[Cite as *Bank of Am., N.A. v. Staples,* 2015-Ohio-2094.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

BANK OF AMERICA, N.A.,	)	CASE NO. 14 MA 109
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	OPINION
	)	
VAN R. STAPLES, JR., HTTA VAN STAPLES, JR., ET AL.,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 13CV335

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: May 27, 2015

[Cite as *Bank of Am., N.A. v. Staples,* 2015-Ohio-2094.]
ROBB, J.

{¶1} Defendant-appellant Van R. Staples ("Appellant") appeals the decision of the Mahoning County Common Pleas Court which granted summary judgment to plaintiff-appellee Bank of America, N.A. ("the Bank") in this foreclosure action. Compliance with the regulations of the Secretary of Housing and Urban Development ("HUD") is incorporated into Appellant's note and mortgage. Appellant takes issue with the Bank's compliance with two HUD regulations. First, Appellant alleges that there exists a genuine issue of material fact as to whether the Bank complied with the face-to-face meeting requirement within 24 C.F.R. 203.604(b). Next, Appellant argues that there exists a genuine issue as to whether the Bank sent notice of the default as required by 24 C.F.R. 203.606(a). For the following reasons, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶2} On February 6, 2013, the Bank filed a complaint in foreclosure stating that $37,663.42 remained unpaid by Appellant on a note secured by a mortgage on Appellant's property at 2317 Bellfield Ave in Youngstown, Ohio. (Appellant's wife was also named in the complaint, but she was not a party to the note and mortgage and is not named as an appellant on appeal.) The complaint disclosed that the loan was in default, stated that the loan had been declared immediately due, and asserted that all conditions precedent had been satisfied.

{¶3} On April 25, 2013, Appellant sought leave to file an answer instanter, which a magistrate permitted on May 10. Appellant's answer set forth a general denial and various affirmative defenses, including that the Bank failed to follow the necessary notice procedures set forth in the mortgage and failed to satisfy all conditions precedent prior to filing the foreclosure complaint.

{¶4} The Bank filed a motion for summary judgment in November of 2013 stating that the loan was in default under the terms of the note, the note had been accelerated, and the Bank was entitled to judgment as the holder of the note and owner of the mortgage. The Bank noted that the non-movant has the burden in summary judgment to assert any affirmative defenses and pointed out that, pursuant

to Civ.R. 9(C), if a cause of action is contingent upon a condition precedent, then the plaintiff can aver generally that all conditions precedent have been satisfied, but the defendant must specifically deny the occurrence of any condition precedent with particularity.

{¶5} The Bank preemptively argued against the defenses listed in the answer. In urging that it properly provided notice of default and acceleration, the Bank explained that it need not prove the borrower's actual receipt of the notice but only that it was mailed via first-class mail. Under the specific terms of the mortgage, notice is "deemed given" upon such mailing. *See* Mortgage at ¶ 13 (any notice required by the instrument shall be deemed to have been given to the borrower when delivered or when sent by first class mail, unless another method is required by applicable law).

{¶6} The affidavit of Assistant Vice President Adragna was submitted in support. Her affidavit incorporated various attached documents as business records. She stated that Exhibit D was a true and accurate copy of the breach letter that was sent to Appellant. This exhibit contained an August 20, 2012 Notice of Intent to Accelerate disclosing, among other things, the amount due in order to cure the default. Included in this exhibit was a copy of an envelope with Appellant's address, the Bank's return address, various bar codes, and a box stating, "PRESORTED First-Class Mail U.S. Postage and Fees Paid WSO."

{¶7} On January 3, 2014, Appellant filed a memorandum in opposition. He pointed out that the note at paragraph 6(B) and the mortgage at paragraphs 9(a) and 9(d) incorporated the requirement of compliance with the regulations of the Secretary of HUD prior to foreclosure. Appellant's affidavit stated that he did not receive the August 20, 2012 letter at his property address (or any other location). He contended that there was a genuine issue as to whether the Bank provided notice of default as required in HUD regulation 203.606(a).

{¶8} Specifically, he claimed that Adragna's affidavit failed to identify her relationship with the Bank and failed to indicate personal knowledge that the August 20, 2012 notice of default and acceleration was actually mailed to him. He

acknowledged that she could gain such personal knowledge if she was the person who mailed the letter or there was some type of evidence of mailing in the business records. Appellant concluded that the affiant "is basing her statement that the letter was mailed on the bare fact that a copy of the letter is in the business records." He did not discuss the copy of the envelope contained in the exhibit along with the letter.

{¶9} Appellant then asserted for the first time that there was a genuine issue as to whether the Bank complied with HUD regulation 203.604(b), which requires a face-to-face meeting with the borrower, or reasonable efforts at arranging such a meeting. His affidavit stated that he was never contacted by the Bank (or any other entity) and informed of the right to a face-to-face interview with the Bank prior to the filing of the foreclosure action.

{¶10} A status conference was held in January 2014. On February 19, 2014, Appellant sought leave to file an amended answer to add specificity to the conditions precedent allegation. A proposed amended answer was attached to the motion. The proposed amended answer added that the Bank failed to satisfy all conditions precedent prior to filing the foreclosure complaint when it failed to comply with all requirements of the HUD Secretary's regulation as required by paragraph 6(B) of the note and paragraph 9(d) of the mortgage. There was still no specific claim of failing to arrange a face-to-face meeting or citation to the contested HUD regulations.

{¶11} On March 3, 2014, a magistrate granted Appellant leave to file an amended answer but did not deem the proposed answer filed. Notably, the request was not an instanter motion, but rather the attached answer was specifically called a proposed answer. An amended answer was never filed.

{¶12} On March 6, 2014, the Bank filed a reply in support of summary judgment. As to Appellant's statement that he did not receive the August 20, 2012 notice of default and acceleration, the Bank reiterated that receipt was not required when a letter is mailed.

{¶13} Regarding the face-to-face meeting defense, the Bank stated that it not only engaged in reasonable efforts to arrange a meeting, including a letter and three visits to the property by a field representative, but at the third visit, Appellant (in-

person) declined the offered meeting. The Bank attached the affidavit of Assistant Vice President Brandstetter, who stated that the business records showed a June 20, 2012 letter was sent to Appellant at the property address in order to coordinate a face-to-face meeting.

{¶14} The letter, and its June 22 proof of dispatch by overnight delivery, were attached to the affidavit. The letter asked Appellant to call and schedule a visit to review the loan and any assistance options. Alternatively, it instructed him to call if he did not want a representative to visit the home. The letter advised that if no response was made, a representative would attempt to visit the home over the next week. The affiant also stated that the business records demonstrated field visits to the property took place on June 24, June 26, and June 30, 2012. She related that, on the third visit, Appellant advised the field representative that he declined a face-to-face meeting.

{¶15} A status conference was held in March of 2014. The case was reset for a further status hearing in sixty days. The Bank thereafter asked the court to delay ruling on summary judgment while the Bank reviewed financial documentation provided by Appellant concerning loss mitigation. After loss mitigation efforts failed, the Bank filed a notice on June 2, 2014 and requested that the court proceed to rule on its motion.

{¶16} On July 16, 2014, the court granted summary judgment in favor of the Bank finding that $37,663.42, plus interest, was due on the note; the conditions of the mortgage had been broken; and the Bank was entitled to foreclose. Appellant filed a timely notice of appeal, setting forth one general assignment of error with two specific issues presented.

ASSIGNMENT OF ERROR & GENERAL LAW

{¶17} Appellant's assignment of error provides:

"THE TRIAL COURT ERRED AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT TO PLAINTIFF-APPELLEE."

{¶18} Summary judgment can be granted where there remains no genuine issue of material fact for trial and where, after construing the evidence most strongly

in favor of the non-movant, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. *Byrd v. Smith*, 110 Ohio St.3d 24, 850 N.E.2d 47, 2006-Ohio-3455, ¶ 10, citing Civ.R. 56(C). The burden of showing that there are no genuine issues of material fact initially falls upon the party who files for summary judgment. *Id.*, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 294, 662 N.E.2d 264 (1996).

{¶19} Thereafter, the non-movant may not rest upon mere allegations or denials in the party's pleadings but must respond, through affidavit or as otherwise provided in the rule, by setting forth specific facts showing that there is a genuine issue of material fact for trial. *Id.*, citing Civ.R. 56(E). If the non-movant does not so respond, summary judgment, if appropriate, shall be entered against him. Civ.R. 56(E). Although courts are cautioned to construe the evidence in favor of the non-moving party, summary judgment is not to be discouraged where a non-movant fails to respond with proper evidence supporting the essentials of his claim. *See Leibreich v. A.J. Refrigeration, Inc.*, 67 Ohio St.3d 266, 269, 617 N.E.2d 1068 (1993).

