[Cite as *HSBC Mtge. Corp. (USA) v. Rider*, 2012-Ohio-3476.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

HSBC Mortgage Corporation (USA),	:	
Plaintiff-Appellee,	:	
v.	:	No. 12AP-78 (C.P.C. No. 10CVE-03-3586)
John J. Rider et al.,	:	
Defendants-Appellees,	:	(ACCELERATED CALENDAR)
Linda S. Rider,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 2, 2012

Lerner, Sampson & Rothfuss, *Stacy L. Hart*, and *Jesse M. Kanitz*, for plaintiff-appellee HSBC Mortgage Corporation (USA).

Jump Legal Group, LLC, and *John Sherrod*, for defendant-appellant Linda S. Rider.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Defendant-appellant, Linda S. Rider ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which granted summary judgment and

decree of foreclosure to plaintiff-appellee, HSBC Mortgage Corporation (USA) ("appellee"). For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} On March 8, 2010, appellee filed a complaint in foreclosure against appellant and others. In it, appellee alleged that John J. Rider and appellant owed $141,548.61, plus interest, on a note and mortgage held by appellee, by reason of their default. On April 8, 2010, appellant filed a request for foreclosure mediation and extension of time to answer. The trial court referred the matter to mediation, but efforts at mediation failed.

{¶ 3} On July 7, 2010, appellant filed a pro se answer. In it, she denied for lack of knowledge appellee's allegations that it was the current holder of the note and mortgage, the amount owed, and the propriety of any notices issued. She also raised a number of affirmative defenses, including lack of standing.

{¶ 4} On August 30, 2010, appellee moved for summary judgment against appellant. In support, appellee submitted the following: a copy of the original signed note; a copy of the original signed mortgage; a copy of the assignment of the mortgage to appellee in 2002; a printout of charges and payments made on the note; a copy of the January 21, 2010 default notice sent to appellant and John J. Rider; and the affidavit of an executive of appellee, stating that the account was in default and the amount owed.

{¶ 5} In her pro se response to appellee's motion, appellant again denied the allegations contained within appellee's complaint. She contended that appellee had failed to produce the original note. Under the heading "AFFIRMATIVE DEFENSES," appellant stated that appellee lacked standing to bring the action because her original mortgage was with Homestead Mortgage. She also stated that there was a lack of proof that appellee was the real party in interest as appellee had not demonstrated the circumstances under which it acquired its interest in the note and mortgage. She contended that the default, in part, was the result of misconduct by John J. Rider, against whom she was seeking a divorce and contempt findings in order to force payment on the mortgage. She attached numerous documents, including a copy of her

request for information from appellee, a signed agreement to mediate, and a July 26, 2010 letter from appellee in response to a request for assistance.

{¶ 6} Appellant also filed a motion for summary judgment. In it, she contended that appellee had failed to respond to her requests for information. She also stated that appellee had failed to provide proof of legal standing and ownership and to mediate with the defendants in good faith.

{¶ 7} On February 24, 2011, the trial court referred the matter to mediation for a second time. The court thereafter continued the trial date multiple times to allow mediation to proceed. On September 14, 2011, appellee asked the court to return the case to the active docket as "there are no retention options available for the homeowner."

{¶ 8} On January 3, 2012, the trial court issued an entry granting summary judgment and decree in foreclosure in favor of appellee. The court expressly found that the note was secured by a mortgage held by appellee, the mortgage was recorded in 2002, and that appellant and John J. Rider were in default.

II. ASSIGNMENTS OF ERROR

{¶ 9} Appellant filed a timely appeal, and she raises the following assignments of error:

> 1. The trial court erred in granting [appellee's] motion for summary judgment insofar as:
>
> a. There was a genuine question of material fact whether [appellee] no longer had an ownership interest in the mortgage at the time of the judgment;
>
> b. There was a genuine question of material fact whether [appellee] provided [appellant] with proper notice of its intent to accelerate and/or foreclose.
>
> 2. The trial court erred in granting [appellee's] motion for summary judgment as there was a genuine question of material fact regarding damages.
>
> 3. The trial court erred in relying on a stale affidavit in support of [a]ppellee's motion for summary judgment.

III. DISCUSSION

{¶ 10} In her assignments of error, appellant contends that the trial court erred by granting summary judgment in favor of appellee. We review a summary judgment de novo by independently reviewing the judgment, without deference to the trial court's determination. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994), citing *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App.3d 704, 711 (4th Dist.1993). We apply the same standard as the trial court and must affirm the judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 11} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, 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." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992), quoting *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1, 2 (1982).

{¶ 12} When a party moves for summary judgment on the ground that the nonmoving party cannot prove its case, the movant bears the initial responsibility of informing the trial court of the basis for the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292

(1996). If the moving party meets its initial burden, the non-movant must set forth specific facts demonstrating a genuine issue for trial. *Id*. at 293.

{¶ 13} In her first assignment of error, appellant contends that we should reverse the trial court's judgment because there was a genuine issue of material fact as to whether appellee had an ownership interest in the mortgage at the time of judgment. In support, appellant attaches to her brief a copy of a purported assignment of the mortgage from appellee to HSBC Bank, USA, NA, on August 12, 2011, nearly five months before the trial court granted judgment in favor of appellee. Based on this purported assignment, appellant contends that the civil rules required appellee to substitute the assignee as the real party in interest and that the affidavit appellee filed in support of summary judgment was defective.

{¶ 14} It is well-settled that a litigant's failure to raise an issue before the trial court waives the litigant's right to raise that issue on appeal. *Gentile v. Ristas*, 160 Ohio App.3d 765, 2005-Ohio-2197, ¶ 74 (10th Dist.). Therefore, we may only conclude that appellant has waived this issue by failing to raise it before the trial court, and she may not raise it for the first time on appeal.

{¶ 15} Furthermore, the purported mortgage assignment on which appellant relies is not part of the record in this matter. App.R. 9(A)(1) provides that the record on appeal, in all cases, constitutes "[t]he original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court." An exhibit merely appended to an appellate brief is not part of the record, and we may not consider it in determining the appeal. *Jefferson Golf & Country Club v. Leonard*, 10th Dist. No. 11AP-434, 2011-Ohio-6829, ¶ 10. Accordingly, we will not consider the new exhibit appellant attached to her brief for purposes of determining appellee's standing or interests below.

{¶ 16} Next, appellant contends that there remains a genuine issue as to whether she received lawful notice of appellee's intent to accelerate the loan and foreclose. Before the trial court, appellant admitted that she received a notice of default, but stated

that appellee had failed to serve her "with a proper Notice of Default as required by the terms of the mortgage, note and applicable state and federal laws."

{¶ 17} Before this court, appellant cites to federal requirements for notice regarding Housing & Urban Development ("HUD") loans. Appellant does not explain, however, how these regulations apply to her mortgage, as there is no evidence in the record, or on the instrument itself, indicating that this was a HUD loan.

{¶ 18} Appellant does not direct us to a specific notice provision in the note or mortgage, but paragraph 6(C) of the note states the following: "If [the borrower is] in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means."

{¶ 19} Before the trial court, appellee argued that it had complied with all conditions precedent, and appellee submitted to the court a copy of the January 21, 2010 letter sent to appellant and John J. Rider. The letter gave "formal notice" that appellant and John R. Rider were in default. The letter identified the amount that could be paid within 30 days to cure the default. And the letter stated: "If you do not cure this default within the specified time period, your obligation for payment of the entire unpaid balance of the loan will be accelerated and become due and payable immediately." Appellant admitted that she received this notice. While paragraph 6(C) of the note did not require the lender to send this notice, appellee did so and met the remaining requirements of that provision.

{¶ 20} R.C. 2329.33, which appellant cites, does not require a different result. That section provides that, after the sheriff has sold real property at a foreclosure sale, but before the trial court confirms the sale, a judgment debtor may redeem her property by depositing sufficient funds with the clerk of courts. That provision has no relevance here, where nothing in our record indicates that appellant made any attempts at redemption or payment on the judgment.

{¶ 21} For all these reasons, we overrule appellant's first assignment of error.

{¶ 22} In her second assignment of error, appellant contends that a genuine issue of material fact exists as to damages. In support, appellant states only that she disputed the amount of money she owed to appellee. Appellant provided no such evidence to the trial court, however, and appellee's evidence as to the amount owed remained undisputed. Therefore, we conclude that the trial court did not err by granting summary judgment on the amount owed to appellee, and we overrule appellant's second assignment of error.

{¶ 23} In her third assignment of error, appellant contends that the trial court erred by relying on an affidavit that was more than one year old. Appellant is presumably challenging one of the affidavits signed by Kevin Elliott and submitted by appellee in support of its motion for summary judgment and its reply in support of summary judgment.

{¶ 24} Here, appellant seems to be arguing, again, that Mr. Elliott's March 2010, July 2010, and October 2010 affidavits were inaccurate *as of the time of judgment* because he attested to appellee as the holder of the mortgage, even though appellee assigned the mortgage in August 2011. We have already determined that the record contains no evidence of the assignment.

{¶ 25} Appellant also contends that the affidavits were stale because they were more than one year old by the time the court ruled. Appellant cites no authority for the proposition that a trial court may not rely on an affidavit that is more than one year old, nor have we found any. In the 16 months between the filing of appellee's motion and the trial court's decision, appellant could have, but did not, raise this issue to the trial court. Nor did appellant supplement or update her own motion for summary judgment.

{¶ 26} For all these reasons, we overrule appellant's third assignment of error.

IV. CONCLUSION

{¶ 27} In summary, we overrule appellant's first, second, and third assignments of error. We affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and SADLER, J., concur.