

[Cite as *CitiMortgage, Inc. v. Beam*, 2014-Ohio-3809.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CITIMORTGAGE, INC.)	CASE NO. 13 MA 62
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
ROBERT BEAM, et al.)	
)	
DEFENDANTS-APPELLANTS)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 12 CV 1482

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Harry W. Cappel
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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: August 25, 2014

[Cite as *CitiMortgage, Inc. v. Beam*, 2014-Ohio-3809.]
WAITE, J.

{¶1} Appellants, Robert and A. Megan Beam, appeal the Mahoning County Common Pleas Court's decision granting Appellee, CitiMortgage, Inc., summary judgment in this foreclosure action. Appellants assign as error the trial court's decision denying their motion to withdraw admissions and their motion seeking an extension of time to conduct discovery prior to responding to Appellee's motion for summary judgment. Appellants do not contend that the trial court erred in granting summary judgment based on the record before us, nor do they identify any error in the basis of that judgment. This record does not reflect that the trial court abused its discretion in denying Appellants' untimely motion for additional time and unsupported motion for additional discovery. Appellants' two assignments of error are without merit and are overruled.

Factual and Procedural History

{¶2} Appellee initiated the matter by filing a foreclosure complaint on May 16, 2012. The complaint named Appellant Robert Beam as the promisor on the note and stated that the note was in default due to non-payment. The complaint also stated that there was compliance with all conditions precedent and listed the principal amount due (\$73,898.31) and the annual rate of interest (8.5%) on the outstanding debt. Appellants missed an extended deadline for filing their answer, eventually filing it *instanter*. The answer contained several counterclaims and was accepted by the court. The counterclaims included alleged violations of the federal bankruptcy code, and Fair Debt Collection Practices Act (FDCPA) infractions. Appellee filed a timely answer denying Appellants' counterclaims on September 24, 2012. The record

shows that no further action was taken by the parties until November 15, 2012 when Appellee filed a motion requesting that the January 9, 2013 trial date be rescheduled to allow time for Appellee to file a dispositive motion after Appellants' deadline for responding to Appellee's November 5, 2012 discovery requests. This motion was granted and trial was rescheduled for April 10, 2013.

{¶13} On December 13, 2012 Appellee requested leave to file a summary judgment motion. Appellee stated in this request that Appellants failed to respond to the requests for admission sent in November and that Appellee would seek summary judgment on the basis of those admissions. The trial court granted Appellee leave until January 14, 2013 to file its motion. Appellee complied, filing a motion for summary judgment and two supporting affidavits, on January 14, 2013. The first of the two affidavits was sworn by Appellee's counsel and authenticated the discovery requests served by Appellee on November 5, 2012. These requests included admissions addressing the authenticity of the note and mortgage attached to the complaint and Appellant Robert Beam's signature on each document. The admissions also included Appellant's failure to make all payments due on the mortgage during and after their bankruptcy, the existence of default, the absence of discharge, Appellee's compliance with the bankruptcy procedures and requirements and that no damages were sought pursuant to consumer protection codes. (Hanneken Aff., Exh. A.) Due to Appellants' failure to respond to the requests for admission, the facts contained in those admissions were deemed admitted under

Civ.R. 36 and could be used to form the basis of a summary judgment motion under Civ.R. 56.

{¶4} The second affidavit was sworn by Kathy Lynn Collier, a Business Operations Analyst employed by Appellee. Attached to her affidavit were copies of the note and mortgage and a statement of account.

{¶5} After filing the answer and counterclaim, Appellants took no action until March 18, 2013, when a notice of service of discovery responses was filed by Appellants' counsel. According to this notice, counsel had served responses to Appellee's November 5, 2012 discovery requests on March 18: two months after Appellee filed its motion for summary judgment, more than four months after the requests for admission were served, more than three months after the requests for admission were deemed admitted under Civ.R. 36, and less than a month before trial. Appellants also filed a motion for permission to "amend" Appellee's requests for admission, requesting that the court allow Appellants to now respond to the requests, rather than have them deemed admitted.

{¶6} Additionally, Appellants filed a motion for extension of time to respond to Appellee's motion for summary judgment. Appellants intended to set a deposition of Ms. Collier, hoping to uncover an alleged discrepancy between the account summary and notices of default offered in support of Appellee's summary judgment motion. The clear thrust of Appellants' motion was to gain time to engage in discovery in this matter. However, it was filed more than a month and a half after

their response to summary judgment was due. Appellee filed timely opposition to all of Appellants' motions on March 29, 2013.

