[Cite as *Aurora Loan Servs., L.L.C. v. Cart,* 2011-Ohio-2450.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

AURORA LOAN SERVICES, LLC,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-A-0024**
- vs -	:	
CHRISTINE CART, a.k.a. CHRIS CART, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2008 CV 664.

Judgment: Affirmed.

Adam R. Fogelman, Lerner, Sampson & Rothfuss, L.P.A., 120 East Fourth Street, 8th Floor, P.O. Box 5480, Cincinnati, OH 45202 (For Plaintiff-Appellee).

Christine Cart, pro se, 7234 State Route 45, Orwell, OH 44076 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Christine Cart, appeals the Judgment of the Ashtabula County Court of Common Pleas, denying her Emergency Verified Motion to Vacate Void Foreclosure Judgment and Dismiss Complaint with Prejudice. The issue before this court is whether the original default judgment of foreclosure was rendered without notice and is, therefore, void. For the following reasons, we reject Cart's argument and affirm the decision of the court below.

{¶2} On May 9, 2008, plaintiff-appellee, Aurora Loan Services, LLC, filed a Complaint against Christine Cart, Steve Cart, and Joan Hoyt. Aurora Loan Services alleged that it was the "owner and holder of a note," secured by a mortgage, and in default in the amount of $85,070.74. Aurora Loan sought to have the mortgage foreclosed and the subject property sold.

{¶3} Service of process was made against the defendants by certified mail and personal service.

{¶4} On June 2, 2008, Christine Cart returned the documents served upon the defendants marked with the notation, "refused for cause."[1]

{¶5} On July 30, 2008, Aurora Loan Services filed a Motion for Default Judgment.

{¶6} On August 6, 2008, Christine Cart filed with the trial court a certified copy of an Order for Arrest Warrants *in personam*, originally filed in federal district court, seeking to have the clerk of the district court issue an arrest warrant to Aurora Loan Services' trial counsel.

{¶7} On August 29, 2008, the trial court entered a Judgment and Decree in Foreclosure and Reformation of Mortgage.

{¶8} On November 10, 2008, Christine and Steve Cart filed a Motion for Relief, and Motion for Immediate Stay of Execution, and other requests.

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1. Included with the documents was a note to an unidentified clerk of the United States District Court for the Northern District of Ohio, which states: "Please file this refusal for cause in the evidence repository [green file] of Article III case 1:07CV3654; Stephan Wayne vs. SGT. Gregory Kunselman. This is evidence if this presenter, Carol A. Mead / Clerk of Common Pleas Court [of Ashtabula County], claims I have obligations to perform or makes false claims against me in the future. A copy of this instruction has been sent with the original refusal for cause back to the presenter [i.e., Carol A. Mead] in a timely fashion."

{¶9} On November 17, 2008, the subject property was sold at auction for $46,000, to Aurora Loan.

{¶10} On January 9, 2009, the trial court entered its Journal Entry Confirming Sale, Ordering Deed and Distributing Sale Proceeds. On the same day, the court entered a Judgment Entry, denying the Carts' motions and other requests.

{¶11} On May 8, 2009, Christine Cart filed a Motion to Vacate Void Judgment and Dismiss Action. Cart argued the underlying Judgment in Foreclosure was void for the reason that Aurora Loan lacked standing to initiate the foreclosure action, since it did not prove that it owned the note and mortgage on the date the Complaint was filed.

{¶12} On May 13, 2009, the trial court overruled Cart's Motion.

{¶13} On March 22, 2010, this court affirmed the judgment of the trial court, overruling Cart's Motion.

{¶14} On April 21, 2010, Cart filed an Emergency Verified Motion to Vacate Void Foreclosure Judgment and Dismiss Complaint with Prejudice. Cart's Motion was "premised on the Court's lack of subject-matter jurisdiction based on the fact that [Aurora Loan Services] did not present a valid case with an actual controversy; there is no valid or admissible proof, under Ohio Rules of Evidence, in the record by [Aurora Loan Services] of actual ownership of the Note and Mortgage, no valid or admissible proof, under Ohio Rules of Evidence, in the record of Christine being in default of payment to the lender or a Note Holder's right to foreclose the Security Instrument."

{¶15} On June 1, 2010, the trial court issued a Judgment Entry denying Cart's Motion. The court responded by stating that Aurora Loan Services had presented sufficient evidence of its "actual ownership" of the note and mortgage in dispute, as

originally found in the August 29, 2008 Decree of Foreclosure. Moreover, the court stated that the Carts and Hoyt were properly served, "yet did not file an Answer or make a formal appearance of any kind." Lastly, the court noted that the challenge to its jurisdiction was not raised until November 10, 2008, "several months after the Court had granted judgment of foreclosure in favor of Plaintiff."

