

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Fifth Third Mortgage Company,	:	
Plaintiff-Appellant,	:	
v.	:	No. 15AP-394 (C.P.C. No. 13CVH-04-4804)
Jeffrey C. Berman et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on October 27, 2015

*Graydon Head & Ritchey LLP, Harry J. Finke, IV, and
Harry W. Cappel, for appellant.*

Jeffrey C. Berman, pro se.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Plaintiff-appellant, Fifth Third Mortgage Company, appeals from a judgment of the Franklin County Court of Common Pleas in favor of defendant-appellee, Jeffrey C. Berman. For the reasons that follow, we reverse the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On August 12, 2004, appellee executed a promissory note ("note") in the sum of \$132,500 in favor of appellant and a first mortgage on real property as security for the borrowed sum ("mortgage"). The note contains the following provision regarding default:

6(C) Notice of Default – If I am in default, the Note Holder may send me a written notice telling me that if I do not pay

the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(Note, 1.)

{¶ 3} The mortgage contains a similar provision that reads as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument * * *. The notice shall specify: * * * (c) *a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured*; and (d) *that failure [to] cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property.* * * * *If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding.*

(Emphasis added.) (Mortgage, 13.)

{¶ 4} On April 8, 2013, appellant sent appellee a notice of default and acceleration pursuant to the above-cited provision. Twenty-two days later, on April 30, 2013, appellant commenced a foreclosure action in the Franklin County Court of Common Pleas against appellee and several other defendants who are not relevant to this case. The complaint sought judgment against appellee on the note in the amount of \$124,175.86, plus interest at 6.125 percent per annum from May 1, 2009. Paragraph three of the complaint alleges: "Plaintiff has fulfilled all applicable conditions precedent." On June 4, 2014, appellant filed an amended complaint setting forth essentially the same operative facts as the original complaint.

{¶ 5} In his answer to the amended complaint, appellee denied the allegations in paragraph three of the amended complaint and asserted defenses based on the failure of "appropriate notice of acceleration" and failure of "appropriate notice of default." (Answer, 2.) On September 11, 2014, appellant filed a motion for summary judgment, pursuant to Civ.R. 56, supported by the affidavit of Melissa Ragiel, an "Affidavit Analyst"

for appellant. Attached thereto as exhibit "C" is a copy of the April 8, 2013 notice that was sent to appellee regarding default. On November 20, 2014, appellee filed a memorandum in opposition supported by his own affidavit. On December 25, 2014, appellee filed a motion to dismiss "pursuant to Civ.R. 9(C)" seeking dismissal of the action due to appellant's failure to satisfy a condition precedent, specifically, appellant's failure to provide appellee with the full 30 days to cure the default before accelerating the sums secured by the note and seeking foreclosure by judicial proceedings.

{¶ 6} On March 11, 2015, the trial court issued a "Decision and Entry" denying appellant's motion for summary judgment and denying appellee's motion to dismiss.¹ The trial court proceeded to grant summary judgment to appellee *sua sponte* based on the undisputed fact that appellant failed to provide appellee with the full 30-day notice and opportunity to cure the default before accelerating the sums secured by the note and seeking foreclosure by judicial proceedings. The decision and entry specifically states: "The Court **GRANTS** summary judgment in favor of Defendant Jeffrey C. Berman and hereby dismisses this case **WITH PREJUDICE**." (Emphasis sic.) (Decision and Entry, 6.)

{¶ 7} Appellant filed a timely notice of appeal to this court from the judgment of the trial court.

II. ASSIGNMENT OF ERROR

{¶ 8} Appellant assigns the following error:

The trial court erred in dismissing this action with prejudice, after *sua sponte* entering summary judgment in favor of appellee, when a dismissal without prejudice would have been the appropriate course of action under the facts of this case.

(Emphasis sic.)

III. LEGAL ANALYSIS

{¶ 9} As a preliminary matter, we note that appellant's assignment of error does not allege error on the part of the trial court in granting summary judgment in favor of appellee. Rather, the assignment of error only challenges the dismissal of the case with

¹ The trial court determined that "Civ.R. 9(C) cannot be used as a basis for a Motion to Dismiss." (Decision and Entry, 2.)

prejudice. Nevertheless, appellant argues in its merit brief that the trial court erred when it sua sponte granted summary judgment in favor of appellee without providing it with notice of its intention to do so.

{¶ 10} Pursuant to App.R. 12(A)(1)(b), an appellate court must "[d]etermine [an] appeal on its merits on the assignments of error set forth in the briefs under App.R. 16." "[T]his court rules on assignments of error only, and will not address mere arguments." *Huffer v. Brown*, 10th Dist. No. 12AP-1086, 2013-Ohio-4384, ¶ 11, quoting *Ellinger v. Ho*, 10th Dist. No. 08AP-1079, 2010-Ohio-553, ¶ 70, citing *In re Estate of Taris*, 10th Dist. No. 04AP-1264, 2005-Ohio-1516, ¶ 5. Accordingly, we will address only the argument preserved in appellant's assignment of error. *Id.* See also *Bonn v. Bonn*, 10th Dist. No. 12AP-1047, 2013-Ohio-2313, ¶ 9.²

{¶ 11} As noted above, appellant's sole assignment of error argues that, in granting summary judgment to appellee, the trial court erred by adding language to the judgment entry dismissing the action "with prejudice." We agree.

