IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

RONALD A WAKER, Plaintiff, -vs- HOLLY A LAWSON et al, Defendant.	CASE NO. 2018 CV 04218 JUDGE DENNIS J. ADKINS **DECISION, ORDER, AND ENTRY OVERRULING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, SUSTAINING DEFENDANT HOLLY LAWSON'S MOTION FOR SUMMARY JUDGMENT, AND SETTING HEARING ON ATTORNEY FEES**

This matter is before the Court on *Plaintiff's Motion for Summary Judgment* ("*Plaintiff's Motion for Summary Judgment*"), filed by Ronald A. Waker ("Plaintiff") on July 22, 2019. On August 20, 2019, Holly A. Lawson ("Defendant Lawson") filed *Defendant-Counterclaimant Holly Lawson's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment* ("*Defendant Lawson's Opposition*") and, on August 29, 2019, Plaintiff filed *Plaintiff's Reply to Defendant Holly A. Lawson's Opposition to Plaintiff's Motion for Summary Judgment* ("*Plaintiff's Reply*"). On August 20, 2019, Defendant Lawson filed *Defendant-Counterclaimant Holly Lawson's Motion for Summary Judgment* ("*Defendant Lawson's Motion for Summary Judgment*"). On September 20, 2019, Plaintiff filed *Plaintiff's Response to Defendant Holly A. Lawson's Motion for Summary Judgment* ("*Plaintiff's Opposition*"). On October 4, 2019, Defendant Lawson filed *Defendant-Counterclaimant Holly Lawson's Reply in Support of Her Motion for Summary Judgment* ("*Defendant Lawson's Reply*"). These matters are now properly before the Court and, for the reasons contained herein, the Court **OVERRULES** *Plaintiff's Motion for Summary Judgment* and **SUSTAINS** *Defendant Lawson's Motion for Summary Judgment*.

I. Facts and Procedural History

This matter arises out of a *Complaint in Foreclosure* ("*Complaint*"), filed by Plaintiff on September 11, 2018. *See* Docket. Therein, Plaintiff alleges that he is the owner and holder of the promissory note Defendant Lawson executed on June 28, 2016 regarding the property located at 1800 Far Hills Avenue. *Complaint* at ¶ 6. Plaintiff further contends that Defendant Lawson breached the terms and conditions of the Note by failing to make required final payment by July 1, 2018. *Id.* at ¶ 7.

In *Plaintiff's Motion for Summary Judgment*, Plaintiff argues that Defendant Lawson signed the Note and Mortgage regarding the property at issue. *Id.* at 2. Plaintiff contends that he provided all of the funds for the purchase of the property, and the Mortgage Defendant Lawson signed included a date for a balloon payment of $110,000.00. *Id.* at 3. Plaintiff states that Defendant Lawson has not paid any of the amount required by the Note and Mortgage and, therefore, he is entitled to summary judgment as to Count Two in the *Complaint* for foreclosure of the premises. *Id.* at 6.

Conversely, in *Defendant Lawson's Opposition*, Defendant Lawson argues that Plaintiff is not entitled to foreclose because no promissory note ever existed and the parties did not agree to any arrangement to satisfy the debt. *Defendant Lawson's Opposition* at 2. Accordingly, Defendant Lawson contends that, because the Note ever existed, Plaintiff is not the holder of the Note and cannot enforce it. *Id.*, generally.

In *Plaintiff's Reply*, Plaintiff argues that the Note is not necessary to prove the debt secured by the Mortgage. *Plaintiff's Reply* at 2. Therefore, Plaintiff maintains that he is entitled to judgment as a matter of law as to all of his claims against Defendant Lawson. *Id.,* generally.

In *Defendant Lawson's Motion for Summary Judgment*, Defendant Lawson asserts that the Note never existed and, therefore, Plaintiff cannot be the holder of any such note or the person entitled to enforce the terms of the note. *Defendant Lawson's Motion for Summary Judgment* at 7-8. Defendant Lawson further contends that the mechanics' lien Plaintiff filed on the property is invalid because no contract existed between the parties and the lien was untimely. *Id.* at 9-12. Defendant Lawson also states that she is entitled to a quiet title decree because the Mortgage and mechanics' lien are false. *Id.* at 12-14. Defendant Lawson further requests summary judgment in her favor as to her claim for slander of title. *Id.* at 15-19.

In *Plaintiff's Opposition*, Plaintiff argues that, although there is no promissory note, the Mortgage at issue is still enforceable. *Plaintiff's Opposition* at 6-7. Further, Plaintiff maintains that he has a valid mechanics' lien against the Property because there was an implied contract between the parties for Plaintiff to perform renovations on the Property. *Id.* at 8. Plaintiff also states that the filing of the mechanics' lien was timely because he last performed work or furnished materials on September 8, 2016. *Id.* In addition, Plaintiff asserts that Defendant Lawson is not entitled to a quiet title decree because of Plaintiff's valid Mortgage and mechanics' lien, and Defendant Lawson's slander of title claim is untimely. *Id.* at 9-11.

Finally, in *Defendant Lawson's Reply*, she reiterates that she was not aware of any debt obligation to Plaintiff at the time of the closing, and she believed that he was obtaining the Property in her name so that he could flip it. *Defendant Lawson's Reply* at 2-6. Defendant Lawson further states that there is no evidence that the parties ever negotiated the terms of a debt obligation or Mortgage and the mechanics' lien is invalid. *Id.* at 7-8. Defendant Lawson also argues that Plaintiff's statute of limitations argument regarding her slander of title claim was waived because he failed to raise the statute of limitations as an affirmative defense in his responsive pleading to Defendant Lawson's counterclaims. *Id.* at 12-13.

II. Law and Analysis

A. Standard of Review

Summary judgment is a procedural device that terminates litigation, avoiding a formal trial in cases where there is nothing to try. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138. Summary judgment is awarded with caution, construing evidence and resolving doubts in favor of the non-moving party, and "granted only when it appears from the evidentiary material that reasonable minds can reach only an adverse conclusion as to the party opposing the motion." *Id*. at 359.

Summary judgment is proper when: (1) no genuine issues of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence in the light most favorable to the non-moving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Harless et al. v. Willis Day Warehousing Company, Inc., et al.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46, 8 Ohio Op.3d 73 (1978). A material fact is any fact that would affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed2d 202 (interpreting analogous Federal Rule 56).

The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists as to an essential element of the claim(s) involved in the case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264 (1996). The moving party cannot satisfy this burden by simply making assertions that the non-moving party has no supporting evidence. *Id*. Rather, the moving party is required to specifically delineate the basis upon which summary judgment is sought, so the non-moving party has a meaningful opportunity to respond. *The State, ex rel. Coulverson v. Ohio Adult Parole Authority et al.*, 62 Ohio St.3d 12, 14, 577 N.E.2d 352 (1991), quoting *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 114, 526 N.E.2d 798, 800-801, fn 5(1988). If the moving party seeks summary judgment on the basis of an affirmative defense, the movant must demonstrate no genuine issue of material fact exists with respect to every element of the defense. *McCoy v. Maxwell*, 11th Dist. No. 2001-P-0132, 2002-Ohio-7157, ¶33.

Ohio Civil Rule of Procedure 56(C) allows parties to submit pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact as evidence. *Dresher*, 75 Ohio St.3d at 293, see also Civ.R. 56(C) (listing acceptable types of evidence). The trial court has an absolute duty, under Civ.R. 56(C), to review, read, and consider all appropriate materials filed by the parties before ruling on a motion for summary judgment. *Murphy*, 65 Ohio St.3d at 358.

