

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-396 (C.P.C. No. 09CVE07-10099)
The Unknown Heirs, Devisees, Legatees, Executors, Administrators, Spouses and Assigns and the Unknown Guardians of Minor and/or Incompetent Heirs of Ralph E. Mowery aka Ralph E. Mowery et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
(Mowery Properties, Ltd., Defendant-Appellant).	:	

D E C I S I O N

Rendered on March 31, 2011

Lerner, Sampson & Rothfuss, and *Patricia K. Block*, for appellee BAC Home Loan Servicing, LP fka Countrywide Home Loans Servicing LP.

Allen Kuehnle Stovall & Neuman LLP, *Richard K. Stovall*, *Rick L. Ashton*, and *Nicholas R. Barnes*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Mowery Properties, Ltd. ("appellant"), from an entry of the Franklin County Court of Common Pleas granting

summary judgment, and a decree of foreclosure, in favor of plaintiff-appellee, BAC Home Loans Servicing, LP ("BAC").

{¶2} On November 29, 2005, Ralph E. Mowery ("Mowery"), as borrower, executed a note and mortgage agreement in the amount of \$92,000 in favor of America's Wholesale Lender ("AWL"), as lender. AWL recorded the mortgage on December 15, 2005. On May 15, 2007, Mowery transferred the property to appellant by general warranty deed, which was recorded on August 27, 2009. Mowery passed away on October 29, 2007. On July 28, 2008, an estate was opened for Mowery for tax purposes. On June 29, 2009, BAC recited its interest in the mortgage through an assignment.

{¶3} On July 8, 2009, BAC filed a complaint in foreclosure naming various defendants, including the "Unknown Heirs, Devisees, Legatees, Executors, Administrators, Spouses and Assigns * * * of Ralph E. Mowery." The complaint alleged that BAC was the holder of a note secured by a mortgage, and that the note was in default in the amount of \$88,484.05. On October 1, 2009, BAC filed a motion for default judgment, asserting that all defendants had been served a copy of the complaint. On October 20, 2009, appellant filed a combined motion to intervene and a motion for leave to answer or otherwise plead. By entry filed on November 2, 2009, the trial court granted appellant's motion to intervene, and appellant filed an answer on November 3, 2009.

{¶4} BAC and appellant both subsequently filed motions for summary judgment. In its motion for summary judgment, appellant argued that a lender such as BAC was required to assert its claims within six months after the death of the obligor or be forever barred by the statutory limitations imposed for presentation of claims against an estate pursuant to R.C. 2117.06. By entry filed on March 26, 2010, the trial court denied

appellant's motion for summary judgment, finding in part that BAC's claim was not subject to the provisions of R.C. 2117.06. By entry filed on March 31, 2010, the trial court granted summary judgment and a decree in foreclosure in favor of BAC, and ordered a sale of the subject property.

{¶5} On appeal, appellant sets forth the following assignment of error for this court's review:

The trial court erred in granting BAC's Motion for Summary Judgment and, in turn, failing to grant Mowery Properties' Motion for Summary Judgment.

{¶6} Under its single assignment of error, appellant challenges both the trial court's denial of its motion for summary judgment and the summary judgment granted in favor of BAC. Appellant asserts that the promissory note at issue executed by Mowery, the decedent, became an obligation of the estate upon his death. Appellant further argues that the trial court erred in finding that BAC's claim was not barred by the statute of limitations set forth under R.C. 2117.06, which requires "creditors having claims against an estate" to present any such claims within six months after a decedent's death.

{¶7} This court's review of a trial court's decision granting summary judgment is de novo. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, ¶24. Under Civ.R. 56(C), "summary judgment shall be granted when the filings in the action, including depositions and affidavits, 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." *Bonacorsi* at ¶24.

