[Cite as *CitiMortgage, Inc. v. Guinther*, 2013-Ohio-4014.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

CitiMortgage, Inc. successor by merger to ABN AMRO Mortgage Group, Inc.,	:	
Plaintiff-Appellee,	:	No. 12AP-654
v.		(C.P.C. No. 11CVE-08-10308)
Cindy S. Guinther et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on September 17, 2013

Graydon Head & Ritchey LLP, *John C. Greiner*, and *Harry W. Cappel*, for appellee.

Cindy S. Guinther, pro se.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Cindy S. Guinther ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas granting summary judgment and a decree in foreclosure to plaintiff-appellee, CitiMortgage, Inc., successor by merger to ABN AMRO Mortgage Group, Inc. ("CitiMortgage"). Because (1) appellant failed to present sufficient evidence in response to CitiMortgage's motion for summary judgment to establish that CitiMortgage was not a holder of the note and mortgage, (2) appellant failed to demonstrate any prejudice resulting from her delayed receipt of CitiMortgage's motion for summary judgment, and (3) appellant failed to object to the court's entry granting CitiMortgage summary judgment, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} This case concerns a parcel of residential property located on East Lincoln Avenue in Columbus, Ohio. Appellant notes that the property has been in her family's possession for over 80 years.

{¶ 3} On September 4, 2003, appellant executed a promissory note in favor of Pinnacle Equity Group of Canton, Inc. ("Pinnacle") in the face amount of $64,000. Appellant also granted Pinnacle a mortgage upon the East Lincoln Avenue property to secure the obligation under the note. Pinnacle subsequently assigned the note and mortgage to ABN AMRO Mortgage Group, Inc. ("ABN"). On September 1, 2007, ABN merged into CitiMortgage.

{¶ 4} On August 18, 2011, CitiMortgage filed a complaint for foreclosure, alleging that appellant had defaulted under the terms of the note. Appellant, appearing pro se, filed an answer to the complaint.

{¶ 5} On March 2, 2012, CitiMortgage filed a Civ.R. 56 motion for summary judgment. On March 27, 2012, appellant filed a motion for extension of time to file her response to the motion for summary judgment. In her motion for extension of time, appellant asserted that CitiMortgage sent her a letter on March 5, 2012, which misled her into believing that the court had already entered a judgment against her. The March 5 letter contained a proposed judgment entry drafted by CitiMortgage.

{¶ 6} On April 19, 2012, appellant filed a memorandum contra CitiMortgage's motion for summary judgment. Appellant asserted in her memorandum contra that CitiMortgage had not established ownership over either the note or the mortgage, that Freddie Mac claimed to be the owner of the mortgage, and that CitiMortgage violated the Fair Debt Collection Practices Act ("FDCPA") by sending appellant the proposed judgment entry on March 5, 2012. CitiMortgage filed a memorandum in support of its motion for summary judgment on May 7, 2012, noting that appellant failed to submit appropriate Civ.R. 56 evidentiary material to support her memorandum contra.

{¶ 7} On May 23, 2012, appellant filed an affidavit which incorporated several documents by reference. CitiMortgage filed a motion to strike appellant's affidavit on May 31, 2012.

{¶ 8} On July 30, 2012, the trial court filed an entry granting CitiMortgage's motion for summary judgment and a decree in foreclosure. The court granted appellant's motion for extension of time, but did not expressly rule on the motion to strike. The court found that the allegations in the complaint were true, and that a principal balance of $57,180.86 was due and owing to CitiMortgage on the note with interest at the rate of 6.375 percent per annum from April 1, 2011. The court further found that the note was secured by the mortgage, and that the mortgage was a valid and first lien upon the property. The court ordered that, unless appellant paid the sums found to be due to CitiMortgage within three days of the date of the entry, the equity of redemption would be foreclosed and the real estate sold at a sheriff's sale.

