

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

FIRST HORIZON HOME LOANS,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-08-117
	:	
- vs -	:	<u>OPINION</u>
	:	3/8/2010
	:	
BRIAN P. SIMS, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CV73449

Manely Deas Kochalski LLC, Rachel A. Leier, Pamela S. Petas, P.O. Box 42728, Cincinnati, Ohio 45242, for plaintiff-appellee

Jacobs, Kleinman, Seibel & McNally, Kenneth F. Seibel, Scott K. Seibel, 2300 Kroger Bldg., 1014 Vine Street, Cincinnati, Ohio 45202, for defendants-appellants, Brian P. and Jill L. Sims

Christopher A. Watkins, 500 Justice Drive, Lebanon, Ohio 45036, for defendant, Warren County Treasurer

BRESSLER, J.

{¶1} Defendants-appellants, Brian P. Sims and Jill L. Sims, appeal the decision of the Warren County Common Pleas Court granting default judgment and summary judgment in favor of plaintiff-appellee, First Horizon Home Loans, in a foreclosure

action.¹

{¶2} On March 30, 2006, Brian Sims executed a promissory note in favor of appellee in the principal amount of \$898,500, which was secured by a mortgage on property owned jointly by appellants and located at 4911 Chestnut Hill in Deerfield Township. The record indicates that only Brian Sims was listed as mortgagor in the granting clause of the mortgage. Jill Sims was not included as a mortgagor, but signed the mortgage to release her dower interest.

{¶3} On February 3, 2009, appellee filed a three-count complaint against appellants. Appellee alleged that Brian Sims was in default on payments on the note and sought judgment on the note and foreclosure of the mortgage. Appellee requested the principal balance due plus interest and other charges specified in the note and mortgage. Appellee also sought to reform the mortgage, alleging that at the time the mortgage was executed, appellants each owned an undivided interest in the property, but "through mutual mistake perpetrated by a third-party, the notary block states that Jill L. Sims was releasing her dower interest only and Jill L. Sims was not referenced in the granting clause * * *." According to appellee, this apparent error did not reflect the mutual intent of the parties, which was to secure the note with a mortgage on the entire fee simple interest in the property.

{¶4} The record indicates that appellants jointly answered the complaint on March 11, 2009. Subsequently, on May 29, 2009, appellee filed a motion for summary judgment, requesting the following: 1) a default judgment against Jill Sims for failing to answer or otherwise respond to the complaint; and 2) summary judgment against Brian Sims on its note and mortgage foreclosure claims.

1. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

{¶5} Shortly thereafter, on June 2, Jill Sims filed a memorandum in opposition to appellee's motion, disputing the contention that she was in default for failing to respond to the complaint. The record indicates that appellee amended its motion for summary judgment to reflect that an answer on behalf of Jill Sims had been filed. In their June 17 memorandum in opposition to appellee's amended motion, appellants argued that appellee had failed to establish that it was entitled to summary judgment, as it had not met its initial burden of demonstrating the lack of a factual issue with respect to whether Brian Sims was in default on the note, or the alleged amount due appellee.

{¶6} In its August 13, 2009 Judgment Entry and Decree in Foreclosure, the trial court granted appellee's May 29 motion for default judgment against Jill Sims. The court further granted summary judgment in favor of appellee on its claim against Brian Sims for default on the note, and its claim against appellants for foreclosure of the mortgage. The court also reformed the mortgage to include Jill Sims as a mortgagor in the granting clause.

{¶7} Appellants appeal the court's August 13 judgment entry, raising two assignments of error for our consideration. For ease of discussion, appellants' assignments of error will be addressed out of order.

{¶8} Assignment of Error No. 2:

{¶9} "THE TRIAL COURT ERRED TO THE PREJUDICE OF [JILL SIMS] BY GRANTING A DEFAULT JUDGMENT."

{¶10} In their second assignment of error, appellants argue that the trial court erred in entering a default judgment against Jill Sims.

{¶11} An appellate court reviews a trial court's decision to grant or deny a motion for default judgment under an abuse of discretion standard. *Domadia v. Briggs*, Geauga App. No. 2008-G-2847, 2009-Ohio-6510, ¶19; *National City Bank v. Shuman*, Summit

App. No. 21484, 2003-Ohio-6116, ¶6. An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶12} The record clearly indicates that Jill Sims answered appellee's complaint on March 11, 2009. Appellee appeared to have acknowledged this fact by amending its motion for summary judgment to reflect that Jill Sims was not in default. It is axiomatic that once a party has answered, default judgment cannot be rendered. See *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.* (1986), 28 Ohio St.3d 118. Having found that Jill Sims answered appellee's complaint, we conclude that the trial court abused its discretion in entering a default judgment against her.

{¶13} Appellants present an additional issue under this assignment of error regarding the propriety of the trial court's finding that the mortgage should be reformed to reflect the alleged mutual intent of the parties. For ease of discussion, we will address this issue below in the context of appellants' first assignment of error.

{¶14} Appellants' second assignment of error is sustained.

{¶15} Assignment of Error No. 1:

{¶16} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANTS BY GRANTING THE AMENDED MOTION FOR SUMMARY JUDGMENT."

{¶17} In their first assignment of error, appellants argue that the trial court erred in granting appellee's amended motion for summary judgment. Specifically, they contend that the affidavit submitted by appellee in support of its motion was insufficient under Civ.R. 56(E).

