

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TREASURER OF STARK COUNTY

Plaintiff-Appellee

-VS-

ALBERT MARTIN

Defendant-Appellant

: JUDGES:

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Hon. Patricia A. Delaney, P.J.

Hon. John W. Wise, J.

Hon. Craig R. Baldwin, J.

Case No. 2017CA00100

O P I N I O N

CHARACTER OF PROCEEDING:

Appeals from the Stark County Court of
Common Pleas, Case No.
2017CV00156

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

November 6, 2017

APPEARANCES:

For Plaintiff-Appellee:

JOHN D. FERRERO
STARK COUNTY PROSECUTOR

JOHN F. ANTHONY
110 Central Plaza South, Suite 510
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For Defendant-Appellant:

ALBERT MARTIN, PRO SE
INMATE # 232-535
CHILLICOTHE CORRECTIONAL INST.
P.O. Box 5500
CHILLICOTHE, OH 45601

Delaney, P.J.

{¶1} Defendant-Appellant Albert Martin appeals the May 8, 2017 judgment entry of the Stark County Court of Common Pleas in Case No. 2017CA00085 and the June 6, 2017 judgment entry of the Stark County Court of Common Pleas in Case No. 2017CA00100. On June 28, 2017, this Court consolidated the appeals for purposes of review.

FACTS AND PROCEDURAL HISTORY

{¶2} On January 23, 2017, Plaintiff-Appellee Stark County Treasurer filed a complaint in foreclosure naming as defendants Progressive Green Meadows LLC, Francine Cherry, Unknown Spouse of Francine Cherry, Albert Martin, Unknown Spouse of Albert Martin, and Unknown Tenant. The complaint alleged defendant owners failed to pay real estate taxes due and owing on Parcel No. 37-01711 (“parcel”). The failure to pay caused taxes to be delinquent and the Treasurer certified the delinquency to the tax duplicate on August 10, 2010. The amount of delinquent taxes due and payable at the time of filing the complaint was \$10,096.99 plus interest, late charges, and costs.

{¶3} Defendant-Appellant Albert Martin filed an answer to the complaint and motion for stay of proceedings on February 21, 2017. In his answer, Martin stated the parcel was subject to litigation in Case No. 2016CV02672 before the Stark County Court of Common Pleas. He alleged the decision in that case could satisfy and settle the outstanding taxes assessed by the Stark County Treasurer, therefore making the complaint in foreclosure moot.

{¶4} The trial court did not rule on Martin’s motion to stay the proceedings.

{¶5} Defendant Progressive Green Meadows LLC filed an answer to the complaint on February 23, 2017.

{¶6} The Stark County Treasurer completed service on the remaining defendants, but they did not file answers or otherwise appear in the action. On May 3, 2017, the Stark County Treasurer filed a motion for default judgment against Francine Cherry, Unknown Spouse of Francine Cherry, Unknown Spouse of Albert Martin, and Unknown Tenant. The trial court granted the motion for default judgment on May 8, 2017. The judgment entry did not contain Civ.R. 54(B) language.

{¶7} On May 25, 2017, Martin filed a notice of appeal of the May 8, 2017 judgment entry with this Court in Case No. 2017CA00085. Martin also filed a motion to stay of proceedings with the trial court.

{¶8} The trial court did not rule on the motion to stay proceedings.

{¶9} On June 2, 2017, the Stark County Treasurer filed a motion for summary judgment on all claims set forth in the complaint in foreclosure. The Stark County Treasurer argued there was no genuine issue of material fact that Francine Cherry and Martin were the owners of the parcel. As of June 2016, real estate taxes, assessments, penalties, and interests in the amount of \$11,646.29 were due and had not been paid. In support of its motion, the Stark County Treasurer attached an affidavit and a true record of the tax duplicate for the parcel.

{¶10} The trial court granted the motion for summary judgment on June 6, 2017.

{¶11} Martin filed a response to the motion for summary judgment on June 15, 2017. In his response, Martin stated:

1. The Defendant would suffer irreversible damage and significant loss;

2. There is pending litigation involving this parcel of real estate, Case No. 2016CV02672 which can render the above case moot. The latest filing was a Motion for Summary Judgment to order the sale of the property.

3. The Defendant has complied with all orders given to him in Case No. 2016CV02672 up to and including the entry date March 3, 2017.

4. A pending Motion to Stay Proceedings is imperative to satisfying ALL liens and claims (Treasurer, Progressive Green Meadows LLC and myself) to the real estate not just the Stark County Treasurer.

(Defendant's Opposition to Plaintiff's Motion for Summary Judgment, June 15, 2017).