{¶20} The evidence that can be used in ruling on summary judgment includes the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact. Civ.R. 56(C). Affidavits must be made on personal knowledge, setting forth such facts as would be admissible in evidence and showing affirmatively that the affiant is competent to testify to the matters stated therein. Civ.R. 56(E). Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. *Id.*

{¶21} In general, no evidence or stipulation may be considered except as stated in this rule. Civ.R. 56(C). Yet, by failing to object to facts presented at the summary judgment stage, a party waives any objection that the evidence fails to comply with the requirements of Civ.R. 56. *State ex rel. Gilmour Realty, Inc. v. Mayfield Heights*, 122 Ohio St.3d 260, 2009-Ohio-2871, 910 N.E.2d 455, ¶ 10, 17 (unsworn and unauthenticated exhibits attached to trial briefs are property considered

in ruling on a summary judgment motion where no objection is lodged to the nature of the evidence).

{¶22} We review the trial court's application of the summary judgment standard de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 738 N.E.2d 1243, 1245 (2000), citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). However, the decision to consider unobjected to evidence submitted in support of summary judgment is a discretionary one. *See Gilmour Realty*, 122 Ohio St.3d 260 at ¶ 17; *State ex rel. Spencer v. East Liverpool Planning Comm.*, 80 Ohio St.3d 297, 301, 685 N.E.2d 1251 (1997); *Reed v. Davis*, 10th Dist. No. 13AP-15, 2013-Ohio-3742, ¶ 14-15.

{¶23} As to HUD regulations, where compliance with the regulations is a term incorporated into the loan documents, as is the case here, compliance with those regulations is considered a condition precedent to foreclosure. *Bank of America v. Bobovyik*, 7th Dist. No. 13CO54, 2014-Ohio-5499, ¶ 17. Therefore, the defense of failing to comply with a HUD regulation must be raised in the answer with specificity under Civ.R. 9(C), or it is waived. *PNC Mtge. v. Garland*, 7th Dist. No. 12MA222, 2014-Ohio-1173, ¶ 5-6, 25.

ISSUE ONE: FACE-TO-FACE MEETING

{¶24} The first issue presented by Appellant alleges:

"A GENUINE ISSUE OF FACT EXISTS AS TO WHETHER BANK OF AMERICA COMPLIED WITH THE FACE-TO-FACE MEETING REQUIREM[E]NT CONTAINED IN 24 [C.F.R.] §203.604(b) PRIOR TO FILING A FORECLOSURE ACTION AGAINST DEFENDANT-APPELLANT."

{¶25} Pursuant to 24 C.F.R. 203.604(b), "[t]he mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid." Subsection (c) then provides that a face-to-face meeting is not required in certain instances, including if a reasonable effort to arrange the meeting was unsuccessful or if the borrower has clearly indicated that he will not cooperate in the interview. Subsection (d) explains that a reasonable effort to arrange the meeting shall consist

of at least one letter certified by the postal service as dispatched and one trip to see the borrower at the property (unless he does not reside there or mortgaged property is more than 200 miles from the mortgagee, its servicer, or a branch office of either).

{¶26} Appellant's affidavit claimed that he was never contacted by the Bank (or any other entity) and informed of the right to a face-to-face interview with the Bank prior to the filing of the foreclosure action. Appellant attempts to invalidate the Bank's response via the Brandstetter affidavit, which disclosed that field visits were made to the property and that a face-to-face letter was sent to Appellant. His arguments revolve around whether the court was permitted to rely on the Brandstetter affidavit in order to find that reasonable efforts to arrange a meeting were made or were not required.[1]

{¶27} Initially, Appellant claims that, although affiant Brandstetter asserted that she was authorized to sign the affidavit on behalf of the Bank and although a title was attached to her signature, the affiant failed to identify her position or relationship with the Bank "in the body of the affidavit." Appellant does not detail an argument on this observation or specifically claim that the affidavit is invalid due to this claim. In any event, the affiant demonstrated that she was competent to submit an affidavit on behalf of the Bank.

