

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

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|-------------------------------|---|-----------------------------|
| DEUTSCHE BANK NATIONAL | : | OPINION |
| TRUST COMPANY, AS TRUSTEE | | |
| FOR FIRST FRANKLIN | : | |
| MORTGAGE LOAN TRUST 2006-FF8, | : | |
| ASSET BACKED CERTIFICATES, | : | |
| SERIES 2006-FF8, | : | |
| | : | |
| Plaintiff-Appellee, | : | CASE NO. 2012-P-0024 |
| - vs - | : | |
| | : | |
| JOHN GERMANO, et al., | : | |
| | : | |
| Defendant-Appellant. | : | |

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2007 CV 1092.

Judgment: Affirmed.

Rebecca R. Shrader, Manley, Deas & Kochalski, L.L.C., P.O. Box 165028, Columbus, OH 43216-5028; *Kristan A. Prill*, Manley, Deas & Kochalski, L.L.C., 55 Public Square, Suite 1828, Cleveland, OH 44113; *Brooke Turner Bautista*, *Monica Levine Lacks*, and *Candice L. Musiek*, McGlinchey Stafford, PLLC, 25550 Chagrin Boulevard, Suite 406, Cleveland, OH 44122 (For Plaintiff-Appellee).

John Germano, pro se, P.O. 4832, Akron, OH 44310 (Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} John Germano, pro se, appeals from a judgment of the Portage County Court of Common Pleas, which granted summary judgment in favor of appellee, Deutsche Bank National Trust Company (“Deutsche Bank”), on both Deutsche Bank’s

claims and his counterclaims, and entered an order of foreclosure against Mr. Germano's property in Windham, Ohio. For the following reasons, we affirm.

Statement of Facts and Procedural History

{¶2} This appeal stems from a foreclosure action involving certain property in Windham, Portage County, Ohio. Foreclosure proceedings were commenced in August 2007, when Deutsche Bank filed a complaint in the Portage County Court of Common Pleas. In the complaint, Deutsche Bank alleged that Mr. Germano had defaulted on his loan payments, the loan had been accelerated and the default had not been cured. Mr. Germano filed an Answer and Reply, and Deutsche Bank quickly filed an initial motion for summary judgment in early November 2007. Deutsche Bank withdrew this initial motion for summary judgment, however, because Mr. Germano filed a counterclaim on November 19, 2007.

{¶3} The trial court, in an apparent oversight, granted a decree of foreclosure on January 22, 2008 and issued an order of sale the following day. In mid-February 2008, Deutsche Bank moved to vacate the orders of foreclosure and sale. On February 19, 2008, the trial court vacated both orders. The notice of vacation, however, does not appear to have been forwarded to the Portage County Sheriff. A notice of publication was filed, and the order of sale endorsed and returned in mid-June 2008. The sale, however, did not proceed.

{¶4} On January 28, 2009, Mr. Germano filed a Chapter 13 bankruptcy petition in the U.S. Bankruptcy Court, Northern District of Ohio, and the foreclosure matter was immediately stayed. Mr. Germano filed a voluntary dismissal of the Chapter 13 proceedings in early March 2010. Deutsche Bank moved for reinstatement of the

foreclosure proceeding on July 6, 2010, and filed a motion for summary judgment, both on its claims and Mr. Germano's counterclaims, the same day. The case was reinstated a few days later.

{¶5} A month later, Mr. Germano filed a motion to amend his counterclaim, which the trial court denied based on the substantial time that had passed between Mr. Germano's initial counterclaim and his effort to amend. After receiving two extensions to file a response to Deutsche Bank's motion for summary judgment, Mr. Germano filed a "Motion ([sic] Pursuant to Civil rule 56(f) for a Reprieve from Summary Judgment and to Conduct Discovery with Affidavit in Support" on September 23, 2010. The trial court entered judgment in favor of Deutsche Bank in early October 2010, impliedly overruling Mr. Germano's Rule 56(F) motion. After filing various motions for reconsideration with the trial court, Mr. Germano filed a notice of appeal on November 30, 2010.

{¶6} Upon review of Mr. Germano's appeal, this court determined that the trial court had failed to enter a ruling as to Mr. Germano's counterclaims, and dismissed the appeal for lack of a final appealable order. Deutsche Bank again moved for summary judgment on Mr. Germano's counterclaims in late October 2011. In response, Mr. Germano sought an extension of time to respond, and argued that Deutsche Bank had failed to sufficiently respond to his discovery requests. He was granted the extension, and filed his initial answer brief in opposition to summary judgment on November 21, 2011. He also filed a Civ.R. 56(F) motion for continuance "to allow further Discovery to be developed pursuant to Violations of Fraud, Deceit, and Misrepresentation perpetrated upon this Honorable Court." In his Civ.R. 56(F) motion, Mr. Germano essentially challenged Deutsche Bank's standing to enforce the note.

{¶7} The trial court held a hearing on November 22, 2011, regarding a motion to compel discovery filed by Mr. Germano. The Magistrate issued an order the following day requiring Deutsche Bank to provide Mr. Germano certain documents he had requested within 21 days. Mr. Germano was then permitted an additional 21 days from receipt of the documents to file his brief in opposition to summary judgment. On January 5, 2012, Mr. Germano filed that brief in opposition, as well as a Civ.R. 60(B) motion to vacate the initial grant of summary judgment to Deutsche Bank on its claims.

{¶8} After briefing on the Civ.R. 60(B) motion was completed, the trial court entered summary judgment for Deutsche Bank on Mr. Germano's counterclaims and denied the Civ.R. 60(B) motion. The trial court observed that Mr. Germano had failed to proffer any admissible evidence to support his contention that the assignment of the mortgage was fraudulent, and that he had failed to meet the requirements of Civ.R. 60(B).

{¶9} Mr. Germano timely appealed, and now brings the following assignments of error:

{¶10} "[1.] The Trial Court committed prejudicial error in failing to schedule and conduct a status and or management conference in a three-year period as the case was ongoing specifically when there was a two-year halt in the case and Appellant voluntarily dismissed his Chapter 13 Bankruptcy Plan on March 5, 2010 and the case transferred back to the active docket of the Court of Common Pleas."

{¶11} "[2.] The Trial Court committed prejudicial error in denying Appellant his Motion for Leave of the Court to amend his Counterclaim to include ongoing violations with regard to servicing abuse, predatory lending practices, fair debt collection

practices, violations of 'Respa' and 'Tila,' defective Mortgage and Note, and malicious abuse of process causing further undue harm and emotional distress to the Appellant and amending his damage amount.”

{¶12} “[3.] The trial Court committed prejudicial error in denying Appellant his right to conduct Discovery which was served upon the Plaintiff Appellee on June 22, 2010 August 24, 2010 [sic] as his First and Second Request for Discovery and with the agreed cooperation of Plaintiff Appellee’s counsel of record and thus preventing him from presenting his case effectively.”

{¶13} “[4.] The Trial Court committed prejudicial error in denying Appellant’s Motion pursuant to Civil Rule 56(f) for a reprieve from Summary Judgment and to conduct Discovery with exhibits and Affidavit in support clearly demonstrating the necessity of his Discovery requested information to oppose Plaintiff Appellee’s Summary Judgment Motion.”

{¶14} “[5.] The Trial Court committed prejudicial error in granting Plaintiff Appellee’s Motion for Summary Judgment and thus denying Appellant his due process and his constitutional right to be hears [sic] and his day in Court and not considering any evidence submitted in answer and his Counterclaim and the ongoing violations in regards to his Mortgage loan.”

{¶15} “[6.] The Trial Court committed prejudicial error in denying Appellant’s Amended Response in Opposition to the Plaintiff Appellee’s Motion for Summary Judgment and ignoring, and failing, to consider all evidence submitted with an Affidavit in Support of the issues raised in his Counterclaim and the ongoing violations in regards to his mortgage.”

{¶16} “[7.] The Trial Court Committed prejudicial error in granting Plaintiff Appellee’s Motion for Summary Judgment on Appellant’s Counterclaim based on an Affidavit of Appellee and no supporting facts of evidence controverting the issues raised in Appellant’s Counterclaim.”

{¶17} After considering assignments of error one and two, we will then review assignments of error three and four together as they are substantially intertwined, and review assignments of error five, six, and seven together as they assert the same error.

Case Management Conference

{¶18} Mr. Germano points to a purported “Civil Rule 16 (A)” and a case to which he refers as the “Obregon Case” to support his contention that the trial court erred by failing to hold a case status conference. We are unable to locate this rule to which he refers in either the Ohio Civil Rules of Procedure, or Portage County’s Local Rules. It would appear that Mr. Germano is referring to Fed.Civ.R. 16(a) regarding pretrial conferences in the federal judicial system. We are also unable to identify this “Obregon Case,” for which Mr. Germano provides no citation, nor jurisdiction.

