

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

PNC BANK, SUCCESSOR BY MERGER TO NATIONAL CITY BANK,	:	O P I N I O N
	:	
Plaintiff-Appellee,	:	
	:	CASE NO. 2014-T-0062
- vs -	:	
	:	
STEVE KERESZTURI, a.k.a.	:	
STEVE KERESZTURI, JR., et al.,	:	
	:	
Defendants,	:	
	:	
(RENX GROUP, LLC, f.k.a., BIG BLUE CAPITAL PARTNERS, LLC, Appellant.)	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2013 CV 1825.

Judgment: Affirmed.

Robert K. Hogan and Mark C. Brncik, Javitch Block LLC, 1100 Superior Avenue, 19th Floor, Cleveland, OH 44114-2582 (For Plaintiff-Appellee).

Marc E. Dann, Dann, Doberdruk & Harshman, LLC, 4600 Prospect Avenue, P.O. Box 6031040, Cleveland, OH 44103 (For Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from the Trumbull County Court of Common Pleas. Appellee PNC Bank filed a complaint in foreclosure against Steve Kereszturi, Judith Kereszturi, and Big Blue Capital, LLC, predecessor to RenX Group, LLC, (“RenX Group”) and eventually moved for default and summary judgment against Judith

Kereszturi and RenX Group.¹ The trial court granted PNC Bank default judgment against Judith Kereszturi and summary judgment against RenX Group. RenX Group, the sole appellant, appeals the summary judgment ruling contending that PNC Bank lacked standing and did not prove it sent an acceleration notice to the Kereszturis. For the following reasons, we affirm.

{¶2} On August 25, 2005, National City Bank extended a line of credit of \$20,256 to Steve Kereszturi and Judith Kereszturi. The line of credit was secured by a mortgage on property owned by the Kereszturis. Eventually, the Kereszturis failed to make timely payments and therefore defaulted. After National City Bank merged with PNC Bank, PNC Bank instituted foreclosure proceedings.

{¶3} RenX Group responded to the complaint by filing a motion to dismiss arguing that PNC Bank's failure to attach any documentation demonstrating that PNC Bank and National City Bank merged meant that PNC Bank could not demonstrate it had a right to enforce the note. In response, PNC Bank filed an amended complaint alleging the following:²

"FIRST CLAIM

{¶4} "1. Plaintiff is the holder of a line of credit agreement originally executed by Defendants Steve Kereszturi aka Steve Kereszturi, Jr and Judith A. Kereszturis aka Judith Ann Kereszturi., (sic) in favor of National City Bank a copy of which is attached hereto as Exhibit 'A'. The Line (sic) of credit agreement was amended by the letter

1. Steve Kereszturi died before PNC Bank moved for default and summary judgment, and therefore PNC filed a notice of dismissal dismissing him from the case simultaneously with its motion for summary judgment.

2. There is no formal order granting PNC Bank leave to file an amended complaint, rather, PNC's amended complaint alleges that the trial court gave leave to file the amended complaint at a status conference. RenX Group does not allege any error as to the amended complaint.

agreement attached hereto as Exhibit 'B.' The line of credit, as amended, is in default because of the Defendant(s)' failure to pay the same according to it's (sic) terms. Plaintiff has standing to bring this action because it is the successor by merger to National City Bank which merger (sic) was effective prior to the filing of the complaint of this action. Evidence of the merger between PNC Bank National Association and National City Bank is attached hereto as Exhibit 'E'.

{¶5} "2. There is presently due and owing on the line of credit agreement, the sum of \$43,334.01 together with interest at the rate of 1% per annum from July 15, 2011 through June 15, 2013 and 8.44% per annum from June 16, 2013. Defendant(s) Steve Kereszturi * * * and Judith A. Kereszturi * * * have been relieved of any personal liability for the balance due and owing under the line of credit by reason of * * * discharge in bankruptcy * * * and thus Plaintiff does not seek a money judgment on the note but only foreclosure of its mortgage.

"SECOND CLAIM

{¶6} "3. Plaintiff hereby realleges and incorporates by reference each and every allegation set forth in paragraphs 1 through 2 as if fully rewritten herein and further states that in order to secure payment of the line of credit agreement, Plaintiff was given a mortgage by Defendant(s) Steve Kereszturi * * * and Judith A. Kereszturi., (sic) a copy of which is attached hereto as Exhibit 'C'.

