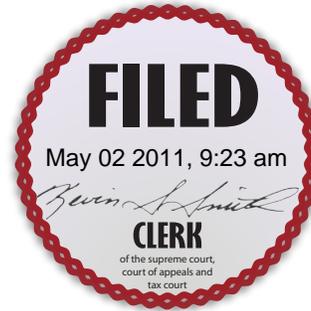


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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ATTORNEY FOR APPELLEE:
Wells Fargo Bank, National Association, as
Trustee for the Holders of the First Franklin
Mortgage Loan Trust

JULIA BLACKWELL GELINAS
LUCY R. DOLLENS
Frost Brown Todd LLC
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

EDWARD SHAFFER,)
)
Appellant-Defendant,)
)
vs.)
)
WELLS FARGO BANK, National Association as)
Trustee for the Holders of the First Franklin)
Mortgage Loan Trust 2006-FF17, Mortgage)
Pass Through Certificates, Series 2006-FF17,)
)
Appellee-Plaintiff.)

No. 49A05-1007-MF-452

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Theodore M. Sosin, Judge
Cause No. 49D02-0903-MF-10501

May 2, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Wells Fargo Bank (the Bank) filed a foreclosure action against Edward Shaffer after Shaffer defaulted on his mortgage payments. The Bank filed for summary judgment and that motion was granted. Shaffer then sought a stay of the proceedings, which the trial court granted on the condition that Shaffer post a \$75,000 bond. Shaffer appeals, presenting the following restated issues for review:

1. Did the trial court err in granting the Bank's motion for summary judgment in its foreclosure action against Shaffer?
2. Did the trial court err in ordering a bond in the amount of \$75,000 to stay the eviction proceedings?

We affirm.

The facts most favorable to Shaffer, the nonmoving party, are that on August 18, 2006, Shaffer signed a purchase agreement to purchase the property located at 7977 Lieber Road for \$155,000. Pursuant to paragraph 5 of this document, the loan was to be a fixed-rate, Veteran Affairs (VA) loan. Shaffer later signed two separate amendments to the purchase agreement – the first on September 22, extending the time for closing and the second on September 25, re-allocating the payment of certain costs associated with the sale, including a proviso that the seller was to pay “VA required fees.” *Appellant's Appendix* at 74. On the same day that he executed the original purchase agreement, Shaffer signed a Uniform Residential Loan Application seeking to obtain a \$155,000 VA loan to purchase the Lieber Road property.

Shaffer and the seller closed on the sale of the Lieber Road property on September 25, 2006. On that day, Shaffer signed a number of documents, including the following: (1) a

Settlement Statement prepared by Title Services, L.L.C., Part B of which was entitled “Type of Loan” and indicated it was a VA loan, *id.* at 60; (2) a Prepayment Note Addendum, which does not mention the type of loan; (3) a mortgage security interest, which specified that Shaffer would also execute an adjustable rate rider; (4) a second Uniform Residential Loan Application, this one for \$124,000 and indicating it was for a conventional loan initially at 8.6% interest, with an adjustable rate; and (5) an adjustable rate note in favor of First Franklin Financial Corporation, a division of National City Bank (First Franklin) for \$124,000. Shaffer did not make any payments on the note after June 1, 2008.

On February 10, 2009, Mortgage Electronic Registration Systems, Inc., as nominee for First Franklin, assigned Shaffer’s note to the Bank. On March 4, 2009 the Bank filed a complaint to foreclose the mortgage on the Lieber Road property. Shaffer answered in denial, asserting a confusing array of defenses to liability on the note. Central to all of these alleged defenses was a single claim, i.e., that at the time of closing, he intended to and believed he was signing a fixed-rate, VA loan, rather than a conventional, adjustable-rate mortgage. The Bank filed a motion for default and summary judgment on November 25, 2009. A hearing was held on the Bank’s motion on April 12, 2010. On May 3, 2010, the court granted the motion and entered judgment in favor of the Bank in the amount of \$135,577.62, plus costs and interest, entered a decree of foreclosure, and appointed an auctioneer pursuant to Ind. Code Ann. § 32-30-10-9(b)(2) (West, Westlaw through 2011 Pub. Laws approved & effective through 2/24/2011). On June 1, 2010, Shaffer filed a motion asking the court to reconsider the grant of summary judgment. The trial court denied the

motion on June 14, 2010 and Shaffer filed his notice of appeal on July 14, 2010.

