[Cite as *CitiMortgage, Inc. v. Booth*, 2012-Ohio-1419.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

CitiMortgage, Inc.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-584 (C.P.C. No. 09CVE-12-17978)
Troy Booth et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	
Citimortgage, Inc., successor by reason of merger with/into CitiFinancial Mortgage Company,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-910 (C.P.C. No. 09CVE-12-17978)
Troy Booth et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
(Brian K. Urbanski, as Trustee of the 7494 Williamson Lane Trust,	:	
Appellant).	:	

D E C I S I O N

Rendered on March 30, 2012

Law Office of Patrick D. Hendershott, LLC, Patrick D. Hendershott, Ernest D. Ducey and *Stanley Green,* for CitiMortgage, Inc.

Jump Legal Group, LLC, John Sherrod and *Sarah Williams,* for Troy and Denise Booth.

Law Offices of Eric J. Wittenberg Co., Eric J. Wittenberg and *Jennifer L. Routte,* for Brian K. Urbanski.

APPEALS from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} This is the combination of two cases resulting from the same foreclosure action filed by plaintiff-appellee, CitiMortgage, Inc. Defendants-appellants, Troy and Denise L. Booth ("Booths"), appeal the decisions of the Franklin County Court of Common Pleas. Brian K. Urbanski ("Urbanski") filed a motion to intervene which was effectively denied by the trial court. He is appealing this decision. For the following reasons, we affirm the decisions of the trial court.

{¶2} The Booths assert the following assignment of error:

> The trial court erred in failing to hold an evidentiary hearing on damages.

{¶3} Urbanski asserts the following assignments of error:

> [I.] The trial court erred when it refused to grant [Urbanski's] motion to intervene as a right filed on September 13, 2011 and subsequently confirmed the sheriff's sale.
>
> [II.] The trial court erred in its order that confirmed the sale when it found that CitiMortgage held a valid and enforceable first mortgage on the property.

{¶4} On October 25, 2005, the Booths borrowed money from CIT Group/Consumer Finance Inc. to purchase the property located at 7494 Williamstown Lane, Canal Winchester, Ohio. The note and the mortgage were assigned by CIT Group/Consumer Finance Inc. to CitiMortgage, Inc. ("CitiMortgage"), on July 21, 2009. CitiMortgage filed a complaint of foreclosure in rem on December 3, 2009. Service was perfected but the Booths did not timely respond with an answer.

{¶5} On March 16, 2010, a scrivener's error led to the recording of a document that purported to assign the mortgage from CIT Group/Consumer Finance Inc. to PennyMac Corp. CIT Group/Consumer Finance Inc. did not have an interest in the mortgage to transfer at that date as their interest was already transferred to CitiMortgage.

{¶6} On May 3, 2010, Urbanski filed a pro se motion to intervene as trustee. Urbanski presented a deed which purported to transfer the property to a trust on April 28, 2010. The trial court denied Urbanski's motion on June 3, 2010, based upon the doctrine of lis pendens that attached on the day the complaint was filed. Urbanski did not appeal this decision.

{¶7} On January 25, 2011, CitiMortgage assigned the mortgage to PennyMac Corp. This document was used to correct the scrivener's error of March 16, 2010. CitiMortgage then proceeded to file a motion for default judgment on January 31, 2011. However, there was never a motion filed substituting PennyMac Corp. for CitiMortgage as a party to this case. The trial court entered a default judgment on March 24, 2011 with CitiMortgage as a party to the case.

{¶8} The Booths filed a motion for relief from judgment on June 10, 2011, which the trial court denied on June 22, 2011. The Booths filed a notice of appeal on July 5, 2011.

{¶9} The property was sold at a sheriff's sale on June 24, 2011. On August 18, 2011, Urbanski, through an attorney, filed a quiet title action. Urbanski then filed a second motion to intervene on September 13, 2011. The trial court, on September 23, 2011, entered an order confirming the sheriff's sale and did not address Urbanski's second motion to intervene. The September 23, 2011 order continued to have CitiMortgage as the plaintiff rather then PennyMac. Urbanski filed a timely motion to appeal the trial court's September 23, 2011 order on October 24, 2011.

{¶10} The Booths' assignment of error alleges that the trial court erred in not holding an evidentiary hearing on damages before issuing a default judgment. The Booths' position is not well-taken.

{¶11} Civ.R 8(D) provides:

> Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

{¶12} The Booths were in default of an answer to CitiMortgage's initial complaint and, therefore, the averments contained within are admitted save the amount of damages.