{¶7} On April 4, 2013 the trial court overruled Appellants' motion for extension of time and request to "amend" discovery responses and granted Appellee's motion for summary judgment. Appellants filed a timely appeal of both the denial of their motions and the decision granting summary judgment.

Assignment of Error No.1

The trial court abused its discretion in denying Appellants permission to amend their responses to requests for admission.

{¶8} Appellants contend that the trial court should have allowed them to "amend" their failure to respond to discovery more than two months after Appellee's motion for summary judgment was filed with the court. Requests for admission are governed by Civ.R. 36(A)(1) which provides:

The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service of the request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney.

When a party does not respond to a request for admissions within the prescribed 28-day period, the matters contained in the admissions are deemed admitted and may be used against the party as a basis for summary judgment. *Colonial Credit Corp. v.*

Dana, 7th Dist. No. 06-MA-100, 2007-Ohio-597, ¶13. A party may alter responses to requests for admissions, or withdraw admissions, only when expressly permitted by the trial court:

Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission * * * the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining his action or defense on the merits.

Civ.R. 36(B). “The decision to grant or deny a motion to withdraw and/or amend an admission is within the discretion of the trial court.” *Abuhilwa v. Corrections Med. Ctr.*, 10th Dist. No. 08AP-642, 2008-Ohio-6915, ¶11. Absent a clear showing that the trial court's attitude was unreasonable, arbitrary or unconscionable, no error will be found. *Sullinger v. Moyer*, 7th Dist. No. 96 C.A. 152 (Aug. 6, 1997).

{¶19} Appellee served Appellants with a request for admissions on November 5, 2012. Due to Appellants' failure to respond in any way, they were deemed admitted under Civ.R. 36(A)(1) and Civ.R. 6(E) on December 6, 2012. When Appellants failed to respond to the requests Appellee filed a motion with the court stating its intention to use those admissions to support a motion for summary judgment. Despite being informed by Appellee's counsel of its intention to file a motion for summary judgment in the December 13, 2012 motion for leave, Appellants

made no attempt to respond to the requests, or to request that the court allow them to withdraw their admissions, before the motion for summary judgment was filed.

{¶10} When Appellee actually filed the motion for summary judgment on January 14, 2014, Appellants again failed to file a timely response opposing the motion. Appellants only sought to withdraw their admissions in March of 2013, months after they had been deemed admitted and only after Appellee's summary judgment motion was filed and the time for a response to that motion had expired. Appellants have offered no explanation for their failure to respond to Appellee's discovery requests and present no reason, either to the trial court or now on appeal, beyond a general assertion that Appellee should have known they would deny the requests, as to why they should be allowed to withdraw their admissions.

{¶11} While it is true that Ohio courts generally prefer that matters be resolved on their merits and not through the artificial operation of procedural rules, Appellants have not placed any evidence in the record to support a conclusion that the withdrawal of their admissions is necessary to resolve the merits of this case. Civ.R. 36; *Perotti v. Ferguson*, 7 Ohio St.3d 1, 3, 454 N.E.2d 951 (1983); *Arrow Fin. Servs. v. Kuzniak*, 7th Dist. 06 MA 133, 2007-Ohio-2191 (overruling a trial court's decision to deny a motion to withdraw admissions).

{¶12} Our decision in *Kuzniak* presents a factual situation that illustrates the deficiencies in the matter at bar. In *Kuzniak*, appellee sought to have a request for admissions deemed admitted in the trial court due to appellant's failure to respond. Appellant immediately filed a motion informing the court that appellant had not been

served with the motion to have the requests deemed admitted. Appellant also placed in the record a copy of the notarized responses that had been served on appellee within the prescribed period. Appellant also filed an affidavit explaining the circumstances surrounding her responses and incorporating those responses. Appellant filed timely objections to the magistrate's decision because the magistrate adopted the admissions in granting summary judgment to appellee. Based on the evidence in the record and submitted by the appellant, we concluded in *Kuzniak* that it was an abuse of discretion to allow the requests to be admitted and to grant summary judgment based on those admissions.

