

DONALD F. OLSON, Appellant,
v.
FIFTH THIRD BANK, Appellee.

No. 2015-CA-001208-MR.

Court of Appeals of Kentucky.

Rendered: February 16, 2018.

APPEAL FROM JEFFERSON CIRCUIT COURT ACTION NO. 14-CI-400304,
HONORABLE JAMES M. SHAKE, JUDGE.

AFFIRMING.

Donald F. Olson, *pro se* Louisville, Kentucky, Briefs for appellant.

Shannon O'Connell Egan, Harry W. Cappel, Ft. Mitchell, Kentucky, Brief for appellee.

BEFORE: MAZE, TAYLOR AND THOMPSON, JUDGES.

NOT TO BE PUBLISHED

OPINION

THOMPSON, Judge.

Donald F. Olson, *pro se*, appeals from an opinion and order of the Jefferson Circuit Court denying his motion to alter or amend its opinion and order granting summary judgment to Fifth Third Bank and judgment of foreclosure based on Olson's default of a mortgage and ordering sale of the property.

Olson owns a residence in Louisville. It is encumbered by a first mortgage held by Wells Fargo, which is not at issue in this case.

On June 20, 2007, Olson executed a home equity line of credit (HELOC) agreement opening a \$60,000 Equity Flexline Account (home equity loan) with Fifth Third Bank, which was secured by an open-ended mortgage. Under the HELOC agreement, the home equity loan had a variable interest rate tied to the index rate. Olson's payments would be due monthly and required a minimum

payment equal to the finance charges that accrued on the outstanding balance, with a balloon payment due at the end of twenty years. The HELOC agreement specified that "[i]f the minimum payment due is not received within 35 days after the billing date, Lender may levy a late charge per month of 10% of the payment amount with a minimum of \$35.00."

The HELOC agreement gave Olson the option to lock a portion of the home equity loan for a fee, which would lock the interest rate and require minimum monthly payments equal to the amount of principal necessary to pay off the locked portion of the loan within the remaining term of the loan, plus monthly finance fees. The unlocked portion of the home equity loan would require minimum monthly finance payments to remain current.

Under the terms of the HELOC agreement, Olson agreed he would be in default, allowing the lender to terminate the plan and accelerate the balance, if he failed to meet the repayment terms. He would also be responsible for all expenses including attorneys' fees for enforcement of lenders rights including foreclosure arising out of any default by borrower.

When Olson entered into the HELOC, he received a Federal Truth in Lending Initial Disclosure concerning his billing rights, which stated the procedure for writing to dispute a bill including the time limits for doing so, and that his creditor could not collect on disputed portions of his bill until it investigated and resolved whether there was a mistake. This disclosure was consistent with 15 United States Code (U.S.C.) § 1666.

On August 2, 2007, Olson converted the outstanding loan to a locked loan with a fixed interest rate on \$60,000. Additional money he borrowed remained unlocked with a variable interest rate.

On November 19, 2012, Olson sent Fifth Third Bank a registered letter contesting the entire current principal balance plus accruing interest on his loan and stating that he would cease payments because Fifth Third Bank's administrative errors caused him financial harm and emotional distress. He enumerated twelve areas in which he believed Fifth Third Bank's actions were wrongful. Olson's main complaints were that Fifth Third Bank failed over the life of the loan to apply payments from Olson in the way he believed they should be allocated to specific billing periods. Specifically, Olson complained that Fifth Third Bank did not properly apply multiple payments during a single billing period and erred by considering payments overdue when the payments were made within the grace

period and did not require a late payment charge. Olson complained these failures caused negative consequences to him, including unwarranted negative credit reports.

Fifth Third Bank's regulatory support specialist, Monica Jackson, responded in a letter dated December 26, 2012, which addressed Olson's concerns. Jackson explained how Olson's account worked and why Fifth Third Bank believed his payments were correctly allocated and that the information reported to credit bureaus was correct:

The statement for your account typically cycles on the twenty-eighth (28th) or twenty-ninth (29th) of the month. Payments received after your statement cycles are applied to the next statement cycle. Additionally, the due date for payment to be posted to your account is the twenty-fifth (25th) of every month. There is a ten (10) day grace period on the account, with a late charge of ten point zero percent (10%) of the payment amount (a minimum of \$35.00) assessed if we do not receive the payment prior to the end of the grace period. Any payments received thirty (30) days after the due date will be reported to the Credit Bureau.

Jackson also noted the actions which could trigger a default of Olson's account, told him the current payoff for his account, stated "we are unable to waive the remaining account balance or interest owed" and asked him to contact their collections department to discuss payment arrangements for his past due November 2012 payment.

Olson continued to dispute that Fifth Third Bank adequately addressed his concerns and did not make any additional payments on his home equity loan.

On February 14, 2014, Fifth Third Bank filed a complaint to enforce its note and mortgage based on Olson's default. Olson, *pro se*, filed a response contesting the default on the basis that the entire loan balance was in error due to repeated failures by Fifth Third Bank to apply his monthly payments in accordance with the contractual terms of the mortgage, causing him harm. He asserted that he had the right not to make payments on disputed amounts until the claim of account error was resolved and, therefore, he could not be in default.

