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The Bullet Point: Ohio Commercial Law Bulletin

Do I have a Duty to Respond to an Overly Broad Qualified Written Request?

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Jim Sandy and Stephanie Hand-Cannane

QWR Responses

Kavanagh v. Specialized Loan Servicing, LLC, N.D.Ohio No. 3:17CV892, 2020 U.S. Dist. LEXIS 46255 (Mar. 17, 2020)

In this case, the Northern District of Ohio granted in part and denied in part the loan servicer's and borrower's competing motions for summary judgment, finding that the servicer was a debt collector who failed to specifically advise the borrower of what documentation was needed to complete her loss mitigation application as required under the Real Estate Settlement Procedures Act (RESPA), while also finding that the servicer did not have a duty to respond to the borrower's qualified written request (QWR) as it was overbroad and did not relate to the servicing of her loan.

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  RESPA is a consumer protection statute that regulates the servicing of a mortgage loan. In regards to loss mitigation applications, RESPA requires a servicer to "1) exercise reasonable diligence in obtaining documents and information needed to complete a borrower's loss mitigation application; 2) review the application and notify the borrower within five days after receiving it that the application is complete or incomplete; 3) if the application is incomplete, advise the borrower of 'the additional documents and information the borrower must submit to make the . . . application complete'; and 4) if the application is complete, 'evaluate the borrower for all loss mitigation options available to the borrower.'"

  In this case, the court determined that the additional documents a borrower submits in response to a servicer's determination that their loss mitigation application is incomplete do not themselves constitute loss mitigation applications. However, the servicer must still provide notice to the borrower of what specific information must be submitted in order to complete their loss mitigation application. The court further clarified that a servicer does not have a duty to respond to a borrower's QWR when the QWR seeks information concerning loan modification or loss mitigation, as such a QWR is a "request to alter the terms of a loan" and is not related to the servicing of the loan. Likewise, a servicer does not have a duty to respond to a borrower's notice of error that is overbroad. As explained by the court, "if

a servicer cannot reasonably determine from the notice of error the specific error that the borrower asserts has occurred", the servicer has no duty to respond.

Under the Fair Debt Collection Practices Act, a servicer is not considered a "debt collector" if the borrower's loan is not in default at the time the servicer begins servicing the loan. However, the court determined that a borrower's loan is in default if they fail to fulfill any promise made under the loan agreement, including failing to pay taxes on the property. Stated differently, a servicer is considered a debt collector if the borrower fails to pay property taxes even if the principal and interest payments owed on the loan are paid in full.

Waiver of Right to Arbitrate

Gembarski v. PartsSource, Inc., 11th Dist. Portage No. 2016-P-0077, 2020-Ohio-981

In this appeal, the Eleventh Appellate District reversed its earlier judgment, concluding that the defendant did not waive its right to assert an arbitration defense as it had no such right until the plaintiff attempted to join non-party members and certify a class action.

- **The Bullet Point**
  In Ohio, a party to a lawsuit does not waive defenses against non-parties who are not yet part of the lawsuit. Put another way, the proper time to raise defenses against non-named, hypothetical putative class members who are not yet parties is at the class certification stage. As such, a defendant does not waive the right to assert an arbitration defense against said putative class members prior to the plaintiff moving to certify the class.

Summary Judgment Affidavits

Bank of New York Mellon v. Urbanek, 11th Dist. Lake No. 2019-L-067, 2020-Ohio-985

In this appeal, the Eleventh Appellate District affirmed the trial court's decision to grant the plaintiff's motion for summary judgment, finding that the plaintiff had standing to initiate the foreclosure action and was the holder of the note, and that the affidavit supporting the motion for summary judgment was made upon personal knowledge.

- **The Bullet Point**
  In order to properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials via affidavit that establishes, among other things, that the plaintiff is a "party entitled to enforce the Note" and is able to foreclose on the mortgage. Pursuant to Civ.R. 56(E), an affidavit submitted in support of a motion for summary judgment must be made on personal knowledge. An affiant can satisfy this requirement by stating that the assertions in the affidavit are based upon his or her personal knowledge. In addition, the court here found that the affiant was not required to state that she reviewed the "original" note in order to establish the lender's standing to foreclose. Rather, Civ.R. 56(E) simply requires that sworn or certified copies of all documents referred to in the affidavit be attached, along with a statement that such copies are "true copies and reproductions."

Affirmance of Arbitration Award

Delly v. Harbor Freight Tools USA Inc., 8th Dist. Cuyahoga No. 108489, 2020-Ohio-919

In this appeal, the Eighth Appellate District affirmed the trial court's decision to dismiss the plaintiff's motion to vacate the arbitration award, finding that Ohio law does not recognize a contractual right to judicially review arbitration awards.

- **The Bullet Point**
  Under Ohio law, once an arbitration is completed, the court has no jurisdiction except to confirm and enter judgment, vacate, modify, correct, or enforce the judgment. Stated differently, "the court possesses jurisdiction only to review the arbitration award; the court cannot review the merits of the claims underlying the award unless the award is vacated." The court's authority to vacate an arbitration award is limited to the grounds listed in R.C. 2711.10, and parties cannot contractually expand judicial review of arbitration awards beyond the statute. As such, in order for a court to vacate an arbitration award, the complaining party "must set forth allegations demonstrating that (1) the award was procured by corruption, fraud, or undue means; (2) there was evidence of partiality or corruption on the part of the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing or in refusing to hear evidence material to the controversy, or any other misconduct prejudicing the party's rights; or (4) the arbitrators exceeded their powers or imperfectly executed those powers in such a way that a mutual, final, and definite award was not rendered."

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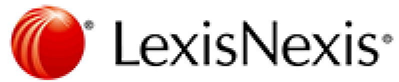

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Kavanagh v. Specialized Loan Servicing, LLC

United States District Court for the Northern District of Ohio, Western Division

March 17, 2020, Filed

Case No. 3:17CV892

Reporter
2020 U.S. Dist. LEXIS 46255 *

Diana Kavanagh, Plaintiff v. Specialized Loan Servicing, LLC, Defendant

Core Terms

mitigation, borrower, deed, notice, servicer, quitclaim, ex-husband, mortgage, documents, default, Regulation, undisputed, responded, argues, entitled to summary judgment, incomplete, escrow, summary judgment motion, contends, damages, summary judgment, charges, divorce, records, debt collector, purposes, reasons, reasonable diligence, original deed, phone call

Counsel: **[*1]** For Diana Kavanagh, Plaintiff: Andrew J. Gerling, Doucet Gerling, Dublin, OH; John A. Zervas, Doucet & Associates, Dublin, OH.

For Specialized Loan Servicing, LLC, Defendant: Jessica E. Salisbury-Copper, Thompson Hine - Miamisburg, Miamisburg, OH; Richard A. Freshwater, Thompson Hine - Cleveland, Cleveland, OH.

Judges: James G. Carr, Senior United States District Judge.

Opinion by: James G. Carr

Opinion

ORDER

This case under the *Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, et seq.* (RESPA), and the *Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq.* (FDCPA), arises out of a dispute between a homeowner and the entity servicing her mortgage.

In April, 2017, defendant Specialized Loan Servicing, LLC (SLS) acquired the right to service plaintiff Diana Kavanagh's loan and mortgage. Multiple disputes soon arose between the parties. For one, SLS claimed to be unable to review Kavanagh's loss mitigation application because Kavanagh failed to submit a quit claim deed from her ex-husband — even though Kavanagh held sole title to the home. For another, SLS purchased force placed insurance for Kavanagh's home even though Kavanagh maintained her own insurance policy on the home at all relevant times. And finally, SLS failed to acknowledge, either entirely or **[*2]** in a timely fashion, many of Kavanagh's letters seeking information about her account.

Unable to resolve these disputes with SLS, Kavanagh filed this suit.

Jurisdiction is proper under *28 U.S.C. § 1331*.

Pending is SLS's motion for summary judgment on Kavanagh's claims (Doc. 38) and Kavanagh's cross-motion for summary judgment as to SLS's liability for violating RESPA and the FDCPA (Doc. 43). For the following reasons, I grant the motions in part and deny them in part.

Background

In October, 2005, Kavanagh and her husband, Kevin Ralston, took out a loan to refinance their home in Marion, Ohio. (Doc. 43-1, PageID 1418 at ¶6). They

executed a mortgage to secure the loan, and Kavanagh and Ralston each signed the note and mortgage. (Doc. 38-2, PageID 930 (note); Doc. 38-3, PageID 934 (mortgage)).

Kavanagh and Ralston divorced in 2009. The state court overseeing dissolution proceedings awarded the home to Kavanagh "free and clear of any claims" by her ex-husband and ordered him to quit claim his interest in the property, "if necessary." (Doc. 43-5). It is undisputed that Kavanagh had purchased the home before her marriage, and that title to the home was, and always had been, in her name alone. (Doc. 43-2, PageID **[*3]** 1427-28).

In April, 2016, SLS became the servicer of Kavanagh's mortgage. (Doc. 38-4, PageID 939). Although the loan balance was current (Doc. 38-5, PageID 945), SLS's records reflected that there was "a negative balance on the[ ] escrow account for taxes that had been advanced" by Kavanagh's prior servicer. (Doc. 47-1, PageID 2113 at ¶9).

A. Force Placed Insurance

In November, 2016, Kavanagh switched homeowner's insurance policies. (Doc. 43-1, PageID 1420 at ¶19). Even though Kavanagh sent a copy of the new policy to SLS, the company, in December, 2016, advised Kavanagh that: 1) it had no evidence that her home was insured; 2) SLS "plan[ned] to buy insurance for your property"; and 3) Kavanagh would have to reimburse SLS. (Doc. 43-36, PageID 1775).

On January 25, 2017, Kavanagh sent SLS a letter identifying the improper placement and escrowing of homeowners' insurance as errors on her account. (Doc. 38-15, PageID 1014-16). Almost immediately thereafter, SLS claimed to have "received evidence of insurance" on Kavanagh's home, "cancelled the force-placed insurance," and refunded the sums SLS had charged to Kavanagh. (Doc. 47-1, PageID 2113 at ¶13). Nevertheless, SLS continued to send Kavanagh **[*4]** escrow analyses that incorrectly charged her with paying the force placed insurance premium. (Doc. 43-38, PageID 1781).

B. First Loss Mitigation Application

In November, 2016, Kavanagh submitted an application to SLS for a loan modification. (Doc. 38-9, PageID 981-90; Doc. 43-1, PageID 1421 at ¶22). Kavanagh's application stated that she was the only borrower on the loan. (Doc. 43-1, PageID 1421 at ¶22). She also attached to her application the divorce court's order awarding her the home "free and clear" from any claim by Ralston. (Doc. 47-1, PageID 2113 at ¶16).

SLS responded on December 5, 2016, stating that Kavanagh's application "isn't complete" because it did not include certain documents relating to Ralston's finances. (Doc. 38-10, PageID 991).

Kavanagh called SLS on December 14 to check on her application. An SLS representative told her that it "needed a copy of [the quit claim] deed" from her ex-husband to complete the application. (Doc. 47-1, PageID 2113 at ¶16). Kavanagh responded that her ex-husband's "name was never on the deed." (Doc. 43-1, PageID 1421-22 at ¶26). Kavanagh later "tried to get her ex-husband to execute a quit claim deed," but he would not return her phone calls. **[*5]** (*Id.*, PageID 1422 at ¶31).

On December 21, 2016, SLS sent Kavanagh another letter advising her that her application was still incomplete. (Doc. 43-16, PageID 1529). This letter requested, not the quit claim deed mentioned during the December 14 phone call, but additional financial documents from Ralston. (*Id.*). Kavanagh, who had recently retained counsel, again advised SLS that she could not get any financial information from her ex-husband. (Doc. 43-17, PageID 1539).

On January 25, 2017, Kavanagh's attorneys sent SLS a letter explaining that the divorce court had awarded her the home "free and clear" of any claims by her ex-husband and that her application was complete, thereby triggering SLS's duty to evaluate her for loss mitigation options. (Doc. 43-18, PageID 1540-41). The January 25 correspondence also identified the improper handling of her loss mitigation application as an error on her account. (Doc. 38-15, PageID 1014-16).