II. ASSIGNMENTS OF ERROR

{¶ 9} Appellant appeals, assigning the following assignments of error:

> I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR CITIMORTGAGE, INC., BY FINDING THAT ALL NECESSARY PARTIES HAVE BEEN PROPERLY SERVED THE PLAINTIFF, CITIMORTGAGE, INC. DID NOT INCLUDE FREDDIE MAC IN THE FORECLOSURE SUMMONS THAT WAS FILED ON 08/18/2011.
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> II. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE PLAINTIFF, CITIMORTGAGE, INC., BECAUSE THE PLAINTIFF DID NOT SEND THE MOTION FOR DEFAULT JUDGMENT, THE MOTION FOR SUMMARY JUDGMENT, AND CRYSTAL BERRY'S AFFIDAVIT THAT WAS FILED ON 03/02/2012, UNTIL 03/20/2012.
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> III. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE PLAINTIFF, CITIMORTGAGE, INC. WHEN THERE STILL EXISTS A GENUINE ISSUE OF MATERIAL FACT, OHIO LAW 56 (C). I HAVE SUBSTANTIAL EVIDENCE THAT FREDDIE MAC IS THE TRUE OWNER OF MY MORTGAGE AND PROMISSORY NOTE, AND THE PLAINTIFF DOES NOT HAVE THE STANDING TO FORECLOSE.
>
> IV. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE PLAINTIFF, CITIMORTGAGE, INC., WHEN THERE IS AN UNCERTAINTY OF THE COSTS. THE

TOTAL AMOUNTS OWED FOR TAXES, INSURANCE, AND OTHER FEES WERE NOT SPECIFIED AS REQUIRED.

{¶ 10} For ease of discussion, we address appellant's first and third assignments of error together.

III. FIRST AND THIRD ASSIGNMENTS OF ERROR—SUMMARY JUDGMENT PROPERLY GRANTED

{¶ 11} Appellant's first assignment of error asserts the trial court erred in granting summary judgment as CitiMortgage failed to serve the complaint on all necessary parties. Appellant's third assignment of error asserts the trial court erred in granting summary judgment as a genuine issue of material fact exists regarding ownership of the note and mortgage. Appellant contends that Freddie Mac is the true owner of her mortgage.

{¶ 12} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. of Commrs.*, 123 Ohio App.3d 158, 162 (4th Dist.1997). "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Bank Corp.*, 122 Ohio App.3d 100, 103 (12th Dist.1997). We must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 13} Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183 (1997).

{¶ 14} When seeking summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bares the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). A moving

party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the nonmoving party has no evidence to prove its case. *Id*. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. *Id*. If the moving party meets this initial burden, then the nonmoving party has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id*.

{¶ 15} In its motion for summary judgment, CitiMortgage explained that it was the holder of the note and mortgage as the successor by merger to ABN. CitiMortgage supported its motion with the affidavit of its document control officer, Crystal Berry.

{¶ 16} Berry explained that through her position at CitiMortgage, she had access to CitiMortgage's business records, including loan documents and loan account records. Berry averred that her affidavit was based on "personal knowledge obtained from [her] personal review of the business records for the loan which is the subject of this action." (Berry Affidavit, ¶ 4.) *See* Civ.R. 56(E); *Cent. Mtge. Co. v. Elia*, 9th Dist. No. 25505, 2011-Ohio-3188, ¶ 9. Berry incorporated by reference into her affidavit the note, the mortgage, the recorded assignment of the mortgage from Pinnacle to ABN, and the certificate reflecting the merger of ABN into CitiMortgage. Berry averred that CitiMortgage was the holder of the note and mortgage, that payments had not been made as required under the terms of the note, that the default on the loan had not been cured, and that CitiMortgage had elected to accelerate the account pursuant to the terms of the loan agreement. Berry averred that a principal balance of $57,180.86 plus interest at the rate of 6.375 percent per annum from April 1, 2011 was due and owing on the note. *See Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14 (noting that "[a]n affidavit stating the loan is in default, is sufficient for purposes of Civ.R. 56, in the absence of evidence controverting those averments").

{¶ 17} The note reflects that appellant executed the note in favor of Pinnacle on September 4, 2003; the note also contains an allonge. The top part of the allonge is signed by an officer at Pinnacle, and states "[w]ithout recourse pay to the order of ABN AMRO Mortgage Group, Inc." (Berry Affidavit, exhibit A.) The bottom part of the allonge

contains an endorsement in blank and is signed by an officer of ABN. The mortgage identifies appellant as the borrower and Pinnacle as the lender, and was recorded at the Franklin County Recorder's Office on September 10, 2003. The assignment of mortgage document demonstrates that Pinnacle transferred the mortgage to ABN, and recorded the transfer at the Franklin County Recorder's Office on September 22, 2003. The certificate of merger states that ABN merged into CitiMortgage effective September 1, 2007. The certificate of merger was filed with the New York Department of State on August 31, 2007.

{¶ 18} "In foreclosure actions, the real party in interest is the current holder of the note and mortgage." *Everhome Mtge. Co. v. Rowland*, 10th Dist. No. 07AP-615, 2008-Ohio-1282, ¶ 12. *See also* R.C. 1301.201(B)(21)(a). " '[W]hen a merger between two companies occurs, one of those companies ceases to exist: "[A] merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former." ' " *Fidelity Tax, L.L.C. v. Hall*, 10th Dist. No. 12AP-923, 2013-Ohio-3165, ¶ 18, quoting *Acordia of Ohio, L.L.C. v. Fishel*, 133 Ohio St.3d 345, 2012-Ohio-2297, ¶ 12, quoting *Morris v. Invest. Life Ins. Co.*, 27 Ohio St.2d 26, 31 (1971). *See also* R.C. 1701.82(A)(1) (holding that, after a merger, "[t]he separate existence of each constituent entity other than the surviving entity in a merger shall cease").

{¶ 19} Following a merger, the surviving company " 'has the ability to enforce * * * agreements as if the resulting company had stepped in the shoes of the absorbed company.' " *Id.*, quoting *Acordia of Ohio, L.L.C. v. Fishel*, 133 Ohio St.3d 356, 2012-Ohio-4648, ¶ 7 ("*Acordia II*"). *See also* R.C. 1701.82(A)(3) (explaining that after a merger the "surviving or new entity possesses * * * every interest in the assets and property, wherever located * * * of each constituent entity, and * * * all obligations belonging to or due to each constituent entity, all of which are vested in the surviving or new entity without further act or deed"); *Id.* at ¶ 18, quoting *Acordia II* (noting that " 'in accordance with R.C. 1701.82(A)(3), * * * every interest in the assets and property of each constituent entity transfer through operation of law to the resulting company postmerger' ").

{¶ 20} When ABN merged into CitiMortgage, CitiMortgage stepped into the shoes of ABN and, by operation of law, assumed ABN's interest in the note and mortgage. Accordingly, the evidence demonstrating the assignment of the note and mortgage to

ABN, and the subsequent merger of ABN into CitiMortgage, was sufficient to carry CitiMortgage's burden to establish that it was the holder of the note and mortgage and thus the real party in interest in this foreclosure action.

{¶ 21} Appellant has never contested that she failed to make the required payments on the note. Rather, appellant's primary contention throughout this litigation has been that Freddie Mac, and not CitiMortgage, is the true owner of the mortgage. In her memorandum contra the motion for summary judgment, appellant supported her assertion that Freddie Mac was the true owner of the mortgage with a letter from CredAbility, a nonprofit credit counseling group. The letter contains the following statement: "Freddie Mac is the owner of your mortgage and was recently notified by your mortgage lender CITIMORTGAGE, INC. that your loan has become delinquent." (Memorandum Contra Motion for Summary Judgment, exhibit C.)

{¶ 22} The letter from CredAbility is not a document of the type listed in Civ.R. 56(C). Civ.R. 56(C) provides that the trial court properly grants summary judgment "if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment." *See Karnofel v. Kmart Corp.*, 11th Dist. No. 2007-T-0036, 2007-Ohio-6939, ¶ 26 (noting that "[a]n unsworn letter is not the type of evidence a trial court may consider under Civ.R. 56"). When a party to summary judgment proceedings wishes to present the court with a document not of the type listed in Civ.R. 56(C) " 'it may be introduced as proper evidentiary material if incorporated by reference in a properly framed affidavit.' " *Hart v. Columbus Dispatch/Dispatch Printing Co.*, 10th Dist. No. 02AP-506, 2002-Ohio-6963, ¶ 18, quoting *Buzzard v. Public Emp. Retirement Sys. of Ohio*, 139 Ohio App.3d 632, 636 (10th Dist.2000).

{¶ 23} Appellant did not incorporate the letter by reference in a properly framed affidavit and, therefore, the trial court could not consider the letter. *See also Karnofel* at ¶ 27 (noting that "the Ohio Rules of Civil Procedure must be followed regardless of whether the litigant is represented by counsel or appears pro se"); *State of Ohio, Crime Victims Reparations Fund v. Pryor*, 10th Dist. No. 07-AP-90, 2007-Ohio-4275. Accordingly, appellant failed to set forth sufficient evidentiary material in her response to

CitiMortgage's motion for summary judgment to create a genuine issue of material fact regarding CitiMortgage's interest in the mortgage.