{¶19} A trial court “*may* schedule one or more conferences before trial to accomplish” a variety of objectives. (Emphasis added.) Civ.R. 16. There is not, however, a mandate as to how a trial court must proceed during the pre-trial stages of a case. Mr. Germano has brought no case law to our attention to demonstrate that the trial court’s failure to hold a formal case management conference constitutes prejudicial error. If assignments of error are not properly briefed, “they should be disregarded ‘due to the complete lack of argument containing reasons in support of the contention and citations to authority.’” *Pearlstein v. Pearlstein*, 11th Dist. No. 2008-G-2837, 2009-Ohio-

2191, ¶81, quoting *Keating v. Keating*, 8th Dist. No. 90611, 2008-Ohio-5345, ¶1111, quoting *Cireddu v. Cireddu*, 8th Dist. No. 76784, 2000 Ohio App. LEXIS 4076, *24 (Sept. 7, 2000). We therefore find the first assignment of error to be without merit.

Amendment of Counterclaim

{¶20} In his second assignment of error, Mr. Germano argues that the trial court committed prejudicial error in denying his motion for leave to amend his counterclaim. We find no abuse of discretion by the trial court in denying this motion, which was brought more than three years after the underlying action was commenced and several weeks after Deutsche Bank had filed its motion for summary judgment.

Standard of Review

{¶21} “A trial court’s ruling on a motion to amend a complaint is reviewed under an abuse of discretion.” *Karnofel v. Kmart Corp.*, 11th Dist. Nos. 2007-T-0036 and 2007-T-0064, 2007-Ohio-6939, ¶38, citing *Wilmington Steel Prods., Inc. v. Cleveland Elec. Illum. Co.*, 60 Ohio St.3d 120, 122 (1991). The same standard applies to amendment of a counterclaim. As this court recently stated, the term “abuse of discretion” is one of art, “connoting judgment exercised by a court, which does not comport with reason or the record.” *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). The Second Appellate District also recently adopted a similar definition of the abuse-of-discretion standard: an abuse of discretion is the trial court’s “failure to exercise sound, reasonable, and legal decision-making.” *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black’s Law Dictionary (8 Ed.Rev. 2004) 11. When an appellate court is reviewing a pure issue of law, “the mere fact that the reviewing court

would decide the issue differently is enough to find error (of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review). By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error.” *Id.* at ¶67.

No Abuse of Discretion

{¶22} Civ.R. 15(A) states that “[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.”

{¶23} Although the rule encourages liberal amendment, limitations do exist and “motions to amend pleadings pursuant to Civ.R. 15(A) should be refused if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party.” *Turner v. Cent. Local School Dist.*, 85 Ohio St.3d 95, 99 (1999), citing *Hoover v. Sumlin*, 12 Ohio St.3d 1 (1984), paragraph two of the syllabus. Further, “[w]here a plaintiff fails to make a prima facie showing of support for new matters sought to be pleaded, a trial court acts

within its discretion to deny a motion to amend the pleading.” *Wilmington Steel Products, Inc. v. Cleveland Elec. Illuminating Co.*, 60 Ohio St.3d 120 (1991), syllabus.

{¶24} Mr. Germano filed his motion for leave to amend on August 24, 2010. This was three years after he initially filed a counterclaim, and 22 days after Deutsche Bank filed its motion for summary judgment. The trial court denied Mr. Germano leave to amend on August 30, 2010, stating clearly that he was out of time to amend and that the case needed to proceed.

{¶25} A review of the motion for leave to amend reveals that it was considerably vague in terms of the claims Mr. Germano wished to add, and failed to make a prima facie showing of support for the new matters he wished to plead. *See Wilmington Steel Products, supra*. Further, purposefully or not, the motion was posed to unnecessarily delay the case, which had been pending for more than three years and was ripe for resolution. Therefore, we cannot say that the trial court abused its discretion in denying Mr. Germano’s motion for leave to amend the counterclaim. The second assignment of error is without merit.

The Discovery Process

{¶26} In his third and fourth assignments of error, Mr. Germano argues that the trial court committed prejudicial error when it (1) denied him “his right” to conduct discovery in June and August 2010, and (2) denied his Civ.R. 56(F) motion for additional time to conduct discovery before responding to Deutsche Bank’s motion for summary judgment. Mr. Germano suggests that the trial court prevented the case from being fully developed via the discovery process by entertaining Deutsche Bank’s motion

for summary judgment and then granting the motion before Mr. Germano finished conducting discovery.

