

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

THIRD FEDERAL SAVINGS & LOAN ASSOCIATION OF CLEVELAND,	:	CASE NO. CA2012-04-028
	:	
Plaintiff-Appellee,	:	<u>OPINION</u>
	:	11/13/2012
- vs -	:	
	:	
SHARYN A. FARNO, et al.,	:	
	:	
Defendants-Appellants.	:	
	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 11CV80629

Carlisle, McNellie, Rini, Kramer & Ulrich, Herbert J. Kramer and Eric T. Deighton, 24755 Chagrin Boulevard, Suite 200, Cleveland, Ohio 44122, for plaintiff-appellee

Andrew M. Engel, 7071 Corporate Way, Suite 201, Centerville, Ohio 45459, for defendant-appellant, Sharyn A. Farno

FIA Card Services, 1000 Samoset Drive, Newark, Delaware, 17913, defendant, pro se

Christopher A. Watkins, 500 Justice Drive, Lebanon, Ohio 45036, for defendant, Jim Aumann, Treasurer

S. POWELL, P.J.

{¶ 1} We reverse and remand the grant of summary judgment in a foreclosure action because plaintiff-appellee, Third Federal Savings & Loan Association of Cleveland (Third

Federal), failed to attach certain documents in its affidavit in support of its motion for summary judgment.

{¶ 2} Third Federal filed a complaint in foreclosure in Warren County Common Pleas Court against homeowner, Sharyn Farno, alleging that Farno defaulted on her note securing her mortgage and Third Federal was entitled to the unpaid balance and interest. Farno answered with a general denial and set forth affirmative defenses, including payment and accord and satisfaction.

{¶ 3} Third Federal moved for summary judgment and attached an affidavit from one of its legal analysts. This affiant averred, in part, that Third Federal accelerated the loan after it performed all of the prerequisites required under the note and mortgage necessary to accelerate the balance due. Having examined Farno's loan history, the affiant averred that Farno was in default of payment because no payments on the loan had been made from June 2011 and thereafter. The affiant stated that "there is due Plaintiff the principal balance of \$77,955.60, plus interest at the rate of 6.75% per annum from May 1, 2011 until paid, plus late charges and, pursuant to the mortgage, all sums advanced for the payment of real estate taxes and assessments, insurance premiums and property protection."

{¶ 4} Farno's response to Third Federal's motion included a motion to strike Third Federal's affidavit. According to Farno's motion, Third Federal averred that Farno was in default after reviewing payment history and, subsequently provided an amount owed, but did not attach any of the documents reviewed to sustain the assertions in the affidavit. Without responding to the motion to strike, the trial court granted summary judgment to Third Federal. Farno appeals, raising three assignments of error.

{¶ 5} Under her first assignment of error, Farno argues that the trial court erred in overruling her motion to strike Third Federal's affidavit. Farno asserts under her second assignment of error that the grant of summary judgment was erroneous because Third

Federal failed in its summary judgment motion to support with documentation all the elements of its claims, including the amount owed on the loan.

{¶ 6} Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Civ. R. 56(C).

{¶ 7} Summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. *Id.* This court's review of a trial court's ruling on a summary judgment motion is de novo. *PNC Mtge. v. Innis*, 12th Dist. No. CA2010-10-013, 2011-Ohio-5594, ¶ 7.

{¶ 8} Civ.R. 56(E) states that:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. 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 court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

{¶ 9} We note that Third Federal indicated it reviewed documents pertaining to the loan history and evidence of payment default, but no documents or portions of documents relative to those matters were attached or served with the affidavit, or for that matter, found

anywhere in the record. There is no indication in the record that Third Federal asked to supplement the record and its affidavit after Farno raised the issue with the trial court, and no indication the trial court took that opportunity to order the record supplemented.

{¶ 10} We sustain Farno's first assignment of error as paragraphs five, six, and seven of Third Federal's affidavit should have been stricken because its summary judgment motion was not supported as provided in Civ.R. 56(E), when no documentation referenced in those portions of the affidavit were attached to or served with the affidavit to show default of payment and payment history. See Civ.R. 56; see *Cincinnati Bar Assn. v. Newman*, 124 Ohio St.3d 505, 2010-Ohio-928, ¶ 7 (requirement of Civ.R. 56[E] that sworn or certified copies of all papers referred to in the affidavit be attached is satisfied by attaching the papers to the affidavit, coupled with a statement therein that such copies are true copies and reproductions; see *State ex rel. Varnau v. Wenninger*, 12th Dist. No. CA2009-02-010, 2011-Ohio-3904, ¶ 10 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit, but not attached to affidavit or served therewith)).

{¶ 11} We do not suggest that Third Federal was required to attach every document in its file on Farno's note, but Third Federal needed to attach or serve with its affidavit some document or documents material to the issues in this case, to wit, the default in payment and applicable portions of the payment history. See *Countrywide Home Loans, Inc. v. Rodriguez*, 9th Dist. Nos. 03CA008345, 03CA008417, 2004-Ohio-4723 (affiant attested to true record of payments on homeowner's account and attached to affidavit document chronicling the payment history on the account).

{¶ 12} We are aware that in *First Horizon Home Loans v. Sims*, 12th Dist. No. CA2009-08-117, 2010-Ohio-847, this court did not require a default document to be attached even though the affiant referred to it; however, the homeowner in *Sims* did not challenge the affidavit in the court below. In the instant case, Farno moved the trial court to strike the

affidavit, and Third Federal could have responded by supplementing its affidavit to address the deficiencies. This court finds no reason in this case to permit the moving party to avoid the requirements of Civ.R. 56 when it is asking for judgment before trial.

{¶ 13} We sustain Farno's second assignment of error because summary judgment is not appropriate as Third Federal failed to satisfy its initial burden for summary judgment when the last three paragraphs of Third Federal's affidavit for summary judgment are stricken and none of the pertinent material was provided in the record to the trial court. See Civ.R. 56; *Dresher v. Burt*, 75 Ohio St. 3d 280, 297-98 (1996) (there is a requirement, however, that a moving party, in support of a summary judgment motion, specifically point to something in the record that comports with the evidentiary materials set forth in Civ.R. 56[C]).

{¶ 14} Farno's third assignment of error alleges that the trial court's judgment entry was too vague and therefore, not a final order, because it failed to specify the amount "awarded for 'sums advanced and to be advanced for real estate taxes, insurance premiums and property protection.'" Farno acknowledged that this court had previously found no problems with such judgment entries because those sums advanced are continuously accruing through the date of the sheriff's sale. See *Washington Mutual Bank, N.A., v. Wallace*, 194 Ohio App.3d 549, 2011-Ohio-4174 (12th Dist.), appeal allowed on other grounds, 130 Ohio St.3d 1493, 2011-Ohio-6556; *Sims*. However, the third assignment of error regarding the judgment entry is rendered moot by our decision in the first and second assignments of error.

{¶ 15} Judgment reversed and this cause is remanded to the trial court for further proceedings in accordance with the law and consistent with this opinion.

RINGLAND and PIPER, JJ., concur.