{¶ 24} One month after filing her memorandum in opposition to the motion for summary judgment, appellant filed an affidavit. CitiMortgage filed a motion to strike the affidavit citing Franklin County Court of Common Pleas Loc.R. 57.02. Loc.R. 57.02 provides that "[a]ll affidavits * * * permitted by Civ. R. 56 (C) in support of or in opposition to the motion for summary judgment shall be filed with the motion or responsive pleading." However, the trial court did not rule on the motion to strike and, after the court filed the entry granting CitiMortgage summary judgment, the motion to strike was deemed denied. *See FitWorks Holdings, L.L.C. v. Pitchford*, 8th Dist. No. 88634, 2007-Ohio-2517, ¶ 9 (noting "[i]t is well-settled that, when a motion is not ruled on, it is deemed to be denied").

{¶ 25} Regardless of any shortcomings in appellant's pro se affidavit, the documents which appellant incorporated into the affidavit did not establish that Freddie Mac had an enforceable interest in the note or mortgage. Appellant incorporated into her affidavit the note, the mortgage, a page from the Freddie Mac Document Custody Procedures Handbook, and a partial release of property application which appellant received from CitiMortgage. Appellant did not incorporate the CredAbility letter into her affidavit.

{¶ 26} On the note and mortgage, appellant circled statements on each document indicating that the documents were Fannie Mae/Freddie Mac uniform instruments. On the page from the Freddie Mac handbook, appellant circled a section entitled "Endorsement Chains." (Appellant's Affidavit, exhibit C.) The section explains that a party selling a note to Freddie Mac "must endorse each Note in blank." (Appellant's Affidavit, exhibit C.) Appellant asserted in her affidavit that ABN put the blank endorsement on the note "when they sold it to Freddie Mac, as Freddie Mac requires an Endorsement in Blank on the Promissory Note when it buys a loan." (Appellant's Affidavit, 3.)

{¶ 27} Appellant also asserted in her affidavit that CitiMortgage stated in the partial release of property application "that Freddie Mac [was] the owner of [her] Mortgage." (Appellant's Affidavit, 2.) The letter accompanying the application indicates

that CitiMortgage was sending the letter "in response to [appellant's] inquiry requesting to have a portion of [her] property released from [her] mortgage." (Appellant's Affidavit, exhibit D.) The letter explains the requirements for obtaining a release and contains blank forms, including a Freddie Mac Form 1125. The Freddie Mac form states it is an "application for partial release or easement," and asks the borrower to fill in the Freddie Mac loan number.

{¶ 28} These documents failed to establish that Freddie Mac held any interest in the note or mortgage. The uniform form designation indicates only that the documents were a certain kind of form. As any party may utilize a blank endorsement to transfer an instrument, the blank endorsement does not indicate that Freddie Mac had an interest in the note. Finally, the partial release application demonstrates that appellant contacted CitiMortgage to ask CitiMortgage to release the mortgage, thus indicating that CitiMortgage owned the mortgage and had the authority to release the mortgage. Moreover, the blank standard form asking the borrower to fill in the Freddie Mac loan number does not establish that Freddie Mac had any ownership interest in the mortgage. Accordingly, appellant's affidavit did not present sufficient evidence to create a genuine issue of material fact regarding ownership of the mortgage.

{¶ 29} In her memorandum contra the motion for summary judgment, appellant also asserted that Berry's averments were not trustworthy, as the allonge on the note attached to the complaint differed from the allonge on the note attached to the motion for summary judgment. While the allonge attached to the complaint contained only the special endorsement transferring the note to ABN, the allonge attached to the motion for summary judgment contained both the special endorsement to ABN and a blank endorsement.

{¶ 30} The Supreme Court of Ohio recently held that, if a party seeking to foreclose on a mortgage fails to establish "an interest in the note or mortgage at the time it filed suit, it [has] no standing to invoke the jurisdiction of the common pleas court." *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶ 28. Here, however, CitiMortgage established its ownership interest in the note and mortgage at the time it filed suit, as it attached the necessary documents establishing that it had assumed ABN's interest in the note and mortgage following the merger. Accordingly, the

blank endorsement was not necessary to establish CitiMortgage's ownership interest in the note. *See* R.C. 1303.25(B) (regarding the effect of blank endorsement).