Standard of Review

{¶27} “[T]he standard of review of a trial court’s decision in a discovery matter is whether the court abused its discretion.” *Oaktree Condo. Assn. v. Hallmark Bldg. Co.*, 11th Dist. No. 2010-L-011, 2012-Ohio-3891, ¶74, quoting *Mauzy v. Kelly Servs.*, 75 Ohio St.3d 578, 592 (1996).

{¶28} “In interpreting Civ.R. 56(F), this court has indicated that a trial court should apply the rule liberally to ensure that the nonmoving party in any summary judgment exercise has sufficient time to discover any fact which is needed to properly rebut the argument of the moving party.” *Marshall v. Silsby*, 11th Dist. No. 2004-L-094, 2005-Ohio-5609, ¶18, citing *King v. Zell*, 11th Dist. No. 97-T-0186, 1998 Ohio App. LEXIS 6364, *10 (Dec. 31, 1998). The nonmoving party’s right to additional discovery time, however, is not absolute in every instance. To be entitled to a continuance under the rule, the nonmoving party has the burden of establishing a sufficient reason for the additional time. *Id.*, citing *Kane v. Kane*, 10th Dist. No. 02-AP-933, 2003-Ohio-4021, ¶14. “That is, the party requesting more time must show that the additional discovery will actually aid in either the demonstration or negation of a fact relevant to an issue in the motion for summary judgment.” *Id.*, citing *King* at *11.

{¶29} “[B]ecause such a request for additional time under Civ.R. 56(F) involves a matter of discovery, the disposition of such a request falls within the sound discretion of a trial court.” *Id.* at ¶19, citing *Westcott v. Assoc. Estates Realty Corp.*, 11th Dist. Nos. 2003-L-059 and 2003-L-060, 2004-Ohio-6183, ¶17. “Thus, the ruling of the trial

court will be upheld on appeal unless it can be shown that the decision was arbitrary, unreasonable or unconscionable.” *Id.*

{¶30} “[W]here discovery proceedings would not, if allowed to proceed, aid in the establishment or negation of facts relating to the issue to be resolved, Ohio’s appellate courts have been reluctant to find that the trial court abused its discretion by granting a motion for summary judgment before the discovery proceedings were completed.” *King* at *11, citing *Ball v. Hilton Hotels*, 32 Ohio App.2d 293, 295 (1st Dist.1972). See also *Gates Mills Investment Co. v. Pepper Pike*, 59 Ohio App.2d 155 (8th Dist.1978).

No Abuse of Discretion in Discovery Process

{¶31} Initially, Mr. Germano submitted requests for interrogatories and the production of documents to Deutsche Bank; he did so directly to the bank and not to its counsel. Despite having already filed its motion for summary judgment, Deutsche Bank, upon receiving the discovery requests properly through counsel, did engage in the discovery process and sought an extension of time to respond due to the voluminous nature of the requests and the delay in receiving them. This extension was granted, indicating the trial court’s awareness of the discovery requests and its facilitation of the process.

{¶32} When Deutsche Bank moved for summary judgment, Mr. Germano first sought two extensions of time to respond before he finally submitted a Civ.R. 56(F) motion. In his Civ.R. 56(F) motion, Mr. Germano stated that the additional time to conduct discovery was necessary in order to develop his case against Deutsche Bank for what he believed were practices of “predatory lending, servicing abuse, failure to establish a condition precedent, violations of ‘Respa,’ violations of ‘Tila,’ defective

mortgage or note, breach of contract, and malicious abuse of process.” However, the majority of those claims and causes of action were not pending against Deutsche Bank, as the trial court had previously denied Mr. Germano’s motion for leave to amend his counterclaim. At the time, only two claims for relief had been brought against Deutsche Bank via a counterclaim; a review of the counterclaim reveals that both of those claims relate to breach of contract. Furthermore, Mr. Germano failed to elucidate in his Civ.R. 56(F) motion how discovery would have helped him *defend* against the foreclosure action, and focused entirely on how discovery would instead help him develop claims against Deutsche Bank that he had not even formally brought. Therefore, we cannot say that the trial court abused its discretion by overruling Mr. Germano’s Civ.R. 56(F) motion; allowing discovery to continue while holding Deutsche Bank’s motion for summary judgment in abeyance would not have aided the court in the “establishment or negation of facts relating to the issue to be resolved.” *See King, supra*, at *11. Both further discovery and the Civ.R. 56(F) motion posed, purposefully or not, to further delay a case ripe for resolution. Assignments of error three and four are without merit.

