[Cite as *U.S. Bank Natl. Assn. v. Morales*, 2009-Ohio-5635.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE SPECIALTY UNDERWRITING AND RESIDENTIAL FINANCE TRUST MORTGAGE LOAN ASSET-BACKED CERTIFICATES SERIES 2007-BC1,	:	**O P I N I O N**
	:	**CASE NO. 2009-P-0012**
Plaintiff-Appellee,	:	
- vs -	:	
JOSEPH G. MORALES, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2008 CV 1608.

Judgment: Affirmed.

M. Elizabeth Hils, Lerner, Sampson & Rothfuss, L.P.A., 120 East Fourth Street, #800, Cincinnati, OH 45202 (For Plaintiff-Appellee).

Edward C. Learner, 3761 Fishcreek Road, Stow, OH 44224 (For Defendants-Appellants, Joseph G. and Mary E. Morales).

COLLEEN MARY O'TOOLE, J.

{¶1} Joseph G. and Mary E. Morales appeal from the grant of summary judgment by the Portage County Court of Common Pleas to U.S. Bank National Association, as Trustee for the Specialty Underwriting and Residential Finance Trust

Mortgage Loan Asset-Backed Certificates Series 2007-BC1 ("U.S. Bank") in a foreclosure action. We affirm.

{¶2} October 5, 2006, Mr. Morales borrowed $102,000 from Wilmington Finance, Inc. He signed a note promising to repay the loan over thirty years. The note was secured by a mortgage on the Moraleses' home located at 429 Harris Street, Kent, Ohio. Mrs. Morales did not sign the note, but did sign the mortgage, in order to subject her dower interest to the lien. The mortgage was recorded October 6, 2006 with the Portage County Recorder. Wilmington Finance thereafter endorsed the note in blank, per an allonge.

{¶3} In early 2008, Mr. Morales defaulted on the loan. September 26, 2008, Wilmington Financial assigned the mortgage and note to U.S. Bank. October 1, 2008, U.S. Bank brought this action for foreclosure. It recorded the assignment of the mortgage from Wilmington Financial October 3, 2008.

{¶4} Pursuant to the directive of the Supreme Court of Ohio, the Portage County Court of Common Pleas includes a "Request for Mediation Hearing" form when a complaint in foreclosure is served. The Moraleses filled this out, and filed it October 17, 2008. The request stayed the foreclosure. However, November 4, 2008, they contacted the trial court's mediation office, to inform it that they had filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Northern District of Ohio, Case No. 08-54062. The Moraleses never filed a suggestion of bankruptcy with the trial court.

{¶5} U.S. Bank moved the bankruptcy court to lift the automatic stay regarding its foreclosure action, which motion the bankruptcy court granted December 11, 2008.

December 23, 2008, the Moraleses answered the complaint. January 27, 2009, U.S. Bank filed for summary judgment. Contemporaneously, it filed the affidavit of Naomi Hernandez, a foreclosure specialist with Wiltshire Credit Corporation, U.S. Bank's servicing agent, with copies of the note, mortgage, assignment, and legal description of the subject property attached, and attesting that Mr. Morales was in default. U.S. Bank also filed separately a copy of the note with allonge, and another copy of the assignment.

{¶6} January 30, 2009, the trial court filed a judgment entry scheduling non-oral hearing on the summary judgment motion twenty-one days hence – i.e., February 20, 2009. It ordered that all memoranda and evidence opposing the motion were to be filed before the hearing date, as well as any request for an extension of time. Notably, Portage Cty. Loc.R. 8.02 requires specifically that memoranda in opposition to a motion be filed fourteen days following filing of the motion, and that reply memoranda be filed within seven days thereafter.

{¶7} February 17, 2009, prior to the scheduled hearing date, but following the time mandated by Portage Cty. Loc.R. 8.02 for filing a memorandum in opposition to the summary judgment motion, the trial court filed its judgment entry granting summary judgment to U.S. Bank. February 19, 2009, the Moraleses filed an "objection" to the summary judgment motion, asserting their right to mediation per their October 17, 2008 request, prior to any summary judgment proceedings. The Moraleses re-filed this objection February 23, 2009.

{¶8} March 2, 2009, the trial court filed a judgment entry, construing the Moraleses' objection as a motion to vacate the grant of summary judgment. It ordered

the Moraleses to file a suggestion of bankruptcy, and proof they had listed U.S. Bank as a creditor. That same day, the trial court scheduled hearing on the motion to vacate before its magistrate for May 20, 2009.

{¶9} March 5, 2009, U.S. Bank filed a praecipe for sale. March 11, 2009, the Moraleses noticed this appeal, and moved the trial court for a stay pending its outcome. March 12, 2009, the trial court denied the stay. April 20, 2009, U.S. Bank filed notice of the Moraleses' bankruptcy case with the trial court, as well as of the termination of the automatic stay. That same day, U.S. Bank noticed to the trial court it was relieved of jurisdiction to consider the motion to vacate as a result of the appeal. May 18, 2009, on U.S. Bank's application, the trial court ordered the Moraleses' home be removed from the sheriff's sale.

{¶10} The Moraleses assign four errors on appeal:

{¶11} "[1.] THE TRIAL COURT ERRED IN FAILING TO SCHEDULE A MEDIATION IN THIS CASE THAT WAS REQUESTED BY APPELLANT *** [.]

{¶12} "[2.] THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF/APPELLEE US BANK NA *** [.]

{¶13} "[3.] THE TRIAL COURT DENIED APPELLANT HIS RIGHT TO DUE PROCESS BY PREMATURELY GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF/APPELLEE US BANK NA *** [.]

{¶14} "[4.] THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF/APPELLEE US BANK NA WHEN PLAINTIFF/APPELLEE DID NOT HAVE LEGAL TITLE OF THE NOTE AT THE TIME OF FILING THE COMPLAINT *** [.]"

{¶15} "'Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.' *Holik v. Richards*, 11th Dist. No. 2005-A-0006, 2006-Ohio-2644, ¶12, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, ***. 'In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party.' Id. citing Civ.R. 56(C). Further, the standard in which we review the granting of a motion for summary judgment is de novo. Id. citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, ***.

{¶16} "Accordingly, '(s)ummary judgment may not be granted until the moving party sufficiently demonstrates the absence of a genuine issue of material fact. The moving party bears the initial burden 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 on a material element of the nonmoving party's claim.' *Brunstetter v. Keating*, 11th Dist. No. 2002-T-0057, 2003-Ohio-3270, ¶12, citing *Dresher* at 292. 'Once the moving party meets the initial burden, the nonmoving party must then set forth specific facts demonstrating that a genuine issue of material fact does exist that must be preserved for trial, and if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.' Id., citing *Dresher* at 293.

{¶17} "***

{¶18} "***

{¶19} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary

judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, ***.

{¶20} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, ***, is too broad and fails to account for the burden Civ.R. 56 places upon a *moving* party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff*. (Emphasis added.)

{¶21} "The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as 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 on a material element of the nonmoving party's claim.' Id. at 276. (Emphasis added.)" *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶36-37, 40-42. (Parallel citations omitted.)

{¶22} By their first assignment of error, the Moraleses contend they were entitled to mediation by the request filed October 17, 2008. They note that the form itself provides that mediation is designed to resolve litigation prior to entry of a final judgment – such as the summary judgment granted U.S. Bank herein. Consequently, they argue their request for mediation divested the trial court of power to enter a final judgment until mediation had occurred.

{¶23} We respectfully disagree. Mediation is, by its very nature, a voluntary process; and, no law or rule cited by the Moraleses indicates that a trial court is required to offer it once litigation has commenced. It is discretionary. Thus, in response to Ohio's foreclosure crisis, the General Assembly has granted trial courts discretionary power to require parties to a foreclosure to participate in mediation. R.C. 2323.06 provides, "In an action for the foreclosure of a mortgage, the court *may* at any stage in the action require the mortgagor and the mortgagee to participate in mediation *** [.]" (Emphasis added.) And Portage Cty. Loc.R. 23.01, governing mediations in actions

before the trial court, similarly couches the trial court's power to order mediation in discretionary terms.

{¶24} Further, once the Moraleses had requested mediation in this case, October 17, 2008, they cancelled it November 4, 2008, upon the filing of their bankruptcy case. Thereafter, once the automatic stay was lifted by the bankruptcy court, December 11, 2008, the Moraleses did not again request mediation: they answered the complaint. They did not raise the issue again until they filed their objection to the summary judgment motion, February 19, 2009. By its judgment entries of March 2, 2009, the trial court attempted to reach the issue, construing the objection as a motion to vacate, and scheduling hearing in front of its magistrate for May 20, 2009. But prior to the hearing date, the Moraleses divested the trial court of jurisdiction to consider the issue of mediation (the only one raised by the February 19, 2009 objection), by noticing this appeal. *Howard v. Catholic Social Serv. of Cuyahoga Cty., Inc.* (1994), 70 Ohio St.3d 141, 147.