{¶12} Martin filed a notice of appeal of the June 6, 2017 judgment entry with this Court in Case No. 2017CA00100.

ASSIGNMENTS OF ERROR

{¶13} Martin raises two Assignments of Error:

{¶14} "I. THE TRIAL COURT ERRED IN GRANTING A DEFAULT JUDGMENT WERE [SIC] THE APPELLANT, ALBERT MARTIN, WAS A MOVING PARTY.

{¶15} "II. THE TRIAL COURT ERRED IN GRANTING A SUMMARY JUDGMENT AND A DECREE OF FORECLOSURE IN CASE NO. 2017CV00156 WERE [SIC] CASE NO. 2016CV02672 IS PRIORITY AND HAS PENDING LITIGATION."

ANALYSIS

I. Default Judgment

{¶16} Martin contends in his first Assignment of Error that the trial court erred in granting default judgment on May 8, 2017.

{¶17} Case No. 2017CA00085 is Martin's appeal of the trial court's judgment entry granting the motion for default judgment. We first find as a jurisdictional issue that when Martin filed his appeal of the May 8, 2017 judgment entry, that judgment was not a final appealable order.

{¶18} The May 8, 2017 judgment entry did not dispose of all claims against all parties. The Stark County Treasurer moved for default judgment against the parties who were served but failed to plead or otherwise defend the action. Martin and Progressive Green Meadows LLC remained as defendants in the action. The May 8, 2017 judgment entry did not contain Civ.R. 54(B) language certifying it as a final appealable order. A trial court's entry of default judgment which does not dispose of all claims against defendants and does not include Civ.R. 54(B) certification is not a final appealable order.

{¶19} We may consider the trial court's May 8, 2017 judgment entry, however, upon Martin's appeal of the June 6, 2017 judgment entry granting summary judgment in favor of the Stark County Treasurer. Martin appealed the June 6, 2017 judgment entry in Case No. 2017CA00100. The June 6, 2017 judgment entry disposed of all claims against all defendants.

{¶20} Martin argues that because he filed an answer to the complaint in foreclosure, the Stark County Treasurer was not entitled to default judgment. Civ.R. 55 governs default judgments and provides as follows:

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefor; * * * If the party against whom judgment by default is sought has

appeared in the action, he (or if appearing by representative, his representative) shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application. * * *.

{¶21} The Stark County Treasurer moved for default judgment pursuant to Civ.R. 55 against defendants Francine Cherry, Unknown Spouse of Francine Cherry, Unknown Spouse of Albert Martin, and Unknown Tenant. These defendants were served with the complaint but failed to plead or otherwise defend. Martin's appearance in the foreclosure action did not prohibit the Stark County Treasurer from moving for default judgment against the defendants who were served with the complaint and failed to plead. Martin's appearance in the action only prevented the Stark County Treasurer from moving for default judgment against Martin.

{¶22} An appellate court will not disturb a trial court's decision regarding a motion for default judgment unless the trial court abused its discretion. *Dye v. Smith*, 189 Ohio App.3d 116, 2010–Ohio–3539, 937 N.E.2d 628, ¶ 7 (4th Dist.). A reviewing court will thus uphold a trial court's decision regarding a motion for default judgment so long as the court did not act in an unreasonable, unconscionable, or arbitrary manner. *E.g., State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). Furthermore, when a reviewing court applies the abuse of discretion standard, it may not simply substitute its judgment for that of the trial court. *E.g., In re Jane Doe 1*, 57 Ohio St.3d 135, 138, 566 N.E.2d 1181 (1991).

{¶23} We find the trial court did not abuse its discretion in granting the Stark County Treasurer's motion for default judgment against Francine Cherry, Unknown Spouse of Francine Cherry, Unknown Spouse of Albert Martin, and Unknown Tenant.

{¶24} Martin's first Assignment of Error is overruled.

II. Summary Judgment

{¶25} Martin contends in his second Assignment of Error that the trial court erred when it granted summary judgment in favor of the Stark County Treasurer.

{¶26} We refer to Civ.R. 56(C) in reviewing a motion for summary judgment which provides, in pertinent part:

Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.* *

* A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only from the evidence or stipulation, that 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, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶27} The moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court, which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). The nonmoving party then has a reciprocal burden of specificity and cannot rest on the allegations or denials in the pleadings, but must set forth "specific facts" by the

means listed in Civ.R. 56(C) showing that a “triable issue of fact” exists. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798, 801 (1988).

