[Cite as *EMC Mtge. Corp. v. Atkinson*, 2015-Ohio-1800.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

EMC MORTGAGE CORP.	C.A. No. 27283
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
ROBERT ATKINSON, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2003 04 2401

DECISION AND JOURNAL ENTRY

Dated: May 13, 2015

MOORE, Judge.

{¶1} Defendant, Robert W. Atkinson, Jr., appeals from the judgment of the Summit County Court of Common Pleas. This Court reverses and remands this matter to the trial court for further proceedings consistent with this decision.

I.

{¶2} In 2003, EMC Mortgage Corporation ("EMC"), filed a complaint in foreclosure against Mr. Atkinson and other defendants not a party to this appeal. Mr. Atkinson filed a combined answer, counterclaim, and third-party complaint. The third-party complaint named United Companies Lending Corporation ("United"), Vanda Coffield, and Midland Title, First American, fka Colonial Title ("Midland") as third party defendants. In 2006, Mr. Atkinson dismissed his counterclaims against EMC without prejudice. He then moved for leave to amend his answer, and he attached a document thereto entitled "Defendant's First Amended Answer and Third-Party Complaint," which he indicated was his proposed amended pleading. Thereafter, the

trial court granted Mr. Atkinson leave to amend his answer. He then filed a "First Amended Answer to Plaintiff's Complaint," in which he omitted the third-party complaint portion of his proposed first amended pleading.

{¶3} Thereafter, EMC moved for summary judgment on its claims against Mr. Atkinson, and the trial court granted EMC's motion. In a journal entry dated April 10, 2007, granting the motion, it noted that Mr. Atkinson did not renew any counterclaim or third-party complaint in his amended answer. The trial court also determined that Mr. Atkinson's affirmative defenses failed as a matter of law due to a release and settlement agreement into which he had entered with United, EMC's predecessor in interest. Subsequently, the trial court issued a foreclosure decree, and Mr. Atkinson filed an appeal. This Court reversed and remanded the matter for further proceedings, holding that the release and settlement agreement did not preclude Mr. Atkinson from raising his affirmative defenses. *EMC Mtge. Corp. v. Atkinson*, 175 Ohio App.3d 571, 578, 2008-Ohio-658, ¶ 21, 24 (9th Dist.).

{¶4} After remand, EMC and Mr. Atkinson reached an agreement, which was journalized in an agreed judgment decree in foreclosure dated December 30, 2008. Thereafter, Mr. Atkinson filed a motion pursuant to Civ.R. 60(B). The trial court then modified that December 30, 2008 judgment, and EMC appealed from the order modifying the judgment, and Mr. Atkinson cross-appealed. We reversed the trial court's decision, holding that it did not have inherent authority to modify the parties' agreement, and we remanded the matter to the trial court for further proceedings. *EMC Mtge. Co. v. Atkinson*, 9th Dist. Summit No. 25067, 2011-Ohio-59, ¶ 9.

{¶5} On remand, the trial court issued a journal entry denying Mr. Atkinson's Civ.R. 60(B) motion, and Mr. Atkinson appealed. We vacated the agreed judgment entry of

foreclosure, and we remanded the matter to the trial court to apply the principles set forth in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 28. *EMC Mtge. Corp. v. Atkinson*, 9th Dist. Summit No. 25968, 2013-Ohio-782, ¶ 7.

{¶6} Thereafter, EMC voluntarily dismissed its complaint pursuant to Civ.R. 41(A)(1)(a). Following the voluntary dismissal, the trial court issued an order sua sponte on February 20, 2014, dismissing Mr. Atkinson's third-party complaint with prejudice. The court determined that service had not been perfected on either Ms. Coffield or Midland, that Mr. Atkinson failed to commence an action against either Ms. Coffield or Midland, and that the agreement that Mr. Atkinson had reached with United prevented him from prevailing on his claim against it.

{¶7} Mr. Atkinson appealed, and he raises one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING [MR. ATKINSON'S] THIRD-PARTY COMPLAINT SUA SPONTE WITH PREJUDICE WITHOUT FIRST PROVIDING [MR. ATKINSON] ANY ADVANCE NOTICE OR OPPORTUNITY TO BE HEARD IN RESPONSE.

{¶8} In his sole assignment of error, Mr. Atkinson argues that the trial court erred in dismissing his third-party complaint without providing him with notice or the opportunity to be heard. We agree.

{¶9} Initially, we consider whether we have jurisdiction to review this matter. "This Court is obligated to raise sua sponte questions related to our jurisdiction." *In re Estate of Thomas*, 9th Dist. Summit No. 27177, 2014-Ohio-3481, ¶ 4, citing *Whitaker-Merrell Co. v. Geupel Constr. Co., Inc.*, 29 Ohio St.2d 184, 186 (1972). "We only have jurisdiction to hear appeals from final judgments." *Thomas* at ¶ 4, citing Ohio Constitution, Article IV, Section

3(B)(2), and R.C. 2501.02. Under the portion R.C. 2505.02 relevant to this matter, an order is final and appealable when it "affects a substantial right in an action that in effect determines the action and prevents a judgment; [or] * * * affects a substantial right made in a special proceeding[.]" R.C. 2505.02(B)(1), (2).

{¶10} Upon review of the initial filings in this appeal, this Court questioned whether we had jurisdiction to consider Mr. Atkinson's appeal because it was unclear whether the trial court's February 20, 2014 order dismissing his third-party complaint affected a substantial right. This was because the trial court had noted in its April 10, 2007 entry that Mr. Atkinson had "filed an Amended Answer without renewing any counterclaim and/or a third-party complaint." Therefore, we ordered the parties to address the issue of whether the February 20, 2014 entry affected Mr. Atkinson's substantial rights when it dismissed claims that the court previously had implied no longer existed.

{¶11} Mr. Atkinson responded that he was aware of no authority requiring him to renew his third-party complaint in an amended answer. Therefore, despite the trial court's observation that he had not renewed his third-party complaint, he asserted that he was not required to do so in order to preserve his third party claims.

{¶12} In the related context of determining whether a counterclaim was required to be restated in an amended answer in order to preserve it, the Tenth District has held that "[a]lthough an amended pleading supersedes the original pleading, * * * an answer and a counterclaim are separate pleadings, even if combined in one document." *See Abram & Tracy, Inc. v. Smith*, 88 Ohio App.3d 253, 263 (10th Dist.1993), citing *Levy v. Univ. of Cincinnati*, 1st Dist. Hamilton No. C-860780, 1987 WL 14677 (Nov. 4, 1987). The Tenth District thus determined that the "defendants' amended answer supersedes only the original answer, not their counterclaim."

Abrams at 263, *accord Timock v. Bolz*, 8th Dist. Cuyahoga No. 67623, 1995 WL 322304, *1 (May 25, 1995). We conclude that the same logic applies with equal force to an amended answer that omits a third-party complaint. The amended answer supersedes only the original answer, leaving intact the third-party complaint.

{¶13} Accordingly, Mr. Atkinson's third-party complaint was in existence at the time that the trial court ordered dismissal of his third-party complaint with prejudice. Therefore, the 2014 entry affected a substantial right, and this appeal is properly before us. We thus proceed to address Mr. Atkinson's sole assignment of error.

{¶14} Civ.R. 41(B)(1) provides that "[w]here the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, *after notice to the plaintiff's counsel*, dismiss an action or claim." (Emphasis added.)

{¶15} The Supreme Court has stated that "the notice requirement of Civ.R. 41(B)(1) applies to *all* dismissals with prejudice." (Emphasis sic.) *Esser v. Murphy*, 9th Dist. Summit No. 25945, 2012-Ohio-1168, ¶ 11, quoting *Sazima v. Chalko*, 86 Ohio St.3d 151, 155 (1999). "The purpose of notice is to give the party who is in jeopardy of having his or her action or claim dismissed one last chance to comply with the order or to explain the default." *Esser* at ¶ 11, quoting *Sazima* at 155. "[T]he notice requirement of Civ.R. 41(B)(1) is satisfied 'when counsel has been informed that dismissal is a possibility and has had a reasonable opportunity to defend against dismissal.'" *Esser* at ¶ 11, quoting *Sazima* at 155, quoting *Quonset Hut, Inc. v. Ford Motor Co.*, 80 Ohio St.3d 46 (1997), at syllabus. "Although the notice requirement may be satisfied by virtue of an opposing party's motion seeking dismissal as a sanction, nonetheless, there must be some notice that provides the party with an indication that the action is actually in

jeopardy of being dismissed and a corresponding opportunity to explain or cure the deficiency." *Esser* at ¶ 11.

{¶16} Here, the trial court sua sponte dismissed Mr. Atkinson's third-party complaint with prejudice without providing him notice of its intent to do so and without any party seeking to dismiss the third-party complaint. Failure to provide such notice is reversible error. *See Levorchick v. DeHart*, 119 Ohio App.3d 339, 343 (2d Dist.1997). Accordingly, we sustain Mr. Atkinson's sole assignment of error.

III.

{¶17} Mr. Atkinson's sole assignment of error is sustained. The judgment of the trial court is reversed, and this cause is remanded to the trial court for further proceedings consistent with this decision.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

CARLA MOORE
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

KIRK SAMPSON, Attorney at Law, for Appellant.

JAMES K. REED, Attorney at Law, for Appellee.