

[Cite as *Bank of Am. v. Miller*, 2015-Ohio-3655.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

BANK OF AMERICA, N.A.

PLAINTIFF-APPELLEE

V.

RICHARD N. MILLER, et al.,

DEFENDANTS-APPELLANT

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CASE NO. 13 MA 119

OPINION
AND
JUDGMENT ENTRY

CHARACTER OF PROCEEDINGS:

Motion to Certify a Conflict

JUDGMENT:

Denied

APPEARANCES:

For Plaintiff-Appellee

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For Defendants-Appellant

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JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: August 17, 2015

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PER CURIAM.

{¶1} Defendant–Appellant, Richard Miller, has filed a motion requesting that we certify a conflict to the Ohio Supreme Court between this court's June 9, 2015 judgment in the instant case, *Bank of Am., N.A. v. Miller*, 7th Dist. No. 13MA119, 2015–Ohio–2325, and the Fifth District's judgments in *U.S. Bank, N.A. v. Detweiler*, 191 Ohio App.3d 464, 2010-Ohio-6408, 946 N.E.2d 777 (5th Dist.) (*Detweiler I*), and *U.S. Bank N.A. v. Detweiler*, 5th Dist. No. 2011CA00095, 2012-Ohio-73 (*Detweiler II*). Miller also claims this judgment conflicts with three Ninth District cases: *Wells Fargo Bank, N.A. v. Beirne*, 9th Dist. No. 09CA0103–M, 2011-Ohio-6678; *Liberty Savs. Bank, F.S.B. v. Bowie*, 9th Dist. No. 27126, 2014-Ohio-1208; and *Deutsche Bank Natl. Trust Co. v. Byrd*, 9th Dist. No. 27280, 2014-Ohio-3704. Plaintiff–Appellee, Bank of America, N.A., filed a brief in opposition.

{¶2} A court of appeals shall certify a conflict when its judgment is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state of Ohio. Section 3(B)(4), Article V, Ohio Constitution. In order to certify a conflict to the Ohio Supreme Court, we must find that three conditions are met:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law-not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

Whitelock v. Gilbane Bldg. Co., 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993). (Emphasis sic.)

{¶3} As a threshold matter, Miller has failed to specify the conflict issue he wants certified. App.R. 25(A) provides that a motion to certify conflict "*shall* specify the issue proposed for certification and shall cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed." (Emphasis added.) *Id.* Accordingly, we could deny the motion for failure to comply with the

Appellate Rules for this reason alone.

{¶4} In any event, Miller has not met the standard for conflict certification; our judgment here does not conflict on a rule of law with any of the other judgments of our sister districts. Here and in the *Detweiler* cases the panels concluded that compliance with HUD regulations is a condition precedent to foreclosure. *Miller* at ¶30, citing *PNC Mtge. v. Garland*, 7th Dist. No. 12 MA 222, 2014-Ohio-1173, ¶2. *Detweiler II* at ¶12, quoting *Detweiler I* at ¶53. The *Detweiler* cases address the ramifications of that categorization upon summary judgment burdens; here we addressed the ramifications upon pleading burdens. *Miller* at ¶29-36; *Detweiler II* at ¶12, quoting *Detweiler I* at ¶53.

{¶5} To the extent Miller appears to be arguing this and the Fifth District cases conflict regarding the manner in which a borrower must plead non-compliance with HUD regulations so as to satisfy his reciprocal pleading burden under Civ.R. 9(C)—in other words, the precise level of specificity required—there is also no conflict. The *Detweiler* cases do not quote the language the borrowers used in their answer, whereas this case does. *Detweiler II* at ¶8; *Detweiler I* at ¶7, ¶38. *Miller* at ¶35. Accordingly, there is no way to accurately compare the cases, let alone draw legal conclusions therefrom.

{¶6} Regarding the Ninth District cases, again, we find no conflict. Those cases stand for the proposition that where failure to comply with Civ.R. 9(C) is not raised by the bank in the trial court, it is waived for appellate purposes and precludes the bank from raising that argument on appeal. *Beirne* at ¶15; *Bowie* at ¶13; *Byrd* at ¶11-15. Here, we did not address that issue; moreover, one of the reasons the trial court granted summary judgment in the bank's favor was Miller's failure to comply with Civ.R. 9(C). *Miller* at ¶17-21.

{¶7} Accordingly, Miller's motion to certify a conflict is denied.

DeGenaro, J., concurs

Donofrio, P.J., concurs

Waite, J., concurs