[Cite as *OneWest Bank, FSB v. Wheeler*, 2017-Ohio-7925.]

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

ONEWEST BANK, FSB Appellee v. EUGENE WINSTON WHEELER, JR., ESTATE, et al. Appellants	C.A. No. 16CA0026-M APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 14CIV0291

DECISION AND JOURNAL ENTRY

Dated: September 29, 2017

HENSAL, Presiding Judge.

{¶1} Robert Anthony and Eugene Wheeler appeal an amended judgment entry of foreclosure of the Medina County Court of Common Pleas. For the following reasons, this Court affirms.

I.

{¶2} In 2007, Mr. Anthony executed a note and mortgage regarding real property in Hinckley. He later quitclaimed his interest in the property to OTM Investments, Inc. The original mortgagee also transferred the mortgage to IndyMac Bank, F.S.B.

{¶3} Before receiving the mortgage, IndyMac filed a foreclosure action against Mr. Anthony and OTM Investments because the note was in default. During the action, IndyMac assigned its interests to OneWest Bank. The court eventually granted summary judgment to OneWest Bank. Mr. Anthony appealed, but no stay was ordered, and the property was sold at sheriff's sale to OneWest Bank, which assigned its bid to OWB REO, LLC. Subsequently, the

Ohio Supreme Court reversed the trial court's judgment under *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, and remanded the matter to the trial court. On remand, OneWest Bank dismissed the action and filed a new foreclosure action. The new action included Mr. Wheeler as a defendant because he had received title from OTM Investments while the first foreclosure action was pending.

{¶4} The case proceeded to trial before a magistrate, who recommended that the court grant a money judgment against Mr. Anthony and issue a decree of foreclosure. Following objections by Mr. Anthony and Mr. Wheeler, which the trial court overruled, the court adopted the magistrate's decision and entered judgment for OneWest Bank. The court later amended its judgment to include parties to the action that had been omitted from the original judgment. Mr. Anthony and Mr. Wheeler have appealed the trial court's judgment, assigning five errors.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANTS BY ENTERING JUDGMENT IN FAVOR OF THE APPELLEE AND DENYING THE MOTION TO VACATE AS THE APPELLEE LACKED THE CAPACITY TO SUE IN THE STATE OF OHIO RENDERING THE JUDGMENT VOID AB INITIO OR OTHERWISE UNENFORCEABLE AS A MATTER OF LAW AND/OR EQUITY.

{¶5} Mr. Anthony and Mr. Wheeler argue that OneWest Bank lacked capacity to sue them because it was not registered with Ohio's Secretary of State. They rely on Revised Code Section 1329.10(B), which provides that "[n]o person doing business under a trade name or fictitious name shall commence or maintain an action * * * in any court in this state or on account of any contracts made or transactions had in the trade name or fictitious name until it has first complied with section 1329.01 of the Revised Code * * *." They also rely on Section 1703.03, which provides that "[n]o foreign corporation * * * shall transact business in this state unless it holds an unexpired * * * license to do so issued by the secretary of state."

{¶6} OneWest Bank argues that Mr. Anthony and Mr. Wheeler cannot raise lack of capacity on appeal because it is an affirmative defense and they did not plead it in their answer. *See Natl. City Mtg. v. Skipper*, 9th Dist. Summit No. 24772, 2009-Ohio-5940, ¶ 12. This Court has held that parties forfeit a lack of capacity defense if they do not plead it in their answer. *Id.* at ¶ 13. Furthermore, as OneWest Bank notes, Section 1703.03 does not apply to federally-chartered savings banks. *See* R.C. 1703.01(A) (including savings banks chartered under the laws of the United States in the definition of domestic corporation); *Huntington Natl. Bank v. Thompson*, 2d Dist. Montgomery No. 26265, 2014-Ohio-5168, ¶ 13.

{¶7} Mr. Anthony and Mr. Wheeler also argue that the trial court incorrectly denied their motion to vacate on this basis. Following the trial court's entry of the amended judgment, Mr. Anthony and Mr. Wheeler moved to vacate the judgment under Civil Rule 60(B). The trial court denied their motion. In their notice of appeal, Mr. Anthony and Mr. Wheeler only stated that they were appealing from the trial court's original judgment and its amended judgment. They did not provide that they were appealing the denial of their motion to vacate. This Court has recognized that it is without jurisdiction to review a judgment or order that is not designated in the appellant's notice of appeal. *Zaryki v. Breen*, 9th Dist. Summit No. 27968, 2016-Ohio-7086, ¶ 22; *see* App.R. 3(D) (providing that the notice of appeal "shall designate the judgment, order or part thereof appealed from[.]"). We, therefore, cannot review any of Mr. Anthony's and Mr. Wheeler's arguments regarding the denial of their motion to vacate. *See Wells Fargo Bank, N.A. v. Deel*, 9th Dist. Summit No. 25876, 2012-Ohio-3782, ¶ 6. Mr. Anthony's and Mr. Wheeler's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANTS BY ENTERING JUDGMENT IN FAVOR OF THE APPELLEE AND

DENYING THE MOTION TO VACATE AS THE DEGREE OF FORECLOSURE WAS VOID, VOIDABLE, AND/OR IMPROPER PURSUANT TO FEDERAL AND OHIO LAW.

{¶8} Mr. Anthony and Mr. Wheeler next argue that OneWest Bank lacked standing to file its action. The Ohio Supreme Court has explained that a person entitled to enforce a note under Section 1303.31 has standing to seek a personal judgment against the promisor on that obligation. *Deutsche Bank Natl. Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, ¶ 35. It has also explained that a "mortgagee or its successor and assign has standing to foreclose on the mortgage." *Id.*

{¶9} Section 1303.31(A)(1) identifies the holder of an instrument as a person entitled to enforce it. At trial, a vice-president of OneWest Bank testified that OneWest Bank was the holder of the note because it purchased the note from IndyMac after IndyMac went into receivership. He also testified that the purchase occurred before OneWest Bank filed its complaint in this action. Regarding the mortgage, OneWest Bank submitted documentation establishing that IndyMac assigned the mortgage to it in June 2010, a few years before it filed its foreclosure complaint. Mr. Anthony and Mr. Wheeler have not pointed this Court to any evidence in the record that indicates that OneWest Bank did not have standing to file its action. We, therefore, reject its argument that the trial court could not enter judgment in favor of OneWest Bank.

{¶10} Mr. Anthony and Mr. Wheeler also argue that OneWest Bank failed to join all necessary, indispensable parties to the action, as required under Civil Rule. 19(A). In particular, they argue that it should have joined OWB REO, LLC, which is the entity that OneWest Bank assigned its interest to after submitting the winning bid at the sheriff's sale in the original foreclosure action.

{¶11} Civil Rule 12(H)(2) provides that "a defense of failure to join a party indispensable under Rule 19 * * * may be made in any pleading permitted or ordered under Rule 7(A), or by motion for judgment on the pleadings, or at the trial on the merits." Mr. Anthony and Mr. Wheeler, however, did not assert that OWB REO, LLC is an indispensable party at any point before or during trial. This Court has consistently held that "[a]rguments that were not raised in the trial court cannot be raised for the first time on appeal." *JPMorgan Chase Bank, N.A. v. Burden*, 9th Dist. Summit No. 27104, 2014-Ohio-2746, ¶ 12. Although Mr. Anthony and Mr. Wheeler raised the issue in their motion to vacate, that motion is not before this Court for review for the reasons stated earlier. Mr. Anthony's and Mr. Wheeler's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANTS BY ENTERING JUDGMENT IN FAVOR OF THE APPELLEE AND DENYING THE MOTION TO VACATE AS THE DECREE OF FORECLOSURE IS VOID PURSUANT TO O.R.C.P. 41(A) MUTUAL COLLATERAL ESTOPPEL, REVISED CODE SECTION 2305.19, INDISPENSIBLE PARTY RULES, AND THE LEGAL DOCTRINE OF RES JUDICATA.

{¶12} Mr. Anthony and Mr. Wheeler next argue that the trial court incorrectly entered judgment for OneWest Bank because it ignored the two dismissal rule. They argue that the court dismissed the previous action and that OneWest Bank should not get a second bite of the apple. They also argue that the court did not have subject matter jurisdiction over the case and note that the savings statute only allows a party to refile an action once.

{¶13} In support of their argument, Mr. Anthony and Mr. Wheeler cite *U.S. Bank Natl. Assn. v. Gullotta*, 120 Ohio St.3d 399, 2008-Ohio-6268. That case involved much different circumstances. In *Gullotta*, U.S. Bank twice filed foreclosure actions against Giuseppe Gullotta,

only to later dismiss them under Civil Rule 41(A). The Ohio Supreme Court held that the bank could not file a third foreclosure action against Mr. Gullotta because the second dismissal constituted a judgment on the merits. *Id*. at ¶ 26. Because there were no operative facts that were different than the previous actions, the Court concluded that U.S. Bank's third complaint was barred by res judicata. *Id*. at ¶ 36-38.

{¶14} Unlike in *Gullotta*, there was only one prior foreclosure action involving the Anthony/Wheeler property. In addition, Mr. Anthony and Mr. Wheeler have not pointed to anything in the record that establishes that the dismissal in the prior action was under Rule 41(A). Upon review of the record, we conclude that OneWest Bank's complaint was not barred by the doctrine of res judicata. Because the action was not barred, we conclude that the trial court had jurisdiction over it and its judgment is not void. Furthermore, Mr. Anthony and Mr. Wheeler have not established that the statute of limitations savings statute, Revised Code Section 2305.19, has any relevance to this action. Mr. Anthony's and Mr. Wheeler's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANTS BY ENTERING JUDGMENT IN FAVOR OF THE APPELLEE AND DENYING THE MOTION TO VACATE AS THE DECREE OF FORECLOSURE WAS VOID, VOIDABLE, AND/OR IMPROPER PURSUANT TO FEDERAL AND OHIO LAW.

{¶15} Mr. Anthony and Mr. Wheeler next argue that the foreclosure decree is void because OneWest Bank violated the Fair Debt Collection Practices Act (FDCPA) and the Ohio Consumer Sales Practices Act (CSPA). Upon review of the record, we note that they did not raise any issues regarding the FDCPA or CSPA in the trial court. As previously explained, appellants make not raise issues for the first time on appeal. *Burden*, 9th Dist. Summit No.

27104, 2014-Ohio-2746, at ¶ 12. Mr. Anthony's and Mr. Wheeler's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANTS BY ENTERING JUDGMENT IN FAVOR OF THE APPELLEE WHEN AMENDED JUDGMENT IN FORECLOSURE WITH INSTRUCTIONS IS NOT FINAL AND APPEALABLE AS TO DISPENSE WITH ALL PARTIES OF RECORD ACCORDING TO BOTH INITIAL AND FINAL JUDICIAL REPORT OF FORECLOSURE UNDER R.C. 2505.02, OHIO RUL. CIV. P. 19(A) AND 19(B).

{¶16} Mr. Anthony's and Mr. Wheeler's final argument is that the trial court's amended judgment entry is not a final appealable order under Section 2505.02. According to them, because the amended judgment does not resolve OWB REO, LLC's status with respect to the property, it is not final. They also repeat their arguments about the action lacking a necessary and indispensable party.

{¶17} This Court has jurisdiction to hear appeals only from final orders or judgments. Article IV, Section 3(B)(2), Ohio Constitution; R.C. 2505.03. In the absence of a final, appealable order or judgment, this Court must dismiss the appeal for lack of subject matter jurisdiction. *Lava Landscaping, Inc. v. Rayco Mfg., Inc.*, 9th Dist. Medina No. 2930–M, 2000 WL 109108, *1 (Jan. 26, 2000).

{¶18} A judgment is a "final determination of the rights of the parties." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 150 (1976). In *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, the Ohio Supreme Court explained that there are "two judgments appealable in foreclosure actions: the order of foreclosure and the confirmation of sale." *Id*. at ¶ 39. It also explained that "for a judgment decree in foreclosure to

constitute a final order, it must address the rights of all lienholders and the responsibilities of the mortgagor." *Id*. at ¶ 20.

{¶19} Mr. Anthony and Mr. Wheeler have not identified any rights or responsibilities of the parties that are not addressed in the amended judgment. Our independent review of the record also reveals no deficiencies. The only issue that Mr. Anthony and Mr. Wheeler believed was not addressed in the judgment was the rights of OWB REO, LLC regarding the property. It, however, was not a party to the action, so its omission from the judgment does not undermine the finality of the judgment. Mr. Anthony's and Mr. Wheeler's fifth assignment of error is overruled.

III.

{¶20} Mr. Anthony's and Mr. Wheeler's assignments of error are overruled. The judgment of the Medina 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 Medina, 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(C). 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 Appellants.

JENNIFER HENSAL
FOR THE COURT

TEODOSIO, J.
CALLAHAN, J.
CONCUR.

APPEARANCES:

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