

[Cite as *PHH Mtge. Corp. v. Ramsey*, 2012-Ohio-672.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

PHH Mortgage Corporation fka	:	
Cendent Mortgage Corporation dba	:	
Coldwell Banker Mortgage,	:	
	:	No. 11AP-559
Plaintiff-Appellee,	:	(C.P.C. No. 09CVE-11-16763)
v.	:	(REGULAR CALENDAR)
Andrew Ramsey et al.,	:	
Defendants-Appellants.	:	

D E C I S I O N

Rendered on February 21, 2012

Lerner, Sampson & Rothfuss, and Patricia K. Block, for appellee.

Goldman & Rosenthal, and Lee S. Rosenthal, for appellants.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendants-appellants, Andrew Ramsey and Precision Real Estate Group, LLC, appeal from a judgment of the Franklin County Court of Common Pleas that granted the summary judgment motion of plaintiff-appellee, PHH Mortgage Corporation fka Cendent Mortgage Corporation dba Coldwell Banker Mortgage, entered judgment for plaintiff in the principal balance of \$53,956.13 plus interest, determined plaintiff to be the first lien on the property subject of the mortgage, and ordered foreclosure on the subject premises. Defendants assign a single error:

The Trial Court committed error when it granted Summary Judgment to Appellee because Appellants presented evidence of genuine issues of material fact to be litigated.

Because genuine issues of material fact preclude granting summary judgment to plaintiff, we reverse.

I. Facts and Procedural History

{¶2} Plaintiff filed a complaint on November 10, 2009 against, among others, defendant Andrew Ramsey. Count One of the complaint alleged defendant owed plaintiff \$53,956.13, together with interest at the rate of 7.00500 percent per year from July 1, 2009 as a result of his default on a note of which plaintiff was the holder. Count Two sought to reform the mortgage securing the note to correct a scrivener's error, and Count Three asked the court not only to declare plaintiff to be the first lien on the property but to foreclose on the mortgage.

{¶3} After Precision Real Estate Group, LLC was added as a defendant, both defendants filed a joint answer to plaintiff's complaint on April 27, 2010. Plaintiff responded to their answer with a motion for summary judgment filed on July 16, 2010; on the same date, plaintiff sought default judgment against those parties who had not filed an answer to the complaint. Before responding to plaintiff's motion for summary judgment, defendants sought and were granted leave to file a counterclaim against plaintiff. They followed the counterclaim with a memorandum opposing plaintiff's motion for summary judgment.

{¶4} On November 18, 2010, the trial court referred the case to mediation and vacated the scheduled trial date pending the outcome of mediation. When mediation proved unsuccessful, the court rescheduled the matter for trial. With leave of court, plaintiff filed a renewed motion for summary judgment on its complaint and defendants' counterclaim.

{¶5} After the parties briefed the motion, the trial court filed an entry on May 27, 2011, determining no genuine issue of material fact existed and plaintiff was entitled to judgment and foreclosure as a matter of law. Accordingly, the trial court granted plaintiff summary judgment, entered a decree in foreclosure, reformed plaintiff's mortgage and deed, and dismissed with prejudice defendants' counterclaim.

II. Summary Judgment—Genuine Issues of Material Fact

{¶6} Defendants' single assignment of error asserts the trial court wrongly granted plaintiff summary judgment because genuine issues of material fact exist to be resolved at trial.

A. Applicable Law

{¶7} An appellate court's review of summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995); *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). Summary judgment is proper only when the parties moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving parties are 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, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181 (1997).

B. Affidavit

{¶8} In responding to plaintiff's summary judgment motion, Ramsey admitted to being the obligor on the note and mortgage attached to plaintiff's complaint but stated payments were current through July 2009 under the terms of the note and mortgage. According to the affidavit, he "always made [his] payments online." (Affidavit, ¶ 3.)

{¶9} As Ramsey's affidavit explained, he attempted to make his August payment electronically, or online, on August 3, 2009 but received an online response that plaintiff was not able to process his payment at that time. He again attempted to pay online on August 6 and 10 but again received the response that plaintiff was unable to process the payment. Ramsey attached to his affidavit the responses received online.