SLS responded on February 6, 2016, acknowledging that it received the divorce decree but explaining that that it had not "receive[d] the Quit-Claim Deed to show that this property was awarded to [Kavanagh]." (Doc. 43-19, PageID 1604). Another letter that SLS **[*6]** sent Kavanagh on February 22, 2017 did not ask Kavanagh to provide SLS with the quit claim deed. (Doc. 43-42). Finally, SLS's internal account-servicing records show that, as of February 28, 2017, SLS had "Received Divorce Decree" and "Kevin Ralston is no longer on the file." (Doc. 43-9, PageID 1475).

Nevertheless, in March, 2017, SLS sent Kavanagh a letter requesting a "Letter of Explanation" respecting Ralston. (Doc. 43-20). The letter did not detail what SLS wanted Kavanagh to explain. (*Id.*).

Ultimately, on April 10, 2017, SLS denied Kavanagh's application because she "did not provide [SLS] with the documents [it] requested." (Doc. 43-21, PageID 1658).

C. Second Loss Mitigation Application

Kavanagh submitted a second loss mitigation application, which was identical to the first application in all material respects, in November, 2017. (Doc. 43-22). Thereafter, on November 25 and December 26, 2017, SLS notified Kavanagh that her application was not complete and directed her to submit a "Letter of Explanation" from her and her ex-husband. (Doc. 43-23, PageID 1693; Doc. 43-25, PageID 1706). Neither notice specified what it was that SLS wanted Kavanagh to explain.

In January, 2018, SLS offered **[*7]** Kavanagh a trial period plan. (Doc. 43-28, PageID 1713). SLS then offered a revised trial period, and Kavanagh ultimately accepted this plan in June, 2018. (Doc. 43-29).

D. Litigation

Kavanagh filed this suit in April, 2017, alleging that SLS violated various provisions of RESPA and the FDCPA. (Doc. 1).

1. Original Complaint

In count one, Kavanagh alleged that SLS violated RESPA in connection with her first loss mitigation application by failing to: 1) "provide [her] with the correct notices regarding [her] application," in violation of *12 C.F.R. § 1024.41(b)(2)(i)(B)*; 2) exercise reasonable diligence in obtaining information needed to complete the application, in violation of *12 C.F.R. § 1024.41(b)(1)*; and 3) evaluate her for all loss mitigation options, in violation of *12 C.F.R. § 1024.41(c)(1)*. (Doc. 1, PageID 11 at ¶¶84-86).

Count two alleges that SLS violation RESPA in connection with the Qualified Written Requests that she submitted on January 25, 2017 and February 7, 2016. Kavanagh claims that SLS violated *12 U.S.C. § 2605(e)* by failing to: 1) respond adequately to the QWRs; 2) correct the errors specified in the QWRs; and 3) conduct an investigation into the specified errors. (Doc. 1, PageID 12 at ¶¶98-100).

In count three, Kavanagh claimed that SLS was a debt collector that violated **[*8]** the FDCPA by making false, deceptive, or misleading representations and attempting to collect amounts and fees not expressly authorized. (Doc. 1, PageID 13 at ¶¶106, 109-10).

2. Supplemental Complaint

Kavanagh filed a supplemental complaint in November, 2017. (Doc. 27). There she brought a RESPA claim and an FDCPA claim that were essentially (but not entirely) identical to those in the original complaint, but directed at SLS's handling of her second loss mitigation application. (*Id.*, PageID 475 at ¶¶59-63, PageID 476-77 at ¶¶71, 75-77).

Standard of Review

Summary judgment is appropriate under *Fed. R. Civ. P. 56* where the opposing party fails to show the existence of an essential element for which that party bears the burden of proof. *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

The movant must initially show the absence of a genuine issue of material fact. *Id. at 323*. Once the movant carries its burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. *Rule 56* "requires the nonmoving party to go beyond the [unverified] pleadings" and submit admissible evidence supporting its position. *Celotex, supra, 477 U.S. at 324*.

"Where, as here, parties have filed cross-motions for summary judgment, the Court grants or denies each motion **[*9]** for summary judgment on its own merit, applying the standards described in *Fed. R. Civ. P. 56*." *Williams v. Ohio Dep't of Rehabilitations & Corr., 2018 U.S. Dist. LEXIS 9710, 2018 WL 500167, *1 (S.D. Ohio 2018)*.

Discussion

A. RESPA Claims

"RESPA is a consumer protection statute that regulates the real estate settlement process." *Washington v. Green Tree Servicing LLC, 2017 U.S. Dist. LEXIS 69330, 2017 WL 1857258, *3 (S.D. Ohio 2017)*. The statute gives consumers "greater and more timely information on the nature and costs of the settlement process" and ensures that they are "protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country." *12 U.S.C. § 2601(a)*.

1. Loss Mitigation Applications

The Mortgage Servicing Rules Under RESPA — known as *Regulation X* - "is a Consumer Financial Protection Bureau regulation promulgated pursuant to *section 1022(b) of the Dodd-Frank Act*, *12 U.S.C. § 5512(b)*, and *[RESPA], 12 U.S.C. § 2601 et seq.*" *Cooper v. Fay Serv., LLC, 115 F. Supp. 3d 900, 903 n.6 (S.D. Ohio 2015)*.

Regulation X requires that a servicer: 1) exercise reasonable diligence in obtaining documents and information needed to complete a borrower's loss mitigation application, *12 C.F.R. § 1024.41(b)(1)*; 2) review the application and notify the borrower within five days after receiving it that the application is complete or incomplete, *12 C.F.R. § 1024.41(b)(2)(i)(A)*, *(B)*; 3) if the application is incomplete, advise the borrower of "the additional documents and information the borrower must submit to make the . . . application complete[,]" *12 C.F.R. § 1024.41(b)(2)(i)(B)*; and 4) if the application **[*10]** is complete, "[e]valuate the borrower for all loss mitigation options available to the borrower," *12 C.F.R. § 1024.41(c)(1)(i)*.

"A borrower may enforce the provisions of [Regulation X] pursuant to *section 6(f) of RESPA* (*12 U.S.C. § 2605(f)*)." *Cooper, supra, 115 F. Supp. 3d at 903 n.6* (citing *12 C.F.R. § 1024.41(a)*).

a. Reasonable Diligence

Each side contends that it is entitled to summary judgment on Kavanagh's claim that SLS did not exercise reasonable diligence in obtaining documents needed to complete her November, 2016 loss mitigation application.

SLS argues that it reasonably determined that it needed a quit claim deed from Kavanagh's ex-husband, showing that the property was in Kavanagh's name only, to complete her loss mitigation application. (Doc. 38-1, PageID 917-18). This is so, the company maintains, because both Kavanagh and Ralston had signed the mortgage and note, and because the couple's divorce decree directed Ralston to "quit claim deed to [Kavanagh] his interest, if necessary, in said property[.]" (*Id.*, PageID 918).

Kavanagh responds that SLS could not have reasonably determined that the quit claim deed was necessary because SLS admitted that it possessed the original deed to Kavanagh's property, which showed that she alone held title. (Doc. 43, PageID 1394-95).

This argument rests on the testimony **[*11]** of Annette Heebner, a mediation associate with SLS's high-risk department. (Doc. 44-1). Asked whether SLS maintains "records of who has . . . an ownership in the property . . . that it services," Heebner gave this answer:

> A: It is part of the overall collateral file. So yes, it would be in those records.
>
> Q: So when SLS acquired servicing rights of Dawn Kavanagh's loan, SLS would have in its possession the most recent deed transferring the ownership interest in the property; is that correct?
>
> [SLS's Counsel]: Objection
>
> A: We would have the most recent — or excuse me, strike that. We would have in our files the original — or a copy of the original title that was part of the collateral file.

(Doc. 44-1, PageID 1936-37).

Kavanagh also argues that SLS did not exercise reasonable diligence because, even assuming it needed Ralston's quit claim deed, it never made a written request for the deed or the original title. (Doc. 43, PageID 1395-96). Rather, SLS made an oral request for the deed when Kavanagh called the company to check the status of her application. (Doc. 43-1, PageID 1421-22 at ¶26).[1]

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[1] Kavanagh contends that SLS has a policy of not reviewing supporting documentation, such as a divorce decree, when it receives a loss mitigation application (Doc. 43, PageID 1394), but the deposition testimony on which she relies does not support, let alone compel, such a conclusion (especially when viewed in the light most favorable to SLS). Rather, after an SLS representative testified that an SLS underwriter merely "mark[s] off," and does not review, the documents attached to a loss mitigation application when SLS first receives it (Doc.

In response, SLS disputes whether SLS had a copy of the deed when it began servicing Kavanagh's loan. **[*12]** (Doc. 48, PageID 2118). It points to an affidavit from its Second Assistant Vice President of Default Administration, Cynthia Wallace. (Doc. 47-1). According to Wallace, "[p]rior to the start of this litigation, SLS's records did not contain a copy of the deed for the [p]roperty." (*Id.*, PageID 2112 at ¶7).

A material factual dispute — whether SLS had a copy of the deed to Kavanagh's property — precludes summary judgment on the reasonable diligence claim.

Viewed in the light most favorable to Kavanagh, Heebner's testimony that it was SLS's practice to maintain in its collateral files a copy of the original deed supports a reasonable inference that the collateral file for Kavanagh's account contained such a document.

This is a reasonable inference to draw because Heebner so testified after counsel asked her specifically if SLS "would have in its possession the most recent deed transferring the ownership interest in the property" when SLS "acquired servicing rights of Dawn Kavanagh's loan." (Doc. 44-1, PageID 1936-37). In other words, Heebner did not simply describe SLS's general practice in the abstract, but instead linked that practice to the contents of Kavanagh's collateral file. Accordingly, **[*13]** if a jury found that SLS had a copy of the deed, it could also find that asking Kavanagh to provide a quit claim deed from her ex-husband — who had no interest to quit claim — was unreasonable and thus a violation of Regulation X.

On the other hand, Wallace's testimony that SLS did not, in fact, have a copy of the original deed precludes summary judgment for Kavanagh. This evidence, accepted as true for purposes of reviewing Kavanagh's motion for summary judgment, suggests that SLS did not know that Kavanagh alone held title to the home.[2]

And given that both Kavanagh and Ralston signed the mortgage and note — and thus appeared to have an interest in the home — a jury could find that SLS reasonably decided that it needed information about Ralston's interest in the property to complete Kavanagh's application.

Finally, even assuming that SLS did not have a copy of the original deed, a jury could find that it was unreasonable for SLS to insist on a copy of the quit claim deed.

For one thing, the divorce decree awarded Kavanagh the home free and clear of all claims by her ex-husband and directed Ralston to quit-claim his interest in the home only "if necessary." Given the present record, **[*14]** and the undisputed evidence that Kavanagh was the sole title holder, a jury could find that SLS had no basis to conclude that it was necessary for Ralston to execute such a document. Likewise, a jury could find that SLS's insistence on the quit claim deed was unreasonable, given: 1) Kavanagh's undisputed inability to get Ralston to execute the quit claim deed; and 2) SLS's undoubted ability to obtain the original deed, either by asking Kavanagh to submit it (especially after Kavanagh told SLS that she was the sole title holder) or by canvassing local property records.

Summary judgment is therefore unwarranted.

b. Timely Notification

The parties also seek summary judgment on the claim that SLS violated *12 C.F.R. § 1024.41(b)(2)(i)(B)* by failing to notify Kavanagh in writing within five days after SLS had received her loss mitigation application that it determined the application was complete or incomplete.

Kavanagh alleges that SLS violated *§ 1024.41(b)(2)(i)(B)* on five occasions by not timely responding to the following submissions:

- Kavanagh's fax on December 9, 2016 containing an IRS Form 4506-T and other financial documents requested by SLS (Doc. 44-1, PageID 117)
- Kavanagh's statement during a December 14, 2016 phone call that she alone **[*15]** held title to her home (Doc. 43-1, PageID 1421-22 at ¶26)
- Letter of explanation from Kavanagh dated

44-1, PageID 2020-21), the representative explained that "we're going to have to look at what the criteria of the divorce decree stipulates" to process the application (*id.*, PageID 2022).

