The Bullet Point: Ohio Commercial Law Bulletin

Volume III, Issue 24
December 6, 2019
Jim Sandy and Richik Sarkar

Can the Court Change the Language of my Deed?

Bailment

***Woods v. Tye,* 10th Dist. Franklin No. 18AP-278, 2019-Ohio-4863.**

In this appeal, the Tenth Appellate District affirmed the trial court's decision finding for the plaintiff on a claim for breach of contract bailment.

The Bullet Point: A mutual benefit bailment is a "bailment arising by operation of law or express contract, which exists where personal property is delivered by the owner to another person. Both parties benefit in the exchange." In order to establish a claim for bailment, a bailor must demonstrate (1) the contract of bailment, (2) delivery of the bailed property to the bailee, and (3) failure of the bailee to redeliver the bailed property undamaged at the termination of the bailment.

Rules of Construction for Deeds

***Brown v. Ward,* 5th Dist. Guernsey No. 19CA00011, 2019-Ohio-4848.**

In this appeal, the Fifth Appellate District affirmed the trial court's decision to grant summary judgment to the defendants regarding claims for reformation and/or rescission of a deed.

The Bullet Point: Under Ohio law, a deed is to be construed most strongly against the grantor in the resolution of any ambiguities contained in the instrument; however, a deed's language is conclusively presumed to express the parties' intention absent "uncertainty" in the language employed. To that end, if a grantee accepts a deed, the knowledge of its provisions is legally imputed to him; and, by its acceptance, he is bound by all of its provisions and is estopped to deny their legal effect. The doctrine of "merger by deed" holds that whenever a deed is delivered and accepted "without qualification" pursuant to a sales contract for real property, the contract becomes merged into the

deed and no cause of action upon said prior agreement exists. The purchaser is limited to the express covenants of the deed only, unless the elements of fraud or mistake are involved or unless the deed was accepted under protest and with a reservation of rights.

Truth-In-Lending Act

***Wells Fargo Bank, N.A. v. Pollard,* 8th Dist. Cuyahoga No. 108257, 2019-Ohio-4980.**

In this appeal, the Eighth Appellate District affirmed a trial court's decision to grant a lender summary judgment in a foreclosure action, finding, among other things, that the borrower failed to timely try and rescind the loan under the Truth-in-Lending Act.

The Bullet Point: The Truth-in-Lending Act (TILA), 15 U.S.C. 1635(a), "grants a right of rescission on any mortgage loan transaction for which the borrower uses his or her principle dwelling as security. This right of rescission generally extends to midnight of the third business day following consummation of the transaction. The borrower may rescind the loan transaction entirely if the lender fails to deliver certain forms or disclose important terms accurately. This right of rescission expires three days after the loan closes or upon the sale of the secured property, which ever date is earlier." "If, however, the lender fails to provide the necessary notices of that right, the borrower has up to three years to rescind the transaction." That three-year period is not subject to equitable tolling. In order to be timely, any claim for rescission under TILA must be brought at the latest within three years of the consummation of the loan.

Hearing to Determine Validity of Arbitration Clause

***DiFranco v. Licht,* 8th Dist. Cuyahoga No. 108387, 2019-Ohio-4894.**

In this case, the Eighth Appellate District reversed the trial court's decision to grant a motion to compel arbitration under Ohio law without first holding a hearing.

The Bullet Point: "Chapter 2711 of the Ohio Revised Code authorizes direct enforcement of arbitration agreements through an order to compel arbitration under R.C. 2711.03, and indirect enforcement of such agreements pursuant to an order staying trial court proceedings under R.C. 2711.02." These are separate and distinct procedures under Ohio law that serve different purposes. To that end, and pursuant to R.C. 2711.03, where a party has filed a motion to compel arbitration and the opposing party has challenged the validity of the provision, the court must, in a hearing, make a determination as to the validity of the arbitration clause. Thus, when a party files a joint motion to stay a proceed and compel arbitration under Ohio law, a hearing should be held to first determine whether the arbitration clause is valid.

[Cite as *Woods v. Tye*, 2019-Ohio-4863.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Gary F. Woods, et al.,	:	
Plaintiffs-Appellees,	:	
		No. 18AP-278
v.	:	(C.P.C. No. 15CV-6197)
David S. Tye, et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on November 26, 2019

On brief: *Law Offices of James P. Connors,* and *James P. Connors*, for appellees. **Argued:** *James P. Connors.*

On brief: *Zacks Law Group, LLC*, *Benjamin S. Zacks*, and *Susan Gellman,* for appellants Benjamin Newsome and Newsome and Associates Construction Concepts, LLC. **Argued:** *Susan Gellman*.

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Defendants-appellants, Benjamin Newsome ("Newsome") and Newsome and Associates Construction Concepts, LLC ("Newsome and Associates" or "appellants" collectively), filed a notice of appeal from three judgment entries, denying their motion for issuance of a nunc pro tunc judgment entry, denying their motion to supplement the record or for a new trial, and overruling their objections to the magistrate's decision, entering judgment in favor of plaintiffs-appellees, Gary F. Woods and Nancy S. Woods. For the following reasons we affirm the trial court's judgments.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} In August 2013, Gary Woods noticed a for rent sign at 1382 South Fourth Street in Columbus, Ohio. In 2007, appellees had operated a Halloween attraction

business. They had placed in storage items they used in the business. The items included props for the Halloween attraction business, pneumatic equipment and sound equipment, along with some household items.

{¶ 3} Appellees were looking to move these items to a bigger storage place. Mr. Woods called the telephone number he had seen on the for rent sign and eventually spoke with defendant, David S. Tye.

{¶ 4} On September 4, 2013, appellees met with Tye who told Mr. Woods that his wife owned the building. The Woods agreed to rent the building. Mr. Woods and Tye signed a handwritten lease. The lease identifies the owner as Tye and Gary Woods as renter for a period of three years, for $625 per month beginning September 15, 2013. A second handwritten lease was signed by the parties and "D&S Management" on September 4, 2013, acknowledging receipt of $665 and $1,230 for the deposit and rent for October 2013. The lease was for three years beginning November 1, 2013 through November 1, 2016. Mr. Woods testified he prepaid the rent for the first year in exchange for a discounted amount of $6,583. Appellees moved items into the building.

{¶ 5} Tye, through the company RED Holdings, LLC,[1] had entered into a land contract and the Trula Newsome Trust ("the Trust") was the holder of a note and the mortgage on the building. Tye failed to make payments and a foreclosure action occurred. The Trust took title to the building on October 10, 2013, through a sheriff's sale. Newsome and Associates acquired the building through a quit claim deed on November 5, 2013.

{¶ 6} On April 5, 2014, Mr. Woods discovered that the locks had been changed. He called the phone number on a sign at the property and spoke to Newsome. Woods testified that he explained to Newsome that he had entered into a lease with Tye and he had property stored in the building. Newsome explained that Tye had failed to make payments under the contract to purchase the building and Tye also had property stored in the building. Newsome told Mr. Woods he believed the property inside the building belonged to him, but Mr. Woods disagreed. Mr. Woods testified that Newsome told him to be patient because his lawyer would be resolving the matter.

---

[1] Tye testified that RED Holdings, LLC was his former wife's company. However, the record demonstrates that his former wife, Rosaland M. Gatewood-Tye, relinquished all her interest in RED Holdings, LLC at the time of the divorce in 2011. RED Holdings, LLC was dissolved on September 13, 2013.

{¶ 7} Mr. Woods testified he spoke to Newsome a second time a few days later and told him he had consulted his lawyer and he had the right to obtain his property from the building. Newsome told Mr. Woods that he wanted to be sure the property was returned to the correct owner and it would take time for the lawyers to resolve these issues, probably the end of November or December. Mr. Woods testified that Newsome assured him that his property was secure and that when the lawyers finished, "I'll let you know and you can come and get your property." (Aug. 23, 2017 Tr. at 131.) Mr. Woods believed he had an agreement with Newsome.

{¶ 8} On May 5, 2014, Newsome sent a text to Mr. Woods and asked for a copy of the lease. Mr. Woods testified that the next day he emailed a copy to Newsome, although Newsome testified he never received a copy of the lease. Mr. Woods testified that on October 13, 2014, he noticed a for-sale sign in the window of the building and sent Newsome a text message asking him when he could remove his property. On December 17, 2014, the Woods discovered that their property was no longer in the building. Newsome had sold the Woods' property at an auction prior to selling the building to a third party on October 17, 2014. Mr. Woods telephoned Newsome several times, but he was unable to speak to him.

