

TENTH APPELLATE DISTRICT

Perpetual Federal Savings Bank, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-285
 : (C.P.C. No. 08CVE11-16291)
 TDS2 Property Management, LLC et al., : (REGULAR CALENDAR)
 :
 Defendants-Appellants. :

D E C I S I O N

Rendered on December 22, 2009

Dinsmore & Shohl, LLP, and Adam R. Todd, for appellee.

John C. Nemeth & Associates, and David A. Herd, for appellants.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendants-appellants, TDS2 Property Management, LLC, and Tim Seek, appeal the judgment of the Franklin County Court of Common Pleas in favor of plaintiff-appellee, Perpetual Federal Savings Bank, pursuant to appellee's motion for summary judgment. For the following reasons, we affirm the judgment.

{¶2} On or about February 13, 2006, appellants executed and delivered to appellee a note and mortgage in the principle amount of \$536,250 secured by property located at 1294-1300 Norton Avenue in Columbus, Ohio. On November 13, 2008,

appellee filed a complaint alleging that appellants were in default on the note. Appellee sought to recover the total amount due on the note plus interest and other charges specified in the note. Appellee also sought to foreclose on the mortgage. Appellants timely filed their answer. Appellants denied that they were in default of the note.

{¶3} On February 2, 2009, appellee filed a motion for summary judgment supported by an affidavit from Michelle Lehn. Lehn stated that she was employed "as an internal auditor/compliance" for appellee and that her affidavit was based upon her personal knowledge and belief. Lehn further stated that appellee was the owner and holder of the subject note and mortgage. She stated that appellants failed to make regular monthly payments as required by the note and mortgage and that appellants were in default thereof. Lastly, Lehn stated that appellants owed appellee \$492,878.62 plus interest and other charges.

{¶4} On February 9, 2009, appellants filed a motion for continuance pursuant to Civ.R. 56(F).¹ Appellants sought a continuance because the "case ha[d] just been filed, and counsel and defendants need[ed] sufficient time to review the records, statements and determine the status of the loan and the veracity of the allegation made by plaintiff." Appellants requested a 30-day extension to respond to appellee's motion for summary judgment. Appellants' motion was supported by an affidavit from their attorney, David A. Herd. The substantive portion of Herd's affidavit consists of the following three sentences:

1. I am counsel for Defendants TDS2 Property Management, LLC and Timothy Seek.

¹ This pleading included a motion to strike "final judgment entry" submitted by appellee with its motion for summary judgment. This motion to strike is not at issue in this appeal.

2. There has been insufficient time for proper review of this case, consultation with the clients and analysis of a proper response to Plaintiff's motion for summary judgment. Plaintiff's motion for summary judgment was filed within two weeks of the Complaint having been answered by Defendants.

3. This affidavit is presented in good faith and simply seeks an additional 30 days for Defendants to file a response to the motion for summary judgment.

{¶5} The record does not contain any response by appellee to appellants' Civ.R. 56(F) motion.

{¶6} On February 19, 2009, the same day that appellants' response to appellee's motion for summary judgment was due, the trial court entered summary judgment in appellee's favor. The trial court's judgment does not contain any reference to appellants' Civ.R. 56(F) motion. Nor does the record indicate that appellants filed a memorandum in opposition to appellee's motion for summary judgment.²

{¶7} Appellants appeal, assigning the following assignments of error:

ASSIGNMENT OF ERROR NO. 1.

The trial court improperly granted summary judgment to Perpetual without acknowledging or ruling upon TDS2's Motion for Continuance under Civ.R. 56(F).

ASSIGNMENT OF ERROR NO. 2.

The trial court improperly granted summary judgment to Perpetual without a specific factual basis in the record.

{¶8} By their first assignment of error, appellants argue that the trial court erred by granting summary judgment in favor of appellee without ruling on appellants' Civ.R.

² On March 17, 2009, appellants filed a motion for reconsideration and/or to vacate entry/order of February 19, 2009. Three days later, appellants timely filed a notice of appeal, thereby divesting the trial court of jurisdiction.

56(F) motion for continuance. Appellants also argue that they were entitled to a continuance pursuant to Civ.R. 56(F). We disagree with both arguments.

{¶9} Here, the trial court did not mention or expressly rule on appellants' Civ.R. 56(F) motion. Nevertheless, when a trial court enters judgment but fails to expressly rule on a pending pretrial discovery motion, it is ordinarily presumed that the court overruled the motion. *State ex rel. The V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 469; *State ex rel. Cassels v. Dayton City Sch. Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 223. Following this principle, Ohio appellate courts regularly presume that a trial court that grants summary judgment without expressly ruling on a pending Civ.R. 56(F) motion has overruled the Civ.R. 56(F) motion. *Franco v. Kemppe Homes, Inc.*, 9th Dist. No. 21769, 2004-Ohio-2663, ¶17 (holding that the trial court's failure to rule on a pending Civ.R. 56(F) motion constituted a denial of the motion); *Wells Fargo Bank, N.A. v. Shingara*, 11th Dist. No. 2007-G-2764, 2007-Ohio-6154, ¶11 (same); *Sipple v. A.G. Edwards & Sons, Inc.*, 1st Dist. No. C-010701, 2002-Ohio-4342, ¶6 (same); *Denham v. New Carlisle* (2000), 138 Ohio App.3d 439, 442 (same). Therefore, we conclude that the trial court effectively denied appellants' Civ.R. 56(F) motion when it granted summary judgment in favor of appellee.