{¶7} "4. The aforementioned mortgage constitutes a good and valid lien upon the premises described therein having been filed for record on September 19, 2005 and recorded as Instrument Number 200509190028435 in the Trumbull County Recorder's Office.

{¶8} “5. By reason of default under the terms of the line of credit agreement and because of the conditions of the mortgage have been broken, the same has become absolute, and Plaintiff is entitled to foreclosure.

{¶9} “6. The Defendants named herein have or claim to have an interest in the real estate which is the subject of this action as revealed by the title examination, a copy of which is attached hereto as Exhibit ‘D’.”

{¶10} On April 29, 2014, the trial court found the motion to dismiss as moot because the amended complaint cured the alleged defect in the complaint. Eventually, PNC Bank moved for summary judgment and default judgment against RenX Group. Although RenX Group filed a response to the motion for summary judgment, RenX Group never filed an answer to the complaint. The trial court granted PNC Bank summary judgment, but did not address PNC Bank’s motion for default judgment. This appeal followed.

{¶11} As the sole assignment of error, RenX Group asserts:

{¶12} “The trial court erred by granting a judgment of foreclosure when the affidavit of Westley Hoag did not state that he ever viewed the original note or that appellee PNC had possession of the original note and when no payment history or merger documents were attached.”

{¶13} Within this assignment, RenX Group argues (1) the affidavit of Westley Hoag accompanying PNC Bank’s motion for summary judgment was not entirely based upon Hoag’s personal knowledge and therefore he could not authenticate the line of credit agreement, (2) Hoag’s affidavit did not state how or if an acceleration letter was mailed, (3) Hoag lacks “sufficient personal knowledge about [the Kereszturi’s] note and mortgage because he did not (a) aver that PNC Bank had possession of the note, (b)

authenticate merger documents, (c) aver that National City Bank did not sell the note prior to merging with PNC Bank,” and (d) aver that he relied upon the original copy of the note and mortgage in making his affidavit, (4) a material question of fact existed as to whether PNC Bank possessed the note and was entitled to enforce the note under R.C. 1303.31, (5) a question of fact existed as to whether PNC Bank complied with the condition precedents needed to accelerate the note and mortgage, and (6) PNC Bank’s failure to attach payment records to the summary judgment motion created a question of fact as to whether a default occurred.

{¶14} In response, PNC Bank argues that the trial court entered default judgment against RenX Group, and RenX Group has waived any error relating to the default judgment by not opposing it in the trial court or assigning error to it in this appeal. Upon inspection of the judgment entry, however, the trial court never entered default judgment against RenX Group; rather, the trial court granted summary judgment in favor of PNC Bank vis-à-vis RenX Group and did not address the motion for default judgment. As the motion for default judgment was pending when the trial court issued a final judgment, the motion was implicitly overruled. *Geygan v. Geygan*, 10th Dist. Franklin No. 11AP-626, 2012-Ohio-1965, ¶30.

{¶15} PNC Bank further responds that RenX Group’s failure to file an answer to the complaint results in the complaint’s allegations being admitted as true, and that these admissions demonstrate RenX Group’s appeal is without merit. Civ.R. 8(D) states: “Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.” Although Civ.R. 8(D) does not technically mandate the admission to averments when a party fails to file responsive pleading, other Ohio courts have

applied Civ.R 8(D) to allegations when the responding party failed to file an answer. See *Wells Fargo Bank, N.A. v. Reaves*, 12th Dist. Clermont No. CA2014-01-015, 2014-Ohio-3556, ¶13.

{¶16} In response, RenX Group claims that it is impossible for it to admit to things that Steve Kereszturi did or did not do because it does not have first-hand knowledge of Steve Kereszturi's actions. This is unpersuasive. Civ.R. 8(B) states in pertinent part that "[i]f the [responding] party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial." As such, the civil rules provide a way of answering allegations with unknown veracity.

{¶17} However, this does not mean that any and all allegations in the complaint are admitted. Although Civ.R. 8(D) does not differentiate between allegations of fact and legal conclusions, judicial admissions, by definition, can only admit the truth of allegations of fact. *Ohio Valley Associated Builders & Contrs. v. Rapier Elec., Inc.*, 12th Dist. Butler Nos. CA2013-07-110, CA2013-07-121, 2014-Ohio-1477, ¶36-37. Therefore any allegations concerning legal conclusions arising from certain facts are not admitted.