{¶ 31} Although appellant continues to assert on appeal that Freddie Mac owns her mortgage, she acknowledges that the "recorded chain of title stops at ABN." (Appellant's brief, 8.) Appellant also notes that she has "never denied, or disputed the legal merger of ABN * * * with CitiMortgage in 2007." (Appellant's reply brief, 5.) Appellant asserts, however, that ABN did not own her mortgage in 2007, as she contends that Freddie Mac acquired the mortgage in November 2003.

{¶ 32} Appellant has attached a print out from a Freddie Mac webpage to her appellate brief which states that Freddie Mac acquired the mortgage on November 12, 2003. Appellant did not file this document in the court below and accordingly we may not consider the print out in determining the merits of this appeal. *See* App.R. 9(A)(1); *Cashlink, L.L.C. v. Mosin, Inc.*, 10th Dist. No. 12AP-395, 2012-Ohio-5906, ¶ 8 (noting that "[a]n exhibit merely appended to an appellate brief is not part of the record, and we may not consider it in determining the appeal").

{¶ 33} Appellant failed to present sufficient evidence in response to CitiMortgage's motion for summary judgment to establish a genuine issue of material fact regarding whether ABN owned the mortgage in 2007 when it merged into CitiMortgage. As appellant has not contested Berry's averment that appellant defaulted under the terms of the note, the trial court properly granted CitiMortgage's motion for summary judgment.

{¶ 34} Appellant's first assignment of error asserts the trial court erred in granting CitiMortgage's motion for summary judgment as CitiMortgage failed to serve the complaint on Freddie Mac. However, as appellant failed to present evidence demonstrating that Freddie Mac held an interest in the mortgage, appellant failed to establish that Freddie Mac was a necessary party to this action. *See Davet v. Sensenbrenner*, 8th Dist. No. 98636, 2012-Ohio-5898, ¶ 19, citing *State ex rel. Squire v. Kofron*, 58 Ohio App. 65 (8th Dist.1937) (noting that "[a]ll parties who have any title, right, or interest in real estate, are necessary parties in a foreclosure action"). Accordingly, there is no discernable error resulting from CitiMortgage's failure to serve Freddie Mac with a copy of the complaint.

{¶ 35} Based on the foregoing, appellant's first and third assignments of error are overruled.

IV. SECOND ASSIGNMENT OF ERROR—SERVICE

{¶ 36} Appellant's second assignment of error asserts the trial court erred in granting summary judgment, as appellant did not receive a copy of CitiMortgage's March 2, 2012 motion for summary judgment until March 20, 2012.

{¶ 37} Appellant notes that she received CitiMortgage's proposed entry granting summary judgment and decree in foreclosure on March 5, 2012. Appellant explains that, after receiving the proposed entry, her friend visited the clerk of court's website and discovered that CitiMortgage had filed the motion for summary judgment. Appellant's friend informed the clerk's office on March 19, 2012 that appellant had not yet received the motion for summary judgment. On March 20, 2012, CitiMortgage's counsel sent appellant a letter and a copy of the motion for summary judgment. On March 27, 2012, appellant filed a motion for extension of time and, on April 19, 2012, appellant filed her memorandum contra the motion for summary judgment.

{¶ 38} Appellant contends that the March 5, 2012 letter containing the proposed judgment entry demonstrates CitiMortgage's "intent to cheat [her] out of the chance to respond to the Motion for Summary Judgment, because the 17-day allotted time period for [her] response would have expired, and this Entry Judgment letter was a good distraction." (Appellant's brief, 5.) Appellant asserts that CitiMortgage's attorney "should have confirmed that [appellant] received" the motion for summary judgment after it was filed. (Appellant's brief, 4.)

{¶ 39} Under Civ.R. 5(B)(2)(c), a party may be served with a motion by mailing it to the person's last known address by United States mail. *Edney v. Life Ambulance Serv., Inc.*, 10th Dist. No. 11AP-1090, 2012-Ohio-4305, ¶ 7. If this method of service is used, service is complete upon mailing. Civ.R. 5(B)(2)(c). "Where a party follows the Ohio Civil Rules of Procedure, courts presume proper service unless the presumption is rebutted with sufficient evidence." *Paasewe v. Wendy Thomas 5 Ltd.*, 10th Dist. No. 09AP-510, 2009-Ohio-6852, ¶ 22. The presumption of proper service " 'may only be rebutted by producing sufficient evidence, such as an affidavit, that the responding party never

received service.' " *White v. Stotts*, 3d Dist. No. 1-10-44, 2010-Ohio-4827, ¶ 45, quoting *JP Morgan Chase Bank v. Ritchey*, 11th Dist. No. 2006-L-247, 2007-Ohio-4225, ¶ 40.

{¶ 40} CitiMortgage's motion for summary judgment contains a certificate of service signed by CitiMortgage's counsel attesting that a copy of the motion was sent to appellant's address by United States mail. Appellant asserted in her affidavit that she did not receive the motion for summary judgment until March 20, 2012. Thus, although appellant argues that she did not receive the motion shortly after it was filed, she expressly acknowledges that she received the motion on March 20, 2012.

{¶ 41} "Absent any indication of material prejudice, error is harmless and cannot serve as a basis for reversal." *Gill v. Grafton Corr. Inst.*, 10th Dist. No. 10AP-1094, 2011-Ohio-4251, ¶ 30. The trial court granted appellant's motion for extension of time, and appellant was able to file her memorandum contra CitiMortgage's motion for summary judgment, which the court considered in its entry granting CitiMortgage's motion for summary judgment. As such, appellant did not suffer any prejudice from the delayed service of the motion for summary judgment. Similarly, although appellant contends that CitiMortgage sent the proposed judgment entry in an effort to cheat her out of a chance to respond to the motion for summary judgment, appellant successfully responded to the motion.

{¶ 42} Appellant makes an additional argument under her second assignment of error regarding the FDCPA. Appellant's second assignment of error, however, concerns only the delayed service of the motion for summary judgment. 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, this court rules on assignments of error only, and will not address mere arguments." *Ellinger v. Ho*, 10th Dist. No. 08AP-1079, 2010-Ohio-553, ¶ 70. Therefore, because appellant failed to set forth an assignment of error regarding her claimed errors under the FDCPA, we need not address this argument. Nevertheless, in the interest of justice, we will briefly address appellant's argument.

{¶ 43} Appellant contends that by sending her the letter containing the proposed judgment entry CitiMortgage violated the FDCPA. Appellant specifically relies on 15

U.S.C. 1692e, which prohibits a debt collector from using any false, deceptive, or misleading representation or means in connection with the collection of any debt.

{¶ 44} "Application of the FDCPA, however, is limited to consumer debt." *Bank of New York v. Barclay*, 10th Dist. No. 03AP-844, 2004-Ohio-1217, ¶ 19. *See* 15 U.S.C. 1692a(5). Moreover, "[e]ven where the underlying debt is consumer debt, the FDCPA applies only to 'debt collectors' as defined, and not to actual creditors or bonafide assignees." *Id.* at ¶ 20. A "debt collector" under the FDCPA includes "any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). Thus, the FDCPA "is directed at independent debt collectors and not creditors attempting to collect on their own debts." *Bank of New York Trustee v. Damnsel,* 10th Dist. No. 00AP-46, 2006-Ohio-4071, ¶ 13.

{¶ 45} By sending the letter and proposed judgment entry to appellant, CitiMortgage was not attempting to collect a debt owed to another. Rather, as a result of the merger of ABN into CitiMortgage, CitiMortgage was, if anything, attempting to collect its own debt. Moreover, although appellant cited 15 U.S.C. 1692e in her memorandum contra CitiMortgage's motion for summary judgment, appellant did not allege that the underlying debt was consumer debt, which was subject to the provisions of the FDCPA. As such, appellant failed to place sufficient evidentiary materials before the trial court to create a genuine issue of material fact regarding any violation of the FDCPA.

{¶ 46} Based on the foregoing, appellant's second assignment of error is overruled.

V. FOURTH ASSIGNMENT OF ERROR—CERTAINTY OF JUDGMENT

{¶ 47} Appellant's fourth assignment of error asserts the trial court's judgment entry is void as it does not present appellant with a definite sum. In its entry granting summary judgment and decree in foreclosure, the court stated that appellant owed a principal balance of $57,180.86 on the note, with interest at the rate of 6.375 percent per annum from April 1, 2011, "and as may be adjusted pursuant to the terms of the note, together with advances for taxes, insurance and otherwise expended, plus costs." (July 30, 2012 Entry, 2.) Relying on *NovaStar Mtge., Inc. v. Akins*, 11th Dist. No. 2007-T-0111, 2008-Ohio-6055, appellant contends that the court's failure to specify the amount due

and owing for advances for taxes, insurance, and other costs, renders the judgment entry void.