{¶28} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997), citing *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

{¶29} The Stark County Treasurer alleged in its complaint that the taxes and assessments, penalties and interest on the parcel were delinquent. Francine Cherry and Martin were alleged to be the owners of the parcel. On June 2, 2017, the Stark County Treasurer filed a motion for summary judgment on all claims set forth in the complaint in foreclosure. The Stark County Treasurer argued there was no genuine issue of material fact that Francine Cherry and Martin were the owners of the parcel. As of June 2016, real estate taxes, assessments, penalties, and interests in the amount of \$11,646.29 were due and had not been paid. In support of its motion, the Stark County Treasurer attached an affidavit and a true record of the tax duplicate for the parcel. The Stark County Treasurer, as moving party, identified portions of the record in its motion for summary judgment that demonstrated there were no genuine issues of material fact.

{¶30} While the trial court granted the motion for summary judgment before Martin filed his response to the motion, pursuant to our de novo review, we consider Martin’s opposition to the motion for summary judgment filed on June 15, 2017. Martin, as the nonmoving party, was required to set forth “specific facts” by the means listed in Civ.R. 56(C) showing that a “triable issue of fact” exists. He had the reciprocal burden of specificity and could not rest on the allegations or denials in the pleadings.

{¶31} In his opposition, Martin stated:

1. The Defendant would suffer irreversible damage and significant loss;
2. There is pending litigation involving this parcel of real estate, Case No. 2016CV02672 which can render the above case moot. The latest filing was a Motion for Summary Judgment to order the sale of the property.
3. The Defendant has complied with all orders given to him in Case No. 2016CV02672 up to and including the entry date March 3, 2017.
4. A pending Motion to Stay Proceedings is imperative to satisfying ALL liens and claims (Treasurer, Progressive Green Meadows LLC and myself) to the real estate not just the Stark County Treasurer.

(Defendant's Opposition to Plaintiff's Motion for Summary Judgment, June 15, 2017).

{¶32} The Stark County Treasurer explains in its appellate brief that Case No. 2016CV02672 is a partition action regarding the parcel. The Stark County Treasurer states Martin did not name it as a defendant in the partition action. In its appellate brief, the Stark County Treasurer raises the doctrine of *lis pendens* and argues it is not applicable to the present case. The doctrine of *lis pendens* provides that if a third party acquires an interest in a property which is at that time subject to litigation, that third party takes the property subject to the final outcome of the litigation. *Bank One, Columbus, N.A. v. Young*, 10th Dist. Franklin No. 98AP-1113, 1999 WL 688181, *5 (Sept. 7, 1999) citing *Cook v. Mozer* (1923), 108 Ohio St. 30, 36, 140 N.E. 590. The Stark County Treasurer argues on appeal that in *Security Trust Co. v. Root*, 72 Ohio St. 535, 74 N.E. 1077 (1905), the Ohio Supreme Court held that the doctrine of *lis pendens* did not apply to the sale of land for taxes.

{¶33} In his opposition to the motion for summary judgment, Martin did not provide any Civ.R. 56(C) evidence to support his allegation that the 2016CV02672 partition action would render the foreclosure action moot. Martin also did not raise the argument of *lis pendens* in his opposition to the motion for summary judgment, other than his allegation that the 2016CV02672 case would render the foreclosure action moot.

{¶34} The material facts in the foreclosure action are whether (1) Francine Cherry and Martin are the owners of the parcel, (2) there are due and owing as of June 2016 delinquent real estate taxes, assessments, penalties, and interests on the parcel in the amount of \$11,646.29, and (3) the unpaid real estate taxes, assessments, penalties, and interests constitute a good and valid lien upon the parcel and the Stark County Treasurer is therefore entitled to foreclose on the real estate and judicial sale. Although the court is obligated to view the facts in a light most favorable to the nonmoving party, when a properly supported motion for summary judgment is made, the nonmoving party is not permitted to rest upon the mere allegations or denials contained in his or her pleading but must come forth with specific facts showing the existence of a genuine issue for trial. Civ.R. 56(E). A review of Martin's opposition to summary judgment shows he failed to come forth with specific facts to demonstrate a genuine issue of material fact existed for trial as to whether the real estate taxes on the parcel were delinquent. Martin did not dispute the real estate taxes were due and owing. He argued the trial court should deny the motion for summary judgment to allow the partition action to proceed, which would satisfy the outstanding real estate taxes. Martin failed, however, to present any Civ.R. 56(C) evidence as to how the 2016CV02672 case would render the render the foreclosure action moot.

{¶1} Upon our de novo review, we find the trial court did not err in granting summary judgment in favor of the Stark County Treasurer. Martin's second Assignment of Error is overruled.

CONCLUSION

{¶2} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Wise, John, J. and

Baldwin, J., concur.