[Cite as *Legacy Village Investors, L.L.C. v. Bromberg*, 2021-Ohio-2930.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

LEGACY VILLAGE INVESTORS, L.L.C., :

Plaintiff-Appellee, :

Nos. 109991 and 110197

v. :

SETH BROMBERG, ET AL., :

Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: August 26, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-918730

Appearances:

Dubyak Nelson, L.L.C., Robert J. Dubyak, and Christina C. Spallina, *for appellant* Seth Bromberg.

Paul W. Flowers Co., L.P.A., Paul W. Flowers, and Louis E. Grube, *for appellant* Bennet Ackerman.

Singerman, Mills, Desberg & Kauntz Co., L.P.A., and Michael R. Stavnicky, *for appellee*.

MICHELLE J. SHEEHAN, J.:

{¶ 1} Appellants, Seth Bromberg and Bennet Ackerman, appeal a judgment in favor of appellee, Legacy Village Investors, L.L.C. ("Legacy Village"), to recover rent due from appellants as guarantors of a commercial lease. As the terms of the personal guaranty allow the lease to be modified without notice or consent by the guarantors and Legacy Village did not waive the terms of the guaranty, we affirm the trial court's grant of summary judgment in favor of Legacy Village.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} In 2003, appellants signed a personal guaranty of payments due under a lease between their restaurant, Finally Fondue II, Inc. d.b.a. The Melting Pot ("the Restaurant"), as tenant and Legacy Village as landlord. The Lease Guaranty ("Guaranty") provided that if the Restaurant was in default of the lease, appellants would pay all rent, damages, and expenses due to Legacy Village from the default. The Guaranty specifically provided that it shall continue even if the lease is amended or modified. The Guaranty provided in part:

> 2. This Guaranty is absolute and unconditional and shall continue in full force and effect without in any way being affected by (i) the bankruptcy or insolvency of Tenant, its successors or assigns, (ii) the lack of notice to Guarantor of any default by Tenant under the Lease, (iii) any modifications or amendments to the Lease or (iv) the disaffirmance or abandonment by any trustee or receiver of Tenant, its successors or assigns.
>
> * * *
>
> 4. Guarantor does hereby expressly waive notice of non-payment, non-performance or non-observance and proof, notice and demand of or for the foregoing. Guarantor agrees that the validity of this

> instrument and all obligations of Guarantor hereunder shall continue as to any modification of the Lease and during any period that Tenant shall occupy the Premises.
>
> 5. Guarantor shall be liable under this Guaranty notwithstanding the assignment or transfer of the Lease or the subletting of the Premises, by operation of law or otherwise.
>
> 6. This Guaranty may not be amended, modified, discharged or terminated in any manner unless in writing signed by Landlord and Guarantor
>
> 7. Anything contained herein or in the Lease to the contrary notwithstanding, the personal liability of Guarantor hereunder shall be primary and not secondary. In any right, claim or action which shall accrue to Landlord hereunder or under the Lease, Landlord may, at its option, proceed against the Guarantor in any fashion it elects regardless of the action, if any, which Landlord has taken against Tenant. The title of this instrument and use of the words "Guaranty," "Guarantor," and "guarantees" shall in no manner limit the primary liability of Guarantor hereunder.

{¶ 3} In 2009, Ackerman sold his interest in the Restaurant to Bromberg pursuant to a Stock Purchase Agreement. In February 2014, the lease between Legacy Village and the Restaurant was amended to allow the Restaurant to pay rent that was in arrears by April 21, 2014. In 2018, the Restaurant again was in arrears, and in 2019, it was taken over by another party.

{¶ 4} On July 24, 2019, Legacy Village filed a complaint for breach of the Guaranty. Specifically, Legacy Village asserted that the lease was in default, it suffered damages, and appellants guaranteed payment under the lease and refused to pay the damages. In January 2020, Legacy Village filed motions for summary judgment against Bromberg and Ackerman. Legacy Village asserted that the Restaurant defaulted on the lease, the lease was taken over by a franchisor in 2019,

and that $242,667.85 in rent was owed, as well as interest, costs, and attorney fees. It further asserted that the Guaranty executed by appellants was absolute and unconditional.

{¶ 5} In March 2020, Bromberg filed a brief in opposition to the motion for summary judgment, which Ackerman later joined.[1] In their opposition to the motion, appellants argued that Legacy Village waived its rights under the Guaranty by modifying the lease. They further argued that because the lease was modified, the Guaranty was no longer in effect.

{¶ 6} On August 31, 2020, the trial court granted judgment in favor of Legacy Village and against appellants in the amount of $242,667.85, plus statutory interest from the date of judgment. Appellants each filed a notice of appeal of the judgment, and thereafter, this court granted their motion to consolidate the appeals.

II. LAW AND ARGUMENT

A. Appellants' Assignment of Error

{¶ 7} Appellants filed a joint brief and asserted a sole assignment of error which reads:

> The trial court erred, as a matter of law, by granting summary judgment in favor of plaintiff-appellee and against defendant[s]-appellants [Journal Entry dated Aug. 31, 2020].

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[1]Ackerman initially filed a cross-claim against Bromberg and a third-party complaint against the Restaurant seeking indemnification pursuant to the terms of the Stock Purchase Agreement. The cross-claim and third-party complaint were voluntarily dismissed the same day Ackerman joined Bromberg's opposition to the motion for summary judgment.

Appellants argue the trial court erred because 1) the Guaranty was no longer valid after the lease was amended in 2014, 2) Legacy Village waived its right to enforce the Guaranty by amending the lease, and 3) Legacy Village failed to attach the lease and thus did not show there were no genuine issues of material fact to be resolved. Ackerman separately argued that he cannot be held liable under the Guaranty after it was amended without his agreement.

{¶ 8} Legacy Village argues the trial court properly granted summary judgment because 1) the Guaranty remained in effect after the lease was amended, 2) its actions did not foreclose collection on the Guaranty, and 3) it demonstrated that no genuine issues of material fact remained in the case. It further argues that Ackerman remained a guarantor under the terms of the Guaranty after the lease was amended.

B. Standard of Review for Summary Judgment

{¶ 9} Under Civ.R. 56, the grant of a motion for summary judgment is appropriate where

> (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his or her favor.

Carter v. Officer Hymes, 8th Dist. Cuyahoga No. 108523, 2020-Ohio-3967, ¶ 20-23, citing *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978); Civ.R. 56(C).

{¶ 10} Summary judgment is granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Civ.R. 56(C). We review a trial court's grant of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Further, we adhere to the standards set forth in Civ.R. 56(C) and evaluate the record "in a light most favorable to the nonmoving party." *Saunders v. McFaul*, 71 Ohio App.3d 46, 593 N.E.2d 24 (8th Dist.1990).

