[Cite as *Everhome Mtge. Co. v. Baker*, 2011-Ohio-3303.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Everhome Mortgage Company,	:	
Plaintiff-Appellee,	:	
v.	:	
Doug A. Baker et al.,	:	No. 10AP-534 (C.P.C. No. 09CVE-01-274)
Defendants-Appellants,	:	
Lawrence D. Baker et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
(Miranda G. Smith,	:	
Intervenor-Appellee).	:	

D E C I S I O N

Rendered on June 30, 2011

Shapiro, Van Ess, Phillips & Barragate, LLP, and *Benjamin D. Carnahan*, for Everhome Mortgage Company.

The Brunner Firm Co., LPA, Rick L. Brunner, Patrick M. Quinn, and *Michael E. Carleton*, for appellants.

Maquire & Schneider, L.L.P., Karl H. Schneider, and *Mark R. Meterko*, for Miranda G. Smith.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Defendants-appellants, Doug A. Baker and Nancy C. Baker ("the Bakers"), appeal from a judgment of the Franklin County Court of Common Pleas granting

summary judgment in favor of plaintiff-appellee, Everhome Mortgage Company, in Everhome's action to foreclose upon a note and mortgage.

{¶2} Everhome filed its complaint on January 8, 2009. The complaint names Doug Baker as the obligor on a note in default and both Doug and Nancy Baker as mortgagors of the property securing the note. From this and later filings, it appears that Nancy Baker was not a record owner of the mortgaged real estate and signed the mortgage solely to pledge her dower interest. The complaint also lists as defendants various potential competing lien holders and two further individuals, Lawrence D. Baker, and Mary J. Baker, whose interest in the property is not defined.

{¶3} The Bakers responded with a motion to dismiss and a motion for more definite statement, relying on various perceived flaws in the chain of title for the mortgage and underlying note. Based upon these, the Bakers asserted that Everhome was not the real party in interest and could not prosecute the foreclosure. Everhome filed by leave of court an amended complaint on March 11, 2009, attaching a copy of the promissory note that was lacking in the original complaint and other documents establishing assignment of the mortgage and supporting Everhome as the holder in due course of the note and mortgage. While the amended complaint adds as a party the "unknown spouse, if any, of Doug A. Baker," it also maintains Nancy Baker as a defendant. On July 10, 2009, the trial court denied the Bakers' pending motions for a more definite statement and to dismiss the original complaint.

{¶4} The Bakers filed an answer to the amended complaint on July 22, 2009. Everhome proceeded with a motion for summary judgment against the Bakers filed September 1, 2009, and a separate motion for default judgment against other defendants.

The Bakers filed their memorandum contra summary judgment and a Civ.R. 56(F) motion to allow further discovery prior to addressing the summary judgment issue.

{¶5} Everhome filed on September 22, 2009, a memorandum opposing the Bakers' Civ.R. 56(F) motion and a reply memorandum to the Bakers' memorandum opposing summary judgment. On September 25, 2009, the trial court entered an order indicating that all pending motions by all parties had been ruled upon. The object of this last entry is unclear, but it is undisputed that, on October 7, 2009, the trial court entered final judgment against Doug Baker on the underlying note and foreclosure in favor of Everhome on the mortgage. On November 5, 2009, the trial court entered a brief nunc pro tunc entry correcting a clerical error in the preceding final order but noting no alteration to the basis of the prior judgment.

{¶6} On January 14, 2010, Everhome filed with the court and served on opposing counsel a motion to set a minimum bid price at the impending sheriff's sale. This was granted by the trial court on January 22, 2010. The property sold at the sheriff's sale on April 9, 2010 to third-party purchaser Miranda G. Smith. On May 5, 2010, the trial court entered judgment confirming the sale, allocating distributions among lien holders, and specifying that, after payment of liens and costs, there remained a balance of $42,419.96 payable to the Bakers. The Bakers have declined to claim this check from the clerk of court and, as a result, the present appeal is not mooted by satisfaction of judgment.

{¶7} The Bakers have appealed and bring the following assignments of error:

> First Assignment of Error:
>
> The trial court erred and the October 7, 2009 Judgment Entry is void because Appellants appeared and the trial court failed

> to servce any written notice or hold a hearing in compliance with Rule 55(A), Ohio Rules of Civil Procedure.
>
> Second Assignment of Error:
>
> The trial court erred in entering a Judgment Entry that was submitted without a decision in favor of Appellee, or without holding a trial on the merits, and which clearly failed to identify any motion that was pending at the time it was granted or at the time it was allegedly circulated to counsel.
>
> Third Assignment of Error:
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> The trial court erred in considering and acting upon Appellee's Amended Complaint which had no Certificate of Service endorsed thereon or separately filed.
>
> Fourth Assignment of Error:
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> The trial court erred in denying Appellants' Motion to Dismiss and/or For a More Definite Statement based on Appellee's Amended Complaint.
>
> Fifth Assignment of Error:
>
> The trial court erred by granting judgment to Appellee, which is not a party to the Original Recorded Mortgage and never had an interest in the Mortgage.
>
> Sixth Assignment of Error:
>
> The trial court erred in entering its Confirmation of Judgment of May 5, 2010.

{¶8} The first matter to address in this appeal is a motion by proposed intervenor Miranda G. Smith, the purchaser of the property at the sheriff's sale, for leave to file an appellate brief or, in the alternative, intervene in the appeal. The Bakers have moved to strike the brief filed by Smith and oppose her intervention in the appeal.

{¶9} Smith was not a party in the trial court at the time the current notice of appeal was filed. Seeking to protect her interest in the subject property, Smith moved to

intervene in the trial court on June 2, 2010, after the Bakers filed a motion to vacate the trial court's judgment of foreclosure. The Bakers filed their notice of appeal to this court on June 4, 2010, abandoning pursuit of their motion to vacate in the trial court. Not until four days later, on June 8, 2010, did the trial court grant Smith's motion to intervene at the trial level. As an initial determination addressing Smith's intervention in the case, we note that the trial court's order permitting Smith to intervene was "inconsistent with [our] jurisdiction to reverse, modify or affirm the judgment." *Yee v. Erie Cty. Sheriff's Dept*. (1990), 51 Ohio St.3d 43, 44. That order is without effect upon Smith's participation in this case. If Smith is to present an argument in this appeal, she must do so by way of appellate intervention.

{¶10} Once a case proceeds to appeal, intervention by a stranger to proceedings in the trial court is not typical. "The proper parties to an appeal to this court are determined by the parties to the proceeding in the court from which the appeal is taken to this court. Ordinarily, no new or additional parties can be added upon appeal." *Miller v. Bd. of Review, Ohio Bur. Emp. Servs*. (May 24, 1979), 10th Dist. No. 79AP-179. However, in an exceptional case, to defend interests that are both imperative and otherwise unrepresented, a non-party "may intervene in a case after jurisdiction has been transferred to an appellate court." *Queen City Lodge No. 69 Fraternal Order of Police v. State Emp. Relations Bd*., 1st Dist. No. C-060530, 2007-Ohio-170, ¶17. The appellate rules do not provide an explicit mechanism for such a procedure, but courts have used Civ.R. 24, governing intervention in trial courts, as guidance, applying it under Civ.R. 1(C) which provides that the civil rules will apply in an appeal when they are not " 'by their nature * * * clearly inapplicable.' " Id. at ¶17, quoting Civ.R. 1(C). Since the interests of a

purchaser at a sheriff's sale are inextricably intertwined with the foreclosure proceeding, and the challenge to the underlying foreclosure proceeding would of necessity implicate matters to which the purchaser could not have yet been a party, we have at least in dicta contemplated joinder by intervention of such purchasers in the subsequent appeal of the foreclosure action. See, e.g., *Am. Business Mtge. Servs., Inc. v. Barclay*, 10th Dist. No. 04AP-68, 2004-Ohio-6725, ¶5. Because Smith has claimed "an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that disposition of the action may as a practical matter impair or impede [her] ability to protect that interest," Civ.R. 24(A), we grant Smith's motion to intervene in the appeal to the extent that we will consider her brief.

{¶11} Next, we consider Everhome's argument that the present appeal must be dismissed because it was not timely filed. Everhome argues that the October 7, 2009 final judgment was not appealed until June 2010, well beyond the 30-day limit permitted for appeal under App.R. 4. Because App.R. 4 is jurisdictional, Everhome argues, the appeal must be dismissed. However, App.R. 4(A) provides that the time to appeal is extended when notice of judgment is not provided to a party within the three-day period in Civ.R. 58(B). In the present case, the record reflects that the clerk of the trial court did not serve the Bakers with a copy of the final judgment of foreclosure. The fact that the Bakers were served with subsequent documents and even responded to them is irrelevant for purposes of tolling the time to appeal. *Huntington Natl. Bank v. Zeune*, 10th Dist. No. 08AP-1020, 2009-Ohio-3482. The present appeal is timely.

{¶12} Finally, we address the assertion by intervernor Smith that the appeal must be dismissed as moot because the confirmation of sale has resulted in irrevocable

disposal of the property and distribution of funds and this court can no longer provide a judicial remedy. There is authority for this proposition. *Charter One Bank v. Mysyk*, 11th Dist. No. 2003-G-2528, 2004-Ohio-4391, ¶4 ("Once the Sheriff's sale occurred, the merits of the trial court's foreclosure order became moot. * * * No relief can be afforded once the property has been sold at foreclosure sale because an appellate court is unable to grant any effectual relief at that point"); *Alegis Group L.P. v. Allen*, 11th Dist. No. 2002-P-0026, 2003-Ohio-3501, ¶14 ("[E]ven if we were to ultimately conclude that the trial court did err in entering judgment for appellee, our decision would only be advisory as this court lacks the authority to return the parties to their original positions").

{¶13} Other cases, however, have disagreed with *Mysyk* and *Alegis*. In *Ameriquest Mtge. v. Wilson*, 11th Dist. No. 2006-A-0032, 2007-Ohio-2576, the Eleventh Appellate District abandoned its own precedent in *Mysyk* and *Alegis* and recognized that, even where the real property itself is no longer recoverable, the case is not moot because the court is not without power to offer a remedy: "[D]ebtors may still obtain relief in the form of restitution from judgment creditors. Restitution is appropriate in cases such as these, where the foreclosed property has been sold." Id. at ¶19, citing *Chase Manhattan Mtge. Corp. v. Locker*, 2d Dist. No. 19904, 2003-Ohio-6665; *MIF Realty L.P. v. K.E.J. Corp*. (May 19, 1995), 6th Dist. No. 94WD059; and *Chupp v. Thomas* (Dec. 8, 1997), 6th Dist. No. H-97-027.

{¶14} In choosing between these conflicting cases, we begin by noting that we find no conflict on the proposition that, where the defendant in a foreclosure action has accepted the funds disbursable to him under the confirmation order, further attack on the foreclosure judgment is barred under the doctrine of satisfaction of judgment. *Villas at*

Pointe of Settlers Walk Condominium Assn. v. Coffman Dev. Co., 12th Dist. No. CA2009-12-165, 2010-Ohio-2822. However, the broader application of mootness proposed in *Mysyk* is neither tenable nor desirable, and the reasoning in *Wilson* is more persuasive. It is a suspect argument to assert that a void, voidable, or merely erroneous judgment might evade appellate review simply because it was rendered rapidly, completely, and without notice. If we test the *Mysyk* rule by taking it to its logical extreme, such a holding would allow no recourse in a case in which a foreclosure action proceeded, completely in error and without any notice to the property owner, from complaint to default to foreclosure and sale. Admittedly, as we will discuss below, that is not the posture of the present case, but adopting mootness as a rule of convenience here would invite injustice in future cases presenting harsher facts.