{¶25} The first assignment of error lacks merit.

{¶26} By their second assignment of error, the Moraleses assert the trial court erred in ruling on the motion for summary judgment prior to the expiration of the twenty-one day period set forth in its judgment entry of January 30, 2009 for holding non-oral hearing. By their third assignment of error, the Moraleses assert they were denied due process of law when the trial court ruled on the motion for summary judgment prior to the date set for non-oral hearing. We analyze these assignments together.

{¶27} By its January 30, 2009 judgment entry, the trial court required that any memoranda and evidence opposing the motion for summary judgment be submitted

prior to the hearing date, which was February 20, 2009 – twenty-one days from the issuance of the scheduling order. However, we believe the January 30, 2009 judgment entry must be read in connection with Portage Cty. Loc.R. 8.02, which mandates that memoranda in opposition to the balance of motions filed (including those for summary judgment) be filed within fourteen days of service of the motion, and that reply memoranda be served within seven days of the opposition. That is, the twenty-one day period for filing memoranda and evidence on the motion for summary judgment set forth in the trial court's January 30, 2009 judgment entry encompassed the entire period for motion practice set forth in the local rule. As U.S. Bank served its motion by mail January 23, 2009, the Moraleses had, pursuant to Portage Cty. Loc.R. 8.02 and Civ.R. 6(E), seventeen days to serve their opposition. This period expired on or about February 9, 2009 – and the Moraleses did not serve their objection to the summary judgment motion until February 18, 2009. Thus, the trial court was within its rights to rule on the summary judgment motion February 17, 2009.

{¶28} In support of their argument that the trial court deprived them of due process by ruling on the summary judgment motion prior to the scheduled hearing date, the Moraleses cite to this court's decision in *Zamos v. Zamos*, 11th Dist. No. 2004-P-0108, 2005-Ohio-6075. In that case, we held: "In applying Civ.R. 6(D) and local rules of court governing the timing of a trial court's consideration of a written motion after its submission, this court has specifically concluded that the failure to abide by the time requirements of such rules constitutes a violation of due process." Id. at ¶17.

{¶29} We think the citation inapposite. First, as discussed above, the trial court did abide by its own local rule. And even if the January 30, 2009 judgment entry is

construed as extending the Moraleses' time to file their memorandum in opposition until the day prior to hearing (which would deprive U.S. Bank of its right, pursuant to the local rule, to file a reply), the error must be deemed harmless. Civ.R. 61. Following filing of the objection, the trial court, construing the objection as a motion to vacate, did set hearing – which could not go forward, due to this appeal.

{¶30} The second and third assignments of error lack merit.

{¶31} By their fourth assignment of error, the Moraleses allege that U.S. Bank was not the proper holder of the note at the time this action was filed, and thus, lacked standing. They premise this argument on the fact that U.S. Bank did not record the September 26, 2008 assignment of the note from Wilmington Financial until October 3, 2008, two days after filing for foreclosure.

{¶32} We respectfully disagree. The Moraleses do not contest the validity of the assignment itself. The purpose of the recording statute regarding transfers in real property interests, R.C. 5301.25(A), is to protect subsequent bona fide purchasers. *Bradford v. B & P Wrecking Co, Inc.*, 171 Ohio App.3d 616, 2007-Ohio-1732, at ¶32. The Moraleses are not subsequent bona fide purchasers, requiring notice of other potential interests in the subject property. The proper assignment of the subject note made U.S. Bank its current holder, with the right to enforce all rights of the original mortgagee – including the right to foreclose. 69 Ohio Jurisprudence 3d (2004), Mortgages, Section 471. As between U.S. Bank, and the Moraleses, recording of the assignment was not a condition precedent to the right of foreclosure. Cf. *Bradford*, supra, at ¶32 (failure to record land installment contracts did not void those contracts as between the vendee and vendor).

{¶33} Further, as U.S. Bank notes, pursuant to Civ.R. 17(A), as current holder of the note and mortgage, and thus, the real party in interest to this foreclosure, it could always be substituted in as plaintiff. Civ.R. 17(A) specifically states that actions should not be dismissed due to failure to prosecute by the real party in interest, until a reasonable amount of time has lapsed to allow substitution or joinder.

{¶34} The fourth assignment of error lacks merit.

{¶35} The judgment of the Portage County Court of Common Pleas is affirmed.

{¶36} It is the further order of this court that appellants are assessed costs herein taxed.

{¶37} The court finds there were reasonable grounds for this appeal.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDELL, J.,

concur.