C. Summary Judgment Was Properly Granted on the Record and the Guaranty Remained in Effect After Amendment of the Lease

{¶ 11} In its complaint, Legacy Village alleged appellants breached a personal guaranty. A guaranty is a contract, and "[c]ourts construe guaranty agreements in the same manner as they interpret contracts." *Parkway Business Plaza Ltd. Partnership v. Custom Zone, Inc.*, 8th Dist. Cuyahoga No. 87434, 2006-Ohio-5255, ¶ 15, citing *G.F. Business Equip. v. Liston*, 7 Ohio App.3d 223, 454 N.E.2d 1358 (10th Dist.1982). The interpretation of a contract is an issue of law to be resolved by the court. *Id*., citing *Alexander v. Buckeye Pipeline Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978). In construing the terms of a contract, the court need not go beyond the terms of the contract where those terms are "clear and unambiguous." *Id*., citing *Blosser v. Enderlin*, 113 Ohio St. 121, 148 N.E. 393 (1925), paragraph two of the syllabus.

{¶ 12} In support of its motion for summary judgment, Legacy Village provided an affidavit from its general counsel that the lease subject to the Guaranty was breached and $242,667.85 was owed because of that breach. In responding to the motion for summary judgment, appellants only challenged the continued validity and enforceability of the Guaranty specifically arguing that because there was an amendment to the lease, the amendment "conflicted with, overrode, and nullified" the Guaranty. Appellants further argued that by amending the lease, Legacy Village waived its right to enforce the Guaranty against appellants.

{¶ 13} Legacy Village asserts that provisions in the Guaranty defeat appellants' arguments that the amendment affected the validity of the Guaranty. It notes the 2014 lease amendment allowed the Restaurant an extension of time to repay past due rent. The Guaranty provides that it "shall continue in full force and effect without in any way being affected by * * * (iii) any modifications or amendments to the Lease" and that "Guarantor agrees that the validity of this instrument and all obligations of Guarantor hereunder shall continue as to any modification of the Lease and during any period that Tenant shall occupy the Premises."

{¶ 14} The terms of the Guaranty clearly and unambiguously provide for the Guaranty to remain in effect in the event of an amendment or modification. In *Parkway Business Plaza*, a guarantor made a claim of novation of a guaranty of a lease where the lease was amended seven times and was thereafter assigned. *Parkway Business Plaza Ltd. Partnership v. Custom Zone, Inc.*, 8th Dist. Cuyahoga

No. 87434, 2006-Ohio-5255. We found that the guaranty was not affected where it provided that guarantor would remain liable "notwithstanding * * * any amendment or modification of the provisions of the [l]ease." *Id*. at ¶ 3. Accordingly, appellants' arguments that the amendment nullified the Guaranty are not well taken.

{¶ 15} Additionally, Ackerman separately argues that he cannot be held liable because the lease amendment was done without his agreement and he had sold his interest in the restaurant to Bromberg. However, the terms of the Guaranty preclude this argument because it provides for the Guaranty to be in effect even where an amendment of the lease is made and where the Guaranty provides that he "expressly waive[d] notice of non-payment, non-performance or non-observance and proof, notice and demand of or for the foregoing" and that he "agree[d] that the validity of this instrument and all obligations of Guarantor hereunder shall continue as to any modification of the Lease and during any period that Tenant shall occupy the Premises." As such, because the Guaranty allows for the amendment of the lease and without notice of the tenant's default, Ackerman's argument is not well taken.

{¶ 16} Appellants characterize Legacy Village's agreement in 2014 to modify the lease as a "waiver" because Legacy Village failed to seek payment from them for the rent owed. They argue that the amendment therefore was an act inconsistent with the Guaranty and amounts to a waiver. In support of this argument, appellants cite to *Natl. City Bank v. Rini*, 162 Ohio App.3d 662, 2005-Ohio-4041, 834 N.E.2d 836, ¶ 35 (11th Dist.), in which a bank brought suit for breach of a guaranty. The guarantor alleged the bank waived its right to collect because the bank told the

guarantor he was not personally liable on the debt and that the debt was secured by business assets only. *Id*. The court found that the evidence presented by the guarantor were "operative facts which establish waiver by estoppel as a meritorious defense" and reversed a court's denial of the guarantor's motion for relief from judgment. *Id*. at ¶ 27.

{¶ 17} Appellants have not identified any evidence that Legacy Village informed them that they were no longer personal guarantors of the lease. Rather, the claimed waiver is that Legacy Village amended the lease and did not attempt to collect previous rent from them as guarantors. This claim is defeated by the terms of the Guaranty that specifically provides that "[i]n any right, claim or action which shall accrue to Landlord hereunder or under the Lease, Landlord may, at its option, proceed against the Guarantor in any fashion it elects regardless of the action, if any, which Landlord has taken against Tenant." Pursuant to this provision, Legacy Village had the option of seeking damages incurred by a breach of the lease from the tenant, from the guarantors, or from both. The Guaranty also provides that "[t]he obligations of Guarantor hereunder shall in no way be affected or impaired by Landlord's assertion of any rights against Tenant." Because the terms of the Guaranty contemplate amendments and provide for action solely against the tenant without affecting the Guaranty, any argument that a modification of the lease amounted to a waiver is without merit.

{¶ 18} Appellants finally argue that Legacy Village did not demonstrate that there were no remaining genuine issues of fact to be resolved because it did not

attach the lease to its motions for summary judgment and the Guaranty applied only to a "certain" lease. In its motions for summary judgment, Legacy Village provided affidavits that the lease was breached and that damages accrued because of the breach. Appellants did not contest the facts alleged in the affidavits, they only contested the validity and enforceability of the Guaranty. The affidavits in support of the summary judgment motions were executed by its representative and general counsel who had knowledge of the lease, the breach, and the Guaranty. It further provided a statement of the account and amounts due. The unchallenged facts contained in the affidavits were sufficient evidence for the trial court to grant the motions for summary judgment. For these reasons, appellants' sole assignment of error is overruled.

III. CONCLUSION

{¶ 19} The Guaranty executed by appellants provided that it would remain in effect notwithstanding amendments to the lease and regardless of whether Legacy Village sought to collect rent from the Restaurant, from appellants, or from both. As such, Legacy Village did not waive any rights under the Guaranty by amending the lease with the Restaurant to collect back rent due. Further, the evidence provided in support of the motions for summary judgment was sufficient to establish that no genuine issues of material fact remained and summary judgment was properly granted.

{¶ 20} Judgment affirmed.

It is ordered that appellee recover of appellants 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.

_____
MICHELLE J. SHEEHAN, JUDGE

EILEEN A. GALLAGHER, P.J., and
EILEEN T. GALLAGHER, J., CONCUR

[Cite as *US Bank Trust, N.A. v. Osborne*, 2021-Ohio-2898.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

US BANK TRUST, N.A. AS TRUSTEE FOR LSF10 MASTER PARTICIPATION TRUST	:	Case No. 20CA3930
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
DONALD OSBORNE, JR. ET AL.,	:	
Defendants-Appellants.	:	

APPEARANCES:

Tyler E. Cantrell, Young & Caldwell, LLC, West Union, Ohio, for Appellants.