{¶ 48} In *NovaStar*, the trial court granted NovaStar's motion for summary judgment and "issued an 'agreed judgment entry and decree of foreclosure.' " *Id*. at ¶ 12. Although captioned an agreed judgment entry, the mortgagor's counsel did not sign the entry, "and specifically responded to the proposed judgment entry with a memo to NovaStar's counsel, which stated, in part, 'the judgment entry you propose is wholly inappropriate and *you do* ***not*** *have permission to sign my consent*.' " (Emphasis sic.) *Id*. at fn. 4. The court signed the agreed judgment entry and entered judgment in favor of the mortgagee in the amount of $80,619.43, plus interest at the rate of 9.1 percent, "plus late charges, costs and advances, all as provided in the Note and Mortgage." *Id*. at ¶ 12. The court further ordered the mortgagor to pay NovaStar for "advances made on behalf of the Property for real estate taxes, insurance premiums and property protection and maintenance by [NovaStar.]" *Id*. at ¶ 48.

{¶ 49} Regarding the advances made for real estate taxes and insurance premiums, the court in *NovaStar* noted that the judgment entry did not provide a sum for these advances, and that the record did not contain any evidence indicating that NovaStar had made such advances. *Id*. at ¶ 50. The court further noted that there was nothing in the record documenting NovaStar's costs and expenses, or any of the funds NovaStar expended for property protection. *Id*. at ¶ 53, 56. As such, the court concluded the judgment entry was "vague and uncertain, because it does not permit [the mortgagor] to determine her obligations as they existed at the time of the decree with reasonable certainty." *Id*. at ¶ 57. Accordingly, the court found the judgment entry " 'void for uncertainty.' " *Id*., quoting *Short v. Short*, 6th Dist. No. F-02-005, 2002-Ohio-2290, ¶ 10.

{¶ 50} The Eleventh District later overruled *NovaStar* to the extent it held the judgment entry void, as the " judgment entry should have been deemed erroneous and voidable, but not 'void for uncertainty.' " *Geauga Sav. Bank v. McGinnis*, 11th Dist. No. 2010-T-0052, 2010-Ohio-6247, ¶ 18. In *Geauga Sav. Bank*, the court found *NovaStar* inapplicable as the appellant, a junior lien holder bank, had "failed to object to the * * * judgment entry, although the record indicate[d] that it was submitted to [the bank]," while in *NovaStar*, the mortgagor did voice an objection to the proposed entry. *Id*. at ¶ 15.

Similarly, in *HSBC Bank USA Natl. Assn. as Trustee v. Lampron*, 5th Dist. No. 10-CA-5, 2010-Ohio-5088, the court declined to apply the holding of *NovaStar* where the "[a]ppellant did not object to the court's failure to itemize the costs and expenses, and did not bring the matter to the court's attention." *Id.* at ¶ 19. *Compare First Horizon Home Loans v. Sims*, 12th Dist. No. CA2009-08-117, 2010-Ohio-847, ¶ 25 (finding the trial court's order granting summary judgment and ordering decree of foreclosure was not unduly vague, although the entry did not include amounts for late fees, advances, or costs, the court concluded that these amounts were "continuously accruing through the date of the sheriff's sale" and thus it "would be impractical to require appellee to state with specificity the total amount due for the additional charges in its affidavit in support of summary judgment").

{¶ 51} Unlike the facts in *NovaStar*, appellant did not voice an objection to the proposed judgment entry, which the court ultimately adopted as its own. Appellant never signed the proposed entry, and thus never indicated whether she accepted or rejected the wording of the entry. *See* Loc.R. 25.01. As appellant failed to object to the judgment entry, and as CitiMortgage may continue to incur costs and advance funds for taxes and insurance through the date of the sheriff's sale, we cannot find that the trial court's judgment entry was voidable for uncertainty.

{¶ 52} Based on the foregoing, appellant's fourth assignment of error is overruled.

VI. CONCLUSION

{¶ 53} Having overruled appellant's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and BROWN, JJ., concur.