If the moving party does not satisfy its initial burden, summary judgment is not proper. *Dresher*, 75 Ohio St.3d at 293. However, if the moving party satisfies its initial burden, the non-moving party cannot rest on allegations or denials in its pleadings. *Id*. Instead, the non-moving party has a reciprocal burden, outlined in Civ.R. 56(E), to set forth specific evidence showing that a genuine issue of material fact exists. *Id*. It is the non-moving party's task to negate the movant's showing by establishing a triable issue. *The State, ex rel. Coulverson*, 62 Ohio St.3d at 14, citing *Harless,* 54 Ohio St.2d at 66. The non-moving party bears the responsibility for producing evidence related to any issue for which it bears the burden of production at trial. *Wing v. Anchor Media, Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991). The non-moving party may not rest upon unsworn or unsupported allegations in the pleadings. *Harless*, 54 Ohio St.2d at 66. If the non-moving party does not satisfy its burden or fails to respond, summary judgment, if appropriate, shall be entered against the non-moving party. *Id*.

B. Breach of Promissory Note

It is well-settled that, in order to have a real interest in a foreclosure action, the party bringing the action must be the owner and holder of the note and mortgage at the time the complaint is filed. *BAC Home Loans Servicing, LP v. McFerren*, 9th Dist. Summit County C.A. No. 26384, 2013-Ohio-3228, 2013 Ohio App. Lexis 3374, ¶8. Pursuant to Ohio's version of the Uniform Commercial Code, a person who is entitled to enforce an instrument includes the "holder" of the instrument. *Fifth Third Mortgage Co. v. Bell*, 12th Dist. Madison County Case No. CA2013-02-003, 2013-Ohio-3678, 2013 Ohio App. Lexis 3804, ¶20.

However, in the present case, both parties admit that a Note never existed with respect to the Property at issue. In fact, Plaintiff provided the following testimony during his deposition:

> **Question:** *** You would agree with me that there has never existed a promissory note between yourself and Holly Lawson?
> **Plaintiff:** **Correct.**
> **Question:** Okay. And just to be very, very clear, there was never one drafted, correct?
> **Plaintiff:** **Not that I'm aware of.**
> **Question:** Okay. All right. So you've never been, you've never possessed anything that you would represent to be a promissory note of a debt she owes you?
> **Plaintiff:** **Correct.**

Plaintiff's Depo. at pp. 25: 9-21, emphasis added. Accordingly, based upon Plaintiff's own statements, there was never a promissory note that Defendant Lawson could have breached and, therefore, this claim must fail and Defendant Lawson is entitled to judgment as a matter of law with respect to this issue.

C. Foreclosure of Mortgage

With respect to Plaintiff's second cause of action, courts in Ohio have held:

> The right to judgment on a note is one cause of action and the right to foreclose a mortgage is another. This is so because a mortgage is merely security for a debt and is not the debt itself. Even when a promissory note is incorporated into the mortgage deed, it is still independent of the mortgage and is a separate enforceable contract between the parties.

Century Nat'l Bank v. Hines, Fourth District Athens County No. 11CA28, 2012 Ohio App. Lexis 3550, 8 (August 28, 2012) (internal citations omitted). "In a foreclosure action, a party may establish its interest in the suit, and thus have standing to bring a foreclosure suit, when at the time it files its complaint in foreclosure, it either (1) has had the mortgage assigned to it, or (2) is the holder of the note. *JP Morgan Chase Bank v. Stevens*, Eighth District Cuyahoga No. 104835, 2017 Ohio App. Lexis 3303, 36 (Aug. 10, 2017). Further, the Tenth District has stated:

> An action in foreclosure has been defined as a proceeding for the determination of the existence of a mortgage lien, the ascertainment of its extent, and the subjection to sale of the property pledged for its satisfaction. A suit to foreclose on a property securing a debt is not a suit directly against the debtor but, rather, is an action 'in rem.' Under Ohio law, a mortgagee has concurrent remedies upon breach of condition of a mortgage agreement; a mortgagee may 'sue in equity to foreclose' (i.e. an action in rem), or 'sue at law directly on the note' (an action in personam).

