[Cite as *Beneficial Ohio, Inc. v. LeMaster*, 2009-Ohio-3984.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BENEFICIAL OHIO, INC.	:	JUDGES:
	:	John W. Wise, P.J.
Plaintiff-Appellee	:	Julie A. Edwards, J.
	:	Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2008 CA 0100
CHARLES LEMASTER,	:	
	:	
and	:	
	:	
DYCIE LEMASTER	:	
	:	
Defendants-Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal From Richland County Court Of Common Pleas Case No. 2007 CV 1841
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	July 30, 2009
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
TIMOTHY R. BILLICK, ESQ. LAURA C. INFANTE, ESQ. JASON A. WHITACRE, ESQ. The Law Offices of John D. Clunk, Co., L.P.A. 5601 Hudson Drive, Suite 400 Hudson, Ohio 44236	GREGORY S. REICHENBACK, ESQ. 3 North Main Street, Suite 812 Mansfield, Ohio 44902

Edwards, J.

{¶1} Defendants-appellants, Charles and Dycie Lemaster, appeal from the September 22, 2008, Judgment Entry of the Richland County Court of Common Pleas granting the Motion for Summary Judgment filed by appellee Beneficial Ohio D/B/A Beneficial Mortgage while denying the Motion for Summary Judgment filed by appellants.

STATEMENT OF THE FACTS AND CASE

{¶2} On March 5, 1999, appellants executed a note and mortgage in favor of appellee Beneficial Ohio D/B/A Beneficial Mortgage in the amount of $66,375.84. The note contained an acceleration clause. Subsequently, on December 18, 2007, appellee filed a complaint in foreclosure against appellants alleging that appellants owed appellee $64, 809.55 plus interest at the rate of 8.992% per annum from August 10, 2006.

{¶3} Appellants, in their answer, which was filed on January 23, 2008, alleged, in part, that appellee's claims were barred by res judicata because appellee or its predecessor "has twice previously sued [appellants] on the same claims and twice previously dismissed its claims by Notice pursuant to Civ.R. 41(A)(1)(a)."

{¶4} Appellee filed a Motion for Summary Judgment on May 20, 2008. In response, appellants, on August 27, 2008, filed a combined memorandum opposing appellee's Motion for Summary Judgment and a Motion for Summary Judgment. Appellants, in the same, alleged that appellee's claims were barred by the doctrine of claim preclusion because "[t]hrice [appellee] has sued the [appellants] to foreclosure on

their home, pursuant to the same note." Appellants noted that in two of the prior cases,[1] appellee had filed a Notice of Dismissal pursuant to Civ.R. 41(A)(1)(a). Appellants, in their pleading, also alleged that there was a factual dispute over whether appellee was the true party in interest and had standing. Appellants alleged, in part, that appellee's attorney had admitted in a letter that the creditor for the loan was HSBC Consumer Lending. Finally, appellants, in their motion, alleged that appellee's claims were barred by fraud in the inducement, unclean hands and violations of the duties of good faith and fair dealing. Appellants specifically alleged that a man who claimed to be appellee's agent came to their home and discussed the loan with appellant Charles Lemaster, who allegedly cannot read or write. According to appellants, the agent promised them that appellee would not foreclose based on the representation that the loan papers included an insurance policy that would cover loan payments if appellants were unable to make them.

{¶5} Pursuant to a Judgment Entry filed on September 22, 2008, the trial court granted appellee's Motion for Summary Judgment.

{¶6} Appellants now raise the following assignments of error on appeal;

{¶7} "I. THE COURT ERRED BY GRANTING SUMMARY JUDGMENT TO THE PLAINTIFF.

{¶8} "II. THE COURT ERRED BY DENYING SUMMARY JUDGMENT TO THE DEFENDANTS."

[1] Appellants attached relevant documents from such cases to their memorandum/motion.

I, II

{¶9} Appellants, in their two assignments of error, argue that the trial court erred in granting summary judgment to appellee while denying appellants' Motion for Summary Judgment. We agree.

{¶10} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. Therefore, we must refer to Civ.R. 56(C), which provides, in pertinent part: "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶11} Pursuant to the above rule, a trial court may not enter summary judgment if it appears that a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the nonmoving party has no evidence to prove its case. The moving party must specifically

point to some evidence which demonstrates that the nonmoving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the nonmoving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall,* 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264.

{¶12} At issue in the case sub judice is whether appellee's complaint in this case was barred by the two-dismissal rule of Civ.R. 41(A)(1)(a). Civ.R. 41(A) states as follows: "(1) * * * [A] plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by * * *

{¶13} "(a) filing a notice of dismissal at any time before the commencement of trial * * *.