{¶10} Appellants suggest that the trial court may not have been aware of their pending Civ.R. 56(F) motion when it granted summary judgment because the motion is not listed on the docket sheet filed by the clerk in this appeal. Contrary to appellants' assertion, the Civ.R. 56(F) motion is listed as document number 29 on the clerk's docket sheet and a time-stamped copy of the motion is in the record. Therefore, there is no indication that the trial court was unaware of appellants' Civ.R. 56(F) motion when it granted summary judgment in favor of appellee.

{¶11} We must now address whether the trial court erred by denying appellants' Civ.R. 56(F) motion. The provisions in Civ.R. 56(F) are discretionary, not mandatory.

ABN AMRO Mortgage Group, Inc. v. Roush, 10th Dist. No. 04AP-457, 2005-Ohio-1763, ¶23; *Martinez v. Yoho's Fast Food Equip.*, 10th Dist. No. 02AP-79, 2002-Ohio-6756, ¶14; *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 648. Absent an abuse of discretion, the denial of a Civ.R. 56(F) motion will not be reversed. *Roush* at ¶23. An abuse of discretion connotes more than an error of law or judgment. It implies that the court's exercise of discretion was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶12} Civ.R. 56(F) provides:

Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

{¶13} Thus, Civ.R. 56(F) requires the party seeking a continuance to submit an affidavit stating sufficient reasons why the party cannot present facts essential to justify the party's opposition to the summary judgment motion. *Roush* at ¶22; *Boseman v. Wendy's Internatl., Inc.* (Aug. 21, 2001), 10th Dist. No. 01AP-112 (quoting *Gates Mills Invest. v. Pepper Pike* (1978), 59 Ohio App.2d 155, paragraph two of the syllabus). Simply requesting a continuance in order to conduct discovery is not a sufficient explanation for why a party cannot present affidavits in opposition to the motion for summary judgment. *Id.*

{¶14} Here, appellants submitted an affidavit from their attorney in support of their Civ.R. 56(F) motion. Nothing in the affidavit or in appellants' motion explains why appellants could not present facts essential to their opposition to appellee's motion for summary judgment. As appellee points out, the only factual issues material to its

motion for summary judgment were whether appellee was the holder of the note and mortgage and whether appellants were in default on the note and mortgage. Appellants made no attempt in their motion to explain why they needed additional discovery or additional time to respond to these issues. The only reason stated in their motion was that they needed additional time "to review the records, statements and determine the status of the loan and the veracity of the allegation made by plaintiff." However, appellants have access to their own records. Presumably, these records would reflect the payment history on the note. Appellants never stated that they lacked this information. Nor did they explain why they were unable to ascertain whether they were in default on the note or why they needed additional discovery. Given appellants' failure to put forth any substantive reason for why they needed more time or discovery before responding to appellee's motion for summary judgment, the trial court did not abuse its discretion by denying appellants' Civ.R. 56(F) motion.

{¶15} By their second assignment of error, appellants contend that the trial court erred when it granted appellee's motion for summary judgment. Appellants argue that appellee failed to present a sufficient factual basis to support the motion. Again, we disagree.

{¶16} Appellate review of summary judgment is de novo. *Anderson v. Highland House Co.*, 93 Ohio St.3d 547, 548, 2001-Ohio-1607. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516, ¶11, quoting *Mergenthal v. Star Bank Corp.* (1997), 122 Ohio App.3d 100, 103. Summary judgment is proper only when the party moving for summary judgment demonstrates: (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, when the evidence is construed in a light most favorable to the non-moving party. Civ.R. 56(C); *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶6; *Roush* at ¶26.

{¶17} When a motion for summary judgment is made and supported as provided by Civ.R. 56, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party. Civ.R. 56(E).

{¶18} Appellants have not disputed that they executed the note and mortgage and that appellee is the holder of the note and mortgage. Nor have appellants disputed that appellee is entitled to accelerate the debt if appellants are in default on these instruments. However, in their answer to the complaint, appellants denied that they were in default on the note.

{¶19} A party seeking to foreclose on a mortgage must establish execution and delivery of the note and mortgage; valid recording of the mortgage; it is the current holder of the note and mortgage; default; and the amount owed. *Neighborhood Housing Servs. of Toledo, Inc. v. Brown*, 6th Dist. No. L-08-1217, 2008-Ohio-6399, ¶16.

{¶20} In support of its motion for summary judgment, appellee attached an affidavit from Michelle Lehn, its internal auditor/compliance. Lehn states that appellee is the owner and holder of a note and corresponding mortgage secured by the subject property. Lehn further avers that the note and mortgage were executed and delivered

by appellants and that the mortgage was recorded in the office of the Franklin County Recorder. Lehn states that appellants failed to make regular monthly payments as required by the note and mortgage, and therefore, appellants are in default thereof. Lastly, Lehn states that appellants owe appellee the sum of \$492,878.62 plus interest and late charges. "An affidavit stating the loan is in default, is sufficient for purposes of Civ.R. 56, in the absence of evidence controverting those averments." *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶14. *Deutsche Bank Natl. Trust Co. v. Ingle*, 8th Dist. No. 92487, 2009-Ohio-3886, ¶33 (uncontroverted affidavit stating note in default sufficient for summary judgment); *JP Morgan Chase Bank, N.A. v. Brown*, 2nd Dist. No. 21853, 2008-Ohio-200, ¶54 (uncontroverted affidavit stating that loan in default sufficient to support summary judgment). Because appellants failed to file a memorandum contra to appellee's motion for summary judgment supported by Civ.R. 56(C) evidence, appellants failed to identify any issue of fact on the issue of their default. Appellants' denial in their answer is not sufficient. Civ.R. 56(E). Therefore, the trial court properly granted summary judgment in favor of appellee. Accordingly, we overrule appellants' second assignment of error.

{¶21} For the foregoing reasons, we overrule appellants' two assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH, P.J., and SADLER, J., concur.
