[Cite as *U.S. Bank Natl. Assn. v. Perry*, 2010-Ohio-6171.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94757

U.S. BANK NATIONAL ASSOCIATION

PLAINTIFF-APPELLEE

vs.

WORLEY V. PERRY, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-664469

BEFORE: Jones, J., Gallagher, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: December 16, 2010

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LARRY A. JONES, J.:

{¶ 1} Defendants-appellants, Worley Perry and Dorothy Perry ("the Perrys"), appeal the February 23, 2010 decision of the trial court granting summary judgment in favor of U.S. Bank and issuing judgment in the amount of $74,062.58, plus interest at 7.5% from and after March 1, 2008, and issuing a decree of foreclosure. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm in part, reverse in part and remand to the trial court for further proceedings in accordance with this opinion.

STATEMENT OF THE CASE

{¶ 2} On July 10, 2008, appellee, U.S. Bank National Association ("U.S. Bank") filed a complaint for foreclosure against the Perrys seeking judgment on a note in the amount of $74,062.58, plus interest and seeking to foreclose on the property at 13211 Rexwood Avenue in Garfield Heights, Ohio 44105.

{¶ 3} On July 31, 2008, the Perrys filed a motion to dismiss, asserting that U.S. Bank was not the recorded owner of the mortgage on the property. In response, U.S. Bank filed a recorded assignment of mortgage executed by Mortgage Electronic Registration Systems, Inc., assigning the mortgage to U.S. Bank on July 10, 2008. The trial court denied the Perrys' motion to dismiss on August 28, 2008.

{¶ 4} U.S. Bank filed its motion for summary judgment on October 15, 2008. U.S. Bank asserted that the note was in default and that it was entitled to judgment on the note and foreclosure on the mortgage. The Perrys responded

by asserting that because the mortgage was not assigned and recorded prior to the filing of the complaint, U.S. Bank lacked standing.

{¶ 5} On December 22, 2008, the magistrate issued an order recommending that the judge grant summary judgment in U.S. Bank's favor. The Perrys filed an objection on January 5, 2009. On February 23, 2010 the trial court overruled the objections and granted U.S. Bank judgment and a foreclosure decree. The Perrys filed their notice of appeal on March 2, 2010. The Perrys also filed a stay of the sheriff's sale pending appeal, which the trial court granted.

STATEMENT OF THE FACTS

{¶ 6} On August 5, 2002, Worley Perry purchased the single family dwelling at issue. He later experienced financial difficulties due to the economy and his wife's illness and fell behind on the payments.

{¶ 7} On September 1, 2005, the Perrys executed on a note, borrowing $76,000 from American Brokers Conduit. On the same day, they executed the mortgage, securing the performance of the note with a lien on the property. The Perrys failed to make payment after March 1, 2008. The failure constituted a default under the note and mortgage, and U.S. Bank accelerated the entire balance due.

ASSIGNMENTS OF ERROR

{¶ 8} The Perrys assign two assignments of error on appeal:

{¶ 9} "[1.] The trial court erred and abused its discretion when it granted

summary judgment to appellee because at the time appellee filed the complaint, appellee did not have the right to invoke the jurisdiction of the court, and thus was not entitled to judgment as a matter of law.

{¶ 10} "[2.] The trial court erred and abused its discretion by relying on the supplemental affidavit in support of motion for summary judgment by Matthew A. Taulbee, an attorney for the plaintiff, which was improper."

LEGAL ANALYSIS

{¶ 11} The Perrys argue in their first assignment of error that the trial court erred when it granted summary judgment because U.S. Bank did not have jurisdiction of the court.

{¶ 12} Civ.R. 56 provides that summary judgment may be granted only after the trial court determines: 1) no genuine issues as to any material fact remain to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come but to one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 433 N.E.2d 615; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.

{¶ 13} It is well established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Celotex Corp. v. Catrett* (1987), 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Doubts must

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

{¶ 14} In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264, the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095. Under *Dresher*, " * * * the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party's claim." Id. at 296, 662 N.E.2d 264. The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. at 293, 662 N.E.2d 264. The nonmoving party must set forth "specific facts" by the means listed in Civ.R. 56(C) showing a genuine issue for trial exists. Id.

{¶ 15} This court reviews the trial court's granting of summary judgment de novo. *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153.

{¶ 16} It is with the above standards in mind that we now address the Perrys' first assignment of error. The Perrys argue that the trial court erred when it granted summary judgment to U.S. Bank because at the time U.S. Bank filed the complaint, U.S. Bank did not have the right to invoke the jurisdiction of the court and was therefore not entitled to judgment. We find the Perrys' argument to have merit.

