[Cite as *Wells Fargo Bank, N.A. v. Sowell*, 2012-Ohio-2987.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Wells Fargo Bank, N.A.,	:	
Plaintiff-Appellee,	:	
		No. 11AP-622
v.	:	(C.P.C. No. 09CVE-10-15880)
Phillip E. Sowell,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 29, 2012

Thompson Hine LLP, *Scott A. King* and *Peter Jones*, for appellee.

Legal Aid Society of Columbus, and *Leslie Varnado, Jr.*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendant-appellant, Phillip E. Sowell, appeals from a summary judgment of the Franklin County Court of Common Pleas granting a decree in foreclosure in favor of plaintiff-appellee, Wells Fargo Bank, N.A. ("Wells Fargo").

{¶ 2} Wells Fargo began the action with a complaint seeking foreclosure on a note and mortgage executed by Phillip Sowell and his wife, Mary Sowell. The Sowells are now separated, and Mrs. Sowell has not personally participated in the present appeal. Mr. Sowell's answer and counterclaim to the foreclosure complaint denied that the loan was currently in default, asserting that Mr. Sowell had remitted sufficient funds as requested by Wells Fargo to cure the default. The answer also asserts that Wells Fargo had not adequately complied with VA regulations governing the loan.

{¶ 3} The undisputed facts in the record reflect that, on July 20, 2006, the Sowells executed a promissory note with a principal amount of $108,883 in favor of Access National Mortgage ("ANM"). In connection therewith, the Sowells executed a mortgage on their property known as 3021 Blue Ridge Road, Columbus, Ohio 43219. The note and mortgage are guaranteed by the United States Department of Veterans Affairs and subject to applicable VA regulations. Mr. Sowell is a veteran who served in the United States Marine Corps.

{¶ 4} ANM later sold the mortgage and note to Wells Fargo. In 2008, the Sowells fell behind on their payments under the note. This seems to have been caused at least in part by a reduction in Mr. Sowell's annuity pension from his federal retirement. Wells Fargo sent several notices of default and "potential" acceleration and had several telephone conversations with the Sowells. In June of 2009, this culminated in a request by Wells Fargo for financial information regarding their current finances and the reason for the delinquency. In August of 2009, Mr. Sowell submitted to Wells Fargo a series of documents indicating that his wife would no longer assist with payments under the note, that his monthly income after the reduction in his pension was $1,491.70, and that his monthly living expenses totaled $2,196.00. Mr. Sowell also indicated that he intended to seek employment consistent with his physical condition. On October 21, 2009, Wells Fargo accelerated the entire debt under the terms of the note, noting a principal balance of $105,531.86, plus interest at the rate of 6.5 percent after February 1, 2009, $4,103.51 in negative escrow balance, and $350.00 in late charges and other fees.

{¶ 5} Mr. Sowell's affidavit in opposition to summary judgment indicates that, in response to information provided by Wells Fargo, on October 22, 2009, he attempted to cure the default by giving Wells Fargo a cashier's check in the amount of $8,425 to cover past-due monthly payments and the anticipated payment for November 2009. Wells Fargo, upon receipt of this amount, then asked Mr. Sowell to tender an additional amount of $14.13. Mr. Sowell further avers that he made his mortgage payment for December 2009 in timely fashion but that Wells Fargo told him not to make a payment for January 2010 due to ongoing mediation proceedings.

{¶ 6} On October 23, 2009, the day after Mr. Sowell tendered his payment on October 22, Wells Fargo filed its complaint in foreclosure. Wells Fargo did not

immediately apply the recent payments by Mr. Sowell to the mortgage balance but contacted Mr. Sowell and requested an additional $2,524.03 (above and beyond the $14.13 previously demanded) to bring the note current under the terms of the note and mortgage. Mr. Sowell did not proffer the additional amount, which seems to represent expenses incurred by Wells Fargo in bringing the foreclosure action. Wells Fargo ultimately returned to Mr. Sowell the various payments he had remitted after acceleration of the note.