Olson also filed a counterclaim arguing Fifth Third Bank wrongfully misapplied his payments from August 31, 2007 through October 29, 2012, when more than one payment was received in a billing cycle. Olson requested dismissal of the case, that his lien be released and that Fifth Third Bank be ordered to reverse its negative credit reports.

Fifth Third Bank filed a motion for summary judgment in which it argued Olson was in default and it had not erred in its application of his payments as supported by the affidavit of Michelle Fancher. Fancher explained how payments were allocated to Olson's home equity loan depended on when they were received: Although the note only indicated that payments were due monthly and subject to a late payment charge if received 35 days after the statement was issued, Fifth Third Bank issued statements two days before the end of each month that indicated the due date was the 25th of the following month. A payment received after the 25th but before the next billing period was late but still allocated to the current billing period. A payment received on the day of or after the next statement was issued, was treated as being paid during the next billing period even though it was not subject to a late payment charge. A late payment received during the next billing period would first be allocated to the finance charges for the month for which it was intended and the following month's billing cycle, before applying the balance of the payment to principal on the locked portion of the loan. If the next payment was received before the next billing period, and the finance charges for that period were already paid, it would first be allocated fully to principal on the unlocked portion of the loan.

Fifth Third Bank argued it did not breach its contract with Olson. Olson misunderstood the loan terms and conflated the timing of the late fee with when the payment was late, rather than understanding that a payment was late prior to the application of the late fee. It did not violate the Fair Credit Billing Act where Olson failed to advise it of an error within sixty days of the first statement containing this alleged error. Olson alleged the first error was on its August 31, 2007 statement but his first letter of dispute was sent more than five years later. Fifth Third Bank further argued Olson's claim was time-barred because the violations occurred prior to February 28, 2013 and were not brought within one year and, even if a violation occurred, Olson's damages were limited to fifty dollars.

The summary judgment motion was referred to the master commissioner who, after holding a hearing, issued a report recommending that summary judgment be granted. The master commissioner stated that Olson was given full credit for all his payments and the only issue was whether his payments were correctly allocated. While Olson's protest letter was proper, the master commissioner disagreed that his demand to be absolved from all further liability and release of his lien was appropriate because such relief was not authorized. Olson could only withhold further payment while Fifth Third Bank reviewed his claim. The master commissioner explained that once Fifth Third Bank determined Olson's claim was resolved, Olson had three options: resume payment, file a complaint with the

Federal Trade Commission or file a legal action under the Fair Credit Billing Act. He did not have an ongoing right to withhold payments. The master commissioner determined Olson's counterclaim was time-barred and while it could still be considered as an affirmative defense, Olson failed to outline any damages and his requested relief was unwarranted. Therefore, the master commissioner recommended summary judgment be granted to Fifth Third Bank.

Olson filed exceptions to this report. He argued that because his credit agreement did not define what an on-time payment was, it should be interpreted as any payment prior to the expiration of the thirty-five day grace period after which a late fee is charged. The trial court disagreed and issued an opinion and order granting summary judgment. The trial court also issued a judgment and order of sale subject to Wells Fargo's mortgage.

In Olson's motion to alter, amend or vacate, he reiterated his previous arguments and noted that he was current with respect to his first mortgage which he expected to be discharged within two years. The trial court denied this motion and Olson appealed.

Olson argues Fifth Third Bank's refusal to correct the error he reported provided him with the contractual basis to suspend his loan payments. Olson argues he would have paid had Fifth Third corrected the errors to his account.

While the HELOC did not provide for when a payment is late or how payments were to be allocated if received within the same statement period, there is no statutory requirement that this matter be specified in an open-ended consumer credit plan secured by a consumer's principal dwelling. 15 U.S.C. § 1637a. While Olson properly contested a claimed billing error in his November 19, 2012 letter pursuant to 15 U.S.C. § 1666(a) and 12 Code of Federal Regulations (C.F.R.) § 226.13(b), **this notice was untimely to address a challenge to errors in previous statements from Fifth Third Bank.** *Gengo v. Target Nat. Bank*, 513 F.Supp.2d 842, 851-52 (S.D. Tex. 2007). **Olson's notice could not properly challenge the entire balance due from him on the basis that the total owed was the result of a billing error.** *Esquibel v. Chase Manhattan Bank USA, N.A.*, 487 F.Supp.2d 818, 829 (S.D. Tex. 2007).

By investigating and sending Olson a written explanation stating why it believed Olson's statement was correct, notifying Olson of when his payment was due and what he still owed on his home equity loan, Fifth Third Bank fully complied with the requirements of 15 U.S.C. § 1666(a)(3)(B)(ii) and 12 C.F.R. § 226.13(c)-(g).

Fifth Third Bank was not obligated to do anything more when Olson continued to make substantially the same allegation with respect to the error he alleged. 15 U.S.C. § 1666(a) and 12 C.F.R. § 226.13(h). Olson's lack of satisfaction with how Fifth Third Bank resolved his dispute was irrelevant to whether it fully complied with its statutory duties of how to respond when a proper written dispute is made.

Under the terms of the HELOC, Olson defaulted on his home equity loan obligation when he stopped making payments. Whether or not Olson was correct on how his loan payments should have been credited, **this cannot excuse his refusal to make payments.** Because Olson defaulted on his home equity loan, summary judgment and the final judgment were properly granted.

Accordingly, we affirm the Jefferson Circuit Court's judgment of foreclosure.

ALL CONCUR.