[Cite as *JPMorgan Chase Bank, N.A. v. Hunter,* 2012-Ohio-5222.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

JPMORGAN CHASE BANK, N.A.,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2011-P-0063**
- vs -	:	
MATTHEW S. HUNTER, et al.,	:	
Defendant-Appellees.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2009 CV 01202.

Judgment: Reversed and remanded.

Stacy L. Hart, *Adam R. Fogelman*, and *John R. Knoebber*, Lerner, Sampson & Rothfuss, L.P.A., 120 East Fourth Street, 8th Floor, P.O. Box 5480, Cincinnati, OH 45201-5480; and *Nelson M. Reid* and *Anne Marie Sferra*, Bricker & Eckler, L.L.P., 100 South Third Street, Columbus, OH 43215 (For Plaintiff-Appellant).

Matthew S. Hunter, pro se, 11110 Loris Avenue, Aurora, OH 44202-9310 (Defendant-Appellee).

Lorena J. Hunter, pro se, 11110 Loris Avenue, Aurora, OH 44202-9310 (Defendant-Appellee).

THOMAS R. WRIGHT, J.

{¶1} This accelerated-calendar appeal is from a final judgment of the Portage County Court of Common Pleas, in which the pending foreclosure action was dismissed on the basis that appellant, JPMorgan Chase Bank, N.A., had failed to cooperate in the mediation process. As the primary grounds for the appeal, appellant maintains that the

dismissal must be reversed because the trial court lacked the authority to render such a judgment when a foreclosure decree had already been issued in the case.

{¶2} In August 2009, appellant initiated the underlying action through the filing of a complaint in foreclosure against appellees, Matthew S. and Lorena J. Hunter. In its two claims, appellant alleged that the Hunters were in default on a promissory note that had previously been executed, and that the sum of $109,887.14 was immediately due. It was further alleged that the promissory note was secured by a mortgage, which gave appellant a valid first lien on the Hunters' residence and accompanying property. For its final relief, appellant sought a judgment against the Hunters for the amount owed and an order of foreclosure regarding the real property.

{¶3} Despite the fact that service on the summons was completed within one week of the filing of the complaint, the Hunters never submitted an answer. As a result, in May 2010, appellant moved for a default judgment. Approximately one month later, the trial court granted appellant's motion and issued a foreclosure decree. In addition to finding that the Hunters were liable under the note for $109,887.14 and interest, the trial court expressly ordered that the mortgaged property was to be sold at a Sheriff's sale unless the Hunters exercised their equity of redemption within the applicable time limit.

{¶4} In addition to never exercising their equity of redemption, the Hunters did not file any motion for relief from the foreclosure decree. But, they did submit a request for mediation. In July 2010, the trial court rendered a new judgment ordering the case to mediation and staying the enforcement of the foreclosure decree until the conclusion of the mediation process.

{¶5} On May 17, 2011, a court mediator issued a written report on the status of the case. The mediator noted that, even though the Hunters had transmitted a proposal

for loan modification to appellant's counsel in February 2011, they had never received a response. In light of this, the report ordered that, unless appellant submitted a response to the Hunters' proposal within seven days, the entire action would be dismissed.

{¶6} On May 26, 2011, appellant moved for an extension of time to submit its response. Five days later, on May 31, 2011, the trial court granted appellant's request, specifically ordering that the response had to be filed within seven days from the date of that order.

{¶7} On June 7, 2011, appellant filed its response to the Hunters' modification proposal. Despite this, on June 13, 2011, the trial court issued its final judgment under which the entire foreclosure action was dismissed on the grounds that appellant had not acted in good faith during the mediation process. The trial court emphasized that, even though appellant had been given seven additional days to submit its response, no such response had ever been received.

{¶8} In appealing the dismissal order, appellant has raised the following three assignments for review:

{¶9} "[1.] The trial court erred in dismissing this case for [appellant's] failure to comply with the May 31, 2011 court order.

{¶10} "[2.] The trial court erred in dismissing this case based on mediation information conveyed in violation of the Uniform Mediation Act.

{¶11} "[3.] The trial court erred in dismissing this case sua sponte after it had entered a Judgment and Decree in Foreclosure in favor of [appellant]."

{¶12} For the following reasons, the trial court's dismissal is reversed.