{¶28} The affidavit introduced the affiant as "Julie M. Brandstetter of Bank of America, N.A. ('BANA')" and stated that she was authorized to sign the affidavit on behalf of the Bank "as an officer of BANA". She explained that she was able to testify to the matters within the affidavit because she had personal knowledge of the Bank's procedures for creating the records used to maintain the loan. She added that it was part of her job responsibilities at the Bank to be familiar with the records maintained

[1] Appellant also mentions that the Adragna affidavit attached to the Bank's summary judgment motion did not mention efforts to arrange a meeting. The Bank explains how at the time the motion was filed, it had no burden to discuss the offer of a meeting because the answer did not allege that this condition precedent was lacking. This is why it was not until the filing of the reply in support of summary judgment that the Bank spoke to the issue of efforts at a meeting. This is true, but it does not appear that Appellant is arguing that the initial lack of explanation is dispositive. Rather, Appellant is simply

in connection with the loan and that she has access to the business records.

{¶29} The affidavit then stated that the information presented was taken from those business records, which were created at or near the time of occurrence of the matters described therein and recorded by persons with personal knowledge of the information in the record or from information transmitted by persons with personal knowledge. It was also disclosed that the records were kept in the ordinary course of the Bank's regularly conducted business activities and that it was the Bank's regular practice to make and to rely upon such records in the normal course of business. These are the requirements for submission of business records as an exception to the hearsay exclusion. *See* Evid.R. 803(6). The affiant showed that she was competent to review those business records and to then submit an affidavit as to the business records.

{¶30} After setting forth the information within those records related to Appellant's loan, Brandstetter signed her name on the signature line and filled in the blank for her title immediately thereafter with, "Assistant Vice President of Bank of America NA." (The notary's jurat also states, "Julie M. Brandstetter, as an Assistant Vice President of Bank of America, N.A.") Contrary to Appellant's suggestion, the title attached to an affiant's signature can be considered in determining whether the affiant was competent to make the affidavit concerning business records. *See, e.g., U.S. Bank, N.A. v. Martin*, 7th Dist. No. 13MA107, 2014-Ohio-3874, ¶ 24-25, 27 (where this court relied upon the title the affiant wrote after her signature in addressing an argument that the affidavit failed to indicate the affiant's position with the bank). An affiant's signature is an important component of an affidavit, and the title the affiant inscribed after her signature was essentially part and parcel of that signature.

{¶31} Besides the title set forth by the affiant after her signature (and repeated in the notary's jurat), other facts support her competency, including the introduction of the affiant as being "of" the Bank, a sworn statement that she is

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pointing out that the initial affidavit does not provide the evidence he finds lacking in the second affidavit.

authorized to sign on behalf of the Bank as an officer of the Bank, and the affiant's statements regarding her use and knowledge of the creation and maintenance of business records. This all combined to establish the affiant was a competent witness to submit the affidavit.

{¶32} Appellant also briefly protests that the affiant used the term "subject property" in stating that three field visits were made. Appellant proposes that an issue of fact exists because it is not clear the affiant is referring to the property subject to this foreclosure action. However, the affidavit is captioned with the information from this court case. For instance, it contains the court, the judge, the case number, and the title of the case, which in turn contains Appellant's name. Additionally, the paragraph after the one speaking of the "subject property" states that a letter was sent to Appellant at the property address. Although the address was not specified by the affiant, she incorporated the letter as an exhibit. The property address on that letter and on the copy of the envelope was "2317 Bellfield Ave Youngstown, OH 44502," the very property subject to this foreclosure action, with Appellant's name as the intended recipient. This connects the property referenced in the affidavit to the property at issue in this case.

{¶33} Appellant next takes issue with the affiant's statements about the content of business records that were not attached to the affidavit. Specifically, the affiant stated that the Bank's: "business records show that three field visits were made to the subject property in order to schedule a face-to-face meeting. These visits took place on June 24, June 26, and June 30, 2012. On the third visit, the Defendants advised the field representative that they declined a face-to-face meeting."

{¶34} This argument is essentially that because the affiant was not the person who made the property visits, she should have attached the business records to her affidavit. Since she was not the person who visited the property and the records were not attached, Appellant asserts that the affiant's statement regarding the property visits constituted inadmissible hearsay and was improperly considered as summary judgment evidence.

{¶35} As aforementioned, an affidavit must be made on personal knowledge and must set forth facts that would be admissible in evidence. Civ.R. 56(E). Papers referred to in an affidavit are to be attached to or served with the affidavit. *Id.* ("Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit."). The former requirement can be satisfied where the affiant says he has personal knowledge that records exist in the business file and explains how he is competent to incorporate those records. *See, e.g., State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 467, 423 N.E.2d 105 (1981). The latter requirement in Civ.R. 56(E) can be satisfied by attaching the papers to the affidavit and stating that they are true copies. *Id.*

{¶36} However, where no objection is specifically made to the form of the evidence presented in summary judgment filings, the trial court has discretion to utilize that evidence in making its decision. *See, e.g., Gilmour Realty, Inc. v. Mayfield Heights*, 122 Ohio St.3d 260, 910 N.E.2d 455, 2009-Ohio-2871, ¶ 17 ("Although appellees did not support these pertinent facts with evidence of the kinds specified in Civ.R. 56(C), courts may consider other evidence if there is no objection on this basis"). For instance, unauthenticated and unsworn documents can be utilized by a court in ruling on summary judgment where no objection as to those documents was entered. *Id.*, citing *Loukinas v. Roto-Rooter Servs. Co.*, 167 Ohio App.3d 559, 2006-Ohio-3172, 855 N.E.2d 1272, ¶ 22 (although video was not proper Civ.R. 56 evidence, court did not err in considering it where there was no objection).

{¶37} In other words, *if an objection was entered*, then documents attached to summary judgment motions that are not incorporated by a properly framed affidavit can be excluded as improper summary judgment evidence under Civ.R. 56(C). *See Rapp v. Sullivan*, 7th Dist. No. 12MA227, 2013-Ohio-5378, ¶ 10-11. But, a trial court can consider unauthenticated documents *if no party objects* on the grounds that the documents attached to the summary judgment filings are not incorporated into a supporting affidavit. *See Bank of America v. Bobovyik*, 7th Dist. No. 13CO54, 2014-Ohio-5499, ¶ 27-28 (unobjected to evidence submitted in summary judgment filings can be used to show that property visit was made prior to foreclosure action).

{¶38} Similarly, the failure to object to a statement in an affidavit on the basis that the affiant failed to attach all of the documents referenced in the affidavit constitutes waiver of the evidentiary issue on appeal. *See, e.g., Wells Fargo Bank v. Smith*, 12th Dist. No. CA2012-04-006, 2013-Ohio-855, ¶ 37-39 (overruling, on grounds of waiver, the argument that the court erred when it relied upon an affidavit that discussed a disclosure form without attaching such form). If the non-movant has issues with whether a trial court should rely on statements contained in affidavits submitted by the movant, the non-movant must enter a timely objection to the evidence. *See, e.g., Discover Bank v. Damico*, 11th Dist. No. 2011-L-108, 2012-Ohio-3022, ¶ 14-15 (trial court does not err in considering movant's affidavit which provided amount due without attaching account documents in support where non-movant failed to file motion to strike affidavit); *Citimortgage v. Elia*, 9th Dist. No. 25482, 2012-Ohio-2499, ¶ 8-10 (court would only consider arguments that were presented to trial court as objections to affidavit and would not consider argument that trial court erred in considering affidavit that failed to incorporate all referenced documents); *Nationwide Mut. Fire Ins. Co. v. Wittekind*, 134 Ohio App.3d 285, 289, 730 N.E.2d 1054 (4th Dist.1999) (failure to object to affidavit on grounds that contents were not based upon personal knowledge permits trial court to consider affidavit in support of summary judgment and waives issue on appeal).

{¶39} In summary, "[a] nonmovant's failure to object to the form of evidence attached to a movant's summary judgment motion results in waiver of any later objection as to the form of that evidence." *Wells Fargo Bank, N.A. v. Murphy*, 7th Dist. No. 13MA35, 2014-Ohio-2937, ¶ 20. Therefore, the failure to attach the business records concerning the property visits to the affidavit did not eliminate the trial court's ability to consider the statement concerning the property visits in the affidavit where Appellant failed to object below. As the Bank points out, there was evidence of three property visits. A minimum of one property visit to attempt a meeting was required pursuant to 24 C.F.R. 203.604(d).

{¶40} Besides the property visit, in order to establish reasonable efforts to arrange a face-to-face meeting, there must also be a letter dispatched to the

borrower. 24 C.F.R. 203.604(d). The Brandstetter affidavit stated that the June 20, 2012 letter was sent to Appellant at the property address. The affiant incorporated the referenced letter into her affidavit and attached it as Exhibit A (unlike the records regarding property visits discussed supra).