{¶10} On August 13, he again attempted an online payment, and the payment appeared to be successful. At the end of the transaction, however, he did not receive a confirmation number. He called the help desk and was given a confirmation number for his August payment. The person at the help desk further told Ramsey "that the payment would be pushed through the system and 'not to worry.' " (Affidavit, ¶ 5.) After receiving a late payment notice from plaintiff on August 16, 2009, Ramsey again called the help line on August 21, 2009. The person Ramsey spoke to informed him "that Plaintiff was having

some system issues but that [his] payment would be processed as he could see it 'stuck' in the system." (Affidavit, ¶ 6.)

{¶11} On September 3, 2009, Ramsey attempted to complete his September payment online, but it could not be processed. At that time, Ramsey became aware that the August 2009 payment was never processed as promised, because a late fee was charged to his account. When he checked his bank account, he learned his August payment was never debited from his account.

{¶12} Ramsey again called the help desk, and the person he spoke to said she would process his payment. Ramsey expressed his concern about the payment being considered late, and the help desk person acknowledged the late payment would be placed on his credit report. Ramsey asked that it be removed because the delay was not his fault, but he was told nothing could be done about it. Ramsey asked to speak with someone else; he "was told there was no one else to speak with." (Affidavit, ¶ 7.) Ramsey requested to speak with the legal department, but the help desk person refused to transfer him and hung up the telephone.

{¶13} After being unable to make an online payment on September 3, Ramsey contacted the Coldwell Banker/King Thompson real estate agent who sold him the property to see if he could suggest any avenue to clear up the matter. Someone from the local office called Ramsey, said they would check on the situation and get back to him, but did not. As a result, on September 9, 2009, Ramsey physically went to the Coldwell Banker/King Thompson office on Polaris Parkway, explained the situation to the receptionist, and asked if he could speak with someone at that location. He was informed no one at the location had authority in the matter, he attempted payment, and his payment was refused.

{¶14} The next day, Ramsey forwarded a letter to Coldwell Banker/King Thompson, together with a check in the amount of \$1,600 for the August and September 2009 payments on the note. The letter explained the situation, but the check was never cashed or returned to Ramsey. On October 5, 2009, Ramsey sent another check in the amount of \$1,600 as payment for October and November, accompanied by another letter of explanation. Again, the check was neither cashed nor returned.

C. Plaintiff's Arguments

{¶15} Aware of defendants' factual contentions from their response to plaintiff's first summary judgment motion, plaintiff's renewed motion for summary judgment alleged plaintiff was entitled to judgment because (1) Ramsey did not attempt to make payment and has no contractual right to pay online, and (2) plaintiff was not required to accept partial payment in the event of default. Plaintiff argues similarly on appeal.

1. Online payments

{¶16} Plaintiff points to the terms of the note and mortgage to support its contention that Ramsey had no contractual right to pay electronically, as the mortgage specifies that payments shall be made in U.S. currency. Whether the provision addresses the issue at hand is questionable at best, as it appears to preclude payment in foreign currency. Moreover, nothing in the note or mortgage precludes electronic payment. To the contrary, the document contemplates electronic funds transfer as an acceptable mode of payment, specifying that if any check or other instrument the lender receives as payment is returned unpaid, the lender may require "any and all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by the Lender: * * * Electronic Funds Transfer." (Mortgage, ¶ 1.)

{¶17} In addition, Ramsey's affidavit states he always made payments electronically. As a result, a genuine issue of material fact exists as to whether plaintiff waived any provision of the agreement that possibly required other than electronic payment. See *EAC Properties, L.L.C. v. Brightwell*, 10th Dist. No. 10AP-853, 2011-Ohio-2373, ¶ 23, appeal not allowed, 129 Ohio St.3d 1506, 2011-Ohio-5358 (noting that whether a party's inconsistent conduct amounts to waiver involves a factual determination within the province of the trier of fact).

