[Cite as *Home S. & L. Co. of Youngstown v. Avery Place, L.L.C.*, 2012-Ohio-6255.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The Home Savings and Loan Company of Youngstown, Ohio,	:	
Plaintiff-Appellee,	:	No. 11AP-1152
v.		(C.P.C. No. 09CVH09-14464)
Avery Place, LLC et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	
The Home Savings and Loan Company of Youngstown, Ohio,	:	
Plaintiff-Appellee,	:	No. 11AP-1153
v.	:	(C.P.C. No. 10CVH08-11601)
James J. Moro et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on December 31, 2012

Bricker & Eckler LLP, Kenneth C. Johnson and *Anthony M. Sharett*, for appellee.

Richard L. Goodman Co., L.P.A., and *Richard L. Goodman*, for appellants.

APPEALS from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendants-appellants, Avery Place, LLC ("Avery Place") and James J. Moro ("Moro") (collectively "appellants"), appeal from summary judgments of foreclosure

granted by the Franklin County Court of Common Pleas to plaintiff-appellee, Home Savings and Loan Company of Youngstown, Ohio ("Home Savings"). For the following reasons, we affirm.

{¶ 2} Avery Place is a company that developed condominiums in Franklin County, Ohio. Moro is the sole owner of the company. Moro also individually owned two condominium units in the Avery Place development.

{¶ 3} In 2007 and 2008, Home Savings made loans to both Avery Place and Moro. These loans were secured by mortgages on real property located in the Avery Place condominium development. The loan agreements executed by Avery Place contained a cognovit provision.

{¶ 4} In 2009 and 2010, Home Savings filed separate actions in the Common Pleas Court of Franklin County. In its complaint against Avery Place, Home Savings alleged that the company had defaulted on its loans and that Home Savings had obtained from the Common Pleas Court of Delaware County a cognovit judgment against Avery Place for money damages. In its Franklin County action, Home State sought foreclosure of the mortgaged property owned by Avery Place. Similarly, in its complaint against Moro, Home Savings alleged that Moro had defaulted on his individual loans. Home State demanded both a judgment against Moro, individually, for damages, as well as foreclosure of the mortgaged property owned by Moro. On May 2, 2011, the trial court consolidated the two cases and set the matter for trial on August 22, 2011.

{¶ 5} On June 17, 2011, Home Savings filed a motion for summary judgment against Avery Place. On June 20, 2011, Avery Place served Home Savings with interrogatories and a request for production of documents. Home Savings responded on August 5, 2011 but asserted objections to a number of Avery Place's discovery requests.

{¶ 6} On August 22, 2011, the trial court conducted a status conference rather than a trial, after which it entered an order that accomplished the following: (1) continued the trial date to December 5, 2011; (2) stayed "[a]ll discovery, absent an agreement of counsel"[1]; and (3) granted leave to Home Savings to file by August 26, 2011 a dispositive

[1] It appears from subsequent court filings that, during the course of the August 22 status conference, both Home State and the appellants agreed to a stay of discovery.

motion concerning the foreclosure of the two condominium units owned individually by Moro. (Aug. 25, 2011 Orders.)

{¶ 7} On August 26, 2011, Home Savings did file a motion seeking partial summary judgment against Moro. Home Savings asserted that there was no genuine issue of material fact concerning its legal entitlement to both money damages and foreclosure of the real property Moro had mortgaged to secure Home Savings' loans. Home Savings attached an affidavit supporting the authenticity of attached copies of the loan agreements and mortgage documents executed by Moro and establishing Moro's default in making timely loan payments.

{¶ 8} On September 19, 2011, appellants submitted a three-pronged filing that included the following: (1) a memorandum in opposition to Home Savings' partial summary judgment motion relative to Moro; (2) a motion for relief from the stay of discovery the court had orally ordered on August 22, 2011, and journalized on August 25, 2011; and (3) a motion "to extend time to reply to partial motion for summary judgment pending resolution of discovery dispute." (Memorandum Contra, at 1.) Appellants contended that Home Savings' motion contained allegations to which it could not respond unless Home Savings provided the information appellants had sought in its June 2011 discovery requests, to which Home Savings had objected.