David T. Brady, Suzanne M. Godenswager, Austin B. Barnes, III, Mark M. Schonhut, Jeffrey A. Panehal, Sandhu Law Group, LLC, Cleveland, Ohio, for Appellee.

Smith, P.J.

{¶1} Donald Osborne, Jr. and Oma Osborne, "Appellants," have appealed two judgment entries of the Scioto County Court of Common Pleas: (1) Judgment Entry and Order of the Court on Motion for Clarification of the Court's June 9, 2020 Entry on Summary Judgment; and, (2) Judgment Entry and Order of the Court on Motion for Summary Judgment as to Count Three. For the reasons which

follow, we find we do not have jurisdiction to consider this appeal. Accordingly, we dismiss the appeal for lack of a final appealable order.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} On July 12, 2019, U.S. Bank Trust, N.A. as Trustee for LSF10 Master Participation Trust, "Appellee," filed a complaint in foreclosure and other equitable relief against Appellants. Along with Appellants, Appellee named several additional defendants: the State of Ohio Department of Taxation; the Third Will Co., LLC; and the Scioto County Treasurer. The foreclosure complaint alleged as follows:

FIRST COUNT

1. Plaintiff is in possession and entitled to enforce a note executed by the Defendant, Donald W. Osborne Jr. aka Donald W. Osborne, a copy of which is attached hereto as Exhibit "A." By reason of default under the terms of the note and the mortgage securing same, plaintiff has declared the debt evidenced by said note due, and there is due hereon $47,611.19, together with interest at the rate of 6.000% per year from June 1, 2014, plus court costs, advances and other charges, as allowed by law. All conditions precedent required under the note, mortgage and other loan documents have been satisfied.

2. Plaintiff further states that Defendant, Donald W. Osborne, Jr. aka Donald W. Osborne, filed a petition commencing a case under Title 11 of the Bankruptcy Code, Chapter 7, in the United States Court, Southern District of Ohio, Western Division, and being Case No. 03-18518, and that Defendant was subsequently discharged and released from the

indebtedness due and owing Plaintiff on its promissory note as set forth in its Complaint as defendant Donald W. Osborne, Jr. aka Donald W. Osborne has been discharged in bankruptcy, that no personal judgment is sought herein against the Defendant.

SECOND COUNT

3. Plaintiff incorporates the allegation of Count One and further states that it is the holder of a mortgage, a copy of which is attached hereto as Exhibit "B." The mortgage was given to secure payment of the above-described note, and said mortgage constitutes a valid first lien upon the real estate described in the correct legal description which is attached hereto as Exhibit "C."

4. The mortgage was filed for record on September 24, 2003, in Volume 1040, Page 170 of the county recorder's records and assigned to Plaintiff on November 1, 2018, and recorded on December 12, 2018, in Volume 617, Page 738 of the Scioto County Records. The conditions of defeasance contained therein have been broken, and plaintiff is entitled to have said mortgage foreclosed.

5. Plaintiff says that the defendants herein may claim an interest in the subject property described in the subject mortgage.

6. Plaintiff states that the conditions of said Mortgage Deed have been broken, by reason of default in payment, and that the Mortgage Deed has therefore become absolute; Plaintiff has fulfilled all applicable conditions precedent; and Plaintiff is entitled to have the equity of redemption, if any, of the Defendants named herein foreclosed, and to have the subject real property appraised, advertised and sold, and the proceeds arising therefrom applied to the judgment of Plaintiff.

THIRD COUNT

7. Plaintiff incorporates herein by reference all of the allegations contained in the foregoing counts as though fully rewritten, herein.

8. This claim is brought pursuant to R.C. 5721.01 et seq., and a real controversy exists in that there is a genuine dispute, a judgment is sought that is not merely advisory in nature or based upon a hypothetical statement of facts, the issue tendered is appropriate for judicial resolution because it has an effect on a valuable property right, Plaintiff will suffer hardship if declaratory relief is denied, and speedy relief is in order to preserve the property rights.

9. Upon the property secured by the mortgage sits a manufactured home (hereinafter, "Manufactured Home").

10. According to the County Auditor, the Manufactured Home is not taxed as part of the real property. See Auditor's Property Information Printout, Exhibit "D."

11. The certificate of title to the Manufactured Home has not been surrendered to the Clerk of Court, meaning the Manufactured Home has not been converted to real property in the records of the Scioto County Auditor.

12. The Manufactured Home has had the wheels removed, is physically affixed to the ground by a cinder block base, and it [sic] attached to city water. See Picture attached to Exhibit "E."

13. It was the intent of the parties to the mortgage that the Manufactured Home be affixed to the real property secured

> by the mortgage, and Plaintiff would not have granted the mortgage would not have been granted [sic] had the Manufactured Home not been intended to be part of the real property.
>
> 14. Plaintiff is entitled to a declaratory judgment ordering that the Manufactured Home be declared affixed to the real property and deemed a part of the real property, and that the Manufactured Home may be sold as part of the real property pursuant to execution on any judgment Plaintiff may obtain in this case.

{¶3} The complaint requested judgment in favor of plaintiff in the above-requested amount and also requested that the real estate be ordered sold according to law. The complaint also requested that all other defendants be required to set up their liens or interests in said real estate or be forever barred from asserting the same. On July 15, 2019, the county treasurer filed an answer. On August 13, by fax, and on August 15, 2019, Appellants filed their answer.

{¶4} On September 30, 2019, Appellee filed a motion for summary judgment, asserting there were no genuine issues of material fact and Appellee was entitled to judgment as a matter of law. Also on that date, Appellee filed a motion for default judgment against defendant Third Will Co., LLC. On October 29, 2019, Appellants filed a memorandum contra to the motion for summary judgment.

{¶5} Appellants asserted a genuine issue of material fact as to the specific property subject to the mortgage. Appellants argued the original mortgage

attached to the complaint and motion for summary judgment contained a legal description for two parcels of land, not three. Furthermore, a mobile home located on the property subject to the mortgage also extended slightly onto a third parcel. However, Appellants claimed that the mobile home was not subject to the mortgage. Appellants supported their argument by attaching their responses to discovery submitted in a prior attempted foreclosure of the subject property which had been dismissed.

{¶6} Appellee filed a sur-reply in support of the motion for summary judgment. Appellee did not address Appellant's substantive argument. Appellee argued the evidence submitted with the memorandum contra, the discovery responses attached from the prior foreclosure proceedings but not properly attached to an affidavit, did not comply with Civ.R. 56(E). Therefore, Appellee claimed entitlement to judgment as a matter of law.

