[Cite as *HillStreet Fund III, L.P. v. Bloom*, 2010-Ohio-2267.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

THE HILLSTREET FUND III, L.P. :

Plaintiff-Appellee : C.A. CASE NO. 23394

v. : T.C. NO. 2008 CV 1603

DONALD R. BLOOM, et al. : (Civil appeal from Common Pleas Court)

Defendants-Appellants :

:

. . . . . .

O P I N I O N

Rendered on the 21st day of May, 2010.

. . . . . .

ROBERT G. SANKER, Atty. Reg. No. 0039040 and SEAN S. SUDER, Atty. Reg. No. 0078535, One East Fourth Street, Suite 1400, Cincinnati, Ohio 45202
Attorney for Plaintiff-Appellee

RICHARD HEMPFLING, Atty. Reg. No. 0029986, 15 West Fourth Street, Suite 100, Dayton, Ohio 45402
Attorney for Defendants-Appellants

. . . . . .

FROELICH, J.

{¶ 1} Donald and Brenda Bloom appeal from a judgment of the Montgomery County Court of Common Pleas, which granted summary judgment to HillStreet Fund III, L.P., and entered a decree in foreclosure on two properties owned by Brenda Bloom. The Blooms claim that the trial court erred in granting summary judgment. For the following

reasons, the trial court's judgment will be affirmed.

I

{¶ 2} Donald Bloom was the former president of Petro Acquisitions, Inc., which, through subsidiaries and affiliates, owned and operated several gas stations/convenience stores under the name "Ameristop." On September 22, 2006, several of Donald Bloom's companies executed and delivered to HillStreet a promisory note with a principal amount of $2.5 million ("the September promissory note").[1] Donald Bloom signed the September promissory note as president of each of the borrowing companies.

{¶ 3} On the same date, Donald Bloom executed an Unlimited Guaranty of the obligations under the September promissory note. Under this guaranty, Donald Bloom unconditionally guaranteed to pay HillStreet all principal, interest, late charges, loan fees, loan charges, collection costs and expenses related to the September promissory note. Brenda Bloom also executed a Limited Recourse Guaranty, in which she unconditionally guaranteed to pay HillStreet all principal, interest, late charges, loan fees, loan charges, collection costs and expenses related to the September promissory note. HillStreet's recourse against Brenda Bloom was limited to her interest in five parcels of real estate: (1) 1316 and 1320 Wyoming Street in Dayton, Ohio;[2] (2) 426 Diamond Street in Mansfield,

[1] The borrowing companies were Petro Acquisitions, Inc., Ohio Valley AFM, Inc., AFM 504, Inc., AFM 29128, Inc., AFM 29041, Inc., AFM 801, Inc., AFM 29131, Inc., OVA Real Estate, Inc., Gillespie Wholesale, Inc., AFM 29133, Inc., AFM 29134, Inc., and AFM 29130, Inc.

[2] Exhibit A to Brenda Bloom's guaranty, which listed the properties, references four categories of property. It appears, however, that the legal description for 1320 Wyoming Street was stated along with the legal description for 1316 Wyoming Street, and the two parcels were referred to collectively as

Ohio; (3) 608 Weber Street in Piqua, Ohio; and (4) property on McKinley Street in Piqua, Ohio. To secure their guaranties, the Blooms executed a mortgage in favor of HillStreet for the properties located at 1316 and 1320 Wyoming Street.

{¶ 4} On November 17, 2006, several of Donald Bloom's other companies executed and delivered a promissory note to HillStreet with a principal amount of $3 million.[3] Donald Bloom again signed the note as president of each of these companies. As with the September promissory note, Donald Bloom signed an Unlimited Guaranty of the November loan, and Brenda Bloom signed a Limited Recourse Guaranty. Brenda Bloom's guaranty was limited to her interest in two other properties – a property located in Springdale, Ohio, and another in Fairfield, Ohio.

{¶ 5} The Blooms acknowledge that the aggregate principal balance of the HillStreet loans was $5.5 million, and that the two loans fell into default. In September 2007, HillStreet brought suit against the Blooms, based on their guaranties, in the Hamilton County Court of Common Pleas. *HillStreet Fund III, L.P. v. Bloom*, Hamilton C.P. No. A0708532. HillStreet obtained a cognivit judgment against the Blooms in an aggregate amount of $5.5 million, plus interest; the judgment limited HillStreet's recourse against Brenda Bloom to her interest in the mortgaged property, as described in the two Limited Recourse Guaranties. The court also awarded attorney fees and reasonable expenses to HillStreet. A certificate of judgment was filed with the Montgomery County Clerk of

---

"1316 Wyoming Street."