{¶18} Summary judgment is a procedural device used to terminate litigation and avoid a formal trial where there are no issues in a case to try. *Burkes v. Stidham* (1995),

107 Ohio App.3d 363, 370, citing *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2. This court reviews summary judgment decisions de novo, which means that we review the trial court's judgment independently and without deference to its determinations. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. We utilize the same standard in our review that the trial court should have employed. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129.

{¶19} The Ohio Supreme Court has repeatedly held that summary judgment is appropriate under Civ.R. 56 when "(1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor." *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389. The party moving for summary judgment has the initial burden of producing some evidence that affirmatively demonstrates the lack of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93, 1996-Ohio-107. The nonmoving party must then rebut the moving party's evidence with specific facts showing the existence of a genuine triable issue; it may not rest on the mere allegations or denials in its pleadings. *Id.*; Civ.R. 56(E).

{¶20} In support of its motion, appellee submitted the affidavit of Marcia Williams, an employee of appellee, who averred that Brian Sims was in default on the note and mortgage. Williams stated that "[a] written notice of default was given in accordance with the terms of the note and mortgage. The default was not cured, and thus the sums due under the note were accelerated." Copies of the note and mortgage were attached to Williams' affidavit. However, a copy of the written notice of default was not attached.

{¶21} Appellants contend that the affidavit was insufficient to establish summary judgment because it did not incorporate the written notice of default pursuant to the requirement of Civ.R. 56(E) that "[s]worn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit."

{¶22} We initially observe that appellants did not specifically raise the issue of whether the affidavit failed to comply with the requirements of Civ.R. 56(E) to the court below. Although we review summary judgment decisions de novo, the parties are not given a second chance on appeal to raise arguments that they should have raised to the trial court. *Wall v. Sprague*, Clermont App. No. CA2007-05-065, 2008-Ohio-3384, ¶20. In addition, we note that appellants did not challenge appellee's contention that a notice of default was provided to Brian Sims. Appellants argued only that there was "no documentation" of Brian Sims' default in Williams' affidavit. This court has previously concluded that an averment of default in an affidavit is sufficient to establish summary judgment when there is no evidence offered by the opposing party to contradict or otherwise place the averment in controversy. See *Provident Bank v. Adriatic, Inc.*, Clermont App. No. CA2004-12-108, 2005-Ohio-5774, ¶13. Accordingly, we conclude that the averment of default in Williams' affidavit was sufficient for summary judgment purposes.

{¶23} Appellants also argue that Williams' affidavit was insufficient because it failed to establish the total amount due appellee under the note and mortgage as a result of Brian Sims' alleged default.

{¶24} In her affidavit, Williams averred that appellee was due the stated note principal of \$898,500 plus interest at the rate of 6.625 percent from August 1, 2008. She also averred that "[l]ate charges, advances made for the payment of taxes, assessments, and insurance premiums, and expenses incurred for the enforcement of

the note and mortgage may also be due, to the extent that the payment of such amounts is not prohibited by Ohio law. If necessary, the final amount of some or all of these items will be established at a later date."

{¶25} The trial court's judgment entry specifically provided for the principal amount due, as well as the interest rate, but did not include amounts for the additional allowances for late fees, advances made on appellants' behalf, or costs and expenses incurred for the enforcement of the note and mortgage. Although appellants do not challenge whether these allowances may be properly due appellee, they contend that summary judgment was improper because there was no evidence produced as to the specific amounts owed for the additional claimed allowances. However, as appellee points out in its brief, these amounts are continuously accruing through the date of the sheriff's sale. See, generally, *Huntington National Bank v. Shanker* (May 21, 1998), Cuyahoga App. No. 72707, 1998 WL 269091 at *2 (potential additional allowances given to mortgage holder to protect their interest in property are "constantly evolving and changing over time"). In light of this consideration, 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.

{¶26} Based on the foregoing, the trial court did not err in granting appellee's amended motion for summary judgment on the issue of Brian Sims' default on the note. As a result, we find that summary judgment in favor of appellee on its note and mortgage foreclosure claims was properly granted.

{¶27} We do, however, conclude that the trial court erred in granting summary judgment to appellee on its mortgage reformation claim.

{¶28} In its entry, the court found that "it was the intent of both Brian P. Sims and Jill L. Sims to sign the [m]ortgage as 'borrowers,' as this term is defined in the

[m]ortgage. The [c]ourt finds that both Brian P. Sims and Jill L. Sims signed the [m]ortgage, but through mistake one of the signatures states that it only releases dower. The [c]ourt hereby reforms the [m]ortgage to clearly state that both Brian P. Sims and Jill L. Sims executed the [m]ortgage as borrowers, * * * thereby encumbering the entire fee simple interest in the property with [appellee's] [m]ortgage."

{¶29} Appellants correctly argue that summary judgment on the reformation claim was improper because there was no evidence presented to the trial court to substantiate appellee's claim, and appellee failed to argue this issue to the court in its amended motion. As a result, appellee's claim for reformation of the mortgage was not properly before the trial court in the context of its amended motion for summary judgment, and it was error for the court to dispose of the claim in its foreclosure entry.

{¶30} Based on the foregoing, appellants' first assignment of error is sustained in part and overruled in part.

{¶31} In sum, we affirm the trial court's decision granting summary judgment to appellee on its claims for judgment on the note and foreclosure of the mortgage. We reverse the trial court's decision granting a default judgment against Jill Sims and granting summary judgment in favor of appellee on its mortgage reformation claim.

{¶32} The judgment of the trial court is affirmed in part, reversed in part, and this cause is remanded to the trial court for further proceedings consistent with this opinion and in accordance with law.

YOUNG, P.J., and HENDRICKSON, J., concur.