{¶7} The trial court conducted a telephonic status conference. The court subsequently ordered the parties to investigate the issue of the mobile home's pertinence to the foreclosure proceeding and to supplement the record within 45 days. On April 7, 2020, Appellee provided a supplemental filing. Appellants subsequently filed a memorandum in response to plaintiff's supplement.

{¶8} On June 9, 2020, the trial court issued a judgment entry and order of the court on motion for summary judgment. Specifically, the court ordered:

> 1. Summary judgment is granted as to the default on the mortgage and note as to the two parcel numbers * * *. Judgment is granted in the amount of $47,611.19 with 6.0% interest from the date of default in June 2014.
>
> 2. Summary judgment does not apply as to the mobile home on the parcels involved. As the mortgage never attached to the mobile home, it is not part of these proceedings.
>
> 3. Plaintiff shall prepare such documentation required to allow the property to proceed to foreclosure sale.
>
> 4. Costs to Defendants.

{¶9} On June 26, 2020, Appellee filed Plaintiff's Motion for Clarification of the Court's June 9, 2020 Journal Entry With Regard to Count III of Plaintiff's Complaint and Whether Judgment Encompasses Parcel No. 23-0075.000. On August 13, 2020, Appellee filed Plaintiff's Motion for Nunc Pro Tunc Correction of the Court's June 9, 2020 Judgment Entry to Include Parcel No. 23-0075.000. Contemporaneously, Appellee a filed Motion for Summary Judgment on Count III of the Complaint.

{¶10} On October 6, 2020, the trial court filed the two entries currently being appealed. In both entries, the trial court noted that Appellants had not replied to Appellee's motions. As to the Judgment Entry and Order of the Court

on Motion for Clarification of the Court's June 9, 2020 Entry on Summary Judgment, the court granted the motion. The Court ordered as follows:

1. Summary judgment as previously granted in the June 9, 2020 Entry and Judgment as to the default on the mortgage and note is for the two parcels described in the mortgage and note. These two parcels are comprised of three tax ID numbers: 23-0073.000, 23-0075.000, and 23-0076.000. Judgment is granted in the amount of $47,611.19 with 6.0% interest from the date of default in June 2014.

2. Plaintiff shall prepare such documentation required to allow the property to proceed to foreclosure sale.

3. Costs to the Defendants.

{¶11} As to the Judgment Entry and Order of the Court on Motion for Summary Judgment as to Count Three, the court ordered:

1. Summary judgment is granted as to Count Three of the Complaint. The mobile (manufactured) home on the property is a fixture and as such the mortgage and note as to the two parcels with tax ID Parcel numbers 23-0073.000(Parcel 1) 23-0075.000 and 23-0076.000 attach to and encumber the mobile home.

2. Defendants are ordered to surrender title to the mobile home, or have a duplicate title issued and surrendered to Plaintiff.

3. Plaintiff shall prepare such documentation required to allow the property to proceed to foreclosure sale.

4. Costs to the Defendants.

{¶12} This timely appeal followed.

LEGAL ANALYSIS

{¶13} Appellants contend that genuine issues of material fact are in contention. First, Appellants contend that Appellee does not have a lien on the mobile home. Second, Appellants contend that it is also unclear that the mobile home is even partially upon the mortgaged real estate. Appellants conclude Appellee is not entitled to judgment as a matter of law.

{¶14} Appellee contends that the trial court did not err in granting summary judgment in its favor. First, Appellee asserts that Appellants failed to present evidence in motion practice which complies with Civ. R. 56(E). Second, Appellee contends that Appellants have raised on appeal arguments which they failed to raise before the trial court. As indicated above, we do not reach the merits of the arguments raised as we have no jurisdiction to consider the appeal.

{¶15} " 'Appellate courts "have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district[.]" ' " *Milford Banking v. Adkins,* 4th Dist. Jackson No. 19CA07, 2020-Ohio-1481, at ¶ 8, quoting *Partners for Payment Relief DE L.L.C. v. Jarvis,* 4th Dist. Scioto No. 15CA3723, 2016-

Ohio-7562, ¶ 6, quoting Ohio Constitution, Article IV, Section 3(B)(2); see R.C. 2505.03(A). If a court's order is not final and appealable, we have no jurisdiction to review the matter and must dismiss the appeal. *Jarvis, supra; Eddie v. Saunders,* 4th Dist. Gallia No. 07CA7, 2008-Ohio-4755, ¶ 11.

{¶16} An order must meet the requirements of R.C. 2505.02 to constitute a final appealable order. *See Adkins, supra* at ¶ 9; *Jarvis, supra,* at ¶ 7, citing *Chef Italiano Corp. v. Kent State Univ.,* 44 Ohio St.3d 86, 88, 541 N.E.2d 64 (1989). Under R.C. 2505.02(B)(1), an order is a final order if it "affects a substantial right in an action that in effect determines the action and prevents a judgment[.]" To determine the action and prevent a judgment for the party appealing, the order " 'must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court.' " *Jarvis, supra, quoting Hamilton Cty. Bd. of Mental Retardation & Dev. Disabilities v. Professionals Guild of Ohio,* 46 Ohio St.3d 147, 153, 545 N.E.2d 1260 (1989).

{¶17} " 'Foreclosure actions proceed in two stages, both of which end in a final appealable judgment: the order of foreclosure and the confirmation of sale.' " *Adkins, supra,* at ¶ 10, *quoting Farmers State Bank v. Sponaugle,* 157 Ohio St. 3d 151, 2019-Ohio-2518, at ¶ 18. A judgment decree in foreclosure fully disposes of liability if it " 'determines the extent of each lienholder's interest, sets forth the

priority of the liens, and determines the other rights and responsibilities of each party in the action.' " *Jarvis, supra,* at ¶ 8, *quoting CitiMortgage, Inc. v. Roznowski,*139 Ohio St.3d 299, 2014-Ohio-1984, ¶ 39. Thus, to qualify as a final order under R.C. 2505.02(B)(1), a foreclosure decree must account for each lienholder's interest and delineate each lienholder's rights. *Id*. at ¶ 20-21; *Second Natl. Bank of Warren v. Walling,* 7th Dist. No. 01-CA-62, 2002-Ohio-3852, ¶ 18 ("a judgment entry ordering a foreclosure sale is not final and appealable unless it resolves all of the issues involved in the foreclosure, including the following: whether an order of sale is to be issued; what other liens must be marshaled before distribution is ordered; the priority of any such liens; and the amounts that are due the various claimants"); *See also Green Tree Servicing L.L.C. v. Columbus & Cent. Ohio Children's Chorus Found.,* 10th Dist. Franklin No. 15AP-802, 2016-Ohio-3426, ¶ 9.

