[Cite as *Huntington Natl. Bank v. Belcher*, 2012-Ohio-3731.]

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

The Huntington National Bank,
Successor By Merger to Sky Bank

Appellee

v.

Kimberly A. Belcher, et al.

Appellant

Court of Appeals No. WD-11-055

Trial Court No. 2008CV0934

DECISION AND JUDGMENT

Decided: August 17, 2012

* * * * *

Eric T. Deighton, for appellee.

George R. Smith, Jr., for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the August 12, 2011 judgment of the Wood County Court of Common Pleas, which granted summary judgment to appellee, Huntington National Bank, and denied summary judgment to appellant, Kimberly A. Belcher. The court awarded appellee a money judgment for appellant's default on a modified promissory note

and ordered foreclosure of the mortgage securing the loan to satisfy the judgment. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellant asserts the following assignments of error on appeal:

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING BELCHER LEAVE TO FILE A COUNTERCLAIM WITH HER AMENDED ANSWER.

II. THE TRIAL COURT ERRED IN GRANTING HUNTINGTON'S MOTION FOR SUMMARY JUDGMENT AS THERE WAS A GENUINE DISPUTE OF MATERIAL FACT WHICH RENDERED THE ENTRY OF SUMMARY JUDGMENT IMPROPER AND HUNTINGTON FAILED TO MEET ITS BURDEN OF PROOF AS TO BELCHER'S AFFIRMATIVE DEFENSES.

{¶ 2} On October 2, 2008, appellee ("the bank"), filed a foreclosure action against appellant. The bank asserted it was the holder of an $84,000 balloon promissory note dated December 18, 2003, between appellant and Sky Bank, the bank's predecessor in interest, and that appellant was in default in the payment of the note as of March 1, 2008. The note was secured by a mortgage. The bank alleged that appellant currently owed $96,457.79 plus interest at the rate of 5.0 percent. During the course of the litigation, appellant presented a December 14, 2007 loan modification agreement, which the bank had failed to attach to its complaint. The bank later moved to have the record corrected to incorporate the agreement.

{¶ 3} The bank filed a motion for summary judgment. Appellant filed a memorandum in opposition to summary judgment and a motion for leave to amend her answer and assert a counterclaim. Appellant sought leave to amend her answer to assert affirmative defenses and counterclaims of breach of contract, wrongful foreclosure, and breach of covenant of good faith and fair dealing. The trial court granted the motion for leave to amend in part allowing appellant to assert only additional affirmative defenses. When mediation failed, appellant filed a cross-motion for summary judgment. Ultimately, the trial court granted summary judgment in favor of the bank concluding that appellant was in default on the promissory note and owed the bank $96,457.79, plus interest at the rate of 5.0 percent from March 1, 2008, plus late charges. The trial court stayed the foreclosure pending appeal.

{¶ 4} In her first assignment of error, appellant argues that the trial court abused its discretion by denying her leave to amend her answer to add counterclaims. The trial court denied appellant's request to add counterclaims because she had never filed a proper answer and never attempted to assert counterclaims before the filing of the motion for leave to amend her answer.

{¶ 5} Appellant argues that her motion to amend her answer should have been freely given since the bank was not prejudiced by the amendment, the issues raised in the counterclaims involve the same issues of fact as the complaint, and there was no undue delay in seeking to amend. The bank, however, argues the motion was untimely filed and

there was no justification for filing a counterclaim so late in the case given the opportunities the court had already extended to appellant.

{¶ 6} Pursuant to Civ.R. 15(A), a party may seek leave to amend an answer and leave should be freely given when justice so requires. An appellate court will not reverse a trial court's decision on a motion to amend absent a finding of an abuse of discretion. *Wilmington Steel Prod., Inc. v. Cleveland Elec. Illum. Co.*, 60 Ohio St.3d 120, 122, 573 N.E.2d 622 (1991). The term "abuse of discretion" requires that we find more than an error of law or judgment. We must find that the "trial court's attitude is unreasonable, arbitrary, or unconscionable." *Id.* citing *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 87, 482 N.E.2d 1248 (1985). In determining whether to affirm or reverse a trial court's decision, the appellate courts have considered whether the moving party can demonstrate operative facts which support the prima facie elements of a proposed claim. *Wilmington Steel* at syllabus.

{¶ 7} Appellant's proposed counterclaims of breach of contract and wrongful foreclosure stem from appellant's allegation that the bank violated the December 14, 2007 loan modification agreement by wrongfully increasing appellant's monthly payments, thereby forcing her into default. Her counterclaim of a breach of covenant of good faith and fair dealing is based upon an allegation that the bank refused to extend her another loan modification.

{¶ 8} We find appellant presented no evidence to prove she made all of the monthly payments required under the December 14, 2007 loan modification agreement

beyond her own affidavit. Appellant asserted in her initial letter to the court, which it treated as an answer, she had made payments from February to May 2008, and then received a new payment book which indicated that the monthly payments were increased from $759.09 to $1,027.72. Appellant later attested (in an affidavit attached to her motion to vacate the default judgment that had been rendered against her) she made the four timely payments from February 1, 2008 onward, but her June 2008 payment was rejected because the monthly payment had increased due to taxes. She further alleged that the bank did not timely credit her payments because her initial $2,000 down payment made in December 2008, was not posted until April 2008, implying that the bank records were not accurate.

{¶ 9} The custodian of the bank records, however, attested the December 14, 2007 loan modification agreement required payments to begin February 1, 2008, and appellant made only two payments: $759.09 on May 6, 2008, and $759.09 on July 31, 2008. Appellant did not present any evidence beyond her own self-serving statements to establish that she had made the monthly payments for February, March, and April 2008. She presented no evidence to establish that an error in posting had occurred. Therefore, we find the evidence is undisputed that appellant defaulted on the loan modification agreement as of March 1, 2008. Appellant's first two counterclaims lack merit because any change to the monthly payment occurred after the default had already occurred.

