisfaction was created. The accord was the mortgage that was in place and accepted by the parties, the submission and acceptance of the payments was the satisfaction, and the payments themselves were consideration. Even if, as appellant argues, accord and satisfaction has been established between the parties, consideration has not.

{¶ 17} In *Rhoades v. Rhoades,* 40 Ohio App.2d 559, 562, 321 N.E.2d 242 (1st Dist.1974), citing 11 Ohio Jurisprudence 2d 320, Contracts, Section 82, the court stated "[i]t is elementary that neither the promise to do a thing, nor the actual doing of it will constitute a sufficient consideration to support a contract if it is merely a thing which the party is already bound to do, either by law or a subsisting contract with the other party."

Appellant was already required to pay monthly by terms of the original mortgage. Even if appellant had received the second modification that he applied for, he would still be bound to pay, which does not create consideration.

{¶ 18} This court has ruled that a partial payment towards a mortgage can be consideration, but only when the payment is presented as an alternative to filing for bankruptcy. "It has long been recognized, however, that partial payment in lieu of filing bankruptcy is sufficient consideration for an accord and satisfaction, despite the lack of a bona fide dispute over the existence or amount of the debt." *Perz, supra*, at ¶ 45.

{¶ 19} Appellant at no point raised the issue of bankruptcy, or made it known to the Bank that he may have to file for bankruptcy if he was required to make full payments towards his mortgage. Had appellant raised this issue, his payments, even though they were partial, may have constituted consideration and allowed appellant to pursue his accord and satisfaction affirmative defense.

{¶ 20} Additionally, the Supreme Court of Ohio has established protections built into the defense of accord and satisfaction. "Two essential safeguards built into the doctrine of accord and satisfaction [to] protect creditors or injured parties from overreaching debtors or tortfeasors: (1) there must be a good-faith dispute about the debt, and (2) the creditor must have reasonable notice that the check is intended to be in full satisfaction of the debt." *Allen*, 66 Ohio St.3d 229, at paragraph two of the syllabus, 611 N.E.2d 794.

{¶ 21} Appellant has established a dispute about the debt, as he believed the second modification was in place and he was making his payments according to the new mortgage, but none of the payments he made to the Bank were intended to be full satisfaction of his mortgage. All of the checks within the record were made for the monthly payments appellant already owed.

{¶ 22} In sum, regardless of which theory appellant attempts to argue accord and satisfaction under, the defense does not apply here. Therefore the trial court was correct in granting the Bank's motion for summary judgment.

{¶ 23} For the foregoing reasons, appellant's sole assignment of error is found not well-taken.

{¶ 24} The judgment of the Lucas County Court of Common Pleas 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

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE