[Cite as *Bank of New York Mellon v. Watkins*, 2012-Ohio-4410.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The Bank of New York Mellon Successor in Interest to JP Morgan Chase Bank, National Association, as Trustee for the Registered Holder of First National Mortgage Loan Trust 2005-FF1 Mortgage Pass-Through Certificates, Series 2005-FF1 c/o Owen Loan Servicing, Inc.,	:	No. 11AP-539
Plaintiff-Appellee,	:	(C.P.C. No. 10CVE05-7896)
v.	:	(REGULAR CALENDAR)
Micheal R. Watkins et al.,	:	
Defendants-Appellants,	:	
First Franklin Financial, a Division of National City Bank of Indiana et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 27, 2012

Jason A. Whitacre, and *Laura C. Infante,* for Bank of New York Mellon.

Micheal R. Watkins, and *Erica D. Watkins*, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Micheal R. Watkins (individually "Micheal") and Erica D. Watkins (individually "Erica"), defendants-appellants, have filed an appeal from the May 23, 2011

judgment of the Franklin County Court of Common Pleas, in which the court granted the motion for summary judgment filed by The Bank of New York Mellon ("BNY"), Successor in Interest to JP Morgan Chase Bank, National Association ("Chase"), as Trustee for the Registered Holder of First National Mortgage Loan Trust 2005-FF1, plaintiff-appellee, and issued a decree of foreclosure.

{¶ 2} On September 24, 2004, appellants executed a promissory note in favor of First Franklin Financial ("First Franklin"), for $519,950. Also on September 24, 2004, appellants executed a mortgage that secured the note and encumbered the property located at 9 Keswick Drive, New Albany, Ohio. The mortgage indicated that the lender was First Franklin. On October 5, 2004, the mortgage was assigned from First Franklin to Chase. On November 16, 2009, the mortgage was assigned from Chase to BNY.

{¶ 3} On May 25, 2010, BNY filed a complaint in foreclosure seeking to foreclose on appellants' home. In addition to appellants, named as defendants in the complaint were First Franklin; New Albany Communities Master Association, Inc. ("New Albany Communities"); New Albany Country Club Association, Inc. ("New Albany Country Club"); Keswick Condominium Association ("Keswick"); and the Franklin County Treasurer ("treasurer"). New Albany Country Club, New Albany Communities, and Keswick filed answers and cross-claims against appellants, and the treasurer filed an answer. The parties were referred to mediation, and the case was stayed for 120 days, giving appellants a 120-day extension to file an answer. Mediation was unsuccessful.

{¶ 4} On November 10, 2010, BNY filed a motion for default judgment against First Franklin and appellants, alleging they were in default of an answer or other pleading. On December 8, 2010, New Albany Country Club and New Albany Communities filed motions for default judgment on their cross-claims against appellants. On January 5, 2011, the court denied the motions for default judgment and granted appellants an extension to file an answer. On February 4, 2011, Micheal filed an answer. On February 28, 2011, BNY filed a motion for summary judgment. Also on February 28, 2011, BNY filed a motion for default judgment against First Franklin and Erica. On March 1, 2011, Keswick, New Albany Country Club, and New Albany Communities filed motions for default judgment against appellants, as appellants had not pled or defended regarding its cross-claims.

{¶ 5} On April 1, 2011, appellants filed a motion to dismiss Keswick's motion for default judgment. On April 1, 2011, Erica also filed a motion to dismiss BNY's motion for default judgment. The record also contains an answer filed by Erica on April 1, 2011. On April 28, 2011, BNY filed a motion to strike Erica's answer, as it was untimely. On May 19, 2011, Keswick filed a motion for summary judgment against appellants.

{¶ 6} On May 20, 2011, the trial court issued a judgment finding First Franklin and Erica in default of an answer and granting BNY's motion for summary judgment against appellants. The court indicated that if the sums found due in the judgment were not paid within three days, the premises would be foreclosed. Also on May 20, 2011, the trial court issued a journal entry in which it denied appellants' April 1, 2011 motion to dismiss, granted BNY's February 28, 2011 motion for summary judgment, granted New Albany Communities' March 1, 2011 motion for default judgment, granted New Albany County Club's March 1, 2011 motion for default judgment, and granted Keswick's March 1, 2011 motion for default judgment.