{¶13} The amount of $271,815.44 claimed by CitiMortgage was properly awarded. An amount alleged in a complaint to be due and unpaid on a promissory note is not damages as the term is used in Civ.R. 8(D*). Farmers & Merchants State & Sav. Bank v. Raymond G. Barr Ent.*, 6 Ohio App.3d 43 (4th Dist.1982). "Where a promissory note is the claimed basis for the action on an account, and the note is attached to the complaint, the underlying contract has also been proved and submitted pursuant to Civ.R. 10(D). A promissory note is 'an instrument that evidences a promise to pay a monetary obligation'." (Citation omitted.) *Capital One Bank (USA), N.A. v. Heidebrink*, 6th Dist. No. OT-08-049, 2009-Ohio-2931 ¶ 44.

{¶14} The amount due on the note was properly determined by the trial court in its final judgment. The trial court could have conducted an evidentiary hearing, pursuant to Civ.R. 55(A), but it was not required to do so. Civ.R. 55(A) states that "[i]f, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper." The amount of $271,815.44 was deemed admitted when the Booths failed to answer the complaint. The trial court did not abuse its discretion in not conducting an evidentiary hearing.

{¶15} The Booths' assignment of error is overruled.

{¶16} Urbanski's first assignment of error asserts that the trial court erred in refusing to grant Urbanski's motion to intervene as of right filed on September 13, 2011, and in confirming the sheriff's sale on September 23, 2011. Urbanski claims that, as trustee, he has an interest in the property and has a right of intervention.

{¶17} Urbanski's September 13, 2011 motion was his second motion to intervene. His first was filed on May 3, 2010. This first motion was denied by the trial court on June 3, 2010. Urbanski's May 3, 2010 motion was made pursuant to Civ.R. 24(A)(2), "Intervention of right," quoting the language of Civ.R. 24(A)(2). Notwithstanding the motion mislabeling the quoted language as Civ.R. 25(A).

{¶18} The denial of a motion to intervene as of right, pursuant to Civ.R. 24(A), is a final appealable order. *Blackburn v. Hamoudi*, 29 Ohio App.3d 350 (10th Dist.1986), paragraph one of the syllabus. A trial court's determination of whether to allow intervention pursuant to Civ.R. 24(A)(2) is reviewed for abuse of discretion. *State ex rel. First New Shiloh Baptist Church v. Meagher*, 82 Ohio St.3d 501, 503 (1998), fn. 1.

{¶19} Urbanski failed to file a notice of appeal to the trial court's June 3, 2010 decision. Urbanski is therefore collaterally estopped from prevailing on the same motion on September 13, 2011 quoting the same language from Civ.R. 24(A)(2). The trial court therefore did not abuse its discretion when it did not address Urbanski's September 13, 2011 motion to intervene.

{¶20} Urbanski's first assignment of error is overruled.

{¶21} Having affirmed the trial court's decision that Urbanski does not have a right to intervene in the this case, and therefore is not a party, his remaining assignment of error is rendered moot.

{¶22} Having overruled the Booths' assignment of error and Urbanski's first assignment of error, and having found Urbanski's second assignment of error moot, we affirm the judgment of foreclosure.

Judgment affirmed.

SADLER, J., concurs.
DORRIAN, J., concurs in part and dissents in part.

DORRIAN, J., concurring in part and dissenting in part.

{¶23} I concur with the majority regarding Urbanski's assignments of error, but I respectfully dissent regarding the Booths' single assignment of error.

{¶24} As noted by the majority, Civ.R. 8(D) provides: "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

{¶25} The majority holds at ¶13 that "[a]n amount alleged in a complaint to be due and unpaid on a promissory note is not damages as the term is used in Civ.R. 8(D)."

The majority cites to *Farmers & Merchants State & Sav. Bank v. Raymond G. Barr Ent.*, 6 Ohio App.3d 43 (4th Dist.1982), in support of this holding.

{¶26} In support of its holding, the court in *Farmers & Merchants* cited to *Dallas v. Ferneau*, 25 Ohio St. 635 (1874), wherein the Supreme Court of Ohio commented on the predecessor statute and rules to Civ.R. 8(D). In *Dallas*, the complaint was founded on an account for work and labor performed and for goods sold and delivered. A copy of the account "with the credits thereon" was included in the complaint. The court held that "[t]he allegation, in the [complaint], of the amount due on the account, after deducting all credits thereon, is a material allegation, and is not, in the sense in which those words are used in section 127 of the code, an allegation of value or damage, but is a specific allegation of the amount due on the account * * * [which] must be controverted by the answer." *Id.* at 638. Subsequent Supreme Court cases applying or acknowledging *Dallas* involved complaints for an action on an account which contained a copy of the account attached thereto. *See Van Ingen v. Berger*, 82 Ohio St. 255 (1910); *Baltimore & O.R. Co. v. Walker*, 45 Ohio St. 577 (1888).

