[Cite as *RBS Citizens, N.A. v. Zigdon*, 2010-Ohio-3511.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93945

RBS CITIZENS, N.A.

PLAINTIFF-APPELLEE

vs.

BENJAMIN ZIGDON, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-682426

BEFORE: Sweeney, J., McMonagle, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: July 29, 2010

ATTORNEY FOR APPELLANTS

Anand N. Misra
The Misra Law Firm, LLC
3659 Green Road, Suite 100
Beachwood, Ohio 44122

ATTORNEYS FOR APPELLEE

Rosemary Taft Milby
Jennifer M. Monty
Weltman, Weinberg & Reis Co., L.P.A.
Lakeside Place, Suite 200
323 Lakeside Avenue, West
Cleveland, Ohio 44113

JAMES J. SWEENEY, J.:

{¶ 1} Defendants-appellants, Benjamin and Linda Zigdon ("the Zigdons"), appeal the court's granting summary judgment to plaintiff-appellee, RBS Citizens, N.A. ("RBS"), in this action to collect a debt, as well as granting summary judgment to RBS on the Zigdon's counterclaim. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On February 25, 2002, the Zigdons took out a line of credit for $283,400 with Charter One Bank, which was secured by a mortgage on the Zigdon's property located at 24110 Buckhurst Drive in Beachwood, Ohio.

{¶ 3} On August 12, 2002, Ohio Savings Bank filed a foreclosure action against the Zigdons to collect a mortgage debt on this same property. In 2007, the court granted Ohio Savings' summary judgment motion and the property was sold at a sheriff's sale. From the proceeds, Ohio Savings was paid in full and Charter One was paid in part from the surplus funds. After the foreclosure, the Zigdons made no further payments on the line of credit, and Charter One was left with a deficiency balance of $256,726.38.

{¶ 4} On September 1, 2007, a bank merger resulted in RBS taking over the assets and liabilities of Charter One, including the Zigdons' debt. On January 21, 2009, RBS sued the Zigdons for the balance due on the Charter One line of credit.

{¶ 5} On August 18, 2009, the court granted summary judgment to RBS on its debt collection claim and on the Zigdons' counterclaim. It is from this order that the Zigdons appeal.

{¶ 6} The Zigdons raise seven assignments of error for our review, which we will address in the order asserted and together where it is appropriate for discussion.

{¶ 7} "I. The trial court committed prejudicial error in failing to strike the affidavit of Nadene Alves, offered in support of RBS' motion for summary judgment, when the affidavit fails the standard required by Civil R. 56(E)."

{¶ 8} We review a court's denial of a motion to strike for an abuse of discretion. *Abernathy v. Abernathy*, Cuyahoga App. No. 81675,

2003-Ohio-1528. An abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (internal citations omitted).

{¶ 9} Pursuant to Civ.R. 56(E), affidavits that support summary judgment motions "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit."

{¶ 10} In the instant case, the Zigdons filed a motion to strike Nadene Alves' affidavit, which was submitted by RBS in support of its summary judgment motion on August 17, 2009. The next day, the court summarily denied the motion to strike and granted RBS' summary judgment motion. The Zigdons argue on appeal that the affidavit was not based on personal knowledge; rather, it was based on Alves' "personal review of the relevant documents including the file for the loan which is the subject of this lawsuit." The Zigdons further argue that the entire affidavit is inadmissible hearsay.

{¶ 11} Evid.R. 803(6) states, in pertinent part, that the following "records of regularly conducted activity" are admissible: "[a] * * * record * * * of acts, events, or conditions, made at or near the time by * * * a person with knowledge, if kept in the course of a regularly conducted business activity * * * all as shown by the

testimony of the custodian * * * unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

{¶ 12} We find the instant case to be on point with *Great Seneca Fin. v. Felty*, 170 Ohio App.3d 737, 2006-Ohio-6618, 869 N.E.2d 30. In *Felty*, the First District Court of Appeals of Ohio held that a representative of Great Seneca Financial (GSF) could properly testify about documents related to the defendant's First USA credit card account. Id. at ¶12-13.

{¶ 13} "GSF's 'custodian of records,' Cheryl Ann Kavanagh, indicated by way of affidavit that GSF had acquired the application and the statements as an assignee of the account and that the documents were 'kept in the course of a regularly conducted business activity and * * * were made at or near the time of the transactions reflected therein. * * * [S]aid records were made either by a party having personal knowledge of the information contained therein or based on information conveyed by a person having personal knowledge of the information contained therein. GSF is an assignee, receiving certified information electronically from an intermediary for the original creditor, First USA Visa.' Consequently, we hold that these documents were properly authenticated, i.e., that GSF established that the records were what GSF claimed them to be. See Evid.R. 901." *Felty*, at ¶12.

{¶ 14} The *Felty* court further held that the records could be admitted into evidence despite that GSF did not create the records. *Felty*, at ¶13-14. "[E]xhibits can be admitted as business records of an entity, even when that entity

was not the maker of those records, provided that the other requirements of [Evid.R.] 803(6) are met and the circumstances indicate that the records are trustworthy." Id. at ¶14.

{¶ 15} The question before us is whether Alves had "personal knowledge" of the documents she reviewed, as contemplated by Civ.R. 56(E). While we acknowledge that Alves did not create the Zigdon documents, we hold that her affidavit is admissible to support a summary judgment motion under the business record exception to the rule against hearsay.

{¶ 16} Alves is a Legal Specialist and Consumer Counselor for RBS. The documents she reviewed relating to the Zigdons were business records created by Charter One. On September 1, 2007, RBS and Charter One merged, with RBS taking over Charter One's accounts. As part of Alves' job duties, she is the custodian of Charter One documents pertaining to the Zigdons' line of credit.

{¶ 17} Accordingly, the court did not abuse its discretion when it denied the Zigdons' motion to strike Alves' affidavit, and the first assignment of error is overruled.

{¶ 18} "II. The trial court committed prejudicial error in disregarding plaintiff's lack of standing."

{¶ 19} Pursuant to Civ.R. 17(A), "[e]very action shall be prosecuted in the name of the real party in interest." Additionally, in *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 77, 701 N.E.2d 1002, the Ohio Supreme Court held that "if a claim is asserted by one who is not the real party in interest, then the

party lacks standing to prosecute the action." We review questions of standing under a de novo standard. *Cuyahoga Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330.

{¶ 20} In the instant case, the Zigdons argue that RBS offered no evidence that it was the owner of the credit line agreement and mortgage at issue, based on their belief that the Alves' affidavit is defective and inadmissible. However, under the first assignment of error, we concluded that the Alves' affidavit was admissible evidence in support of RBS' summary judgment motion. Having established that, we must determine whether the affidavit shows that RBS is the real party in interest.

{¶ 21} The affidavit asserts the following: RBS merged with Charter One and received all Charter One's "assets, debts, liabilities, and property"; after the merger, RBS acquired and serviced the Zigdons' account; and the Zigdons' account was in default and carried an unpaid balance of $256,726.38. Attached to the affidavit were various documents, including: the line of credit agreement and the mortgage in question; the payment history of the line of credit; and Ohio Secretary of State and federal Comptroller of the Currency records evidencing the merger between Charter One and RBS.

{¶ 22} We note that the Zigdons do not dispute this evidence, other than arguing generally that it was improperly admitted. We find, however, that the evidence was properly admitted and it established that RBS was the real party in interest, and thus, had standing to sue. See *Deutsche Bank Nat. Trust Co. v.*

Doucet, Franklin App. No. 07AP-453, 2008-Ohio-589 (holding that evidence showing SouthStar bank assigned Doucet's note to Deutsche Bank for collection was sufficient to prove that Deutsche was the holder of Doucet's note).

{¶ 23} The Zigdons' second assignment of error is overruled.

{¶ 24} "III. The trial court committed prejudicial error in disregarding Zigdons' argument that claims alleged by RBS had been waived through negligence and failure to mitigate damages."

{¶ 25} Essentially, the Zigdons argue that "Charter One failed to assert its lien priority over Ohio Savings Bank until after a judgment had been entered." This argument is without merit because nothing in the record evidences that Charter One had lien priority over Ohio Savings.

{¶ 26} The Zigdons allege that Charter One had a "superior lien position." In support of this allegation, the Zigdons direct us to paragraph three of the statement of facts in their appellate brief. This is not a proper citation to the record. App.R. 16(A)(7). Additionally, the legal authority the Zigdons cite under this assignment of error is irrelevant to the issue of lien priority and mitigation of damages.

{¶ 27} For example, the Zigdons argue that RBS "waived" its claim for damages and that waiver issues are questions of fact for a jury. To support this, they cite to *State Automobile Mutual Ins. Assn. v. Lind* (1930), 122 Ohio St. 500, 506, which concerns the issue of waiver of a notice provision in an automobile insurance policy. The only other legal authority that the Zigdons reference under

this assignment of error is *F. Enterprises, Inc. v. Kentucky Fried Chicken Corp.* (1976) 47 Ohio St.2d 154, 351 N.E.2d 121, which concerns the measure of damages arising from an anticipatory breach of a lease agreement.

{¶ 28} We also note that Charter One filed an answer in the Ohio Savings case on November 8, 2005 — long before the October 12, 2007 judgment — and Charter One received residual payment of $26,085.75 in the Ohio Savings case.

{¶ 29} Without proper evidence alleging that Charter One's security interest in the Zigdons' property was superior to Ohio Savings, we cannot say that Charter One failed to mitigate its damages. As such, the Zigdons' third assignment of error is overruled.

{¶ 30} "IV. The trial court committed prejudicial error in finding that RBS was entitled to recover $256,726.38 plus interest at the rate of 6% per annum, from February 27, 2002, when RBS submitted a contradictory admission that interest was due from June 30, 2008."

{¶ 31} The Zigdons raise this argument for the first time on appeal. The Ohio Supreme Court has held that "we have long recognized, in civil as well as criminal cases, that failure to timely advise a trial court of possible error, by objection or otherwise, results in a waiver of the issue for purposes of appeal." *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121, 679 N.E.2d 1099.

{¶ 32} The Zigdons argue on appeal that "raising this issue to the trial court would have been impossible." However, all of the information that the Zigdons needed to raise this allegation of a "contradictory admission" was contained in

RBS' complaint and its motion for summary judgment, both of which, of course, were part of the trial court's record before final judgment was issued. This issue could have easily been raised at the trial court level.

{¶ 33} Furthermore, the court's finding that interest was due from 2002 does not amount to plain error because, once again, the Zigdons do not dispute the substance of their default on the credit line agreement, nor the amount due including interest. Rather, they point to an alleged inconsistency in RBS' calculations, and for better or worse, they waived this argument on appeal. Consequently, the fourth assignment of error is overruled.

{¶ 34} "V. The trial court committed prejudicial error in dismissing Zigdons' FDCPA counterclaim, because RBS admits to have acquired the alleged debt for collection after it was already in default.

{¶ 35} "VI. The trial court committed prejudicial error in dismissing Zigdons' fraud claims, because Charter One concealed the appraiser's bias and stated a false and inflated value of the property in inducing defendants to obtain a loan.

{¶ 36} "VII. The trial court committed prejudicial error in dismissing Zigdons' contract claim even though RBS did not seek summary judgment on that claim."

{¶ 37} In the Zigdons' final three assignments of error, they argue that the court erred in dismissing their three counterclaims. However, the court did not dismiss anything. It granted summary judgment in favor of RBS on all claims. Furthermore, the Zigdons filed one counterclaim, not three. We assume that the

Zigdons meant to argue that the court erred in granting summary judgment to RBS on their counterclaim, and in the interest of justice, we review as such.

{¶ 38} Appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. The Ohio Supreme Court stated the appropriate test in *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201:

{¶ 39} "Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp*. (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264, 273-274."

{¶ 40} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385, 667 N.E.2d 1197.

Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138.

{¶ 41} The Zigdons first argue that RBS is subject to the Fair Debt Collection Practices Act (FDCPA), as codified in 15 U.S.C. 1692 et seq. However, a cursory review of the law shows that this argument is without merit, because creditors and mortgage service companies are not debt collectors and are not subject to liability under the FDCPA. *Scott v. Wells Fargo Home Mtge. Inc*. (2003), 326 F.Supp.2d 709. See, also, *Montgomery v. Huntington Bank* (C.A.6 2003), 346 F.3d 693, 699 (holding that "[a] bank that is 'a creditor' is not a debt collector for the purposes of the FDCPA and creditors are not subject to the FDCPA when collecting their accounts") (internal citations omitted).

{¶ 42} The purpose of the FDCPA is to "eliminate abusive debt collection practices by debt collectors," as distinguished from creditors. 15 U.S.C. 1692. A debt collector refers to "any business the principle purpose of which is the collection of any debts * * *." A creditor, on the other hand, refers to an entity that "offers or extends credit creating a debt or to whom a debt is owed."

{¶ 43} The Zigdons argue extensively that RBS is a debt collector subject to the FDCPA because RBS "acquired" their loan when it was already in default, thus RBS was engaging in nothing but a "collection activity." This argument is based on a misunderstanding of the law. RBS did not purchase Charter One's liabilities for the purpose of collecting the debt. Rather, RBS and Charter One merged, with RBS taking over, as original creditor, the Zigdons' mortgage. As a

result of a merger, the surviving entity assumes "all obligations belonging to or due each constituent entity * * *." *ASA Architects, Inc. v. Schlegel* (1996), 75 Ohio St.3d 666, 672, 665 N.E.2d 1083 (quoting R.C. 1701.82(A)(3)). Accordingly, RBS is not subject to the FDCPA because it is not a debt collector as envisioned by the statute.

