

[Cite as *Wells Fargo Bank, N.A. v. Miles*, 2010-Ohio-2350.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93484

WELLS FARGO BANK, N.A.

PLAINTIFF-APPELLEE

VS.

LISA J. MYLES, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-633343

BEFORE: Kilbane, P.J., Sweeney, J., and Cooney, J.

RELEASED: May 27, 2010

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Lisa Myles (“Myles”), appeals the trial court’s dismissal of her counterclaims and third-party complaint for her failure to appear at the final pretrial. Myles argues that the journal entry disposing of her claims is void because it was signed by the trial judge, rather than the magistrate. After a review of the record and applicable law, we affirm.

{¶ 2} The following facts give rise to the instant appeal.

{¶ 3} On December 9, 2005, Myles purchased a home located at 23620 Comstock Road in Bedford Heights, Ohio, with a mortgage through American Midwest Mortgage Corporation (“American Midwest”). On February 1, 2007, American Midwest assigned the mortgage to Wells Fargo.

{¶ 4} On August 21, 2007, Wells Fargo filed a foreclosure action against Myles alleging she had failed to make the required mortgage payments. Wells Fargo maintained that Myles owed \$111,208.23, with interest at the rate of 6.25 percent per annum from March 1, 2007. On August 23, 2007, the trial court referred the matter to a magistrate.

{¶ 5} On October 11, 2007, Myles filed an answer and counterclaim asserting breach of contract, constructive fraud, and negligence. Myles alleged that the purchase agreement for the home was contingent upon the original lender, American Midwest, procuring a competent pest inspection and

determining that the home was free of pests.¹ Myles claims that within two weeks of moving into the home, she discovered it was infested with raccoons, bats, and carpenter ants.

{¶ 6} On November 16, 2007, Myles filed an amended answer, counterclaim, and third-party complaint against American Midwest. The third-party complaint alleged that American Midwest failed to procure a proper pest inspection of the residence prior to lending Myles the purchase money. Myles sought \$120,000 in compensatory damages in addition to punitive damages.

{¶ 7} On December 3, 2007, American Midwest filed an answer denying all allegations.

{¶ 8} On July 11, 2008, the trial court issued a journal entry scheduling a final pretrial for February 6, 2009, at 9:30 a.m. The trial court noted that all parties were required to be present at the final pretrial, and that failure of a party to be present would result in dismissal of their claims.

{¶ 9} On July 14, 2008, the trial court determined that the case might be suitable for mediation and stayed all motion practice until a mediator determined whether mediation was appropriate.

¹Although in her counterclaims Myles discusses the negligence of American Midwest in failing to procure a proper pest inspection, the counterclaims were directed at Wells Fargo who was not assigned the mortgage until February 2007.

{¶ 10} On August 15, 2008, the trial court issued an order scheduling a premediation conference for September 8, 2008. The order stated that counsel for the defendant and plaintiff must be present. Further, the order stated that failure of the plaintiff's counsel to appear at the premediation conference would result in plaintiff's claims being dismissed.

{¶ 11} On September 29, 2008, the trial court issued an order stating that a premediation conference had been held, and that the case was suitable for a second premediation conference. The second premediation conference was scheduled for October 8, 2008. All parties were ordered to attend and be prepared to discuss a resolution to the case.

{¶ 12} On October 14, 2008, the trial court entered an order stating that a second premediation conference had been held. The parties were ordered to complete mediation questionnaires and return them to the mediation department no later than November 6, 2008. The trial court warned the parties that the failure to complete the forms would result in dismissal or the return of the case to the foreclosure docket, respectively.

{¶ 13} On February 18, 2009, the trial court entered an order stating that Myles had failed to timely complete and return her mediation questionnaire; therefore, the case was returned to the foreclosure docket. That same day, the trial court entered a second entry detailing the events that transpired during the final pretrial.

{¶ 14} According to the trial court's entry, the final pretrial was scheduled to begin on February 6, 2009, at 9:30 a.m. Two attorneys and a bank representative were present on behalf of Wells Fargo, and Myles's counsel was also present. The trial court stated that despite its July 11, 2008 order requiring Myles to be present, Myles did not attend the final pretrial. The docket indicates that notice of the trial court's July 11, 2008 journal entry was sent to the parties.

{¶ 15} At the final pretrial, Myles's counsel admitted that she failed to provide counsel for Wells Fargo with any financial information, making it impossible to negotiate a resolution in this case. The trial court also stated that Myles's counsel was unprepared for the final pretrial and did not know basic information, such as her client's monthly mortgage payment. Myles's counsel attempted to call Myles to determine why she was not present for the final pretrial. After calling several numbers, Myles's counsel was unable to reach her client.

{¶ 16} The trial court took a break at 10:25 a.m., at which time Myles's counsel left the building, without informing the trial court, and walked to the nearby federal building where Myles worked, in an attempt to locate her and bring her back to the final pretrial. At 11:00 a.m., when Myles's counsel had not returned, the trial court dismissed Myles's claims as a sanction for failing to appear as directed in the trial court's July 11, 2008 entry.