[2] Pointing to the contradiction between Heebner's testimony and Wallace's affidavit, Kavanagh suggests that Wallace's affidavit is a sham, and that I should not consider her testimony in light of the sham affidavit rule. (Doc. 43, PageID 1379 at n.1). But Kavanagh has not made an actual argument along those lines, so I need not consider the issue any further. I do note, however, that some courts have concluded that the sham affidavit rule would not apply on these facts, where two different witnesses testifying for the same party offer conflicting testimony. *E.g.*, *Nelson v. City of Davis, 571 F.3d 924, 928 (9th Cir. 2009)*.

January 17, 2017 stating that she could not get her ex-husband to provide a quit claim deed (Doc. 43-17, PageID 1539)

- Letter of explanation from Kavanagh dated March 16, 2017 repeating statement that she could not get her ex-husband to provide a quit claim deed (Doc. 38-21)
- Letter of explanation from Kavanagh dated November 28, 2017 providing additional information about her employment, as requested by SLS (Doc. 38-25).

(Doc. 27, PageID 475 at ¶59).

In response, SLS first acknowledges that it did not timely respond to the December 9, 2016 and November 28, 2017 submissions, but argues that the tardy responses did not cause Kavanagh any damages. (Doc. 48, PageID 2123-24). Second, the company concedes that it did not respond to Kavanagh's letters of January 17 and March 17, but it contends that the letters did not constitute a "loss mitigation application" under *12 C.F.R. § 1024.41*, such that its receipt of the documents did not trigger a duty to respond. Third, while expressing skepticism that Kavanagh told an SLS representative during the December 14, 2016 call that she was the sole title holder, SLS argues **[*16]** that "no written response was required" because Kavanagh did not submit documentation showing she was the sole title holder. (*Id.*, PageID 2123).

Kavanagh responds that, with respect to SLS's untimely responses to the December 9, 2016 and November 28, 2017 submissions, she is entitled to damages for the emotional distress that SLS's omissions caused and the attorney fees she incurred before filing suit. (Doc. 49, PageID 2154). Regarding SLS's non-responses to her phone call of December 14, 2016 and her letters of January 16 and March 16, 2017, Kavanagh argues that each constitute a "loss mitigation application" under the applicable regulations.

i. December 9, 2016 and November 28, 2017 Submissions

Because SLS cites no evidence in the record that it responded in writing within five days after receiving these submissions to notify Kavanagh that her application was complete or incomplete — indeed, SLS concedes it did not respond — Kavanagh is entitled to summary judgment as to SLS's liability for violating *12 C.F.R. § 1024.41(b)(2)*.

Contrary to SLS's arguments, the emotional distress that Kavanagh claims to have experienced due to the lack of a response (Doc. 43-1, PageID 1421 at ¶23; *id.*, PageID 1424 at ¶40) constitutes **[*17]** actual damages. *Houston v. U.S. Bank Home Mortg. Wisconsin Serv., 505 F. App'x 543, 548 n.6 (6th Cir. 2012)* ("We find nothing in the text of *§ 2605(f)*, or in RESPA more broadly, to preclude 'actual damages' from including emotional damages, provided that they are adequately proven.").

Furthermore, Kavanagh may be entitled to recover some of the attorney's fees she incurred before filing suit.

Damages are available for a RESPA violation if the plaintiff proves "1) that she suffered actual damages and 2) that those damages were caused by [the servicer's] violation." *Cameron v. Ocwen Loan Servicing, LLC, 2020 U.S. Dist. LEXIS 3468, 020 WL 104981, *2 (S.D. Ohio 2020)*. Thus, as the Sixth Circuit has recognized, the "costs [a plaintiff] incurred associated with preparing her QWR" may "become actual damages when [a servicer] ignored its statutory duties to adequately respond." *Marais v. Chase Home Fin. LLC, 736 F.3d 711, 721 (6th Cir. 2013)*. Here, if Kavanagh can prove that she incurred costs, such as attorney fees, in preparing the submissions to which SLS failed to respond, then those costs would be actual damages under RESPA. An accounting of such damages must await trial, however.

ii. December 14, 2016; January 16, 2017; and March 16, 2017 Submissions

Regulation X defines a "loss mitigation application" as "an oral or written request for a loss mitigation option that is accompanied by any information required by a servicer for evaluation for a loss **[*18]** mitigation option." *12 C.F.R. § 1024.31*.

As Kavanagh notes, the Official Comment provides that "[a] loss mitigation application is to be considered expansively." 12 C.F.R § 1024., Supp. I, cmt 41(b)(1)-1.ii.[3] Nevertheless, neither the text of Regulation X nor the Official Comment supports Kavanagh's position that her submissions of December 14, 2016; January 16,

[3] The comments are available at https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1024/41/#41-b-1-Interp-1-ii."

2017; and March 16, 2017 were themselves loss mitigation applications to which SLS had to respond.

What Regulation X aims to do in mandating an "expansive" understanding of a "loss mitigation application" is prevent a servicer from evading its acknowledge-and-review obligations by claiming that a consumer's informal submission does not, under the servicer's own internal protocols, qualify as a loss mitigation application. This is apparent from the comment on which Kavanagh relies:

> 2. When an inquiry or prequalification request becomes an application. A servicer is encouraged to provide borrowers with information about loss mitigation programs. *If in giving information to the borrower, the borrower expresses an interest in applying for a loss mitigation option and provides information the servicer would evaluate in connection with a loss mitigation application,* **[*19]** *the borrower's inquiry or prequalification request has become a loss mitigation application*. A loss mitigation application is considered expansively and includes any "prequalification" for a loss mitigation option. For example, if a borrower requests that a servicer determine if the borrower is "prequalified" for a loss mitigation program by evaluating the borrower against preliminary criteria to determine eligibility for a loss mitigation option, the request constitutes a loss mitigation application.

12 C.F.R § 1024., Supp. I, cmt 41(b)(1)-1.ii (emphasis supplied); *see also* *Necak v. Select Portfolio Servicing, Inc., 2019 U.S. Dist. LEXIS 71147, 2019 WL 1877174, *6 (N.D. Ohio 2019)* (discussing this comment).

In this case, however, Kavanagh had already submitted a loss mitigation application in November, 2016, and, on December 5, 2016, SLS acknowledged receiving it. (Doc. 38-10). SLS also advised Kavanagh that her application was incomplete because it did not include information about her ex-husband's financials. (*Id.*). Kavanagh then made her submissions of December 14, 2016; January 16, 2017; and March 16, 2017, all of which she intended to cure the omission that SLS had identified (rightly or wrongly, reasonably or unreasonably) in her original application.

There is simply no basis in the text of Regulation **[*20]** X or its comments to find that the additional documents that a borrower submits to complete a loss mitigation application are themselves "loss mitigation applications."

Kavanagh cites only case to support her argument, *McKerracher v. Green Tree Servicing, LLC, 2015 U.S. Dist. LEXIS 175682, 2015 WL 9942621 (S.D. Ohio 2015)*, but that case says nothing about this issue.

The plaintiff in *McKerracher* requested mortgage assistance during a telephone call with a Green Tree representative. The representative told the plaintiff that she was "prequalified" for such assistance, and that "Green Tree would be sending a request for assistance package" to her. *McKerracher, supra, 2015 U.S. Dist. LEXIS 175682, 2015 WL 9942621 at *5*. However, the plaintiff never received the package. *Id.* The court held that the plaintiff plausibly alleged a violation of *§ 1024.41(b)(2)* because: 1) her oral request constituted a loss mitigation request; and 2) given that the request "was not written and was not complete," Green Tree had a duty under *§ 1024.41(b)(2)(i)(B)* "to identify to McKerracher what additional documents and information were necessary to complete the application." *Id.*

McKerracher did not address the further question that this case presents: whether the documents a borrower submits in response to a servicer's determination that her application is incomplete constitute loss mitigation applications. And for the **[*21]** reasons already given, I find that they do not. Accordingly, SLS is entitled to summary judgment on Kavanagh's claim that it violated *12 C.F.R. § 1024.41(b)(2)(i)(B)* by not responding to Kavanagh's submission of December 14, 2016; January 16, 2017; and March 16, 2017. Kavanagh's counter-motion for summary judgment on this claim is denied.

c. Adequacy of the Notices

Regulation X further provides that, "[i]f a loss mitigation application is incomplete, the notice shall state the additional documents and information the borrower must submit to make the loss mitigation application complete and the applicable date pursuant to *paragraph (b)(2)(ii)* of this section." *12 C.F.R. § 1024.41(b)(2)(i)(B)*.

Kavanagh claims that four notices that SLS sent after it determined that her application was incomplete did not adequately advise her how to complete the application.

She argues that SLS's internal records "confirm that as of December 14, 2016, the only document it was seeking was a quit claim deed." (Doc. 43, PageID

1400).[4] Nevertheless, none of the four notices directed Kavanagh to submit that document. Rather, SLS's letter of December 21, 2016 told Kavanagh to submit her ex-husband's tax returns. (Doc. 43-16, PageID 1529). SLS's letters of March 7, November 15, and December 26, **[*22]** 2017, in turn, directed Kavanagh to submit a "Letter of Explanation" from Ralston, Kavanagh herself, or both — all without specifying what it was that Kavanagh or Ralston needed to explain. (Doc. 43-20, PageID 1653; Doc. 43-23, PageID 1693; Doc. 43-25, PageID 1706).

SLS responds that its notices adequately communicated what information it needed to complete Kavanagh's application.

This is so, the company argues, because its notices contained a definition of "Letter of Explanation" to guide Kavanagh's response. (Doc. 48, PageID 2122). According to the notices, a "Letter of Explanation" is "a letter completed by the borrower to explain discrepancies found that need further clarification. Your Single Point of Contact is the best resource to contact if you have questions on what needs to be reviewed." (*Id.*). Because Kavanagh was "regularly informed of the identity of, and the contact information for, her single point of contact," but failed to "follow up[ ]" with that person, SLS maintains that there was no violation of *§ 1024.41(b)(2)(i)(B)*. (*Id.*, PageID 2122-23).

i. December 21, 2016 Notice

Kavanagh is entitled to summary judgment as to liability on her claim respecting the December 21, 2016 notice.

Kavanagh **[*23]** testified that SLS told her on December 14, 2016 that it needed a quit claim deed from her ex-husband to complete her loss mitigation application. (Doc. 43-1, PageID 1421-22 at ¶26). SLS, in turn, cites no evidence in the record to dispute this assertion. (Doc. 48, PageID 2122-23); *see* *Fed. R. Civ. P. 56(c)(1)(A)*. Indeed, SLS's opposition brief does not respond to Kavanagh's motion for summary judgment with respect to the December 21, 2016 notice. (Doc. 48, PageID 2118-20, 2122-23). Accordingly, the only reasonable finding a jury could make is that SLS violated Regulation X because the notice did not "state the additional documents and information the borrower must submit" - i.e., the quit claim deed - "to make the loss mitigation application complete[.]" *12 C.F.R. § 1024.41(b)(2)(i)(B)*.

For the same reasons, I must deny SLS's motion. Although the company asserts that its December 21, 2016 notice "request[ed] additional documents," it does not acknowledge or respond to Kavanagh's testimony that SLS told her she needed to submit the quit claim deed (testimony I accept as true in reviewing SLS's motion).

ii. 2017 Notices

Kavanagh is likewise entitled to summary judgment, as to liability, on her claim respecting the three 2017 notices. It is undisputed **[*24]** that these notices directed Kavanagh (or her ex-husband) to submit a "Letter of Explanation" without specifying what it was that Kavanagh or Ralston needed to explain.

Far from supporting the company's position, the definition of "Letter of Explanation" in the notices themselves only reinforces the conclusion that SLS violated Regulation X. SLS defines "Letter of Explanation" as a letter from the borrower that "explain[s] discrepancies found that need further clarification." (Doc. 48, PageID 2122). The definition presumes the existence of "discrepancies" that have been "found" by SLS and communicated to the borrower, but it is undisputed that the notices at issue did not identify any such "discrepanc[y]."

A notice that fails to advise a borrower what information she must submit to complete her loss mitigation application — and that suggests by means of a generally applicable definition that she make a phone call to find out what the servicer should have, but failed, to tell her — is not a notice that "state[s] the additional documents and information the borrower must submit to make the loss mitigation application complete[.]" *12 C.F.R. § 1024.41(b)(2)(i)(B)*.