Grant of Summary Judgment on the Counterclaims

{¶33} In his fifth and sixth assignments of error, Mr. Germano argues that the trial court erred in granting summary judgment in favor of Deutsche Bank on his counterclaims. He suggests that in granting summary judgment, the trial court denied him “due process and his constitutional right to be heard and have his day in Court as a Pro se litigant * * *.”

Standard of Review

{¶34} We review de novo a trial court's order granting summary judgment. *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13, citing *Cole v. Am. Industries and Resources Corp.*, 128 Ohio App.3d 546 (7th Dist.1998). “A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law.” *Id.*, citing *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App.3d 826, 829 (9th Dist.1990).

{¶35} “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* [75 Ohio St.3d 280 (1996)], 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, 526 N.E.2d 798.” *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 200-Ohio-4374, ¶40.

The Counterclaim

{¶36} In its motion for summary judgment on Mr. Germano’s counterclaim, Deutsche Bank established, with evidentiary quality materials, that it was entitled to foreclose upon the note and mortgage and that no issues of material fact existed as to Mr. Germano’s breach of contract claims. Deutsche Bank attached to its motion: (1) an affidavit executed by Sharon Maerkle of Home Loan Services, Inc., the loan servicing agent for Deutsche Bank, stating that the loan was in default, that notice had been provided to Mr. Germano of the default, and that the default had not been cured; (2) a certified copy of the note, executed by Mr. Germano to First Franklin Division of National City Bank of Indiana, in the amount of \$69,500; (3) a certified copy of the mortgage, executed by Mr. Germano to Mortgage Electronic Registration System, Inc. (“MERS”), solely as nominee of First Franklin Division of National City Bank of Indiana; (4) a copy of the March 21, 2007 assignment of mortgage from MERS to Deutsche Bank National Trust Company; and (5) a copy of the default notice sent to Mr. Germano, dated June 5, 2007.

{¶37} Despite the trial court’s November 23, 2011 order requiring Deutsche Bank to provide Mr. Germano with the settlement statement from the original loan closing, a complete loan payment history, a history of all insurance policies and

payments, and a history of real estate taxes paid on the loan, and granting Mr. Germano an additional 21 days after receipt of these documents to file his brief in opposition, Mr. Germano failed to set forth any specific facts in his brief in opposition to establish that a genuine issue of material fact existed as to the counterclaim.

{¶38} In his brief in opposition to summary judgment, Mr. Germano addressed issues that were not in fact raised in his counterclaim, such as the assignment of the mortgage, accusations of robo-signing, and violations of “Respa” and “Tila”. Because these issues were not raised in the counterclaim, nor were they supported by evidentiary quality materials, they were not relevant to the trial court’s consideration of the motion, nor are they relevant to our review now.

{¶39} The trial court found that Mr. Germano had failed “to present any proper Rule 56(C) evidence for this Court to consider, let alone significant and probative evidence to support Defendant’s Counterclaim for breach of contract. Defendant’s Opposition to the Motion for Summary Judgment fails to address his claims for breach of contract in any way. He does not present this Court with any evidence demonstrating 1) Plaintiff’s failure to properly credit his loan account; 2) any improper reporting to credit reporting agencies; 3) any contractual obligation by Plaintiff to offer conflict resolution and any failure to do so; 4) any abusive collection efforts by Plaintiff; or 5) any contractual obligation to provide a payment history and failure to do so.”

{¶40} A careful review of Mr. Germano’s response in opposition to summary judgment reveals that the trial court did not err in finding he had failed to present any evidence that an issue of material fact remained. Mr. Germano, in fact, provided no proper Civ.R. 56(C) evidence to support his claims that a genuine issue of material fact

remained for trial. See, e.g., *U.S. Bank Nat'l Assn. v. Kafantaris*, 11th Dist. No 2011-T-0002, 2011-Ohio-5601, ¶30. Despite the numerous news reports as to deceptive practices in the mortgage loan industry, a court may not simply take notice of the allegations or even established facts in other cases in other jurisdictions. Therefore, the trial court properly granted Deutsche Bank's motion for summary judgment on the counterclaim. Assignments of error five, six, and seven are without merit.

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

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.