[Cite as *BAC Home Loans Servicing, L.P. v. Hall*, 2010-Ohio-3472.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

BAC HOME LOANS SERVICING, L.P. fka Countrywide Loans Servicing,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-10-135
	:	O P I N I O N 7/26/2010
- vs -	:	
	:	
DERRYL T. HALL, et al.,	:	
Defendants-Appellants.		

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CV74578

C. Scott Casterline, 24755 Chagrin Boulevard, Suite 200, Cleveland, Ohio 44122-5690, for plaintiff-appellee

Derryl T. Hall & Pamela K. Hall, 80 Cambridge Drive, Springboro, Ohio 45066, defendants-appellants, pro se

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Rachel A. Hutzel, Warren County Prosecuting Attorney, Christopher A. Watkins, 500 Justice Drive, Lebanon, Ohio 45036, for defendant, United States of America

POWELL, P.J.

{¶1} Defendants-appellants, Derryl T. Hall and Pamela K. Hall, appeal pro

se the decision of the Warren County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, BAC Home Loans Servicing, L.P. fka Countrywide Home Loans Servicing, LP, in a foreclosure action. For the reasons set forth below, we affirm the decision of the trial court.

{¶2} On June 14, 2006, Derryl Hall executed a promissory note in favor of E-Loan, Inc., in the principal amount of $172,000. The note was secured by a mortgage on property owned by appellants and located at 80 Cambridge Drive in Springboro, Ohio. The mortgage listed appellants as the mortgagors, and Mortgage Electronic Registration Systems, Inc. ("MERS"), was designated as the mortgagee as the nominee for E-Loan.

{¶3} On June 15, 2009, appellee filed a foreclosure action against appellants, alleging that Derryl Hall was in default on the payment of the note. Appellee sought judgment on the note in the amount of $168,862.73, plus late fees and interest from November 1, 2008, and further sought to foreclose on the mortgage.

{¶4} Appellee's complaint also named the United States of America as a defendant. The United States answered, asserting that it had an interest in the property by virtue of a federal tax lien against "Pamela E. Hall and Felix M. Hall" which was reflected in the preliminary judicial report filed with appellee's complaint.

{¶5} On July 14, 2009, appellants, appearing pro se, filed an answer to the complaint and entered a general denial to the allegations. Although they did not separately set forth affirmative defenses in their answer, appellants averred generally that appellee was not the real party in interest because "the filing of the complaint occurred before [appellee] [was] the loan servicer of record." Appellants attached a

copy of a mortgage assignment to their answer, which was executed in favor of appellee on June 10, 2009 by MERS, as the nominee for E-Loan. The assignment was recorded with the Warren County Recorder's Office on June 19, 2009.

{¶6} Appellants also claimed in their answer that appellee failed to provide them with written notice of the mortgage assignment pursuant to the requirements of the Real Estate Settlement Procedures Act ("RESPA"), and that the federal tax lien was invalid.

{¶7} On August 7, 2009 appellee moved for summary judgment. Appellants submitted a memorandum in opposition, and in its September 21, 2009 judgment entry, the trial court granted summary judgment in favor of appellee on its claims for judgment on the note and foreclosure of the mortgage.

{¶8} Appellants appeal the trial court's September 21 entry, raising a single assignment of error for our review:

{¶9} "THE COMMON PLEAS COURT[ ] IMPROPERLY RULED IN FAVOR OF THE PLAINTIFF. THE PLAINTIFF LACKED STANDING UNDER THE [OHIO REVISED CODE] TO FILE THE COMPLAINT."

{¶10} In their sole assignment of error, appellants contend that the trial court improperly granted summary judgment in favor of appellee. They have raised several issues for our review under this assignment.

{¶11} 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.

{¶12} 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).

{¶13} Appellants initially contend that appellee was not the real party in interest and therefore lacked standing to initiate the foreclosure action because the mortgage assignment was not recorded until June 19, 2009, four days after the complaint was filed. In its decision, the trial court determined that the mortgage was duly assigned to appellee, but did not specifically address the merits of appellants' standing claim.[1]

1. We note that Civ.R. 56(C) provides that in ruling on a motion for summary judgment, a trial court may consider pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact. Although the mortgage assignment was not introduced into evidence by way of an affidavit in support of, or in opposition to, summary judgment, because it was attached to appellants' answer, it was part of the record available for the trial court to review. See Civ.R. 10(C) ("A copy of any written instrument attached to a pleading is a part thereof for

{¶14} Pursuant to Civ.R. 17(A), "[e]very action shall be prosecuted in the name of the real party in interest." A real party in interest is one who can "discharge the claim upon which the suit is brought * * * [or] is the party who, by substantive law, possesses the right to be enforced." *Discover Bank v. Brockmeier*, Warren App. No. CA2006-057-078, 2007-Ohio-1552, ¶7, quoting *In re Highland Holiday Subdivision* (1971), 27 Ohio App.2d 237, 240. Unless the party has some real interest in the subject matter of the action, the party lacks standing to invoke the jurisdiction of the court. Id. In a foreclosure action, the real party in interest is the entity that is the current holder of the note and mortgage. *Countrywide Home Loans, Inc. v. Montgomery*, Lucas App. No. L-09-1169, 2010-Ohio-693, ¶12.

{¶15} Appellants cite R.C. 5301.25 in support of their contention that appellee was required to record the mortgage assignment prior to filing the complaint. This argument is misplaced. R.C. 5301.25 requires the recordation of instruments of interests in real property in order to protect subsequent bona fide purchasers. *U.S. Bank Nat. Assoc. v. Morales*, Portage App. No. 2009-P-0012, 2009-Ohio-5635, ¶32. See, also, *Wead v. Lutz*, 161 Ohio App.3d 580, 2005-Ohio-291, ¶16. In this case, however, appellants were not subsequent bona fide purchasers, requiring notice of other potential interests in the property. *Morales* at ¶32. As a result, the recordation of the assignment was not a "condition precedent" to appellee's right of foreclosure. Id. See, also, *Wells Fargo Bank, N.A. v. Stovall*, Cuyahoga App. No. 91802, 2010-Ohio-236, ¶17 (bank's failure to record assignment of mortgage before filing complaint was not fatal to foreclosure claim as all interest in the note and mortgage had been assigned to it prior to the filing of the complaint). Although it was not

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all purposes.") See, also, *McBroom v. Bob-Boyd Lincoln-Mercury* (Jan. 30, 1997), Franklin App. Nos. 96APE06-768, 96 APE10-1305, 1997 WL 35527, *3.

recorded until June 19, 2009, the assignment was executed on June 10, 2009. As the current holder of the note and mortgage at the time the complaint was filed on June 15, 2009, appellee was the real party in interest and therefore had standing to bring the foreclosure action.

{¶16} Appellants also argue that appellee was required to demonstrate that it "suffered some actual injury" as a result of Darryl Hall's default on the note. This contention is without merit, as appellee was not required to establish that it suffered some form of damages beyond default in order to prevail on its foreclosure claim. See *Bank of New York v. Barclay*, Franklin App. No. 03AP-844, 2004-Ohio-1217, ¶15. In support of its motion for summary judgment, appellee attached the affidavit of David Perez, an assistant vice-president of appellee, who averred that appellee was in possession of the note, that the note was in default, and that "all prerequisites required under the note and mortgage necessary to accelerate the balance due" had been performed. At no point in the proceedings have appellants disputed that the note was in default, and they failed to present any evidence in their memorandum to rebut the averments in appellee's affidavit.

{¶17} As an additional issue presented for review, appellants claim that appellee failed to comply with the requirements of the RESPA, codified at Section 2601 et seq., Title 12, U.S.Code, by failing to notify them of the mortgage assignment within 15 days after the effective date of the transfer. Although it was raised in their memorandum, the trial court did not specifically address appellants' argument with respect to this issue.

{¶18} However, our review of appellants' answer to the complaint reveals that although they made reference to the RESPA and alleged that they did not receive

written notice of the mortgage assignment from appellee, appellants presented the claim as an affirmative defense to the foreclosure action, rather than as a counterclaim. The difference between a defense and a counterclaim is that "the latter is affirmative in nature, and asserts a separate cause of action, while the former serves to preclude recovery by asserting facts that defeat the plaintiff's right to recovery." *Riley v. Montgomery* (June 30, 1983), Warren App. No. 88, at 5. An affirmative defense generally refers to that which is offered to defeat an action by "denying, justifying, or confessing and avoiding the plaintiff's cause of action. It goes to the plaintiff's right and generally would not be considered an independent claim existing against the plaintiff." Id., citing *Secrest v. Standard Oil Co*. (1963), 118 Ohio App.270, 271. In this case, any claim appellants would have had against appellee under the RESPA should have been pleaded in the form of a counterclaim rather than as an affirmative defense. See, generally, *LaSalle Bank, N.A. v. Kelly*, Medina App. No. 09CA0067-M, 2010-Ohio-2668, ¶20; *Mortgage Elec. Registration Sys., Inc*. v. *Lambert*, Cuyahoga App. No. 90247, 2008-Ohio-3040, ¶3.

{¶19} Civ.R. 8(C) provides that "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation." However, this provision was intended to permit trial courts to remedy clerical errors made in designating affirmative defenses and counterclaims, and was not intended as a means by which a party could correct a substantive error in a pleading after the time for amendment to the pleading had passed. *American Outdoor Adver. Co., LLC v. P&S Hotel Group, Ltd*., Franklin App. No. 09-AP-221, 2009-Ohio-4662, ¶26.

{¶20} Based upon our review of appellants' answer, it cannot be said that a

clerical error was present such that they mistakenly designated a counterclaim for an alleged RESPA violation as an affirmative defense. Appellants failed to comply with the pleading requirements of Civ.R. 8(A), and neglected to aver that they suffered any damages as a result of appellee's alleged failure to provide notice of the assignment. See Section 2605(f)(1)(A), Title 12, U.S.Code. Although we recognize that appellants appeared pro se in this action, they are nevertheless bound by the same rules and procedures as members of the bar. See *Cravens v. Cravens,* Warren App. No. CA2008-02-033, 2009-Ohio-1733 at fn. 1. Pro se litigants are "not to be accorded greater rights and are bound to accept the results of their own mistakes and errors, including those related to correct legal procedures." Id., quoting *Cat-The Rental Store v. Sparto,* Clinton App. No. CA2001-08-024, 2002-Ohio-614, at 5. As a result, we conclude that appellants failed to set forth the necessary elements to sufficiently plead a counterclaim against appellee for a RESPA violation.

{¶21} Finally, appellants contend that the federal tax lien is invalid. Appellants point out that the lien attached to the preliminary judicial report references the names of different individuals and an unknown property address.

{¶22} In its judgment entry, the trial court determined that any right, title, interest or lien the United States may have on the property was subordinate to appellee's mortgage lien. However, the court made no finding with respect to the validity of the tax lien, stating as follows:

{¶23} "The [c]ourt makes no finding as to the claim, right, title, interest or lien of the defendant, United States of America, as set forth in its respective [a]nswer filed herein, except to note that such claim, right, interest or lien of the hereinabove defendant is hereby ordered transferred to the proceeds derived from the sale of said

premises, after the payment of costs of the within action, taxes due and payable and the amount hereinabove found due [appellee] and the same is hereby ordered continued until further order of the [c]ourt."[2]

{¶24} Although the validity of the tax lien was not resolved in the trial court's entry, it was not a material issue preventing summary judgment in favor of appellee on its foreclosure claim. See *Link v. Matthews*, Allen App. No. 1-08-61, 2009-Ohio-1920, ¶31. "[M]aterial facts are those facts that might affect the outcome of the suit under the governing law of the case." Id., quoting *Lexie v. Ohio Edison Co.* (2000), 140 Ohio App.3d 578, 582. In this case, the trial court's determination to continue the issue of lien validity did not prejudice the parties or affect the outcome of the action, as the court would be able to hear any issue raised by appellants with respect to the matter following the sale of the property. Id.

{¶25} Based on the foregoing, we conclude that summary judgment in favor of appellee on its note and mortgage foreclosure claims was property granted. Appellants' sole assignment of error is accordingly overruled.

{¶26} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.

2. With regard to the United States' claim, the trial court also determined that there was "no just cause for delay" pursuant to Civ.R. 54(B).