{¶ 44} The Zigdons next argue that summary judgment on their fraud counterclaim was improper because the appraiser was biased and the appraisal value of the property was inflated.

{¶ 45} A fraud claim is subject to a four-year statute of limitations. R.C. 2305.09(C). The Zigdons argue that their fraud claim against RBS is still viable pursuant to the discovery rule, which states that a claim for fraud does not begin to accrue until the fraud is, or should have been, discovered. *Investors REIT One v. Jacobs* (1989), 46 Ohio St.3d 176, 546 N.E.2d 206. According to the Zigdons, the earliest opportunity they had to discover the alleged fraud was when the property was sold on December 31, 2007.

{¶ 46} However, similar to our analysis in the fourth assignment of error, all of the information the Zigdons needed to allege fraud was available to them in 2002. On February 25, 2002, the Zigdons signed, as part of the credit line agreement with Charter One, an "Affiliated Business Arrangement Disclosure Statement," disclosing that the appraisal company was owned by a subsidiary of Charter One. Notwithstanding that a signed disclosure of an affiliation would

presumably preclude an action for fraud on that issue, the statute of limitations on this claim ran on February 25, 2006.

{¶ 47} As to the allegation of an inflated appraisal, the Zigdons claim for fraud cannot withstand summary judgment. The elements of fraud are: (1) a knowingly false representation; (2) made with the intent to induce reliance; (3) actual reliance by the injured party; and (4) resulting injury. *Richard v. WJW TV-8*, Cuyahoga App. No. 84541, 2005-Ohio-1170.

{¶ 48} In their counterclaim, the Zigdons allege that they relied upon an appraisal "made on or about mid-January 2002," when signing the loan documents and paying "unwarranted interest charges." However, there is no evidence in the record of a January 2002 appraisal. The February 25, 2002 loan agreement that the Zigdons signed states that the loan is conditioned upon an "acceptable appraisal." Attached to RBS' summary judgment motion is the September 12, 2002 appraisal that Charter One ordered for the Zigdon property in conjunction with the credit line agreement.

{¶ 49} The Zigdons produced no evidence to challenge this appraisal, or otherwise show it was a false representation made knowingly by RBS. Clearly, the Zigdons did not rely on an appraisal that had not yet occurred when signing the loan documents. Furthermore, there is no evidence of an alleged injury suffered by the Zigdons as a result of the appraisal. In short, the Zigdons produced no evidence of fraud.

{¶ 50} The final argument that the Zigdons allege is that the court erred in granting summary judgment to RBS on their breach of contract counterclaim because RBS did not seek summary judgment on that claim. This assertion misstates the procedural facts of the case. In their counterclaim, the Zigdons state that RBS "had a duty under the agreement * * * to protect the collateral" and RBS "breached the agreement by failing to act to protect the collateral * * *."

{¶ 51} In RBS' summary judgment motion, approximately three pages are devoted to the following subject: " * * * the Zigdons allege that [RBS] is barred because it failed to protect its collateral in the Ohio Savings Foreclosure and thus breached a fiduciary duty owed to the Zigdons. None of these claims can survive summary judgment." Accordingly, we find that RBS moved for summary judgment on the Zigdons' breach of contract claim. As the Zigdons do not argue the substance of summary judgment being granted on the breach of contract claim, we hold that it was procedurally proper for the court to entertain summary judgment on this claim, inasmuch as it was included in RBS' motion for summary judgment.

{¶ 52} The Zigdons fail to satisfy Civ.R. 56(E), as they set forth no specific facts showing a genuine issue of material fact for trial on their counterclaim. The fifth, sixth, and seventh assignments or error are overruled.

{¶ 53} In conclusion, after reviewing the record, we find that the Zigdons do not dispute that they defaulted on the credit line agreement and now owe $256,726.38. Rather, they challenge various procedural aspects of this case.

To review our holdings, the Alves' affidavit was properly admitted; RBS had standing to sue; there is no evidence that Charter One had lien priority; the Zigdons waived arguments made for the first time on appeal; and the court did not err in granting summary judgment to RBS.

Judgment affirmed.

It is ordered that appellee recover from appellants its 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 Court of Common Pleas 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.

JAMES J. SWEENEY, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
PATRICIA A. BLACKMON, J., CONCUR