{¶18} Appellants have not appealed a decree in foreclosure but have appealed the trial court's decisions on summary judgment. This case involves multiple parties and claims. Appellee initially named Appellants, the State of Ohio Department of Taxation, Third Will Co., LLC, and the Scioto County Treasurer as defendants in the foreclosure complaint. Presently, Appellee, Appellants, and Defendant Scioto County Treasurer are active parties.

{¶19} The Ohio Department of Taxation also did not participate in the underlying proceedings and has not participated in this appeal. The final judicial report indicates the Department filed a state tax lien on December 26, 2009, in the amount of $307.89.

{¶20} Defendant Third Will Co. LLC did not participate in the underlying proceedings and has not participated in the appellate proceedings. Appellee filed a motion for default judgment against the entity. As the record does not reflect the trial court's decision on the motion, we presume the motion to be overruled. *See Caterpillar Financial Services Corporation v. Tatman,* 2019-Ohio-2110, 137 N.E.3d 512 at ¶ 26 (4th Dist.). Nevertheless, the final judicial report filed September 30, 2019, indicates the mortgaged property herein is subject to a UCC financing statement filed against Appellant Donald W. Osborne, Jr. on August 12, 2014, in the Scioto County Recorder's Office. Other than this, the status of Third Will Co. LLC's claim cannot be gleaned from the record.

{¶21} The Scioto County Treasurer filed an answer admitting it had an interest in the real property identified in the complaint. The Treasurer requested that its interest in the subject property be declared a lien against the property and that it be paid in its priority. Nothing in the trial court's October 6, 2020 judgment entry addresses the Scioto County Treasurer's interest in this action.

{¶21} If a case involves multiple parties or multiple claims, the court's order must also meet the requirements of Civ.R. 54(B) to qualify as a final appealable order. *See Jarvis, supra,* at ¶ 9; *Chef Italiano Corp.* at 88. Under Civ.R. 54(B), "[w]hen more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay." Absent the mandatory language that "there is no just reason for delay," an order that does not dispose of all claims is subject to modification and is not final and appealable. *See Noble v. Colwell,* 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 (1989); *See* Civ.R. 54(B). The purpose of Civ.R. 54(B) is " 'to make a reasonable accommodation of the policy against piecemeal appeals with the possible injustice sometimes created by the delay of appeals[,]' * * * as well as to insure that parties to such actions may know when an order or decree has become final for purposes of appeal * * *." *Pokorny v. Tilby Dev. Co.,* 52 Ohio St.2d 183, 186, 370 N.E.2d 738 (1977), quoting *Alexander v. Buckeye Pipeline,* 49 Ohio St.2d 158, 160, 359 N.E.2d 702 (1977). In this case, the appealed-from judgment entries do not utilize the Civ.R. 54(B) language indicating there is "no just reason for delay."

{¶22} While the appealed-from judgment entries do direct Appellee to prepare "such documentation required to allow the property to proceed to foreclosure sale," the entries do not address the Scioto County Treasurer's interest in the matter. The entries do not address the amount of the Treasurer's interest. Nor do the entries address the priority of the Treasurer's interest or the Ohio Department of Taxation's lien. Thus, we are without a final appealable order in this matter and we lack jurisdiction to consider this appeal. Accordingly, we dismiss the appeal for lack of a final appealable order.

APPEAL DISMISSED.

JUDGMENT ENTRY

It is ordered that the APPEAL BE DISMISSED and that Appellant pay any costs herein.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Abele, J. and Hess, J., Concur in Judgment and Opinion.

For the Court,

_____
Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

2021 WL 3810384
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio, Western Division.

SAMUEL VOSS, Plaintiff,
v.
QUICKEN LOANS LLC, et al., Defendants.

Case No. 1:20-cv-756
|
08/26/2021

Stephanie K. Bowman, United States Magistrate Judge

MEMORANDUM OPINION AND ORDER [1]

***1** Plaintiff Samuel Voss filed a putative class action suit against Defendants Mortgage Electronic Registration Systems Inc. ("MERS") and Quicken Loans, LLC ("Quicken") in state court, alleging that Defendants failed to comply with state law when they did not file an entry of satisfaction of a mortgage on Plaintiff's property within 90 days of the sale of that property. Defendants removed the action to federal court on the basis of diversity jurisdiction. Pending before the Court is Defendants' motion for summary judgment. (Doc. 22; *see also* Docs. 23-24). Plaintiff has filed an opposing memorandum and supporting exhibits, (*see* Docs. 28, 30, 32-34), to which Defendants have filed a reply. (*see* Docs. 35-39). As explained below, this Court lacks subject matter jurisdiction. Therefore, remand to state court is required.

I. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, a court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The moving party has the burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has met its burden of production, the nonmoving party cannot rest on its pleadings, but must present significant probative evidence to defeat the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

The parties do not dispute the material facts relevant to key jurisdictional issues, including the basis for diversity jurisdiction and the standing of Plaintiff to proceed in this Court. Because the undisputed facts demonstrate that subject matter jurisdiction is lacking, the action will be remanded to state court for further proceedings.

II. Findings of Fact

1. On February 5, 2020, Plaintiff Voss purchased a property at 486 Stanley Avenue in Cincinnati, Ohio from Donald Dow, Jr.

2. Prior to the sale, Dow had obtained a loan from Quicken Loans, and executed a mortgage that listed MERS as mortgagee on behalf of Quicken Loans.

3. Dow used the proceeds of the sale of his property to satisfy his obligations to Quicken Loans on February 5, 2020.

4. After Dow satisfied his obligations to Quicken Loans, Quicken Loans prepared a satisfaction of Mr. Dow's mortgage (the "Dow Satisfaction").

5. Quicken Loans sent the Dow Satisfaction to the Recorder's Office for Hamilton County, Ohio by electronic means on May 26, 2020.

6. The Hamilton County Recorder's Office recorded the Satisfaction of Mortgage on May 27, 2020.

7. Under state law, Ohio Rev. Code § 5301.36(B), the satisfaction of a mortgage must be recorded within 90 days of the lien satisfaction, a deadline that expired for the Dow Satisfaction on May 5, 2020.

III. Analysis

***2** Defendants argue that they are entitled to summary judgment on two grounds: (1) because Plaintiff lacks standing to sue under Article III of the United States Constitution; and (2) because Ohio law would excuse the state law violation based upon the impacts of the COVID-19 pandemic and the order issued by the Governor of Michigan in response

to the pandemic. (Doc. 22 at 1). Prior to turning to the grounds advanced by Defendants, the undersigned considers *sua sponte* whether Defendants properly removed this case from state court under diversity jurisdiction. Concluding that diversity jurisdiction is lacking, the Court finds remand to state court to be appropriate for that reason alone.

In addition, however, the Court agrees with Defendants that Plaintiff lacks standing to sue in federal court under Article III. Plaintiff's lack of standing also deprives this Court of jurisdiction and requires remand. Based upon the conclusion that this Court lacks jurisdiction and that remand is required, the Court declines to reach Defendants' second argument, that the COVID-19 pandemic excused Defendants' compliance with Ohio R.C. § 5301.36(B).