{¶ 9} On December 2, 2011, the trial court issued a decision granting Home Savings' motion for summary judgment against Avery Place. In a separate decision on the same date, the court granted Home Savings' motion for summary judgment against Moro. In the final paragraph of the latter decision, the court formally denied appellants' motion for relief from the previously ordered stay of discovery, as well as the motion to extend time to reply to the motion for partial summary judgment. On December 28, 2011, the trial court entered final judgments consistent with its decisions granting the summary judgment motions.

{¶ 10} Avery Place and Moro timely filed notices of appeal from the trial court's judgments in favor of Home Savings. In a joint brief, the appellants have asserted the following as assignments of error:

> 1. The trial court erred when it granted Plaintiff Summary Judgment in foreclosure against Defendant, Avery Place, LLC.

> 2. The trial court erred when it determined that the cognovit judgment rendered in Delaware County against Avery Place, LLC is binding on the parties in the current proceedings.
>
> 3. The trial court erred when it granted Plaintiff's motion for partial summary judgment in foreclosure against James J. Moro when there are facts and evidence of record which creates an issue of material fact regarding whether or not the loan transaction between Plaintiff and Defendant may have been illegal *ab initio*.
>
> 4. The trial court erred when it denied Defendant Moro's Motion for Relief from Stay of Discovery when such discovery could have produced evidence whether the loan transaction between Plaintiff and Defendant may have been illegal *ab initio* and therefore a complete defense to a foreclosure action.
>
> 5. The trial court erred when it denied Defendant Moro's Motion to Extend Time to Reply to Plaintiff's Motion for Partial Summary Judgment Pending Resolution of Discovery Dispute.
>
> 6. The trial court erred when it granted Plaintiff's motion to dismiss all counts of Defendant Moro's counterclaim against Plaintiff.
>
> 7. The trial court erred when it waited to rule on all pending motions only one day prior to the trial date (the Decisions were rendered on Friday, December 2, 2011 and the trial was scheduled to commence on Monday, December 5, 2011[)], when Defendants had outstanding discovery requests that were never responded to by Plaintiff which would have permitted Defendant to adequately prepare for trial.

{¶ 11} Appellants' entire argument in support of all seven assignments of error consists of a total of four paragraphs, preceded by the following caption: "The trial court erred when it failed to permit [appellants] to conduct discovery which would allow them to form a defense to [appellees'] Partial Motion for Summary Judgment and to the foreclosure action."

{¶ 12} The law is clear that "[a]n appellant must demonstrate each assigned error through an argument supported by citations to legal authority and facts in the record."

Ford Motor Credit Co. v. Ryan, 189 Ohio App.3d 560, 2010-Ohio-4601, ¶ 23 (10th Dist.), citing App.R. 16(A)(7), and *Cross v. Ohio Adult Parole Auth. Chief*, 10th Dist. No. 09AP-364, 2009-Ohio-5027, ¶ 3. "If an appellant neglects to advance such an argument, a court of appeals may disregard the assignment of error." *Ford Motor* at ¶ 23, citing App.R. 12(A)(2), and *Bond v. Canal Winchester*, 10th Dist. No. 07AP-556, 2008-Ohio-945, ¶ 16-17.

{¶ 13} Appellants have failed to provide arguments in support of their first, second, sixth, and seventh assignments of error, and we therefore do not address them in this appeal. Construing its brief generously, appellants have provided an argument relative to their third, fourth, and fifth assignments of error, albeit arguments that are devoid of citation to any legal authority other than references to the standards by which a grant of summary judgment is appropriately granted. Despite this deficiency, we will address those three assignments of error.

{¶ 14} We first consider the fourth and fifth assignments of error which reference the trial court's denial of appellants' motions relative to discovery. In their fourth assignment of error, appellants argue that the trial court should have granted its "motion for relief from stay of discovery." In their fifth assignment of error, appellants argue that the trial court should have granted them an extension of time, pending further discovery, to further reply to Home State's partial summary judgment motion. We will address these two assignments of error together because of their interrelated nature.

