

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Thomas E. Weaver,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 11AP-1065
v.	:	(C.P.C. No. 11CVH-3-3984)
	:	
The Bank of New York Mellon,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on September 25, 2012

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*Fisher, Skrobot & Sheraw, LLC, Brett R. Sheraw, and John C. Ridge, for appellant.*

*Shapiro, Van Ess, Phillips & Barragate, LLP, and Phillip Barragate, for appellee.*

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APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Plaintiff-appellant, Thomas E. Weaver, appeals from the judgment of the Franklin County Court of Common Pleas dismissing his complaint for declaratory judgment upon the motion of defendant-appellee, The Bank of New York Mellon. For the reasons that follow, we affirm the judgment of the trial court.

**I. FACTS**

{¶ 2} The instant litigation concerns real property located at 91 Hanford Street, Columbus, Ohio ("the property"). According to the complaint, Thomas E. Weaver, Sr.

("Weaver, Sr.") and Mary Weaver became the fee simple owners of the property on August 13, 1970 pursuant to a warranty deed. Mary died intestate on November 2, 2000, and Weaver, Sr. became the sole owner of the property upon her passing. On February 23, 2005, Weaver, Sr. executed an adjustable rate note ("note") to appellee, and the note was secured by a mortgage on the property. Weaver, Sr. died on May 15, 2009. Weaver, Sr.'s will devised the property to Mary for her lifetime and the remainder to his four children, appellant, Joyce Weaver, Nancy Woods, and Terri Siddige, share and share alike. On February 23, 2011, a certificate of transfer was filed in the Franklin County Court of Common Pleas Probate Court transferring the property to Weaver, Sr.'s four children.

{¶ 3} Appellant filed the instant complaint on March 28, 2011, seeking a declaration that appellee is barred from maintaining any action on the note and that appellee's mortgage on the property is invalid and unenforceable. Specifically, the complaint asserts that because appellee failed to present its claim to the executor of Weaver, Sr.'s estate within six months of his death, as required by R.C. 2117.06, appellee is now barred from maintaining an action on the note.

{¶ 4} Appellee filed a motion to dismiss the complaint pursuant to Civ.R. 12(B)(6). Appellee argued that both statutory law and case precedent preclude appellant's requested declaratory relief. By decision rendered September 23, 2011, the trial court agreed with appellee and held that R.C. 2117.06 was inapplicable to the matter at hand. Consequently, the trial court granted appellee's motion to dismiss. A judgment entry reflecting such action was filed on November 4, 2011.

## **II. ASSIGNMENT OF ERROR**

{¶ 5} This appeal followed, and appellant brings the following assignment of error for our review:

THE TRIAL COURT ERRED IN DISMISSING THE COMPLAINT OF APPELLANT BECAUSE APPELLEE'S CLAIM UNDER THE NOTE IS FOREVER TIME BARRED AS APPELLEE FAILED TO PRESENT SUCH CLAIM IN THE MANNER REQUIRED BY THE OHIO REVISED CODE AND APPELLEE FAILED TO RECORD ITS MORTGAGE ADMITTING IT TO THE PUBLIC RECORD.

### III. DISCUSSION

{¶ 6} A declaratory judgment action is a civil action and provides a remedy in addition to other legal and equitable remedies available. *Aust v. Ohio State Dental Bd.*, 136 Ohio App.3d 677, 681 (10th Dist.2000). "The essential elements for declaratory relief are: (1) a real controversy exists between the parties, (2) the controversy is justiciable in character, and (3) speedy relief is necessary to preserve the rights of the parties." *Id.* R.C. 2721.02(A) provides, in part, "courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. \* \* \* The declaration may be either affirmative or negative in form and effect. The declaration has the effect of a final judgment or decree."

{¶ 7} An appellate court reviews a dismissal of a declaratory judgment action based on justiciability for an abuse of discretion. *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, ¶ 13. However, a trial court's holding regarding questions of law are reviewed on a de novo basis. *Id.* See also *Stewart v. Fifth Third Bank of Columbus, Inc.*, 10th Dist. No. 00AP-258 (Jan. 25, 2001) (appellate review of dismissal for failure to state a claim under Civ.R. 12(B)(6) reviewed de novo). Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party. *Byrd v. Faber*, 57 Ohio St.3d 56, 60 (1991).

{¶ 8} "A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint." *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). In order for a trial court to grant a motion to dismiss for failure to state a claim upon which relief may be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *Id.*; *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. In construing the complaint upon a Civ.R. 12(B)(6) motion, a court must presume all factual allegations contained in the complaint to be true and make all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). Material incorporated in a complaint may be considered part of the complaint for purposes of determining a Civ.R. 12(B)(6) motion to dismiss. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249 (1997).

{¶ 9} Appellant's complaint requests a declaration that, pursuant to R.C. 2117.06, appellee is barred from maintaining an action on the note, and appellee's mortgage is invalid and unenforceable. We conclude appellant is not entitled to the relief sought.

{¶ 10} In this action, it is undisputed that in February 2005, Weaver, Sr. executed a note and mortgage agreement in favor of appellee for the principal amount of \$104,000. It is appellant's position that upon Weaver, Sr.'s death, the note became an obligation of the estate, and because said claim was not presented to the estate within six months as required by R.C. 2117.06, appellee is now forever barred from presenting said claim. R.C. 2117.06 provides, in relevant 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. For purposes of this division, if an executor or administrator is not a natural person, the writing shall be considered as being actually received by the executor or administrator only if the person charged with the primary responsibility of administering the estate of the decedent actually receives the writing within the appropriate time specified in division (B) of this section.

\* \* \*

(B) Except as provided in section 2117.061 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 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.

{¶ 11} According to appellant, the only exception to the time parameters set forth in R.C. 2117.06 is contained in R.C. 2117.10, which provides:

The failure of the holder of a valid lien upon any of the assets of an estate to present the lienholder's claim upon the indebtedness secured by the lien, as provided in this chapter, shall not affect the lien if the same is evidenced by a document admitted to public record, or is evidenced by actual possession of the real or personal property that is subject to the lien.

{¶ 12} However, because appellee did not record the mortgage with the Office of the Franklin County Recorder prior to Weaver, Sr.'s death, appellant contends the lien has not been "evidenced by a document admitted to public record," and thus, appellee cannot take advantage of R.C. 2117.10's exception. In rejecting appellant's position, the trial court relied on this court's decision in *BAC Home Loans Servicing, LP v. The Unknown Heirs of Ralph E. Mowery*, 10th Dist. No. 10AP-396, 2011-Ohio-1596.

{¶ 13} *BAC Home Loans* originated as a foreclosure action based on a note and mortgage agreement executed in 2005. A month following its execution, the mortgage was duly recorded. In May 2007, the obligor transferred the property by general warranty deed to Mowery Properties, Ltd. ("Mowery Properties"). In October of that same year, the obligor passed away. Approximately one and one-half years later, in July 2009, the lender filed a complaint seeking foreclosure. Like appellant, Mowery Properties argued the lender failed to present its claim within six months of the obligor's death as required by R.C. 2117.06, and, therefore, the lender was forever barred from presenting said claim.

{¶ 14} In rejecting Mowery Properties' assertion, this court made several observations. First, we noted that a foreclosure action pertaining to property securing a debt is not a suit directly against the debtor but, rather, is an action in rem. *Id.* at ¶ 15, citing *United States v. Alvarado*, 5 F.3d 1425, 1429 (11th Cir.1993). Second, this court

noted that Ohio law provides 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)." *Id.*, quoting *Fifth Third Bank v. Hopkins*, 177 Ohio App.3d 114, 2008-Ohio-2959, ¶ 16 (9th Dist.). Third, we observed prior Supreme Court of Ohio precedent 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." *Id.* at ¶ 16, quoting *Ambrose v. Byrne*, 61 Ohio St. 146 (1899), paragraph one of the syllabus.

{¶ 15} Thereafter, we stated, "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.' " *Id.* at ¶ 17, quoting *Waghop v. Bartlett*, 165 Ill. 124, 129-30 (1896); *Financial Freedom v. Kirgis*, 377 Ill.App.3d 107 (1st Dist.2007).

{¶ 16} The court in *BAC Home Loans* also relied upon *Beneficial Mtge. Co. of Ohio v. Currie*, 5th Dist. No. 2003CA00238, 2004-Ohio-5190, wherein a lender sought foreclosure after the underlying note went into default. The obligor in *Beneficial Mtge.* passed on January 4, 2000, an estate was opened on the obligor's behalf, and the property was subsequently transferred to the obligor's heirs. On appeal, the heirs argued that because a claim was not filed against the estate within the statutory time periods set forth in R.C. 2117.06, recovery was forever barred. The *Beneficial Mtge.* court stated that "[t]o 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." *Id.* at ¶ 13.

{¶ 17} In reaching its conclusion, *Beneficial Mtge.* referenced R.C. 2113.52, which provides that devisees taking real property under a will do so subject to a mortgage lien existing at the testator's death, and R.C. 2117.29, which provides that beneficiaries take real estate subject to existing liens. According to *Beneficial Mtge.*, these two statutory

provisions "imply mortgage liens do not fall under the requirements of R.C. 2117.06." *Id.* at ¶ 18.

{¶ 18} In reliance on *Beneficial Mtge.*, this court, in *BAC Home Loans*, rejected Mowery Properties' characterization of BAC's claim as one against an estate on a promissory note and, instead, characterized the claim as one 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. *Id.* at ¶ 19. Accordingly, this court concluded that "BAC's action to foreclose on the mortgage lien did not constitute a 'claim against the estate' under R.C. 2117.06," and, therefore, the statutory limitations period of R.C. 2117.06 did not preclude BAC's right to bring an action to foreclose on the mortgage lien and effectuate a sale of the property to satisfy the debt. *Id.*

{¶ 19} A similar issue was raised in *GMAC Mtge. Corp. v. McElroy*, 5th Dist. No. 2004-CA-00380 (June 6, 2005), where the decedent executed a promissory note and mortgage in June 2003 and passed away in July of that year. An executor of the decedent's estate was named on October 6, 2003. The lender did not record its mortgage until May 7, 2004, which was the same day the lender filed a complaint seeking foreclosure. On appeal, the heirs argued the lien was invalid because it was recorded after the obligor's death. The court rejected said assertion and cited *Beneficial Mtge.*'s holding that R.C. 2113.52 and 2117.29 imply mortgage liens are not subject to R.C. 2117.06. *GMAC Mtge.* at ¶ 15.

{¶ 20} Appellant contends *BAC Home Loans*, *Beneficial Mtge.*, and *GMAC Mtge.* are inapplicable to the matter at hand. In appellant's view, this matter is distinguishable because in this case appellee did not record its mortgage until after Weaver, Sr.'s death, and after the property was transferred to appellant and the remaining heirs, both of which occurred after the six-month timeframe set forth in R.C. 2117.06.

{¶ 21} While the decisions rendered in *BAC Home Loans* and *GMAC Mtge.* reflect when the respective mortgages were filed, we note that *Beneficial Mtge.*, which was relied upon in both *BAC Home Loans* and *GMAC Mtge.*, makes no reference of if or when the subject mortgage was recorded. Moreover, the holdings of *BAC Home Loans*, *GMAC Mtge.*, and *Beneficial Mtge.* are not contingent on recording of the mortgages. Rather, the focus in each of these cases is the characterization of the presented claims and

whether such claims had to be presented within the time parameters of R.C. 2117.06 in order to remain valid. As recognized by *GMAC Mtge.*, a mortgage is valid and binding between the parties to the instrument even if it is not recorded. "It becomes operative as to third persons only when recorded, even if it is not recorded until after death of the borrower, because the recording of the mortgage is solely the act of the lender, and does not require any action or consent by the borrower." *GMAC Mtge.* at ¶ 13, citing *Sidle v. Maxwell*, 4 Ohio St. 236 (1854). As stated by this court in *Fifth Third Bank v. Banks*, 10th Dist. No. 04AP-860, 2005-Ohio-4972, ¶ 27, "[t]he purpose of the recording statutes is to put other lien holders on notice and to prioritize the liens." See also *Holstein v. Crescent Communities, Inc.*, 10th Dist. No. 02AP-1241, 2003-Ohio-4760, ¶ 23 ("The main purpose of the recording is to establish priority among creditors and bona fide purchasers."); *Wayne Bldg. & Loan Co. v. Yarborough*, 11 Ohio St.2d 195 (1967).

{¶ 22} Thus, the validity of the mortgage is not affected by whether or not the mortgage is recorded, and foreclosure is a remedy independent of those provided for in the probate court. *Banks*; *BAC Home Loans*. Further, a foreclosure claim is not characterized as a claim against an estate, but rather as a claim in the nature of an in rem proceeding to reach the mortgaged property to satisfy a debt. *Id.* Therefore, because R.C. 2117.06 does not preclude appellee's right to bring an action in foreclosure, appellant is not entitled to a declaration stating otherwise.

#### IV. CONCLUSION

{¶ 23} For these reasons, we conclude appellant did not state a claim for relief under Civ.R. 12(B)(6), and, therefore, the trial court did not err by dismissing appellant's complaint. Accordingly, we overrule appellant's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN, P.J., and DORRIAN, J., concur.

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