Subsequently, on August 9, 2010, the Lieber Road property sold at auction to the Bank for \$93,133.03. On September 1, 2010, Shaffer filed a Petition to Stay Proceedings and Set Aside Sale Pending Outcome of Appeal and Waive Appeal Bond. On September 8, 2010, the Bank filed a Motion for Writ of Assistance, asking the court's assistance in evicting Shaffer from the property. On September 15, 2010, the trial court granted Shaffer's motion for stay and to set aside the sheriff's sale, pending Shaffer's posting of a \$75,000 bond. On September 30, 2010, the Bank filed a motion to clarify the September 15 order, asking the court to reconsider the setting aside of the sheriff's sale. On October 1, 2010, the court issued an order clarifying its September 15 order whereby it reinstated the sheriff's sale and clarified that the eviction proceedings would be stayed pending the posting of a \$75,000 bond by Shaffer.

1.

Shaffer contends the trial court erred in entering summary judgment in favor of the Bank in its foreclosure action against Shaffer. In support of this claim, Shaffer challenges the validity of his purchase of the Lieber Road property. Among other things, he claims the original lender committed fraud in designating his loan as an adjustable rate conventional loan, versus a fixed-rate, VA loan.

Our standard of review in appeals from the grant or denial of a motion for summary judgment is well established: when reviewing a ruling on a motion for summary judgment, we apply the same standard as the trial court. *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d

154 (Ind. 2005). A party seeking summary judgment must show “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.” Ind. Trial Rule 56(C); *see also Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154. The review of a ruling on a summary judgment motion is limited to those materials designated to the trial court. T.R. 56(H); *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154. We will accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmoving party, and resolve all doubts against the moving party. *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154. A trial court’s grant of summary judgment is clothed with a presumption of validity, and the appellant bears the burden of demonstrating that the grant of summary judgment was erroneous. *W.S.K. v. M.H.S.B.*, 922 N.E.2d 671 (Ind. Ct. App. 2010).

Moreover,

[a] grant of summary judgment may be affirmed upon any theory supported by the designated evidence. While the trial court here entered specific findings of fact and conclusions of law in its order granting summary judgment . . . , such findings and conclusions are not required and, while they offer valuable insight into the rationale for the judgment and facilitate our review, we are not limited to reviewing the trial court’s reasons for granting or denying summary judgment.

Gilbert v. Loogootee Realty, LLC, 928 N.E.2d 625, 629 (Ind. Ct. App. 2010) (quoting *Van Kirk v. Miller*, 869 N.E.2d 534, 539-40 (Ind. Ct. App. 2007), *trans. denied*) (citations omitted), *trans. denied*.

In its complaint, the Bank alleged that Shaffer executed and delivered to First Franklin a promissory note in the amount of \$124,000, and that in order to secure repayment of the note Shaffer executed a mortgage granting a security interest in the Lieber Road property to

Mortgage Electronic Registration Systems, Inc. as nominee of First Franklin. The Bank further alleged that the promissory note was ultimately assigned to the Bank, and that Shaffer ceased making payments on the note in 2008, thereby defaulting on his obligations. The Bank alleged that pursuant to the note, the Bank accelerated the indebtedness due under the promissory note and mortgage and sought foreclosure. The Bank moved for summary judgment, designating in support of its motion copies of: (1) the promissory note executed by Shaffer, (2) the mortgage, (3) the chain of assignments reflecting that the Bank was a legitimate holder of the promissory note, (4) the affidavit of Paul Langford, an officer of Select Portfolio Servicing, Inc. and attorney in fact for the Bank, attesting to the fact that Shaffer had defaulted on the promissory note, and (5) the affidavit of Jeffrey S. Wilson, an attorney representing the Bank in this matter, attesting to the fact that Shaffer was not an infant nor incompetent, nor then on active duty in the military service.

