

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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|-----------------------------------|---|----------------------------|
| U.S. Bank National Association as | : | |
| Trustee c/o GMAC Mortgage, LLC, | : | |
| | : | |
| Plaintiff-Appellee, | : | No. 12AP-107 |
| | : | (C.P.C. No. 07CVE11-15280) |
| v. | : | |
| | : | (REGULAR CALENDAR) |
| Christopher M. Weber et al., | : | |
| | : | |
| Defendants-Appellants, | : | |
| | : | |
| State of Ohio, Department | : | |
| of Taxation et al., | : | |
| | : | |
| Defendants-Appellees. | : | |

D E C I S I O N

Rendered on December 20, 2012

Carpenter Lipps & Leland LLP, David A. Wallace, Joel E. Sechler, and Karen M. Cadieux, for appellee.

Duncan Simonette, Inc., Brian K. Duncan, and Elliott B. Garvey, for appellants.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} This is an appeal by defendants-appellants, Christopher M. Weber and Theresa L. Weber (collectively, "appellants"), from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, U.S. Bank National Association as Trustee.

{¶ 2} On November 9, 2007, appellee filed a complaint in foreclosure, alleging that appellant Christopher Weber was in default on a promissory note and mortgage in the amount of \$106,063.88. The trial court entered default judgment against appellants in December of 2007, but the court subsequently vacated that judgment. Appellant Christopher Weber filed an answer on December 18, 2007.

{¶ 3} On July 13, 2011, appellee filed a motion for summary judgment against Christopher Weber. On September 23, 2011, appellee filed a motion for default judgment against Theresa Weber; appellee later withdrew the motion and requested leave to file an amended motion for summary judgment to add Theresa Weber following her appearance. On October 17, 2011, appellee filed an amended motion for summary judgment against appellants. On November 28, 2011, appellants filed a memorandum contra appellee's motion for summary judgment. On December 14, 2011, appellee filed a motion for leave to supplement its motion for summary judgment with an affidavit in support.

{¶ 4} By decision filed January 11, 2012, the trial court granted summary judgment in favor of appellee, finding it had satisfied all conditions precedent to accelerate the note and foreclose on the property. The decision of the trial court was journalized by judgment entry filed January 12, 2012.

{¶ 5} On appeal, appellants set forth the following assignment of error for this court's review:

THE TRIAL COURT ABUSED ITS DISCRETION BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WERE ISSUES OF FACT AND APPELLEE WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

{¶ 6} Under their single assignment of error, appellants argue that the trial court erred in granting appellee's motion for summary judgment because appellee failed to show that it satisfied conditions precedent to foreclosure. Specifically, appellants argue that a genuine issue of material fact exists as to whether appellee complied with the provision in the mortgage requiring the lender to give notice to the borrower prior to acceleration following a breach by the borrower.

{¶ 7} Pursuant to Civ.R. 56(C), summary judgment shall be granted if the filings in the action, including pleadings and affidavits, "show that there is no genuine issue as to

any material fact and that the moving party is entitled to judgment as a matter of law." This court's review of a trial court's decision granting summary judgment is de novo. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, ¶ 24. In order to prevail on a motion for summary judgment, "the moving party has the initial burden to affirmatively demonstrate that there is no genuine issue of material fact to be resolved in the case, relying on evidence in the record pursuant to Civ.R. 56(C)." *Renzi v. Hillyer*, 11th Dist. No. 2012-L-041, 2012-Ohio-5579, ¶ 10, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If the moving party meets this initial burden, "the nonmoving party then bears the reciprocal burden to set forth specific facts which prove there remains a genuine issue to be litigated, pursuant to Civ.R. 56(E)." *Renzi* at ¶ 10.

{¶ 8} At issue are several provisions of the note and mortgage entered into between the parties. Paragraph 7(C) of the note addresses notice of default, and states:

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 that 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.

{¶ 9} Section 22 of the mortgage states in part:

Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument * * *. The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding.

{¶ 10} As noted, appellants argue that a genuine issue of material fact exists as to whether appellee complied with notice provisions under the note that would support its right to accelerate the balance due. Under Ohio law, "a foreclosure action brought by a lender who has failed to comply with the notice terms embodied in the note executed between the parties may be dismissed." *Wells Fargo Bank, N.A. v. Walker*, 10th Dist. No. 09AP-947, 2010-Ohio-3698, ¶ 9.

{¶ 11} In its decision, the trial court found that appellee had submitted evidence that it properly notified Christopher Weber, "the only person who signed the Note, of a default under the Note," and that appellants offered no evidence in rebuttal. The court thus found that appellee had met its burden to show that it satisfied all conditions precedent to acceleration and foreclosure.

{¶ 12} Section 22 of the mortgage, set forth above, provides in part that the "Lender shall give notice to Borrower prior to acceleration," and such notice shall specify the default, the action required to cure the default, a date not less than 30 days from notice within which to cure the default, and that failure to cure the default may result in acceleration. In construing the terms of the note and mortgage, the trial court held that proper notice of default is a condition precedent to the lender's right to accelerate and foreclose. We agree. See *LSF6 Mercury REO Invests. Trust Series 2008-1 v. Locke*, 10th Dist. No. 11AP-757, 2012-Ohio-4499, ¶ 10 (construing mortgage provision containing identical language as requiring lender, prior to accelerating balance due, to "provide notice that met the conditions precedent specified in paragraph 22").

{¶ 13} The trial court further found that appellee presented evidence that it properly notified Christopher Weber of the default. Again, we agree. As part of the material before the trial court on summary judgment, appellee submitted copies of the note and mortgage, as well as affidavit testimony that the borrower had defaulted under the terms of the instruments, and that the default had not been cured. Appellee also submitted the affidavit of Yvonne K. Boyd, an officer of GMAC Mortgage, LLC (the loan servicing agent for appellee). In the affidavit, Boyd averred that "the breach letter attached hereto and incorporated herein is a true and accurate copy of the breach letter that was mailed to Defendant Christopher M. Weber on September 3, 2007, in accordance

with Paragraph 15 of the Mortgage attached to Plaintiff's Complaint." The letter, dated September 3, 2007, specified that the loan was "in default," and outlined the actions to be taken to "cure the default," including payment, "within thirty (30) days" from the date of the letter. The notice of default also provided that, unless full payment was rendered, "we will accelerate the maturity of the loan." As found by the trial court, the notice of default satisfied all of the information required by the note and mortgage.

{¶ 14} Finally, paragraph 8 of the note and section 15 of the mortgage require notice to be delivered or mailed by first class mail to the property address or other address provided by the borrower. Pursuant to paragraph 15 of the mortgage, notice "shall be deemed to have been given to Borrower when mailed by first class mail." As noted above, appellee submitted affidavit evidence that the notice of default was mailed to Christopher Weber pursuant to the terms of the note and mortgage. Further, appellants submitted no contrary evidence on this issue.

{¶ 15} Based upon this court's de novo review of the record, appellee has demonstrated there is no genuine issue of material fact with respect to whether it satisfied the conditions precedent to foreclosure as required by the note and mortgage. Accordingly, the trial court did not err in granting summary judgment in favor of appellee.

{¶ 16} Based upon the foregoing, appellants' single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

SADLER and DORRIAN, JJ., concur.
