[Cite as *Wells Fargo Bank, N.A. v. Smith*, 2012-Ohio-1672.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

WELLS FARGO BANK, NA,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-T-0051**
- vs -	:	
WILLARD SMITH, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2007 CV 01451.

Judgment: Affirmed.

Dale S. Smith and *Scott A. King*, Thompson Hine, L.L.P., 3900 Key Center, 127 Public Square, Cleveland, OH 44114; *Jason P. Bichsel* and *Terry W. Posey, Jr.*, Thompson Hine, L.L.P., 2000 Courthouse Plaza, N.E., P.O. Box 8801, Dayton, OH 45401-8801 (For Plaintiff-Appellee).

Maurus G. Malvasi, 11 Overhill Road, Lower Level, Youngstown, OH 44512 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from a final order of the Trumbull County Court of Common Pleas, in which summary judgment was granted in favor of appellee, Wells Fargo Bank, N.A., and a decree of foreclosure was issued as to the subject real estate. Appellant, Willard Smith, challenges the trial court's decision ordering foreclosure because he breached the terms of the mortgage regarding payment of an escrow item, namely

property taxes. Appellant primarily argues that summary judgment should have been denied because there was a factual dispute as to whether the parties agreed to orally modify appellee's right under the mortgage to create an escrow account in the event that property taxes were not paid in a timely manner.

{¶2} The majority of the underlying facts in this case are not in dispute. In May 2006, appellant purchased a home and accompanying real estate on Bianca Lane in Cortland, Trumbull County, Ohio. To finance this purchase, appellant entered into a loan agreement with appellee ("Wells Fargo"), under which he executed a promissory note and a mortgage on the entire property. Pursuant to the terms of the note, the amount of the loan was for $274,500, with interest to be paid at an initial percentage of 8.950 each year. The note further provided that appellant's initial monthly payments for principal and interest would be $2,198.83.

{¶3} The accompanying mortgage also contains a number of provisions regarding appellant's monthly payment under the loan. For example, in relation to the various charges which had to be satisfied in a monthly payment, Section 1 of the mortgage's uniform covenants states, in pertinent part:

{¶4} "Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3."

{¶5} Section 1 of the mortgage's covenants also provides that Wells Fargo has the right to reject a monthly payment if it is not sufficient to cover all amounts owed at that time: "Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current."

{¶6} As was referenced above, the mortgage expressly provides that a monthly payment had to satisfy all amounts presently owed for "Escrow Items." Section 3 of the mortgage's covenants states that, until the promissory note was fully satisfied, appellant has to pay Wells Fargo a monthly sum which the bank would then use to cover certain periodic obligations associated with the real property, including property taxes and other types of assessments that could become a lien and attain priority over the mortgage. In regard to the question of whether these particular obligations could be paid in another manner, Section 3 further stated:

{¶7} "Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligations to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender. *** If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all funds, and in such amounts, that are then required under this Section 3."

{¶8} Under Section 9 of the mortgage's covenants, Wells Fargo is accorded the right to take steps to protect its security interest in the subject property. Specifically,

Section 9 provides that if appellant breaches any other "covenant and agreement" in the mortgage, the bank could immediately pay any reasonable amount to protect its interest and maintain the priority of the mortgage over other possible liens. Moreover, Section 9 states that any amount paid by the bank for the foregoing purpose becomes additional debt, secured under the mortgage, which appellant is obligated to repay upon receipt of proper notice from the bank.

{¶9} Pursuant to the promissory note, appellant's first payment was due July 1, 2006. Over the final six months of that year, he made a timely payment each month of $2,198.83, covering the principal and interest. During that same time period, appellant did not submit any extra monthly payments to Wells Fargo for property taxes, one of the "Escrow Items" delineated under Section 3 of the mortgage's covenants. Furthermore, although one of the bi-annual payments for the property taxes was due in July 2006, he did not make any payments to the county treasurer prior to December 2006.