Because there is no genuine factual dispute on this question, **[*25]** I will grant Kavanagh's motion for summary judgment as to liability on this claim and deny SLS's motion.

d. Review of Kavanagh's Applications

Regulation X also requires that a servicer evaluate a

[4] SLS's account notes actually reflect that the company was seeking one of two documents: either the "recorded QCD [quit claim deed] or for the cobrwr to complete RMA [request for mortgage assistance] and send supporting docs." (Doc. 43-8, PageID 1467).

borrower for all loss mitigation options within thirty days of receiving a complete application. 12 C.F.R. § 1024.41(c)(1)(ii).

Kavanagh argues that SLS violated this requirement twice.

First, she contends that as of December 14, 2016 - when she orally advised SLS that she was the only borrower whose name was on the title — her application was complete, but the company failed to conduct the required evaluation. (Doc. 43, PageID 1402).

Second, Kavanagh argues that SLS again had all necessary information to evaluate her second loss mitigation application on November 13, 2017. (*Id.*). Nevertheless, the company asked her to provide a letter of explanation — even though Kavanagh's complaint in this case contained a copy of the deed. (Doc. 43, PageID 1402; *see also* Doc. 1-4, PageID 31-32).

Neither party is entitled to summary judgment on the claim respecting the first loss mitigation application. As discussed above, there is a factual dispute whether SLS had the original deed when it began servicing Kavanagh's loan. Depending on how **[*26]** a jury resolved that dispute, it could find either that Kavanagh's application was complete or incomplete after the December 14, 2016 phone call.[5]

Second, SLS is entitled to summary judgment on the claim respecting the second loss mitigation application.

It is undisputed that, after SLS received that application, it sent Kavanagh a notice advising her that the application was not complete. (Doc. 38-24, PageID 1311). It is also undisputed that, even though the letter did not specify what information SLS was seeking, Kavanagh responded by submitting to SLS a letter "to explain my employment." (Doc. 38-25, PageID 1321). After SLS received that submission, it "conducted a review of [Kavanagh's] application for a mortgage relief option," provided Kavanagh with "a list of the mortgage relief options [she was] evaluated for," and explained "the result of each" option that SLS considered. (Doc. 38-27, PageID 1334). Thereafter, Kavanagh received a loan modification. (Doc. 38-28).

Although Kavanagh argues that her application had to be complete once she submitted the deed with her complaint, she cites no evidence in the record showing that SLS considered the second application complete. *Cf.* *Fed. R. Civ. P. 56(c)(1)(A)* **[*27]** . Indeed, Kavanagh's brief in support of her motion for summary judgment does not respond to SLS's argument vis-à-vis the second loss mitigation application. (Doc. 49, PageID 2152).

For these reasons, SLS is entitled to summary judgment with respect to review of the second application.

2. QWR Claims

"If [a] servicer of a federally related mortgage loan receives a qualified written request from the borrower . . . for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 5 days," excluding holidays and weekends. *12 U.S.C. § 2605(e)(1)(A)*. Within thirty days after receiving a QWR, a servicer must do one of three things:

> (A) make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction[;]
>
> (B) after conducting an investigation, provide the borrower with a written explanation or clarification that includes -
>
> > (i) to the extent applicable, a statement of the reasons for which the servicer believes that account of the borrower is correct as determined by the servicer[; or]
>
> (C) after conducting an investigation, **[*28]** provide the borrower with a written explanation or clarification that includes -
>
> > (i) information requested by the borrower or an explanation of why the information requested is unavailable[.]

12 U.S.C. § 2605(e)(2)(A)-(C).

a. Reasonable Investigation

Kavanagh alleges that SLS "failed to take appropriate action" in response to the "Notice of Error," first set forth in her January 25, 2017 QWR, that the company had mishandled her loss mitigation application. (Doc. 43,

[5] For the same reason, summary judgment is not warranted as to Kavanagh's claim that SLS did not advise her of her right to appeal. A servicer must provide such notice only when the application is complete, *see* *12 C.F.R. § 1024.41(c)(1)(i)*, and whether Kavanagh's application was complete is a disputed factual question.

PageID 1412). There she complained that SLS insisted that she provide a quit claim deed from her ex-husband, even though her application included a copy of the divorce court's order awarding her sole title to the home. (Doc. 38-15, PageID 1015).

Kavanagh maintains that, had SLS conducted a reasonable investigation, as 12 U.S.C. § 2605(e)(2) required it do, "it would have learned that a quit claim deed may not be 'necessary' and instructed [her] to submit proof of current ownership." (Doc. 43, PageID 1412).

SLS makes two responses.

First, SLS observes that a servicer must respond to a QWR only if it requests "information relating to the servicing of [the] loan." 12 U.S.C. § 2605(e)(1)(A). For purposes of this provision, "servicing" means "receiving any scheduled periodic payments from a borrower pursuant **[*29]** to the terms of any loan" and "making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan." 12 U.S.C. § 2605(i)(3).

Because Kavanagh's QWR sought information relating to loss mitigation — a request that, at its core, asked SLS to alter or modify the terms of the original loan — SLS contends that it had no duty to respond to Kavanagh's QWR. (Doc. 38-1, PageID 923).

Second, and in any event, SLS contends that it reasonably determined that the quit claim deed was necessary to complete Kavanagh's application. (*Id.*, PageID 925).

I agree the SLS that Kavanagh's January 25, 2017 QWR did not require a response because it did not request "information relating to the servicing of [a] loan." 12 U.S.C. § 2605(e)(1)(A). Rather, the QWR concerned a "loan modification," which "is a request to alter the terms of a loan." *Smallwood v. Bank of Am., N.A., 2015 U.S. Dist. LEXIS 160926, 2015 WL 7736876, *6 (S.D. Ohio 2015)*.

The definition of "servicing" "ensures that the statutory duty to respond does not arise with respect to *all* inquiries or complaints from borrowers to servicers." *Medrano v. Flagstar Bank, FSB, 704 F.3d 661, 666 (9th Cir. 2012)* (emphasis in original). Rather, "the types of servicing inquiries" that § 2605(e)(1)(A) "is directed at are those arising in the ordinary course of a borrower making, **[*30]** and a servicer applying, regularly scheduled mortgage payments." *Mbakpuo v. Wells Fargo Bank, N.A., 2015 U.S. Dist. LEXIS 94414, 2015 WL 4485504, *8 (D. Md. 2015)*. By so defining the term "servicing," RESPA "distinguishes between letters that relate to borrowers' disputes regarding servicing, on the one hand, and those regarding the borrower's *contractual relationship with the lender*, on the other." *Medrano, supra, 704 F.3d at 667* (emphasis supplied).

For these reasons, many courts have recognized that "[a] request for modification of a loan agreement . . . does not concern the loan's servicing" and thus does not trigger the servicer's duty to respond. *Medrano, supra, 704 F.3d at 667*; *accord* *Hudgins v. Seterus, 192 F. Supp. 3d 1343, 1349-51 (S.D. Fla. 2016)*; *Watson v. Bank of America, N.A., 2016 WL 3552061, *5 (S.D. Cal. 2016)*; *Mbakpuo, supra, 2015 U.S. Dist. LEXIS 94414, 2015 WL 4485504 at *8*; *Christenson v. Citimortgage, Inc., 2013 U.S. Dist. LEXIS 133445, 2013 WL 5291947, *6 (D. Colo. 2013)*.

I agree with these decisions and hold that Kavanagh's QWR of January 25, 2017 did not trigger SLS's duty to respond because it concerned her application for a loan modification, rather than the "servicing" of that loan.

Kavanagh's reliance on *Cole v. JPMorgan Chase Bank, N.A., 2016 U.S. Dist. LEXIS 114409, 2016 WL 4491731 (S.D. Ohio 2016)*, is unavailing here.

That case did not hold, as Kavanagh implies, that "a QWR asserting that the servicer was avoiding evaluating the borrower's application [for a loan modification] by repeatedly claiming the application was incomplete" triggered the servicer's duty to respond under § 2605(e)(1)(A). Rather, the court held that the plaintiff's allegations stated a plausible claim under 12 U.S.C. § 2605(k)(1), which forbids a servicer to fail to **[*31]** "take timely action to respond to a borrower's requests to correct errors relating to . . . avoiding foreclosure" or fail to comply with "any other obligation found by the Bureau of Consumer Financial Protection, by regulation, to be appropriate." *Cole, supra, 2016 U.S. Dist. LEXIS 114409, 2016 WL 4491731 at *9*.

Here, however, Kavanagh did not bring a claim under § 2605(k)(1). (Doc. 1, PageID 12-13); *see* *Christenson v. Citimortgage, Inc., 2014 U.S. Dist. LEXIS 130231, 2014 WL 4637119, *3 (D. Colo. 2014)* (distinguishing between QWR claims brought under § 2605(k)(1)(C) and QWR claims brought under § 2605(e)(1)(A)).

The only argument that Kavanagh makes in her briefs,

moreover, is that "[e]rrors related to a servicer's failure to provide a borrower accurate information regarding loss mitigation or that a servicer is not giving a loss mitigation application proper consideration falls within the definition of servicing." (Doc. 43, PageID 1410; *see also* Doc. 49, PageID 2156 (same argument in reply brief)). That is not correct, for the reasons already given, and SLS is entitled to summary judgment on this claim.

b. Force Placed Insurance

Kavanagh also claims that SLS "failed to adequately respond to [her] notice of error regarding forced placed insurance." (Doc. 43, PageID 1413).

The QWR advised SLS that Kavanagh had maintained homeowner's insurance at all times on her property, and that it was improper **[*32]** to purchase such insurance and charge her for it. (Doc. 38-15, Page 1014). She asked SLS to: 1) "correct the forced placement of insurance against her account and correct the escrow payments to reflect that SLS is not paying for force place insurance"; 2) remove all charges related to the force placed insurance; and 3) explain why SLS applied that insurance in the first place. (*Id.*, PageID 1014-15).

SLS contends that it properly responded to Kavanagh's QWR because it explained, first, that when it began servicing Kavanagh's account, the account had a negative escrow balance of $7,988.70 in delinquent taxes. (Doc. 38-17, PageID 1079). It also explained that a previous escrow analysis that had been conducted occurred when the forced-placed insurance was in effect. (*Id.*). SLS then explained that the "force-placed insurance was canceled" on January 13, 2017, and that it would provide Kavanagh with a new escrow analysis. (*Id.*). Finally, SLS refunded the $730 it had previously charged Kavanagh for the insurance. (Doc. 38-5, PageID 945).

Viewing the undisputed evidence in the light most favorable to Kavanagh, no reasonable jury could return a verdict in her favor. The evidence shows that SLS: **[*33]** 1) explained why it had purchased force-placed insurance for Kavanagh's property; 2) explained that it had canceled that insurance; 3) stated that it would provide Kavanagh a new escrow analysis reflecting that it was not charging her for the force-placed insurance; and 4) issued her a full refund.

On these undisputed facts, no reasonable jury could find that SLS did improperly respond to the notice of error relating to force placed insurance. Accordingly, SLS is entitled to judgment as a matter of law on this claim.

c. "All Late Fees, Charges, Inspection Fees," Etc.

Kavanagh's third identified error disputed "all late fees, charges, inspection fees, property appraisal fees, force placed insurance charges, legal fees, and corporate advances" charged to her account. (Doc. 38-15, PageID 1015). It also disputed that "the Monthly mortgage payment is accurate given the mishandled escrow and insurance issues" that Kavanagh had identified earlier in the QWR. (*Id.*).

SLS argues that it is entitled to summary judgment on this claim because "such a broad dispute does not trigger a response from a servicer under RESPA." (Doc. 38-1, PageID 925). Regarding the allegedly erroneous mortgage amount, SLS **[*34]** contends that its response letter thoroughly addressed Kavanagh's complaints.

Kavanagh's briefs do not address this claim. (Doc. 43, PageID 1410-13; Doc. 49, PageID 2156-58).

I find that SLS is entitled to summary judgment.

First, SLS had no duty to respond to an "[o]verbroad notice of error" - that is, "if the servicer cannot reasonably determine from the notice of error the specific error that the borrower asserts has occurred." *12 C.F.R. § 1024.35(g)*. Kavanagh's notice of error concerning seven different categories of charges was overbroad, thereby relieving SLS of any obligation to respond. *Hittle v. Residential Funding Corp., 2014 U.S. Dist. LEXIS 107423, 2014 WL 3845802, *10 (S.D. Ohio 2014)* (holding that notice of error that was identical to Kavanagh's was overbroad for purposes of *12 C.F.R. § 1024.35(g)(1)(ii)*).

Second, there is no genuine dispute that SLS properly responded to the notice of error to the extent that it complained about the incorrect monthly payment amount. (Doc. 38-17, PageID 1079). The company explained the amounts due by referencing: 1) how the prior loan servicer had paid delinquent taxes, and that amount had transferred to SLS; 2) the presence of the negative escrow balance [i.e., the account was in default]; 3) the mistaken, and corrected, issuance of force placed insurance; and 4) the due date of the loan, **[*35]** the current interest rate, the amount owed, and the interest charged. (*Id.*).

On these undisputed facts, a jury could find only that SLS satisfied its burden to respond under *12 U.S.C. §*

2605(e)(2)(B).

B. FDCPA Claims

"The Fair Debt Collection Practices Act prohibits a debt collector from the use of 'any false, deceptive, or misleading representation or means in connection with the collection of any debt.'" Wallace v. Washington Mut. Bank, F.A., 683 F.3d 323, 326 (6th Cir. 2012) (quoting 15 U.S.C. § 1692e).

To make out a claim under the FDCPA, "(1) plaintiff must be a 'consumer' as defined by the Act; (2) the 'debt' must arise[ ] out of transactions which are 'primarily for personal, family or household purposes;' (3) defendant must be a 'debt collector' as defined by the Act; and (4) defendant must have violated § 1692e's prohibitions." Id. at 326.

The parties initially dispute whether SLS is a "debt collector."

For purposes of the FDCPA, a "debt collector" is "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Excluded from that definition, however, is "any person collecting or attempting **[*36]** to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person[.]" 15 U.S.C § 1692a(6)(F)(iii).

SLS argues that it falls within the (F)(iii) exemption because, "at the time SLS began servicing the loan [in] April 2016, the loan balance was current" and not in default. (Doc. 38-1, PageID 927). In support, the company cites payment records showing that "the loan was paid through March of 2016" when SLS became Kavanagh's servicer. (Doc. 47-1, PageID 2112 at ¶9; *see also* Doc. 38-5, PageID 945). SLS also relies on Kavanagh's deposition testimony that she kept the loan current and never received a notice of default.

Kavanagh responds that SLS is a debt collector because "the overwhelming evidence shows that the account was in default when SLS acquired servicing rights." (Doc. 43, PageID 1405).

Pointing to "the loan documents that govern the parties' relationship" as "the best source to determine . . . if a default has occurred," Kavanagh contends that her account was in default "under the Note for unpaid taxes." (Doc. 43, PageID 1405). Kavanagh also cites a mortgage statement from her prior servicer **[*37]** showing that, as of February 13, 2016, the "Total Amount Due" on her loan was over $10,000. (Doc. 43-6, PageID 1449). Thereafter, in October, 2016, SLS issued a mortgage statement showing that Kavanagh's account was past due in the amount of $9,310.56. (Doc. 43-11, PageID 1483).

SLS's reply does not address Kavanagh's argument that she was in default under the terms of the Note. (Doc. 48, PageID 2128-29). It acknowledges that there was an outstanding escrow balance, but contends, without reference to any relevant contract or provision of law, that this did not constitute a default. (*Id.*, PageID 2128).

Even viewing the evidence in the light most favorable to SLS, a reasonable jury could find only one thing: Kavanagh's debt was in default when SLS acquired servicing rights.

The FDCPA does not define when a debt is in default for purposes of the (F)(iii) exemption. Accordingly, "[i]n the absence of a clarifying amendment by Congress . . . the determination of whether a debt is in default is to be made by a court on a case-by-case basis, and . . . applicable contractual or regulatory language defining the point of default may be instructive." Church v. Accretive Health, Inc., 2014 U.S. Dist. LEXIS 173199, 2014 WL 7184340, *3 (S.D. Ala. 2014) (internal quotation marks omitted).

The note that **[*38]** Kavanagh executed provides that she "will be in default" if she "fail[ed] to fulfill any promise made under this agreement." (Doc. 43-3, PageID 1431). One promise that Kavanagh made was to "pay all taxes, assessments and other fees payable on the property." (*Id.*). It is undisputed that Kavanagh fell behind on her taxes and, despite keeping up with her principal and interest payments, owed over $10,000 to her prior servicer in February, 2016, just two months before SLS acquired the servicing rights. (Doc. 43-1, PageID 1418 at ¶¶8-9). Indeed, SLS's second assistant vice president for default administration confirmed this. (Doc. 47-1, PageID 2113 at ¶9).

This undisputed evidence establishes that Kavanagh's debt was in default when SLS acquired servicing rights in April, 2016. The exemption in 15 U.S.C § 1692a(6)(F)(iii) is therefore inapplicable as a matter of

law, and SLS is a debt collector for purposes of this suit.

Unfortunately, SLS's opposition brief to Kavanagh's motion for summary judgment did not address the merits of her FDCPA claims. Although I have discretion to treat Kavanagh's motion as undisputed and rule on it without the benefit of SLS's views, *see Fed. R. Civ. P. 56(e)(2)-(3)*, I decline to take that course here. Rather, I **[*39]** will hold a status/scheduling conference at which the parties should be prepared to discuss whether they can reach a resolution of this case in light of the rulings in this order. If they are not so able, I will direct SLS to file a response brief, adjudicate the FDCPA claims, and set the case for trial.

Conclusion

It is, therefore,

ORDERED THAT:

1. Defendant Specialized Loan Servicing LLC's motion for summary judgment (Doc. 38) be, and the same hereby is, granted in part and denied in part as provided herein.
2. Plaintiff Diana Kavanagh's motion for summary judgment (Doc. 43) be, and the same hereby is, granted in part and denied in part as provided herein.
3. The clerk of court shall forthwith set this case for a telephonic status/scheduling conference.

So ordered.

/s/ James G. Carr

Sr. U.S. District Judge

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[Cite as *Gembarski v. PartsSource, Inc.*, 2020-Ohio-981.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

EDWARD F. GEMBARSKI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,	:	**O P I N I O N**
	:	**CASE NO. 2016-P-0077**
Plaintiff-Appellee,	:	
- vs -	:	
PARTSSOURCE, INC.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2013 CV 0001.

Judgment: Reversed and remanded.

Thomas J. Connick, Connick Law, LLC, 25550 Chagrin Boulevard, Suite 101, Cleveland, OH 44122 (For Plaintiff-Appellee).

Jeffrey J. Wedel, Stephen S. Zashin, and *Helena Oroz,* Zashin & Rich Co., L.P.A., Ernst & Young Tower, 950 Main Avenue, 4th Floor, Cleveland, OH 44113 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} This matter is before the court upon the order of the Supreme Court of Ohio reversing and remanding this court's judgment and opinion in *Gembarski v. PartsSource, Inc.* 11th Dist. Portage No. 2016-P-0077, 2017-Ohio-8940, as it related to this court's determination of PartsSource's third assigned error pertaining to the issue of waiver as well as class certification. *See Gembarski v. PartsSource, Inc.*, 157 Ohio

St.3d 255, 2019-Ohio-3231, ¶44-47. Because the Supreme Court did not address either of PartsSource's first or second assignments of error, our analysis and disposition of those assigned errors in *Gembarski*, 2017-Ohio-8940, ¶11-55, are unaffected by the Supreme Court's remand order and are therefore final, pursuant to the law-of-the-case doctrine. With this in mind, the instant matter is reversed and remanded to the Portage County Court of Common Pleas for further proceedings consistent with this opinion, as well as the Supreme Court's analysis and disposition in *Gembarski*, 2019-Ohio-3231.

{¶2} On October 1, 2012, appellee filed a class-action complaint for damages against appellee in the Summit County Court of Common Pleas. Appellee filed an answer and the case was transferred to the Portage County Court of Common Pleas by stipulation of the parties. On September 22, 2015, appellee filed a motion to certify class action and a motion to modify/amend class definition. Appellee opposed the motion. On March 31, 2016, the motion to modify/amend class definition was granted.

{¶3} On May 2, 2016, appellant filed a brief in opposition to appellee's motion to certify class action. PartsSource argued that it had instituted an alternative-dispute-resolution program in January 2011 and that, under that program, employees who entered into an arbitration agreement waived their right to file a lawsuit in favor of binding arbitration. Mr. Gembarski, however, refused to sign the arbitration agreement. As a result, PartsSource argued Mr. Gembarski could not meet the typicality necessary for his motion to certify. PartsSource argued his claims or defenses were not typical of the claims or defenses of the putative class as employees who signed arbitration agreements would be precluded from participating in the case. PartsSource also

claimed that Mr. Gembarski failed to establish adequacy because his interests diverged from those putative class members who were subject to the arbitration agreement.

{¶4} Mr. Gembarski argued PartsSource had waived the defense of arbitration because it had participated in the litigation and had not asserted the defense previously, which was inconsistent with its alleged right to arbitrate. Mr. Gembarski asserted that, because of the waiver, there was nothing barring the unnamed class members from participation in the class action.

{¶5} In response, PartsSource argued that its right to demand arbitration was not triggered at the inception of the lawsuit because Mr. Gembarski did not enter an agreement to arbitrate. As such, it would have been premature to assert any argument relating to arbitration prior to the class-certification phase of the litigation – the point at which the arbitration defense/attack could be used to arguably preclude certification of the class.

{¶6} After holding a hearing, the magistrate found PartsSource knew of its alleged right to arbitrate since the filing of the class action. And PartsSource actively and vigorously participated in the litigation over the course of several years and never mentioned any argument relating to arbitration. The magistrate determined that PartsSource's actions were "manifestly inconsistent with its alleged rights of arbitration." Hence, the magistrate concluded PartsSource waived any right to arbitrate the matter or attack the certification on that basis.

{¶7} PartsSource filed objections to the magistrate's decision, which were opposed by Mr. Gembarski. Ultimately, the trial court overruled the objections and adopted the magistrate's decision. PartsSource appealed to this court and assigned

three errors relating to the trial court's judgment adopting the magistrate's decision, including the argument that the trial court erred in concluding Mr. Gembarski satisfied the Civ.R. 23's class-certification prerequisites. This court affirmed the judgment of the trial court, holding PartsSource was aware of its right to assert the arbitration defense from the inception of the class action. *Gembarski*, 2017-Ohio-8940, ¶66. This court further observed that even though Mr. Gembarski was not a party to the arbitration provision, PartsSource "had notice that other potential class members who suffered from the harm alleged in the complaint would be bound by the arbitration clause." *Id.* This court observed that PartsSource's "failure to assert the arbitration defense in its answer, or a supplement thereto, or seek to enforce the right to arbitration at some point prior to its opposition to certification was fundamentally inconsistent with its right to assert the defense." *Id.* Accordingly, this court concluded that PartsSource waived the arbitration defense to the typicality and adequacy requirements to class certification. *Id.*

{¶8} PartsSouce filed a discretionary appeal to the Supreme Court. The Court accepted the jurisdictional appeal. As its propositions of law, PartsSource asserted:

> **{¶9}** (I) Typicality and/or adequacy of representation are lacking where a named plaintiff who is not subject to arbitration seeks to represent unnamed putative class members who are subject to arbitration.
>
> **{¶10}** (II) A party to a class action cannot waive defenses against non-parties who are not yet under the court's jurisdiction – the proper time to raise defenses against non-named, hypothetical putative class members who are not yet parties is at the class certification stage.
>
> **{¶11}** (III) A party to a lawsuit does not waive the right to arbitrate by failing to assert arbitration as an affirmative defense; instead, waiver of the right to arbitrate is based upon the totality of the circumstances.

{¶12} The Court addressed PartsSource's second and third proposition of law, but did not reach the merits of the first proposition. In so doing, the Court reversed this court's judgment, concluding:

> **{¶13}** PartsSource did not waive the right to raise the arbitration defense, because prior to the class-certification stage of the proceedings, PartsSource did not have a right to arbitrate with Gembarski, who was the only named party. Further, because PartsSource did not have an obligation to raise the arbitration defense, its failure to do so has no impact on PartsSource's ability to raise the Civ.R. 23(A) argument.
>
> **{¶14}** PartsSource did not waive the right to assert a Civ.R. 23(A) argument, because it had no duty to raise that argument at any time prior to the class-certification stage of the proceedings. PartsSource properly provided a general denial in its answer and raised the Civ.R. 23(A) argument at the class-certification stage of the proceedings. Thus, the lower courts erred in determining that PartsSource had waived any argument pertaining to Civ.R. 23(A) or the arbitration defense. Accordingly, we reverse the judgment of the court of appeals on the issue of waiver. *Gembarski*, 2019-Ohio-3231, *supra*, ¶44-45.