A. The Amount in Controversy for Diversity Jurisdiction

Defendants removed this case from state court on the basis of diversity jurisdiction under 28 U.S.C. § 1332. As the removing party, Defendants bear the burden of showing that jurisdiction exists. "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between...citizens of different States." *Id*. On the record presented, the complaint clearly alleges that complete diversity exists insofar as the parties are citizens of different states. However, in order for removal to be proper, Defendants also were required to show that the "amount in controversy" exceeds $75,000. The requisite amount-in-controversy is not apparent from the face of the complaint.

It is incumbent upon the district court to raise the question of subject matter jurisdiction *sua sponte* whenever it appears from the pleadings or otherwise that jurisdiction is lacking. *Louisville & Nashville R.R. Co. v. Mottley,* 211 U.S. 149, 29 S.Ct. 42 (1908). Not only is a court permitted to raise the issue of its subject matter jurisdiction *sua sponte,* it must do so when a question as to its jurisdiction arises. *Clarke v. Mindis Metals, Inc.,* No. 95–5517, 1996 WL 616677, at *3 (6th Cir.Oct.24, 1996) ("Neither party has raised the jurisdictional issue this case presents, but it is axiomatic that we *must* raise issues of subject-matter jurisdiction *sua sponte"*) (emphasis added) (citing *Community First Bank v. Nat'l Credit Union Admin.,* 41 F.3d 1050, 1053 (6th Cir.1994)).

The essence of Plaintiff's claim is that Defendants violated a state statute that requires the satisfaction of a mortgage to be filed within 90 days. When a mortgage satisfaction is not timely filed, Ohio R.C. § 5301.36(C) specifically provides for "damages" in the set amount of $250.00 to accrue to "the mortgagor of the unrecorded satisfaction and the current owner of the real property to which the mortgage pertains." Plaintiff seeks statutory damages for himself, and on behalf of a putative class of other Ohio property owners who are entitled to statutory damages under Ohio R.C. § 5301.36(C) based upon the Defendants' failure to file the satisfaction of their liens within the 90-day period.

In order to meet the requirements of diversity jurisdiction for a putative class action,[2] a named plaintiff's individual damage claim must exceed $75,000. *See generally, Siding and Insulation Co., Inc. v. Acuity Mut. Ins. Co*., 754 F.3d 367, 373 (6th Cir. 2014); *Exxon Mobil Corp. v. Allapattah Services, Inc*., 125 S.Ct. 2611, 2620, 545 U.S. 546, 558 (2005) (holding that § 1367(a) confers supplemental jurisdiction over claims of other class members so long as at least one class representative satisfies the amount-in-controversy requirement and other claims are part of the same Article III case or controversy). Here, Plaintiff seeks damages "in an amount to be determined at trial, including, **but not limited to**, the amount of $250.00 for each violation of R.C. § 5301.36 *et seq*.," injunctive relief "[r]equiring Defendants to comply with R.C. § 5301.36," "costs and expenses of this lawsuit and reasonable attorneys' fees," prejudgment interest, and any other "equitable relief" deemed appropriate. (Complaint at 10-11, emphasis added).

***3** Defendants seize upon the "not limited to" language to argue that Plaintiff *could* be seeking damages in excess of $75,000. They note that in addition to the provision for an automatic sum of $250.00 in statutory damages, § 5301.36 "does not preclude or affect any other legal remedies or damages that may be available." R.C. § 5301.36(C). Defendants reason that this case is analogous to an action to quiet title in which the object of the litigation is the property itself. Therefore, they assert that the entire value of Plaintiff's residential property ($300,000) is "at issue" in this litigation.

It is true that in cases where the entire property is the object of the litigation, an action to quiet title satisfies the amount-in-controversy requirement if the value of the property at issue exceeds $75,000.

> When construing the amount in controversy requirement of a federal statute limiting the appellate jurisdiction of the federal courts, the Supreme Court once stated that "a suit to quiet the title to parcels of real property, or to remove a cloud therefrom, by which their use and enjoyment by the owner are impaired, is brought within the cognizance of the court, under the statute, only by the value of the property affected." *Smith v. Adams,* 130 U.S. 167, 175…(1889) (construing Act of March 3, 1885, ch. 355, 23 Stat. 443). Thus, the fair market value of [the subject parcel of land] speaks to the amount in controversy, not the damages that Plaintiff has alleged.

Johnson v. Shank, 2014 WL 794760, at *5 (S.D. Ohio 2014); *see also McGhee v. Citimortgage, Inc*., 834 F.Supp.2d 708, 712 (E.D. Mich. 2011) (in a suit to undo a foreclosure sale and quiet title, the property is the object of the litigation and the market value of the foreclosed property is the best measure of the amount in controversy); *Planning and Development Dept. v. Daughters of Union Veterans of Civil War*, 2005 WL 3163393, at *6 (E.D. Mich.2005) (holding that the amount in controversy exceeded $75,000 where plaintiffs alleged ongoing clouds on their title that precluded them from selling a building at market value).

The problem for Defendants in this case is that the analogy does not ring true. Plaintiff's complaint does not allege that there is any continuing "cloud on the title" that he seeks to clear in order to sell or lease the property, or that would make the entire value of the property the "object of suit." Unlike cases in which a plaintiff seeks to cancel a mortgage, avoid foreclosure, or otherwise remove an *ongoing* cloud from a title so that a plaintiff may have full use and enjoyment of his or her property, Plaintiff is not seeking that type of relief. Rather, Plaintiff alleges that Defendants' statutory violation placed only a temporary "cloud on the title of the property." (*See* Complaint at ¶19). It is undisputed that – assuming any cloud existed [3] – it was ephemeral in nature and evaporated three weeks later when the satisfaction of the lien was recorded.

Plaintiff does not place any monetary value on the temporary "cloud" beyond the $250.00 amount of statutory damages. Not only does Plaintiff not allege that his use and enjoyment of the property was in any way impaired *beyond* the alleged short-lived cloud on his title, but he testified that he was not even aware of that alleged cloud until after it had dissipated. And Defendants have offered undisputed testimony that Plaintiff was wholly unimpaired in his use or enjoyment of the property throughout the brief period during which the alleged cloud remained in place. In the absence of any alleged damages during the three-week period in May of 2020 *beyond* the $250.00 provided for by the Ohio statute, the case appears to have been improvidently removed from state court. [4] Therefore, remand to state court is required.