{¶ 17} Review of the docket and the markings on the complaint demonstrate that the complaint was filed on July 10, 2008. U.S. Bank filed its motion for summary judgment and attached an affidavit from China Brown, the Vice President of Loan Documentation for Wells Fargo. The affidavit provided the following:

> "2. Plaintiff is the holder of the note and mortgage which are the subject of the within foreclosure action. True and accurate reproductions of the originals as they exist in Plaintiff's files are attached hereto as Exhibits 'A' and 'B'."[1]

{¶ 18} The affidavit is dated September 22, 2008 and the affidavit states that the plaintiff is the holder of the note and mortgage. It does not state that plaintiff was the holder of the note and mortgage at the time the complaint was filed.

{¶ 19} Because the complaint was filed the same day the assignment was dated, without evidence that the assignment was given prior to the filing of the complaint, the trial court should have denied the motion for summary judgment. See *Wells Fargo Bank, N.A., Trustee, Etc. v. Jordan*, Cuyahoga App. No. 91675, 2009-Ohio-1092.

{¶ 20} *Wells Fargo v. Jordan* provides the following:

> "Several judges have held that a complaint must be dismissed if the plaintiff cannot prove that it owned the note and mortgage on the date the complaint was filed. E.g., *In re Foreclosure Cases*, (N.D. Ohio 2007), Case Nos. 1:07CV2282, et seq., (Boyko, J.); *In re Foreclosure Cases* (S.D. Ohio 2007), 521 F.Supp.2d 650, (Rose, J.). Thus, if plaintiff has offered no evidence that it owned the note and mortgage when the complaint was filed, it would not be entitled to judgment as a matter of law."

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[1]See China Brown Affidavit, second paragraph.

> "*In Wells Fargo Bank, N.A. v. Byrd, supra*, where Wells Fargo filed suit on its own behalf but acquired the mortgage from the original lender after filing, the court held that, 'in a foreclosure action, a bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage.'"
>
> "Our facts are exactly the same here. Delta Funding Corporation owned the Mortgage for the Property on August 3, 2007, the date WFB filed its complaint against Jordan. On September 24, 2007, WFB filed a Notice of Filing of Final Judicial Report. Attached to the Notice were a Final Judicial Report and an Assignment of Mortgage, indicating the Mortgage had been assigned to WFB on August 22, 2007, nearly three weeks after it filed its complaint. In short, WFB was not the real party in interest on the date it filed its complaint seeking foreclosure against Jordan."
>
> "Thus, WFB lacked standing to bring a foreclosure action against Jordan. As such, the trial court erred in granting summary judgment in favor of WFB because WFB was not entitled to judgment as a matter of law. We sustain Jordan's first assignment of error, reverse summary judgment, and order the trial court to dismiss the complaint without prejudice."

{¶ 21} Here, China Brown's affidavit does not state that U.S Bank was the holder of the note and the mortgage at the time the complaint was filed. Accordingly, the trial court did not have evidence to prove that U.S. Bank was indeed the holder of the note and the mortgage at the time the complaint was actually filed. Accordingly, we find that it appears from the evidence that reasonable minds can come to more than one conclusion.

{¶ 22} The Perrys' first assignment of error is well taken.

{¶ 23} The Perrys argue in their second assignment of error that the trial court erred by relying on Matthew A. Taulbee's supplemental affidavit in support of motion for summary judgment. Specifically, the Perrys argue that Taulbee was

employed as trial counsel for Lerner, Sampson & Rothfuss, and as trial counsel for plaintiff, Taulbee is forbidden from acting as a witness.

{¶ 24} However, a review of the record demonstrates that the Perrys failed to raise this issue in the court below. Generally, if a party has knowledge of an error with sufficient time to object before the judge takes any action, that party waives any objection to the claimed error by failing to raise that issue on the record before the action is taken. *Tissue v. Tissue*, Cuyahoga App. No. 83708, 2004-Ohio-5968; *Belvedere Condominium Unit Owners Assn. v. R.E. Roark Cos*., *Inc.*, 67 Ohio St.3d 274, 279, 1993-Ohio-119, 617 N.E.2d 1075; *Mark v. Mellott Mfg. Co., Inc.* (1995), 106 Ohio App.3d 571, 589, 666 N.E.2d 631; *Sagen v. Thrower* (Apr. 8, 1999), Cuyahoga App. No. 73954. Therefore, a litigant who had the opportunity to raise a claim in the trial court, but failed to do so, waives the right to raise that claim on appeal. Id.

{¶ 25} Accordingly appellants' second assignment of error is overruled.

Judgment is affirmed in part, reversed in part and remand to the trial court for further proceedings.

It is ordered that appellee and appellants split the 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 Cuyahoga County 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.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR