

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Green Tree Servicing LLC,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 15AP-761
v.	:	(C.P.C. No. 14CV-8173)
	:	
Tamela Y. Graul,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 28, 2016

On brief: *The Law Offices of John D. Clunk Co., L.P.A., Jason A. Whitacre, and Laura C. Infante*, for appellee.
Argued: *Jason A. Whitacre*.

On brief: *The Legal Aid Society of Columbus and Scott E. Torguson*, for appellant. **Argued:** *Scott E. Torguson*.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Defendant-appellant, Tamela Y. Graul, appeals from a judgment of the Franklin County Court of Common Pleas, which entered a judgment of foreclosure and granted the motion for summary judgment filed by plaintiff-appellee, Green Tree Servicing LLC. For the following reasons, we reverse the trial court judgment and remand the case to the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On August 6, 2014, appellee filed a complaint in foreclosure naming appellant as an owner of record of a residential property allegedly in default in payment on the promissory note secured by a recorded mortgage. According to the clerk's original

case schedule, the dispositive motions for the case were due March 13, 2015, the cut-off for discovery was set for March 27, 2015, decisions on motions would be issued on July 8, 2015, and the trial assignment was slated for August 5, 2015.

{¶ 3} On September 9, 2014, appellant filed an answer and a motion to stay further proceedings to pursue mediation, which the trial court granted on September 10, 2014. The mediation outcome report dated November 21, 2014 indicates that the parties did not resolve the dispute.

{¶ 4} On March 19, 2015, appellee filed a motion for summary judgment against appellant and a motion for default judgment against the remaining defendants who were in default of an answer or other pleading. On April 3, 2015, appellant filed with the trial court a motion for a continuance, pursuant to Civ.R. 56(F), asking the court to allow a 60-day extension to respond to the motion for summary judgment in order to permit appellant to depose a representative of appellee. The trial court granted the motion, stayed the proceedings, and indicated June 1, 2015 as appellant's new deadline to file her response to the motion for summary judgment. On May 13, 2015, appellant filed a notice of taking of deposition of appellee's designated representative stating that the deposition would occur on May 15, 2015 and cover the following topics: (1) the oral agreement for a loan modification, (2) the chain of title leading to plaintiff's alleged status as the party with standing to bring this action, (3) plaintiff's possession of the original note, (4) the Consumer Financial Protection Bureau's ("CFPB") action against plaintiff for its servicing practices, and (5) all issues covered in the affidavit attached to plaintiff's motion for summary judgment. (Notice of Taking of Depo. at 1.)

{¶ 5} One day later, on May 14, 2015, appellee filed a motion to delay consideration of its motion for summary judgment and motion for default judgment, "in accordance to the rules and regulations of the [CFPB's], to further attempt to try and resolve the case." (Pl.'s Mot. to Delay Consideration at 1.) The trial court granted appellee's motion on May 18, 2015 with an order which stated: "[appellee's] Motion for Summary Judgment and Motion for Default Judgment will be held in abeyance until further order of this Court." (Order to Delay Consideration of Mot. for Summ. Jgmt. and Mot. for Default Jgmt. at 1.)

{¶ 6} The same day that the trial court granted appellee's motion to delay consideration of its motions, appellee filed a motion for a protective order under Civ.R. 26(C) requesting the court to allow appellee's representative to not provide testimony at the deposition regarding the CFPB's action against appellee concerning its servicing practices. In the motion, appellee additionally requested that "if [appellant] re-notices a deposition" of appellee, that the trial court order the deposition to occur under certain specified conditions. (Mot. for Protc. Order at 4.) On May 29, 2015, appellant filed a memo regarding the motion for a protective order, stating that appellee had supplied her with documents which eliminated the need for her to depose the representative regarding the lawsuit between appellee and the CFPB and requested that appellee's motion regarding the protective order be denied as moot.

{¶ 7} On July 8, 2015, the trial court granted appellee's motion for summary judgment against appellant and motion for default judgment against the remaining defendants, and entered an order to foreclose on the residence. Appellant filed a timely appeal to this court.

II. ASSIGNMENT OF ERROR

{¶ 8} Appellant assigns the following assignment as error:

The Trial Court Erred By Ruling On Green Tree's Motion For Summary Judgment Without Giving Notice That The Motion Was Again Ripe For Review.

III. DISCUSSION

{¶ 9} Appellant contends that the trial court erred by ruling on the motion for summary judgment while the motion for summary judgment was held "in abeyance" as additional settlement talks proceeded and without issuing a "further order" pursuant to its own May 15, 2015 order. (Order to Delay Consideration of Mot. for Summ. Jgmt. and Mot. for Default Jgmt. at 1.) Doing so, according to appellant, violates her procedural due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution.

{¶ 10} Appellee argues in response that the trial court's ruling on the motion for summary judgment did not violate appellant's due process rights as the trial court followed Franklin Co. C.P.R. 21.01 in initially allowing a 14-day period for appellant to

respond to the pending motion and granted her additional time to respond to the summary judgment motion by setting a June 1, 2015 deadline. Furthermore, appellee argues that the intervening May 15, 2015 order had no effect on the June 1st deadline for three reasons: (1) appellee only requested that the trial court delay consideration of or a decision on the motion, (2) the trial court never ruled that appellant was afforded more time to respond to the motion, and (3) appellant did not request a change in the case schedule.

