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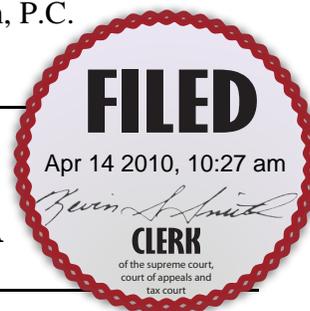
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**IN THE
COURT OF APPEALS OF INDIANA**



DAVID W. GARRETT, CYNTHIA J. GARRETT,)
TREASURER OF VANDERBURGH COUNTY,)
OCCUPANT(S) OF 10430 DRIVER DRIVE,)
EVANSVILLE, IN 47725-8056, FIFTH THIRD)
BANK (SOUTHERN INDIANA), HOOSIER)
ACCOUNTS SERVICES, FIFTH THIRD BANK,)
and FINEWOOD INVESTMENTS,)

Appellants/Defendants/
Counterclaim Plaintiffs,¹

vs.

FIFTH THIRD MORTGAGE COMPANY,)

Appellee/Plaintiff/
Counterclaim Defendant.)

No. 82A01-0912-CV-579

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Tornatta, Judge
Cause No. 82D03-0811-MF-6718

¹ Named parties Treasurer of Vanderburgh County, Occupant(s) of 10430 Driver Drive, Evansville, IN 47725-8056, Fifth Third Bank (Southern Indiana), Hoosier Accounts Services, Fifth Third Bank, and Finewood Investments do not join the Garretts' challenge on appeal. Pursuant to Indiana Appellate Rule 17(A), however, a party of record in the trial court shall be a party on appeal.

April 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

In this pro se appeal, Appellants/Defendants/Counter-claim Plaintiffs David W. Garrett and Cynthia J. Garrett (the “Garretts”) challenge the trial court’s entry of summary judgment against them in a foreclosure action brought by Appellee/Plaintiff/Counterclaim Defendant Fifth Third Mortgage Company (“Fifth Third”). We affirm.

FACTS AND PROCEDURAL HISTORY

On September 1, 2005, the Garretts, for value received, executed and delivered a mortgage note (“note”) by which they promised to pay Fifth Third the sum of \$304,000 in monthly installment payments of principal plus interest in the sum of \$1849.57 per month at an annual rate of 6.125 percent. At the same time, the Garretts executed a mortgage on certain real estate owned by the Garretts, and any improvements located thereon in order to secure the payment of the note. The Garretts have failed to make the scheduled monthly payments on the note and are in default.

On November 26, 2008, Fifth Third initiated foreclosure proceedings. Fifth Third filed an Amended Complaint on Note and For Foreclosure of Mortgage on January 9, 2009. The Garretts subsequently filed an Answer, Affirmative Defenses, and Counterclaim. On February 17, 2009, Fifth Third filed a Motion for Summary Judgment. In support of its motion, Fifth Third designated an Affidavit of Indebtedness, an Affidavit of Attorneys Fees, and the note and mortgage executed by the Garretts. On March 12, 2009, the Garretts filed

their Brief in Opposition to Summary Judgment as well as a motion seeking additional time to conduct discovery.

The trial court conducted a hearing on Fifth Third's summary judgment motion on April 2, 2009. As of April 2, 2009, the Garretts had submitted no discovery requests to Fifth Third. During the summary judgment hearing, the Garretts sought to submit additional documents in opposition to Fifth Third's motion for summary judgment. Fifth Third objected to the submission of these additional documents on the grounds that they were not properly designated before the trial court, and the documents were not admitted. Following the conclusion of the hearing, the trial court entered summary judgment in favor of Fifth Third, foreclosing Fifth Third's mortgage against the Garretts' real estate.

On April 13, 2009, the Garretts filed a discovery request for documents relating to their counterclaim against Fifth Third. On April 29, 2009, the Garretts filed a Motion for Leave to Amend Designated Materials. This motion was subsequently denied by the trial court. The Garretts also filed multiple Motions to Correct Errors relating to the trial court's order granting summary judgment in favor of Fifth Third, all of which were denied by the trial court. The Garretts' counterclaim was subsequently dismissed following a request for a dismissal by Fifth Third. The Garretts now appeal the trial court's order granting summary judgment in favor of Fifth Third.