{¶10} On December 12, 2006, Wells Fargo made a direct payment of $2,343.13 to the county treasurer, covering the entire amount of property taxes that were due five months earlier. Consistent with the provisions of Section 9 of the covenants, Wells Fargo then created an escrow account with an initial deficiency of $2,343.13, and sent written notice to appellant that he is liable under the mortgage for the entire deficit in the escrow account.

{¶11} Appellant immediately contacted Wells Fargo to discuss the "property tax" issue because he supposedly still intended to make his bi-annual payments directly to the county treasurer. According to him, he was able to negotiate a separate agreement with Wells Fargo, under which the bank's prior payment of the July 2006 tax bill would

be treated as an interest-free loan that he would liquidate by making extra payments of $173.09 over a 12-month period. Under this alleged agreement, appellant's basic monthly payment to the bank would increase from $2,198.83 to $2,371.92. Wells Fargo admitted, via affidavits of its officers, that it indeed came to this repayment agreement with appellant regarding cure of this first default. According to appellant, however, Wells Fargo also orally agreed not to establish any new escrow accounts for his property taxes in the future. This Wells Fargo disputes and the outcome of the case turns on this dispute and the law governing oral modification and oral waiver.

{¶12} In January 2007, appellant submitted a mortgage payment of $2,198.84 to Wells Fargo. That amount was only sufficient to cover the principal and interest for that particular month and did not repay any of the accrued escrow balance for the taxes Wells Fargo paid to date. However, in February 2007, appellant's monthly payment was for $2,371.92 representing principal, interest, and the increased payment to reduce the escrow balance consistent with the 12-month repayment agreement. Both of these payments were accepted by Wells Fargo. Regarding the February payment, the bank applied $173.09 of the submitted amount to the "property tax" debt in the escrow account and the remainder to principal and interest.

{¶13} Appellant's next property tax bill was due to be paid in February 2007. Appellant did not timely pay, representing his second default. Wells Fargo immediately satisfied the debt by paying the entire sum owed, $2,113.35, to the county treasurer. Rather than creating a new escrow account for this specific payment, the bank simply added the $2,113.35 to the remaining amount stemming from the payment of the July 2006 tax bill; therefore, after the deduction of appellant's February 2007 mortgage

payment, the total sum he owed under the escrow account was $4,238.37. The bank's procedure was consistent with Section 9 of the mortgage's covenants.

{¶14} On March 13, 2007, Wells Fargo sent appellant written notice of its actions regarding the February 2007 property tax bill and the resulting increase in the amount owed under the escrow account. The notice further indicated that, in order to liquidate the escrow debt in a timely manner, appellant was required to make a monthly payment of $2,777.13.

{¶15} On March 15, 2007, appellant made a mortgage payment in the amount of $2,500. Upon receipt of this payment, Wells Fargo initially applied $301.16 toward the escrow balance and held the remaining $2,198.84 in suspense. A few days later, the bank applied the remaining $2,198.83 to the escrow balance.

{¶16} During the entire month of April 2007, appellant did not take any steps to supplement the amount of his March 2007 payment. As a result, on May 3, 2007, Wells Fargo deducted the total payment of $2,500 from the escrow account and refunded the money to appellant. As the grounds for this action, Wells Fargo concluded that, since appellant's March payment was not for the entire required amount of $2,777.13, he had failed to keep the loan current.

{¶17} Approximately one month after returning the March 2007 payment, Wells Fargo filed its complaint in foreclosure against appellant and other named defendants. After appellant answered the complaint, the bank moved for summary judgment in November 2007. In this motion, the bank asserted that appellant had defaulted on the loan by failing to make required payments in a timely fashion. In support of its basic assertion, the bank submitted the affidavit of its vice president for loan documentation.

{¶18} In his initial response to the summary judgment motion, appellant did not assert any argument concerning whether Wells Fargo had acted properly in paying the July 2006 property taxes, and did not make any direct reference to the payment of the February 2007 taxes. Rather, he only contended that he and the bank had reached an agreement as to the re-payment of the July 2006 taxes and the subsequent use of any escrow accounts, and that the bank had violated the oral modification by not accepting his March 2007 payment. Appellant supported his contention with his own affidavit. In addition to citing the alleged new agreement, the affidavit contained the statement that the July 2006 property taxes had not been delinquent when they were paid by the bank in December 2006.

{¶19} In its reply brief, Wells Fargo maintained that, after it paid the property tax bill for February 2007, appellant's next payment had to cover the principal, interest, and the two tax bills. Wells Fargo further maintained that, since appellant's March 2007 payment was never supplemented to cover the entire sum of $2,777.13, it had the right to reject that payment as insufficient. As a supplement to its evidentiary materials, the bank presented the new affidavit of Yolanda Williams, a second vice president for loan documentation. Besides providing a statement of appellant's payment history, Williams expressly averred that the March 2007 payment was refunded because it was deemed a partial payment under the covenants in the mortgage.

{¶20} In March 2009, the trial court granted summary judgment in favor of Wells Fargo and rendered an order of foreclosure. Accordingly, steps were taken to have the property sold to cover the underlying debt. Nevertheless, approximately seven months later, appellant moved for relief from the foreclosure order under Civ.R. 60(B). Only two

days later, the trial court granted the request for relief, and then gave appellant leave to file a new response to the motion for summary judgment.

{¶21} In his second response to the bank's dispositive motion, appellant again asserted the argument that the bank had orally agreed not to pay his February taxes and increase the escrow account. In addition, he also raised a new contention regarding the procedure Wells Fargo employed in paying the July 2006 tax bill. Specifically, appellant contended that the bank violated the basic terms of the mortgage by making the tax payment in December 2006 without first contacting him about the situation. According to the statements in this response, if the bank had made prior contact, he would have informed the bank officials that he had already spoken with county officials and had arranged for a payment plan on the July 2006 taxes. Yet, in a second affidavit accompanying the second response, appellant only averred that he had "intended" to contact county officials for that purpose.

{¶22} After the bank submitted a new reply brief in support, appellant filed a supplemental response. For the first time, the text of his response raised the contention that Wells Fargo's payment of the July 2006 tax bill was not justified because the taxes had not been delinquent in December 2006. However, instead of presenting a specific legal argument on the issue, the supplemental response only restated the prior factual assertion that appellant had already arranged for a payment plan with county officials.

{¶23} In March 2010, the trial court issued a separate judgment in which Wells Fargo's motion for summary judgment was again granted as to all claims pertaining to appellant. As the basis for this ruling, the trial court only indicated that, even when the evidentiary materials were construed most favorably for appellant, a reasonable person

would still reach a conclusion adverse to him. One month later, the trial court rendered its final order of foreclosure.

{¶24} In appealing the summary judgment decision, appellant has asserted one assignment of error for review:

{¶25} "The trial court erred in granting summary judgment in favor of appellee, Wells Fargo Bank, N.A."

{¶26} In challenging the propriety of the summary judgment ruling, appellant has raised two arguments for consideration. First, he contests Wells Fargo's right under the mortgage to pay the July 2006 tax bill and create the escrow account. Specifically, he contends that the bank's payment of that particular bill was not legally justified because, pursuant to the mortgage's covenants, such a payment could only be made when it was necessary to "preserve" the underlying property. Appellant further contends that Wells Fargo's December 2006 payment was not needed to maintain the priority of its interest in the property because it was never shown that the taxes had been declared delinquent at that time.

{¶27} As was noted previously, in each of his two affidavits and in the text of his supplemental response, appellant made the general assertion that his property taxes were not delinquent as of December 2006. But, despite asserting the issue at the trial level, he never supported his broad assertion with any legal analysis. Our review of his appellate brief establishes that he has still failed to present such an analysis.