{¶ 7} On May 23, 2011, the trial court issued a judgment granting summary judgment and a decree of foreclosure. Appellants appeal the judgment of the trial court, asserting the following assignments of error, which we have renumbered for ease of reference:

> [I.][a.] The trial court abused its discretion in failing to provide the Appellant-Defendants with seven days notice and a hearing prior to entry of the default judgment, as required by Ohio R. Civ. P. 55(A). This procedural failure constitutes ground[s] for relief pursuant to Ohio R. Civ. P. 60(B)(5).
>
> [I.][b.] The Trial Court erred in not transferring the case to Federal Court when Plaintiff's filings verified that there is an issue of *Diversity Jurisdiction* pursuant to U.S. Code Ann. Title 28 §§ 1441 . 464.
>
> [II.] The Trial Court's judgments are "VOID" pursuant to ORC §2325.01 *et seq.* and Ohio R. Civ. P. 60(B) due to:
>
> (a) Plaintiff's failure in filing a valid assignment instrument pursuant to Ohio R. Civ. P. 60(B) and FDCPA Fair Debt Collection Practices Act 15 U.S.C. §16921692p; and,

> (b) defective service pursuant to ORC §2325.01 and Civ. R. 60[.]
>
> [III.] The Trial Court erred in allowing Attorneys for the Appelle[e]-Plaintiff to not properly file Appearances and to not properly Withdraw as Counsel pursuant to ORC 2325.01 *et seq.*, thereby, *prejudicing* the Appellant-Defendants by granting Default and Summary Judgments on the Appelle[e]-Plaintiff's moot motions that the court has no jurisdiction to rule on.
>
> [IV.] The Trial Court knowingly committed *act(s) of fraud* concerning "material issues of fact" in the case record and original complaint which caused it to error in its Granting Default and Summary Judgments to the Plaintiff for want of *subject-matter jurisdiction*, pursuant to Ohio R. Civ. P. 60(B).

(Emphasis sic.)

{¶ 8} Appellants present two arguments under their first assignment of error. Appellants first argue that the trial court abused its discretion when it failed to provide them with seven days' notice and a hearing prior to entry of the default judgment, as required by Civ.R. 55(A). We first note that Micheal filed an answer in the present case, and the trial court did not find him to be in default. Thus, the present argument does not apply to him.

{¶ 9} With respect to Erica, Civ.R. 55(A) provides, in pertinent part:

> 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.

{¶ 10} Appellants argue that Erica appeared in this case; thus, pursuant to Civ.R. 55(A), the trial court was required to hold a hearing before entering default and to give her seven days notice of that hearing. The trial court found in its May 20, 2011 judgment entry that Erica was in default of an answer or other pleading and thereby confessed the

allegations of the complaint to be true. We agree with appellants that Erica made an appearance in the case for purposes of Civ.R. 55(A). We must liberally construe the term "appeared" when applying Civ.R. 55(A). *Columbus Mgt. Co. v. Nichols*, 10th Dist. No. 92AP-191 (Aug. 4, 1992). Here, Erica filed a request for foreclosure mediation and extension of time to answer, and she participated in mediation. These actions constitute an appearance for purposes of Civ.R. 55(A). *See GMAC Mtge., L.L.C. v. Lee*, 10th Dist. No. 11AP-796, 2012-Ohio-1157, ¶ 12 (despite failure to file an answer, defendant's actions constituted an appearance, as defendant filed a formal request for mediation and an extension of time to answer the complaint and also participated in the requested mediation). Therefore, based upon Erica's conduct, she was entitled to written notice of BNY's motion for default judgment seven days prior to the trial court's hearing on that motion. *See id*. (based upon his conduct, defendant was entitled to written notice of motion for default judgment seven days prior to the trial court's hearing on the motion).

{¶ 11} In the present case, the trial court found in its May 20, 2011 journal entry that Erica was deemed to have been provided with proper notice of the motion for default judgment and denied her April 1, 2011 motion to dismiss the motion for default judgment. BNY's motion for default judgment was filed on February 28, 2011, and the trial court did not grant the motion for default judgment until May 20, 2011. Thus, it is clear that more than seven days elapsed before the trial court granted the motion for default judgment.

{¶ 12} However, appellants also contend that Erica was entitled to an oral hearing on the motion for default judgment pursuant to Civ.R. 55(A). We disagree. Pursuant to Loc.R. 21.01:

> On the 28th day after the motion is filed, the motion shall be deemed submitted to the Trial Judge. Oral hearings on motions are not permitted except upon leave of the Trial Judge upon written request by a party.