{¶41} Appellant argues that there is an issue of fact as to whether the June 20, 2012 letter attached to the Brandstetter affidavit was sent to him. *As Appellant recognizes, receipt of the letter by the borrower need not be established. See* 24 C.F.R. 203.604(d) (dealing with evidence of dispatch, not receipt). *See also Murphy*, 7th Dist. No. 13MA35 at ¶ 32-37 (an appellant's sworn statement that he did not receive notice does not create genuine issue precluding summary judgment where bank's affidavit stated that the notice was mailed; although dealing with notice of default discussed in the next issue presented). He therefore does not argue that the Bank failed to show he received the letter.

{¶42} *Rather, Appellant's argument is based upon his position that the statement in the affidavit that the letter was sent is hearsay because the affiant did not personally send the letter to him or attach a business record indicating that the letter was sent*. He asserts that the court and the affiant were confined to "the four corners" of the letter to ascertain whether that letter was sent to him, apparently believing that the letter was all she attached to the affidavit.

{¶43} *Contrary to appellant's suggestion, the affiant did not presume the letter was sent because of its mere existence in the file.* The first page of Exhibit A contains a June 22, 2012 dispatch receipt for the June 20 letter showing that it was sent to Appellant at the address of the subject property by standard overnight delivery. This was incorporated as a business record by the affiant along with the letter.

{¶44} *Appellant failed to address the significance of this dispatch receipt below and does not do so on appeal either*. Moreover, there was no objection to the affiant's ability to provide a statement that the June 20, 2012 letter was sent to Appellant at the property address. As analyzed above, Appellant waived arguments regarding the form of the evidence attached to the Bank's reply.

{¶45} Therefore, the trial court did not err in considering the affiant's statement that the letter was sent to Appellant at the property address listed in the letter and in utilizing the attached letter and its proof of dispatch as summary judgment evidence, which evidence of dispatch was uncontested.

{¶46} Additionally, Appellant failed to raise the face-to-face meeting issue in his answer. He raised the matter for the first time in opposition to summary judgment. As the Bank's summary judgment motion emphasized, a condition precedent must be stated with particularity in the answer in response to a complaint which avers that all conditions precedent were satisfied; otherwise, the condition precedent is deemed admitted. Civ.R. 9(C); *Bank of America v. Bobovyik*, 7th Dist. No. 13CO54, 2014-Ohio-5499, ¶ 17; *PNC Mtge. v. Garland*, 7th Dist. No. 12MA222, 2014-Ohio-1173, ¶ 5-6, 25.

{¶47} Appellant was permitted to amend the answer in order to add specificity. A proposed amended answer was attached to the motion for leave, but it was not filed after the trial court granted leave to do so. Even if the proposed amended answer could be considered filed, it did not specify that the condition precedent they claimed was lacking involved the face-to-face meeting requirement.

{¶48} Appellant added to the amended answer a claim of non-compliance with HUD regulations as generally required by particular sections of the loan documents. However, this does not reveal with particularity what regulations were allegedly violated or what particular condition precedent the Bank allegedly failed to satisfy as required by Civ.R. 9(C).

{¶49} In our *Garland* case, the note and mortgage had similar language to the note and mortgage at issue here regarding compliance with HUD regulations, and the debtor's answer stated that the Bank failed to comply with HUD regulations prior to acceleration. *Garland*, 7th Dist. No. 12MA222 at ¶ 34. This court concluded that said contention in the answer did not sufficiently plead the lack of a face-to-face meeting with particularity as required by Civ.R. 9(C). *Id.* at ¶ 35.

{¶50} The Bank does not have a summary judgment burden to negate every possible HUD regulation issue. Rather, the borrower's answer must state with

particularity which HUD regulation or requirement within the regulation is at issue. Appellant's proposed amended answer did not cite a HUD regulation or reveal the condition precedent factually said to be lacking "specifically and with particularity" as required by Civ.R. 9(C).

{¶51} We also point out that the Bank responded to the attempt to amend the answer by filing a reply in support of summary judgment with an affidavit on March 6, 2014. A status conference was held. More than a month later, the case was stayed at the Bank's request pending loss mitigation efforts. The court did not rule on the summary judgment motion until July 16, 2014, more than six weeks after the Bank informed the court that loss mitigation efforts had failed and asked the court to proceed to rule on the summary judgment motion. Appellant had 4.5 months to file evidentiary or competency objections to the affidavit submitted regarding the face-to-face meeting defense. He did not do so. Nor did he ask to file any supplemental items to respond to or contest the additional information and arguments propounded by the Bank's reply.