{¶28} As Wells Fargo correctly notes, the collection of taxes by an Ohio county is governed by R.C. Chapter 323. The first section of that chapter, R.C. 323.01, states two definitions for the term "delinquent taxes." The second of these definitions, as set

forth in R.C. 323.01(E)(2), provides that the term includes:

{¶29} "Any current taxes charged on the general tax list and duplicate of real and public utility property that remain unpaid after the last day prescribed for payment of the second installment of such taxes without penalty, whether or not they have been certified delinquent, and any penalties and interest charged against such taxes."

{¶30} Under the foregoing definition, county taxes on real property are viewed as "delinquent" if it is not paid by the last day prescribed under the law. In relation to the due dates for taxes owed to the county, R.C. 323.12(A) indicates that if such taxes are to be paid twice a year, one-half of the total amount owed for the prior tax year shall be due by the twentieth day of June of the present year. Furthermore, R.C. 323.17 states that the due date for the payment of county taxes can be extended for thirty days when the delivery of the county tax duplicate has been delayed. Accordingly, the latest date upon which the first payment of a given year's county taxes can be due is the twentieth day of July.

{¶31} In the present case, there is no factual dispute that appellant failed to make any payment of taxes on, or before, July 20, 2006. In fact, it is undisputed that, as of December 2006, he had still not made any payment on the July 2006 property tax bill. Thus, pursuant to the statutory definition set forth in R.C. 323.01(E)(2), the tax bill at issue was delinquent at the time Wells Fargo paid the debt.

{¶32} As an aside, this court would again note that, at the trial level, appellant maintained that the July 2006 tax bill was not delinquent as of December 2006 because he had already reached an agreement with county officials to make payments on the debt. However, even though appellant made this assertion in the text in two of his

responses to the summary judgment motion, his second affidavit only stated that he had "intended" to contact the county to make such arrangements. To this extent, appellant did not submit any evidentiary materials to support his allegations on this point. Hence, the materials before the trial court supported the finding that Wells Fargo could properly invoke its rights under Sections 3 and 9 of the mortgage's covenants because the July 2006 property taxes were overdue; i.e., delinquent. Additionally, regardless of whether Smith had set up a payment plan to pay his property taxes, Wells Fargo had a right to pay the property taxes under both the mortgage agreement and applicable law. A mortgagee may pay taxes which the mortgagor is under a duty to pay in the terms of the mortgage. See *Citizens Fed. Savings v. Dainco*, 2nd Dist. No. 5728, 1978 Ohio App. LEXIS 8900, at *4 (because a "mortgage *** secures the moneys expended properly and necessarily to protect the mortgage," the mortgagee may pay taxes on the mortgagor's property to protect the mortgagee's interest in the property); *Windett v. Union Mutual Life Ins. Co.* (1892), 144 U.S. 581, 584.

{¶33} Under his second challenge, appellant argues that the trial court erred in failing to conclude that the averments in his affidavit were sufficient to create a factual dispute concerning whether Wells Fargo orally agreed to modify certain provisions of the mortgage. It is appellant's contention that if the trial court had properly construed his affidavits, it would have also warranted the conclusion that the bank violated the terms of this modification when it paid the February 2007 tax bill and increased the amount of his total monthly payment. In light of this, he ultimately states that he never defaulted on the loan because his March 2007 payment was sufficient to cover the actual amount due.

{¶34} As was previously discussed, as one of the arguments set forth in his first response to the summary judgment motion, appellant asserted that, upon receiving the notice of Wells Fargo's payment of the July 2006 tax bill, he contacted a representative of the bank and was able to negotiate a new agreement as to the bank's employment of an escrow account in regard to his property taxes. In his first affidavit, appellant essentially stated that two oral agreements were entered into: (1) he would be permitted to re-pay the funds for the July 2006 tax bill to the bank in twelve monthly payments; and (2) the bank would not use the "escrow account" procedure in relation to his future property taxes. Wells Fargo essentially admitted that it orally entered into the repayment plan, however, Wells Fargo contends that it did not enter into the second oral modification and that even if such an oral agreement had been discussed, it was not enforceable under the mortgage terms. As to this point, the bank emphasized that Section 3 of the mortgage's covenants states that, although the use of an escrow account for property taxes could be waived by the bank, such a waiver always had to be in writing. In other words, Section 3 contained a "no oral modification" clause.