Proceeding pro se at that point, Shaffer responded to the Bank's summary judgment motion with a submission entitled "Responce [sic] to Order". This included the following:

First Franklin was the proposed Leader [sic], advision [sic] of National City Bank,. I am alledging [sic] that First Franklin was not a legal entity at the time of this transaction, Sept. 2006 (see sec. of state DOC.)

As an Exhibit C. I have enclosed a letter from First Franklin: this letter states, First Franklin never have [sic] processed VA Guaranteed Loans. This is a genuine issue regarding [sic] their Lending Practices vs. the HUDI Settlement statement. My agreement was for a VA guaranteed loan. I filled out documentation and my original application was for a VA guaranteed loan only.

As **Exhibit-D** "Admendment [sic] to purchase agreement, Dated 9.25.06, Closing date. Note Paragraph G: Other changes in Agreement, Four thousand dollars was to have been paid towards a VA guaranteed loan toward it's [sic] fees.

Exhibit E from MIBOR Board of Realtors stating sold terms was VA

Exhibit F I have enclosed part of the Commitment [sic] for Title Insurance, Schedule A. It clearly states the proposed Insured as the Veterans Administrative and it was titled as such in the Marion County Records Office.

II Argument

I am alledging [sic] that Regulation 2. The Truth N [sic] Lending Act was Violated. This is a genuine issue.

I am alledging [sic] that that the Promissory Note + Mortgage are Fraudulent. I did not orginate [sic] a sub-prime loan. First Franklin does not originate VA Guaranty loans, and that is what I Contracted for per the HUDI.

The HUDI states Oracle Appraisal Inc. was paid \$300.00 to produce the Fair Market Value of the Home. (the Appraisal) I am alledging [sic] that Oracle Appraisal (Co. [sic] never existed. The Plaintiff [sic] is asking the court to believe a one hundred and fifty-five thousand dollars loan was created to finance a home without data value.
“This is a genuine issue.”

Plantiff [sic] is not Entitled to summary Judgement and has bot [sic] proven that it has any enforcement rights. As the consumer, I did not recieve [sic] the loan i [sic] contracted for, The Defendant states this is an [sic] genuine issue.

III Conclusion

I am alledging [sic] The Truth N [sic] Lending Act was violated, and that is a genuine issue.

I am alledging [sic] my rights to recieve [sic] benefits as a qualified United States Purple Heart Veteran were neglected, to commit fraud.

I am alledging [sic] that the RESPA laws were violated, it is unclear who has the right to collect funds. First Franklin stated in 2008 under Exhibit C, that they were not the holder. I further alledge [sic] that in Sept.2006, First Franklin was not a legal entity to do business under the laws of Indiana. These are genuine issues.

I believe as a matter of how [sic] governing Real Estate Fraud, the Plaintiff [sic] does not have a right to accelerate any sums due in this matter from me. I am the injured consumer. I am alledging [sic] this as a genuine issue of major Fraud with the intent to cover up. The instruments provided to induce this transaction, I am alledging [sic] there is not legal data to support the Sub Prime/Conventional Transaction.

Appellant's Appendix at 58-59.

As indicated in his response, Shaffer attached six documents in support of his motion in opposition to summary judgment, which he designated as Exhibits A through F, including: (Exhibit A) the Title Services Settlement Statement, with "VA" checked as the type of loan, (Exhibit B) the August 9, 2006 Purchase Agreement between him and the seller of the Lieber Road property; also attached is the September 22 Amendment to Purchase Agreement, which merely indicates that the date of closing was extended to September 29 and contains no information relative to the type of loan Shaffer procured, (Exhibit C) a May 13, 2008 letter from First Franklin to Shaffer in which First Franklin stated: "Your loans were not submitted to First Franklin as VA loans, and First Franklin does not originate VA loans", *Appellant's Appendix* at 69, (Exhibit D) a responsive letter from Home Loan Services informing Shaffer that he should direct his complaint to First Franklin Financial Corporation as the latter was the originator of his loan, while the former merely services the loan, (Exhibit E) a September 8, 2009 MLS sheet for the Lieber Road property that contained a line stating: "Sold Terms: VA", *id.* at 72, and (Exhibit F) a Title Services, LLC Commitment for Title Insurance form, dated July 22, 2006 that stated: "Proposed Insured: Veterans Administration, its successors and/or assigns as their interest may appear". *Id.* at 73. We agree with the Bank that these documents are irrelevant on the question of whether the note held by the Bank is enforceable

against him.

The presenting question is whether Shaffer is liable on the First Franklin note. Our interpretation of Shaffer's brief in opposition is that Shaffer opposed summary judgment upon the claim that his signature on the note was fraudulently obtained, or upon the claim that he did not sign the note at all. Does the evidence designated by Shaffer create questions of fact in these regards? In early August 2006, Shaffer and the seller in this case executed a purchase agreement whereby Shaffer proposed to purchase the Lieber Road property for \$155,000 via a VA loan. No one seems to dispute that Shaffer did indeed apply for a VA loan. Although not designated to the trial court at the summary judgment stage, the appellate materials contain a residential loan application for a VA loan for the full purchase price of the house (\$155,000) submitted by Shaffer nine days after he signed the purchase agreement, on August 18, 2006. There is no indication, however, that such a loan was approved. Indeed, all signs are to the contrary.

Be that as it may, the Title Service LLC settlement statement (Exhibit A), a July 22, 2006 title insurance form proposing that the Veteran's Administration would be the insured (Exhibit F), and a September 8, 2009 MLS sheet reflected the purchase was financed with a VA loan. In our view, Exhibits B (purchase agreement) and F (commitment for title insurance form) prove only that at some point before the sale, Shaffer believed he would secure a VA loan. Exhibits C and D (letters from First Franklin and Home Loan Services, respectively) merely informed Shaffer in response to his complaint that First Franklin, which originated Shaffer's loan, does not originate VA loans. Exhibits A (settlement statement)

and E (post-sale MLS sheet) indicate that the sale of the property was completed via VA loan, but the primary purposes of these forms were to record the allocation of the purchase funds and to describe the Lieber Road property, respectively. These documents were completed by third parties on matters whose primary focus was on something other than the nature of the financing of the purchase. Taken as a whole, we conclude that the documents designated by Shaffer do not create a question of fact regarding the nature of Shaffer's loan or the validity of Shaffer's signature on the conventional loan and the attending documents. We find nothing that would create a question of fact with respect to whether Shaffer was deceived into signing an adjustable-rate note, versus a conventional, fixed-rate note. Therefore, the trial court did not err in granting summary judgment in favor of the Bank.

2.

Shaffer contends the trial court violated his constitutional rights by setting what he describes as an "excessive" appeal bond. *Appellant's Brief* at 11. Indiana Trial Rule 62(D)(1) provides, "The trial court or judge shall have jurisdiction to fix and approve the bond or letter of credit and order a stay pending an appeal as well as prior to the appeal." "The determination of the amount of an appeal bond lies within the discretion of the trial court, and will not be disturbed absent an abuse of discretion." *Kocher v. Getz*, 824 N.E.2d 671, 675 (Ind. 2005).

Shaffer's argument that the trial court abused its discretion in setting the appeal bond in this case at \$75,000 is unaccompanied by citation to legal authority and couched only in general, emotionally charged terms, e.g.:

Given that this property is a point of contention, then setting a bond out of reach of the appellant is an unjust taking and against public policy. It is not public policy to only make appeals available to the rich. By setting the bond in excess of ones [sic] means only establish [sic] the precedent that the poor should not appeal any trial court's rulings because they will be systematically denied the fruit by placing it out of reach with an unreasonable bond. Once the poor cannot post the bond then the rich win. Our system was not set up to deny the poor due process or equal protection.

Appellant's Brief at 11.

We perceive no argument addressing the specific issue of whether a \$75,000 bond, on the facts of this particular case, was unreasonably high. In any event, we note that as of the time judgment was rendered in favor of the Bank, the outstanding balance owed by Shaffer was in excess of \$122,000. Later, on May 3, 2010, the trial court entered judgment in favor of the Bank for \$135,577.62, which included costs and post-judgment interest. The trial court set bond at more than \$50,000 less than the outstanding balance at the time of default, and more than \$70,000 less than the final money judgment entered in favor of the Bank. This does not constitute an abuse of discretion.

Judgment affirmed.

BAILEY, J., and BROWN, J., concur.