{¶13} Unlike the record in *Kuzniak*, which reflected the appellant's active participation in the suit and attempts to comply with the Civil Rules, Appellants in this matter have allowed each deadline to pass without action. When finally making some attempt at defending the matter, Appellants offered no explanation or evidence to explain their failures or preserve a factual dispute for review. Although Appellants made a general denial in their answer in this foreclosure action, they have not submitted Civ.R. 56 evidence of payment in the record or offered any other proof of a defense. Instead, it appears that Appellants seek to raise alleged defects in the application of payments made during their Chapter 13 bankruptcy plan and violations of federal bankruptcy law without demonstrating the basis of those claims, establishing the trial court's authority to address alleged violations of federal law in the context of a foreclosure action, or explaining what legal effect these claims allegedly have with regard to the foreclosure action filed by Appellee.

{¶14} Neither party has submitted any evidence from any bankruptcy proceeding in this record. Nevertheless, the parties agree that Appellants filed for and completed a Chapter 13 proceeding, that the subject note and mortgage obligation were included in a bankruptcy payment plan, and that the note was not discharged in bankruptcy. With regard to the actual foreclosure claim, Appellants do not dispute that they are party to the subject note and mortgage.

{¶15} As we have previously noted, a trial court “may, in the interest of justice, allow a party to retract admissions, even if the admissions arise by default through failure to respond to the request for admissions.” *Richard v. Colucci*, 7th Dist. No. 03 MA 103, 2004-Ohio-1198, ¶20. The evaluation of a motion to withdraw admissions under Civ.R. 36(B) is a two-step process: first, the trial court should determine whether the withdrawal would “[subserve] the presentation of the merits of the action.” Once the court determines that withdrawal would support presentation on the merits, the court then determines whether the withdrawal will prejudice the party who is entitled to rely on them “in maintaining his action or defense on the merits.” Civ.R. 36(B); *Balson v. Dobbs*, 62 Ohio St.3d 287, 405 N.E.2d 293 (1980). “Note the language of Civ.R. 36(B), stating that the court *may* permit withdrawal of amendment when the elements of the two part test are satisfied. Nowhere does it say the court must permit withdrawal or amendment. This language [indicates] that the decision to allow withdrawal or amendment of an admission is purely within the discretion of the trial court.’ ” (Emphasis sic.) *J.P. Morgan Chase Bank v. Macejko*, 7th Dist. Nos. 07-MA-148, 08-MA-242, 2010-Ohio-3152, ¶22, quoting *Sullinger*,

supra. Thus, a trial court acting under Civ.R. 36 has discretion “to act ‘to serve what [it] believe[s] to be the best interests of justice.’ ” *Colucci, supra*, at ¶20 citing *Cincinnati ex rel. Cosgrove v. Grogan*, 141 Ohio App.3d 733, 750, 753 N.E.2d 256 (2001).

{¶16} In the absence of an explanation of Appellant’s failure to respond to Appellee’s requests for admission and tardy responses to every other filing in this matter, coupled with Appellants’ failure to present any evidence whatsoever that there is a genuine dispute to be resolved concerning the subject matter of the admissions, there is nothing in this record that would have allowed the trial court to conclude that the withdrawal of the admissions was necessary or even appropriate. Appellants’ first assignment of error is without merit and is overruled.

Assignment of Error No. 2

The trial court erred in denying the motion for extension of time to respond to the motion for summary judgment.

{¶17} Appellee filed a motion for leave to file a motion for summary judgment on December 13, 2012. The trial court granted Appellee’s motion on December 18, 2012, and ordered Appellee to file its motion on or before January 14, 2013. “[I]f the trial court sets explicit cutoff dates for the parties to file briefs and Civ.R. 56 materials, it succeeds in putting the parties on notice of the date that the motion will be ripe for decision.” *Hooten v. Safe Auto Ins. Co.*, 100 Ohio St.3d 8, 13, 2003-Ohio-4829, 795 N.E.2d 648, ¶23. Appellee’s motion for summary judgment was served on January

11, 2013, and filed in compliance with court order on January 14, 2013. A motion for summary judgment is governed by Civ.R. 56(C), which provides:

The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing, may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

Clearly, Appellants had notice, in the form of a court order, that a motion for summary judgment was forthcoming, and also had notice of the explicit cutoff date for filing. Therefore, they were "on notice of the date that the motion will be ripe for decision." *Hooten, supra*, at ¶23. Appellants did not timely respond to the motion for summary judgment or timely seek an extension of time to respond. Pursuant to Civ.R. 56(C),

judgment is permitted after the time for response has expired, so long as the appropriate Civ.R. 56 evidence in the record demonstrates that there is no issue of material fact and the moving party is entitled to judgment as a matter of law. Evidence provided by Appellee in support of its motion complies with Civ.R. 56, which requires:

(E) Form of affidavits; further testimony; defense required.