{¶ 9} On July 22, 2015, appellees filed a complaint against Tye, D&S Lawn Management, Rosaland M. Gatewood-Tye, Newsome, Newsome and Associates, Trula Newsome, and the Trust alleging breach of contract, negligence/bailment, negligent misrepresentation/fraud, and civil conspiracy. On May 6, 2016, the trial court granted a default judgment in favor of appellees against Tye. On August 26, 2016, the trial court entered judgment against Tye in the amount of $53,346.60, including compensatory damages in the amount of $43,918.85 and attorney fees and costs in the amount of $9,427.75 for a total of $53,346.60. (July 21, 2016 Mag.'s Decision; Aug. 26, 2016 Jgmt. Entry.)

{¶ 10} On November 18, 2016, Newsome and Newsome and Associates filed a motion for summary judgment. The trial court granted their motion, extinguishing appellees' civil conspiracy claim, but denying summary judgment on the remaining claims. (Jan. 19, 2017 Decision & Entry.) The trial court dismissed the claims against D&S Lawn Management on January 12, 2017 for lack of prosecution.

{¶ 11} On August 18, 2017, the parties filed a joint motion for continuance, but the trial court denied the motion. The matter was tried before a magistrate on August 23, 2017. On September 29, 2017, the magistrate issued a decision finding for appellees on the issue of breach of a contract bailment by Newsome and Newsome and Associates, but the magistrate denied appellees relief on their claims for negligent misrepresentation and fraud. The magistrate found appellees were entitled to $36,105.85 in damages from Newsome and Newsome and Associates and the magistrate entered judgment in favor of Trula Newsome and the Trust. Newsome and Newsome and Associates filed objections to the magistrate's decision.

{¶ 12} Tye filed a motion for relief from judgment on August 20, 2017. The magistrate denied the motion on December 4, 2017 and the trial court adopted that decision in an entry dated January 8, 2018.

{¶ 13} On January 9, 2018, the trial court denied the objections to the magistrate's decision and adopted the magistrate's September 29, 2017 decision. On January 30, 2018, the trial court filed an entry dismissing the claims against Rosaland M. Gatewood-Tye and entered judgment for appellees against Newsome and Newsome and Associates, jointly and severally, for damages in the amount of $36,105.85.

{¶ 14} On February 19, 2018, Newsome and Newsome and Associates filed a motion to supplement the record with newly found evidence or for a new trial. The trial court denied the motion on March 27, 2018.

II. ASSIGNMENTS OF ERROR

{¶ 15} Newsome and Newsome and Associates appeal and assign the following two assignments of error for our review:

> [1.] The Trial Court's Judgment Is Not Amenable to Meaningful Review, Because the Trial Court Never Stated Its Theory of Legal Liability, What Duty Applied, or How the Facts Established a Violation of Any Duty.
>
> [2.] Even If Liability Had Been Properly Determined, the Trial Court's Calculation of Damages Was Incorrect, Because (A) the Trial Court Denied Procedural Motions that Would Have Allowed a Complete Record, (B) the Trial Court Accepted Unsupported Valuations, and (C) the Trial Court Gave an Award for Damages for Which the Appellees Had Already Received a Judgment Representing Complete Recovery for the Alleged Losses.

III. ANALYSIS

{¶ 16} In the first assignment of error, appellants argue that the trial court's judgment is not amenable to meaningful review because the trial court never stated its legal theory or basis for determining liability, nor did it state what duty applied or how the facts established a violation of any legal duty. Appellants argue that the trial court decision is unclear whether the court found a contract or a bailment, and if a bailment, which type of bailment or the details of the agreement reached between the parties as bailor and bailee and thus, it is impossible to determine whether there was breach and if the determination is supportable by law. Appellants further argue that the trial court's factual findings and assessment of damages are based on an incomplete record because the trial court denied the motion for continuance and the motion to supplement the record. Newsome was unable to travel to Texas to gather his records before the trial and was not able to supplement the record after the trial.

{¶ 17} Generally, a trial court's " 'findings and conclusions must articulate an adequate basis upon which a party can mount a challenge to, and the appellate court can make a determination as to the propriety of, resolved disputed issues of fact and the trial court's application of the law.' " *Alternatives Unlimited-Special, Inc. v. Ohio Dept. of Edn.*, 10th Dist. No. 12AP-647, 2013-Ohio-3890, ¶ 35, quoting *Hahn v. Johnston*, 4th Dist. No. 06CA16, 2007-Ohio-2800, ¶ 2. A trial court must make its findings in order for an appellate court to conduct a meaningful review. *Id.* at ¶ 35, citing *Walker v. Doup*, 36 Ohio St.3d 229, 230-31 (1988).

{¶ 18} In this case, appellants agree that the judgment is based on the conclusion that there was a bailment contract between the Woods and Newsome. However, appellants argue that the trial court's analysis of the contract theory and the bailment were cursory and conclusory and not adequate to form a reviewable judgment.

{¶ 19} The magistrate specifically found that Mr. and Mrs. Woods were credible witnesses. Further, the magistrate found that these facts supported a conclusion that the parties entered into an oral agreement with Newsome and Newsome and Associates. " 'A contract is generally defined as a promise, or a set of promises, actionable upon breach.' " *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶ 16, quoting *Perlmuter Printing Co. v. Strome, Inc.*, 436 F.Supp. 409, 414 (N.D.Ohio 1976). To demonstrate a claim of

breach of contract, a plaintiff must prove (1) the existence of a contract, (2) plaintiff's performance, (3) defendant's breach, and (4) damages or loss to the plaintiff. *Thyssen Krupp Elevator Corp. v. Constr. Plus, Inc.*, 10th Dist. No. 09AP-788, 2010-Ohio-1649,¶ 13, citing *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, ¶ 18 (10th Dist.). The purpose of contract construction is to realize and give effect to the parties' intent. *Skivolovki v. E. Ohio Gas Co.*, 38 Ohio St.2d 244 (1974), paragraph one of the syllabus. An oral agreement is enforceable when the terms of the agreement are sufficiently particular. The terms of an oral contract may be determined from " 'words, deeds, acts, and silence of the parties.' " *Kostelnik* at ¶ 15, quoting *Rutledge v. Hoffman*, 81 Ohio App. 85 (12th Dist.1947).

{¶ 20} A mutual benefit bailment is a "bailment arising by operation of law or express contract, which exists where personal property is delivered by the owner to another person. Both parties benefit in the exchange." *Mills v. Liberty Moving & Storage, Inc.*, 29 Ohio App.3d 90 (10th Dist.1985). In order to establish a prima facie case in an action, a bailor must demonstrate (1) the contract of bailment, (2) delivery of the bailed property to the bailee, and (3) failure of the bailee to redeliver the bailed property undamaged at the termination of the bailment. *David v. Lose*, 7 Ohio St.2d 97 (1966), paragraph one of the syllabus.

{¶ 21} The magistrate found that Newsome assured and agreed that appellees' property was safe and secure and that Mr. Woods would be contacted in order to remove the property later in the year. Appellees performed in accordance with the agreement by refraining from pursuing a legal remedy and waiting for Newsome to contact them to remove the property. Forbearance is sufficient consideration to support the agreement. *Coffman v. Ohio State Adult Parole Bd.*, 10th Dist. No. 12AP-267, 2013-Ohio-109, ¶ 9, citing *Motorists Mutual Ins. Co. v. Columbus Finance, Inc.*, 168 Ohio App.3d 691, 2006-Ohio-5090, ¶ 8 (10th Dist.). Appellants breached the agreement by disposing of the property and failing to return it. Mr. Woods testified to these facts.

{¶ 22} Appellants in their assignment of error contend that the trial court's decision is not amenable to meaningful review because the trial court did not clearly state its theory of liability, what duty applied, or how the facts established a violation of any legal duty. Appellants do not contend that that the trial court erred in its determinations, but argue

the decision is not amenable to meaningful review. We do not agree with appellants because we are able to discern that the trial court found appellants violated a contract of bailment based on the supporting evidence. Appellants' first assignment of error is overruled.

