[Cite as *FirstMerit Bank v. Miller,* 2009-Ohio-4842.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

FirstMerit Bank, N.A.,	:	
Plaintiff-Appellee,	:	
v.	:	
David E. Miller,	:	No. 09AP-264 (C.P.C. No. 06CVH09-11800)
Defendant-Appellant,	:	(REGULAR CALENDAR)
and	:	
Cynthia A. Miller,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 10, 2009

Weltman, *Weinberg & Reis Co.*, *L.P.A.*, *Rosemary Taft Milby*, and *Matthew G. Burg*, for appellee FirstMerit Bank, N.A.

Abroms Law Offices, and *Hillard M. Abroms*, for appellant David E. Miller.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, David E. Miller ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, in which that court granted a summary judgment against appellant and in favor of plaintiff-appellee, FirstMerit Bank, N.A. ("appellee").

{¶2} Appellee was the holder of a promissory note and security agreement executed by appellant and his former wife, Cynthia A. Miller, for the purchase of a motor home, which was the collateral under the terms of the agreement. Appellant and his former wife defaulted on the note, and appellee repossessed the motor home. After repossession, appellee sent appellant a "Notice of Our Plan to Sell Property" pursuant to R.C. 1309.611. Appellee sent the notice via certified mail. The return receipt of service that appellee received contains a signature, though appellant disputes that it is his signature. Subsequently, appellee disposed of the collateral and, on September 11, 2006, filed a complaint against appellant and his former wife, alleging default on the promissory note, and seeking judgment in the amount of the deficiency balance on the note. On December 11, 2008, appellee obtained a summary judgment against appellant's former wife, who has not appealed that judgment.

{¶3} Meanwhile, on November 25, 2008, appellee filed a motion for leave to file a motion for summary judgment instanter against appellant. The trial court granted the motion for leave on December 8, 2008. On December 23, 2008, appellant filed his memorandum in opposition to appellee's motion for summary judgment. On January 13, 2009, the court of common pleas issued a decision granting appellee's motion for summary judgment. By judgment entry journalized on February 5, 2009, the trial court

granted judgment in favor of appellee and against appellant in the amount of the deficiency balance that appellee sought.

{¶4} Appellant timely appealed and sets forth an issue, denominated as an assignment of error, as follows:

> Whether it is implicit in ORC [sic] 1309.611, in requiring a Notice of Sale be sent to the debtor, that the secured party actually received the letter by the secured party by signing for the return receipt or a proper/responsible person signing said receipt.

{¶5} Though appellant states it in the form of an issue, we interpret this statement as an assignment of error charging that the trial court erred in granting appellee's motion for summary judgment because the court should have found that R.C. 1309.611 contains an implicit requirement that the secured party prove that the debtor actually received the notice required thereunder, and that appellee failed to carry this burden of proof.

{¶6} Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the non-moving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd*., 78 Ohio St.3d 181, 183, 1997-Ohio-221. An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc*. (1994), 94 Ohio App.3d 579, 588.

{¶7} In an action where the secured party's compliance is at issue, "the secured party has the burden of establishing that the * * * disposition * * * was conducted in

accordance with [R.C. 1309.601 to 1309.628]." R.C. 1309.626(B). Thus, appellee bore the burden of demonstrating its compliance when disposing of the collateral. Moreover, "[i]t is basic that regardless of who may have the burden of proof at trial, the burden is on the party moving for summary judgment to establish that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Horizon Sav. v. Wootton* (1991), 73 Ohio App.3d 501, 504.

{¶8} The issue before us in this case is whether R.C. 1309.611 requires that the secured party prove the debtor's actual receipt of the notice of sale that the statute requires to be sent as a condition precedent to recovery of any deficiency judgment. We begin by examining the statute itself. R.C. 1309.611(B) provides, in pertinent part:

> [a] secured party who disposes of collateral under section 1309.610 of the Revised Code *shall send a reasonable authenticated notification* of disposition to the [debtor].

(Emphasis added.)

{¶9} In support of his assignment of error, appellant argues that this language contains an implicit requirement that the secured party prove that the notice actually reached the debtor. He further argues that the return receipt ("green card") in the record in this case is insufficient to prove that appellant actually received the notice. In response, appellee argues that the only requirement in the statute is that a secured party "send" the notice to the debtor, and there is no language from which to draw a requirement that the secured party prove actual receipt by the debtor.

{¶10} Section 1309.611 of the Ohio Revised Code is derived from Section 9-611 of the Uniform Commercial Code, which the Ohio General Assembly codified on July 1, 2001. The Official Comment to the statute explains the requirement that the secured

party "send a reasonable authenticated notification of disposition" of the collateral to the debtor:

> Reasonable Notification. This section requires a secured party who wishes to dispose of collateral under section 9-610 to send "a reasonable authenticated notification of disposition" to specified interested persons, subject to certain exceptions. *The notification must be reasonable as to the manner in which it is sent, its timeliness (i.e., a reasonable time before the disposition is to take place), and its content*. See sections 9-612 (timeliness of notification), 9-613 (contents of notification generally), 9-614 (contents of notification in consumer-goods transactions).

(Emphasis added.) R.C. 1309.611, Comment 2.

{¶11} We have previously rejected appellant's argument that secured parties are required to prove actual receipt of the notice of disposition of collateral. In a case that involved the analogous predecessor to R.C. 1309.611, we held, "A secured creditor can satisfy the notice requirements set forth in R.C. 1309.47 merely by sending notice to the debtor. Actual receipt of the notice is not required and need not be proven. All that is required of the creditor under R.C. 1309.47 is that he take reasonable steps to notify the debtor of his intentions to resell certain repossessed collateral." *BancOhio Natl. Bank v. Freeland* (1984), 13 Ohio App.3d 245, paragraph two of the syllabus. Later, citing our holding in *BancOhio*, the Supreme Court of Ohio also held, "It is well-established law in Ohio that '[a] secured creditor can * * * satisfy the notice requirements set forth in R.C. 1309.47 merely by sending notice to the debtor. Actual receipt of the notice is not required and need not be proven.' " *Ford Motor Credit Co. v. Potts* (1989), 47 Ohio St.3d 97, 99, quoting *BancOhio* at 247.

{¶12} In accordance with these well-established authorities, we hold that appellee was not required to prove appellant's actual receipt of the notice; it was required to prove that it *sent* him the notice, and this he does not dispute. He also does not dispute that the notice was timely, that it was sent to appellant's correct address, and that it was reasonable as to its content. Indeed, he makes no other argument as to the existence of any genuine issue of material fact that would make summary judgment inappropriate. Having found no merit in appellant's sole assignment of error, we overrule the same, and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH, P.J., and KLATT, J., concur.

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