Supporting and opposing affidavits 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. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule an adverse 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. If the party does not so respond, summary judgment, if appropriate, shall be granted against the party.

On appeal, Appellants do not even address the fact that the absence of their timely response allowed the trial court to enter judgment fourteen days after the service of the motion, under Civ.R. 56. Moreover, Appellants do not assign as error the trial

court's decision to grant summary judgment, or attempt to raise or explain any defect or deficiency in Appellee's submissions in support of the motion. Where a motion for summary judgment is made and supported pursuant to rule, the party opposing judgment has a duty to act. Appellants were required to "set forth specific facts showing that there is a genuine issue for trial" "by affidavit or as otherwise provided in this rule" within the period prescribed by Civ.R. 56(C). They were not permitted to simply "rest upon the mere allegations or denials of the party's pleadings." Civ.R. 56(E).

{¶18} On March 18, 2013, months after Appellants had missed their several deadlines and less than a month before the trial date, Appellants filed a motion seeking extension of time to engage in discovery so that they could respond to the motion for summary judgment. A motion for an extension of time is governed by two separate Civil Rules 6 and 56. Civ.R. 6 provides:

(B) Time: extension. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect[.]

Under Civ.R. 6(B), Appellants were required to request an extension of time to respond to the motion for summary judgment within the fourteen day period prescribed by Civ.R. 56(C) or to demonstrate that the failure to make a timely request was the result of excusable neglect. Appellants did not file a timely motion for extension and offered no explanation of their neglect in doing so. To the extent that Appellants made an untimely request for extension of time and made no attempt to demonstrate excusable neglect, the trial court acted within the bounds of discretion in denying the request.

{¶19} Because Appellants' motion for extension of time specifically included a request to conduct discovery concerning the documents filed in support of Appellee's motion for summary judgment, it was also governed by Civ.R. 56(F), which provides:

(F) When affidavits unavailable. Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

This section of Civ.R. 56 allows the trial court to permit parties who are not in possession of all the evidence necessary to respond to summary judgment to seek a continuance to conduct additional discovery. Such motions, pursuant to section (F), are required to be supported by affidavit(s) of the party opposing summary judgment stating sufficient reasons for the apparent inability to "present by affidavit facts

essential to justify the party's opposition." Civ.R. 56(F). Hence, even Appellants' motion for extension of time and request for additional time to depose Appellee's affiant is facially deficient due to the absence of the supporting affidavits required by rule.

{¶20} "The determination as to whether to allow additional time to permit a party opposing summary judgment to conduct discovery is within the sound discretion of the trial court." *Kristian v. Youngstown Orthopedic Assoc.*, 2004-Ohio-7064, ¶18, citing *Banfield v. Turner*, 131 Ohio App.3d 213, 216, 722 N.E.2d 136 (1999). "The trial court has broad discretion in regulating the discovery process. A trial court's ruling dealing with the discovery process will not be reversed in the absence of an abuse of discretion that prejudicially affects the substantial rights of the parties." (Citation omitted.) *Id.*

{¶21} The record in this instance clearly discloses that Appellants ignored their obligation to respond to discovery which included request for admissions. They ignored the requirements of Civ.R. 56(C) and (E) when they failed to respond to Appellee's motion for summary judgment. Appellants ignored the requirements of Civ.R. 6(B) when they failed to seek an extension of time within the time period for response to the motion for summary judgment; and they ignored the requirements of Civ.R. 56(F) when they failed to submit an affidavit setting forth reasons why they could not present facts essential to justify their opposition to summary judgment. Under any one of these circumstances the trial court's decision to deny Appellants'

motion for extension of time would not amount to an abuse of discretion. Appellants' second assignment of error is without merit and is overruled.

Conclusion

{¶22} The trial court did not abuse its discretion in denying Appellants' motion to withdraw their admissions. The trial court also did not abuse its discretion in denying Appellants' untimely motion for extension of time to respond to summary judgment. Appellants' two assignments of error are without merit and are overruled. The judgment of the trial court is affirmed.

Donofrio, J., concurs.

Vukovich, J., concurs.