{¶52} Lastly, the bank also argues Appellant clearly indicated he would not cooperate in a face-to-face meeting. Appellant's affidavit asserted he was never contacted and informed about his right to a face-to-face meeting. The Bank's affidavit in reply stated Appellant told the field representative during the third property visit that he declined a meeting. This alternative argument need not be addressed.

{¶53} We concluded supra that the Bank set forth acceptable evidence on its reasonable efforts to arrange a meeting in the form of a dispatched letter and property visits. We also observed that Appellant failed to raise below his objections to the affidavit in the summary judgment stage. Additionally, the face-to-face meeting allegation was not sufficiently raised in the answer as a condition precedent. Appellant's first issue presented is therefore without merit.

ISSUE TWO: NOTICE OF DEFAULT

{¶54} Appellant's second issue presented contends:

"A GENUINE ISSUE OF FACT EXISTS AS TO WHETHER BANK OF AMERICA COMPLIED WITH THE PRE-FORECLOSURE REQUIREM[E]NTS

CONTAINED IN 24 [C.F.R.] § 203.606 (a) PRIOR TO FILING A FORESLOCURE ACTION AGAINST DEFENDANT-APPELLANT."

{¶55} As aforementioned, the Bank generally averred, in compliance with Civ.R. 9(C), that all conditions precedent had been satisfied. Appellant's original answer set forth a defense that the Bank failed to follow the necessary notice procedures in the mortgage prior to filing the foreclosure complaint and that the Bank failed to satisfy all conditions precedent prior to filing the foreclosure complaint. (The proposed amended answer added that the Bank failed to satisfy all conditions precedent when it failed to comply with HUD regulations as required by specific paragraphs in the note and mortgage.) In his response below and on appeal, Appellant argues the Bank failed to establish it complied with the provision in 24 C.F.R. 203.606(a), requiring the Bank to notify the borrower of default and the Bank intends to foreclose unless the default is cured.

{¶56} In addressing the condition precedent issue, the Bank's motion for summary judgment "concedes" that paragraph 22 of the mortgage provided that the Bank shall give the borrower notice of any breach prior to acceleration. The Bank then quoted the various items said to be required by the mortgage, e.g. the notice shall specify: the default, the action required to cure the default, a date by which the default must be cured (which is not less than 30 days), failure to cure by that date may result in acceleration and foreclosure, the right to reinstate, and the right to assert in a foreclosure action the non-existence of a default or any other defense. These items were all covered by the letter.

{¶57} This court notes that the mortgage does not contain a twenty-second provision as stated in the bank's summary judgment motion, and the section quoted in the Bank's summary judgment motion as to the required notice is not in Appellant's mortgage. The Bank's mistake will not be held against Appellant as the Bank imposed upon itself a condition precedent, which it "concede[d]" was directly in the mortgage. Appellant's original answer raised not only conditions precedent in general but also specifically stated that the Bank failed to comply with the notice

provisions of the mortgage. Therefore, we will not apply the Civ.R. 9(C) specificity waiver to this issue.

{¶58} In addressing the notice defense, the Bank's motion for summary judgment stated that the Bank provided a breach letter to Appellant prior to the acceleration of the loan. In support, the Bank attached the affidavit of its Assistant Vice President Jacklyn Ann Adragna, which incorporated various documents, including those in Exhibit D, as business records of the Bank. She stated that the breach letter within that exhibit was mailed to Appellant on August 20, 2012 in accordance with the note and mortgage. The Bank concluded that this demonstrated proper notice of default was mailed to Appellant via first class mail. The loan documents provide that notice is deemed given upon first class mailing (or delivery). *See* Mortgage at ¶ 13. *See also* Note at ¶ 8.

{¶59} Appellant's opposing affidavit stated that he did not receive the letter. It is acknowledged that under the terms of his loan, the Bank can establish mailing instead of delivery. *See Murphy*, 7th Dist. No. 13MA35 at ¶ 32-37 (an appellant's sworn statement that he did not receive notice does not create genuine issue precluding summary judgment where bank's affidavit stated that the notice was mailed). Basically, the issue set forth is whether the Bank's evidence properly showed that the default letter was mailed. Before reaching his main argument, we dispose of his other issues with the Adragna affidavit.