{¶15} The Court therefore reversed this court's judgment and opinion as it related to the waiver analysis and remanded the matter for this court to consider PartsSource's assignments of error in light of the foregoing holding. *Id.* at ¶47. We shall proceed in accord with the Court's order. PartsSource's three assignments of error provide:

{¶16} "[1.] The trial court abused its discretion by adopting the magistrate's findings, which adopted appellee's proposed findings verbatim, over appellant's objection where the record does not contain competent and credible evidence supporting those findings.

{¶17} "[2.] The trial court abused its discretion in adopting the magistrate's finding of fact and conclusion of law which by improperly engaging in a merits based

inquiry, certifying a proposed class that is unascertainable and ordering PartsSource to ascertain the putative class members.

{¶18} "[3.] The trial court abused its discretion in summarily concluding that appellee satisfied Civ.R. 23's seven prerequisites, where the record does not contain competent and credible evidence supporting that conclusion, and where such conclusion is against the manifest weight of the evidence."

{¶19} As indicated at the outset of this opinion, the merits of PartsSource's first and second assignments of error were not the subject of the Supreme Court's opinion in *Gembarski*, 2019-Ohio-3231. As a result, our disposition of those assignments of error in *Gembarski*, 2017-Ohio-8940 remain intact pursuant to the law-of-the-case doctrine.

{¶20} With this in mind, the Ohio Supreme Court has identified seven prerequisites for maintaining a class action derived from Civ.R. 23:

> **{¶21}** (1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be met. *Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67, 71 (1998).

{¶22} Moreover, "Civ.R. 23(B)(3) states that in order to certify a class in an action for damages, two findings must be made by the trial court. First, it must find that questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and second, the court must find that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *In re Consol. Mgte. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-

Ohio-6720, ¶7. "A party seeking certification pursuant to Civ.R. 23 bears the burden of demonstrating by a preponderance of the evidence that the proposed class meets each of the requirements set forth in the rule." *Cullen v. State Farm Mut. Auto Ins. Co., 137 Ohio St.3d 373, 2013-Ohio-4733,* paragraph three of the syllabus.

{¶23} In *Gembarski*, 2019-Ohio-3231, the Supreme Court found merit to PartsSource's argument challenging this court's affirmance of the trial court's judgment on the issue of waiver. The Court's disposition is related to this court's determination, in *Gembarski*, 2017-Ohio-8940, that PartsSource's third assignment of error lacked merit. In light of the Supreme Court's ruling, we now hold PartsSource could not waive the arbitration attack to certification prior to the filing of the motion to certify the class. The unnamed putative class members were not parties to the action prior to class certification and, as a result, PartsSource was not required to raise an arbitration defense prior to such proceedings. Instead, PartsSource was required only to deny allegations in Mr. Gembarski's complaint in order to preserve the arbitration challenge for the certification phase, the point at which the trial court must consider, inter alia, whether Mr. Gembarski's claims were typical of unnamed putative class members and whether he could adequately represent those unnamed putative class members. Accordingly, this matter must be reversed and remanded to the trial court to consider that challenge to the typicality and adequacy prerequisites on the merits.

{¶24} In this respect, PartsSources's third assignment of error has merit.

{¶25} We acknowledge that Mr. Gembarski, in his original response brief, made an alternative argument in support of the trial court's decision. Specifically, borrowing from the magistrate's decision, Mr. Gembarski pointed out that even if no waiver

occurred or could have occurred, the arbitration agreement did not apply to preclude participation because, "[n]oticeably absent from [PartsSource's] Arbitration Agreement is a class action waiver barring the absent Class Members from participating in a class action." Mr. Gembarski asserts that PartsSource, the apparent drafter of the writing, chose to omit any reference to a class-action waiver in the arbitration agreement; and, because a contract is strictly construed against the drafter, there is nothing precluding the unnamed members who signed the agreement from participating in the class action with Mr. Gembarski as the class representative. We do not agree with Mr. Gembarski's construction of the agreement.

{¶26} A plain reading of the terms of the arbitration agreement demonstrate that it encompasses the claims sought to be raised through the class action lawsuit. The agreement states, in part:

{¶27} The **only** claims that I can bring against PartsSource outside of the ESP [Employment Solution Program] are criminal claims, and claims for workers' compensation or unemployment compensation benefits. * * * **I understand that, by signing this Agreement, and except where prohibited by law, I am giving up forever my right (and that my heirs, spouse, agents and representatives) to file a lawsuit against PartsSource in a court, to seek and obtain legal or equitable relief through a court, and to have a jury decide the claims that I might want to bring against PartsSource.** (Emphasis sic.)

{¶28} The arbitration agreement specifically limits the claims that can be brought outside of the arbitration process, and the claims upon which Mr. Gembarski premises his theories of liability are not listed. Thus, pursuant to expressio unius est exclusio

alterius, employees who are/were signatories to the agreement are precluded from filing or participating in the class actions where the right to arbitration is asserted. As such, typicality and adequacy could not be satisfied by recourse to Mr. Gembarski's alternative argument. We accordingly reject the same.

{¶29} For the foregoing reasons, the matter is reversed and remanded to the Portage County Court of Common Pleas for further proceedings consistent with this opinion as well as the Supreme Court's opinion in *Gembarski*, 2019-Ohio-3231.

MATT LYNCH, J.,

MARY JANE TRAPP, J.,

concur.

[Cite as *Bank of NY Mellon v. Urbanek*, 2020-Ohio-985.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

THE BANK OF NEW YORK MELLON f.k.a. THE BANK OF NEW YORK, SUCCESSOR INDENTURE TRUSTEE TO JPMORGAN CHASE BANK, N.A., AS INDENTURE TRUSTEE ON BEHALF OF THE NOTEHOLDERS OF THE CWHEQ INC., CWHEQ REVOLVING HOME EQUITY LOAN TRUST, SERIES 2006-D,	:	**O P I N I O N**
	:	**CASE NO. 2019-L-067**
Plaintiff-Appellee,	:	
- vs -	:	
JAMES A. URBANEK, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 2018 CF 001758.

Judgment: Affirmed.

James W. Sandy, McGlinchey Stafford, 3401 Tuttle Road, Suite 200, Cleveland, OH 44122 (For Plaintiff-Appellee).

David N. Patterson, P.O. Box 1423, Willoughby, OH 44096 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, James A. Urbanek, appeals the June 29, 2019 judgment of the Lake County Court of Common Pleas granting summary judgment in favor of appellee, The Bank of New York Mellon f.k.a. The Bank of New York, Successor Indenture

Trustee to JPMorgan Chase Bank, N.A., as Indenture Trustee on behalf of the Noteholders of the CWHEQ Inc., CWHEQ Revolving Home Equity Loan Trust, Series 2006-D ("BONY"), and issuing a decree in foreclosure. For the reasons set forth herein, the judgment is affirmed.

{¶2} In March 2006, Mr. Urbanek executed a home equity credit line agreement (the "Note") with non-party Aegis Funding d.b.a. Aegis Home Equity ("Aegis") in the amount of $185,000 and an open-ended mortgage (the "Mortgage") (collectively, the "Loan") with Mortgage Electronic Registration Systems ("MERS") as nominee for Aegis, which granted a security interest in certain property located in Painesville, Ohio, Permanent Parcel No. 08A024A000250 (the "Property").

{¶3} The Note contained two endorsements on the last page: one from Aegis to Aegis Mortgage Corporation, and one from Aegis Mortgage Corporation to Countrywide Bank, N.A. An allonge contained two additional endorsements: one from Countrywide Bank, N.A. to Countrywide Home Loans, Inc., and one from Countrywide Home Loans, Inc. in blank. In September 2011, the Mortgage was assigned to BONY by MERS in an Assignment of Mortgage (the "Assignment").

{¶4} BONY asserts, and Mr. Urbanek does not dispute on appeal, that he defaulted on the Loan by failing to make the agreed payments beginning in September 2010. Accordingly, BONY accelerated the Loan and commenced the subject foreclosure in October 2018. In May 2019, BONY filed a motion for summary judgment, attaching in support an affidavit from Ms. Regina Irving-Francis, an Assistant Vice President at Bank of America, N.A. ("BANA"), the servicer of the Loan. To this affidavit, Ms. Francis attested, was attached a "true and accurate" copy of the Note, Mortgage,

and the payment history. Mr. Urbanek responded to the motion with objections and his own affidavit. The court ultimately granted summary judgment in BONY's favor. Mr. Urbanek now appeals, assigning two errors for our review.

{¶5} "In order to obtain summary judgment, the movant must show 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) it appears from the evidence that reasonable minds can come to but one conclusion when viewing evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party." *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336 (1996). Appellate courts review a trial court's decision to award summary judgment de novo and review the evidence without giving deference to the trial court's decision. *Id.*

{¶6} Furthermore, Civ.R. 56(E) sets forth the requirements for affidavits submitted in support of summary judgment and provides, in pertinent part, that "[s]upporting and opposing affidavits shall be made on personal knowledge. * * * [A]n adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

{¶7} Mr. Urbanek's first assignment of error states:

> **{¶8}** Reviewing Appellee-Plaintiff's Motion for Summary Judgment de novo, the record is clear and convincing that the trial court erred to the prejudice of the Appellant by granting the Appellee-Plaintiff's Motion for Summary Judgment in favor of the Appellee.

{¶9} Under this assignment of error, Mr. Urbanek raises two sub-issues.

> **{¶10}** [1.] The Affidavit submitted by Appellee-Plaintiff was insufficient to warrant summary judgment and should not have been considered by the trial court for analyzing the motion for summary judgment before it.

{¶11} [2.] The evidence and Affidavits submitted by the Appellee-Plaintiff was insufficient to warrant summary judgment on the complaint as Appellee failed to sufficiently and properly establish that it is the true real party in interest and has proper standing.

{¶12} Under this assigned error, Mr. Urbanek argues that Ms. Francis failed to indicate if she personally observed the original, blue-ink Note and that she failed to sufficiently establish that BONY was and remains the holder of the Note, or otherwise was a real party in interest with standing in the instant matter. We do not find these arguments meritorious.

{¶13} First, we address Mr. Urbanek's challenges to the validity and sufficiency of BONY's affidavit. While this court has not had the opportunity to consider whether an affiant must state in the affidavit that he or she observed the *original* Note before attesting to information contained therein, various other Ohio appellate courts have.

{¶14} In *Wachovia Bank of Delaware, N.A. v. Jackson*, 5th Dist. Stark No. 2010-CA-00291, 2011-Ohio-3203, the Fifth District Court of Appeal found that "in order to properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials [and] * * * the affiant must state he or she was able to compare the copy with the original and verify the copy is accurate, or explain why this cannot be done." *Id.* at ¶40, 49.

{¶15} The Sixth District Court of Appeals has held similarly. *See HSBC Mtge. Servs., Inc. v. Edmon*, 6th Dist. Erie No. E-11-046, 2012-Ohio-4990. In *Edmon*, the Sixth District reversed the lower court, which found "it immaterial regarding [the affiant] not seeing the original Note when she made the affidavit * * *. She knew the original was in Plaintiff's custody. She has a file copy in the file she reviewed and the original Note was in the * * * office where they are retained." *Id.* at ¶4. The Sixth District

determined that the Civ.R. 56(E) requirement of personal knowledge "is satisfied by a statement in the affidavit declaring that the copies of the documents submitted are true and accurate reproductions of the originals." *Edmon, supra,* ¶11, citing *State ex rel. Corrigan v. Seminatore,* 66 Ohio St.2d 459 (1981).

