IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

PENNYMAC LOAN SERVICES, LLC,

Plaintiff-Appellee,

v.

ANNETTE J. MARKER

AKA ANNETTE J. DEVORE ET AL.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 18 JE 0024

Civil Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 17CV00060

BEFORE:
Gene Donofrio, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed

Atty. David Lockshaw Jr., Dickson Wright PLLC, 150 East Gay Street, Suite 2400, Columbus, Ohio 43215 and *Attorney William Leaman*, Lerner, Sampson and

Rothfuss, 120 East Fourth Street, Suite 800, Cincinnati, Ohio 45202, for Plaintiff-Appellee and

Annette Marker et al., (PRO SE), P.O. Box 4734, Steubenville, Ohio 43952, for Appellants-Defendants.

Dated:
September 30, 2019

DONOFRIO, J.

{¶1} Defendant-appellant, Annette Marker, appeals the judgment of the Jefferson County Common Pleas Court granting summary judgment and a decree of foreclosure in favor of plaintiff-appellee, PennyMac Loan Services, LLC.

{¶2} Appellant purchased real property located at 70 Lacy Drive in Steubenville, Ohio (the property). Appellant's purchase of the property was financed by Franklin American Mortgage Company. The financing was memorialized in a promissory note dated December 28, 2012 and secured by a mortgage on the property. The note required appellant to make monthly payments of $560.29 on the principal amount of $126,734 which included an interest rate of 3.375% per year for 30 years. The note was endorsed in blank. Appellee became the holder of the note and was assigned the mortgage.

{¶3} Beginning in July of 2015, appellant stopped making payments on the note. On September 24, 2015, appellee sent appellant a notice of default and intent to accelerate the amount due stating that appellant had defaulted on the note by failing to make three consecutive payments.

{¶4} In September or October of 2015, appellee and appellant came to an agreement to avoid foreclosure. Appellee agreed to place appellant on a one-year forbearance program. Under the forbearance program, appellant still had to make nominal payments of five dollars a month on the note.

{¶5} Near the end of the forbearance period in 2016, appellant applied for a loan modification with appellee. Appellee denied appellant's loan modification on the basis that appellant had insufficient income.

{¶6} On February 17, 2017, appellee filed this action seeking to foreclose on the property due to appellant's default on the note. Appellee's complaint generally

asserted that it had satisfied all necessary conditions precedent prior to initiating the foreclosure proceedings.

{¶7} On May 22, 2017, appellant, pro se, filed an answer. The answer admitted that there "has been a default under the terms of the note." But the answer generally disputed that appellee failed to comply with all necessary conditions precedent before filing its complaint.

{¶8} During discovery, appellee produced over 400 pages of documents to appellant. But appellee objected to several of appellant's interrogatories and requests for admissions for various reasons, including: they were compound in nature, they were overly vague, or they were irrelevant and not likely to lead to discoverable information.

{¶9} On September 29, 2017, appellee filed its first motion for summary judgment. This motion argued that there was no genuine issue of material fact on appellee's foreclosure claim and appellee was entitled to judgment in its favor.

{¶10} On December 6, 2017, appellant filed a "motion to dismiss plaintiff's motion for summary judgment" and a motion for leave to file an amended answer and counterclaim. Appellant's "motion to dismiss summary judgment" argued that her amended answer and counterclaim would create genuine issues of material fact.

{¶11} After her motion for leave was granted, appellant filed her amended answer and counterclaim on January 22, 2018. Appellant's amended answer also admitted that she was in default on the note but denied that appellee satisfied all necessary conditions precedent before initiating this action. The amended answer and counterclaim made numerous allegations, including: appellant was denied a loan modification, her husband's income would not be used to support the loan modification application as he was not a party to the note, appellee denied her request to add her husband to the note, and appellee considered her husband's income when it calculated her forbearance payments but refused to consider her husband's income for a loan modification.

{¶12} The answer also asserted four affirmative defenses: appellee was not entitled to enforce the note, appellee was not the proper party in interest to bring the action, appellee failed to join all necessary parties, and appellee failed to state a claim upon which relief could be granted.

