

[Cite as *Deutsche Bank Natl. Trust Co. v. Hill*, 2015-Ohio-1575.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE FOR THE
CERTIFICATEHOLDERS OF THE
FIRST FRANKLIN MORTGAGE LOAN
TRUST 2005-FFH3, ASSET-BACKED
CERTIFICATES, SERIES 2005-FFH3

Plaintiff-Appellee

-vs-

RONALD W. HILL, et al.

Defendants-Appellants

JUDGES:

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

Case No. 14 CA 00021

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 12 CV 00017

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

April 23, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendants-Appellants

JASON A. WHITACRE
LAURA C. INFANTE
4500 Courthouse Blvd., Suite 400
Stow, Ohio 44224

BRUCE BROYLES
5815 Market Street
Suite 2
Boardman, Ohio 44512

Wise, J.

{¶1} Appellants James and Pamela Green appeal the June 27, 2014, decision of the Licking County Court of Common Pleas denying their Motion to Intervene and Motion to Vacate Judgment Entry and Decree of Foreclosure.

{¶2} Appellee is Deutsche Bank National Trust Company.

STATEMENT OF THE FACTS AND CASE

{¶3} This appeal arises out of a foreclosure action. Ronald W. Hill (“Hill”) entered into a promissory note secured with a mortgage upon his real property commonly known as 304 Moss Street, New Straitsville, Ohio 43766 (“Real Estate”).

{¶4} Appellants James and Pamela Green maintain that on July 26, 2010, they entered into a land installment contract with Hill for the purchase of the subject real estate.

{¶5} On January 12, 2012, Appellee Deutsche Bank National Trust Company, as Trustee for the Certificateholders of the First Franklin Mortgage Loan Trust 2005-FFH3 Asset-Backed Certificates, Series 2005-FFH3, (“Deutsche Bank”) filed a Complaint in Foreclosure seeking judgment on the Note and foreclosure of the Mortgage. The Greens were not named as parties to the Foreclosure complaint.

{¶6} In its Complaint, Appellee Deutsche Bank pled that it was due upon a certain promissory note, that the loan account of Hill had fallen into, and remained in, default, and that he had failed to cure that default, resulting in acceleration of the note and mortgage. Hill failed to respond to the Complaint or otherwise appear and on March 15, 2012, Deutsche Bank filed its Motion for Default Judgment.

{¶17} On May 4, 2012, Default Judgment was granted. A sale date was scheduled for November 16, 2012.

{¶18} On October 23, 2012, Appellants filed a Motion to Stay the Sheriff's sale, claiming an interest through an unrecorded land contract with the borrower. The Motion was briefed and denied.

{¶19} On November 16, 2012, Appellee Deutsche Bank caused the property subject to the foreclosure to be sold. The sale was judicially confirmed on June 24, 2013.

{¶110} Appellant then moved to intervene in this matter and vacate the judgment entry and decree of foreclosure of May 4, 2012

{¶111} After the Sheriff's sale was conducted and the property sold to Deutsche Bank, the trial court issued an Order Staying the Confirmation of the Sale and requested Deutsche Bank provide a brief to the court as to why Appellants were not necessary parties to the foreclosure action based on a recently recorded land contract.

{¶112} On February 12, 2013, Appellee Deutsche Bank provided a brief in opposition to Appellants' Motion to Stay the Sheriff's Sale.

{¶113} On June 24, 2013, the trial court vacated its entry which had previously stayed the proceedings and confirmed the Sheriffs sale.

{¶114} On September 10, 2013, Appellants filed a Motion to Vacate the Decree of Foreclosure, Motion to Intervene, Motion to Stay Execution and an Affidavit of counsel.

{¶115} On June 27, 2014, after briefing of the Motions, the Court issued a denial of the Motions.

{¶16} Appellants filed an appeal and this matter is now before this Court for consideration. Assignments of error are as follows:

{¶17} "I. THE TRIAL COURT ERRED IN REFUSING TO ALLOW JAMES GREEN AND PAMELA GREEN TO INTERVENE IN THE ACTION.

{¶18} "II. THE TRIAL COURT ERRED IN DENYING THE MOTION TO VACATE WHEN APPELLEE DID NOT POSSESS AN INTEREST IN THE PROMISSORY NOTE OR MORTGAGE AT ANY TIME DURING THE PROCEEDINGS."

I.

{¶19} In their First Assignment of Error, Appellants claim the trial court erred in refusing to allow them to intervene. We disagree.