{¶16} We do not, however, find *Seminatore* to support this proposition. In that case the Ohio Supreme Court held that, "[t]he specific allegation in the affidavit that it was made upon personal knowledge is sufficient to meet this requirement of Civ.R. 56(E) and, if the adverse party contends otherwise, an opposing affidavit setting forth the appropriate facts must be submitted. * * * The requirement of Civ.R. 56(E) that sworn or certified copies of all papers referred to in the affidavit be attached is satisfied by attaching the papers to the affidavit, coupled with a statement therein that such copies are true copies and reproductions." *Id.* at 467. Absent from this holding is any requirement that the affiant must make express statement attesting to a review of the original documents in order to establish personal knowledge.

{¶17} Moreover, other Ohio appellate courts have also rejected this as a requirement. In *Wells Fargo Bank v. Hammond*, 8th Dist. Cuyahoga No. 100141, 2014-Ohio-5270, the Eighth District held that it "has not adopted this as a requirement under Civ.R. 56(E), nor do we intend to do so because the Ohio Supreme Court has not made this a requirement of Civ.R. 56(E)." *Id.* at ¶37, citing *HSBC Mtge. Servs. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778. *See also Wells Fargo Bank, N.A. v. Lundeen,* 8th Dist. Cuyahoga No. 107184, 2020-Ohio-28, ¶25 (finding it sufficient that the affiant "averred that she was a bank officer, had reviewed the bank's business records, and had personal knowledge of their contents, * * * that the

documents attached to her affidavit were copies of the note, mortgage, notice of default, and merger documents."); *Hancock Fed. Credit Union v. Coppus*, 3rd Dist. Seneca No. 13-15-19, 2015-Ohio-5312, ¶22 ("while [Civ.R. 56(E)] requires that documents referenced in the affidavits be sworn or certified copies, the affiant does not need to expressly 'state he or she was able to compare the copy with the original and verify the copy is accurate, or explain why this cannot be done' * * *. Rather, '[t]he requirement of Civ.R. 56(E) that sworn or certified copies of all papers referred to in the affidavit be attached is satisfied by attaching the papers to the affidavit, coupled with a statement therein that such copies are true copies and reproductions.'")

{¶18} We adopt the Third and Eighth District's reasoning and do not find Ms. Francis' affidavit was deficient for failing to expressly state she viewed the original Loan documents. It is reasonable to assume from her affidavit that she based her affidavit upon personal knowledge and that BONY was in possession of the original documents.

{¶19} Ms. Francis stated that "BANA typically maintains a hard-copy file of certain loan documents, an electronic file of imaged loan documents and correspondence, and electronic records * * *." Mr. Urbanek points to this as evidence that she did not review the original "blue-ink" documents. However, we do not find this to definitively support Mr. Urbanek's assertions. It is not unreasonable for the loan servicer to keep copies of the documents, while the owner or holder maintains the originals. Indeed, Ms. Francis averred she had "access to and [has] reviewed the records of the loan taken out by [Mr. Urbanek]." She also averred that she has "personal knowledge of the facts contained in this affidavit by virtue of [her] position at BANA, [her] familiarity with certain BANA practices and procedures, and based upon

[her] review and analysis of the relevant business records and other BANA documents references and attached" and that "[BONY] has possession of the promissory note and held the note at the time of filing the foreclosure complaint." It is logical to assume from these statements that BONY was in possession of the *original* documents and that Ms. Francis had access to and reviewed the *originals*, even though BANA, as servicer, only kept copies.

{¶20} This holding aligns with similar findings of this court. In *Bank of Am. v. Merlo,* 11th Dist. Trumbull No. 2012-T-0103, 2013-Ohio-5266*,* this Court found that to show the bank had standing at the time the complaint was filed, the affiant need not expressly state the bank was in possession of the "original" note, but a statement that the bank "had possession of the note" was sufficient. This court reasoned that "[s]ince [the affiant] did not qualify her testimony by saying the bank has possession of a copy of the note, she was referring to the actual note itself, i.e., the original, rather than a copy." *Id.* at ¶18.

{¶21} As Mr. Urbanek did not reference any competent evidence to contradict Mr. Francis averments, he failed to show there remained an issue of material fact on this matter.

{¶22} Moreover, insofar as Mr. Urbanek argues BONY failed to establish it was a holder with standing to enforce the Note, we also find this argument without merit. Mr. Urbanek questions whether BONY had standing to commence this action, alleging "bogus assignments," "unenforceable blank endorsements," and a "post-filing assignment." The record does not support his assertions.

> **{¶23}** Whether a plaintiff has standing to initiate a foreclosure action turns on whether they are a person entitled to enforce the instrument at

> issue. * * * R.C. 1303.31(A) identifies three classes of persons who are 'entitled to enforce' an instrument, such as a note: (1) the holder of the instrument, (2) a nonholder in possession of the instrument who has the rights of a holder, and (3) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to R.C. 1303.38 or R.C. 1303.58(D). *PNC Bank v. Kereszturi*, 11th Dist. Trumbull No. 2014-T-0062, 2015-Ohio-957, ¶19 (citation omitted).

{¶24} Civ.R. 17(A) states, in pertinent part, that "[e]very action shall be prosecuted in the name of the real party in interest." "In foreclosure actions, the real party in interest is the current holder of the note and the mortgage." *Wells Fargo Bank, N.A. v. Sessley,* Franklin App. No. 09AP-178, 2010-Ohio-2902, ¶11. "Although the plaintiff in a foreclosure action must have standing at the time suit is commenced, proof of standing may be submitted subsequent to the filing of the complaint." *Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 2015-Ohio-1484, ¶17. "Whether standing exists is a matter of law that we review de novo." *Bank of New York Mellon v. Grund*, 11th Dist. Lake No. 2014-L-025, 2015-Ohio-466, ¶25.

{¶25} A "holder" in this context is "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." R.C. 1301.201(B)(21)(a). "When an instrument is endorsed in blank, the instrument becomes payable to bearer and may be negotiated by transfer of possession alone * * *." R.C. 1303.25(B).

{¶26} Here, the final endorsement on the Note is in blank. Mr. Francis averred that BONY "has possession of the promissory note and held the note at the time of filing the foreclosure complaint." As discussed above, Mr. Urbanek has not sufficiently refuted that attestation. Thus, we find BONY sufficiently established it was a holder of the Note.

{¶27} Finally, Mr. Urbanek argues that "the note was severed from the mortgage at origination, which had the effect of rendering the mortgage unenforceable as such was subsequently assigned and endorsed." He argues it is clear that the original lender, Aegis, agreed the Note would be held by Aegis and the Mortgage would remain with the MERS. Thus, he argues, when the Note was transferred, the Mortgage did not follow. We find, however, no evidence in the record to suggest the note and the mortgage were severed.

{¶28} The Ohio Supreme Court has held that "a mortgage is not property separate and distinct from the note which it secures, but * * * the mortgage security is an incident of the debt which it is given to secure, and, in the absence of a specific agreement to the contrary, passes to the assignee or transferee of such debt." *Edgar v. Haines,* 109 Ohio St. 159, 164 (1923). *See also Bank of America v. Jones*, 11th Dist. Geauga No. 2014-G-3197, 2014-Ohio-4985; *Bank of Am., N.A., v. Pasqualone,* 10th Dist. Franklin No. 13AP-87, 2013-Ohio-5795 ("where a note refers to the mortgage and the mortgage refers to the note, the clear intent of the parties is to keep the note and mortgage together."); *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ("[t]he attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien."); *U.S. Bank Natl. Assn. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, (7th Dist.) ("the negotiation of a note operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered."); and Section 5.4 of the Restatement III, Property (Mortgages) ("on rare occasions a mortgagee will disassociate the

obligation from the mortgage, but courts should reach this result only upon evidence that the parties to the transfer agreed. Far more commonly, the intent is to keep the rights combined, and ideally the parties would do so explicitly.")

{¶29} Here, Section 18A of the Note states, "[Aegis] may transfer and assign [its] rights and obligations under this Agreement and the Mortgage at any time without [Mr. Urbanek's] consent." The Note references the Mortgage and the Mortgage references the Note, and nothing in the record suggests that any party or parties intended to sever the two at any time. Furthermore, as discussed above, BONY has established that it was the holder of the Note with standing to bring this action in foreclosure, and has submitted the Assignment of Mortgage, showing it was transferred to BONY in 2011.

{¶30} Accordingly, Mr. Urbanek's first assignment of error is without merit.

{¶31} Mr. Urbanek's second assignment of error states:

> **{¶32}** The trial court erred to the prejudice of Appellant by granting the Appellee's Motion for Summary Judgment even though the Appellee failed to prove that it satisfied all conditions precedent mandated by the National Housing Act of 1934 (12 U.S.C. § 1701 et seq.) and 42 U.S.C. §3534(a) and rescission and other rights set forth in 15 U.S.C. 1635 and The Truth and Lending Act (15 U.S.C. §1601, *et seq*).

{¶33} Under this assigned error, Mr. Urbanek argues that BONY failed to show it complied with conditions precedent required by the United States Department of Housing and Urban Development ("HUD"), particularly those of 24 C.F.R. § 203.602 and § 203.604, requiring giving written notice of default and conducting a face-to-face meeting with the mortgagor before a third month's default. BONY argues Mr. Urbanek's Loan was not HUD/FHA insured and thus those regulations do not apply.

{¶34} This and other Ohio appellate courts have held that compliance with HUD regulations is only required in cases in which the loan is HUD/FHA insured. *U.S. Bank*

Nat'l Ass'n v. Martz, 11th Dist. Portage No. 2013-P-0028, 2013-Ohio-4555. Here, there is no indication that the Loan was HUD/FHA insured. Both the Note and the Mortgage state that these documents are "governed by federal law to the extent applicable and that, with respect to state law, the loan * * * is made entirely within the provisions of the Ohio Mortgage Loans Act, section 1321.51 to 1321.60 of the Ohio Revised Code."

{¶35} In *Martz,* this court found that substantially similar language in a mortgage failed to establish that the loan was HUD/FUA insured, finding "[t]he recognition of the fact that the mortgage, as with any business transaction occurring within the territorial United States, is subject to federal law does not demonstrate that the mortgage is federally insured or that federal housing regulations have otherwise been incorporated into the agreement." *Id.* at ¶16. As nothing in the Loan documents here indicate this Loan was HUD/FUA insured, BONY was not required to comply with HUD requirements.

{¶36} Accordingly, Mr. Urbanek's second assignment of error is without merit.

{¶37} In light of the foregoing, the judgment of the Lake County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, J.,

MARY JANE TRAPP, J.,

concur.

[Cite as *Delly v. Harbor Freight Tools USA, Inc.*, 2020-Ohio-919.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CHRISTOPHER DELLY, :

Plaintiff-Appellant, :

No. 108489

v. :

HARBOR FREIGHT TOOLS USA
INC., ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: March 12, 2020

Civil Appeal from the Cuyahoga County Common Pleas Court
Case No. CV-18-908512

Appearances:

Michael T. Conway, *for appellant*.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Bruce G. Hearey, and Corey Noel Thrush, *for appellees*.

SEAN C. GALLAGHER, J.:

{¶ 1} Christopher Delly appeals the dismissal of his complaint, which followed the denial of his motion to vacate a binding arbitration award in favor of Harbor Freight Tools USA Inc. We affirm.

{¶ 2} Delly commenced an action against his former employer, Harbor Freight, claiming wrongful termination in violation of state law. That action was voluntarily dismissed without prejudice after Harbor Freight sought to enforce its contractual right to binding arbitration. The parties agreed that the arbitration was exclusively under the procedures set forth in the Federal Arbitration Act, 9 U.S.C. 10 et seq. The arbitrator concluded that Harbor Freight was entitled to an award in its favor upon all of Delly's wrongful termination claims.

{¶ 3} Unsatisfied with the arbitrator's decision, Delly filed a new action within three months of the arbitrator's award in Harbor Freight's favor. The refiled complaint included the same wrongful termination allegations as the original complaint, a new breach of contract claim in which Delly preemptively complained that Harbor Freight breached the terms of the arbitration agreement by not permitting a de novo appeal of the arbitrator's award to the common pleas court, and a claim to vacate the arbitration award. Neither of the parties have discussed the scope of the trial court's jurisdiction to review the claims advanced in the refiled complaint.