Here, more than 28 days elapsed before the trial judge ruled on the motion for default judgment. Erica did not respond to the merits of that motion. Instead, Erica filed only her motion to dismiss the motion for default judgment and an answer with no motion for leave to file such. The trial court determined that Erica received proper notice, and she was given seven weeks to respond to the merits of the default judgment but failed to do so.

{¶ 13} Pursuant to Civ.R. 55(A), a trial court has discretion to decide if a hearing is necessary. *Buckeye Supply Co. v. Northeast Drilling Co.*, 24 Ohio App.3d 134 (9th Dist.1985). Here, no party requested an oral hearing pursuant to Loc.R. 21.01. Thus, the matter was automatically set for a "non-oral hearing." *See Scarefactory, Inc. v. D & B Imports, Ltd.*, 10th Dist. No. 01AP-607 (Jan. 3, 2002), citing *Ramson's Imports, Inc. v. Chheda*, 10th Dist. No. 83AP-566 (Jan. 10, 1984); *Columbus v. Kahrl*, 10th Dist. No. 95APG09-1204 (Mar. 12, 1996). It is permissible for a trial court to set a motion for default judgment for a non-oral hearing when the defendant has made an appearance and no parties have requested a hearing pursuant to Civ.R. 55(A) and Loc.R. 21.01. *See id*. Therefore, we find the trial court here did not err when it did not hold an oral hearing on BNY's motion for default judgment.

{¶ 14} Appellants also argue that the trial court erred when it failed to transfer the case to federal court when BNY's filings verified that there was an issue of diversity jurisdiction. However, there is no evidence in the record that appellants ever filed a notice of removal in federal court or filed a notice in the trial court that they had removed the matter to federal court. There is also nothing in the trial court record relating to removal to federal court based upon diversity of citizenship, and there is no indication that appellants ever raised this issue before the trial court. Therefore, this argument is without merit.

{¶ 15} Furthermore, insofar as appellants may claim to be entitled to relief, pursuant to Civ.R. 60(B), appellants failed to file any motions before the trial court based upon Civ.R. 60(B); thus, this argument must be rejected. For the foregoing reasons, appellants' first assignment of error is overruled.

{¶ 16} Appellants argue in their second assignment of error that the trial court's judgment is void pursuant to R.C. 2325.01, et seq., and Civ.R. 60(B) due to (a) BNY's failure to file a valid assignment instrument pursuant to Civ.R. 60(B) and the Fair Debt Collection Practices Act ("FDCPA"), and (b) defective service pursuant to R.C. 2325.01 and Civ.R. 60. We first note, that, insofar as this argument relates to Civ.R. 60(B), as we explained above, appellants never filed a motion for relief pursuant to Civ.R. 60(B), so that rule has no application to the issues raised. Furthermore, insofar as appellants claim any relief was appropriate pursuant to R.C. 2325.01, that section has long been repealed.

{¶ 17} Appellants first argue that BNY did not establish that it was the owner of the subject note and mortgage at the time it filed the complaint. Appellants assert that the assignment instrument submitted at the time of the filing of the complaint on May 25, 2010, transferred the mortgage from First Financial to Chase, and a valid assignment of mortgage from Chase to BNY was not filed until BNY filed its summary judgment motion on February 28, 2011. Thus, appellants claim that BNY could not file the foreclosure complaint here because it did not file a valid transfer of assignment contemporaneous to the filing of its complaint.

{¶ 18} An entity must prove that it was the holder of the note and mortgage on the date that the complaint in foreclosure was filed, otherwise summary judgment is inappropriate. *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092, ¶ 23. However, the holding in *Jordan* does not require that "a mortgagee must prove that it is the holder of a mortgage on the exact date that the complaint in foreclosure is filed." *Countrywide Home Loans v. Montgomery*, 6th Dist. No. L-09-1169, 2010-Ohio-693, ¶ 13. Rather, a mortgagee can offer proof after the filing of the foreclosure action to establish that the mortgage was assigned to the mortgagee prior to or at the time of the filing of the foreclosure action. *U.S. Bank Natl. Assn. v. Mitchell*, 6th Dist. No. S-10-043, 2012-Ohio-3732, ¶ 18 (filing assignment of mortgage, which was dated prior to the filing date of the foreclosure complaint, with the summary judgment motion was permissible), citing *Montgomery* and *Wells Fargo Bank, N.A. v. Stovall*, 8th Dist. No. 91802, 2010-Ohio-236, ¶ 16 (same). In the present case, BNY attached to its motion for summary judgment the assignment of mortgage indicating that the subject mortgage was transferred to it prior to its filing of the present foreclosure action. Also, shortly before filing its motion for summary judgment, BNY filed a copy of the subject note. Therefore, BNY could properly file its foreclosure complaint even though it did not file the note and transfer of mortgage until after it filed its complaint. Therefore, this argument is without merit.

{¶ 19} Insofar as appellants argue the FDCPA has some application to these issues, we fail to grasp the precise nature of appellants' argument. Nevertheless, we have already found that BNY's filing of the transfer of assignment in this case was valid and

permissible; thus, any argument that BNY made a false and misleading statement under the FDCPA in this respect is not well-taken.

{¶ 20} Appellants also raise an argument regarding alleged discrepancies in the start date of the record as displayed on the case information online system for the Franklin County Clerk of Courts. However, appellants seek to demonstrate their claim by attaching documents to their brief that are not a part of the trial record. A reviewing court cannot add matter to the record before it that was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter. *State v. Hooks*, 92 Ohio St.3d 83 (2001). Notwithstanding, our review of the physical record before this court demonstrates that BNY filed its complaint in foreclosure on May 25, 2010, and we see no anomalies and discern no hint of missing pleadings in the record thereafter. Therefore, this argument is without merit. For these reasons, appellants' second assignment of error is overruled.

{¶ 21} Appellants argue in their third assignment of error that the trial court erred when it allowed several attorneys for BNY to file motions on behalf of BNY without filing proper notices of appearance as counsel. We first note that appellant never raised this issue before the trial court and cannot raise it here for the first time. *Amare v. Chellena Food Express, Inc.*, 10th Dist. No. 08AP-678, 2009-Ohio-147, ¶ 14, citing *Ohio Civ. Rights Comm. v. Triangle Real Estate Servs., Inc.*, 10th Dist. No. 06AP-157, 2007-Ohio-1809, ¶ 11. Nevertheless, there is a presumption that a regularly admitted attorney has authority to represent the client for whom he appears. *FIA Card Servs., N.A. v. Salmon*, 180 Ohio App.3d 548, 2009-Ohio-80, ¶ 13 (3d Dist.), citing *Minnesota v. Karp*, 84 Ohio App. 51, 53 (1st Dist.1948). Furthermore, the use of different attorneys from the same law firm does not result in any discernable prejudice to the appellees. *Id.*, citing *Garcia v. Coler*, 2d Dist. No. 86-CA-36 (June 11, 1987). This court has also acknowledged that it is not uncommon for an associate of a firm to appear as substitute counsel on behalf of a partner when that partner is unable to make the court appearance. *See id.*, citing *Freeman v. Freeman*, 10th Dist. No. 03AP-85, 2003-Ohio-4959, ¶ 12.

{¶ 22} Here, BNY's attorneys who filed motions on its behalf were members of the same law firm. Appellants point to no prejudice that they incurred as a result of several attorneys from the same law firm filing motions on BNY's behalf throughout the

proceedings. *See, e.g., Liberty Credit Servs., Inc. v. Stoyer*, 10th Dist. No. 05AP-489, 2005-Ohio-5927, ¶ 9 (no prejudice when attorneys from the same firm appear on behalf of a party without filing a change-of-counsel entry). Therefore, this argument is without merit, and appellants' third assignment of error is overruled.

{¶ 23} Appellants argue in their fourth assignment of error that the trial court erred when it knowingly committed acts of fraud concerning material issues of fact in the case record and original complaint, causing it to err in its granting of default and summary judgments for want of subject-matter jurisdiction. Under this assignment of error, appellants largely reassert arguments already raised and rejected under their other assignments of error, which we again reject.

{¶ 24} As to the only new argument, appellants contend they were entitled to a mandatory hearing on the motion for summary judgment. We disagree. Civ.R. 7(B)(2) provides that a court may make provision by rule for the submission and determination of motions without oral hearing upon written statements. As we already explained with regard to default judgment, Loc.R. 21.01 provides that a motion shall be deemed submitted to the trial court on the 28th day after the motion is filed, and oral hearings are not permitted except upon leave of the court upon written request by a party. Here, more than 28 days elapsed before the trial judge ruled on the motion for summary judgment, and no parties sought an oral hearing. Therefore, we find the trial court did not err when it did not hold an oral hearing on BNY's motion for summary judgment. For these reasons, appellants' fourth assignment of error is overruled.

{¶ 25} Accordingly, appellants' four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

FRENCH and DORRIAN, JJ., concur.