{¶18} Plaintiff next suggests that even if online payments are acceptable, payments are not deemed received until the lender receives them at the location designated in the note or such other location as the lender may designate. Plaintiff argues that because Ramsey was aware his attempted online payments were ineffective but nonetheless failed to send them to the designated location, he failed to make payment according to the note and mortgage. Ramsey's affidavit explains his efforts to make the regular payments beginning with his August payment. The affidavit states he called on

August 13, 2009 concerning the August payment and received confirmation for it. Although plaintiff contends its records do not reflect a payment in August, the dispute over the August payment is in itself an issue for a trier of fact to resolve after hearing all the evidence, resolution of which may affect Ramsey's subsequent payments, at least one of which was forwarded in advance of the due date.

2. Timeliness and partial payment

{¶19} Plaintiff also asserts Ramsey's attempt to make his August payment was untimely, noting payments were to be made on the first of the month but Ramsey did not attempt payment until, at the earliest, August 3, 2009. Plaintiff's argument presents at least two issues. Initially, the pertinent documents specify a late fee, suggesting failure to make payment on the first of each month is not necessarily a default on the note, even though it may cause Ramsey to incur late fees. Secondly, the exhibits attached to plaintiff's affidavit indicate Ramsey on many occasions made payments after the first of the month, and plaintiff accepted them, thus raising an issue of plaintiff's possible waiver of the provisions requiring payment on the first of the month.

{¶20} Pertinent to the waiver issue, both the note and mortgage contain anti-waiver provisions. The note states that "[e]ven if, at a time when [the borrower is] in default, the Note Holder does not require [the borrower] to pay immediately in full as described above, the Note Holder will still have the right to do so if [the borrower is] in default at a later time." (Note, ¶ 6(D).) To the extent the provision applies under these circumstances, the record evidence does not appear to address whether plaintiff invoked its rights. The mortgage states that "Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its right to refuse such payments or partial payments in the future." (Mortgage, ¶ 1.) To the extent the provision applies, the evidence again is unclear that plaintiff ever invoked the provision, as its September 9, 2009 letter to Ramsey not only does not declare him in default, but demands payment for the months of August and September.

{¶21} In the end, Ramsey's version of the payment history between the parties creates genuine issues concerning the due date for payments and the applicability of the anti-waiver provisions. *Cf. Fairfield Natl. Bank v. Lininger*, 5th Dist. No. 02-CA-25, 2002-Ohio-4875, ¶ 31 (noting "[i]t is well settled that if one accepts late payments and

subsequently wishes to insist on a specific due date as a 'time of the essence' requirement, prior notification thereof is required") and *First Natl. Bank of Am. v. Pendergrass*, 6th Dist. No. E-08-048, 2009-Ohio-3208, ¶ 25 (noting "it has repeatedly been held that a mortgagee's previous acceptance of late loan payments does not constitute a waiver of the mortgagee's right to accelerate and foreclose on a loan following a subsequent default where, as here, the relevant loan documents contain 'anti-waiver' provisions"). The trial court did not address those issues. In the absence of the trial court's addressing the meaning and applicability of the note and mortgage anti-waiver provisions to the facts provided in the parties' affidavits and exhibits, we decline to do so in the first instance.

{¶22} Lastly, plaintiff's motion for summary judgment asserts that because Ramsey was in default on his payment, the entire amount of the note became due, leaving plaintiff free to reject Ramsey's attempt to partially pay by tendering the September and October payments to plaintiff. Because a genuine issue of material fact exists as to whether Ramsey defaulted on the note, plaintiff's argument premised on a default is premature.

{¶23} In the final analysis, the affidavits and exhibits submitted in connection with plaintiff's summary judgment motion reveal genuine issues of material fact regarding whether Ramsey defaulted in his payment on the note, making summary judgment inappropriate. Defendants' single assignment of error is sustained, the judgment of the trial court is reversed, and this matter is remanded for further proceedings consistent with this decision.

*Judgment reversed and
cause remanded.*

SADLER and CONNOR, JJ., concur.
