[Cite as *Home S. & L. Co. v. Eichenberger*, 2012-Ohio-5662.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The Home Savings and Loan Company of Youngstown, Ohio,	:	
Plaintiff-Appellee,	:	No. 12AP-1
	:	(C.P.C. No. 09CVE-12-18747)
v.	:	(REGULAR CALENDAR)
Raymond L. Eichenberger et al.,	:	
Defendants-Appellants,	:	
Franklin County Treasurer,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 4, 2012

Bricker & Eckler LLP, and *Anthony M. Sharett*, for appellee.

Raymond L. Eichenberger, pro se and for appellant Jane E. Eichenberger Real Estate Trust.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendants-appellants, Raymond L. Eichenberger and the Jane E. Eichenberger Real Estate Trust dated August 23, 2002 ("Eichenberger Trust"), appeal a judgment of the Franklin County Court of Common Pleas granting summary judgment to plaintiff-appellee, The Home Savings and Loan Company of Youngstown, Ohio ("Home Savings"). For the following reasons, we affirm.

{¶ 2} On October 16, 2007, Eichenberger, individually and as trustee of the Eichenberger Trust, executed and delivered to Home Savings a promissory note in the

amount of $33,300. Eichenberger mortgaged a condominium belonging to the Eichenberger Trust to secure the note. Home Savings filed the mortgage, which Eichenberger signed as trustee, with the Franklin County Recorder on October 24, 2007.

{¶ 3} Defendants' initial monthly payment on the mortgage loan was $377, which included an amount that Home Savings escrowed for the payment of property taxes. The amount of the monthly payment rose as defendants' property taxes rose. After June 16, 2009, Home Savings received no further payments from defendants. In a letter dated September 2, 2009, Home Savings notified Eichenberger that he and the Eichenberger Trust were delinquent in making their monthly loan payments. The letter warned defendants that if they did not pay the outstanding amounts due within 30 days, Home Savings would accelerate the loan and initiate foreclosure proceedings. Defendants did not respond to the notice.

{¶ 4} On December 17, 2009, Home Savings filed suit against defendants, seeking judgment on the note and foreclosure on the mortgaged condominium. Defendants answered the complaint and filed a counterclaim. In the counterclaim, defendants asserted that Home Savings breached the terms of the mortgage and fraudulently induced them to enter the note and mortgage. According to defendants, Home Savings increased the amount due to it under the note by requiring defendants to pay for the cost of an unnecessary insurance policy on the condominium. Defendants also alleged that, prior to the execution of the note and mortgage, Home Savings fraudulently represented that it would not require Eichenberger to obligate himself, personally, on the note. Despite this alleged representation, Home Savings later refused to go forward with the loan unless both the Eichenberger Trust and Eichenberger, himself, endorsed the note.

{¶ 5} After Home Savings replied to defendants' counterclaim, defendants filed a motion requesting that the trial court either order the parties to submit to mediation or stay the case until defendants could sell the condominium. The parties and trial court discussed this motion during the January 25, 2011 pretrial conference, and the trial court recounted that discussion in an entry issued January 31, 2011. According to the January 31, 2011 entry, defendants' counsel informed the trial court that the condominium had been on the market for some time. Although Home Savings did not oppose defendants' efforts to sell the condominium, it objected to an indefinite stay

because defendants had not made any payments on the note since they defaulted. In an attempt to appease all parties, the trial court amended the original case schedule to allow defendants more time to find a buyer for the condominium, but limited the extension to six months. Because defendants did not want to reinstate the loan, the trial court did not refer the case to mediation.

{¶ 6} Importantly, the January 31, 2011 entry required the parties to file any dispositive motions by June 27, 2011 and set the final pretrial conference for August 8, 2011 at 9:00 a.m. Upon Home Savings' motion, the trial court extended the deadline for dispositive motions to July 7, 2011. In the June 29, 2011 entry setting forth the amended case schedule, the trial court maintained August 8, 2011 as the date for the pretrial conference.

{¶ 7} On July 7, 2011, Home Savings moved for summary judgment. Home Savings supported its motion with the affidavit of Kristine Kerrigan, an assistant vice president of mortgage default of Home Savings. Kerrigan testified that Home Savings accelerated defendants' loan when they did not respond to the September 2, 2009 default notice. She also testified that defendants owed Home Savings $38,907.48 as of July 6, 2011, with interest at a rate of 6.875 percent after that date. Additionally, Kerrigan addressed defendants' contention that Home Savings increased their monthly payment with the cost of unnecessary insurance. According to Kerrigan, Home Savings' records had indicated that defendants' hazard insurance coverage on the condominium expired on November 2, 2008. In the spring of 2009, Home Savings sent defendants two letters asking for a copy of their current hazard insurance policy. When defendants did not respond, Home Savings purchased hazard insurance for the condominium.[1] Apparently, upon receiving a notice that they owed $349 for that coverage, defendants supplied Home Savings with a copy of their hazard insurance policy. Home Savings then cancelled the policy that it had obtained and credited defendants' account $349. Kerrigan acknowledged that the amount of defendants' monthly payment rose each year. However,

[1] Home Savings purchased hazard insurance pursuant to Section 5 of the mortgage. That section requires the borrower to keep its property insured against hazards. It also allows the lender to obtain hazard insurance coverage if the borrower fails to maintain that coverage. In such an instance, "[a]ny such amounts disbursed by the Lender [to purchase hazard insurance] shall become additional debt of Borrower secured by this Security Instrument."

Kerrigan attributed the increase to rising property taxes, which Home Savings paid on defendants' behalf, and not the cost of hazard insurance.

{¶ 8} Defendants responded to Home Savings' motion for summary judgment, relying on Eichenberger's affidavit to create questions of fact. Defendants did not dispute that they had defaulted on the promissory note and mortgage by failing to make their monthly payments. However, defendants challenged the amount owed. According to Eichenberger's affidavit testimony, Home Savings increased defendants' monthly payments to cover the cost of the insurance policy that it purchased, and it refused to decrease the amount of the monthly payments once it cancelled the duplicative coverage.

{¶ 9} Secondarily, defendants argued that it was "intolerable and grossly unfair" to permit Home Savings to foreclose when defendants' equity in the condominium exceeded the amount owed. Defendants' Memorandum Contra Plaintiff's Motion for Summary Judgment, at 4. As part of this argument, defendants asked the trial court to take judicial notice of "the foreclosure crisis in the United States and in the State of Ohio as a whole, including Franklin County, in which the current financial recession/depression has placed many homeowners in untenable positions in regard to their mortgage loans." *Id*. at 3.

{¶ 10} Third, defendants presented facts that they contended precluded summary judgment on their claim for fraudulent inducement. Eichenberger stated in his affidavit that, in late summer or early fall of 2007, Home Savings informed him that it would extend a mortgage loan to the Eichenberger Trust without requiring Eichenberger to obligate himself, personally. When Eichenberger arrived at the scheduled closing, he discovered that Home Savings would not go forward with the loan unless he signed the promissory note in both his trustee and individual capacities. Eichenberger agreed, and so executed the note, because he needed the loan money to pay his mother's bills for assisted-living care. Based on these facts, defendants asserted that Home Savings fraudulently induced Eichenberger to obligate himself on the note.

{¶ 11} Finally, defendants argued that they could demonstrate bad faith, equitable estoppel, and unconscionability. According to defendants, these affirmative defenses prohibited the trial court from ordering a foreclosure.

{¶ 12} On August 8, 2011, while the motion for summary judgment was pending, the trial court held the final pretrial conference. Eichenberger, who was acting as counsel for himself and the Eichenberger Trust, did not appear at the hearing. In an entry dated August 12, 2011, the trial court ordered Eichenberger to demonstrate good cause for his absence to avoid a $500 sanction. The trial court gave Eichenberger 14 days in which to submit a response demonstrating good cause. When Eichenberger filed nothing, the trial court issued an entry imposing the $500 sanction.

{¶ 13} Upon receiving the entry that imposed the sanction, defendants filed a motion for reconsideration. In his attached affidavit, Eichenberger stated that he did not receive the August 12, 2011 entry, so he did not know he needed to demonstrate good cause for his failure to attend the final pretrial conference. He also explained that he missed the conference because he was in California vacationing from August 6 until August 14, 2011. He did not request a continuance because he forgot that the conference was scheduled for August 8, 2011. In a decision and entry dated December 5, 2011, the trial court found that forgetting about the pretrial conference did not constitute good cause to avoid sanctions. Thus, the trial court denied defendants' motion for reconsideration.

{¶ 14} On the same day the trial court ruled on the motion for reconsideration, it also issued a decision granting Home Savings' motion for summary judgment. The trial court reduced its decision to judgment on December 30, 2011.

{¶ 15} Defendants now appeal the December 30, 2011 judgment, and they assign the following errors:

> [1.] THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ITS COMPLAINT.
>
> [2.] THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY GRANTING THE SUMMARY JUDGMENT OF THE PLAINTIFF ON THE COUNTERCLAIM OF THE DEFENDANTS.
>
> [3.] THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FAILING TO RECOGNIZE THE DRAMATIC SCOPE AND ILL EFFECTS OF THE FORECLOSURE CRISIS IN OHIO AND IN THE

> UNITED STATES, AND ABUSED ITS DISCRETION BY REFUSING TO OFFER DEFENDANTS RELIEF AND BY REFUSING TO STAY THE FORECLOSURE ACTION.
>
> [4.] THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FINDING THE INDIVIDUAL DEFENDANT IN CONTEMPT OF COURT AND FINING HIM THE AMOUNT OF $ 500.00.

{¶ 16} Defendants' first and second assignments of error challenge the trial court's ruling on Home Savings' motion for summary judgment. Summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 17} A party seeking foreclosure on a mortgage must establish: (1) execution and delivery of the note and mortgage, (2) valid recording of the mortgage, (3) that it is the current holder of the note and mortgage, (4) default, and (5) the amount owed. *Perpetual Fed. Sav. Bank v. TDS2 Property Mgt., LLC*, 10th Dist. No. 09AP-285, 2009-Ohio-6774, ¶ 19. Here, Kerrigan's affidavit contains the evidence necessary to establish each element for foreclosure. Defendants, however, argue that they presented contrary evidence on the last element—the amount owed. According to Eichenberger's affidavit testimony, Home Savings increased the monthly payments to cover the cost of the duplicative hazard insurance policy on the condominium. Eichenberger disputes Kerrigan's representation that Home Savings credited the cost of the insurance coverage to defendants' account after its cancellation. Eichenberger avers that Home Savings continued to include a

charge for insurance coverage in the monthly payment and, as a consequence, the amount Home Savings claims defendants owe is wrong.

{¶ 18} According to Civ.R. 56(E), affidavits offered to support or oppose a motion for summary judgment must be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify as to the matters stated in the affidavit. "Personal knowledge" is " '[k]nowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said.' " *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, ¶ 26, quoting *Black's Law Dictionary* 875 (7th Ed.1999). The mere assertion of personal knowledge satisfies the personal knowledge requirement of Civ.R. 56(E) only if the nature of the facts in the affidavit combined with the identity of the affiant creates a reasonable inference that the affiant has personal knowledge of the facts in the affidavit. *State ex rel. Ohio v. Obetz*, 10th Dist. No. 06AP-1030, 2008-Ohio-4064, ¶ 24.

{¶ 19} In his affidavit, Eichenberger testified that he had "personal knowledge of the facts referred to herein." Eichenberger affidavit, at ¶ 1. We conclude, however, that this personal knowledge did not include the reasons why the monthly mortgage payment increased. Home Savings calculated the monthly mortgage payment, and, thus, Home Savings had within its unique knowledge the explanation behind any increase in the payment and the calculations supporting that increase. In his affidavit, Eichenberger did not aver that he ever requested or obtained that information. Eichenberger, consequently, did not have sufficient knowledge to identify the cause behind the rise in the monthly payment. As Eichenberger cannot testify to matters beyond his personal knowledge, we disregard the portions of his affidavit in which he testified to why the monthly mortgage payment increased. Without that testimony, no conflict of fact exists. Accordingly, we conclude that the trial court did not err in granting Home Savings summary judgment on its claims, and we overrule defendants' first assignment of error.

{¶ 20} By defendants' second assignment of error, they argue that the trial court erred in granting Home Savings summary judgment on defendants' claim for fraudulent inducement. We disagree.

{¶ 21} A claim for fraudulent inducement arises when a party is induced to enter into an agreement through fraud or misrepresentation. *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 502 (1998). To prove fraud in the inducement, a plaintiff must establish that the defendant made a knowing, material misrepresentation with the intent of inducing the plaintiff's reliance, and that the plaintiff relied on that misrepresentation to his detriment. *Id.*

{¶ 22} Here, defendants claim that Home Savings misrepresented that it would fund the mortgage loan without requiring Eichenberger to obligate himself, personally, on the promissory note. In reliance on that alleged misrepresentation, Eichenberger attended the first closing expecting to sign the note only in his capacity as trustee of the Eichenberger Trust. At the closing, however, Eichenberger learned that Home Savings would not extend the mortgage loan unless he also signed the note in his personal capacity. Eichenberger then decided to sign the note under the terms Home Savings required. Thus, Eichenberger was not relying on the alleged misrepresentation when he executed the promissory note. Rather, at that point, he understood Home Savings' terms and voluntarily chose to bind himself in accordance with those terms. Given this situation, we conclude that defendants cannot prove that Home Savings fraudulently induced Eichenberger to endorse the note.

{¶ 23} In a separate argument underlying this assignment of error, defendants contend that various affirmative defenses bar Home Savings from foreclosing. This argument does not correspond with the assignment of error, which only challenges the trial court's ruling on defendants' counterclaim. Pursuant to App.R. 12(A)(1)(b), appellate courts must "[d]etermine [an] appeal on its merits on the assignments of error set forth in the briefs under App.R. 16." Thus, generally, appellate courts will rule only on assignments of error, not mere arguments. *Thompson v. Thompson*, 196 Ohio App.3d 764, 2011-Ohio-6286, ¶ 65 (10th Dist.). Nevertheless, in the interest of justice, we will consider defendants' argument.

{¶ 24} As the trial court noted, defendants did not plead in their answer the affirmative defenses that they now advance. Affirmative defenses are waived if not raised in the pleadings or in an amendment to the pleadings. *Jim's Steak House, Inc. v. Cleveland*, 81 Ohio St.3d 18, 20 (1998); *Bell v. Teasley*, 10th Dist. No. 10AP-850, 2011-

Ohio-2744, ¶ 13. We, thus, concur with the trial court's holding that defendants waived the affirmative defenses at issue. Because we reject defendants' arguments regarding their claim for fraudulent inducement and their affirmative defenses, we overrule defendants' second assignment of error.

{¶ 25} By their third assignment of error, defendants first argue that the trial court erred in not taking judicial notice of the large numbers of foreclosures occurring across the country and Ohio. Second, defendants argue that the trial court erred in not staying the foreclosure action to allow them time to sell the condominium in a private sale. We disagree with both arguments.

{¶ 26} Defendants fail to explain how the national and state-wide foreclosure crises have any bearing on the facts of this case. The issues pertinent here are whether *defendants* defaulted on their loan obligations, how much *defendants* owe to Home Savings, and if the equities of *defendants'* situation weigh against foreclosure. Courts are not required to take judicial notice of facts that are irrelevant to the proceedings. *Hargis v. Access Capital Funding, LLC*, 674 F.3d 783, 793 (8th Cir.2012); *Meador v. Pleasant Valley State Prison*, 312 Fed.Appx. 954, 956 (9th Cir.2009); *United States v. Falcon*, 957 F.Supp. 1572, 1585 (S.D.Fla.1997), *aff'd*, 168 F.3d 505 (11th Cir.1999). Therefore, we find no error in the trial court's failure to take judicial notice of the high numbers of foreclosures across the country and state.

{¶ 27} We also find no error in the trial court's refusal to stay the proceedings until defendants could find a buyer for the condominium. The determination of whether to issue a stay of proceedings generally rests within the trial court's discretion and will not be disturbed absent a showing of an abuse of discretion. *State ex rel. Charvat v. Frye*, 114 Ohio St.3d 76, 2007-Ohio-2882, ¶ 16. Here, the trial court granted defendants a six-month continuance to allow them to sell the condominium. The condominium, however, did not sell. This result was hardly surprising, as the condominium had been on the market almost continuously since the winter of 2008. While the condominium languishes on the market, defendants have not submitted any payment to Home Savings since they defaulted in the summer of 2009. Given these circumstances, we conclude that the trial court did not abuse its discretion in denying defendants an indefinite stay.

Because we are not persuaded by either of defendants' arguments, we overrule their third assignment of error.

{¶ 28} By defendants' fourth assignment of error, they argue that the trial court erred in sanctioning Eichenberger for his failure to attend the August 8, 2011 pretrial conference. We disagree.

{¶ 29} Pursuant to Loc.R. 39.05(D) of the Franklin County Court of Common Pleas, General Division:

> The Trial Judge, upon motion of a party or sua sponte, may impose sanctions for failure to comply with the local rules and/or a case schedule and/or the Civil Rules. If the Trial Judge, finds that a party or attorney has failed to comply with the local rules and/or a case schedule and/or the Civil Rules without reasonable excuse or legal justification, the Trial Judge may impose sanctions proportional to the extent or frequency of the violation(s).

(Emphasis sic.) We review the imposition of sanctions under the abuse-of-discretion standard. *Telecom, Ltd. v. Wisehart & Wisehart, Inc.*, 10th Dist. No. 11AP-1147, 2012-Ohio-4376, ¶ 18.

{¶ 30} Defendants first argue that Eichenberger did not violate an order of the court. We direct defendants to the January 31 and June 29, 2011 entries—both orders of the court—setting the final pretrial conference for August 8, 2011. Counsel must attend final pretrial conferences. Loc.R. 41.03. Eichenberger does not dispute that he failed to appear at the August 8, 2011 conference. Consequently, Eichenberger violated both local rule and orders of the court and, thus, subjected himself to the possibility of sanction.

{¶ 31} Defendants next argue that the trial court did not afford Eichenberger an opportunity to demonstrate that he had good cause for his absence from the pretrial conference. We disagree. In its August 12, 2011 entry, the trial court granted Eichenberger 14 days to provide the court with a reasonable excuse for his nonattendance. Eichenberger claims that he did not receive the entry and, thus, did not know he needed to respond. Eichenberger, however, filed a motion for reconsideration that included his justification. The trial court considered that justification. Therefore, we conclude that the trial court gave Eichenberger an opportunity to demonstrate good cause.

{¶ 32} Finally, defendants argue that Eichenberger had good cause for his absence because he was out of state on August 8, 2011 and did not have notice of the pretrial conference. Defendants' contention that Eichenberger had no notice of the pretrial conference contradicts Eichenberger's affidavit testimony. In his affidavit, Eichenberger stated that he forgot about the pretrial conference, which necessarily means that he knew about the conference. The trial court concluded that Eichenberger's memory lapse was not a reasonable excuse for his absence. We find no abuse of discretion in that conclusion. Accordingly, we overrule defendants' fourth assignment of error.

{¶ 33} For the foregoing reasons, we overrule all of defendants' assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and FRENCH, JJ., concur.