[Cite as *U.S. Bank Natl. Assn. v. Bayless*, 2009-Ohio-6115.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

U.S. BANK NATIONAL ASSOCIATION

Plaintiff-Appellee

-vs-

BRIAN S. BAYLESS, et al.

Defendants-Appellants

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 09 CAE 01 004

O P I N I O N

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common Pleas, Case No. 08 CVE 02 0280

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 13, 1009

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Brian S. Bayless appeals the decision of the Court of Common Pleas, Delaware County, which granted foreclosure of his residential property in favor of Appellee U.S. Bank, National Association. The relevant facts leading to this appeal are as follows.

{¶2} On November 10, 1998, appellant executed a promissory note with Norwest Bank in the amount of $131,595.00. On the same date, appellant and Karen Bayless, his spouse, executed a mortgage to secure the note, the subject property being 231 Overtrick Drive in Delaware, Ohio.

{¶3} On October 6, 2006, appellant executed a loan modification agreement with the successor to Norwest, which was Wells Fargo Bank. Under said agreement, while the note and mortgage remained in full effect, the amount owed by appellant was modified to $122,485.53.

{¶4} In October 2007, appellant began defaulting on the note and mortgage.

{¶5} On February 28, 2008, Appellee U.S. Bank filed an action in the Delaware County Court of Common Pleas against appellant and Karen Bayless, seeking the balance of the aforesaid note and foreclosure of the mortgage. Appellee also named as defendants the Delaware County Treasurer and Bank One, N.A., which later merged with JP Morgan Chase Bank, N.A.[1] Appellee therein alleged that it was the "holder" of the note. However, Wells Fargo, the prior holder of the note and mortgage (via a merger with Norwest Bank), did not formally assign and transfer said note and mortgage to

[1] Chase has participated in this appeal as a defendant-appellee. Chase maintains, and we agree, that appellant, by not raising the issue herein, has forfeited any claimed error regarding the trial court's decision to grant Chase's motion to strike appellant's "counterclaim" against it.

appellee until April 1, 2008, and the assignment was not recorded in Delaware County until April 14, 2008.

{¶6} On May 19, 2008, appellant filed a "response" to appellee's complaint, as well as a motion to dismiss. The motion to dismiss stated that appellee's complaint should be dismissed for want of plaintiff's standing, on the basis that appellee was not the holder of the note at the time of the filing of the complaint. Appellant also essentially alleged that Wells Fargo, the prior holder of the note and mortgage, failed to work out a loan modification in good faith.

{¶7} On May 30, 2008, appellee filed a response to the motion to dismiss, concurrently submitting a notice of filing of assignment of the mortgage and note from Wells Fargo to appellee.

{¶8} On August 1, 2008, appellant filed a motion for stay and a counterclaim. On August 25, 2008, appellee filed a motion for summary judgment and a motion to dismiss appellant's counterclaim. On September 12, 2008, appellant filed a motion to extend time for responding to appellee's motion for summary judgment. However, appellant did not further file a response.

{¶9} On October 7, 2008, following a status conference, the trial court issued a judgment entry stating that "mediation may be appropriate" and ordering that the case be held in abeyance for sixty days. The entry also provided as follows:

{¶10} "The parties shall advise the Court on or before December 3, 2008 in writing as to the status of this matter. If this matter is not resolved, then the parties shall be scheduled, at that time, for mediation with William Kepko. Said mediation shall be completed on or before December 31, 2008." Judgment Entry, October 7, 2008.

{¶11} On December 11, 2008, the trial court granted summary judgment in favor of Appellee U.S. Bank. On January 5, 2009, a final judgment entry was issued, granting a decree of foreclosure and establishing the priority of damages for appellee, the county treasurer, and Chase Bank.

{¶12} On January 12, 2009, appellant filed a notice of appeal. He herein raises the following three Assignments of Error:

{¶13} "I. US BANK WAS NOT THE HOLDER OF THE MORTGAGE IN QUESTION AT THE TIME OF THE ORIGINAL FILING AND THUS, NOT ENTITLED TO ASSERT THE JURISDICTION OF THE COURT.

{¶14} "II. DEFENDANT WAS ENTITLED TO, AND WAS INFORMED BOTH VERBALLY AND IN THE OFFICIAL COURT DOCUMENTS THAT CASE [SIC] WOULD BE REFERRED FOR MEDIATION IF PARTIES WERE UNABLE TO RESOLVE THEIR DIFFERENCES BY DECEMBER 3, 2008.

{¶15} "III. DEFENDANT WAS ENTITLED TO EQUAL PROTECTION UNDER THE PROVISIONS OF THE 14TH AMENDMENT OF THE US CONSTITUTION."

I.

{¶16} In his First Assignment of Error, appellant contends summary judgment was improper for the reason that appellee was not the holder of the note and mortgage at the time of the filing of its complaint. We disagree.

{¶17} As an appellate court reviewing summary judgment issues, we must stand in the shoes of the trial court and conduct our review on the same standard and evidence as the trial court. *Porter v. Ward*, Richland App.No. 07 CA 33, 2007-Ohio-

5301, ¶ 34, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 506 N.E.2d 212.

{¶18} Civ.R. 56(C) provides, in pertinent part:

{¶19} "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. * * * 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. * * * "

{¶20} The legal concept of "real party in interest" is addressed in Civ.R. 17(A), which reads in pertinent part as follows:

{¶21} "Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his name as such representative without joining with him the party for whose benefit the action is brought. *** No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification,

joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

{¶22} In *Wachovia Bank, N.A. v. Cipriano*, Guernsey App.No. 09CA007, 2009-Ohio-5470, ¶ 38, we emphasized: "Pursuant to Civ.R. 17(A), the real party of interest shall 'prosecute' the claim. The rule does not state 'file' the claim." We thus rejected Cipriano's argument in that case that the trial court had lacked jurisdiction because Wachovia was not the holder or owner of the note and mortgage at the time of the filing of the complaint. Id. at ¶ 40. We rejected a similar "real party in interest" argument in *LaSalle Bank Natl. Assn. v. Street*, Licking App.No. 08 CA 60, 2009-Ohio-1855, ¶ 28.

{¶23} In the case sub judice, it is undisputed that on May 30, 2008, appellee filed a notice of filing of assignment of the mortgage and note, more than six months before the trial court granted summary judgment. Appellant thereafter did not expressly contradict this evidence of ownership. Therefore, in light of our precedent in *Cipriano* and *Street*, we find no merit in appellant's arguments in this regard.

{¶24} Appellant's First Assignment of Error is overruled.

II.

{¶25} In his Second Assignment of Error, appellant contends the trial court committed reversible error in granting summary judgment where the court had previously ordered the case referred to mediation if the parties could not reach a resolution. We disagree.

{¶26} Appellant challenges the trial court's decision to grant summary judgment on December 11, 2008, despite its prior order that the case would be referred to a mediator if no resolution was reached by the parties by December 3, 2008. However, it

is well-established that an appellant, in order to secure reversal of a judgment, must generally show that a recited error was prejudicial to him. See *Tate v. Tate,* Richland App.No. 02-CA-86, 2004-Ohio-22, ¶ 15, citing *Ames v. All American Truck & Trailer Service* (Feb. 8, 1991), *Lucas App. No. L-89*-295, quoting *Smith v. Flesher* (1967), 12 Ohio St.2d 107, 110, 233 N.E.2d 137. The trial court's decision to order possible mediation under these circumstances was wholly discretionary, and any effective rescission of that order cannot be deemed prejudicial based on our above de novo conclusion that summary judgment in favor of appellee was ultimately proper.

{¶27} Appellant's Second Assignment of Error is therefore overruled.

III.

{¶28} In his Third Assignment of Error, appellant challenges the grant of summary judgment to appellee as a violation of his rights under the Fourteenth Amendment to the United States Constitution.

{¶29} Appellant essentially challenges, on equal protection grounds, the trial court's application of Ohio's Civ.R. 17, supra, to recognize appellee as the real party in interest, vis-à-vis the United States District Court's interpretation of Fed.R.Civ.P. 17 in *In re Foreclosure Cases* (N.D.Ohio 2007), Case Nos. 1:07CV2282, et seq., 2007 WL 3232430.

{¶30} By analogy, we have maintained that "[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal."

State v. Ivery, Stark App.No. 2005CA00270, 2006-Ohio-5548, ¶ 44, quoting *State v. Awan* (1986), 22 Ohio St.3d 120, 489 N.E.2d 277, syllabus.

{¶31} As noted in our recitation of facts, appellant failed to file any response to appellee's motion for summary judgment of August 25, 2008. Furthermore, although appellant's response to the complaint makes brief reference to the aforecited federal case, our review of the trial court file reveals no attempt by appellant to raise the constitutional challenge now presented on appeal. We therefore find appellant's equal protection argument to be waived.

{¶32} Appellant's Third Assignment of Error is therefore overruled.

{¶33} For the reasons stated in the foregoing opinion, the decision of the Court of Common Pleas, Delaware County, Ohio, is hereby affirmed.

By: Wise, J.

Farmer, P. J., and

Hoffman, J., concur.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ WILLIAM B. HOFFMAN_____

JUDGES

JWW/d 1026

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

U.S. BANK NATIONAL ASSOCIATION	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
BRIAN S. BAYLESS, ET AL.	:	
Defendant-Appellant	:	Case No. 09 CAE 01 004

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ WILLIAM B. HOFFMAN_____

JUDGES