[3] These borrowing companies were Petro Venutres, Inc., WACO Acquisitions, Inc., AFM 802, Inc., AFM 803, Inc., AFM 804, Inc., AFM 808, Inc., AFM 809, Inc., AFM 811, Inc., AFM 813, Inc., and AFM 817, Inc.

Courts on September 26, 2007.

{¶ 6} On February 14, 2008, HillStreet filed a Complaint in Foreclosure in the Montgomery County Court of Common Pleas against the Blooms and others who might have an interest in Brenda Blooms' properties located at 1316 and 1320 Wyoming Street.[4] HillStreet claimed that the Blooms had defaulted on their obligations under the two guaranties for $2.5 million and $3 million, respectively, and that it had received a judgment against the Blooms in the amount of $5.5 million, plus attorney fees and expenses, on September 21, 2007, based on those guaranties. HillStreet alleged that the judgment was in full force and effect, remained wholly unpaid, and was a valid lien against property belonging to the Blooms. HillStreet sought foreclosure of Brenda Bloom's properties located at 1316 and 1320 Wyoming Street in Dayton.

{¶ 7} The Blooms, the Montgomery County Treasurer, and JP Morgan Chase Bank, N.A., as successor in interest to Bank One, Cincinnati, N.A. ("JP Morgan Chase"), filed Answers. JP Morgan Chase claimed to hold a first mortgage lien on the property; the Montgomery County Treasurer claimed it held a lien for real estate taxes and assessments. In their Answer, the Blooms admitted that they had executed the guaranties, that they had defaulted on their obligations under the guaranties, and that HillStreet had obtained a judgment against them. They denied, however, "that said judgment is in full force and effect and wholly unpaid ***." The matter was referred to a magistrate.

---

[4]The other defendants included New Nu Investments; Thomas J. Nugent aka Thomas J. Nugent, Jr.; JP Morgan Chase Bank, National Association, successor in interest to NBD Bank; Warehouse Beer Systems, Inc.; Warehouse Beer Franchise Company; and Princy, Inc. None of these defendants filed Answers, and the court granted default judgment against them.

{¶ 8} On October 14, 2008, HillStreet moved for summary judgment, asserting that there was no genuine issue of material fact as to the Blooms' liability with respect to the certified judgment and that the priority of lienholders was undisputed. HillStreet asserted that, apart from real estate tax liens, JP Morgan Chase had first lien priority and HillStreet had second lien priority for the properties. HillStreet supported its motion with numerous exhibits and the affidavit of Christian Meininger, president of HillStreet Capital III, Inc. (the investment manager of HillStreet), who stated that the Hamilton County judgment remained due and owing.

{¶ 9} The Blooms requested an extension of time to respond to HillStreet's motion, pursuant to Civ.R. 56(F). They supported their request with an affidavit by Donald Bloom ("Bloom Aff. I"), in which he averred, in part:

{¶ 10} "3. Upon information and belief, Affiant states that the following described stores/assets were administered and sold in the case of *In Re Petro Acquisitions, Inc*., Case No. 07-15723 in the United States Bankruptcy Court, Southern District of Ohio, Western Division and other bankruptcy cases of the Ameristop entities which were jointly administered (collectively the 'Bankruptcy Case'); and

{¶ 11} "4. Upon information and belief, Affiant states that the proceeds from the sale of collateral that was held by Hillstreet for the September 2006 Loan is as follows:

{¶ 12} "AFM 29128 $70,000

{¶ 13} "AFM 29801 $750,000

{¶ 14} "AFM 29131 $610,000

{¶ 15} "AFM 29130 $310,000

{¶ 16} "Gillespie $120,000

{¶ 17} "Dealer contracts $150,000

{¶ 18} "Lash Zebra Note $175,000

{¶ 19} "AFM 29141 Note $87,735

{¶ 20} "Chella Food Note $50,000

{¶ 21} "Store 135 $35,000

{¶ 22} "Subtotal $2,357,735; and

{¶ 23} "***

{¶ 24} "9. Upon information and belief, the Ameristop assets that were pledged as collateral for the November 2006 Loan have been sold as follows:

{¶ 25} "AFM Stores 29803, 29804, 29811, and 29817 were sold to Road Ranger, LLC – $9,900,000.00.

{¶ 26} "802 $900,000

{¶ 27} "808 $1,600,000

{¶ 28} "809 $2,700,000

{¶ 29} "813 $900,000

{¶ 30} "Subtotal $16,000,000; and

{¶ 31} "***

{¶ 32} "12. Upon information and belief, as of this date, Affiant believes that the Plaintiff has been paid the sum of approximately $7,972,735."