{¶ 7} By the time the matter proceeded for consideration of summary judgment before the trial court, the controversy had been largely reduced to a few identifiable issues: first, whether Wells Fargo had failed to comply with VA regulatory requirements to ascertain the borrower's financial circumstances before proceeding with foreclosure, specifically by conducting a face-to-face interview under 38 C.F.R. 36.4350(g); second, whether Wells Fargo was precluded from foreclosing by its acceptance of Mr. Sowell's payments submitted after the filing of the foreclosure action; and third, whether Wells Fargo could demand, as a condition to cure the default, recovery of its foreclosure expenses including attorney fees.

{¶ 8} The trial court, in granting summary judgment for Wells Fargo, concluded that 38 C.F.R. 36.4350(g), which provides that lenders must employ flexible collection techniques adapted to the needs and circumstances of the borrower and both establish contact with the borrower and determine the financial circumstances of the borrower, did not expressly mandate a face-to-face interview with the borrower prior to pursuing foreclosure. The trial court found that Wells Fargo had exchanged lengthy correspondence with the Sowells and adequately ascertained their financial circumstances. The trial court further concluded that the substantial payments made by Mr. Sowell on the eve of foreclosure, in light of Wells Fargo's subsequent return of these amounts, did not create any equitable bar that would preclude foreclosure. The trial court further (and unnecessarily, in light of the facts before it) concluded that, since Wells Fargo had accelerated the amount, it would have been entitled to keep all partial payments and apply them to the balance. Finally, the trial court did not address the attorney-fees issues. The court's judgment entry awarded Wells Fargo the principal sum of $105,531.96, with interest at a rate of 6.5 percent per year from Febuary 1, 2009, $4,102.51 in escrow

advances, and $350.00 in late charges and inspection fees, plus court costs, advances, and other charges as allowed by law.

{¶ 9} Mr. Sowell has timely appealed and brings the following assignments of error:

> FIRST ASSIGNMENT OF ERROR
>
> The trial court erred in granting summary judgment to the Plaintiff because there were disputed issues of material fact regarding whether the Plaintiff had complied with conditions precedent to acceleration of the note.
>
> SECOND ASSIGNMENT OF ERROR
>
> The trial court erred in granting summary judgment to the Plaintiff because there were disputed issues of material fact regarding whether the defendant had tendered sufficient funds to make the loan current.

{¶ 10} We initially note that this matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64 (1978). Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support each element of the stated claims. *Id*.

{¶ 11} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994); *Bard v. Soc. Natl. Bank, nka KeyBank*, 10th Dist. No. 97APE11-1497 (Sept. 10, 1998). Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.*, 106 Ohio App.3d 440, 445 (5th Dist.1995). As such, we have the authority to overrule

a trial court's judgment if the record does not support any of the grounds raised by the movant, even if the trial court failed to consider those grounds. *Bard*.

{¶ 12} Mr. Sowell's first assignment of error argues that Wells Fargo did not sufficiently comply with its obligations under applicable VA regulations before proceeding with foreclosure. Section 11 of the note specifically provides that these regulations will govern the rights, duties, and liabilities of the parties to the loan and supersede any inconsistent provisions of the note or mortgage. 38 C.F.R. 36.4350(g) provides as follows:

> *Collection actions.* (1) Holders shall employ collection techniques which provide flexibility to adapt to the individual needs and circumstances of each borrower. A variety of collection techniques may be used based on the holder's determination of the most effective means of contact with borrowers during various stages of delinquency. However, at a minimum the holder's collection procedures must include the following actions:
>
> (i) An effort, concurrent with the initial late payment notice to establish contact with the borrower(s) by telephone. When talking with the borrower(s), the holder should attempt to determine why payment was not made and emphasize the importance of remitting loan installments as they come due.
>
> (ii) A letter to the borrower(s) if payment has not been received within 30 days after it is due and telephone contact could not be made. This letter should emphasize the seriousness of the delinquency and the importance of taking prompt action to resolve the default. It should also notify the borrower(s) that the loan is in default, state the total amount due and advise the borrower(s) how to contact the holder to make arrangements for curing the default.
>
> (iii) In the event the holder has not established contact with the borrower(s) and has not determined the financial circumstances of the borrower(s) or established a reason for the default or obtained agreement to a repayment plan from the borrower(s), then a face-to-face interview with the borrower(s) or a reasonable effort to arrange such a meeting is required.

{¶ 13} The record in the present case reflects extensive contact and correspondence between Wells Fargo and the Sowells over the lengthy period preceding

actual foreclosure upon the note. The Sowells provided detailed financial information in response to inquiries from Wells Fargo regarding the reason for the default. Wells Fargo then summarized this information in subsequent correspondence with the Sowells up to the time at which Wells Fargo accelerated the debt and filed for foreclosure. The regulation specifically provides that no face-to-face meeting is required under the regulation when there has been effective contact between the parties by other means. We accordingly find that the trial court did not err when it concluded that there remained no genuine issue of material fact regarding Wells Fargo's compliance with VA regulations during the period after which the note went into default and at the time Wells Fargo filed for foreclosure. Mr. Sowell's first assignment of error is accordingly overruled.

{¶ 14} Mr. Sowell's second assignment of error asserts that the trial court erred in finding that there remained no genuine issue of material fact on the question of whether Mr. Sowell had adequately cured the default by tendering all sums necessary to bring the note current, including an anticipated payment for the next month due. Wells Fargo argues that even the payment by Mr. Sowell of $8,425.00 on the eve of foreclosure filing, followed by an additional payment of $14.13 (apparently in response to a communication from Wells Fargo), would not have been sufficient to bring the note current because Wells Fargo under the terms of the note could properly require Mr. Sowell to tender an additional $2,524.03, representing the cost of initiating the foreclosure proceedings, which were initiated after acceleration of the note but before Wells Fargo actually received the large lump sum tendered by Mr. Sowell. Section 14 of the mortgage instrument provides that the lender may recover such costs:

> Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees.

Section 19 of the mortgage instrument provides a right of cure to the borrower, but again provides for recovery by the lender of costs associated with enforcement of the security agreement:

> If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument

> discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument * * * [.]

{¶ 15} The issue raised in Mr. Sowell's second assignment of error, therefore, is whether Mr. Sowell, by remitting the amounts demanded by Wells Fargo up to but not including the final demand for $2,524.03, exercised his right to cure the default under Section 19. Accepting, for purposes of summary judgment, that the amounts initially paid by Mr. Sowell represented all that was necessary to cure the default with respect to past-due principle, interest, and late fees as they stood prior to the filing of the foreclosure complaint, the remaining question is whether the additional $2,524.03 in costs related to foreclosure could reasonably be imposed by the bank under the language in Section 19(c) requiring the borrower, as part of an effort to cure default, to pay all expenses, including reasonable attorney fees.

{¶ 16} We note initially that Wells Fargo argues that this issue was not adequately raised in opposition to summary judgment before the trial court and has therefore been waived. This is inaccurate. Mr. Sowell's own motion for summary judgment asserts that recovery of attorney fees under these circumstances is contrary to public policy under *Leavans v. Ohio Natl. Bank*, 50 Ohio St. 591 (1893).

{¶ 17} *Leavans*, however, is no longer good law, at least with respect to recovery of litigation costs as a prerequisite to reinstatement of a residential home loan. "A provision in a residential-mortgage contract requiring a defaulting borrower to pay a lender's reasonable attorney fees as a condition of terminating pending lender-initiated foreclosure proceedings on a defaulted loan and reinstating the loan is not contrary to

Ohio statutory or decisional law or against Ohio public policy. *Leavans v. Ohio Natl. Bank* (1893), 50 Ohio St. 591, 34 N.E. 1089, and *Miller v. Kyle* (1911), 85 Ohio St. 186, 97 N.E. 372, distinguished.)" *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, syllabus.

{¶ 18} Although the timing of events in this case makes for hard facts and a harsh outcome, we are compelled to find that Wells Fargo had a right to require payment of reasonable litigation costs incurred in enforcement of its security interest, that Wells Fargo had, in fact, filed the action in foreclosure and demanded costs associated therewith, and that Mr. Sowell had declined to make payment of these additional costs in his attempt to cure the default. We therefore find that there remains no genuine issue of material fact on the question of whether Mr. Sowell had timely cured the default, and his second assignment of error is overruled.

{¶ 19} In summary, we find that the Franklin County Court of Common Pleas did not err in finding that there remains no genuine issue of material fact and that Wells Fargo was entitled to summary judgment in its foreclosure action. Both of appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

FRENCH and TYACK, JJ., concur.