{¶27} The present case can be distinguished from *Dallas* as the complaint did not contain a copy of an account detailing credits to the principal amount and/or interest and, therefore, it was not possible to "deduct all credits thereon" from the amount due on the account. Furthermore, even though it does not appear that an account was attached to the complaint in *Farmers & Merchants*, the present case can be distinguished from that case as well because no affidavit as to damages was provided with the complaint or motion for default judgment.

{¶28} In *Stickney v. Ervin*, 10th Dist. No. 89AP-616, 1989 WL 146505 (Dec. 5, 1989), this court indicated that the holding in *Farmers & Merchants* does not apply where no account is attached to the complaint:

> Where an action on an account is properly filed, it has been held that no evidentiary hearing is required upon the theory that the amount due on the account does not constitute damages. See *Farmers & Merchants State & Savings Bank v. Raymond G. Barr Ent., Inc.* (1982), 6 Ohio App.3d 43. We need not determine that issue herein inasmuch as the complaint does not constitute a proper action on an account, *there being no copy of an account but merely a bill or*

> *statement attached to the complaint*. See *Brown v. Columbus Stamping & Mfg. Co.* (1967), 9 Ohio App.2d 123. Under such circumstances, a damage hearing is required, although the trial court has discretion as to the nature of the hearing. See *Maintenance Unlimited, Inc., v. Salemi* (1984), 18 Ohio App.3d 29.

(Emphasis added.) *Id.* at *2.[1]

{¶29} Civ.R. 10(D)(1) requires that a copy of an account be attached to a pleading when any claim is founded on an account. In defining what constitutes an account, this court has held that:

> An account must show the name of the party charged. It begins with a balance preferably at zero, or with a sum recited that can qualify as an account stated, but at least the balance should be a provable sum. Following the balance, the item or items, dated and identifiable by number or otherwise, representing charges, or debits, and credits, should appear. Summarization is necessary showing a running or developing balance or an arrangement which permits the calculation of the balance claimed to be due.

Brown v. Columbus Stamping & Mfg. Co., 9 Ohio App.2d 123 (10th Dist.1967). Since *Brown*, we have further acknowledged that compliance with Civ.R. 10(D)(1) can be achieved by attaching documents which do not strictly constitute a statement of account. *Hudson & Keyse, LLC, v. Carson*, 10th Dist. No. 07AP-936, 2008-Ohio-2570; *Equable Ascent Fin., L.L.C. v. Christian*, 10th Dist. No. 10AP-1120, 2011-Oho-3791. However, in the instant case, no documents were provided reflecting credits or debits; but, rather, the complaint merely stated the end amount owed and the applicable interest rate. As was the case in *Equable*, here, the complaint "does little more than allege defendant[s] owe it

[1] Five years prior to *Stickney*, in *Buckeye Federal Sav. and Loan Assn. v. Terrell*, 10th Dist. No. 85AP-447, 1985 WL 10505, at *3, this court cited to *Dallas* and *Farmers & Merchants* and commented that "[a]lthough Civ. R.55(A) does require a hearing with respect to damages and Civ.R. 8(D) provides that a failure to answer admits the averments in the complaint, 'other than those as to the amount of damage,' an allegation of the amount due on a promissory note is not an allegation of damages within the contemplation of Civ.R. 8(D) but instead is a specific allegation which is admitted by the failure to file an answer." This court noted however, that evidence was submitted and considered by the trial court before granting default judgment. Here, no evidence was submitted to the trial court in the form of an account attached to the complaint or an affidavit attached to the motion for default judgment. Therefore, I do not believe that the decision in *Buckeye Federal* would control the outcome of the present appeal.

an unexplained sum of money, an allegation that fails to comply with Civ.R. 10(D)." *Id.* at ¶ 17.

{¶30} As Supreme Court precedent has only held that no evidentiary hearing is necessary as to damages in an action upon an account in instances where an account was attached to the complaint, I would not extend the holding in *Dallas* to cases such as the one before us where an account was not attached to the complaint. I would sustain the Booths' assignment of error and reverse and remand to the trial court for an evidentiary hearing as to damages.
