[Cite as *Home S. & L. Co. of Youngstown v. Vandeleur Investors L.L.C.*, 2013-Ohio-1146.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The Home Savings and Loan Company of Youngstown, Ohio,	:	
Plaintiff-Appellee,	:	No. 12AP-277
v.		(C.P.C. No. 09CVE-10-15127)
Vandeleur Investors LLC et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on March 26, 2013

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

Richard L. Goodman Co., L.P.A., and *Richard L. Goodman*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Vandeleur Investors LLC ("Vandeleur"), appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, The Home Savings and Loan Company of Youngstown, Ohio ("Home Savings"), in an action for foreclosure upon real estate.

{¶ 2} In June 2007, Home Savings and Vandeleur entered into a construction loan agreement secured by a mortgage upon a single-family residence in Dublin, Ohio. Home Savings subsequently obtained a second mortgage on the property to secure

additional debt. The later loan and second mortgage are not directly at issue in the present case.

{¶ 3} Vandeleur is closely associated with, and presumably controlled by, a central Ohio real estate developer, James Moro. The construction loan underlying the first mortgage is reflected in a cognovit promissory note executed by Moro on behalf of Vandeleur.

{¶ 4} Vandeleur failed to make payments on the construction loan, and Home Savings filed its complaint in the Franklin County Court of Common Pleas and obtained a confession of judgment under the terms of the cognovit note in the amount of $520,863.56 with interest and fees against both Moro and Vandeleur.

{¶ 5} Moro and Vandeleur subsequently filed a motion for relief from judgment pursuant to Civ.R. 60(B), which was denied by the trial court. Upon appeal to this court, we affirmed the trial court's denial of relief from judgment and thus the underlying judgment in favor of Home Savings on the cognovit note. *Home S. & L. Co. of Youngstown v. Vandeleur Investors, LLC*, 10th Dist. No. 10AP-1180, 2011-Ohio-4765. The Supreme Court of Ohio subsequently declined to accept jurisdiction in the case. 131 Ohio St.3d 1440, 2012-Ohio-331.

{¶ 6} Home Savings then filed its action to foreclose on the subject property pursuant to the terms of the mortgage and the judgment obtained upon the cognovit note. Home Savings filed for summary judgment on September 8, 2011, Vandeleur filed a memorandum contra on November 14, 2011, and the trial court entered summary judgment in favor of Home Savings on February 8, 2012. Vandeleur brings the following sole assignment of error:

> The trial court erred when it granted Plaintiff Summary Judgment in foreclosure against Defendant.

{¶ 7} We initially note that this matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64 (1978).

Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support each element of the stated claims. *Id*. An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994); *Bard v. Soc. Natl. Bank, n.k.a. KeyBank*, 10th Dist. No. 97APE11-1497 (Sept. 10, 1998). Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.*, 106 Ohio App.3d 440, 445 (5th Dist.1995). As such, we have the authority to overrule a trial court's judgment if the record does not support any of the grounds raised by the movant, even if the trial court failed to consider those grounds. *Bard*.

{¶ 8} It is undisputed in the present case that Home Savings holds a valid judgment upon the underlying cognovit note. That judgment has been appealed and affirmed to this court, and further appeal was presented to and rejected by the Supreme Court. That judgment stands as the final law of the case, and it is indisputable that pursuant to that default upon the note, Vandeleur is in default under the terms of the mortgage.

{¶ 9} In opposition to summary judgment, Vandeleur presented Moro's affidavit asserting that Home Savings provoked the default when it refused to disburse funds in connection with the construction of Moro's development project, Avery Place Condominiums. Moro also averred that, given an opportunity for additional discovery, he could establish that Home Savings was the object of a cease-and-desist order entered by federal regulatory authorities addressing accounting practices and reporting requirements for the bank. On appeal, Vandeleur raises these same arguments.

{¶ 10} Vandeleur's arguments regarding the effect of the cease-and-desist order upon the loan were rejected by this court in a companion case, *Home S. & L. Co. of Youngstown v. Avery Place, L.L.C.*, 10th Dist. No. 11AP-1152, 2012-Ohio-6255, application for reconsideration denied, 10th Dist. No. 11AP-1152 (Mar. 14, 2013) (memorandum decision). Those arguments carry no more weight in the present case.

{¶ 11} We now turn to Vandeleur's arguments concerning the extent to which Home Savings should be barred from pursuing foreclosure because it had provoked default on the cognovit note. Vandeleur asserts that by refusing to provide financing in other areas of the project, Home Savings deliberately, or at least improperly, created a cascading insolvency that forced Moro and Vandeleur into default. Such arguments regarding Home Savings' performance under the interwoven loan agreements financing Moro's construction projects are germane only to the default on the note, were raised unsuccessfully in that case, and cannot be re-raised in the subsequent foreclosure where default on the note is a sufficient prerequisite to the subject judgment.

{¶ 12} In summary, and without unduly reiterating arguments that have already been addressed and disposed of by this court, we find that new additional discovery by Moro and Vandeleur would not have permitted them to procure information precluding foreclosure, because judgment on the underlying cognovit note stands as the law of the case and a default event under the mortgage. The arguments regarding Home Savings regulatory infractions and conduct in the interwoven loan agreements financing Moro's construction project are germane only to the default on the note, were raised unsuccessfully in that case, and cannot be re-raised in the subsequent foreclosure where default on the note is a sufficient prerequisite to the subject judgment.

{¶ 13} We accordingly find that the sole assignment of error of appellant Vandeleur Investors LLC does not have merit and is overruled, and the judgment of the Franklin County Court of Common Pleas granting foreclosure to appellee, The Home Savings and Loan Company of Youngstown, Ohio, is affirmed.

Judgment affirmed.

KLATT, P.J., and DORRIAN, J., concur.