B. Plaintiff Lacks Standing to Proceed in Federal Court

***4** Even if a reviewing court were to find the existence of the requisite amount-in-controversy to establish diversity jurisdiction, the undersigned still would remand this case to state court based upon Plaintiff's lack of standing in federal court. Article III of the United States Constitution limits the power of federal courts to "Cases" and "Controversies." "For there to be a case or controversy under Article III, the plaintiff must have a 'personal stake' in the case - in other words, standing." *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2203 (2021) (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)). In order to prove he has standing, Plaintiff must show "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion*, 141 S.Ct. at 2203.

Here, Plaintiff cannot show a "concrete" injury-in-fact because he admits that the only injury he suffered was the transient cloud on his title created by the three-week delay in fling the satisfaction of the lien - a technical or procedural violation of state law that controlling Supreme Court authority confirms is insufficient to convey standing in federal court. "The Supreme Court has rejected the proposition that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.' " *Ward v. Nat'l Patient Account Servs*., ___ F.4th ___, 2021 WL 3616067 at *2 (6th Cir. Aug. 16, 2021) (quoting *Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016), additional citation omitted).

In *TransUnion*, the Supreme Court elaborated on *Spokeo's* conclusion that a plaintiff does not automatically satisfy the injury-in-fact requirement "whenever a statute grants a person a statutory right." *TransUnion*, 141 S. Ct. at 2205 (quoting *Spokeo*, 136 S. Ct. at 341), [5] *TransUnion* emphasizes that

"Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* At issue in *TransUnion* was whether a group of plaintiffs whose credit files contained misleading information that allegedly violated the Fair Credit Reporting Act ("FCRA"), but which information had not been disseminated to any third parties, had standing. The Court answered no.

> The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm. In cases such as these where allegedly inaccurate or misleading information sits in a company database, the plaintiffs' harm is roughly the same, legally speaking, as if someone wrote a defamatory letter and then stored it in her desk drawer. A letter that is not sent does not harm anyone, no matter how insulting the letter is.

Id., 141 S.Ct. at 2210.

As in *TransUnion*, the failure to timely file the Dow Satisfaction resulted in inaccurate information being maintained in the County's database for 22 days beyond what state law allowed, insofar as the database showed the continuing existence of a mortgage that had been fully satisfied.[6] However, like *TransUnion*, there was no "disclosure" of that inaccurate information to any third parties. No one attempted to sell or lease Plaintiff's property or otherwise had any opportunity to discover the inaccuracy caused by the delay in recording the Dow Satisfaction. For that reason, and because Plaintiff claims no other injury (and indeed was not even aware of the delay until being notified of it by his attorneys after the fact),[7] any "risk of harm" that was present during the excess 22 days that the Dow Satisfaction went unrecorded does not constitute a concrete injury. *See id.* at 2211 ("[T]here is a significant difference between (i) an actual harm that has occurred but is not readily quantifiable, as in cases of libel and slander *per se*, and (ii) a mere risk of future harm."); *Ward*, 2021 WL 3616067 at *3 (holding that a procedural violation of the **FDCPA** did not suffice to establish a concrete injury because "the mere failure to provide certain information does not mirror an intentional intrusion into the private affairs of another").

***5** Because Plaintiff was neither aware of the alleged risk of harm during the 22 days that it occurred, nor suffered any actual harm through disclosure of the inaccurate mortgage information, he lacks standing to proceed in this Court. *Accord* *TransUnion*, 141 S.Ct. at 2212; *id.* at 2207, n.3 ("[U]nder Article III and this Court's precedents, Congress may not authorize plaintiffs who have not suffered concrete harms to sue in federal court simply to enforce general compliance with regulatory law."). Following *TransUnion*, the Sixth Circuit similarly has held that a plaintiff does not have standing where he cannot show that the "risk" encompassed by a statutory violation has actually materialized. *See, e.g., Thomas v. TOMS King (Ohio), LLC*, 997 F.3d 629, 642-3 (6th Cir. 2021) (holding that plaintiff failed to show printing of additional digits on a credit card receipt caused actual harm or a risk of harm sufficient to confer standing); *Beaudry v. TeleCheck Services, Inc.*, 854 Fed. Appx. 44 (6th Cir. July 27, 2021) (holding that a request for statutory damages cannot redress a "**risk of future harm, standing alone**," and that the plaintiff lacked standing because she had no evidence that the cited risk ever materialized) (quoting *TransUnion* at 2210-11, emphasis original); *Ward*, 2021 WL 3616067 at *4.

Although the undersigned believes *TransUnion* and recent Sixth Circuit case law to be dispositive, the parties direct this Court's attention to cases outside the Sixth Circuit that have analyzed standing issues in the context of similar state lien satisfaction statutes. In particular, the Eleventh and Second Circuits both issued pre-*TransUnion* opinions that discuss a New York lien release statute, but that reached divergent results. Defendants rely upon the Second Circuit's decision in *Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016), in which that court affirmed the dismissal of a lawsuit alleging a violation of the New York statute where - like here - the plaintiff had not alleged "that he or anyone else was aware that the [satisfaction] had not been recorded during the relevant time period." *Nicklaw* holds that "the requirement of concreteness under Article III is not satisfied every time a statute creates a legal obligation," but only if a plaintiff has "suffer[ed] some harm or risk of harm from the statutory violation." *Id.* The Sixth Circuit previously described the reasoning of *Nicklaw* as "persuasive." *See* *Lyshe v. Levy*, 854 F.3d 855, 859-60 (6th Cir. 2017) ("a statutory violation in and of itself is insufficient to establish standing"). This Court

also finds *Nicklaw* to be persuasive because it is consistent with *Spokeo* and *TransUnion.*

In accepting *Nicklaw,* the undersigned necessarily rejects the reasoning of the Second Circuit in *Maddox v. Bank of New York Mellon Trust Company, N.A.*, 997 F.3d 436 (2d Cir. 2021). Decided a mere month prior to *TransUnion*, *Maddox* created a circuit split by holding that the statutory violation of the same New York mortgage release law was sufficient, standing alone, to support Article III standing. "The mortgage satisfaction-recording statutes create a substantive right, the violation of which produces a concrete, intangible harm." *Id.*, 997 F.3d at 446; *accord Villanueva v. Wells Fargo Bank, N.A.*, 2017 WL 11539677, at *2 (S.D.N.Y. Jan. 25, 2017) (concluding that *Nicklaw* was incorrectly decided based upon the "risk" of harm apparent from New York statute despite the fact that no one was aware of the delay until after the fact); *Weldon v. MTAG Servs., LLC*, 2017 WL 776648 at **5-7 (D. Conn. Feb. 28, 2017) (holding, despite *Nicklaw*, that plaintiff had alleged an Article III injury because the alleged failure to release liens posed "a risk of real harm to the interest in clear title" that Connecticut statute was "designed to protect.").