{¶ 23} In their second assignment of error, appellants contend that the trial court erred in determining damages because (1) the trial court denied procedural motions that would have permitted a complete record, (2) the trial court accepted unsupported valuations of the property, and (3) the trial court awarded damages for which the appellees had already received a judgment representing complete recovery for the loss.

{¶ 24} Appellants argue that the trial court's denial of the motion for continuance and denial of the motion to supplement the record or for a new trial, prevented the trial court from basing its decision on all of the facts. Appellants acknowledge that it is within a trial court's discretion to deny a motion for continuance.

{¶ 25} The appellants moved for continuance arguing it was necessary because counsel for Newsome and Newsome and Associates and counsel for Tye were new to the case and needed additional time to prepare. And they sought more time for mediation because Tye had not previously been involved in the mediations.

{¶ 26} The motion for continuance was filed on Friday, August 18, 2017 and the trial was scheduled for August 23, 2017. The trial court denied the motion on Monday, August 21, 2017. The trial court denied the "last minute" motion finding that the case had been pending since July 2015 and the case schedule had been "generously amended." (Aug. 21, 2017 Entry.) Two attempts at mediation had already occurred. The trial court stated that the record established that counsel and the parties had more than sufficient time to prepare for trial and to mediate.

{¶ 27} The decision to grant or deny a continuance is within the sound discretion of the trial court. *State v. Unger*, 67 Ohio St.2d 65, 67 (1981). "Although an abuse of discretion is typically defined as an unreasonable, arbitrary, or unconscionable decision, we note that no court has the authority, within its discretion, to commit an error of law." (Citations omitted.) *State v. Chandler*, 10th Dist. No. 13AP-452, 2013-Ohio-4671, ¶ 8; *see also JPMorgan Chase Bank, N.A. v. Liggins*, 10th Dist. No. 15AP-242, 2016-Ohio-3528, ¶ 18.

{¶ 28} In *Unger*, at 67-68, the court discussed factors to consider in granting or denying a motion for continuance:

> In evaluating a motion for a continuance, a court should note, *inter alia*: [1] the length of the delay requested; [2] whether other continuances have been requested and received; [3] the inconvenience to litigants, witnesses, opposing counsel and the court; [4] whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; [5] whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and [6] other relevant factors, depending on the unique facts of each case.

{¶ 29} In the reviewing a trial court's decision on a motion for continuance, we " 'apply a balancing test, thereby weighing the trial court's interest in controlling its own docket, including the efficient dispensation of justice, versus the potential prejudice to the moving party.' " *Foley v. Foley*, 10th Dist. No. 05AP-242, 2006-Ohio-946, ¶ 16, quoting *Fiocca v. Fiocca*, 10th Dist. No. 04AP-962, 2005-Ohio-2199, citing *Unger* at 67. Applying this balancing test to reviewing the trial court's decision, we consider the factors discussed in *Unger*.

{¶ 30} We note that the request did not specifically include a certain amount of time. Appellants argue that the denial of the motion for a continuance "forced the parties to go to trial without any apparent preparation." (Appellants' Brief at 34.) However, the record reveals that the case was filed on July 22, 2015 and thus, had been pending for over two years and the continuance was requested at the last minute. The trial date had been continued twice to allow for mediations that were unsuccessful in resolving the case and the case schedule was generously amended as the trial court noted. Considering the third factor, given that the continuance request was a joint request, it seems it would not have inconvenienced the parties. The trial court considered the request dilatory, given that it was filed just days before trial, asked for mediation which had already occurred twice and was unsuccessful, and the trial court noted that the case had been pending for over two years.

{¶ 31} In his brief, Newsome argues that he needed time to return to Texas to gather documents, however, again the case had been pending for over two years. The fact that Newsome did not return to Texas during those two years to gather documents necessary for trial does factor into the balancing test that Newsome contributed to the circumstance

which gave rise to the request for a continuance. We have carefully examined the record in this case and considered the factors. Under these circumstances, we conclude that the trial court did not abuse its discretion in refusing to grant the requested continuance.

{¶ 32} The second issue raised in appellants' second assignment of error is that the trial court erred in its determination of damages because the trial court accepted unsupported valuations of the property. Appellants argue that the valuations relied on by the trial court for the items that were sold at the auction were valuations provided by appellees, and appellants argue that the valuations were entirely subjective and unsubstantiated.

{¶ 33} Appellees submitted a document with a list of 27 categories of items stored at the property, including documentation of the purchase and value of these items. Mr. Woods testified that the value of the property was $36,105.85, and Mrs. Woods testified that the testimony and exhibits submitted by Mr. Woods were true and accurate and the value of the items may even be higher than the value reflected on the exhibits. Appellants provided no rebutting evidence of the value of the property, but testified that Newsome sold the property at an advertised public auction and received $3,600 in proceeds. In the motion to supplement the record or for a new trial, appellants attempted to supplement the record with the paperwork from the auction that Newsome had recently found. Newsome argues the documents were in storage in Texas but he had been out of the country for nearly one year and then relocated to Florida.

{¶ 34} In cases involving a bailment, damages for items lost or destroyed are measured by the fair market value of the items at the time of the loss. *Maloney v. Gen. Tire Sales, Inc.*, 34 Ohio App.2d 177, 184 (10th Dist.1973). Newsome and Newsome and Associates did not provide any evidence of the value of the property except for Newsome's testimony of the auction proceeds. The magistrate found the Woods' testimony credible; the trier of fact is free to believe all, part, or none of the witnesses' testimony. *Whitestone Co. v. Stittsworth*, 10th Dist. No. 06AP-371, 2007-Ohio-233, ¶ 32, citing *State v. Wiley*, 10th Dist. No. 03AP-340, 2004-Ohio-1008, ¶ 48. Given the lack of evidence offered by appellants, we cannot say that the trial court erred in relying on the Woods' evidence.

{¶ 35} In the third part of their second assignment of error, appellants contend that the trial court gave an award of damages for which the appellees had already received a

judgment representing complete recovery for the alleged losses. Appellants argue that prior to the judgment for $36,105.85 against Newsome and Newsome and Associates, the trial court entered a default judgment for appellees for $53,346.60 against Tye. Appellants contend the two separate judgments in the same case for the same loss invites the possibility of a double recovery.

{¶ 36} Initially, we note that appellants failed to raise this issue before the trial court. "Under Ohio law, 'arguments raised for the first time on appeal are improper.' " (Emphasis omitted.) *Tucker v. Leadership Academy for Math*, 10th Dist. No. 14AP-100, 2014-Ohio-3307, ¶ 20, quoting *Marysville Newspapers, Inc. v. Delaware Gazette Co., Inc.*, 3d Dist. No. 14-06-34, 2007-Ohio-4365, ¶ 23.

{¶ 37} Regardless of the number of entries or that the trial court issued two judgments for the same recovery,[2] even if the trial court erred, appellees may only recover one time. " 'The law in Ohio is well-settled that an injured party is entitled to only one satisfaction for his injuries.' " *Haendiges v. Haendiges*, 82 Ohio App.3d 720, 723 (3d Dist.1992), quoting *Seifert v. Burroughs*, 38 Ohio St.3d 108, 110 (1988). Thus, appellees will not be able to recover damages from two parties for the same loss. Appellants' second assignment of error is overruled.

IV. CONCLUSION

{¶ 38} For the foregoing reasons, appellants' two assignments of error are overruled and the judgments of the Franklin County Court of Common Pleas is affirmed.

Judgments affirmed.

KLATT, P.J., and LUPER SCHUSTER, J., concur.

---

[2] The magistrate's decision does break out the damages against Tye and the compensatory damages eventually awarded by the trial court in adopting the magistrate's decision are that same amount, $53,346.60.

[Cite as *Brown v. Ward*, 2019-Ohio-4848.]

BrownCOURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THOMAS R. BROWN

Plaintiff-Appellant

-vs-

PHYLLIS L. WARD, et al.

Defendants-Appellees

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 19CA000011

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 17CV000601

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 25, 2019

APPEARANCES:

For Plaintiff-Appellant

DANIEL P. CORCORAN
ADAM J. SCHWENDEMAN
THEISEN BROCK
424 Second Street
Marietta, Ohio 45750

For Defendants-Appellees

SCOTT D. EICKELBERGER
RYAN H. LINN
KINCAID, TAYLOR & GEYER
50 N. Fourth Street, P. O. Box 1030
Zanesville, Ohio 43702-1030

Wise, J.

{¶1} Plaintiff-Appellant Thomas R. Brown appeals the decision of the Guernsey County Court of Common Pleas granting summary judgment in favor of Defendants-Appellees Phyllis Ward, Jon Brown, Megan Brown and Sam Brown.

STATEMENT OF THE FACTS AND CASE

{¶2} The relevant facts and procedural history are as follows:

{¶3} Plaintiff-Appellant Thomas Brown and Defendant-Appellee Phyllis Ward were divorced in December, 2016, following a forty (40) year marriage. For more than 20 years prior to the divorce, Appellant and Appellee Ward had jointly owned and lived on the real property located at 17900 Burson Road, Lore City, Ohio, 43755.

{¶4} The divorce became extremely contentious within the family and resulted in a rift between Appellant and his children, including Jonathan Brown and his wife Megan Brown, and Samuel Brown (the "Brown Appellees"). (Aff. Brown at ¶4). During the course of the divorce proceedings Appellant was held in contempt of court on more than one occasion and was arrested several times as a result of those contempt applications. (Aff. Brown at ¶6; Aff. Donahue- Angler at ¶3).

{¶5} One of the principal points of contention within the divorce was the disposition of the Marital Property. Appellee Ward wanted to sell the property to their children, the Brown Appellees. (Aff. Donahue-Angler at ¶4). Following some negotiations, Appellant and Appellee Ward agreed to sell the property to the Brown Appellees provided Appellant could retain and reserve his one-half (1/2) interest in the sub-surface minerals underlying the property. (Aff. Brown at ¶9; Aff. Donahue-Angler at ¶4).

{¶6} On November 9, 2016, Ward and Appellant appeared, represented by counsel, at a hearing before a magistrate. (Aff. Brown at ¶10; Aff. Donahue-Angler at ¶5). At the hearing, both Appellee Ward and Appellant expressed, through counsel, the terms of this verbal separation agreement, which was read into the record of the court and which they indicated they had entered into freely and voluntarily with the assistance of counsel, and which they believed to be fair and equitable. (Aff. Brown at ¶11; Aff. Donahue-Angler at ¶6). The court found the parties' separation agreement to be fair and equitable, approved it, and entered the decree that same day. (Aff. Brown at ¶12; Aff. Donahue-Angler at ¶7). Under the terms of the divorce decree, the parties agreed to sell the property to their adult children, Jon and Sam Brown, reserving unto themselves each a ½ interest in the mineral rights.

{¶7} The deed conveying the marital property, and the other closing documents to complete the court-approved sale, were prepared by Moorehead Law Offices in Zanesville, Ohio. (Aff. Brown at ¶14). In January 2017, Appellant was contacted by a representative from Moorehead Law Offices requesting that he come to the office in order to execute the closing documents to complete the sale of the real estate. (Aff. Brown at ¶15). Appellee Ward attended the closing separate from Appellant and signed the Deed and other closing documents.

{¶8} On January 13, 2017, Appellant first went to the Moorehead Law Offices but he refused to sign the Deed and the other closing documents because he was concerned that the Deed did not contain a reservation of mineral rights consistent with the court approved agreement and sale. (Aff. Brown at ¶16). According to Appellant, the

representatives from Moorehead Law Offices were irritated that he refused to sign the documents they had prepared. (Aff. Brown at ¶17).

{¶9} Appellant returned to the Moorehead Law Offices a second time on January 17, 2017, and this time, upon the suggestion of a friend, he took a copy of the divorce decree with him to show to the people at Moorehead Law Office. (Aff. Brown at ¶18; Aff. Rominger at ¶3). According to Appellant, during this second visit, Mr. Moorehead assured him that everything was fine, and that he should sign the closing documents, including the Deed. (Aff. Brown at ¶19). Appellant states that he repeatedly expressed to the people at Moorehead Law Offices that he wanted to reserve his mineral rights in the Marital Property. Appellant again refused to sign the documents as he was still concerned about whether the Deed included a reservation of his mineral rights. At that time a representative from Moorehead Law Offices told Appellant that if he refused to sign, Ms. Ward's attorney might file a motion for contempt. (Aff. Brown at ¶20).

{¶10} On January 18, 2017, Atty. Donahue-Angler, Appellant's divorce counsel, received an e-mail from Attorney Church stating that Appellant was refusing to sign closing documents and requesting that she call Appellant or Amy at Moorehead Law Offices in Zanesville. (Aff. Donahue-Angler, ¶16-17). At some point, either in a phone call or by text, Attorney Church told Atty. Donahue-Angler that she intended to file a motion for contempt against Appellant for not signing the Deed conveying the Marital Property. (Aff. Donahue-Angler at ¶18).

{¶11} According to Atty. Donahue-Angler, she informed Appellant that since the divorce decree said that the mineral rights were reserved, there was no reason why the deed would not be consistent with the decree. (Aff. Donahue-Angler at ¶20). She also

told Appellant that if he refused to cooperate in selling the Marital Property, consistent with the terms of the divorce decree, that he could be held in contempt of court. (Aff. Donahue-Angler at ¶20). Appellant has the same recollection of their conversation. (Aff. Brown at ¶21)

{¶12} Appellant returned to the Moorehead Law Offices a third time and signed the closing documents, including the Deed. (Aff. Brown at ¶21).

{¶13} On September 16, 2017, Appellant entered into a contract to sell his one-half (1/2) mineral interest in the Marital Property. (Aff. Brown at ¶22). After signing the contract, Appellant learned that he could not sell his one-half (1/2) interest in the minerals because they had not been reserved in the Deed. (Aff. Brown at ¶23).

{¶14} On October 27, 2017, Appellant filed a Complaint seeking reformation and/or rescission of the January 13, 2017, deed due to mutual mistake, duress, and/or fraud. Appellant also asserted a claim against Appellees for conversion.

{¶15} On December 29, 2017, Appellees served their answer to Appellant's Complaint

{¶16} On January 18, 2019, Appellees filed a Motion for Summary Judgment asking the trial court to dismiss Appellant's claims with prejudice. Appellees submitted the Affidavits of Appellee Jonathan Brown, Appellee Phyllis Ward, and Derek Moorehead in support of their motion.

{¶17} On February 15, 2019, Appellant filed a Memorandum in Opposition to Appellees' Motion for Summary Judgment, supplemented by the affidavits of Appellant, Atty. Lindsey K. Donahue-Angler, and Larry Rominger.

{¶18} On March 1, 2019, Appellees filed their Reply in support of their Motion for Summary Judgment. In addition to the various affidavits submitted by the parties, the deposition transcripts of Derek Moorehead and Amy Wilson, and a second affidavit of Atty. Lindsey K. Donahue-Angler were also filed and in the record.

{¶19} The trial court held a non-oral hearing on the parties' motions.

{¶20} On April 1, 2019, the trial court issued an entry granting Appellees' Motion for Summary Judgment.

{¶21} Appellant now appeals, assigning the following error for review:

ASSIGNMENT OF ERROR

{¶22} "I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS'-APPELLEES' MOTION FOR SUMMARY JUDGMENT."

Summary Judgment Standard

{¶23} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ.R. 56(C) provides, in pertinent part:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, 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. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, 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, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

{¶24} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

{¶25} It is based upon this standard that we review Appellant's Assignment of Error.

I.

{¶26} In his sole assignment of error, Appellant challenges the trial court judgment entry granting summary judgment in favor of Appellees on Appellant’s complaint. We disagree.

{¶27} As a general principle of construction, a deed is to be construed most strongly against the grantor in the resolution of any ambiguities contained in the

instrument; however, a deed's language is conclusively presumed to express the parties' intention absent “uncertainty” in the language employed. Ohio Real Estate Law and Practice, *supra,* Section T15.06(B), at 298. If a grantee accepts a deed, the knowledge of its provisions is legally imputed to him; and, by its acceptance, he is bound by all of its provisions and is estopped to deny their legal effect. 35 Ohio Jurisprudence 3d (1982) 290, 291–292, Deeds, Section 58.

{¶28} The doctrine of “merger by deed” holds that whenever a deed is delivered and accepted “without qualification” pursuant to a sales contract for real property, the contract becomes merged into the deed and no cause of action upon said prior agreement exists. The purchaser is limited to the express covenants of the deed only, unless the elements of fraud or mistake are involved or unless the deed was accepted under protest and with a reservation of rights. *See*, generally, 80 Ohio Jurisprudence 3d (1988) 91, 93, Real Property Sales and Exchanges, Sections 58–59; *Brumbaugh v. Chapman* (1887), 45 Ohio St. 368, 13 N.E. 584; *Fuller v. Drenberg* (1965), 3 Ohio St.2d 109, 32 O.O.2d 91, 209 N.E.2d 417, paragraph one of the syllabus. Cf. *Dillahunty v. Keystone Savings Assn.* (1973), 36 Ohio App.2d 135, 65 O.O.2d 157, 303 N.E.2d 750, *Suermondt v. Lowe* (2006), 165 Ohio App.3d 427 (5th Dist.).

{¶29} In *Suermondt, supra,* this Court quoted *Newman v. Group On,* 2005-Ohio-1582 , which states:

> In reality, this doctrine is merely an application of the contract doctrine of integration. Under this doctrine, all prior documents are considered to be integrated into the final contract, and only the provisions contained in the final contract are part of the agreement. This doctrine is the

> combined result of the parol evidence rule and the rule of interpretation which seeks to determine the intentions of the parties. Thus, if it can be shown that the parties actually intended that the provisions of a prior agreement continue in force, then the provisions do so continue. Similarly, the merger doctrine should only be applied as a canon of construction that attempts to arrive at the true intention of the parties to a deed. (14 Powell on Real Property (1995) 81A-136, Section 81A.07(1)(d)).

{¶30} Thus, a proper delivery and acceptance of a deed extinguishes any obligations of a prior agreement to the extent that the agreement touches upon the real property which is the subject of the deed. McDermott's Ohio Real Property (1990) at 319. Exceptions to the rule are made in cases of fraud, mistake, or collateral agreements not intended by the parties to be incorporated into the deed. *Id.* at 320. Rescission of instruments of conveyance, generally, may also be had only where there is duress, undue influence, or, when there is bad faith, want or failure of consideration. McDermott's Ohio Real Property*, supra,* at 299.

Reformation

{¶31} "[R]eformation" is defined as the remedy afforded by courts possessing equitable jurisdiction to the parties and the privies of parties, to written instruments which import a legal obligation to reform or rectify such instruments whenever they fail, through fraud or mutual mistake, to express the real agreement or intention of the parties. *Greenfield v. Aetna Cas. & Sur. Co.*, 75 Ohio App. 122, 127-128, 61 N.E.2d 226 (12th Dist. 1944).

Mutual Mistake

{¶32} A court may reform the language in a contract where the parties' true intentions have not been expressed due to a 'mutual mistake' - meaning a common mistake by all the parties to the contract. *In re Haynes*, 25 Ohio St.3d 101, 104, 495 N.E.2d 23 (1986). The party wishing to reform the deed must demonstrate the 'mutual mistake' by clear and convincing evidence. *See Stewart v. Gordon* (1899), 60 Ohio St. 170, 53 N.E. 797, paragraph one of the syllabus.

{¶33} Clear and convincing evidence is the degree of evidence necessary to elicit in the mind of the trier of fact a firm belief or conviction as to the allegations to be established. *Id*.

{¶34} In the instant matter, the evidence submitted by Appellant in opposition to Appellees' motion for summary judgment did not demonstrate a question of fact supporting mutual mistake. A "mutual mistake" means " 'a common mistake by all the parties to the contract.' " *Wells Fargo Bank Minnesota v. Mowery*, 187 Ohio App.3d 268, 2010-Ohio-1650, 931 N.E.2d 1121, ¶ 24 (4th Dist. 2010), quoting *Huber v. Knock*, 1st Dist. Hamilton No. C-080071, 2008-Ohio-5900, 2008 WL 4891562, ¶ 6.

{¶35} Here, the record reflects that appellant and Appellee each signed the real estate purchase agreement, the disclosure forms and the deed, all of which were consistent with one another and all of which transferred their entire interests in the property, including the mineral rights. The affidavit of Jon Brown stated that he and his brother, the purchasers in this case, intended to purchase the entire interest in the real property. Likewise, Phyllis Ward's affidavit stated that it was her intent to convey the entire

estate. Further, Appellant signed the warranty deed voluntarily, after conferring with counsel.

{¶36} For these reasons, we find that the trial court properly determined that Appellant was not entitled to reformation based on a mutual mistake.

Fraud

{¶37} The elements of fraud are, "(a) a representation, or where there is a duty to disclose, concealment of fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying on it, (e) justifiable reliance upon the representation or concealment and (f) a resulting injury proximately caused by the reliance." *Burr v. Bd. of Cnty. Com'rs of Stark Cnty.* (1986), 23 Ohio St.3d 69, paragraph two of the syllabus, 491 N.E.2d 1101.

{¶38} Upon review, we find that Appellant has failed to show concealment, false statements or misrepresentations in this matter.

{¶39} Here, the language in both the contract and deed is clear and unambiguous. As stated above, all of the closing documents were consistent with purchase agreement and the disclosure forms. Appellant had the opportunity to inspect the deed through a simple pre-closing inspection of the deed and did in fact delay signing the deed until after he had an opportunity to confer with counsel. Appellant signed the deed in this form. Once the deed was accepted by Appellees, Appellant became bound by the terms of the deed. The fraud exception to the application of the doctrine of merger by deed cited by Appellant is not applicable to these facts. See *Reid v. Sycks* (1875), 27 Ohio St. 285, and *McGovern Builders, Inc. v. Davis* (1983), 12 Ohio App.3d 153, 12 OBR 477, 468 N.E.2d 90.

Duress

{¶40} Finally, Appellant argues an exception to the Merger by Deed Doctrine based on duress.

{¶41} The Ohio Supreme Court considered the issue of coercion in avoidance of contract in *Blodgett v. Blodgett*, 49 Ohio St.3d 243, 551 N.E.2d 1249 (1990):

> To avoid a contract on the basis of duress, a party must prove coercion by the other party to the contract. It is not enough to show that one assented merely because of difficult circumstances that are not the fault of the other party.

{¶42} *Id.* at syllabus.

{¶43} The *Blodgett* court further held that to prove duress, the party seeking to avoid the contract must establish

> (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. * * * The assertion of duress must be proven to have been the result of the defendant's conduct and not by the plaintiff's necessities. * * *" (Emphasis added.) (Citations omitted.)

{¶44} *Id.* at 246.

{¶45} Appellant herein argues that he signed the deed in this case "because of a threat that he was going to be arrested and held in contempt of Court." (Appellant's brief at 20).

{¶46} Upon review of the record, we find that Appellant and Appellees appeared at different times for the real estate closing. Deposition testimony from the notary present at the closing supports the position that Appellant signed the deed voluntarily, without any undue or outside influence from Appellees and that he did not appear to be in a state of fear or apprehension while so doing. (Depo. of Amy Wilson at 54-56).

{¶47} Further, Appellant consulted with counsel prior to executing the deed. If Appellant believed the deed to be in contravention with the prior agreement, he could have refused to sign same. Instead, he chose to sign the deed as drafted. As such, we find Appellant has failed to make a case for duress in this case.

{¶48} Consequently, on the issue of the land transfer, there is no genuine issue of material fact, and Appellees were entitled to judgment as a matter of law. Civ.R. 56. Therefore, the trial court properly granted partial summary judgment pursuant to the rule. Accordingly, Appellants' sole assignment of error is not well-taken.

{¶49} For the foregoing reasons, the judgment of the Court of Common Pleas, Guernsey County, Ohio, is affirmed.

By: Wise, J.

Hoffman, P. J., and

Delaney, J., concur.

JWW/d 1120

[Cite as *Wells Fargo Bank, Natl. Assn. v. Pollard*, 2019-Ohio-4980.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

WELLS FARGO BANK, NATIONAL ASSOCATION, :

Plaintiff-Appellee, :

No. 108257

v. :

MELVIN POLLARD, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: December 5, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-898687

Appearances:

McGlinchey Stafford, and James W. Sandy, *for appellee*.

Melvin Pollard, *pro se*.

MARY J. BOYLE, P.J.:

{¶ 1} Defendant-appellant, Melvin Pollard, appeals the trial court's order granting plaintiff-appellee, Wells Fargo Bank National Association, summary judgment. He raises five assignments of error for our review:

1. The trial court erred by granting summary judgment against the defendant as there are genuine issues of material fact.

2. The trial court committed prejudicial error by disregarding O.R.C. 1343.01(A) that governs the interest chargeable on the Note, after Plaintiff conceded to, by failing to address claim.

3. The trial court committed prejudicial error in disregarding the forged signatures of documents used as proof of standing.

4. The trial court committed prejudicial error in accepting summary judgment affidavit as qualifying where nature of facts are question and conclusory.

5. The trial court committed prejudicial error in disregarding claim of notice of right to cancel that was conceded to, by failing to address. [sic]

{¶ 2} Finding no merit to his assignments of error, we affirm.

I. Procedural History and Factual Background

{¶ 3} On June 1, 2018, Wells Fargo Bank, N.A., filed a complaint for money damages and foreclosure against Pollard and his unknown spouse, and the United States of America. The complaint sought forfeiture of property located at 5149 Fowler Avenue in Cleveland, Ohio and alleged that Wells Fargo was the holder in possession of a promissory note and the mortgage deed for the property and that Pollard was in default of payment on the note and mortgage in the amount of $40,763.03, plus interest at the rate of 11.54% per annum since December 16, 2016. In its complaint, Wells Fargo stated that it included the United States of America as a defendant because it "has or claims to have an interest in the premises by virtue of Forfeiture Agreement and Notice of Lien," which were both attached to the complaint.

{¶ 4} Pollard filed his answer and a counterclaim against Wells Fargo. He stated that he was requesting $23,776.20 to be returned to him, alleging that it was "collected by Nationstar/Mr. Cooper under false pretense as being entitled to Note payments since November 2013 said transfer from Bank of America, as Defendant's counterclaim."

{¶ 5} In July 2018, Wells Fargo moved for summary judgment against all defendants.

{¶ 6} In August 2018, Wells Fargo moved for default judgment against Pollard's unknown spouse. Pollard opposed both motions and filed his own motion for summary judgment.

{¶ 7} On August 7, 2018, the United States of America filed an answer, admitting that it had an interest in the property on Fowler Avenue by virtue of a forfeiture agreement, objecting to the release of any lien of the United States not included in the complaint, and reserving its right to redeem.

{¶ 8} On December 17, 2018, the magistrate (1) found that Wells Fargo was in possession of the promissory note for the property, had the right to enforce the note, and had standing to bring its complaint; (2) disagreed with Pollard's argument that "the interest rate in his note causes him not to be in default" and was in contravention with R.C. 1343.01; and (3) determined that Wells Fargo's affidavit and supporting evidence was sufficient to meet its burden under Civ.R. 56(E) and that Wells Fargo "demonstrated all of the necessary elements of foreclosure." The magistrate granted Wells Fargo's motion for summary judgment against Pollard,

granted Wells Fargo's motion for default judgment against Pollard's unknown spouse, and denied Pollard's motion for summary judgment. The magistrate's decision concluded that under the promissory note, Pollard owed Wells Fargo $40,763.03, plus interest at the rate of 11.54% per annum from December 6, 2016. The magistrate determined that any right, title, interest, or lien that the United States of America had to the property was subsequent to Wells Fargo's lien.

{¶ 9} Pollard filed objections to the magistrate's decision, but on February 6, 2019, the trial court adopted the magistrate's decision and overruled Pollard's objections.

{¶ 10} On February 22, 2019, the order of sale was issued to the sheriff with an appraisal.

{¶ 11} Pollard filed a notice of appeal from the trial court's decision on March 1, 2019.

{¶ 12} On March 10, 2019, the notice of sale and approval of appraisers' fees was filed, and the trial court's journal entry stated that the sale was scheduled for April 8, 2019.

{¶ 13} On March 29, 2019, Pollard moved our court for a stay of the scheduled sheriff sale proceedings during the pendency of his appeal. On April 2, 2018, we denied his motion, stating, "Pursuant to App.R. 7(A), the stay must 'ordinarily be made in the first instance in the trial court' unless it is "not practicable" to do so. We do not find it impracticable for the appellant to file a motion to stay with the trial court."

{¶ 14} The trial court's docket reflects that the order of sale was returned on April 8, 2019, and that the property was sold on that date.

{¶ 15} On April 26, 2019, Pollard filed a motion to vacate judgment and approval of redemption. The trial court denied Pollard's motion, stating,

> In order to redeem, the amount of the judgment with all costs specified in the statute must be deposited. O.R.C. 2329.33. Defendant has indicated that he is attempting to deposit the sum of $18,282.37 but a review of the record reveals that the judgment in this case was $40,763.03 with interest at 11.54% per annum from 12/16/16.

The court ordered that confirmation of the sale be held until May 31, 2019, giving Pollard seven days to deposit the required money.

{¶ 16} On May 31, 2019, Pollard moved to set aside sale before confirmation and approval of redemption. The trial court denied his motion on August 12, 2019, again stating that Pollard failed to deposit the necessary amount to redeem.

{¶ 17} On August 19, 2019, Pollard filed a motion for reconsideration, which the trial court denied on September 4, 2019.[1]

II. Law and Analysis

{¶ 18} Pollard's assignments of error all contest the trial court's grant of summary judgment to Wells Fargo, and as a result, we will address them together.

{¶ 19} An appellate court reviews a trial court's decision to grant summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d

---

[1] As of November 21, 2019, the trial court's docket does not reflect that it confirmed the sale of the property or that the proceeds from the sale have been distributed. The trial court's docket also does not reflect that Pollard moved to stay the sale, confirmation, or distribution of proceeds.

241 (1996). De novo review means that this court independently "examine[s] the evidence to determine if as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997), citing *Dupler v. Mansfield Journal*, 64 Ohio St.2d 116, 413 N.E.2d 1187 (1980). In other words, we review the trial court's decision without according the trial court any deference. *Smith v. Gold-Kaplan*, 8th Dist. Cuyahoga No. 100015, 2014-Ohio-1424, ¶ 9, citing *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.*, 121 Ohio App.3d 188, 699 N.E.2d 534 (8th Dist.1997).

{¶ 20} Under Civ.R. 56(C), summary judgment is properly granted when (1) "there is no genuine issue as to any material fact," (2) "the moving party is entitled to judgment as a matter of law," and (3) "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[.]" *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). Because it ends litigation, courts should carefully award summary judgment only after resolving all doubts in favor of the nonmoving party and finding that "reasonable minds can reach only an adverse conclusion" against the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138 (1992).

{¶ 21} "The burden of showing that no genuine issue exists as to any material fact falls upon the moving party. Once the moving party has met his burden, it is the non-moving party's obligation to present evidence on any issue for which that party bears the burden of production at trial." *Robinson v. J.C. Penney Co.*, 8th Dist.

Cuyahoga Nos. 62389 and 63062, 1993 Ohio App. LEXIS 2633, 14 (May 20, 1993), citing *Harless* and *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991). "The moving party is entitled to summary judgment if the nonmoving party fails to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Brandon/Wiant Co. v. Teamor*, 125 Ohio App.3d 442, 446, 708 N.E.2d 1024 (8th Dist.1998), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

> To properly support a motion for summary judgment in a foreclosure action, a plaintiff must present "evidentiary quality materials" establishing: (1) that the plaintiff is the holder of the note and mortgage, or is a party entitled to enforce the instrument; (2) if the plaintiff is not the original mortgagee, the chain of assignments and transfers; (3) that the mortgagor is in default; (4) that all conditions precedent have been met; and (5) the amount of principal and interest due.

Deutsche Bank Natl. Trust Co. v. Najar, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 17, citing *United States Bank, N.A. v. Adams*, 6th Dist. Stark No. E-11-070, 2012-Ohio-6253.

{¶ 22} We find that Wells Fargo provided evidentiary quality materials to support its motion and establish the above requirements. Attached to Wells Fargo's motion for summary judgment was an affidavit from Rebecca C. Wallace, a document execution associate for Nationstar Mortgage L.L.C., loan servicing contractor for Wells Fargo. The affidavit stated that Wells Fargo possessed the note and "all of the prerequisites required under the note and mortgage necessary to

accelerate the balance due on the note have been performed." According to Wallace's affidavit, Pollard was in default as of January 2017 and Wells Fargo sent a notice of default, and Pollard owed a principal balance of $40,763.03 plus interest at the rate of 11.54% per annum from December 16, 2016 as well as late charges and sums advanced for real estate taxes and assessments, insurance premiums, and property protection. The affidavit contained true and accurate copies of the adjustable rate note, showing that Pollard promised to pay Delta Funding Corporation $51,000 with a yearly interest rate of 11.540% on May 16, 2000; the mortgage; and chain of assignments. The chain of assignments included the recorded assignment of the mortgage, dated May 16, 2000, assigning Pollard's mortgage from Delta Funding Corporation to Countrywide Home Loans as servicer on behalf of Wells Fargo and a subsequent assignment of mortgage from Countrywide Home Loan to Wells Fargo, dated March 2, 2018. Also attached to the affidavit was a letter from Nationstar to Pollard, dated February 28, 2017, informing Pollard that he was in default and a document detailing Pollard's transaction history.

{¶ 23} In his attempt to meet his reciprocal burden on summary judgment, Pollard maintains in his assignments of error that (1) Wells Fargo did not demonstrate that it was the original mortgagee or the relevant chain of assignments; (2) Wells Fargo failed to attached sufficient evidentiary materials to support its motion for summary judgment; (3) Wells Fargo's affidavit did not establish that the affiant had personal knowledge; (4) the note and allonge were forged and do not establish that Wells Fargo had standing; (5) there were genuine issues of material

fact "concerning default where the overcharged annual rate of interest is a setoff available which is equal to or exceeds the amount of the indebtedness due at the time of said default[;]" and (6) the trial court failed to address Pollard's claim of notice of right to cancel. We find that all of Pollard's arguments lack merit.

{¶ 24} First, as discussed above, Wells Fargo attached documentary evidence establishing that, although it was not the original mortgagee, it was in possession of the note, that the mortgage was assigned to it on March 2, 2018, and Pollard was in default.

{¶ 25} Turning to Pollard's argument that Wells Fargo's affidavit was insufficient to show that the affiant had personal knowledge and to support Wells Fargo's motion for summary judgment (his fourth assignment of error), Civ.R. 56(E) provides:

> 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[.]

{¶ 26} "'Personal knowledge' has been defined as 'knowledge of factual truth which does not depend on outside information or hearsay.'" *Residential Funding Co., L.L.C. v. Thorne*, 6th Dist. Lucas No. L-09-1324, 2010-Ohio-4271, ¶ 64, quoting *Modon v. Cleveland*, 9th Dist. Medina No. 2945-M, 1999 Ohio App. LEXIS 6147 (Dec. 22, 1999). Further, "an affiant's mere assertion that he has

personal knowledge of the facts asserted in an affidavit can satisfy the personal knowledge requirement of Civ.R. 56(E)." *Thorne* at ¶ 70. *See Bank One, N.A. v. Swartz*, 9th Dist. Lorain No. 03CA008308, 2004-Ohio-1986, ¶ 14. An assertion of personal knowledge satisfies Civ.R. 56(E) if the nature of the facts in the affidavit combined with the identity of the affiant creates a reasonable inference that the affiant has personal knowledge of the facts in the affidavit. *Thorne* at ¶ 70.

{¶ 27} Here, Rebecca C. Wallace's affidavit stated that she was a document execution associate for Nationstar Mortgage L.L.C., a servicing contractor for Wells Fargo. She stated that she "has access to the business records hereafter described and has personal knowledge of the contents thereof" and "has access to the loan file and computer databases associated with the loan which is the subject of this matter." She averred that the copies of the note, mortgage, and assignments of the mortgage were true and accurate copies and that Wells Fargo "is and was prior to the filing of the complaint herein, in possession of the note as evidenced by the [attached] collateral tracking sheet." She also averred that Pollard was in default, attached true and accurate copies of Pollard's history of transactions, and stated that Pollard owed a principal balance of the note of $40,763.03 plus interest at the rate of 11.54% per annum from December 16, 2016, in addition to late charges, real estate taxes and assessments, insurance premiums, and property protection. We find that the above establishes that Wallace had personal knowledge of the facts asserted in her affidavit and that Pollard's argument lacks merit.

{¶ 28} We next analyze Pollard's argument that the note and allonge were forged and did not establish that Wells Fargo had standing (his third assignment of error). We review whether a party has standing de novo. *Bank of Am. v. Lynch*, 8th Dist. Cuyahoga No. 100457, 2014-Ohio-3586, ¶ 31. In *Lynch*, we stated:

> A party may establish its interest in the suit, and thus have standing, when, at the time it files its complaint of foreclosure, it either (1) has had a mortgage assigned or (2) is the holder of the note. *CitiMortgage, Inc. v. Patterson*, 2012-Ohio-5894, 984 N.E.2d 392, ¶ 21, citing *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214.

Id. at ¶ 32.

{¶ 29} As stated above, attached to Wells Fargo's motion for summary judgment was an assignment of the mortgage showing that the mortgage was transferred to Wells Fargo on March 2, 2018, as well as an affidavit from Rebecca C. Wallace stating that Wells Fargo was in possession of the note. *See Lynch* at ¶ 38 (Bank of America had standing to initiate the foreclosure action because it attached a copy of the relevant assignments to its motion for summary judgment.).

{¶ 30} We are unable to ascertain what Pollard's argument is with respect to his claim that the documents were forged. It seems that Pollard is arguing that the documents are forged based on his own comparison of signatures found on the documentary evidence attached to Wells Fargo's motion for summary judgment. Pollard's self-serving allegation of forgery without any credible evidence, however, is not enough to create a genuine issue of material fact. *N. Eagle, Inc. v. Kosas*, 8th

Dist. Cuyahoga No. 92358, 2009-Ohio-4042, ¶ 26. Therefore, his argument lacks merit.

{¶ 31} Pollard next argues that summary judgment was improper because he was overcharged for the annual rate of interest (which is his argument in his second assignment of error). He cites to R.C. 1343.01(A), which states, "The parties to a bond, bill, promissory note, or other instrument of writing for the forbearance or payment of money at any future time, may stipulate therein for the payment of interest upon the amount thereof at any rate not exceeding eight per cent per annum payable annually, except as authorized in division (B) of this section." Subsection (B), however, creates exceptions to that rule, stating that a party may agree to pay an interest rate in excess of 8% per annum in a number of circumstances, including when "the instrument evidences a loan secured by a mortgage, deed of trust or land installment contract on real estate which does not otherwise qualify for exemption from the provisions of this section[.]" R.C. 1343.01(B)(4). Here, the note, secured by a mortgage, stated that Pollard agreed to pay an annual interest rate of 11.54%. Therefore, he was not overcharged, and his argument lacks merit.

{¶ 32} Finally, Pollard argues that summary judgment was improper because he rescinded his loan (his fifth assignment of error).

{¶ 33} Foremost, Pollard did not raise this argument in his opposition to Wells Fargo's motion for summary judgment, and he has therefore waived it. *See Nationstar Mortgage, L.L.C. v. Wagener*, 8th Dist. Cuyahoga No. 101280, 2015-

Ohio-1289, ¶ 42 (" It is well established that a party cannot raise new issues for the first time on appeal that he or she failed to raise before the trial court.").

{¶ 34} Even assuming Pollard did not waive his argument,

> 15 U.S.C. 1635(a) [(the Truth in Lending Act)] grants a right of rescission on any mortgage loan transaction for which the borrower uses his or her principle dwelling as security. This right of rescission generally extends to midnight of the third business day following consummation of the transaction. The borrower may rescind the loan transaction entirely if the lender fails to deliver certain forms or disclose important terms accurately. This right of rescission expires three days after the loan closes or upon the sale of the secured property, which ever date is earlier.

Argent Mtge. Co. v. Ciemins, 8th Dist. Cuyahoga No. 90698, 2008-Ohio-5994, ¶ 27. "If, however, the lender fails to provide the necessary notices of that right, the borrower has up to three years to rescind the transaction." *Deutsche Bank Natl. Trust Co. v. Forgues*, 8th Dist. Cuyahoga No. 103613, 2016-Ohio-4702, ¶ 2, citing 15 U.S.C. 1635(a). *Accord Bank of N.Y. v. Jordan*, 8th Dist. Cuyahoga No. 88619, 2007-Ohio-4293, ¶ 56 ("This right of rescission expires three years after the loan closes or upon the sale of the secured property, whichever date is earlier."). That three-year period is not subject to equitable tolling. *WM Specialty Mtge. v. Mack*, 5th Dist. Licking No. 2008 CA 00125, 2009-Ohio-2590, ¶ 27, citing *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 118 S.Ct. 1408, 140 L.Ed.2d 566 (1998).