{¶20} Civil Rule 24 governs intervention and states the following:

(A) Intervention of right

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(B) Permissive intervention

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action

have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(C) Procedure

A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Civ.R. 5. The motion and any supporting memorandum shall state the grounds for intervention and shall be accompanied by a pleading, as defined in Civ.R. 7(A), setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of this state gives a right to intervene.

{¶21} For motions to intervene based on subsection (A), this Court's standard of review is de novo. For motions seeking permissive intervention under subsection (B), our standard of review is abuse of discretion. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶22} Appellants made their motion to intervene before the trial court pursuant to Civ.R. 24(B). However, in their brief to this Court, all of the arguments raised by Appellants are made pursuant to Civ.R. 24(A).

{¶23} It is well-settled law in Ohio that appellate courts will not consider as error issues that are raised for the first time on appeal. *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 210, 436 N.E.2d 1001 (1982); see also *Ohio Performance, Inc. v. Nelson*, 4th Dist. Scioto No. 94CA2226, 1995 WL 103634, *3 (Mar. 7, 1995) (“It is axiomatic that a litigant's failure to raise an issue in the trial court waives the litigant's right to raise that issue on appeal. * * * Litigants must not be permitted to hold their arguments in reserve for appeal, thus evading the trial court process.”) At the trial court, Appellants brought their motion to intervene pursuant to Civ.R. 24(B), arguing permissive intervention. Appellants did raise any of the arguments asserted in their appellate brief for intervention of right. Thus, Appellants have waived those arguments and we cannot consider them for the first time on appeal.

{¶24} Even if this Court were to consider Appellants' arguments pursuant to Civ.R.24(A), we would still find that the trial court did not abuse its discretion in denying their motion to intervene.

{¶25} In order for a party to intervene as a matter of right, pursuant to Civ.R. 24(A), all four of the following elements must be met: (1) the intervenor must claim an interest relating to the property or transaction that is the subject of action; (2) the intervenor must be so situated that the disposition of the action may, as a practical matter, impair or impede the intervenor's ability to protect his or her interest; (3) the intervenor must demonstrate that his or her interest is not adequately represented by

the existing parties; and (4) the motion to intervene must be timely. *Fairview Gen. Hosp. v. Fletcher*, 69 Ohio App.3d 827, 591 N.E.2d 1312 (10th Dist.1990). “Failure to meet any one of the elements in Civ.R. 24(A) will result in denial of the right to intervene.” *Id.* at 831. Civil rule 24(A) is to be liberally construed in favor of intervention, but the putative intervenor still bears the burden of establishing each of the elements to intervene. *Grover Court Condominium Unit Owners' Assn. v. Hartman*, 8th Dist. No. 94910, 2011–Ohio–218.

{¶26} “Intervention after final judgment has been entered is unusual and ordinarily will not be granted.” *Greenman v. Greenman*, 5th Dist. No. 04CA69, 2005–Ohio–4961. However, intervention after judgment is permissible if it is the only way to protect the intervenor's rights. *Id.*

{¶27} In the case sub judice, the land contract through which Appellants claim an interest in the property was never recorded, which makes it invalid as to all except the parties to the contract, here Appellants and Hill. R.C. §5313.02(C) provides that, “[w]ithin twenty days after a land installment contract has been signed by both the vendor and the vendee, the vendor shall cause a copy of the contract to be recorded as provided in section 5301.25 of the Revised Code and a copy of the contract to be delivered to the county auditor.”

{¶28} R.C. §5301.25(A) requires a land installment contract to be recorded, and provides that, “[u]ntil so recorded or filed for record, [a land installment contract is] fraudulent insofar as they relate to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of that former deed, land contract, or instrument.”

{¶29} Recordation gives constructive notice to all persons dealing with the land of properly recorded instruments in the chain of title. *Option One Mtge. Corp. v. Boyd* (June 15, 2001), Montgomery App. No. 18715, citing *Thames v. Asia's Janitorial Serv., Inc.* (1992), 81 Ohio App.3d 579, 587, 611 N.E.2d 948.

{¶30} In addition, the following factors are considered in determining timeliness of the motion to intervene: (1) the point to which the suit had progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure after he knew or reasonably should have known of his interest in the case to apply promptly for intervention and (5) the existence of unusual circumstances mitigating against or in favor of intervention. *State ex rel. First New Shiloh Baptist Church v. Meagher*, 82 Ohio St.3d 501, 503, 696 N.E.2d 1058 (1998).

{¶31} Here, Appellants' motion was not timely. Appellants were aware of the foreclosure action for approximately one year before moving to intervene in the action. Further, the action had progressed to a confirmation of sale.

{¶32} Additionally, as noted above, Civ.R. 24(C) requires that a motion to intervene and any supporting memorandum state the grounds for intervention and be accompanied by a pleading as defined in Civ.R. 7(A) setting forth the claim or defense for which intervention is sought. Civ.R. 7(A) states:

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who

was not an original party is summoned under the provisions of Civ.R. 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer the motion was not accompanied by a pleading as required by Civ.R. 24(C).

{¶33} Upon review of the record, Appellants' motion to intervene was not accompanied by a pleading, as defined in Civ.R. 7(A), setting forth the claim or defense for which intervention was sought. Accordingly, the trial court could have properly denied Appellants' motion for failure to comply with Civil Rule 24(C) on that basis alone. *Avanti Corp. v. Morelli Realty Corp.*, 5th Dist., Stark App. 2005CA00147, 2005-Ohio-6698.

{¶34} Based on the foregoing, Appellants' First Assignment of Error is overruled.

II.

{¶35} In their Second Assignment of Error, Appellants argue the trial court erred in denying their Civ.R. 60(B) motion to vacate. We disagree.

{¶36} A motion for relief from judgment under Civ.R. 60(B) lies in the trial court's sound discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75 (1987). In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983). In *GTE Automatic Electric Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus, the Supreme Court of Ohio held the following:

To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken.

{¶37} "The above three requirements are independent and in the conjunctive. Unless each of the three is satisfied, relief must be denied." *Volodkevich v. Volodkevich*, 35 Ohio St.3d 152, 153 (1988).

{¶38} In their motion to vacate, Appellants argued that Appellee did not possess an interest in the promissory note or mortgage at any time during the foreclosure proceedings.

{¶39} As this Court noted in *Huntington Nat'l Bank v. Priest*, 5th Dist. Delaware No. 13 CAE 06 0049, 2014–Ohio–356 at paragraph 38:

In a foreclosure action, the current holder of the note and mortgage is the real party in interest. *Wells Fargo Bank, N.A. v. Stovall*, 8th Dist. Cuyahoga No. 91802, 2010–Ohio–236, ¶ 15, citing *Chase Manhattan Mtge. Corp. v. Smith*, 1st Dist. Hamilton No. C–061069, 2007–Ohio–5874. Further, "a party may establish its interest in the suit, and therefore have standing to invoke the jurisdiction of the court when, at the time it files its complaint of foreclosure, it *either* (1) has had a mortgage assigned or (2) is the holder of the note." *CitiMortgage, Inc. v. Patterson*,

8th Dist. Cuyahoga No. 98360, 2012–Ohio–5894, ¶ 21, citing *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012–Ohio–5017, 979 N.E.2d 1214. (Emphasis added).

{¶40} Here, Deutsche Bank attached the Assignment of Mortgage to its Complaint along with an endorsement on the Note. Deutsche Bank therefore established that it had standing in this action. Clearly, at the time the complaint was filed in this case, Appellee was the holder of the mortgage. Appellee was assigned the mortgage on September 28, 2011, and the mortgage assignment was recorded on October 11, 2011, which is before the complaint was filed on January 19, 2012. We concur with Appellee that this is sufficient to establish standing under *Schwartzwald*.

{¶41} We further find that even if Appellee was not in possession of the note at the time the complaint was filed, the assignment of the mortgage is sufficient to transfer both the note and the mortgage because the documents evidence the parties' intent to keep the instruments together. In *Bank of New York v. Dobbs*, 5th Dist. Knox No. 2009–CA–00002, 2009–Ohio–4742, we held that the assignment of a mortgage, without an express transfer of the note, is sufficient to transfer both the mortgage and the note if the record indicates the parties intended to transfer both the note and the mortgage.

{¶42} Here, Deutsche Bank attached the Assignment of Mortgage to its Complaint along with an endorsement on the Note. Deutsche Bank therefore established that it had standing in this action.

{¶43} Appellant also argues, for the first time on appeal, that the trial court's May 4, 2012, default judgment and Decree of Foreclosure was void, claiming that there is no indication in the record that final judicial report was filed in this case.

{¶44} Again, as stated above, this Court will not consider as error issues that are raised for the first time on appeal. *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 210, 436 N.E.2d 1001 (1982).

{¶45} Upon review, we find the trial court did not abuse its discretion in denying Appellants' motion for relief from judgment.

{¶46} Appellants' Second Assignment of Error is denied.

{¶47} For the foregoing reasons, the judgment of the Court of Common Pleas of Perry County, Ohio, is hereby affirmed.

By: Wise, J.

Hoffman, P. J., and

Farmer, J., concur.

JWW/d 0323