{¶ 33} Donald Bloom further averred that he had attempted, unsuccessfully, to communicate with the bankruptcy trustee and Ameristop's corporate counsel to determine

"the precise amount of payments to Hillstreet." Bloom Aff. I at ¶13-14. Donald Bloom had communicated with Perazzo and Meininger to determine the amount of payments, but had not been provided an accounting. Id. at ¶15. Donald Bloom stated that he required additional time to communicate with individuals to determine "the precise amount of payments that have been paid to Hillstreet under the administration of the Bankruptcy Case and to further determine whether such payments should be credited against the Brenda Bloom Collateral" for the two loans. Id. at ¶16. Although the court did not file an entry, it appears that the Blooms' motion was implicitly granted.

{¶ 34} The Blooms filed an opposition memorandum on November 25, 2008, primarily arguing that HillStreet had been paid $7,199,675 out of various bankruptcy cases and, thus, there was a material issue of fact as to whether the loans had been paid in full. The Blooms attached a second affidavit by Donald Bloom ("Bloom Aff. II") and incorporated by reference his first affidavit filed in support of their Civ.R. 56(F) motion. The second affidavit stated, in part:

{¶ 35} "7. Most of the Ameristop assets and other assets held as collateral for the Hillstreet Loan have been administered and/or sold; and

{¶ 36} "8. Affiant states that he has reviewed certain records and filings in the Ameristop Bankruptcy Cases which reflect payments/credits to Hillstreet; and

{¶ 37} "9. Affidant states that Affiant has met with Tom [Perazzo], the accountant and duly authorized representative of the Hillstreet Fund; and

{¶ 38} "10. Based on his review of the Ameristop records in the Bankruptcy Cases and the statements/admissions made to Affiant by Tom [Perazzo], the accountant and duly

authorized representative of the Hillstreet Fund, the Hillstreet Fund has been paid or acknowledges credits against the Hillstreet Loans in the amount of Seven Million One Hundred Ninety-Nine Thousand Six Hundred Seventy-Five and 00/100 Dollars ($7,199,675.00) (collectively the 'Hillstreet Payments'); ***"

{¶ 39} Donald Bloom's second affidavit did not include any supporting documentation.

{¶ 40} In December 2008, the magistrate granted HillStreet's motion for summary judgment, finding no genuine issues of material fact as to the validity of the Hamilton County judgment or the certificate of judgment filed in Montgomery County. The magistrate further found that there were "no genuine issues of material fact that Hillstreet is entitled to foreclose on the property owned by Defendant Brenda Bloom on Wyoming Street in Dayton, Ohio."

{¶ 41} The Blooms objected to the magistrate's decision, raising, among other arguments, that Donald Bloom's affidavits created a material issue of fact as to whether the judgment rendered by the Hamilton County court and the Montgomery County judgment filed thereon had been paid in full. HillStreet filed a memorandum in support of the magistrate's decision.

{¶ 42} In responding to the Blooms' assertion that the judgment had been satisfied, HillStreet offered an affidavit by Thomas Perazzo, a certified public accountant who served as an advisor to HillStreet. In his affidavit, Perazzo stated that he had "the responsibility of calculating the outstanding balance of the loans that HillStreet made to certain corporations owned or controlled by Donald R. Bloom" and that he was present at the auction where

substantially all of the assets of these entities were sold. Perazzo stated the amount due and owing to HillStreet from the Blooms is $6,320,498, including principal, interest, and fees. Perazzo prepared a spreadsheet of all payments, credits, and deductions related to the loans guaranteed by the Blooms, which was attached to Perazzo's affidavit.

{¶ 43} On March 27, 2009, the trial court overruled the Blooms' objections and adopted the magistrate's decision. The trial court found that paragraph ten of Donald Bloom's second affidavit was hearsay and declined to consider it. As for paragraph eight where Bloom stated that he had reviewed certain bankruptcy records that reflected payments/credits to HillStreet, the trial court stated that it was "not persuaded by this averment, because Plaintiff's [sic] conceded they received payments from the Bankruptcy cases." The trial court further found Perazzo's affidavit to be "highly persuasive as to the issue of the amount due and owing." In a footnote, the court indicated that it was considering Perazzo's affidavit pursuant to Civ.R. 53(D)(4)(b). On April 13, 2009, the trial court entered a decree in foreclosure.

{¶ 44} The Blooms appeal from the trial court's March 27, 2009, decision and the subsequent decree in foreclosure.

II

{¶ 45} In their sole assignment of error, the Blooms claim that the trial court erred in granting HillStreet's motion for summary judgment. First, they assert that the trial court should not have considered the affidavit of Thomas Perazzo. Second, they claim that the trial court erred in disregarding as hearsay a statement in Donald Bloom's second affidavit that, based on a conversation that he (Bloom) had with Perazzo, HillStreet had been paid or

has acknowledged payment of $7,199,675 toward the two loans. The Blooms assert that this statement created a genuine issue of material fact as to the amount owed, precluding summary judgment.