{¶ 35} Here, the loan closed on May 16, 2000. Assuming for sake of argument that Pollard was not provided the necessary notices, Pollard had three years to rescind the loan; that is, he could rescind until May 16, 2003. As evidenced by Pollard's affidavit and signed notice of right to cancel, he did not attempt to

rescind the loan until August 2017, which was 14 years after his right expired. Therefore, his argument lacks merit, and the trial court did not err in disregarding his claim and granting Wells Fargo summary judgment.

{¶ 36} Accordingly, we overrule Pollard's assignments of error.

{¶ 37} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
PATRICIA ANN BLACKMON, J., CONCUR

[Cite as *DiFranco v. Licht*, 2019-Ohio-4894.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

BENEDICT DIFRANCO, :

Plaintiff-Appellant, :

No. 108387

v. :

CHRISTOPHER LICHT, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: November 27, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-902655

Appearances:

Patrick D. Quinn and Ronald A. Annotico, *for appellant*.

Dworken & Bernstein Co., L.P.A., Grant J. Keating, Jo A. Tatarko, and Jodi L. Tomaszewski, *for appellees*.

KATHLEEN ANN KEOUGH, J.:

{¶ 1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc.App.R. 11.1. The purpose of an accelerated appeal is to allow this court to render a brief and conclusory opinion. *State v. Priest*, 8th Dist. Cuyahoga No. 100614, 2014-Ohio-1735, ¶ 1.

{¶ 2} Plaintiff-appellant, Benedict DiFranco ("DiFranco"), appeals from the trial court's judgment granting the motion of defendants-appellees, Christopher Licht, CBRestaurants, L.L.C., Piccolo Restaurant, L.L.C., Joanne Laurie-O'Brien, Robert O'Brien, and Edward Licht (collectively "appellees"), to stay the case and compel arbitration. For the reasons that follow, we reverse and remand with instructions for the trial court to hold a hearing regarding appellees' motion to compel arbitration.

{¶ 3} DiFranco filed a four-count complaint for breach of contract, breach of fiduciary duty, declaratory judgment, and unjust enrichment. Appellees never filed an answer to the complaint, but filed a motion to stay litigation and compel arbitration. DiFranco filed a brief in opposition to appellees' motion, asserting that the alleged arbitration agreement was unenforceable because it is vague and ambiguous, calls for non-binding arbitration, and is an unenforceable "agreement to agree." DiFranco argued further that even if the arbitration agreement were enforceable, it would apply only to his claims related to CBRestaurants and not to his claims regarding Piccolo Restaurant because those claims arose from an oral agreement, and there is no written arbitration provision applicable to DiFranco's claims against Piccolo Restaurant.

{¶ 4} The trial court subsequently issued a journal entry granting appellees' motion and staying proceedings in the case. DiFranco then filed a motion asking the court to reactivate the case with respect to his claims against Piccolo Restaurant only. The trial court denied the motion, and this appeal followed.

{¶ 5} In his first assignment of error, DiFranco contends that the trial court erred in ordering a stay of the case and compelling arbitration with respect to his claims against Piccolo Restaurant, and then in denying his motion to reactivate the case with respect to Piccolo Restaurant only. In his second assignment of error, DiFranco contends that the trial court erred in staying the case and compelling arbitration with respect to his claims regarding CBRestaurants. In his third assignment of error, DiFranco contends that the trial court erred in granting appellees' motion to stay litigation and compel arbitration because it did not hold a hearing on the motion. DiFranco's third assignment of error is dispositive of his appeal.

{¶ 6} Chapter 2711 of the Ohio Revised Code authorizes direct enforcement of arbitration agreements through an order to compel arbitration under R.C. 2711.03, and indirect enforcement of such agreements pursuant to an order staying trial court proceedings under R.C. 2711.02. *Maestle v. Best Buy Co.*, 100 Ohio St.3d 330, 2003-Ohio-6465, 800 N.E.2d 7. In *Maestle,* the Ohio Supreme Court noted that a motion to compel arbitration and a motion to stay proceedings are separate and distinct procedures that serve different purposes. *Id*. at ¶ 17. A party may choose to move for a stay, petition for an order to compel arbitration, or seek both. *Id*. at ¶ 18.

{¶ 7} The *Maestle* court held that a trial court is not required to conduct a hearing when a party moves for a stay pursuant to R.C. 2711.02, but may stay proceedings "upon being satisfied that the issue involved in the action is referrable

to arbitration under an agreement in writing for arbitration." *Id.* at ¶ 19; R.C. 2711.02.

{¶ 8} The *Maestle* court noted further that "R.C. 2711.03 applies where there has been a petition for an order to compel the parties to proceed to arbitration." *Id.* at ¶ 15. R.C. 2711.03(A) provides that a party

> may petition * * * for an order directing that the arbitration proceed in the manner provided for in the written agreement. * * * The court shall hear the parties, and, upon being satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the agreement.

{¶ 9} Under R.C. 2711.03(B),

> [i]f the making of the arbitration agreement or the failure to perform it is in issue * * *, the court shall proceed summarily to the trial of that issue. If no jury trial is demanded as provided in this section, the court shall hear and determine that issue.

{¶ 10} Accordingly, as this court has consistently held, pursuant to R.C. 2711.03, where a party has filed a motion to compel arbitration and the opposing party has challenged the validity of the provision, the court must, in a hearing, make a determination as to the validity of the arbitration clause. *Marks v. Morgan Stanley Dean Witter Commercial Fin. Servs.*, 8th Dist. Cuyahoga No. 88948, 2008-Ohio-1820, ¶ 21; *Post v. ProCare Automotive Serv. Solutions*, 8th Dist. Cuyahoga No. 87646, 2007-Ohio-2106, ¶ 29; *Benson v. Spitzer Mgt., Inc.*, 8th Dist. Cuyahoga No. 83558, 2004-Ohio-4751, ¶ 19; *McDonough v. Thompson*, 8th Dist. Cuyahoga No. 82222, 2003-Ohio-4655, ¶ 11.

{¶ 11} Appellees contend that no hearing was necessary because "in this case, appellees only sought a stay of proceedings pursuant to R.C. 2711.02." (Appellees' brief, p. 6.) This assertion is not true. Appellees' motion was captioned "motion to stay litigation and *compel arbitration*." The motion stated that appellees "move this court for an order staying this litigation and *compelling Benedict DiFranco* (hereinafter "Plaintiff") *to arbitrate his claims* in accordance with the written agreement between the parties." Likewise, the brief in support of appellees' motion argued that "because the validity of the agreement is not at issue, the court should *compel plaintiff to arbitrate* their [sic] claims against defendants." Further, appellees' brief stated that "[b]ased on the foregoing, defendants respectfully request that the court grant defendants' motion to stay the litigation and *compel arbitration* in accordance with the mandatory arbitration provision contained in the agreement." (Emphasis added in all quotations.)

{¶ 12} It is apparent that appellees filed a joint motion to stay proceedings and compel arbitration. Accordingly, the trial court was required under R.C. 2711.03 to conduct a hearing regarding the enforceability of the arbitration provision. We find nothing in the record demonstrating that the trial court held such a hearing, nor that there was discovery or evidence before the trial court for it to adequately determine if the arbitration clause applies.

{¶ 13} Accordingly, we sustain the third assignment of error. The trial court's judgment is reversed, and the matter is remanded with instructions for the trial court to conduct a hearing regarding appellees' motion to compel arbitration.

Although we make no conclusion regarding the enforceability of the arbitration agreement, we note that should the trial court determine after a hearing that the agreement is enforceable, the court's judgment entry should clearly indicate its findings and the evidence it relied upon, as well as whether the agreement applies to all of DiFranco's claims, or only to those regarding CBRestaurants.

{¶ 14} In light of our resolution of the third assignment of error, the first and second assignments of error are rendered moot and we need not consider them. App.R. 12(A)(1)(c).

{¶ 15} Judgment reversed and remanded.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE

MARY J. BOYLE, P J., and
RAYMOND C. HEADEN, J., CONCUR