{¶35} At the outset of our analysis on the "oral modification" question, this court would recognize that, whenever it is claimed that a written contract was orally modified despite the presence of a "no oral modification" clause, the party raising the issue is also implicitly asserting that the clause itself was orally waived. A review of the relevant case law indicates that Ohio appellate courts have generally held that an oral waiver of a "non-oral modification" clause is legally permissible when certain circumstances exist. For example, in *Fields Excavating, Inc. v. McWane, Inc.*, 12th Dist. No. CA2008-12-114, 2009-Ohio-5925, the Twelfth Appellate District concluded that such a clause can be

orally waived when: (1) the alleged oral modification of the underlying contract has been acted upon by *both* parties; and (2) one of the parties has suffered an injury due to detrimental reliance upon the modification.

{¶36} In *Fahlgren & Swink, Inc. v. Impact Resources, Inc.*, 10th Dist. No. 92AP-303, 1992 Ohio App. LEXIS 6766 (Dec. 24, 1992), the underlying contract was between an advertising firm and a marketing research company. During performance of the contract, a dispute arose about the amount of compensation the advertising firm would need to receive in order to profit from the ongoing relationship. According to the firm, the marketing research company agreed to an oral modification of the original compensation "agreement." When the marketing research company later refused to abide by the alleged modification, the advertising firm filed suit for breach of contract.

{¶37} Before the trial court in *Fahlgren*, the marketing research company argued that the alleged oral modification was not enforceable because the underlying contract had a "no oral modification" clause. Accepting the company's argument, the trial court granted summary judgment in its favor on the advertising firm's complaint. On appeal, the Tenth Appellate District reversed, concluding that there was a set of facts under which the alleged oral modification would be enforceable despite the existence of the "no oral modification" clause.

{¶38} Under the *Fahlgren* analysis, "the crucial issue is whether [the marketing research company] treated the modification as operative and caused justifiable detrimental reliance ***." *Id*. at *14. As to that point, the appellate court stated that some evidence was presented which could be interpreted as showing that the marketing research company engaged in subsequent conduct acknowledging the oral

"compensation" modification as binding; as a result, a full trial was warranted on the issue of whether the "no oral modification" clause had been orally waived. *Id*. at *14-15.

{¶39} Pursuant to the *Fahlgren* decision, the "crucial" issue was not whether the party asserting the existence of the oral modification subsequently acted in such a way as to give effect to the modification. Instead, the important point concerned whether the party opposing the existence of the oral waiver and oral modification had subsequently "treated" the oral modification as operative.

{¶40} While it may not have been stated as precisely as in *Fahlgren*, other Ohio appellate courts have also held that some evidence of subsequent acknowledgement by the party opposing the existence of both the oral waiver and oral modification must be present before waiver of a "no oral modification" clause can be found.

{¶41} In *Frantz v. Van Gunten*, 36 Ohio App.3d 96 (1987), the syllabus of the opinion stated:

{¶42} "A provision in a construction contract that change orders be reduced to writing and signed by the parties may be waived. The requirement will be considered to have been waived by the parties when there is clear and convincing evidence showing that the alterations were made with the knowledge and *participation* of all concerned, no fraud having been shown." (Emphasis added.)

{¶43} In *Frantz*, evidence of the subsequent acknowledgement of the oral modification was contained in the testimony of the "opposing" parties when the homeowners admitted that they had requested the changes in question, and that they fully expected to pay for the changes. In *Fields Excavating*, 2009-Ohio-5925, the fact that the "opposing" party had treated the oral modification as operative was established

through evidence as to the opposing party's subsequent conduct. Thus, the "opposing" party's acknowledgement by means of subsequent acts can be established through an admission by the "opposing" party, a stipulation by both parties, or the "opposing" party's conduct after the fact.

