[Cite as *Reveille II, L.L.C. v. Ion*, 2011-Ohio-1212.]

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

REVEILLE II, LLC.	C.A. No. 25456
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MARY K. ION, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellants	CASE No. 2009 12 9270

DECISION AND JOURNAL ENTRY

Dated: March 16, 2011

WHITMORE, Presiding Judge.

{¶1} Defendant-Appellant, Mary K. Ion, appeals from the decision of the Summit County Court of Common Pleas, granting summary judgment in favor of Plaintiff-Appellee, Reveille II LLC ("Reveille"), and cross-claimant, Michael Scanlon. This Court affirms.

I

{¶2} On December 30, 2009, Reveille filed a complaint against Ion, seeking to foreclose on her home and the adjoining eleven acres of land located at 669 East Barlow Road in Hudson. Reveille sought to foreclose on a $22,740.11 promissory note it held from Ion which was secured by a mortgage on the Barlow Road property. Reveille named several other parties as defendants to the action and identified the purported interest each defendant had in the foregoing property. One of the defendants named in the suit was Michael Scanlon, an attorney who also held a mortgage interest in the property. Scanlon filed an answer and cross-claim against Ion, asserting that he had $5,000 mortgage on the property, based on a promissory note

he executed with Charles Hott, Ion's brother who had previously co-owned the property with Ion before his death. On February 8, 2010, Ion and Attorney Estelle Flasck both signed a leave to plead in which Ion requested additional time to file an answer. On February 10, 2010, Reveille filed a motion for default judgment against several named defendants who had not yet filed an answer. In that motion, Reveille indicated that Ion had appeared in the proceeding and requested leave to file an answer, so she was "not affected by th[e] motion."

{¶3} On February 19, 2010, Reveille filed a motion for summary judgment. On February 23, 2010, Scanlon also filed a motion for summary judgment. On February 25, 2010, Ion filed her answer to Reveille's complaint and Scanlon's cross-claim and a counterclaim asserting that Reveille's mortgage interest was void because it was procured by the use of undue influence and a lack of consideration. She also filed a motion to dismiss, asserting that she was under the protection of a bankruptcy stay and that Reveille had not received relief from stay in order to pursue the foreclosure action. The matter was referred to foreclosure mediation in March, and in April, the mediator referred the case back to the trial court for resolution.

{¶4} On May 19, 2010, Ion filed a discovery request. On May 25, 2010, the trial court granted summary judgment to Reveille and Scanlon and entered a decree of foreclosure as to the Barlow Road property. Following the trial court's order of foreclosure, Ion filed several pleadings, including a motion to vacate the foreclosure decree and a motion for default judgment based on Reveille's failure to file an answer in response to her counterclaim asserting its mortgage interest was void. Ion then timely filed her notice of appeal from the order of foreclosure. She asserts two assignments of error for our review, which we have combined in order to facilitate our analysis.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED IN GRANTING, APPELLEES, REVEILLE II, LLC'S AND MICHAEL SCANLON'S MOTIONS FOR SUMMARY JUDGMENT WHEN THE MOTIONS FOR SUMMARY JUDGMENT WERE NOT SERVED UPON APPELLANT, MARY K. ION AND THE MOTION WAS FILED BY APPELLEES PRIOR TO APPELLANT, MARY K. ION, FILING AN ANSWER AND COUNTERCLAIM, ANSWER TO CROSSCLAIM AND MOTION TO DISMISS AND BEFORE THERE WAS ANY OPPORTUNITY TO COMPLETE DISCOVERY."

Assignment of Error Number Two

"THE TRIAL COURT ERRED BY DENYING, APPELLANT, MARY K. ION, OF THE FUNDAMENTALLY FAIR PROCEDURES IN ACCORDANCE WITH DUE PROCESS OF LAW AND THE RIGHT TO AN OPPORTUNITY TO BE HEARD BY GRANTING, APPELLEES, REVEILLE II, LLC'S AND MICHAEL SCANLON'S MOTION FOR SUMMARY JUDGMENT[.]"

{¶5} In her first assignment of error, Ion asserts that neither she nor her counsel was served with the motions for summary judgment separately filed by Reveille and Scanlon. Consequently, she asserts that the trial court erred as a matter of law in granting summary judgment in favor of Reveille and Scanlon. In her second assignment of error, Ion asserts that she was denied due process when summary judgment was granted in favor of Reveille and Scanlon because she was not given the opportunity to be heard in opposition to the motion. We disagree.

{¶6} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co*. (1996), 77 Ohio St.3d 102, 105. Civ.R. 56(C) provides that summary judgment is proper if:

"(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in the favor of the party against whom the motion for

> summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc*. (1977), 50 Ohio St.2d 317, 327.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶7} In its motion for summary judgment, Reveille asserts that Ion is in default on the promissory note the parties executed in August 2008. Attached to Reveille's summary judgment motion are two affidavits: one signed by Dana Hoover, Reveille's managing member, in which she attests that Ion is in default on the promissory note she executed with Reveille, which is secured by the mortgage on her real property; and another signed by Dean Hoover, in which he attests to his attorney fees in the underlying foreclosure action, which are to be paid by Ion under the terms of the parties' promissory note. In Scanlon's summary judgment motion, he asserts, by way of an affidavit attached to his motion, that he holds a promissory note from Charles Hott, the previous owner of the Barlow Road property, which is in default and also secured by a mortgage on the property. As indicated, Reveille and Scanlon filed their motions on February 19, 2010, and February 23, 2010, respectively. Based on the foregoing evidence, both Reveille and Scanlon met their initial burden under *Dresher*.

{¶8} Ion does not dispute that she failed to file a response to either parties' motion for summary judgment. Instead, she asserts that she was not served with either motion. Consequently, she asserts that she was denied due process when the trial court issued the foreclosure decree and further, that she had raised genuine issues of material facts through other pleadings filed in the case. In particular, Ion points to the counterclaim in which she asserted that the promissory note between the parties was void and the motion to dismiss in which she asserted that the foreclosure action should be stayed based on her then-pending bankruptcy proceeding.

{¶9} Civ.R. 5 governs service of pleadings and papers filed after the initial complaint. It provides that "every written motion *** shall be served upon each of the parties." Civ.R. 5(A). If a party is represented by counsel, "service shall be made upon the attorney unless service upon the party is ordered by the court." Civ.R. 5(B). The rule further states that any "[p]apers filed with the court shall not be considered until proof of service is endorsed thereon or separately filed" and that "[t]he proof of service shall state the date and manner of service and shall be signed in accordance with Civ. R. 11." Civ.R. 5(D). This Court has previously stated that "[t]here is a presumption that proper service exists when the record reflects that the Civil Rules pertaining to service of process have been followed." *US Bank, NA v. Fowler*, 9th Dist. No. 22159, 2005-Ohio-2396, at ¶8.

{¶10} The certificates of service accompanying both summary judgment motions in this case contain identical language, which indicate that the motions were served "by regular mail on all defendants who have not answered or otherwise appeared and on the counsel of record for those defendants who have answered or otherwise appeared." The certificates were dated and signed by the respective attorney for each party. Without question, the certificates of service

were marginally sufficient under the Civil Rules and as a practical matter, are unhelpful in determining what defendants were actually served with the summary judgment motions. Moreover, their lack of specificity requires this Court to engage in guesswork and presumptions as to service, instead of providing clear and unequivocal proof of what person or entity was served with the motions. Though it is indisputable that the better practice would have been to identify by name the parties that were served with the motion, neither Civ.R. 5(D) or S.C.C. Loc.R. 7.04(C) requires such specificity. See Civ.R. 5(D); S.C.C. Loc.R. 7.04(C) (requiring that "proof of [] service shall be shown on or attached to *** [a] motion" to demonstrate that it was "served upon all opposing counsel or upon all parties not represented by counsel"). Compare App.R. 13(D) (specifying that the certificate of service for documents filed in an appellate case include "a statement of the date and manner of service and of the names of the persons served"). Consequently, we must conclude that the certificates of service demonstrate proper service of the summary judgment motions, despite Ion's claims otherwise. See *Third Federal Sav. and Loan Assoc. of Cleveland v. Dalton* (May 26, 1999), 9th Dist. No. 97CA006955, at *3 (concluding that the summary judgment motion was properly served where the certificate of service indicated it was mailed "to the last known address of the attorneys representing the defendants herein or where not so represented, to the parties themselves").

{¶11} Ion argues in her brief that when she and her attorney jointly signed the request for leave to plead on February 8, 2010 in which she requested additional time to file an answer, Ion had only a "tentative fee agreement" with her attorney, which was subject to the approval of the bankruptcy court. In that same vein, she asserts that when the motions for summary judgment were served on her, she had not yet "file[d] an answer or otherwise appear[ed]." The record, however, belies this assertion. Irrespective of when Ion and her attorney consummated

their fee agreement, the request for leave to plead was signed by Attorney Flasck as "Attorney for Defendant, Mary Ion" and by Mary Ion as "Defendant" and filed on February 8, 2010. Thus, by her own filings, Ion was, in fact, represented by counsel at a point prior to the filing of either Reveille or Scanlon's dispositive motion on February 19, 2010 and February 23, 2010 respectively.

{¶12} To the extent Ion argues that information contained in her answer and counterclaim were sufficient to create a genuine issue of material fact and preclude summary judgment, Civ.R. 56(E) specifically requires that "an adverse party may not rest upon the mere allegations of denials of the party's pleadings, but the party's response [to a motion for summary judgment] must set forth specific facts showing that there is a genuine issue for trial." Thus, Ion's initial answer to the complaint and her corresponding counterclaim were insufficient to defeat Reveille and Scanlon's motions for summary judgment, nor did they contain any Civ.R. 56(C) evidence upon which the trial court could have relied. Accordingly, Ion did not sustain her reciprocal *Dresher* burden.

{¶13} Ion also argues that the trial court failed to consider the affidavit she attached to her motion to vacate in which she attested to having not received either party's motion. This argument is flawed for several reasons. A motion to vacate is by definition a post-judgment motion, so any assertion that the trial court failed to consider matters contained in a post-judgment motion before entering judgment is simply illogical. See, e.g., *JP Morgan Chase Bank v. Ritchey*, 11th Dist. No. 2006-L-247, 2007-Ohio-4225, at ¶45 (disregarding an affidavit attesting to improper service which was attached to a motion to vacate filed nearly a month after summary judgment was granted and subsequently appealed). Further, though Ion filed a motion to vacate the foreclosure decree in which she asserted several grounds to support vacating the

judgment, she abandoned that challenge when she appealed the foreclosure decree itself. *Howard v. Catholic Social Servs. of Cuyahoga Cty., Inc.* (1994), 70 Ohio St.3d 141, 147 (concluding that an appeal divests trial courts of jurisdiction to consider a pending Civ.R. 60(B) motion for relief from judgment). As a result of this appeal, the trial court was precluded from ruling on Ion's motion to vacate or considering the merits of her affidavit, as are we. Finally, as discussed, having appeared with counsel as of February 8, 2010, it was Ion's counsel who would have been served with the motions based on the requirements of Civ.R. 5(B) and the terms of the certificates of service, not Ion personally. Thus, even if the trial court had considered the contents of Ion's affidavit, her affidavit would not have supported the conclusion that service was improper in this case. See *Ritchey* at ¶44 (concluding that where the defendant had counsel, his affidavit that he did not receive notice of the summary judgment motion was "incompetent as proof that [his attorney] did not receive service").

{¶14} Because the record demonstrates that service of the motions for summary judgment was proper under the Civil Rules and Ion failed to file any type of brief in opposition in response, the trial court did not err in granting Reveille and Scanlon's motions. Accordingly, Ion's two assignments of error are overruled.

III

{¶15} Ion's two assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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(E). 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 Appellant.

BETH WHITMORE
FOR THE COURT

DICKINSON, J.
MOORE, J.
CONCUR

APPEARANCES:

ESTELLE D. FLASCK, Attorney at Law, for Appellant.

DEAN S. HOOVER, Attorney at Law, for Appellee.

MICHAEL C. SCANLON, pro se, Appellee