BAC Home Loans Servicing, LP v. Heirs, Tenth District Franklin County No. 10AP-396, 2011 Ohio App. Lexis 1383, 15 (March 31, 2011) (internal citations omitted). Notably, "[a]n action to foreclose a mortgage is not an action for personal judgment on the note secured by such mortgage." *U.S. Bank N.A. v. Robinson*, Eighth District Cuyahoga No. 105067, 2017 Ohio App. Lexis 2657, 7 (June 29, 2017). In fact, even where there is no enforceable obligation to pay the note, a mortgagee is still entitled to maintain an action in foreclosure to secure its interest in the property. *Id.* at 8. Further, "upon default, legal title to the mortgaged property passes to the mortgagee as between the mortgagor and mortgagee." *Id.* Accordingly, a foreclosure action on the mortgage only, such as the instant case, is characterized as one meant to secure the mortgagee's interest in the property at issue – not enforcing an obligation to pay the note. *Id.* It has been long recognized that an action for a personal judgment on a promissory note and an action to enforce mortgage covenants are separate and distinct remedies." *Id.* at 9 (internal citations omitted). "There are two remedies available with respect to actions pursued upon the mortgage, an action for ejectment and one for foreclosure[,]" and "prohibitions against enforcing a note do not preclude an action on the mortgage[.]" *Id.*, see also *Nat'l City Mortg. Co. v. Piccirilli*, Seventh District Mahoning County No. 08 MA 230, 2011 Ohio App. Lexis 3590, 27 (Aug. 24, 2011) ("an action for personal judgment on a promissory note is completely separate from an in rem action in foreclosure on a mortgage securing the note.")

Here, with respect to the Mortgage, Plaintiff provided the following deposition testimony:

> **Plaintiff:** I mean, I was buying the house, and we put it in her name, like she said in her deposition she had no clue if she, it was bought to be resold or whatever I chose to do with it. (Plaintiff's Depo. At pp. 26: 4-7).
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> **Defense Counsel:** Okay. So, to be fair, there was never a discussion between you and Holly with regard to the terms of a loan with regard to Far Hills, was there?
> **Plaintiff:** There was.
> **Defense Counsel:** Okay. Prior to its purchase?
> **Plaintiff:** Prior to its purchase, no.
> **Defense Counsel:** Okay. Now, the $110,000, sorry. The $110,000 does not represent a sum that's equal to the purchase price for 1800 Far Hills, you would agree with me, right?

Plaintiff: Agreed.
Defense Counsel: Okay. And I'm ballparking it here, but I believe the house was purchased for approximately $99,000; do you have any reason to dispute that?
Plaintiff: Ballpark.
Defense Counsel: Okay. Maybe 99,9 or something like that. I can give you exact, but it's my understanding that the sum of $110,000 came about by you representing that that was the purchase sum plus what you anticipated having into the property; is that a fair representation?
Plaintiff: That is exactly correct.
(Id. at pp. 30: 3-25).

Further, Defendant Lawson stated the following during her deposition testimony:

Plaintiff's Counsel: Your realtor did not provide, Celeste did not provide anything in advance to you?
Defendant Lawson: No. She was working for Ron.
Plaintiff's Counsel: Do you know whether or not there was going to be a mortgage on the premises prior to showing up at the closing?
Defendant Lawson: I never had any idea.
Plaintiff's Counsel: Did Celeste and/or Joey tell you that there was going to be a mortgage on the property at any time prior to you signing?
Defendant Lawson: No.
Plaintiff's Counsel: Did they tell you at the closing that there was going to be a mortgage at the property?
Defendant Lawson: No.
(Defendant Lawson Depo. at pp. 31: 6-19.)

