

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Fifth Third Mortgage Company,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-637
Jeffrey C. Berman et al.,	:	(C.P.C. No. 09CVE-09-14673)
Defendants-Appellants.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on September 27, 2012

Felty & Lembright Co., L.P.A., Antonio J. Scarlato and David M. Gauntner, for appellee.

Benjamin S. Zacks and Robin L. Jindra, for appellant Jeffrey C. Berman.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Jeffrey C. Berman, appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, Fifth Third Mortgage Company, in this mortgage foreclosure action.

{¶ 2} Fifth Third filed a complaint in foreclosure on September 7, 2011, naming as defendants Mr. Berman and various governmental entities with potential competing tax liens against the property. The complaint alleges that Fifth Third is the owner and holder of a promissory note executed by Mr. Berman; that the note is in default; that there is due on the note the balance of \$124,175.86 plus interest running from May 1, 2009; and that Fifth Third is entitled to judgment on that amount and to sale of the property pursuant to the mortgage securing the note.

{¶ 3} Mr. Berman answered with a general denial and various defenses. Mr. Berman specifically asserted that Fifth Third had not provided him with proper notice of default as required by the terms of the note and mortgage. Mr. Berman's answer also asserted that Fifth Third had not properly served the complaint upon him and that the action should therefore be dismissed for lack of personal jurisdiction.

{¶ 4} Fifth Third moved for summary judgment based upon the terms of the original instruments, the payment history of the account, and the affidavits of two corporate custodians for the account records.

{¶ 5} Mr. Berman responded in his memorandum and affidavit opposing summary judgment by itemizing a series of partial payments made by him to Fifth Third that were not credited to his mortgage account. Mr. Berman further averred that these payments were accepted without comment at his local Fifth Third office, and he was not told for some three months that the payments were not being applied to his mortgage account, which accordingly went into default. Mr. Berman further averred that instructions or communications regarding the account had been sent to addresses other than the subject property, where he expected to receive them.

{¶ 6} The trial court granted summary judgment for Fifth Third by judgment entry dated June 30, 2011, ordering foreclosure and sale of the property. The court's judgment also sets the priority of competing tax liens.

{¶ 7} Mr. Berman has timely appealed and brings the following sole assignment of error:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY
GRANTING APPELLEE'S MOTION FOR SUMMARY
JUDGMENT.

{¶ 8} We initially note that this matter was 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.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64 (1978). Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case.

Dresher v. Burt, 75 Ohio St.3d 280, 293 (1996). Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support each element of the stated claims. *Id.*

{¶ 9} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994); *Bard v. Soc. Natl. Bank, nka KeyBank*, Tenth Dist. No. 97APE11-1497 (Sept. 10, 1998). Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.*, 106 Ohio App.3d 440, 445 (5th Dist.1995). As such, we have the authority to overrule a trial court's judgment if the record does not support any of the grounds raised by the movant, even if the trial court failed to consider those grounds. *Bard*.

{¶ 10} Mr. Berman asserts that there remains a genuine issue of material fact as to whether Fifth Third provided the requisite notice of default and acceleration under the terms of the note and mortgage. Paragraph 6 of the note in this case contains typical language providing that the lender may, upon providing written notice of default, accelerate the full amount of principal and interest due under the note and require payment no sooner than 30 days after notice of default:

6(B) Default – If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

6(C) Notice of Default – If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

{¶ 11} Paragraph 7 of the note and paragraph 15 of the mortgage govern the manner in which all notices required under the contract will be provided by the parties to each other:

7. GIVING OF NOTICES - Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address. Any notice that must be given to the Note Holder under this Note will be given by delivering it or by

mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

* * *

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. . . . The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specific procedure. There may be only one designated notice address under this Security Instrument at any one time.

{¶ 12} In support of summary judgment, Fifth Third initially submitted the affidavit of Ben Heckert in which the affiant averred as follows: "Affiant has personal knowledge that on 8/3/09 Fifth Third Mortgage Company drafted and mailed out the required Notice of Acceleration sent to the Defendant, Jeffery Berman[.]"