{¶8} R.C. 2117.06 provides in part:

(A) All creditors having claims against an estate, including claims arising out of contract, out of tort, on cognovit notes, or

on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated, shall present their claims in one of the following manners:

(1) After the appointment of an executor or administrator and prior to the filing of a final account or a certificate of termination, in one of the following manners:

(a) To the executor or administrator in a writing;

(b) To the executor or administrator in a writing, and to the probate court by filing a copy of the writing with it;

(c) In a writing that is sent by ordinary mail addressed to the decedent and that is actually received by the executor or administrator within the appropriate time specified in division (B) of this section.

* * *

(B) Except as provided in section 2117.061 [2117.06.1] of the Revised Code, all claims shall be presented within six months after the death of the decedent, whether or not the estate is released from administration or an executor or administrator is appointed during that six-month period. Every claim presented shall set forth the claimant's address.

(C) Except as provided in section 2117.061 [2117.06.1] of the Revised Code, a claim that is not presented within six months after the death of the decedent shall be forever barred as to all parties, including, but not limited to, devisees, legatees, and distributees.

{¶9} As noted, in denying appellant's motion for summary judgment, the trial court rejected appellant's contention that BAC's action was barred by the six-month statute of limitations specified in R.C. 2117.06. The trial court relied in part upon *Beneficial Mtge. Co. v. Currie*, 5th Dist. No. 2003CA00238, 2004-Ohio-5190, a case involving a decedent who owned property at the time of her death subject to a mortgage held by the appellee, Beneficial Mortgage Company ("Beneficial"). Following the death of the decedent, the property was transferred to the appellant (decedent's daughter). After

monthly mortgage payments lapsed, Beneficial filed a complaint in foreclosure against the appellant, and the trial court subsequently granted Beneficial's motion for summary judgment.

{¶10} On appeal, the appellant argued that Beneficial was barred from recovery because it failed to file a timely claim against the estate pursuant to R.C. 2117.06. In *Beneficial Mtge.* at ¶13, the appellate court rejected the appellant's argument, holding in relevant part:

To accept appellant's position would be against the general principles of real estate and probate law. The subject real estate is never in the possession of the estate or executor. By law, it passes directly to the heirs. All liens on real estate run with the land and unless they are paid, they remain against the title holder.

{¶11} The court in *Beneficial Mtge.* also considered two related statutory provisions: (1) R.C. 2117.29, which provides that, when the only remaining unpaid debts of an estate are secured by liens on the property of the estate, the heirs may be entitled to take the property "subject to such liens" if all of the lienholders consent and waive recourse; and (2) R.C. 2113.52(B), which provides that if real estate devised in a will is subject to a mortgage lien on the date of the testator's death, the devisee "has no right of exoneration for the mortgage lien, regardless of a general direction in the will to pay the testator's debts, unless the will specifically provides a right of exoneration that extends to that lien." In analyzing the provisions of R.C. 2117.29 and 2113.29, the court in *Beneficial Mtge.* concluded that "[t]hese statutes imply mortgage liens do not fall under the requirements of R.C. 2117.06." *Id.* at ¶18.

{¶12} In the present case, the trial court similarly found that BAC's claim was "not one enumerated under R.C. 2117.06(A)." The trial court found persuasive the reasoning

of the court in *Beneficial Mtge.*, and concluded that "mortgage liens run with the property and remain against the title holder, in this case Mowery Properties, and not with the estate."

{¶13} As noted, appellant argues that BAC's claim is barred because it failed to present such claim to the administrator of the estate within six months of Mowery's death. In support, appellant seeks to define the nature of BAC's action as merely a creditor's claim against an estate on a promissory note. We disagree, however, with appellant's characterization.

{¶14} In the instant case, BAC filed a "complaint in foreclosure," in which it sought foreclosure of its mortgage and a sale of the property. Specifically, in its complaint, BAC requested that its mortgage be "adjudged a valid first lien upon the real estate," and that "said mortgage be foreclosed," that the "real property be ordered sold," and that it "be paid out of the proceeds of such sale." Further, the complaint itself did not seek judgment directly against the estate, but instead recited that "the unknown heirs, devisees, legatees, executors, administrators, spouses and assigns * * * may claim an interest in the above described property."