Here, the parties both represented during their testimony that Defendant Lawson was not aware of the Mortgage at the time of the closing. As the Second District Court of Appeals has held, "[m]ortgages being voluntary security agreements incident or collateral to a primary obligation, are susceptible to the same rules of interpretation and the same framework of analysis which apply to contracts generally." *U.S. Bank, N.A. v. Stewart*, Second District Montgomery No. 21775, 2007 Ohio App. Lexis 4986, 56 (Oct. 19, 2007). "In construing any written instrument, the primary and paramount objective is to ascertain the intent of the parties[,]" and "[t]he general rule is that contracts should be construed so as to give effect to the intention of the parties." *Aultman Hospital Ass'n v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53 (1989). In sum, "[w]here the parties, following negotiations, make mutual promises which thereafter are integrated into an unambiguous written contract, duly signed by them, courts will give effect to the parties' expressed intentions." *Id.*

In the present case, the parties both admit that Defendant Lawson did not intend to enter into a Mortgage at the time of the closing because, as Plaintiff himself stated, she was not aware of the Mortgage, or terms of any alleged loan from Plaintiff, prior to the purchase of the Property. In fact, Plaintiff admitted that Defendant Lawson knew the Property would be in her name, but that she had no knowledge as to Plaintiff's

ultimate plans for the Property. Based upon the foregoing, the Court finds that, based upon the evidence presented including the testimony by both parties, it is clear that Defendant Lawson did not voluntarily enter into a Mortgage for the Property at issue and, therefore, Plaintiff is not entitled to foreclose on the Property. Therefore, the Court **OVERRULES** *Plaintiff's Motion for Summary Judgment.*

D. Mechanics' Lien

Pursuant to R.C. 1311.06, an affidavit for a mechanics' lien shall be filed within sixty days from the date on which the last labor or work was performed or material was furnished by the person claiming the lien. Here, Plaintiff admits that he "last performed labor and/or furnished materials" on September 8, 2016. *Plaintiff's Opposition* at 8. Further, he admits that the mechanics' lien was filed on November 9, 2016. *Id.* However, the Court notes that sixty days from September 8, 2016 was November 7, 2016 – two days prior to the date Plaintiff admits the lien was filed. Accordingly, there is no question of fact as to the validity of the mechanics' lien because it was not timely filed, and it is not necessary for the Court to consider the additional arguments regarding the substance of the lien itself. Therefore, the Court **SUSTAINS** *Defendant Lawson's Motion for Summary Judgment* as to this issue.

E. Quiet Title

Pursuant to R.C. 5303.01, "[a]n action may be brought by a person in possession of real property, by himself or a tenant, against any person who claims an interest therein adverse to him, for the purpose of determining such adverse interest." Further, courts in Ohio have determined that:

> A cloud upon title is a title, or incumbrance, apparently valid, but in fact invalid. *** A cloud upon a title is but an apparent defect *** the density of the cloud can make no difference in the right to have it removed. Anything of this kind that has a tendency, even in a slight degree, to cast doubt upon the owner's title, and to stand in the way of a full and free exercise of his ownership, is *** a cloud upon his title which the law should recognize and remove.

Novogroder v. DiPaola, 11 Ohio App. 374, 377-78 (8th Dist. 1919). As the Court has previously held, the Mortgage and mechanics' lien at issue are both invalid. Specifically, the Mortgage is invalid because the testimony and evidence before the Court establishes that Defendant Lawson did not enter into any such agreement knowingly or voluntarily, and the mechanics' lien is invalid because it was not timely filed. Moreover, the parties agree that the Property is titled in Defendant Lawson's name and both the Mortgage document and the mechanics' lien could cast doubt on Defendant Lawson's ownership of the Property. See Deposition of Plaintiff at pp. 24: 13-16. Therefore, Defendant Lawson is entitled to a decree of quiet title,

releasing the Mortgage and mechanics' lien and the Court **SUSTAINS** *Defendant Lawson's Motion for Summary Judgment* as to this issue.