{¶ 11} "[A] trial court must afford a non-moving party time for a full and fair response before ruling on a motion for summary judgment." *Union Sav. Bank v. Schaefer*, 10th Dist. No. 13AP-222, 2013-Ohio-5704, ¶ 18, *discretionary appeal not allowed*, 138 Ohio St.3d 1495, 2014-Ohio-2012, citing *Cheap Escape Co., Inc. v. Tri-State Constr., L.L.C.*, 173 Ohio App.3d 683, 2007-Ohio-6185, ¶ 30 (10th Dist.), and *Hooten v. Safe Auto Ins. Co.*, 100 Ohio St.3d 8, 2003-Ohio-4829, ¶ 40. A trial court's failure to do so implicates procedural due process rights of the nonmoving party and constitutes reversible error. *Schaefer* at ¶ 18-20; *Cheap Escape Co.* at ¶ 37; *Village of Harbor View v. Jones*, 10th Dist. No. 10AP-356, 2010-Ohio-6533, ¶ 37 ("As applied to summary judgment, procedural due process requires that a non-moving party have an opportunity to respond before the adjudication of a motion for summary judgment.").

{¶ 12} Generally, a trial court's local rules establish the timing for a nonmoving party to respond to a motion for summary judgment that comports with due process. *Cheap Escape Co.* at ¶ 30; *Schaefer* at ¶ 18-20. Concomitantly, a trial court does not commit an error by ruling on motions for summary judgment without considering memoranda and affidavits filed out of rule or where a party fails to respond within the parameters of the rule. *Prohazka v. Ohio State Univ. Bd. of Trustees*, 10th Dist. No. 03AP-616, ¶ 28 (Mar. 30, 2004), citing *Ayers v. Demas*, 10th Dist. No. 95APE10-1296 (Mar. 28, 1996); *Jones* at ¶ 37.

{¶ 13} However, the date a party must respond to a motion for summary judgment under the local rule is not fixed but may be altered or extended in certain circumstances. *Hooten* at ¶ 41 (discussing extensions under Civ.R. 56(F), former Franklin Co. C.P.R. 14(B), or pursuant to a general motion by the opposing party for an extension of time). *See also* Franklin Co. C.P.R. 39.04 ("When a case is stayed, the original case schedule

shall be stayed."). In addition, where a party files a motion for summary judgment and, prior to the time a response is due, a subsequent motion is filed which affects whether that motion for summary judgment may be considered, the trial court must resolve the intervening motion and allow additional time to respond to the motion for summary judgment consistent with local rules and due process. *See, e.g., Schaefer* at ¶ 16-20 (finding trial court erred in not allowing nonmoving party 14 days to respond to a motion for summary judgment after denying nonmoving party's motion to strike); *Cheap Escape* at ¶ 34.

{¶ 14} Here, appellee filed a motion for summary judgment on March 19, 2015. The trial court granted appellant's motion for a continuance pursuant to Civ.R. 56(F), stayed the proceedings, and indicated June 1, 2015 as appellant's new deadline to file her response to the motion for summary judgment. However, prior to the June 1st deadline and one day after appellant filed her notice of taking of deposition, appellee filed a motion to delay consideration of its motion for summary judgment to attempt to resolve the case with appellant pursuant to the rules and regulations of the CFPB. The trial court granted that motion, and the plain language of the trial court's May 18, 2015 order states that the motion for summary judgment itself will be held in abeyance until further order of the court.

{¶ 15} After the trial court's May 18, 2015 order, the record only reflects appellant's memorandum regarding the protective order. The memorandum was in response to a motion filed by appellee on the same day as the trial court's order to hold the motion for summary judgment in abeyance. The memorandum does not address the status of the parties' efforts to resolve the case, pursuant to CFPB rules, but, instead, generically states certain documents had been provided by appellee at some point in the past, which rendered one of the discovery issues on the case moot. The record does not reveal a "further order of the court" between the trial court's May 18, 2015 order and its July 8, 2015 decision on the merits of the summary judgment motion.

{¶ 16} "A court speaks only through its journal entries. [T]he entry must reflect the trial court's action in clear and succinct terms." *Infinite Sec. Solutions, L.L.C. v. Karam Properties II*, 143 Ohio St.3d 346, 2015-Ohio-1101, ¶ 29, citing *State ex rel. Worcester v. Donnellon*, 49 Ohio St.3d 117, 118 (1990). It is self-evident that a court

should follow the plain language of its own orders. Our review of the record shows that the trial court ordered the motion for summary judgment to be held in abeyance until further order of the court in order to allow the parties to attempt to resolve the case. The record does not show that the parties' attempt to resolve the case was complete or that the trial court otherwise provided a further order regarding the motion for summary judgment. On these facts, regardless of outstanding discovery, we agree with appellant that the trial court erred in deciding the merits of the motion for summary judgment before following the language of its prior order.

{¶ 17} Accordingly, appellant's sole assignment of error is sustained.

IV. CONCLUSION

{¶ 18} Having sustained appellant's sole assignment of error, we hereby reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to the trial court for further proceedings consistent with this decision.

*Judgment reversed;
cause remanded.*

DORRIAN, P.J., and LUPER SCHUSTER, J., concur.