{¶15} An action in foreclosure has been defined as "a proceeding for the legal determination of the existence of a mortgage lien, the ascertainment of its extent, and the subjection to sale of the property pledged for its satisfaction." *Carr v. Home Owners Loan Corp.* (1947), 148 Ohio St. 533, 540. A suit to foreclose on property securing a debt is not a suit directly against the debtor but, rather, is an action "in rem." *United States v. Alvarado* (C.A.11, 1993), 5 F.3d 1425, 1429. Under Ohio law, a mortgagee has concurrent remedies upon breach of condition of a mortgage agreement; a mortgagee

may "sue in equity to foreclose" (i.e., an action in rem), or "sue at law directly on the note" (an action in personam). *Fifth Third Bank v. Hopkins*, 177 Ohio App.3d 114, 2008-Ohio-2959, ¶16.

{¶16} This court has previously recognized, similar to the court's statement in *Beneficial Mtge.*, that the real estate of a decedent "descends directly to his heirs or devisees." *Hackmann v. Dawley* (1995), 105 Ohio App.3d 363, 367. Thus, in *Hackmann*, this court held that a vendee's action for specific performance of a contract for the sale and purchase of real estate was not barred, following the death of the vendor, where the vendee failed to file a claim against the vendor's estate within the time requirements under R.C. 2117.06. Further, the Supreme Court of Ohio has held that, where a judgment is a "subsisting lien on the lands of the debtor at the time of his death," it is not necessary to present such claim for allowance to the personal representative as a personal claim against the estate in order to preserve the lien. *Ambrose v. Byrne* (1899), 61 Ohio St. 146, paragraph one of the syllabus.

{¶17} Courts in other jurisdictions have recognized that the right of action of a "mortgagee or legal holder of a note is independent of the remedy given him by filing his claim in the probate court" because a foreclosure proceeding "is not one against an estate, nor is it one *in personam*," but, rather, "is in the nature of a proceeding *in rem* to enforce certain security specially set apart for the indemnity of the holder of the note." (Emphasis added.) *Waughop v. Bartlett* (1896), 165 Ill. 124, 129-30. See also *Financial Freedom v. Kirgis* (2007), 377 Ill.App.3d 107 (despite death of mortgagor, it was not incumbent upon holder of note secured by a mortgage to probate the note when the maker was deceased, and therefore plaintiff's action was not barred by limitations period

under probate code). In such cases, even though "the debt is evidenced by the promissory note of the mortgagor, * * * no judgment is asked against the estate either for the debt, or any part of it." *Fallon v. Butler* (1862), 21 Cal. 24, 32. Rather, "[t]he sole object sought is to reach the property mortgaged, and subject it to sale, and have the proceeds applied to the payment of the debt." *Id.*

{¶18} Appellant has cited no case law in support of its position that a mortgage lien represents a claim against the estate, for purposes of R.C. 2117.06, and, as noted above, *Beneficial Mtge.* supports a contrary view. Further, the primary case relied upon by appellant, *In re Estate of Curry*, 10th Dist. No. 09AP-469, 2009-Ohio-6571, is distinguishable from the instant case, as *Curry* did not involve an action in foreclosure on a mortgage lien. Rather, the issue in that case was whether R.C. 2117.06 was applicable to bar a creditor's action against a decedent's estate for an unpaid balance on a nursing home account following the decedent's death.

{¶19} In the present case, the purpose of BAC's action was not to seek a personal judgment against the estate, but instead was in the nature of an in rem proceeding to reach the mortgaged property, subject it to sale, and have the proceeds applied as payment for the debt. *Fallon* at 32. As such, BAC's action to foreclose on the mortgage lien did not constitute a "claim against the estate" under R.C. 2117.06. Here, because the statutory limitations period for presentment of claims against an estate did not preclude BAC's independent right to bring an action in equity to foreclose on the mortgage lien and effectuate a sale of the property to satisfy the debt, the trial court did not err in granting summary judgment in favor of BAC and in denying appellant's motion for summary judgment.

{¶20} Based upon the foregoing, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