DISCUSSION AND DECISION²

² We state that although the Garretts' Notice of Appeal did not specifically list the trial court's order granting summary judgment in favor of Fifth Third as one of the appealed orders pursuant to Indiana Appellate Rule 9(F)(1), it is clear from the Garretts' Notice of Appeal that the Garretts intended to appeal the trial court's order granting summary judgment in favor of Fifth Third. Because the Garretts' intentions were clear

I. Whether the Trial Court Erred in Granting Summary Judgment in favor of Fifth Third

On appeal, the Garretts challenge the trial court's order granting summary judgment in favor of Fifth Third. When reviewing a grant or denial of summary judgment our well-settled standard of review is the same as it is for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. *Ind. Univ. Med. Ctr., Riley Hosp. for Children v. Logan*, 728 N.E.2d 855, 858 (Ind. 2000). Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *Id.* The review of a summary judgment motion is limited to those materials designated to the trial court. *Rood v. Mobile Lithotripter of Ind., Ltd.*, 844 N.E.2d 502, 507 (Ind. Ct. App. 2006).

Indiana Code section 32-30-10-3 provides that "if a mortgagor [borrower] defaults in the performance of any condition contained in a mortgage, the mortgagee [lender] or the mortgagee's assigns may proceed in the circuit court of the county where the real estate is located to foreclose the equity of redemption contained in the mortgage." *See also Gainer Bank v. Cosmo. Nat. Bank of Chicago*, 577 N.E.2d 992, 993 (Ind. 1991). Where a mortgage provides that the mortgagor will pay the mortgage indebtedness, the mortgagors bind

regarding their desire to challenge the trial court's order granting summary judgment in favor of Fifth Third, we will review the Garretts' challenge on that basis.

themselves to pay the debts secured by the mortgage. *Creech v. LaPorte Prod. Credit Ass'n*, 419 N.E.2d 1008, 1011 (Ind. Ct. App. 1981). Moreover, the holder of the mortgage becomes entitled to foreclose pursuant to the provisions of the mortgage upon default by the mortgagor. *See Bowery Sav. Bank v. Layman*, 142 Ind. App. 170, 173, 233 N.E.2d 492, 494 (1968) (providing that the bank became entitled to accelerate the mortgage debt and foreclose pursuant to the provisions of the mortgage upon failure of the mortgagors to cure their debt). Evidence of the terms of the promissory note and mortgage, default by the mortgagor, and the amount of the mortgage debt is sufficient to support an entry of judgment and foreclosure. *See Creech*, 419 N.E.2d at 1012 (concluding that the evidence was sufficient to support a judgment for foreclosure when the mortgagee presented evidence of the demand note, the mortgage, default by the mortgagor, and the remaining debt).

In the instant matter, the designated evidence before the trial court on the date that the trial court issued its order granting Fifth Third's motion for summary judgment on April 2, 2009, established that Fifth Third was entitled to summary judgment because there were no issues of material fact regarding the Garretts' default of their mortgage obligation. Fifth Third designated the note and the mortgage executed by the Garretts identifying Fifth Third as the lender. Fifth Third additionally designated an Affidavit of Indebtedness executed by Fifth Third Foreclosure Analyst Chrissy Miller. The note established that the Garretts promised to repay Fifth Third \$304,400 plus interest in return for the loan they received from Fifth Third in connection with the real estate described in the mortgage. The mortgage provided that Fifth Third could foreclose the mortgage following a default on the note by the

Garretts. Miller averred that the Garretts had failed to repay their loan pursuant to the terms of the note and were in default. Miller further averred that the balance due on the note as of December 31, 2008, was \$308,991.25 plus an additional \$49.30 per day for each day that the loan was not repaid.

The Garretts designated certain evidence in support of their motion in opposition to summary judgment. Specifically, the Garretts designated two letters from Fifth Third, one three-fold mailing from Fifth Third, and the first page of a prior filing by the Garretts against Fifth Third in this court. None of these documents, however, created any issue of material fact as to the existence of the note and mortgage, default by the Garretts, or the remaining balance due. In light of the undisputed evidence presented by Fifth Third regarding the note and mortgage executed by the Garretts, the default by the Garretts, and the remaining balance due, we conclude that Fifth Third was entitled to judgment as a matter of law.

We recognize that the Garretts filed a motion for leave to amend their designated materials on April 29, 2009. This motion was subsequently denied. The Garretts sought to amend their prior pleadings and designate certain uncertified printouts from nongovernmental websites which the Garretts argued would create an issue of material fact regarding Fifth Third's standing to foreclose on their mortgage.³ The trial court subsequently denied the Garretts' request to amend their designated materials. To the extent that the

³ To the extent that the Garretts claim that these uncertified printouts from nongovernmental websites were self-authenticating, we note that other jurisdictions have held that such "printouts" are not self-authenticating and therefore are inadmissible without accompanying testimony. *See Campbell v. State*, 949 So.2d 1093, 1094 (Fla. Dist. Ct. App. 2007) (providing that under Florida law, computer printouts are not self-authenticating and are admissible only if the custodian or other qualified witness is available to testify as to the manner of preparation, reliability, and trustworthiness of the printout).