{¶18} Consequently, a large portion of RenX Group's arguments can be resolved by their admission to factual allegations in the complaint. In regard to RenX Group's first argument that the Hoag affidavit did not properly authenticate the note, we do not need to decide this issue because by not responding to the first paragraph of PNC Bank's complaint, RenX Group admits that PNC Bank had possession of the original line of credit agreement. Although PNC Bank alleges that they are a "holder" of the line of credit agreement, this allegation contains allegations of fact and of legal

conclusions arising from those facts. Although “holder” in this context is statutorily defined as “[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession,” R.C. 1301.201(B)(21), “holder” also has a colloquial definition which is defined as “a person in possession of and legally entitled to receive payments of a bill, note, or check.” Merriam-Webster Dictionary, iOS app. version 3.1.2, entry for “holder” (last visited January 7, 2015). Although this colloquial definition as used in the complaint contains a legal conclusion that the “holder” is legally entitled to receive payment, it also contains a factual allegation that the “holder” possesses a note or similar object. Accordingly, we conclude that by not responding to the allegation that PNC Bank is the holder of the line of credit agreement, RenX Group has conceded that PNC Bank possesses the line of credit agreement that was originally executed between the Kereszturis and National City Bank. Consequently, it is immaterial whether Hoag’s affidavit demonstrated he possessed personal knowledge of the existence of the line of credit agreement to authenticate it.

{¶19} Next, RenX Group makes a series of arguments that challenge whether PNC Bank had standing at the time of filing. Specifically, RenX Group argues questions of fact exist as to whether PNC Bank possessed the note and properly authenticated merger documents, whether National City Bank sold the note prior to merging with PNC Bank, and whether PNC Bank had the “right to enforce” the note pursuant to R.C. 1303.31(A). “Whether a plaintiff has standing to initiate a foreclosure action turns on whether they are a person entitled to enforce the instrument at issue. *See United States Bank Natl. Assn. v. Gray*, 10th Dist. Franklin No. 12AP-953, 2013-Ohio-3340, ¶23. R.C. 1303.31(A) identifies three classes of persons who are ‘entitled

to enforce' an instrument, such as a note: (1) the holder of the instrument, (2) a nonholder in possession of the instrument who has the rights of a holder, and (3) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to R.C. 1303.38 or R.C. 1303.58(D). With respect to negotiable instruments, 'holder' means either: '(a) If the instrument is payable to bearer, a person who is in possession of the instrument; [or] (b) If the instrument is payable to an identified person, the identified person when in possession of the instrument.' R.C. 1301.01(T)(1).” *PennyMac Corp. v. Nardi*, 11th Dist. Portage No. 2014-P-0014, 2014-Ohio-5710, ¶12.

{¶20} By not responding to the first paragraph of the complaint, RenX Group admitted (1) PNC Bank possessed the “originally executed” line of credit agreement obligating the Kereszturis to pay \$50,256 and a mortgage securing the line of credit agreement and (2) PNC Bank is the successor by merger of National City Bank. Accordingly, PNC Bank put forth sufficient evidence demonstrating its standing. Although RenX Group alleges that National City Bank may have sold its note prior to its merger with PNC Bank, this mere allegation or denial of the moving party’s pleading does not create a question of fact. Civ.R. 56(E). As such, RenX Group’s arguments are without merit.

{¶21} RenX Group next argues that a question of fact exists as to whether the Kereszturis defaulted because PNC Bank did not attach payment records to the motion for summary judgment. However, this argument is meritless as RenX Group admits that the Kereszturis did not make payments in accordance with the terms of the line of credit agreement.

{¶22} Finally, RenX Group argues that the PNC Bank failed to comply with the notice requirements for accelerating the note or mortgage. PNC Bank does not make any allegation concerning whether it made any effort to notify the Kereszturis that it was accelerating the amount owed in its complaint. However, after inspecting the mortgage and note, the evidence, when looked in a light most favorable to RenX Group, demonstrates PNC Bank was not required to notify the Kereszturis it decided to accelerate their balance owed. The line of credit agreement expressly provides that PNC Bank can accelerate the balance without notice. The mortgage states that it can accelerate the balance, subject to federal or state law on the issue. RenX Group has not alleged any federal or Ohio law that would require PNC Bank to send an acceleration notice. Therefore, PNC Bank's failure to send such a notice does not defeat summary judgment.

{¶23} The sole assignment of error is without merit.

{¶24} The judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.