

[Cite as *Bank of New York Mellon v. Askin*, 2012-Ohio-5859.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The Bank of New York Mellon, as Successor :  
Indenture Trustee under NovaStar  
Mortgage Funding Trust, Series 2006-1, :

Plaintiff-Appellee, :

v. :

No. 12AP-393

(C.P.C. No. 11CVE-03-4040)

Ray W. Askin et al., :

(REGULAR CALENDAR)

Defendants-Appellees, :

Linda Askin, :

Defendant-Appellant. :

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D E C I S I O N

Rendered on December 11, 2012

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*Manley Deas Kochalski LLC, and Kyle E. Timken, for  
plaintiff-appellee.*

*Linda Askin, pro se.*

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APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Defendant-appellant, Linda Askin ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which denied her motion for reconsideration of that court's grant of summary judgment in foreclosure in favor of plaintiff-appellee, The Bank of New York Mellon, as Successor Indenture Trustee under NovaStar Mortgage Funding Trust, Series 2006-1 ("the bank"). As we describe below,

however, appellant's interest in the property has been extinguished. Therefore, we dismiss her appeal.

## **I. BACKGROUND**

{¶ 2} This matter arises from the bank's complaint for foreclosure against appellant's former husband, Ray W. Askin. Appellant signed the mortgage at issue. Below her signature, however, is the following statement: "SIGNING SOLELY TO RELEASE HER DOWER INTEREST." On the same page is the following statement: "LINDA ASKIN, WIFE OF RAY W. ASKIN, IS SIGNING SOLELY TO RELEASE HER DOWER INTEREST." Although the complaint named appellant as a defendant, the complaint asked for judgment only against Mr. Askin for the amount due on the mortgage; the complaint sought no judgment against appellant.

{¶ 3} Appellant filed a motion to dismiss the complaint. In it, she contended that she and Mr. Askin were engaged in divorce proceedings that would result in the division of the parties' property, including her "dower rights, interests, and equity of redemption in the parties' marital residence, which is the subject of" the bank's foreclosure action. Thereafter, appellant filed an answer, as well as numerous other motions and requests. As to her interest, in essence, appellant contended that she had released her dower interest in the residence under duress, and that her dower interest was superior to any interest the bank or other lienholders might have.

{¶ 4} Important for our purposes here, on March 15, 2012, the trial court issued a judgment entry and decree in foreclosure. In it, the court granted the bank's motion for summary judgment and motion for default judgment against Mr. Askin, who had not filed an answer to the complaint.

{¶ 5} On March 26, 2012, Mr. Askin moved for leave to file an answer, *instanter*. On March 29, 2012, appellant moved for reconsideration of its grant of summary judgment in favor of the bank. On April 16, 2012, the trial court issued a decision and entry that denied Mr. Askin's motion for leave to file an answer and denied appellant's motion for reconsideration. As to the latter, the trial court concluded that appellant's motion was a nullity because the civil rules do not provide for the filing of a motion for reconsideration after the issuance of final judgment. The court also stated that, even if it

were to consider the motion, appellant's arguments in support would have no bearing on the outcome of the case. She was not liable on the promissory note, and her express release of her dower interest extinguished any right she might otherwise have.

{¶ 6} On May 2, 2012, appellant filed a notice of appeal. In her notice, she stated that she was appealing (1) the March 15, 2012 judgment entry and decree in foreclosure and (2) the April 16, 2012 denial of her request for reconsideration.

## **II. ASSIGNMENTS OF ERROR**

{¶ 7} Before this court, appellant assigns the following errors:

I. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONDUCT A PRELIMINARY INQUIRY TO DETERMINE [THE BANK'S] LEGAL STANDING TO SUE, AND WHETHER [THE BANK] IS THE REAL-PARTY-IN-INTEREST.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY: A) FAILING TO COMPLY WITH CIVIL RULES AND PROCEDURES; B) FAILURE TO ENFORCE COMPLIANCE WITH AND ADHER[E]NCE TO THE CASE SCHEDULE; C) DENYING ADVERSE PARTIES PROPER NOTICE; OPPORTUNITY TO BE HEARD; OR OPPOSE [THE BANK'S] MOTIONS FOR SUMMARY AND DEFAULT JUDGMENTS; AND D) TERMINATING THE CASE IMPROPERLY AND PREMATURELY.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER [APPELLANT'S] ANSWER AND AFFIRMATIVE DEFENSES; AND BY FAILING TO CONDUCT A FACTUAL INQUIRY TO DETERMINE, AS A MATTER OF LAW, WHETHER APPELLANT'S AFFIRMATIVE DEFENSES ARE, IN FACT, "RECOUPMENT" "UNCONSCIONABILITY DEFENSES," AND PURSUANT TO R.C. 1303.35(A)(2).

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING [APPELLANT'S] TWO (2) MOTIONS TO COMPEL PRODUCTION; AND THEREBY OBSTRUCTED APPELLANT'S ANSWER AND AFFIRMATIVE DEFENSES; AND DENIED [APPELLANT'S] SUBSTANTIAL RIGHTS TO A FAIR AND JUST TRIAL, DUE PROCESS, AND EQUAL PROTECTION OF THE LAW AND PREJUDICED [APPELLANT'S] CASE.

V. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO MAKE A RULING ON [APPELLANT'S] MOTION FOR A STATUS CONFERENCE, FILED DECEMBER 2, 2011; AND THEREBY OBSTRUCTED [APPELLANT'S] ABILITY TO SUPPORT OR DEFEND [APPELLANT'S] ANSWER AND AFFIRMATIVE DEFENSES; AND THEREBY DENIED [APPELLANT'S] SUBSTANTIAL RIGHTS TO A FAIR AND JUST TRIAL, DUE PROCESS, AND EQUAL PROTECTION OF THE LAW.

VI. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER APPELLANT'S ANSWER AND AFFIRMATIVE DEFENSES; AND BY FAILING TO CONDUCT A FACTUAL INQUIRY TO DETERMINE, AS A MATTER OF LAW, IF THE "LOAN DOCUMENTS," UPON WHICH [THE BANK'S] COMPLAINT RELIES; ARE IN FACT, THE WRONG "LOAN DOCUMENTS" IN DETERMINING APPELLANT'S DOWER INTEREST IN THE FORECLOSURE ACTION.

### **III. THE BANK'S MOTION TO SUPPLEMENT THE RECORD AND MOTION TO DISMISS THE APPEAL**

{¶ 8} The bank moved this court to supplement the record with the certified final divorce decree entered in the divorce proceedings between appellant and Mr. Askin. *See Askin v. Askin*, Franklin County Court of Common Pleas, Division of Domestic Relations case No. 09DR-4411. According to the bank, we should dismiss this appeal because that decree extinguished appellant's dower interest and rendered her only possible claim in this matter moot. We agree.

{¶ 9} We take judicial notice of the August 7, 2012 Judgment Entry-Decree of Divorce issued by the Franklin County Court of Common Pleas, Division of Domestic Relations. That entry expressly orders that Mr. Askin "shall retain" the marital residence—the same residence subject to the note and mortgage at issue in this appeal—"as his own, free and clear of any claim" by appellant. Appellant does not dispute the existence of the decree or its award of the residence to Mr. Askin. At oral argument, appellant stated that she intended to appeal the decree. The domestic court's docket, however, indicates that neither appellant nor Mr. Askin appealed the divorce decree, and there is no stay of that decree in effect.

{¶ 10} Because appellant's only possible interest in the property at issue in this appeal has been extinguished in a court order that is final and that has not been appealed or stayed, we grant the bank's motion to dismiss this appeal. Because we have taken judicial notice of the final divorce decree and the related docket, supplementation of the record is unnecessary.

**IV. CONCLUSION**

{¶ 11} For the foregoing reasons, we grant the bank's motion to dismiss this appeal. The bank's motion to supplement the record is moot.

*Cause dismissed.*

TYACK and SADLER, JJ., concur.

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