Garretts challenge this decision on appeal, we conclude that the trial court did not err in denying the Garretts' request to amend their designated materials because the request was made approximately seventy-one days after the Garretts received service of Fifth Third's motion for summary judgment, and twenty-seven days *after* the trial court granted summary judgment in favor of Fifth Third. *See generally, Coleman v. Charles Court, LLC*, 797 N.E.2d 775, 787 (Ind. Ct. App. 2003) (providing that the trial court did not err in striking designated materials that were not filed within thirty days of service of the motion for summary judgment pursuant to Indiana Trial Rule 56(C)). We further conclude that the trial court did not err in denying the Garretts' request to amend their designated materials because the additional documents were uncertified printouts from nongovernmental websites that could not create an issue of material fact. *See Wallace v. Ind. Ins. Co.*, 428 N.E.2d 1361, 1365 (Ind. Ct. App. 1981) (providing that uncertified or unverified exhibits do not qualify as proper evidence and should not be considered in summary judgment proceedings).⁴

II. Whether the Trial Court Abused its Discretion in Denying the Garretts' Request for an Extension of Time to Complete Discovery

The Garretts additionally contend that the trial court abused its discretion in limiting their right to pursue discovery which they claim might have turned up evidence to defeat Fifth Third's Motion for Summary Judgment. Trial Rule 56(F) provides that the trial court

⁴ We recognize that the Garretts claim that that the trial court failed to consider additional untimely affidavits filed by David Garrett which the Garretts claim create an issue of material fact that would preclude summary judgment. However, none of these affidavits were designated before the trial court and as a result, we will not consider them on appeal. *See Rood v. Mobile Lithotripter of Ind., Ltd.*, 844 N.E.2d 502, 507 (Ind. Ct. App. 2006) (providing that the review of a summary judgment motion is limited to those materials designated to the trial court).

may grant a continuance to allow the parties to gather necessary affidavits or conduct discovery. The trial court is vested with broad discretion in ruling on pre-trial motions relating to discovery matters. *Mut. Sec. Life Ins. Co. by Bennett v. Fid. and Deposit Co. of Maryland*, 659 N.E.2d 1096, 1103 (Ind. Ct. App. 1995), *trans. denied*. Due to the fact-sensitive nature of discovery matters, the ruling of the trial court is cloaked in a strong presumption of correctness on appeal. *Id.* “Discovery, ‘like all matters of procedure, has ultimate and necessary boundaries.’” *Id.* (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)). It is within the discretion of the trial court to place bounds on the duration of discovery. *Id.* The Garretts correctly assert that it is generally improper to grant summary judgment when requests for discovery are pending. *Id.* However, when pending discovery is unlikely to develop a genuine issue of material fact, summary judgment may be granted. *Id.*

Here, the Garretts indicated as early as February 23, 2009, that they wished to conduct discovery. However, the Garretts took no steps to request any discovery from Fifth Third prior to the March 23, 2009 discovery deadline and did not request any discovery until April 13, 2009, eleven days after the trial court entered the summary judgment order. Moreover, the Garretts failed to show that any requested discovery was likely to create a genuine issue of material fact. In fact, the discovery requested related to the Garretts counterclaim against Fifth Third, not any issue decided by the court on summary judgment. Because the Garretts failed to request any discovery prior to the court’s order granting summary judgment in favor of Fifth Third and because the Garretts failed to show that the requested discovery was likely to create an issue of material fact, we conclude that the trial court did not abuse its discretion

in this regard. *See id.* (providing that summary judgment may be appropriate even when a request for discovery is pending if the pending discovery is unlikely to develop a genuine issue of material fact).

Finally, to the extent that the Garretts argue that the attorneys for Fifth Third violated Indiana Rule of Professional Conduct 1.7 by allegedly representing more than one party to this appeal, we note that the Garretts have failed to present a cogent argument, and thus have waived this issue for appellate review. *See Leone v. Keesling*, 858 N.E.2d 1009, 1014 (Ind. Ct. App. 2006) (providing that an unsupported assertion of error results in waiver of the claim on appeal), *trans. denied*.

The judgment of the trial court is affirmed.

RILEY, J., and MATHIAS, J., concur.