{¶ 13} Mr. Berman opposed summary judgment in part with his affidavit stating that he was not made aware of the declaration of default and acceleration in conformity with the terms of the note:

17. At no time from June 30, 2009 through September 15, 2009 when I made the above-referenced payments did any teller, or any other employee of the Fifth Third Banking Centers where I made the above payments, inform me that my payments were not being credited to my account, that my mortgage was in default or that it was in jeopardy of foreclosure.

* * *

19. It was not until on or about September 30, 2009 when I attempted to make another payment at a banking center that a teller told me they could not accept my payment because my account was in foreclosure.

20. Additionally, I never provided notice to or instructed Plaintiff of any address other than the Property Address for which communications on the Note or Mortgage were to be delivered.

21. Several communications from Plaintiff were (and are still being) delivered to a different address than the Property Address on the Note and Mortgage.

{¶ 14} Mr. Berman also supplied a copy of a letter from Fifth Third to him dated July 31, 2009, notifying him that he was in default on his loan and had 30 days to cure by paying all past-due amounts. This letter is addressed as follows:

JEFFREY C BERMAN
324 N STANWOOD RD
PO BOX 9866
COLUMBUS, OH 43209-1109

This format makes the post office box, rather than the residential address of the subject property, the operative part of the mailing address for postal purposes.

{¶ 15} In response to Mr. Berman's memorandum and affidavit opposing summary judgment, Fifth Third filed a supplemental memorandum to add an additional affidavit by another custodian of records, Susan Smith, asserting in part that Mr. Berman "*instructed* Fifth Third Mortgage Company to use P.O. Box 9866[,] Columbus, Ohio 43209 as the contact address on this specific account and his other accounts with Fifth Third Mortgage Company." (Emphasis added.)

{¶ 16} In addition to the above materials, Mr. Berman argues on appeal as to the effect of certain responses to interrogatories and requests for admission obtained from Fifth Third during discovery. These responses and admissions, however, were never filed with the trial court in conjunction with the memoranda submitted below, and while extensively discussed in such memoranda they do not constitute part of the record and will not be considered.

{¶ 17} We first address Fifth Third's contention that Mr. Berman's affidavit should carry no weight in opposing summary judgment because it is a "mere self-serving affidavit." An otherwise competent affidavit is not invalid for the sole reason that it is executed by a party and submitted to aver facts in opposition to summary judgment. To the contrary, a party's affidavit is competent to create a genuine issue of material fact if

made on personal knowledge. *Wolf v. Big Lots Stores, Inc.*, 10th Dist. No. 07AP-511, 2008-Ohio-1837, ¶ 12. To the extent, therefore, that Mr. Berman's affidavit does not present mere conclusory assumptions but sets forth matters within his personal knowledge, we may consider it in this case.

{¶ 18} Based upon the evidence before the trial court, there remained a genuine issue of material fact in this case as to whether Fifth Third complied with the terms of the note and mortgage before proceeding with foreclosure. The terms of the note require due notice of default sent in writing to the designated address, which would be the address of the subject property unless formally changed by the parties. For a change of notice addressed to become effective under paragraph 7 of the note and section 15 of the mortgage, Mr. Berman would have needed to notify Fifth Third in writing.

{¶ 19} The copy of the default notice supports the proposition that Fifth Third mailed it to a post office box rather than the address of the subject property. Mr. Berman's affidavit avers that he never attempted to notify Fifth Third, in writing or by any other means, of a change of address for notices. In response, Fifth Third can only produce two inconclusive affidavits. The first states that Fifth Third mailed the required notice. This affidavit does not specify to which address the notice was mailed. The second affidavit avers that Mr. Berman "instructed" Fifth Third to mail notices to a new post office box address. This affidavit does not specify how Mr. Berman conveyed these instructions. Fifth Third was not able to provide a copy of written correspondence from Mr. Berman formally changing his mailing address for delivery of notices required under the note and mortgage. There remains a genuine issue of material fact regarding whether the notice was sent according to the terms of the note and mortgage.

{¶ 20} In accordance with the foregoing, Mr. Berman's sole assignment of error is sustained and the judgment of the Franklin County Court of Common Pleas granting summary judgment to Fifth Third Mortgage Company is reversed.

*Judgment reversed;
cause remanded.*

SADLER and TYACK, JJ., concur.