{¶44} In *Reckart v. Lyons*, 11th Dist. No. 92-L-180, 1993 Ohio App. LEXIS 3933 (Aug. 13, 1993), this court upheld the trial court's grant of summary judgment and enforced a "no oral modification" clause in the wake of a bald assertion that the written terms were waived and modified. There were no allegations in *Reckart* that the party opposing the existence of the oral modification engaged in subsequent acts that treated the modification as operative; i.e., there was no admission, stipulation, or subsequent course of conduct.

{¶45} When considered as a whole, the foregoing appellate precedent supports the legal conclusion that a party asserting the existence of an oral waiver of a "no oral modification" clause cannot prevail absent evidence of a subsequent act of the "opposing" party which treats the modification as operative. In other words, waiver of a "no oral modification" clause cannot be based solely upon the bald statement of the "asserting" party that an oral waiver occurred and an oral modification of another contractual term was reached.

{¶46} Obviously, the purpose for including a "no oral modification" clause in a contract is to protect a party against fraudulent or mistaken oral testimony regarding the alleged existence of an oral modification. *Fields Excavating*, 2009-Ohio-5925, at *24. If a simple statement were enough to create a factual dispute on the matter, the clause in question would be rendered meaningless. By requiring evidence as to subsequent acts

of the "opposing" party, a proper balance is reached between the enforcement of the basic purpose of the clause and the concern that a party could agree to both the oral waiver and modification, and then "hide" behind the "no oral modification" clause in order to avoid enforcement.

{¶47} In our case, the evidentiary submissions show that appellant only made a bald assertion that the "no oral modification" clause had been waived, and that an oral modification had been reached regarding the use of the escrow accounts in relation to the payment of his property taxes. Appellant failed to submit any evidence indicating that Wells Fargo admitted, stipulated, or engaged in a subsequent conduct which had the effect of acknowledging the alleged modification.

{¶48} Essentially, Smith alleged that, after making the payment for the July 2006 tax bill and opening an escrow account, Wells Fargo agreed not to follow that procedure again as to future property taxes. Yet, Wells Fargo's actions thereafter were to enforce the terms of the escrow clause pursuant to the written mortgage, again pay appellant's unpaid taxes, increase the amount owed under the escrow account to cover the February 2007 tax bill, and increase appellant's monthly payment to $2,777.13 so that he, and not Wells Fargo, would be paying the property taxes. Furthermore, when his next monthly payment was only for $2,500, less than the $2,777.13 due, Wells Fargo returned payment to appellant, and then filed the foreclosure action against him.

{¶49} Even when construed in a manner most favorable to appellant, none of the foregoing acts could be interpreted as an acknowledgment of the existence of an oral waiver and oral modification of the escrow clause. In fact, the opposite is true. The subsequent acts of Wells Fargo can only be construed to show that it was still operating

under the original provisions of the mortgage. There was no admission, stipulation, or conduct on the part of Wells Fargo, the party "opposing" the existence of the oral waiver of the "no oral modification" clause, acknowledging appellant's claim.

{¶50} "To prevail in a summary judgment exercise, the moving party must show that: (1) there are no genuine issues of material fact remaining to be litigated; (2) [the moving party] is entitled to judgment as a matter of law; and (3) the state of the evidentiary materials is such that, even when those materials are construed in a manner most favorable to the non-moving party, a reasonable person could only reach a conclusion adverse to that particular party." *Tutolo v. Young*, 11th Dist. No. 2010-L-118, 2012-Ohio-121, at ¶48. Consistent with the foregoing discussion, Wells Fargo was entitled to summary judgment. Wells Fargo demonstrated that it acted in accordance with the terms of the mortgage, and that appellant defaulted on the loan.

{¶51} Appellant has failed to demonstrate error. Accordingly, the trial court's judgment is affirmed.

MARY JANE TRAPP, J., concurs,

DIANE V. GRENDELL, J. concurs in judgment only.