{¶ 46} Civ.R. 56(C) provides that summary judgment may be granted when the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, 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. *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Our review of the trial court's decision to grant summary judgment is de novo. *See Helton v. Scioto Cty. Bd. of Commrs.* (1997), 123 Ohio App.3d 158, 162.

{¶ 47} In this case, the trial court referred the matter to a magistrate, who issued a decision on HillStreet's summary judgment motion. When timely objections to the magistrate's decision are filed, as occurred in this case, the trial court is required to rule on those objections. Civ.R. 53(D)(4)(d). In doing so, the trial court must make a thorough, independent analysis of the issues and apply appropriate rules of law. Id.; *DeWitt v. Myers*, Clark App. No. 08-CA-86, 2009-Ohio-807, ¶17. Before conducting such a review, the trial court "may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate." Civ.R. 53(D)(4)(d).

{¶ 48} The Blooms claim that it was "fundamentally unfair" for the trial court to

consider Perazzo's affidavit when HillStreet did not seek leave to file the affidavit nor did HillStreet explain why such evidence could not have been presented to the magistrate. They state that the trial court should have notified the parties that it was inclined to consider additional evidence and should have either held a hearing or permitted the Blooms to respond in some other fashion.

{¶ 49} Civ.R. 53(D)(4)(d) gives the trial court authority to accept additional evidence, although it may, in its discretion, refuse to accept that evidence if it could have been introduced before the magistrate. In this case, the trial court elected to consider Perazzo's affidavit in conducting its independent, de novo review. The Blooms did not move to strike the affidavit or otherwise object to Perazzo's affidavit prior to the court's decision on HillStreet's summary judgment motion. Nor did the Blooms file a reply memorandum or request an opportunity to provide additional evidence, in light of Perazzo's affidavit, before the trial court ruled on their objections and entered judgment a month and a half later. Although the trial court could have chosen, in its discretion, not to consider Perazzo's affidavit, we find nothing fundamentally unfair about the court's decision to do so.

{¶ 50} Second, the Blooms claim that the trial court erred in disregarding statements in Donald Bloom's affidavits concerning statements made to him by Perazzo regarding payments received by HillStreet on the loans. We disagree.

{¶ 51} The statements in Bloom's first affidavit were made "upon information and belief." As we stated in *Hillstreet Fund III, L.P. v. Bloom*, Miami App. No. 09 CA 12, 2009-Ohio-6581, a foreclosure case by HillStreet against the Blooms to foreclose upon other properties: "Bloom's representations 'on information and belief' are not assertions based

on his personal knowledge of the truth of the facts concerned, on which a trier of fact could rely to find that such facts exist. Those representations are no more than speculative assertions concerning which a witness would not be competent to testify. Therefore, they do not satisfy the evidentiary requirements of Civ.R. 56(E)." *Bloom* at ¶12. The trial court properly disregarded these statements.

{¶ 52} As for the second affidavit, Donald Bloom's averment that HillStreet had been paid $7,199,675.00 was based upon his review of bankruptcy court records and a conversation he had with Perazzo. Bloom asserts that Perazzo's statements to him constituted statements of a party-opponent, which are admissible under Evid.R. 801(D)(2), and that the trial court erred in finding that his averment was hearsay.

{¶ 53} Evid.R. 801(C) defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A "statement," as included in the definition of hearsay, is an oral or written assertion or nonverbal conduct of a person if that conduct is intended by him as an assertion. Evid.R. 801(A). "Evid.R. 802 mandates the exclusion of hearsay unless any exceptions apply." *In re Lane*, Washington App. No. 02CA61, 2003-Ohio-3755, at ¶11. Certain statements are excluded from the definition of hearsay, including statements of a party-opponent where the statement is offered against that party. Evid. R. 801(D)(2)(a).

{¶ 54} Bloom did not provide Perazzo's actual statements in his second affidavit. Rather, "Bloom's statement is a mere conclusion by him based on the alleged representations of [Perazzo], which derive from [Perazzo's] personal knowledge, not Bloom's." *Bloom* at ¶13. Accordingly, the trial court properly disregarded Bloom's

averment. We further note that, while the bankruptcy records themselves would have been admissible if properly presented, Bloom's representations based on those documents also constitute hearsay.

{¶ 55} Upon review of the evidence submitted by the parties, the trial court did not err in concluding that no genuine issues of material fact exist and in granting summary judgment to HillStreet on its foreclosure claim.

{¶ 56} The assignment of error is overruled.

III

{¶ 57} The judgment of the trial court will be affirmed.

. . . . . .

BROGAN, J. and GRADY, J., concur.

Copies mailed to:

Robert G. Sanker
Sean S. Suder
Richard Hempfling
Hon. Dennis J. Langer