{¶13} Appellant's counterclaim set forth 11 separate causes of action. Among those causes of action were claims of unjust enrichment, negligent infliction of emotional distress, and intentional infliction of emotional distress. The remaining causes of action generally alleged: appellee failed to satisfy necessary conditions precedent, appellee was engaged in unfair or deceptive business practices, appellee "benefited from the fruits of fraud," appellee engaged in "servicing abuse," and appellee violated appellant's bankruptcy protection.

{¶14} Appellant also attached a supporting memorandum to her amended answer. This memorandum argued that there were material facts regarding appellee's foreclosure claim that were in dispute. This memorandum also argued: appellant was not given an opportunity to view the original note during discovery, appellee was not the true holder of the note, appellant's loan was a Rural Housing Service (RHS) loan that was guaranteed by the United States Department of Agriculture (USDA), and appellee did not comply with USDA RHS regulations prior to filing a foreclosure action.

{¶15} Appellant's amended answer and counterclaim also contained numerous exhibits. These exhibits included, but are not limited to: a copy of the promissory note, a copy of the mortgage, a website article with information about the Mortgage Electronic Registration System, a transcript of cassette recorded phone calls appellant made to several of appellee's employees regarding loan modifications, various printouts from different websites regarding RHS loans, an email from appellant to an employee of appellee's counsel sending discovery requests, and appellee's responses to appellant's first requests for production of documents.

{¶16} On January 26, 2018, appellee withdrew its first motion for summary judgment on the basis that it needed additional time to respond to appellant's counterclaims.

{¶17} On March 5, 2018, appellee filed a motion to dismiss appellant's counterclaim on the basis that the causes of action failed to state a claim upon which relief could be granted. When addressing appellant's "unfair and deceptive practices" claim, appellee argued that the transcript attached to appellant's amended answer and counterclaim showed that appellee was not engaged in any unfair or deceptive practices. Appellee argued that the transcript showed that appellant did not qualify for a loan

modification because she had insufficient income. In a footnote, appellee stated that it disputed the authenticity and evidentiary value of the transcript but presumed that it was true for the purpose of ruling on a motion to dismiss.

{¶18} On March 9, 2018, appellant filed a motion to compel discovery seeking to compel appellee's response to numerous discovery requests. First, appellant sought to compel appellee to permit her to inspect the original note and mortgage. Second, appellant argued that appellee refused to appropriately respond to six different requests for production of documents. Third, appellant argued that appellee inappropriately objected to ten of her requests for admissions. Fourth, appellant argued that appellee either inappropriately answered or refused to answer ten interrogatories.

{¶19} On March 26, 2018, appellee filed an opposition to appellant's motion to compel. Appellee first argued that appellant did not attempt to make an out-of-court resolution of the discovery dispute prior to filing a motion to compel. Appellee also argued that it provided numerous documents relevant to the action, including a copy of the note and mortgage, and previously agreed to allow appellant to inspect the original note and mortgage. Finally, appellee argued that appellant's interrogatories and requests for admission were either compound in nature or overly vague.

{¶20} On March 27, 2018, the trial court denied appellant's motion to compel for two reasons. First, appellant provided no evidence that she attempted an out-of-court resolution of the discovery dispute prior to filing a motion to compel. Second, the trial court held that appellee substantively responded to appellant's discovery requests.

{¶21} On May 11, 2018, appellant filed an opposition to appellee's motion to dismiss her counterclaim. On May 17, 2018, appellee filed a reply memorandum in support of its motion to dismiss. On May 18, 2018, appellant filed a motion for leave to file a surreply to appellee's reply memorandum in support of its motion to dismiss. On June 6, 2018, the trial court denied appellant's motion for leave to file a surreply holding that the issue had been fully briefed.

{¶22} On July 6, 2018, the trial court ruled on appellee's motion to dismiss appellant's counterclaim. The trial court denied the motion regarding appellant's claims for unjust enrichment, negligent infliction of emotional distress, and intentional infliction of

emotional distress. The trial court granted the motion on the remaining eight causes of action on the basis that they failed to state a claim upon which relief could be granted.

{¶23} On August 10, 2018, appellee filed its second motion for summary judgment. This motion argued that there was no genuine issue of material fact regarding its foreclosure claim. This motion argued that it was the holder of the note and mortgage, appellant admitted that she defaulted on the mortgage, and there remained due and owing $120,140.65 plus interest on the note. As for appellant's remaining causes of action, appellee argued that appellant's unjust enrichment claim failed as a matter of law because there was a contract in this issue and there was no evidence that appellee wrongly retained any benefit. Appellee also argued that there was no evidence to support any element of appellant's claims for negligent infliction of emotional distress and intentional infliction of emotional distress.

{¶24} On the same day, appellant filed two motions. The first was a "motion to amend judgment." The second was a motion for summary judgment. Appellant generally argued that appellee failed to follow the necessary conditions precedent prior to filing a foreclosure action. The parties also filed memorandums in support of their respective summary judgment motions and memorandums in opposition to each other's summary judgment motions.

{¶25} On October 30, 2018, the trial court denied appellant's motion for summary judgment and granted appellee's motion for summary judgment. This same ruling also issued a decree in foreclosure.

{¶26} Appellant timely filed a notice of appeal on November 28, 2018. Appellant now raises five assignments of error.

{¶27} A case becomes moot when its issues are no longer live, or when the parties no longer have a legally cognizable interest in the outcome. *State ex rel. Gaylor, Inc. v. Goodenow*, 125 Ohio St.3d 407, 2010–Ohio–1844, 928 N.E.2d 728, ¶ 10. "It is not the duty of the court to answer moot questions[.]" *Id.*

{¶28} In this case, after the trial court issued a decree in foreclosure, appellant filed a motion for a stay of execution with the trial court. The trial court denied that motion. After appellant filed this appeal, she filed another motion for a stay of execution with this court. We granted appellant's motion on the condition that she post a bond of $125,000.

Appellant never posted the bond and the property was sold to a third-party after a sheriff's sale. Consequently, appellant no longer has a legally cognizable interest in the property and this appeal is moot.

{¶29} This court has previously held that an appeal of a foreclosure is moot once the property is sold and the proceeds are distributed. *U.S. Bank Natl. Assn. v. Marcino*, 7th Dist. Jefferson No. 09 JE 2010, 2010-Ohio-6512. Other appellate districts have also held that an appeal of a foreclosure is moot when the property is sold, and the proceeds are distributed. *U.S. Bank Trust National Association v. Janossy*, 8th Dist. Cuyahoga No. 106361, 2018-Ohio-2228; *Art's Rental Equip., Inc. v. Bear Creek Const., L.L.C.*, 1st Dist. Hamilton Nos. C-110544, C-110555, C-110558, C-110559, C-110564, C-110785, C-110792, C-110797, C-110798, C-110799, C-110800, C-110801, C-110808, C-120309, 2012-Ohio-5371.

{¶30} Based on the foregoing, this appeal is moot. And even assuming arguendo that it is not, appellant's assignments of error are without merit.

{¶31} Appellant's first assignment of error states:

> THE TRIAL COURT ERRED BY ABUSING ITS DISCRETION BY DENYING MRS. MARKER'S [MOTION] TO COMPEL.

{¶32} Appellant argues that appellee inappropriately objected to various discovery requests and the trial court should have compelled appellee's responses.

{¶33} A trial court's resolution of a discovery issue is reviewed for abuse of discretion. *Martin v. Gen. Motors Acceptance Corp., N. Am.*, 160 Ohio App.3d 19, 2005-Ohio-1349, 825 N.E.2d 1138, ¶ 60 (7th Dist.) citing *Lightbody v. Rust*, 137 Ohio App.3d 658, 739 N.E.2d 840 (8th Dist.2000). Abuse of discretion connotes more than an error in judgment; it implies that the trial court's judgment is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶34} Motions to compel discovery are governed by Civ.R. 37(A). Under the rule, the motion to compel discovery must contain a certification that the movant has, in good faith, conferred or attempted to confer with the party failing to make discovery in an effort to obtain it without court action. Civ.R. 37(A)(1).

{¶35} There is nothing in appellant's motion to compel that indicates she made a good faith attempt to resolve her discovery dispute with appellee prior to filing a motion to compel. Appellant makes three arguments on this point: Civ.R. 37(A) does not specify how a good faith attempt should be made; Civ.R. 37(A) does not specify how many good faith attempts should be made; and, given her previous interactions with appellee, any attempt to resolve the dispute would have been futile. But these arguments do not negate the fact that Civ.R. 37(A)(1) requires a good faith attempt to resolve a discovery dispute prior to filing a motion to compel. The trial court's denial of appellant's motion to compel was not an abuse of discretion.

{¶36} Accordingly, appellant's first assignment of error is without merit.

{¶37} Appellant's second assignment of error states:

> THE TRIAL COURT ERRED BY ABUSING ITS DISCRETION BY ALLOWING PENNYMAC TO CHANGE THEIR PLEADING, ABOUT A MATERIAL FACT, WITHOUT LEAVE OF COURT OR ANOTHER APPROPRIATE REMEDY, SUCH AS ALLOWING MRS. MARKER TO FILE A SUR-REPLY.

{¶38} Appellant argues that appellee amended pleadings in violation of the Rules of Civil Procedure and that the amended pleadings were contradictory in nature. The filings appellant refers to in this assignment of error are actually motions as opposed to pleadings that are set out in Civ.R. 7(A).

{¶39} Appellee filed its first motion for summary judgment on September 29, 2017. After appellant filed a counterclaim, appellee voluntarily withdrew its first motion for summary judgment. Appellee then filed a motion to dismiss appellant's counterclaim. After the trial court dismissed most of appellant's causes of action in her counterclaim, appellee filed its second motion for summary judgment. Appellant argues that the arguments in appellee's first motion for summary judgment and appellee's motion to dismiss are contradictory.

{¶40} Appellee's withdrawal of its first motion for summary judgment renders the motion moot. As for appellee's motion to dismiss, it was filed in response to appellant's counterclaim and, therefore, is not an amendment to its first motion for summary

judgment. Also, there is no provision in the Rules of Civil Procedure that bars a party from amending a motion. Moreover, after reviewing appellee's first motion for summary judgment and appellee's motion to dismiss, there is nothing in these motions that is contradictory.

{¶41} Accordingly, appellant's second assignment lacks merit.

{¶42} Appellant's third assignment of error states:

> THE TRIAL COURT ERRED BY ABUSING ITS DISCRETION BY ALLOWING PENNYMAC TO DISPUTE THE AUTHENTICITY AND EVIDENTIARY VALUE OF THE TRANSCRIPT OF PHONE CALLS, EXHIBIT 4, OF MRS. MARKER'S AMENDED ANSWER AND COUNTERCLAIMS, THEN USE THE TRANSCRIPT OF PHONE CALLS AS EVIDENCE IN THEIR OWN PLEADINGS.

{¶43} Appellant's fourth assignment of error states:

> THE TRIAL COURT ERRED BY ABUSING ITS DISCRETION BY ALLOWING PENNYMAC TO DISPUTE THE AUTHENTICITY AND EVIDENTIARY VALUE OF THE TRANSCRIPT OF PHONE CALLS.

{¶44} In construing these assignments of error, appellant argues that the trial court inappropriately allowed appellee to both rely on Exhibit 4 of appellant's amended answer and counterclaim (the transcribed phone calls between appellant and appellee's employees) and dispute Exhibit 4's authenticity and probative value in its motion to dismiss.

{¶45} There is no ruling from the trial court concerning Exhibit 4. In a motion to dismiss, the court is obliged to assume as true the factual allegations of the complaint. *Phung v. Waste Management, Inc.*, 23 Ohio St.3d 100, 491 N.E.2d 1114 (1986). In this case, appellee argued that, if the statements in Exhibit 4 are true, they show that appellee was not engaged in any fraudulent or deceptive practices. This is a permissible argument in a motion to dismiss. As for appellee disputing Exhibit 4's authenticity and probative value, this dispute was located in a footnote and ends with a concession that Exhibit 4 is presumed true for purposes of ruling on a motion to dismiss. Because appellant

submitted Exhibit 4 during this action, appellee was free to make arguments concerning Exhibit 4. After reviewing this motion, there is no error with appellee's argument in its motion to dismiss.

{¶46} Accordingly, appellant's third and fourth assignments of error lack merit.

{¶47} Appellant's fifth assignment of error states:

> THE TRIAL COURT ERRED BY ABUSING ITS DISCRETION BY GRANTING PENNYMAC'S SECOND [MOTION FOR SUMMARY JUDGMENT] WHEN THERE WERE STILL GENUINE ISSUES OF MATERIAL FACTS LEFT TO LITIGATE.

{¶48} An appellate court reviews a trial court's summary judgment decision de novo, applying the same standard used by the trial court. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007-Ohio-4948, 874 N.E.2d 1155, ¶ 5. A motion for summary judgment is properly granted if the court, upon viewing the evidence in a light most favorable to the nonmoving party, determines that: (1) there are no genuine issues as to any material facts; (2) the movant is entitled to judgment as a matter of law, and (3) the evidence is such that reasonable minds can come to but one conclusion and that conclusion is adverse to the opposing party. Civ. R. 56(C); *Byrd v. Smith*, 110 Ohio St. 3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 10.

{¶49} Summary judgment is appropriate when there is no genuine issue as to any material fact. A "material fact" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.,* 104 Ohio App.3d, 598, 603, 662 N.E.2d 1088 (8th Dist. 1995), citing *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

{¶50} In order for a plaintiff to be granted summary judgment on a foreclosure, the plaintiff must show: (1) they are the holder of the note and mortgage, (2) the mortgagor is in default, and (3) the amount of principal and interest due. See *Bank of Am. v. Saadey*, 7th Dist. Mahoning No. 12 MA 196, 2014-Ohio-3569, ¶ 18.

{¶51} Appellee's motion for summary judgment contained the following exhibits: a copy of appellant's promissory note indorsed in blank, a copy of the mortgage, a copy of the assignment of the mortgage to appellee, appellant's customer activity statement,

and a copy of appellee's September 24, 2015 letter to appellant informing her that she was in default on the note. Also attached to appellee's motion was an affidavit from one of appellee's employees, Johnny Morton. Morton's affidavit avers that appellant was in default on the note and there remained due and owing $120,140.65 plus interest on the note.

{¶52} Moreover, appellant admitted in her amended answer that she was in default on the note. Therefore, there was sufficient evidence that appellee was entitled to summary judgment.

{¶53} Appellant makes two arguments as to why summary judgment in appellee's favor was improper: appellee erroneously denied her a loan modification and appellee failed to satisfy all USDA regulations governing RHS loans prior to initiating foreclosure proceedings.

{¶54} In addressing appellant's loan modification argument, lenders have no duty to modify a loan. *Wells Fargo Bank, N.A. v. Stevens*, 7th Dist. Mahoning No. 12 MA 219, 2014-Ohio-1399, ¶ 16 citing *Deutsche Bank Natl. Trust Co. v. Davis*, 5th Dist. Delaware No. 11CAE060055, 2011-Ohio-5791. "Until both parties agree to the modification, the original terms of the loan are still in force, and mere negotiations are unenforceable." *Id.* citing *Huntington v. R.R. Wellington, Inc.*, 11th Dist. Portage No. 2012-P-0035, 2012-Ohio-5935.

{¶55} In addressing appellant's conditions precedent argument, appellee's complaint generally averred that it satisfied all necessary conditions precedent prior to initiating foreclosure proceedings. "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred." Civ.R. 9(C).

{¶56} Appellant now asserts that appellee did not comply with the face-to-face meeting requirement prior to initiating foreclosure proceedings. The face-to-face meeting requirement, found in 24 C.F.R. 203.604(d), is a U.S. Department of Housing and Urban Development (HUD) regulation. *RBS Citizens NA v. Sharp*, 7th Dist. Mahoning No. 17 MA 0059, 2018-Ohio-2480, ¶ 13.

{¶57} A promissory note and a mortgage are not subject to federal regulations if the note and mortgage make no reference to federal regulations. See *JPMorgan Chase*

Bank, Natl. Assn. v. Burden, 9th Dist. Summit No. 27104, 2014-Ohio-2746, ¶ 20-21 citing *U.S. Bank Natl. Assn. v. Martz*, 11th Dist. Portage No. 2013-P-0028, 2013-Ohio-4555. General references that a note and mortgage are subject to federal law are insufficient to incorporate federal regulations. *Id.* quoting *Martz*. In this case, appellant presented no evidence that her loan was governed by any USDA or HUD regulations. The note and mortgage only make general references that they are subject to state and federal law.

{¶58} Accordingly, appellant's fifth assignment of error lacks merit.

{¶59} As set out above, since the property at issue in this appeal has been sold to a third party, this appeal is moot as appellant no longer has a legally cognizable interest in the subject matter of the action. And even assuming arguendo that the appeal is not moot, appellant's assignments of error are without merit.

{¶60} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, P. J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Jefferson County, Ohio is hereby affirmed. Costs taxed against Appellant.

A certified copy of this Opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.