{¶ 10} As to the reason for the failure of the parties to enter into a third loan modification agreement, the bank presented the affidavit of the bank's custodian of

records, who attested the bank attempted to work with appellant regarding a third loan modification agreement during this litigation, but no agreement could be reached because appellant was unable to make the required down payment. Therefore, we also find there is undisputed evidence to establish that the parties were unable to enter into a third loan modification solely because appellant was unable to make a down payment and not because the bank failed to deal fairly with appellant. Appellant's third counterclaim lacked merit as well.

{¶ 11} Therefore, we find appellant failed to establish she had any facts to support her counterclaims and the trial court did not abuse its discretion by denying appellant's motion to amend her answer to add these counterclaims. Appellant's first assignment of error is not well-taken.

{¶ 12} In her second assignment of error, appellant argues that the trial court erred by granting summary judgment to the bank. The appellate court reviews the grant of summary judgment under a de novo standard of review. *Doe v. Shaffer,* 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 (2000), citing *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Applying the requirements of Civ.R. 56(C), we uphold summary judgment when it is clear "(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." *Harless v. Willis Day Warehousing Co*., 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 13} Once the moving party has identified the issues where there is no genuine issue of material fact and the issue can be determined as a matter of law, the opposing party must come forward with specific facts to show that there is a genuine issue for trial. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988). A self-serving affidavit which baldly contradicts the evidence offered by the moving party is insufficient to create a genuine issue of fact. *Citibank v. Eckmeyer*, 11th Dist. No. 2008-P-0069, 2009-Ohio-2435, ¶ 60, and *State ex rel. Todd v. Felger,* 7th Dist. No. 06 CO 38, 2007-Ohio-2065, ¶ 22, *rev'd on other grounds*, 116 Ohio St.3d 207, 2007-Ohio-6053, 877 N.E.2d 673 (2007).

{¶ 14} The bank sought summary judgment arguing the evidence was undisputed that appellant was in default in payment of the note and the bank had accelerated and called due the note. The bank also asserted that appellant had defaulted on two loan modification agreements, one executed on July 10, 2006, and the other executed on December 14, 2007.

{¶ 15} Attached to its motion for summary judgment was the affidavit of the bank's assistant vice president who attested that appellant is in default for failure to pay the monthly installments of principal and interest required by the 2007 loan modification agreement; appellee exercised its option under the mortgage note to accelerate and call due the entire principal balance due on the note; and the principal balance appellant owed

was $96,457.79, plus interest at the rate of 5.0 percent from March 1, 2008, plus late charges and advancements for the payment of real estate taxes and assessments, insurance premiums, and property protection. The bank asserted that there is no evidence that appellant made any payments which were returned by the bank. The custodian of the bank's records attested that appellant also defaulted on her line of credit on April 19, 2007, and the bank charged off a loss of $23,399.

{¶ 16} Appellant argues there is a material fact in dispute in this case; i.e., whether or not appellee caused appellant to default on her mortgage by breaching the December 14, 2007 loan modification agreement. Appellant asserted that despite her compliance with the loan modification agreement, the bank increased her monthly payment and forced her into default. She attested that after the December 14, 2007 loan modification agreement was signed, she was supplied with a coupon book containing four monthly payment coupons for $759.09. The next booklet she received indicated the payments were $1,027.72, effective June 1, 2008. The bank branch refused to accept a partial payment of $759.09 in July 2008 and appellant was unable to find anyone who could tell her why her payment had increased.

{¶ 17} We find the claim that the default was due to an improper increase in the monthly payment is not a material question of fact in this case because the increase in the payment occurred after appellant had already defaulted on the loan.

{¶ 18} She also asserts that there was contradictory evidence presented as to the posting of her loan payments. Her December 2007 payment of $2,000 was not posted

until April 2008. She recalled making all of the payments required until June 2008, and provided the court with an affidavit attesting to this fact. She also argues that appellee failed to come forward with any evidence to dispute her affirmative defense that it had wrongfully refused tender of payments by appellant under the terms of the loan modification agreement.

{¶ 19} While appellant attested that she made all of the required payments, there is no further evidence to contradict the records of the bank. There was no evidence the bank erred in posting these payments or refused to accept any payments. When faced with the evidence of the bank records, appellant was required to come forward with additional evidence of payment beyond her own remembrance of having made them to defeat summary judgment. Instead, she focused her arguments on the increase in the monthly payment, which is an issue that arose after she had already defaulted on the loan. Having failed to present additional evidence to establish she had not defaulted in her payments, appellant did not meet her burden on summary judgment.

{¶ 20} Appellant also alleges that appellee misrepresented to the court that the foreclosure was based on the breach as of March 1, 2008, and did not reference the December 14, 2007 loan modification agreement.

{¶ 21} We agree that the bank erred by failing to attach the December 2007 loan modification agreement to its complaint. However, the proper remedy for the failure to attach a document is to file a motion for a more definite statement under Civ.R. 12(E), not to seek dismissal of the complaint. *Fletcher v. Univ. Hosps. of Cleveland,* 120 Ohio St.3d

167, 2008-Ohio-5379, 897 N.E.2d 147, ¶ 11. Since appellant supplied the missing document and the bank moved to have the record corrected, we find the error was remedied.

{¶ 22} Therefore, we find that the trial court did not err in finding the bank is entitled to summary judgment as a matter of law. Appellant's second assignment of error is not well-taken.

{¶ 23} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the court 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, P.J.

Stephen A. Yarbrough, 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.