{¶60} Appellant begins by mentioning that "the body" of the Adragna affidavit fails to identify the affiant's position at the Bank. He made this same observation above as to the Brandstetter affidavit, which is similar to the Adragna affidavit in format, competency status, and recitation of business record status. The affidavit introduced the affiant as "Jacklyn Ann Adragna of Bank of America, N.A. ('BANA')" and stated that she was "authorized to sign the affidavit on behalf of the Bank as an officer of BANA."

{¶61} She explained that she was able to testify to the matters within the affidavit because she has personal knowledge of the Bank's procedures for creating the records that the Bank maintains for the loan and she is familiar with those

maintained records as part of her job responsibilities for the Bank. She additionally disclosed that her information was derived from the Bank's business records and then set forth the requirements of Evid.R. 803(6) as discussed supra. *See* Evid.R. 803(6) ("A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness * * *").

{¶62} Finally, she signed the affidavit with her name and her title. In the title blank, she wrote, "Assistant Vice President Bank of America NA" and then the date. (The notary's jurat also stated "by Jacklyn Ann Adragna, as an Assistant Vice President of Bank of America, N.A.") As analyzed supra, the title the affiant wrote after her signature was essentially part of the signature, and an affiant's signature is an important component of an affidavit. The title attached to a signature can be considered in determining whether the affiant was competent to make the affidavit. *See, e.g., Martin*, 7th Dist. No. 13MA107 at ¶ 24-25, 27. For all of these reasons, the initial position suggested (but not really argued) by Appellant is without merit. Due to the combination of statements in the affidavit, her ability to review the records was properly outlined.

{¶63} Turning to the main argument, Appellant posits that one cannot properly testify that a letter was mailed merely due to the existence of the letter within business records. He states that only if the affiant was the person responsible for mailing the letter or there was evidence of mailing in the business records could the affiant say the letter was mailed. *Citing U.S. Bank Natl. Assn. v. Umphrey*, 9th Dist. No. 27172, 2014-Ohio-4461 (where affiant worked for different bank than one who sent notice, where affiant did not state that the letter was mailed or that it had been sent in any manner, and where letter was only potential evidence of mailing).

{¶64} Appellant's argument is based upon the misconception that the affiant's statement (that the August 20, 2012 letter was mailed to Appellant) was the affiant's

presumption based upon "the bare fact" that a copy of the letter was maintained in the business records. *See* Defendant's Memorandum in Opposition at 5 (Jan. 3, 2014). To the contrary, the presence of the letter in the Bank's file was not the sole reason the affiant Bank officer ascertained that the letter had been mailed to Appellant.

{¶65} The first page of Exhibit D is a copy of the envelope used to mail the letter. It is addressed to Appellant at the address for the property subject to this foreclosure action with a bar code above Appellant's name; this information is in the position where the recipient would be located on an envelope, not merely in a header on a letter. The Bank's name and address appears in the spot for the return address. There is another bar code next to it. In the corner reserved for a stamp is a box containing the following information: **"PRESORT First-Class Mail U.S. Postage and Fees Paid WSO."**

{¶66} It was reasonable for an affiant to draw the conclusion from these business records that the letter was mailed. The attached document demonstrates that said mailing was by way of first-class mail. Moreover, although Appellant argued below that the "bare fact" the letter is in the records does not mean it was sent, he did not offer an argument as to the copy of the envelope in the business records submitted with the affidavit.

{¶67} The affiant's statement that the letter mailed was not based upon the bare existence of a letter in the file but was also based upon the existence of the first class copy of the envelope accompanying the letter. Appellant did not argue to the trial court that the envelope copy was insufficient evidence of mailing. The trial court was able to utilize this envelope copy as evidence due to the lack of specific objection under the waiver doctrine outlined above. Furthermore, Appellant's argument *on appeal* also speaks only to what can be gleaned from the letter itself and does not address the (apparently unnoticed) evidence of mailing provided as a business record.

{¶68} In sum, we conclude that the Bank presented sufficient summary judgment evidence showing that the notice of default and acceleration was sent to

the borrower by first class mail. For all of the foregoing reasons, appellant's assignment of error is overruled, and the trial court's foreclosure judgment is upheld.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.