The differing opinions of the referenced cases might have presented a closer issue prior to *TransUnion.* However, at this point in time, *Maddox* can no longer be reconciled with controlling Supreme court authority.[8] Additionally, regardless of what the New York legislature may have intended, an examination of case law confirms that the Ohio legislature intended the $250.00 damage figure to serve as a statutory penalty for a procedural violation. The statute does preserve "legal remedies or damages that *may* be available." Ohio R.C. § 5301.36(C). (emphasis added). But case law suggests that other damages are only available if an actual, concrete injury has occurred and a plaintiff's substantive rights have been impacted, such as an adverse impact on the sale or lease of a property, or an adverse impact on a mortgagee's credit rating. *See Radatz v. FNMA*, 50 N.E.3d 527, 535, 145 Ohio St.3d at 483, 2016-Ohio-1137, ¶ 28 (Ohio 2016) (holding that "[i]f a borrower suffers actual harm resulting from a mortgage-recording error or delay - for example, a cloud on title that disrupts or prevents the disposition of encumbered property - R.C. 5301.36(C) allows the borrower to pursue a claim for damages" in addition to the statutory penalty).[9]

***6** Plaintiff argues that the statute itself confirms that his injury was sufficiently "concrete" because it defines the $250.00 to which he is entitled as "damages." And indeed, for the limited purpose of determining the applicable state statute of limitations, a majority of the Ohio Supreme Court found the Ohio legislature's statutory use of the term "damages" to be dispositive. See *Rosette v. Countrywide Home Loans, Inc.*, 825 N.E.2d 599, 602, 105 Ohio St.3d 296, 299, 2005-Ohio-1736, ¶ 16 (Ohio 2005).[10] However, Article III standing is a federal concept that must be determined under federal law. Notably, when asked to review the same statute under *federal law*, the Ohio Supreme Court clearly held that the $250.00 amount of "damages" specified by R.C. § 5301.36(C) constitutes a "penalty" as opposed to any type of actual damages. *Radatz*, 50 N.E.3d at 535-536, 145 Ohio St.3d at 483 (distinguishing *Rosette* because a "completely different test" applies to the determination of a penalty under federal law). Because Plaintiff here seeks recovery of what amounts to a penalty for a procedural violation of an Ohio statute, he does not have standing under Article III to sue in federal court.

Defendants seek judgment in their favor on the basis of Plaintiff's lack of Article III standing, urging this Court to find that an Ohio court would rule similarly under the different standing analysis that would apply in state court. But Article III standing is a federal concept that does not apply to actions brought in state court. *See Phillips Petroleum Co. v. Shutts*, 105 S.Ct. 2965, 2970, 472 U.S. 797, 804 (1985) ("Standing to sue in any Article III court is, of course, a federal question which does not depend on the party's prior standing in state court."); *Whitsette v. Marc Jacobs International, LLC*, 2018 WL 4002606, at *2 (N.D. Ohio Aug. 22, 2018) ("This Court's authority to grant relief consistent with Article III is a distinct issue from the Plaintiff's right to bring suit under state law.")

A state court is best suited to address whether Plaintiff has standing under Ohio law.[11] And because Defendants improperly removed Plaintiff's case from state court to this Court, remand rather than dismissal is the only appropriate remedy. *See* 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.") This Court lacks discretion to do otherwise. "[I]n a removed action, upon determination that a federal court lacks jurisdiction, remand to state court is mandatory." *Coyne v. American Tobacco Co.*, 183 F.3d 488, 496-97 (6th Cir. 1999).

IV. Conclusion and Order

As this Court is without subject matter jurisdiction and Plaintiff lacks Article III standing to proceed in federal court, this case is hereby **REMANDED** to the Hamilton Court of Common Pleas for further proceedings. Defendants' motion for summary judgment (Doc. 22) and Plaintiff's motion to file a sur-reply (Doc. 41) are hereby **DENIED** as moot. [12]

IT IS SO ORDERED.

s/ Stephanie K. Bowman

Stephanie K. Bowman

United States Magistrate Judge

All Citations

Slip Copy, 2021 WL 3810384

Footnotes

1 The parties have consented to the exercise of plenary jurisdiction by the undersigned magistrate judge. *See* 28 U.S.C. § 636(c)

2 The Class Action Fairness Act ("CAFA") provides for federal jurisdiction when the aggregate amount of claims exceeds $5 million. *See* 28 U.S.C. §§ 1332(d)(2)(A), (d)(5), (d)(6). Here, however, Plaintiff alleges that the aggregate amount of claims is less than $5 million. (Complaint at ¶6). Therefore, Defendants rely solely on diversity jurisdiction and not CAFA.

3 Defendants maintain that no cloud existed as a matter of state law. Although this Court is required to draw all reasonable inferences in favor of Plaintiff on summary judgment, the Court finds no need to resolve the issue of whether a cloud did or did not exist under Ohio law during the time period in which the Dow Satisfaction was not yet recorded. The only material fact is that any cloud that may have existed was fully resolved when the Dow Satisfaction was recorded prior to suit being filed. And that fact is undisputed.

4 The Court considered issuing a "show cause" order to permit Defendants an additional opportunity to justify removal. However, in light of the Court's conclusion that Plaintiff also lacks Article III standing, additional briefing on the amount-in-controversy issue would not alter the result.

5 *TransUnion* considered the injury resulting from the violation of a federal statute enacted by Congress. The undersigned assumes that *TransUnion* would analyze the violation of a state statute in the same manner.

6 The fact that Ohio allows a full 90 days for a satisfaction of a lien to be recorded confirms the lack of any statutory injury caused by the mere presence of "inaccurate" information (*i.e.*, the alleged "cloud") for the first 90 days after a mortgage has been satisfied but not yet recorded.

7 (*See* Voss Deposition, Doc. 24-8 at 38-41, PageID 628-631).

8 Defendants argue that *Maddox* and other cases cited by Plaintiff are distinguishable on their facts. The Court agrees that there are significant factual differences but finds it unnecessary to review them in light of the binding authority of *TransUnion*.

9 The language of *Radatz* assumes that it would be the borrower, as holder of the satisfied but unrecorded mortgage, rather than the purchaser of the property (Plaintiff Voss) who would have a cause of action for additional damages. However, its "actual harm" reasoning could be extended to Plaintiff here if Plaintiff had been prevented from using or disposing of his property.

10 Three justices dissented from the majority holding in *Rosette*. In a published decision, another federal court recently expressed "doubts about the continuing viability of *Rosette.*" *Brack v. Budish*, ___F. Supp.3d ___, 2021 WL 1960330, at *4 (N.D. Ohio May 17, 2021). To the extent *Rosette* remains good law, it is not dispositive of the federal issue at hand.

11 The Ohio Supreme Court has held that its legislature can confer standing to sue under a statute. *See generally*, *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St. 3d 520, 13 N.E.3d 1101 (Ohio 2014).

12 Plaintiff's motion to Certify Class and to Appoint Class Representative and Class Counsel (Doc. 21) remains pending for determination by the Hamilton County Court of Common Pleas.

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