{¶ 4} Instead, Harbor Freight contended that the doctrine of res judicata precluded Delly from asserting the wrongful termination claims because those were

conclusively resolved in the binding arbitration, and that the breach of contract claim should be dismissed for failure to state a claim because the unambiguous terms of the contract do not provide for a de novo appeal of the arbitration award to the common pleas court. In addition, Harbor Freight asked the trial court to treat Delly's claim seeking to vacate the arbitration award as the motion contemplated under 9 U.S.C. 11 and to deny the same as unsubstantiated. The trial court agreed with Harbor Freight, and Delly timely appealed that decision.

{¶ 5} In this appeal, Delly claims the trial court erred in granting the motion to dismiss because the arbitration agreement provided Delly the right to appeal the arbitration award to the trial court under the de novo appellate standard, and such an error impacted the trial court's dismissal of the remaining allegations. We find no merit to Delly's argument, but we do so based on the procedural posture of the case that has been largely overlooked by the parties.

{¶ 6} According to Delly, the "trial court found that the only arbitration award review standard it could apply to resolve [his] Complaint in accord with [Harbor Freight's Dispute Resolution Policy] was the Federal Arbitration Act or a state law arbitration act narrow standard of review," instead of the "de novo" review that the parties contractually agreed to in their arbitration agreement.[1] The standard of review that Delly is evidently referring to is the trial court's standard in

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[1] The actual terms of the arbitration agreement provided in pertinent part that the losing party could seek judicial review of whether the award was supported by substantial evidence. Delly has not presented any authority for the proposition that the substantial evidence standard is the equivalent to a de novo review of the arbitration proceedings. App.R. 16(A)(7).

reviewing whether to vacate the arbitration decision. Under both the Federal Arbitration Act and R.C. Chapter 2711, unless an arbitration award is vacated or modified, the trial court or district court must confirm the arbitration award. As Delly has framed the issue, the question in this appeal is whether the Federal Arbitration Act or Ohio's version enacted under R.C. Chapter 2711 permits the parties to expand the standard of review applied in deciding whether to vacate an arbitration award.

{¶ 7} Although the parties both refer to the Federal Arbitration Act as the source of our review, we need not consider or rely on the federal construct. Although the arbitration agreement in this case expressly relies on the procedures set forth under 9 U.S.C. 9, 10, and 11, those provisions vest the federal courts with broad authority to enforce arbitration agreements. *Ortiz-Espinosa v. BBVA Secs. of Puerto Rico, Inc.,* 852 F.3d 36, 43 (1st Cir.2017). This enforcement includes confirming, modifying, or vacating an arbitration award. *Id.* Enforcement of arbitration agreements under the Federal Arbitration Act exclusively occurs in federal courts, and "[i]n fact, there is no explicit provision for post-award enforcement in state courts" under the federal law.

{¶ 8} The authority to vacate an arbitration award under the Federal Arbitration Act is in "the United States court in and for the district wherein the award was made." 9 U.S.C. 10(a). The Federal Arbitration Act is not pertinent to the current case in which Delly sought to vacate the arbitration award in state court.

{¶ 9} Assuming, for the sake of discussion, that the arbitration agreement in this particular case contemplated a de novo standard of judicial review, the threshold question is whether Ohio law permits parties to contractually expand the scope of judicial review of an arbitration decision beyond the limitations expressed in R.C. 2711.10. The answer to this question impacts the trial court's authority to review the claims underlying the arbitration award.

{¶ 10} Under Ohio law, "once an arbitration is completed, a court has no jurisdiction except to confirm and enter judgment (R.C. 2711.09 and 2711.12), vacate (R.C. 2711.10 and 2711.13), modify (R.C. 2711.11 and 2711.13), correct (R.C. 2711.11 and 2711.13), or enforce the judgment (R.C. 2711.14)." *State ex rel. Westlake v. Corrigan*, 112 Ohio St.3d 463, 2007-Ohio-375, 860 N.E.2d 1017, ¶ 21, quoting *State ex rel. R.W. Sidley, Inc. v. Crawford*, 100 Ohio St.3d 113, 2003-Ohio-5101, 796 N.E.2d 929, ¶ 22; *Champion Chrysler v. Dimension Serv. Corp.*, 2018-Ohio-5248, 118 N.E.3d 490, ¶ 10 (10th Dist.). Further, "the vacation, modification or correction of an award may only be made on the grounds listed in" R.C. Chapter 2711 and only when such an application is timely filed under R.C. 2711.13. *Warren Edn. Assn. v. Warren City Bd. of Edn.*, 18 Ohio St.3d 170, 173, 480 N.E.2d 456 (1985). Accordingly, the jurisdiction of the trial court to review arbitration awards is statutorily limited. *Id.*; *Miller v. Gunckle*, 96 Ohio St.3d 359, 2002-Ohio-4932, 775 N.E.2d 475, ¶ 10; *Telle v. Estate of William Soroka*, 10th Dist. Franklin No. 08AP-272, 2008-Ohio-4902, ¶ 9. The trial court possesses jurisdiction only to review the

arbitration award; the court cannot review the merits of the claims underlying the award unless the award is vacated.

{¶ 11} In this case, Delly is claiming that the arbitration agreement contractually expanded the scope of judicial review of the arbitration award, which would have permitted the trial court to review the merits of the underlying claims without deference to the arbitration award. Under Ohio law, however, parties cannot contractually expand judicial review of arbitration awards beyond that which is provided by statute. *Cleveland v. IBEW Local 38*, 8th Dist. Cuyahoga No. 92982, 2009-Ohio-6223, ¶ 21, citing *Univ. Mednet v. Blue Cross & Blue Shield of Ohio*, 126 Ohio App.3d 219, 231-232, 710 N.E.2d 279 (8th Dist.1997).

{¶ 12} In *Ignazio v. Clear Channel Broadcasting, Inc.*, 165 Ohio App.3d 32, 2005-Ohio-6783, 844 N.E.2d 881, ¶ 47 (7th Dist.), for example, the parties agreed to what the appellate court considered to be a de novo review of the arbitration award by the trial court determining whether to vacate the arbitration award. *Id.* at ¶ 47. The Seventh District rendered two conclusions. It was first held that a trial court has no jurisdiction to conduct an expanded review of the arbitration award beyond that which is provided under R.C. Chapter 2711. *Id.* at ¶ 48; *see also IBEW Local 38*, *Univ. Mednet*. It was then concluded that because the parties agreed to an expanded judicial review of the arbitration award beyond the limitations under R.C. 2711.10, the arbitration was not binding, and as a result, the trial court should have vacated the award and proceeded to resolve the merits of the case. *Ignazio* at

¶ 49, citing *Schaefer v. Allstate Ins. Co.*, 63 Ohio St.3d 708, 715-716, 590 N.E.2d 1242 (1992).

{¶ 13} The Ohio Supreme Court accepted *Ignazio* for review. The proposition of law accepted for review in *Ignazio v. Clear Channel Broadcasting, Inc.*, 113 Ohio St.3d 276, 2007-Ohio-1947, 865 N.E.2d 18, was "whether a clause in an arbitration agreement that provides for greater judicial review of an award than is permitted under R.C. Chapter 2711 renders the entire agreement unenforceable, or whether the offensive clause may be severed and the remainder of the agreement enforced." As the issue was framed, the question was whether the invalid provision expanding the scope of review authorized under R.C. 2711.10 rendered the entire arbitration agreement to be unenforceable. *Id.* at ¶ 1. Thus, the proposition of law presumed that any agreement expanding judicial review beyond the enumerated standard under R.C. 2711.10 was invalid on its face.

{¶ 14} It was ultimately concluded that a provision in the arbitration agreement that expands the scope of review under R.C. Chapter 2711 is unenforceable but the invalid provision can be severed from the agreement. *Id.* at ¶ 17. Importantly for our purposes, a clause providing for an expanded judicial review of an arbitration award is "not an essential term of the agreement to arbitrate." *Id.* "[S]evering the offending provision and enforcing the remainder of the agreement is consistent with this state's strong public policy in favor of arbitration." *Id.* at ¶ 18.

{¶ 15} Although given the opportunity, the Ohio Supreme Court did not address the Seventh District's conclusion that parties cannot contractually expand the scope of judicial review provided in R.C. 2711.10. *Ignazio*, 165 Ohio App.3d 32, 2005-Ohio-6783, 844 N.E.2d 881, at ¶ 47; *IBEW Local 38*, 8th Dist. Cuyahoga No. 92982, 2009-Ohio-6223, at ¶ 21. "Judicial intervention statutorily is restricted by R.C. 2711.09, R.C. 2711.10 and R.C. 2711.11, which permit the court to interfere [with an arbitration award] only on certain enumerated grounds." S*chiffman v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 8th Dist. Cuyahoga No. 86723, 2006-Ohio-2473, ¶ 22. Further, any attempts to expand the judicial review of an arbitration award beyond the constraints of R.C. 2711.10 is statutorily invalid and such a clause must be severed from the arbitration agreement, the remainder of which can be enforced through R.C. Chapter 2711. *Ignazio*, 113 Ohio St.3d 276, 2007-Ohio-1947, 865 N.E.2d 18.

{¶ 16} Delly argues that neither the Federal Arbitration Act nor R.C. Chapter 2711 are the exclusive mechanisms to challenge an arbitration award. In other words, Delly claims to have a contractual right to judicial review of the arbitration award notwithstanding state or federal law. In support, Delly cites *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008). In *Hall St. Assocs.*, it was concluded that the Federal Arbitration Act provides the exclusive mechanism in which to enforce an arbitration award in federal court. *Id.* at 588. After so concluding, the Supreme Court opined:

> In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: *they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.*

(Emphasis added.) *Id.* at 590. Thus, although the scope of judicial review under the Federal Arbitration Act cannot be expanded in federal court, state law may afford greater latitudes under that particular state's statutory or common law scheme. *See, e.g., Raymond James Fin. Servs., Inc. v. Honea*, 55 So.3d 1161, 1163-1164 (Ala. 2010) (concluding that Alabama state law permitted a more expansive review of an arbitration award notwithstanding *Hall St. Assocs.*).

{¶ 17} Delly's reliance on *Hall St. Assocs.* is misplaced. *Hall St. Assocs.* does not create a right to contractually expand the scope of judicial review of an arbitration award. It merely permits an alternative to the federal scheme "where judicial review of different scope is arguable." *Id.* at 590. As noted above, Ohio law does not permit the parties to expand the scope of judicial review of an arbitration decision. The exclusive mechanism to seek the vacation of an arbitration award under Ohio law is R.C. 2711.10. Ohio does not recognize a contractual right to judicially review arbitration awards. Because R.C. Chapter 2711 limits the trial court's jurisdiction in reviewing an arbitration award, *Hall St. Assocs.* does not afford Delly any greater relief than is provided under Ohio law. Delly's arguments to the contrary are overruled.

{¶ 18} Under Ohio law, parties may not contractually expand the scope of judicial review of arbitration awards. *Corrigan*, 112 Ohio St.3d 463, 2007-Ohio-375; *Ignazio*, 113 Ohio St.3d 276. On this point, in order to vacate an arbitration award, the complaining party must set forth allegations demonstrating that (1) the award was procured by corruption, fraud, or undue means; (2) there was evidence of partiality or corruption on the part of the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing or in refusing to hear evidence material to the controversy, or any other misconduct prejudicing the party's rights; or (4) the arbitrators exceeded their powers or imperfectly executed those powers in such a way that a mutual, final, and definite award was not rendered. R.C. 2711.10. In the absence of any allegations demonstrating any of the enumerated grounds to vacate the award, the trial court must dismiss the action. *Progressive Max Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 8th Dist. Cuyahoga Nos. 82227, 82257, and 82417, 2003-Ohio-4348, ¶ 16.

{¶ 19} In this case, Delly's motion to vacate is entirely based on his claim that the arbitration agreement expanded the scope of judicial review of the arbitration decision. Delly's proposed argument cannot be accepted because doing so would necessarily conflict with binding authority. Further, there were no allegations in Delly's refiled complaint demonstrating any of the enumerated grounds to vacate an arbitration award under R.C. 2711.10 — the sole basis to vacate the arbitration award was limited to the de novo review argument. The trial court's jurisdiction was

therefore limited to determining whether to vacate the award under R.C. 2711.10. The trial court did not err in dismissing the action.

{¶ 20} We affirm the decision of the trial court.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

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SEAN C. GALLAGHER, JUDGE

EILEEN T. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR