

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Wells Fargo Bank, N.A.,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-1061 (C.P.C. No. 10CVE07-9874)
Karin Hazel et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 6, 2012

Thompson Hine LLP, Scott A. King and Peter E. Jones, for appellant.

Karin Hazel, pro se.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Plaintiff-appellant, Wells Fargo Bank, N.A. ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas denying appellant's objections to the magistrate's decision filed July 25, 2010 and adopting the magistrate's July 11, 2011 decision. Because we conclude that the trial court did err in denying appellant's objections to the magistrate's decision and in vacating its own judgment of September 20, 2010, we reverse.

{¶2} On July 6, 2010, appellant filed a complaint in foreclosure asserting that defendant-appellee Karin Hazel ("appellee") was in default on a promissory note that was secured by a mortgage on real property located at 6960 Pearce Lane, Canal Winchester, Ohio 43110. At paragraph three of the complaint, appellant asserted that "[appellant] has complied with all conditions precedent." On August 2, 2010, appellee, pro se, filed her

answer. As she did in response to every other paragraph of the complaint, in response to paragraph three, appellee stated: "[Appellee] is without information sufficient to form a belief as to the truth or accuracy of the allegations as set forth in Paragraph 3 of [appellant's] complaint, and therefore denies same." (Appellee's Answer, at 2.) She also asserted as defenses that one or more of appellant's claims were barred: (1) to the extent that appellant's reliance on the alleged representations was not justified; (2) for failure to state a claim upon which relief can be granted; and (3) to the extent that appellee acted reasonable and in good faith at all times relevant hereto. Appellee reserved the right to amend her answers to include additional defenses as discovery continued.

{¶3} Thereafter, on August 30, 2010, appellant moved for summary judgment. The affidavit of James E. Blue was filed in support of the motion. Mr. Blue averred he is the vice president of loan documentation for appellant and has custody of the accounts of appellant, including the account of appellee. He further averred that "[appellee] was served with notice of their [sic] default and notice of the [appellant's] intent to accelerate by letter attached hereto as Exhibit 'D.' " (Blue Affidavit, at ¶ 4.) Exhibit D, dated April 4, 2010 and addressed to appellee, states:

Dear Borrower(s): Our records indicate that your loan is in default for failure to make payments due. Unless the payments on your loan can be brought current by May 04, 2010, it will become necessary to require immediate payment in full (also called acceleration) of your Mortgage Note and pursue the remedies provided for in your Mortgage or Deed of Trust, which include foreclosure. * * * To avoid the possibility of acceleration, you must pay [\$4,197.45] on or before May 04, 2010 * * *. If funds are not received by the above referenced date, we will proceed with acceleration[.]

Neither the letter nor Mr. Blue's affidavit indicate that the letter was served via certified mail.

{¶4} Appellee did not respond to appellant's motion for summary judgment but, rather, requested an extension of time to respond. In her request, appellee sought time to obtain discovery and stated that she believed the alleged balance due was incorrect, that appellant was not the real party in interest, and that appellant violated United States

Department of Housing and Development ("HUD") regulations. Appellee's statements of belief were not supported by an affidavit or other evidence.

{¶5} On September 20, 2010, without ruling on the appellee's request for extension of time to respond, thereby denying it, the trial court entered summary judgment in favor of appellant finding there were no genuine issues of material fact and that appellant was entitled to judgment as a matter of law. On September 22, 2010, appellee filed a motion to dismiss, a motion contra appellant's motion for summary judgment, and motion for default judgment. On September 27, 2010, appellee filed a motion for reconsideration. On October 13, 2010, appellee filed an appeal¹ of the September 20, 2010 judgment, as well as a motion to vacate judgment pursuant to Civ.R. 60(B). In the motion to vacate, appellee argued, inter alia, that appellant did not aver or provide evidence verifying any signed certified mail receipt of default and accelerations notice as required by 24 C.F.R. 201.50(b). She further asserted that she never received such notice. Appellant filed its opposition to the same. The trial court referred the motion to a magistrate, who heard the matter on June 8, 2011.

{¶6} After the hearing, the magistrate, on July 11, 2011, entered a decision and entry granting appellee's motion to set aside the judgment. The magistrate found that the motion was timely and that appellee established excusable neglect for failing to respond to appellant's summary judgment motion. The magistrate also found that appellee had established "a plausible meritorious defense claiming that [appellant] did not comply with the United States Department of Housing and Development ('HUD') regulations pursuant to Title 24 C.F.R. 201.50"—specifically, appellee's assertion that appellant did not serve notice of acceleration via certified mail. (July 25, 2010 Magistrate's Decision, at 4.) Appellant filed objections to this finding. Appellant argued, as it had previously argued in its memorandum contra appellee's motion to vacate and at the hearing before the magistrate, that, because appellant had alleged in its complaint that it had complied with all conditions precedent, appellee had waived such a meritorious defense as she did not

¹ Appellee's appeal was stayed and remanded by this court in order for the trial court to rule on appellee's motion to vacate judgment. Ultimately, the appeal was sua sponte dismissed on December 23, 2011, as the trial court vacated the entry which was the subject of appellee's appeal.

assert it with particularity and specificity in her answer. Appellee filed a memorandum contra appellant's objections.

{¶7} On November 2, 2011, the trial court adopted the magistrate's decision. The court concluded that, because appellant had not filed a transcript with its objections, the court must accept the magistrate's factual findings and limit its review only to the magistrate's legal conclusions. The court further concluded that, without a transcript, it could not determine that the magistrate erred with her legal conclusions "because those conclusions are directly based on the findings of facts she took into consideration during the hearing." (Nov. 2, 2011 Decision, at 3.) In so concluding, the trial court overruled appellant's objections and adopted the magistrate's July 11, 2011 decision granting appellee's motion to set aside the judgment.

{¶8} Appellant appeals the trial court's November 2, 2011 decision and brings the following assignments of error:

1. The trial court erred by refusing to consider the merits of Wells Fargo's objections to the Magistrate's decision of July 11, 2011.
2. The trial court erred by adopting the Magistrate's decision of July 11, 2011 and vacating its judgment of September 20, 2010.

As these assignments of error are interrelated, we will address them together.

{¶9} The Supreme Court of Ohio has held that, "[w]hen a party objecting to a [magistrate's decision] has failed to provide the trial court with the evidence and documents by which the court could make a finding independent of the [decision], appellate review of the court's findings is limited to whether the trial court abused its discretion in adopting the [magistrate's decision]." *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728 (1995). With this in mind, under such circumstances, this court has opined that our review of similar assignments of error was "limited to whether the trial court abused its discretion in applying the law to the magistrate's findings of fact." *Moore v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 05AP-53, 2005-Ohio-3939, citing *H.L.S. Bonding Co. v. Fox*, 10th Dist. No. 03AP-150, 2004-Ohio-547, citing *Duncan* at 730. An abuse of discretion connotes more than an error of law or

judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). Furthermore, "[a]s a general rule, misapplication of the law to the facts is an abuse of discretion." *Thirty Four Corp. v. Sixty Seven Corp.*, 91 Ohio App.3d 818, 823 (10th Dist.1993). Appellant suggests, however, that we should apply a de novo standard of review because the trial court's order is based on an erroneous standard or a misconstruction of the law and, therefore, presents a question of law. Appellant cites to several cases in support of its argument, but none of the cases involve a trial court's adoption of a magistrate's decision. Nevertheless, whether applying abuse-of-discretion or de novo-review standards, we find that the trial court erred.

{¶10} In its objections to the magistrate's decision, appellant set forth two objections: (1) the decision erred in holding that "[appellee] has established that she may have a meritorious defense to [appellant's] claims if relief from judgment is granted"; and (2) the decision erred in holding that "[appellee] has demonstrated that she is entitled to relief from judgment pursuant to Civ.R. 60(B)(1)." (Objections to Magistrate's Decision, at 1.) Appellant does not specifically identify these two objections as objections to the magistrate's conclusions of law, rather than to the findings of fact. Nevertheless, in its memorandum in support of these objections, appellant states "[w]ith respect, the Magistrate failed to correctly apply the law," thereby clarifying that the objections were to the magistrate's conclusions of law. (Memo in Support of Objections, at 2.)

{¶11} The law which the magistrate allegedly failed to correctly apply, as identified by the appellant, is that "'HUD regulations, incorporated within the terms of the default and/or acceleration provisions, * * * are conditions precedent'" and "'subject to the requirements of Civ. R. 9(C),' " requiring that a denial of performance or occurrence shall be made specifically and with particularity. (Memo in Support of Objections, at 6, citing to *U.S. Bank, N.A. v. Detweiler*, 191 Ohio App.3d 464, 472, 2010-Ohio-6408 (5th Dist.).

{¶12} The trial court found that it could not conclude that the magistrate erred in its application of this law because the conclusion is "directly based on the findings of facts [the magistrate] took into consideration during the hearing." (Nov. 2, 2011 Decision, at 3.) However, a close examination of the magistrate's decision reveals that the magistrate made no finding of fact regarding whether appellee complied with Civ.R. 9(C) in asserting

the defense of failure to comply with HUD regulation Title 24 C.F.R. 201.50 requiring notice of acceleration via certified mail.² Furthermore, whether appellee complied with the requirements of Civ.R. 9(C) is readily discernible from her answer. The trial court did not need a transcript to determine compliance.

{¶13} In *Natl. City Mtge. Co. v. Richards*, 182 Ohio App.3d 534, 542, 2009-Ohio-2556 (10th Dist.), in the context of a similar foreclosure case, this court stated that "[w]here prior notice of default and/or acceleration is required by a provision in a note or mortgage instrument, the provision of notice is a condition precedent,' and it is subject to the requirements of Civ.R. 9(C)." *Id.*, citing *First Fin. Bank v. Doellman*, 12th Dist. No. CA2006-02-029, 2007-Ohio-222. We then reiterated the requirements of Civ.R. 9(C).

"Where a cause of action is contingent upon the satisfaction of some condition precedent, Civ.R. 9(C) requires the plaintiff to plead that the condition has been satisfied, and permits the plaintiff to aver generally that any conditions precedent to recovery have been satisfied, rather than requiring plaintiff to detail specifically how each condition precedent has been satisfied. In contrast to the liberal pleading standard for a party alleging the satisfaction of conditions precedent, a party denying the performance or occurrence of a condition precedent must do so specifically and with particularity. Civ.R. 9(C). A general denial of performance of conditions precedent is not sufficient to place performance of a condition precedent in issue. The effect of the failure to deny conditions precedent in the manner provided by Civ.R. 9(C) is that they are deemed admitted."

(Citations omitted.) *First Fin. Bank* at ¶ 20, quoting *Lewis v. Walmart, Inc.*, 10th Dist. No. 93AP-121 (Aug. 12, 1993).

{¶14} With this standard in mind, the trial court should have considered appellant's objections and determined whether appellee complied with Civ.R. 9(C).

{¶15} Therefore, both of appellant's assignments of error are sustained, and we reverse the judgment of the Franklin County Court of Common Pleas adopting the

² The magistrate did acknowledge appellant's assertion that appellee did not comply. "[Appellant] argued that the issue regarding conditions precedent required by HUD was set forth in the complaint and that [appellee] failed to properly respond in her answer in accordance with Civ. R. 9." (Magistrate's Decision, at 4.) Yet, the magistrate made no finding related to this assertion.

decision of the magistrate. We remand this case to that court for it to consider the objections and to determine whether appellee complied with Civ.R. 9(C).

Judgment reversed and cause remanded with instructions.

BROWN, P.J., and FRENCH, J., concur.