{¶15} While it is true that, pursuant to R.C. 2329.45 and 2325.03, Smith has taken title as purchaser in good faith at the sheriff's sale of the subject property and her interest is no longer subject to attack by any subsequent modification of the underlying judgment of foreclosure, this court can still offer a meaningful remedy. As stated in *Wilson*, the plain language of R.C. 2329.45 clearly contemplates that a trial court, in the event of reversal of the underlying foreclosure judgment, may craft a suitable monetary remedy. Reversal of a wrongful foreclosure would not only be necessary to allow the trial court to revisit the merits and determine such a remedy if warranted, but would also be an important predicate to any defense or recovery by the original property owner in collateral proceedings or companion cases. Even less speculatively, reversal would avoid any execution on a deficiency judgment arising out of the foreclosure, although again this

case does not present that difficulty as the sale resulted in a surplus payable to the Bakers.

{¶16} We therefore find that the matter is by no means moot merely by virtue of the subsequent sale of the property; if the Bakers succeed on appeal in setting aside the judgment of foreclosure, they could, if Everhome were unable to obtain a new judgment of foreclosure after proceedings on remand, propose to the trial court a variety of monetary remedies in satisfaction of the damages incurred by the Bakers through Everhome's foreclosure action.

{¶17} We now turn to the Bakers' first assignment of error, which asserts that the trial court erred in granting "default" judgment against them. This is based upon language in the trial court's October 7, 2009 judgment entry, presented as follows in the Bakers' appellate brief: "The Court finds that all necessary parties have been served with summons according to law and are properly before the Court; that the Defendants * * * are in default of Answer or other pleadings."

{¶18} This argument more than somewhat distorts the text of the trial court's judgment entry. More completely stated, the pertinent text of the first two paragraphs of the entry read as follows: "THIS CAUSE was submitted to the Court and heard upon the Complaint of the Plaintiff, the Answer of Defendants Doug Baker, Nancy Baker, State of Ohio Department of Taxation, United States of America, and the evidence. * * * The Court finds that all necessary parties have been served with summons according to law * * *; that the Defendants, Jane Doe, Unknown Spouse of Douglas A. Baker, Richard Roe, Unknown Occupant, Union Federal Savings and Loan Association, Lawrence D. Baker and Mary J. Baker, are in default of Answer or other pleading and thereby confess

the allegations of the Complaint to be true, and said Defendants are forever barred from asserting any right, title or interest in and to the hereinafter described premises."

{¶19} The court's entry clearly is not intended to grant *default* judgment against Doug and Nancy Baker. The decision notes that Doug and Nancy Baker filed an answer and that only various other parties, including Lawrence D. Baker and Mary J. Baker, were in default of answer. As to the parties present in this appeal, therefore, the judgment entered by the trial court is consistent with summary judgment pursuant to the filings then before the court.

{¶20} We do note the concern raised by the Bakers at oral argument that the trial court's judgment could be misconstrued to grant summary judgment against Nancy Baker on the underlying note, rather than simply upon her mortgaged interest in the property. Although this argument was not raised by assignment of error and is therefore not properly before us in a posture that would support reversal of the trial court order, we take the opportunity to clarify that the trial court could not and did not enter any judgment that would render Nancy Baker liable on the note itself, which Nancy never signed. The concern is less urgent than it would be in a case that generated a deficiency judgment, but nonetheless worth clarifying.

{¶21} The Bakers also argue under this assignment of error that the trial court's entry does not comply with Loc.R. 25.04 of the Franklin County Court of Common Pleas. This rule requires all entries to either state the reason for the entry or relate the entry to the motion decided. The text of the trial court decision in the present case clearly indicates that it is a final judgment of foreclosure in favor of Everhome, granted upon the

complaint, answer, and evidence before the court. The entry therefore complies with Loc.R. 25.04.

{¶22} In summary, after consideration of the above arguments the Bakers' first assignment of error is overruled.

{¶23} The Bakers' second assignment of error asserts the trial court erred in entering a judgment entry that was not circulated by counsel for the parties as described in Loc.R. 25.01 of the Franklin County Court of Common Pleas. This rule, by its own language, allows the trial court to employ another procedure other than circulation for signature among the parties of the proposed judgment entry submitted by the prevailing party. Moreover, we find no authority for the proposition that non-compliance with Loc.R. 25.01, of itself, would constitute reversible error in the absence of some real and discernible prejudice to a party, such as a deprivation of procedural due process rising to the level of a constitutional violation. The Bakers articulate no alternative course of action that they would have undertaken had the entry circulated to counsel. The Bakers' second assignment of error is accordingly overruled.

{¶24} The Bakers' third assignment of error asserts that the trial court should not have considered Everhome's amended complaint in the matter because this complaint was not properly served upon the Bakers. The record clearly indicates that the Bakers filed their answer to the amended complaint on July 22, 2009. This answer does not set forth an affirmative defense of insufficiency of service of process, and, as a result, all such arguments are waived for the balance of the action. Civ.R. 12(H)(1); *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156-57. The Bakers' third assignment of error is overruled.

{¶25} The Bakers' fourth assignment of error asserts that the trial court erred in denying their motion to dismiss the action and their motion for a more definite statement. Both were based upon reported inadequacies in the initial complaint in this action, all of which were essentially rectified by subsequent filing of the amended complaint. A motion to dismiss an original complaint is rendered moot by subsequent filing of an amended complaint. *State v. Weir* (Aug. 29, 1978), 10th Dist. No. 78AP-359; *DVCC, Inc. v. Med. College of Ohio*, 10th Dist. No. 05AP-237, 2006-Ohio-945. The holder-in-due-course arguments addressed in these motions, as well as questions over the non-inclusion of a copy of the underlying financial note, were resolved by the amended complaint. The Bakers' fourth assignment of error is overruled.

{¶26} The Bakers' fifth assignment of error asserts the trial court erred in granting summary judgment to Everhome. Summary judgment under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the non-moving party has no evidence to prove its case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Rather, the moving party must point to some evidence that affirmatively demonstrates that the non-moving party has no evidence to support his or her claims. Id.

{¶27} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Bard v. Soc. Natl. Bank* (Sept. 10, 1998), 10th Dist. No. 97APE11-1497. Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445. As such, we have the authority to overrule a trial court's judgment if the record does not support any of the grounds raised by the movant, even if the trial court failed to consider those grounds. *Bard*.

{¶28} Both in their memorandum contra summary judgment and in their argument before this court, the Bakers rely solely upon the premise that Everhome is not the real party in interest because it has failed to establish that it is the actual holder of the note and mortgage. The documentation filed by Everhome in support of summary judgment evinces a chain of title with an initial transfer by United Federal Bank of Indianapolis assigning its mortgage interest to the Mortgage Electronic Registration System ("MERS"), and then a subsequent transfer from MERS to Everhome. The trial court correctly could conclude there remains no genuine issue of material fact that Everhome is the proper holder of the mortgage. The Bakers' fifth assignment of error is accordingly overruled.

{¶29} The Bakers' sixth assignment of error argues that, should the underlying judgment of foreclosure be reversed, the order confirming the subsequent sheriff's sale should be vacated. They raise no further argument regarding the sale proper or the distribution of funds therefrom. In light of our disposition of the preceding assignments of error, this assignment of error is rendered moot.

{¶30} In conclusion, the Bakers' first, second, third, fourth, and fifth assignments of error are overruled, and the Bakers' sixth assignment of error is rendered moot. The

judgment of foreclosure entered by the the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

SADLER and TYACK, JJ., concur.

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