F. Slander of Title

It is well-settled that "[s]lander of title is a tort action which may be 'brought against anyone who falsely and maliciously defames the property, either real or personal, of another, and thereby causes him some special pecuniary damage or loss.'" *Green v. Lemarr*, 139 Ohio App. 3d 414, 430 (2d Dist. 2000). In order to prevail on such a claim, one must prove: "(1) there was a publication of a slanderous statement disparaging claimant's title; (2) the statement was false; (3) the statement was made with malice or made with disregard of its falsity; and (4) the statement caused actual or special damages." *Id.* at 430-31. Further, when a document creates a potential cloud on title, the aggrieved owner of the property may bring a claim for slander of title. *Id.* at 432. "In the context of a claim for slander of title, malice exists if a party acts in reckless or wanton disregard of the rights of others, even if there is no evidence of personal hatred or ill will." *Weiner v. Kopp*, First District Nos. C-960611, C-960631, 1997 Ohio App. Lexis 2717, 15 (June 25, 1997).

Here, as an initial note, the Court agrees with Defendant Lawson that Plaintiff waived his ability to assert the affirmative defense that this claim is barred by the statute of limitations because he did not raise the defense in his response to Defendant Lawson's counterclaim. See *Swaim v. Scott*, Second District Montgomery County No. 25726, 2014 Ohio App. Lexis 412, ¶ 15 (Feb. 7, 2014) (holding that the "statute of limitations defense must be set forth affirmatively *** in a pleading responsive to the complaint.")

With respect to the elements of this claim, the Court notes that Plaintiff's use of the invalid Mortgage to bring this action, as well as the invalid mechanics' lien, constitute publications of slanderous statements that disparaged Defendant Lawson's title. The Court further finds that Plaintiff acted with malice because he acted with reckless disregard for Defendant Lawson's rights. Specifically, Plaintiff provided detailed testimony, admitting that he has extensive experience with buying and selling properties, the Property is titled in Defendant Lawson's name and, yet, Plaintiff did not discuss the terms of the Mortgage with Defendant Lawson prior to the purchase of the Property. Moreover, Plaintiff admits that he arbitrarily determined the amount of the Mortgage, which did not reflect the actual purchase price of the Property. See Plaintiff's Depo., generally. Accordingly, when Plaintiff brought this action for foreclosure, using the invalid Mortgage and untimely mechanics' lien, he showed reckless disregard for Defendant Lawson's rights as the titled owner of the Property

and, therefore, acted with malice. With respect to the final element of this claim, the Court finds that Plaintiff's actions have caused Defendant Lawson actual and special damages arising out of the litigation of this matter. The amount of any attorney fees will be addressed at a separate hearing as set forth below. Accordingly, the Court **SUSTAINS** Defendant Lawson's claim for slander of title.

III. CONCLUSION

Based upon the foregoing, the Court **OVERRULES** *Plaintiff's Motion for Summary Judgment* and **SUSTAINS** *Defendant Lawson's Motion for Summary Judgment*. A hearing on the issue of attorney fees arising out of Defendant Lawson's claim for slander of title shall take place on **November 12, 2019 at 9:00 a.m. in Courtroom 1**.

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NO JUST CAUSE FOR DELAY FOR PURPOSES OF CIV. R. 54. PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED:

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JUDGE DENNIS J. ADKINS

To the Clerk of Courts:
Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

ALFRED WM. SCHNEBLE, III
(937) 222-1232
Attorney for Plaintiff, Ronald A Waker

SEAN M KOHL
(614) 944-5219
Attorney for Defendant, Holly A Lawson

TIMOTHY J COOK
(614) 944-5219
Attorney for Defendant, Holly A Lawson

MICHELE PHIPPS
(937) 496-7676
Attorney for Defendant, Montgomery County Treasurer

ROBERT SCHMIDT, Bailiff (937) 496-7951 E-mail: robert.schmidt@montcourt.oh.gov

General Divison
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

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2018 CV 04218

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So Ordered,