{¶ 17} Myles filed the instant appeal, asserting five assignments of error for our review. In light of the fact that all five assignments of error are interrelated and address the validity of the underlying journal entry, we will address them together.

ASSIGNMENT OF ERROR NUMBER ONE

“THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ADOPTION OF REFEREE’S FACTUAL FINDINGS, WHERE APPELLANT DID NOT HAVE AN OPPORTUNITY TO OBJECT TO FACTUAL FINDINGS CONTAINED IN THE MAGISTRATE’S DISMISSAL ORDER.”

ASSIGNMENT OF ERROR NUMBER TWO

“THE MAGISTRATE EXCEEDED ITS AUTHORITY DISPOSING OF APPELLANT [SIC] CLAIM AND IN FAILING TO FILE ITS ENTRY WITH THE CLERK.”

ASSIGNMENT OF ERROR NUMBER THREE

“THE COURT ABUSED ITS DISCRETION AND ITS DUTY FOR INDEPENDENT REVIEW IN RENDERING A DECISION BASED ON A PROCEEDING BEFORE THE MAGISTRATE WITHOUT ALLOWING APPELLANT THE OPPORTUNITY TO OBJECT[,] THUS[,] THE FEBRUARY 18, 2009 ENTRY IS VOIDED.”

ASSIGNMENT OF ERROR NUMBER FOUR

“TRIAL COURT FAILED TO SATISFY ITS DUTY TO MAKE AND ENTER ITS OWN INDEPENDENT JUDGMENT WHEN IT ADOPTED [THE] MAGISTRATE’S ORDER DISMISSING ALL CLAIM[S] FILE BY APPELLANT LISA MYLES, THUS, THE FEBRUARY 18, 2009 ENTRIES SHOULD BE DECLARED VOID.”

ASSIGNMENT OF ERROR NUMBER FIVE

"TRIAL COURT ABUSED ITS DISCRETION BY ADOPTING MAGISTRATE'S ORDER WHICH WAS PROCEDURAL [SIC] DEFICIENT"

{¶ 18} In all of her assigned errors, Myles argues that the February 18, 2009 journal entry dismissing her claims is void because the magistrate was required to sign the journal entry, not the judge. We disagree.

{¶ 19} Myles maintains that because the final pretrial was held by the magistrate, the magistrate was required to sign the February 18, 2009 journal entry. Myles states that if the magistrate signed the journal entry, she would have been afforded ten days to object pursuant to Civ.R. 53(D)(2)(a)(2), prior to the judge approving the order. Myles contends that because the judge signed the journal entry, she was not afforded the ten-day period to file objections.

{¶ 20} Myles fails to recognize that, although certain actions may be referred to a magistrate, the case still remains on the trial judge's active docket. The trial judge may limit the magistrate's powers and duties pursuant to Civ.R. 53(D)(1)(b). The trial judge always retains the inherent authority to control the docket and issue orders. *In the Matter of Zmuda* (Mar. 31, 1997), 6th Dist. No. L-96-073, citing *State ex rel. Kura v. Sheward* (1992), 75 Ohio App.3d 244, 245, 598 N.E.2d 1340. Myles does not cite a case or rule that would prevent the trial judge from issuing orders on a case after it has been referred to a magistrate.

{¶ 21} Myles also asserts that she should have been afforded time to object to the February 18, 2009 journal entry because it contains factual findings. However, factual findings are findings with respect to the merit of a party's claims, and not the documentation of events that occurred at a final pretrial.

{¶ 22} Finally, Myles alleges that the magistrate did not properly serve and file the journal entry pursuant to Civ.R. 53(D)(2)(a)(ii). As the journal entry was signed by the judge and not the magistrate, Civ.R. 53 is inapplicable. An order by the trial court is considered valid when it has been signed by the trial judge and file-stamped by the clerk of courts. *Berea v. Wuensch* (Sept. 28, 2000), 8th Dist. No. 77291. The February 18, 2009 journal entry dismissing Myles's claims was appropriately signed and file-stamped. The docket also states that notice of the journal entry was sent to the parties.

{¶ 23} Myles fails to address the underlying dismissal of her claims in her brief, therefore, we will not address that issue. Myles merely states that the magistrate lacked the authority to dismiss her claims; however, it was the judge and not the magistrate that dismissed her claims. This court is not required to analyze issues that are not specifically listed as assignments of error and properly argued. *Cleveland Hts. v. Watson*, 8th Dist. No. 85344, 2005-Ohio-3595, at ¶52; App.R. 12(A); App.R. 16(A).

{¶ 24} We conclude that the judge had the authority to sign the February 18, 2009 journal entry. Accordingly, Myles's assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
COLLEEN CONWAY COONEY, J., CONCUR