{¶ 12} The term "with prejudice," when applied to a judgment of dismissal, "is as conclusive of rights of parties as if action had been prosecuted to final adjudication adverse to the plaintiff." *Webb v. Webb*, 10th Dist. No. 85AP-343 (Nov. 19, 1985), quoting Black's Law Dictionary (5 Ed.Rev.1979). The word "merits," as used in speaking of the determination of an action on the merits, "embraces the consideration of substance, not of form; of legal rights, not of mere defects of procedure or practice or the technicalities thereof." *Cero Realty Corp. v. Am. Mfrs. Mut. Ins. Co.*, 171 Ohio St. 82 (1960), paragraph two of the syllabus.

{¶ 13} As a general rule, "summary judgment, pursuant to Civ.R. 56, is an adjudication on the merits that operates as a dismissal with prejudice." *Natl. Crime Reporting, Inc. v. McCord & Akamine, L.L.P.*, 177 Ohio App.3d 551, 2008-Ohio-3950, ¶ 7

² We note that the Supreme Court of Ohio has held "[o]nce a party files a motion for summary judgment, a trial court may grant summary judgment for a non-moving party, despite that party's failure to file its own motion for summary judgment, if: (1) all relevant evidence is before the trial court, (2) no genuine issue of material fact exists, and (3) the non-moving party is entitled to judgment as a matter of law." *Columbus v. Bahgat*, 10th Dist. No. 10AP-943, 2011-Ohio-3315, ¶ 11, citing *Todd Dev. Co. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, ¶ 16-17. See also *State ex rel. J.J. Detweiler Ents., Inc. v. Warner*, 103 Ohio St.3d 99, 2004-Ohio-4659, ¶ 13; *State ex rel. Cuyahoga Cty. Hosp. v. Ohio Bur. of Workers' Comp.*, 27 Ohio St.3d 25, 28 (1986); *Byers v. Robinson*, 10th Dist. No. 08AP-204, 2008-Ohio-4833, ¶ 36; *Charvat v. Dish TV Now, Inc.*, 10th Dist. No. 07AP-759, 2008-Ohio-2019, ¶ 13.

(10th Dist.), citing *Stuller v. Price*, 10th Dist. No. 02AP-29, 2003-Ohio-583, ¶ 23. However, where summary judgment is based on a procedural matter, such as a lack of capacity to sue, it is not an adjudication on the merits. *Id.* Furthermore, it has been held that a dismissal for failing to meet a condition precedent to filing suit operates as a decision on the merits only if the aggrieved party is permanently foreclosed from fulfilling the condition. *Mitchell v. Chapman*, 343 F.3d 811, 821 (6th Cir.2003), *cert. denied*, 542 U.S. 937 (2004); *Jones v. Franklin*, 468 Fed.Appx. 557, 566 (6th Cir.2012). *See also* Restatement of the Law 2d, Judgments, Section 20(2) (1982) ("A valid and final personal judgment for the defendant, which rests * * * on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after * * * the precondition has been satisfied, unless a second action is precluded by operation of the substantive law.").

{¶ 14} In *Natl. Crime Reporting*, the trial court held that the plaintiff lacked a present capacity to sue the defendants in Ohio and granted defendants' motion for summary judgment; yet, the trial court's judgment entry "specifically dismissed all of the plaintiff's claims with prejudice." *Id.* at ¶ 7. In reversing the judgment of the trial court, this court stated:

[T]he trial court's summary judgment in the present case was based upon a procedural matter and was not an adjudication on the merits. *As the judgment was not upon the merits, the trial court should have dismissed National's action without prejudice.* Having dismissed the action with prejudice, the trial court erred. Thus, National's assignment of error must be sustained.

The judgment of the Franklin County Municipal Court is reversed, and this cause is remanded to that court to enter a new judgment dismissing the action without prejudice.

(Emphasis added.) *Id.* at ¶ 12-13.

{¶ 15} Here, the trial court based its decision to sua sponte grant summary judgment for appellee on appellant's failure to satisfy a condition precedent to accelerating the sums secured by the note and seeking foreclosure by judicial proceedings. In doing so, the trial court made no findings regarding the substantive allegations of appellant's complaint in foreclosure and drew no conclusion regarding appellee's liability

under the note and mortgage. In the limited context of deciding whether the trial court erred by dismissing appellant's case with prejudice, we find that the trial court's judgment does not constitute a determination on the merits so as to permit a dismissal with prejudice. Because the judgment entry "dismisses [the] case **WITH PREJUDICE**," it purports to be a final disposition on the merits of appellant's claim against appellee under the note and mortgage. (Emphasis sic.) (Decision and Entry, 6.) Accordingly, the judgment entry contains an error. *Id.*

{¶ 16} Pursuant to the rule of law in *Natl. Crime Reporting*, we must reverse the judgment of the trial court and remand the case to the trial court to issue a new judgment entry dismissing the action without prejudice. *See also L & W Supply Co., Inc. v. Constr. One, Inc.*, 3d Dist. No. 5-99-55 (Mar. 31, 2000) (trial court erred by dismissing Illinois corporation's claim for breach of contract, with prejudice, where the determination that the corporation lacked capacity to maintain an action in Ohio did not involve consideration of the substance of the case and was not "on the merits").³

{¶ 17} For the foregoing reasons, we sustain appellant's assignment of error.

IV. CONCLUSION

{¶ 18} Having sustained appellant's sole assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas and remand the case for the court to issue a new judgment entry dismissing the action without prejudice.

*Judgment reversed;
cause remanded with instructions.*

LUPER SCHUSTER and BRUNNER, JJ., concur.

³ Whether a judgment in this case will have a preclusive affect on a subsequent judicial proceeding brought by appellant against appellee under the note and mortgage is not a question that is properly before this court in this appeal, and we decline to address it herein.