{¶16} On June 14, 2010, Christine Cart filed her Notice of Appeal. On appeal, Cart raises the following assignment of error:

{¶17} "The trial court erred to the prejudice of the Appellant-Defendant in its Judgment Entry (T.d. 76) by stating that Appellant did not make an appearance/formal appearance of any kind in this matter and when the trial judge granted default judgment in favor of Appelle[e]-Plaintiff where the record demonstrates that the default judgment was granted without first providing notice to Appellant of the default hearing in violation of Appellant's Due Process rights under the state and federal constitutions to the provisions of Civ.R. 55(A); hence the initial Judgment Entry for foreclosure is void (not voidable) pursuant to Civ.R. 55(A), the Ohio Supreme Court's decision in *AMCA Intern. Corp. v. Carlton* (1984), 10 Ohio St.3d 88, the authority of the federal case law cited therein *AMCA Intern. Corp.* pursuant to the Supremacy Clause of the United States Constitution, Article VI, Clause 2, and pursuant to Local Rule VI(A) [sic]."

{¶18} Cart asserts that her Motion to Vacate Void Foreclosure Judgment and Dismiss Complaint constitutes a "common law motion to vacate," in that it is premised on the contention that the trial court's judgment is void ab initio. *Aurora Loan Servs., LLC v. Cart*, 11th Dist. No. 2009-A-0026, 2010-Ohio-1157, at ¶14. Accordingly, our

standard of review is abuse of discretion. *Terwoord v. Harrison* (1967), 10 Ohio St.2d 170, 171.

{¶19} A judgment is void ab initio when it is rendered by a court lacking either subject matter or personal jurisdiction. *Patton v. Diemer* (1988), 35 Ohio St.3d 68, paragraph three of the syllabus ("[a] judgment rendered by a court lacking subject matter jurisdiction is void *ab initio*"); *Lincoln Tavern, Inc. v. Snader* (1956), 165 Ohio St. 61, 64 ("[i]t is axiomatic that *** a judgment rendered without proper service or entry of appearance is a nullity and void").

{¶20} Aurora Loan Services objects that Cart may not raise the argument that she was entitled to notice of the default hearing because she failed to raise the issue in her Motion to Vacate Void Foreclosure Judgment and Dismiss Complaint. We agree.

{¶21} The Ohio Supreme Court has often observed: "An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Williams* (1977), 51 Ohio St.2d 112, paragraph one of the syllabus, citing *State v. Glaros* (1960), 170 Ohio St. 471, paragraph one of the syllabus ("[i]t is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court").

{¶22} Cart's argument that she was entitled to notice of the default hearing was not raised or argued before the trial court, but, rather, is made for the first time on appeal. As Cart concedes in her brief, the issue of the validity of the default judgment

was "inadvertently" raised by the trial court in its June 1, 2010 Judgment Entry, when it stated that she had not made a formal appearance in this case prior to the entry of the default. Significantly, this statement was not made in response to any argument raised by Cart and did not acknowledge or discuss the issue of notice. Cart may not exploit such obiter dicta in the trial court's Judgment to raise new issues on appeal. Cf. *Aurora Loan Servs. v. Brown*, 12th Dist. Nos. CA2010-01-010 and CA2010-05-041, 2010-Ohio-5426, at ¶¶25-29 (rejecting the argument that a default judgment was void ab initio raised for the first time on appeal).

{¶23} Moreover, it is the established precedent of this appellate district that "where a defendant makes an appearance in an action, but does not receive the requisite notice under Civ.R. 55(A), the award of default judgment is voidable and subject to being vacated under a Civ.R. 60(B) analysis." *Heiner v. Moretti*, 11th Dist. No. 2009-A-0001, 2009-Ohio-5060, at ¶16, citing *Fenner v. Kinney*, 10th Dist. Nos. 02AP-749 and 99CVF-036244, 2003-Ohio-989, ¶17, *Hall v. Parcels of Land Encumbered with Delinquent Tax Liens*, 10th Dist. No. 96APE11-1552, 1997 Ohio App. LEXIS 2437, *5-*6, and *Natl. City Mtge. Co. v. Johnson & Assoc. Fin. Servs., Inc*., 2nd Dist. No. 21164, 2006-Ohio-2364, ¶16.[2] No such analysis has been submitted by Cart in this case.

{¶24} Accordingly, the trial court's default judgment is not vulnerable to reversal through Cart's common law Motion to Vacate.

2. A discussion of the authorities holding that the failure to provide Civ.R. 55(A) notice renders a judgment void is contained in *Northland Ins. Co. v. Poulos*, 7th Dist. No. 06 MA 160, 2007-Ohio-7208. The Seventh District also rejects the position that a default judgment rendered without notice is void, rather than voidable. The Seventh District rightly notes that these cases rely on a dubious interpretation of the Ohio Supreme Court's citation to federal authority in the *AMCA Internatl. Corp. v. Carlton* (1984), 10 Ohio St.3d 88 decision. Id. at ¶¶38-39.

{¶25} The sole assignment of error is without merit.

{¶26} For the foregoing reasons, the Judgment of the Ashtabula County Court of Common Pleas, denying Cart's Motion to Vacate Void Foreclosure Judgment and Dismiss Complaint with Prejudice, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.