{¶13} As one basis for its decision to dismiss, the trial court stated that appellant failed to comply with its May 31, 2011 order requiring a response to the Hunters' "loan

modification" proposal within seven days. However, as appellant correctly notes, it filed a timely response.

{¶14} Given that, pursuant to Civ.R. 6(A), the running of the seven-day period did not begin until June 1, 2011, appellant's submission of its response on June 7, 2011, was timely. Obviously, in rendering the dismissal order, the trial court was unaware of the filing of the response. Nevertheless, since appellant complied with the trial court's seven-day order, it follows that the trial court should have allowed mediation to continue and not dismiss the action. For this reason, appellant's first assignment also has merit.

{¶15} Under its second assignment, appellant challenges the legal propriety of the procedure that was employed during the mediation process. According to appellant, the written report of the court mediator contained improper communications concerning the extent of appellant's participation in the process. Based upon this, appellant further maintains that, since any reference to its failure to respond was inappropriate, the trial court erred in predicating its subsequent actions in the case upon the statements in the written report.

{¶16} The Ohio General Assembly adopted the Uniform Mediation Act in R.C. Chapter 2710. R.C. 2710.02(A)(1) states that the provisions of the Act are applicable to situations in which the parties to a civil action have been either referred to mediation by a court order or required to engage in mediation by a court rule.

{¶17} In addition to setting forth provisions governing whether communications made during the mediation process are privileged, R.C. Chapter 2710 delineates rules which expressly limit the substance of a mediator's report. Specifically, R.C. 2710.06(A) prohibits a mediator from making "a report, assessment, evaluation, recommendation,

finding, or other communication regarding a mediation" to the court that may ultimately have to dispose of the underlying dispute in the case. In regard to possible items which may be discussed in a mediator's report, subsection (B) of that statute provides:

{¶18} "(B) A mediator may disclose any of the following:

{¶19} "(1) Whether the mediation occurred or has terminated, whether a settlement was reached, and attendance; * * *."

{¶20} In applying the quoted provision, this court has concluded that the statute does not permit a mediator to inform the trial court of the behavior of a party during the course of a mediation. In *Anthony v. Andrews*, 11th Dist. No. 2008-P-0091, 2009-Ohio-6378, the medical malpractice case was scheduled for mediation immediately after the parties had filed their respective pleadings. During the first session, the defendant's trial counsel allowed the mediation to proceed for ninety minutes before telling the mediator that his client would not give her consent to any settlement. The next day, the trial court itself issued an entry in which the defendant was ordered to show cause as to why final judgment should not be rendered for the plaintiff on the basis that the defendant had not negotiated in good faith. Although the trial court ultimately allowed the action to still go forward, it did impose a sanction based upon the events during the mediation. *Id.*, at ¶5.

{¶21} Upon appeal in *Anthony*, this court reversed the imposition of the sanction, holding that the trial court had erred in basing its decision upon a communication from the mediator. *Id*. at ¶23. In addition to concluding that trial counsel's statement to the mediator was privileged under R.C. 2710.03, we expressly held that the substance of the statement could not be conveyed to the trial court through a written report from the mediator. *Id*. at ¶22. Citing R.C. 2710.06(B)(1), we indicated that, while the mediator

could disclose to the trial court that the mediation was terminated, he could not disclose the reason why no settlement had been reached. *Id*.

{¶22} Even though the instant case did not involve an oral statement made in an actual session of mediation, the logic of the *Anthony* decision would still apply. First, it is apparent from the trial record that the requirement for the Hunters to submit a loan modification proposal, and for appellant to then respond to the proposal, emanated from the mediation process. In other words, the required submissions were not based upon a court order, but instead arose from the proceedings before the mediator. Second, in placing his written status report upon the record of the case, the mediator did not simply state that the mediation process had stalled; rather, he expressly stated that there had been no progress because appellant had not responded to the Hunters' proposal. To this extent, the statement in the report did not fall within the exception to non-disclosure under R.C. 2710.06(B)(1), and the trial court was not permitted under R.C. 2710.06(C) to consider it in taking further action in the case.

{¶23} Accordingly, appellant's second assignment of error has merit. Moreover, in light of our disposition on the first two assignments, the third assignment is moot.

{¶24} Given that appellant's first two assignments of error have merit, it is the order and judgment of this court that the judgment of the Portage County Court of Common Pleas is reversed, and the case is hereby remanded for further proceedings consistent with this opinion.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.