{¶ 15} In examining these assignments of error, we are cognizant that trial courts enjoy discretion in managing the course of the litigation before them and have inherent power to manage their own dockets and the progress of the proceedings before them. *Canady v. Rekau & Rekau, Inc.*, 10th Dist. No. 09AP-32, 2009-Ohio-4974, ¶ 16. In addition, we observe that trial courts enjoy broad discretion in the management of discovery. The standard of review of a trial court's decision in a discovery matter is whether the court abused its discretion. *Curtis v. Ohio Adult Parole Auth.*, 10th Dist. No. 04AP-1214, 2006-Ohio-15, ¶ 33, citing *State ex rel. Daggett v. Gessaman*, 34 Ohio St.2d 55, 57 (1973). In examining the trial court's denial of these motions, we therefore apply an abuse-of-discretion standard of review. Abuse of discretion implies that the court acted in an unreasonable, arbitrary, or unconscionable manner. *Curtis* at ¶ 33.

{¶ 16} In support of its motions, appellants observed in the trial court that state and federal regulatory authorities had, in August 2008, issued a cease-and-desist order to Home Savings. Appellants argued that the existence of the cease-and-desist order created an issue as to whether the notes Moro had signed might be void for illegality. Appellants advised the court that Home Savings had previously taken the position that discovery concerning the cease-and-desist order was irrelevant in a foreclosure action. Appellants further suggested that Home Savings was unlikely to change that position and that, should Home Savings not provide the information appellants had requested, appellants would "be forced to file a motion to compel discovery." (Memorandum Contra, at 3.) Appellants did not, however, thereafter file a motion to compel discovery, as authorized by Civ.R. 37, even though they had previously indicated they might be "forced" to do so.

{¶ 17} In addition, the Civil Rules provide a procedure that may be employed by a party faced with a summary judgment motion who believes he has had insufficient time to conduct discovery. Civ.R. 56(F) states:

> Should it appear *from the affidavits* of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(Emphasis added.)

{¶ 18} In this case, appellants did not avail themselves of this Civ.R. 56(F) procedure. Even were we to construe appellants' motion seeking an extension of time as a Civ.R. 56(F) motion, that motion was defective in that it failed to include the required affidavit. *Accord Hahn v. Groveport*, 10th Dist. No. 07AP-27, 2007-Ohio-5559, ¶ 30 ("Civ.R. 56(F) requires the party opposing the motion for summary judgment *to submit affidavits* with sufficient reasons stating why it cannot present by affidavit facts essential to justify its opposition. [Citation omitted.] Mere allegations requesting a continuance for the purpose of discovery are not sufficient reasons why a party cannot present affidavits in opposition to the motion for summary judgment." (Emphasis added.))

{¶ 19} In summary, we reject appellants' argument that the trial court abused its discretion in "fail[ing] to permit [appellants] to conduct discovery which would allow them

to form a defense." (Appellants' brief, at 7.) Rather, appellants failed to take measures available under the Civil Rules to litigate whether their discovery demands, served before the stay was imposed, were enforceable.

{¶ 20} Similarly, we find a lack of merit in appellants' argument that the trial court abused its discretion in deferring its ruling on the two motions until December 2, 2011, only three days before the scheduled trial date. Loc.R. 21.01 of the Franklin County Court of Common Pleas, applicable to motion practice, states in relevant part:

> On the 28th day after the motion is filed, the motion shall be deemed submitted to the Trial Judge. * * * Except as otherwise provided, this Rule shall apply to all motions.

{¶ 21} Appellants' motions were therefore deemed submitted to the trial court on October 17, 2011, the 28th day after they were filed. When no trial court rulings on the two motions were forthcoming after that date, and with a trial date approaching in December, appellants decided at their peril to simply wait for the court's rulings rather than taking action to pursue their discovery remedies.

{¶ 22} Accordingly, we hold that the trial court did not abuse its discretion in denying the two motions, and we overrule appellants' fourth and fifth assignments of error.

{¶ 23} Having found that the trial court did not err in denying appellants' September 19, 2011 procedural motions, we turn to their third assignment of error, which asserts that the trial court erred in granting summary judgment in favor of Home Savings and against Moro.

{¶ 24} Summary judgment is appropriate where "the moving party demonstrates that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) 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." *Capella III, L.L.C. v. Wilcox*, 190 Ohio App.3d 133, 2010-Ohio-4746, ¶ 16, citing *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶ 6. In *Heider v. Ohio Dept. of Transp.*, 10th Dist. No. 12AP-115, 2012-Ohio-3771, ¶ 8, this court stated:

> When determining what is a "genuine issue," the court decides if the evidence presents a sufficient disagreement between the parties' positions. [*Turner v. Turner*, 67 Ohio

> St.3d 337, 340 (1993).] "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record * * * which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). Once the moving party meets its initial burden, the non-moving party must then produce competent evidence showing that there is a genuine issue for trial. *Id.* Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358–59, 604 N.E.2d 138 (1992).

{¶ 25} Moreover, "appellate review of summary-judgment motions is de novo." *Id.*, citing *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548 (2001). "De novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision." *Holt v. State*, 10th Dist. No. 10AP-214, 2010-Ohio-6529, ¶ 9 (internal citations omitted). "We stand in the shoes of the trial court and conduct an independent review of the record applying the same summary judgment standard. As such, we must affirm the trial court's judgment if any of the grounds raised by the moving party are found to support it, even if the trial court failed to consider those grounds." *Heider* at ¶ 9.

{¶ 26} Appellants asserted in the trial court that the documents they had requested in their discovery requests of June 20, 2011, went "to the very nature of the foreclosure case: the legality and lawfulness of the transactions" between Home Savings and appellants. (Memorandum Contra, at 5.) It represented to the court that "[s]hould these requested documents confirm the illegal nature of [appellee's] actions towards [appellants], then [appellants] have a complete defense to the foreclosure action and will seek rescission of the loans." (Memorandum Contra, at 3-4.)

{¶ 27} We note that appellants were aware of the contents of the regulatory order to cease and desist, as evidenced by their having attached to their memorandum in opposition to partial summary judgment a copy of the order. Yet, despite this knowledge, appellants in the trial court failed to identify any relationship between the contents of that order and the loan transactions they had entered into with Home Savings.

{¶ 28} Home Savings, on the other hand, asserted that the cease-and-desist order addressed matters that did not relate in any way to issues concerning the legal enforceability of the loans Home State had made to Avery Place and Moro. It stated that the cease-and-desist order, to which Moro was not a party, concerned bank-management matters, such as loan-to-value rations, amortization requirements, and risk-management matters. It contended that Ohio law does not permit borrowers to void loan transactions based upon violations of banking statutes. Additionally, Home Savings observed that appellants had executed their loan agreements with Home Savings prior to issuance of the cease-and-desist order and suggested that the court in Delaware County had rejected a similar "illegality" argument.

{¶ 29} Appellants did not file a reply memorandum to rebut these arguments in the trial court. Nor have appellants responded to the same arguments which Home State has reiterated in this court.

{¶ 30} Home Savings' partial summary judgment motion thus included evidence supporting both the existence of the loans and mortgages, as well as appellants' default, and contended that there was, therefore, no genuine issue for trial. In response, appellants provided no affidavits nor any other evidence rebutting the evidence Home Savings had provided. Instead, they asserted that Home Savings' motion contained allegations to which they could not respond in the absence of further discovery disclosures and asked for "additional time within which to obtain such information necessary to respond to the motion for summary judgment." (Memorandum Contra, at 5.)

{¶ 31} We have previously concluded that the trial court did not abuse its discretion in refusing to grant leave of that nature. Appellants simply did not avail themselves of the discovery enforcement mechanisms available to them under the Civil Rules. Nor did they produce competent evidence showing that there was a genuine issue for trial after Home Savings met its initial burden of establishing that it was entitled to damages and foreclosure of the mortgage. Accordingly, the trial court did not err in granting summary judgment to Home Savings. Appellants' third assignment of error is therefore overruled.

{¶ 32} Appellants' first, second, sixth, and seventh assignments of error are overruled due to appellants' failure to argue them in any manner in their appellate briefs,

and their third, fourth, and fifth assignments of error are also overruled for the reasons stated in this decision. Accordingly, we affirm the judgments of the Franklin County Court of Common Pleas.

Judgments affirmed.

KLATT and CONNOR, JJ., concur.