{¶14} "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that *a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court*." (Emphasis added.)

{¶15} In the case sub judice, appellee filed a complaint for foreclosure against appellants on June 14, 2005, (Case No. 05CV596) based on the same note and mortgage. Appellee, in its complaint in such case, alleged that appellants owed appellee $65,573.00 plus interest at the rate of 8.993% per annum from April 10, 2005. Appellee filed a Notice of Voluntary Dismissal of such case without prejudice pursuant to Civ.R. 41(A)(1) on August 19, 2005. Thereafter, on October 3, 2005, appellee filed a second complaint for foreclosure against appellants (Case No. 05CV1001). Appellee, in its complaint in such case, alleged that appellants owed appellee $65,543.06 plus interest

at the rate of 8.993% per annum from April 10, 2005. Appellee filed a Notice of Voluntary Dismissal of such case without prejudice pursuant to Civ.R. 41(A)(1) on November 21, 2005. Appellee then filed the case sub judice on December 18, 2007, alleging that appellants owed appellee $64,809.55 plus interest at the rate of 8.992% per annum from August 10, 2006.

{¶16} The Ohio Supreme Court, in *U.S. National Bank Assn. v. Gullotta*, 120 Ohio St.3d 399, 2008-Ohio-6268, 899 N.E.2d 987, recently addressed the application of the two-dismissal rule of Civ.R. 41(A)(1) in the context of a foreclosure action. The facts of *Gullotta*, as set forth by the Ohio Supreme Court in it decision, are as follows.

{¶17} On June 2003, Gullotta executed an adjustable rate note and a mortgage in the amount of $164,900.00 with MILA, Inc., which subsequently assigned the note to U.S. Bank. On April 9, 2004, U.S. Bank filed a complaint for money judgment, foreclosure, and relief, declared the entire debt due, and prayed for judgment in foreclosure in the entire amount of the principal due on the note, $164,390.91, plus interest at the rate of 7.35 percent per year from November 1, 2003. On June 8, 2004, U.S. Bank voluntarily dismissed that complaint pursuant to Civ.R. 41(A).

{¶18} Thereafter, on September 9, 2004, U.S. Bank filed a second complaint for money judgment, foreclosure, and relief. Again, the bank alleged a default under the note and mortgage, declared the entire debt due, and prayed for judgment in foreclosure in the amount of the principal due on the note, $164,390.91, plus interest at the rate of 7.35% percent per year from December 1, 2003. On March 15, 2005, U.S. Bank dismissed that complaint pursuant to Civ. R. 41(A).

{¶19} Thereafter, on October 26, 2005, U.S. Bank filed another complaint for money judgment, foreclosure, and relief. Again, the bank alleged a default under the note and mortgage, declared the entire debt due, and prayed for judgment in foreclosure in the amount of the principal due on the note, $164,390.91, plus interest at the rate of 7.35% percent per year from November 1, 2003.

{¶20} Gullotta argued to the trial court that the third foreclosure action was barred by the doctrine of res judicata because, pursuant to Civ.R. 41(A), the second dismissal constituted an adjudication on the merits. However, the trial court disagreed and granted summary judgment to U.S. Bank. Gullotta then appealed to this Court. This Court, in our Opinion in *U.S. National Bank Assn. v. Gullotta*, Stark App. No. 2006CA00145, 2007-Ohio-2085, affirmed the trial court, finding that res judicata did not bar U.S. Bank's third foreclosure complaint because such complaint covered different dates of default and months not litigated in the first two complaints.

{¶21} In reversing the judgment of this Court and holding that res judicata barred U.S. Bank's third foreclosure complaint, the Ohio Supreme Court, in *Gullotta*, held that each missed payment under the promissory note and mortgage did not give rise to a new claim and that Civ.R. 41(A)'s two-dismissal rule applied. The Court, in *Gullotta*, stated, in relevant part, as follows: "Do the claims here arise from a common nucleus of operative facts? U.S. Bank argues that its third bite at the apple is different from its first two because in its amended complaint, it sought interest only from April 1, 2005. However, all of the claims in all of the complaints filed by U.S. Bank against *Gullotta* arise from the same note, the same mortgage, and the same default. The note and mortgage have not been amended in any way. From the time of Gullotta's original

breach, he has owed the entire amount of the principal. The amended third complaint alleged the same amount of principal due as the other two complaints.

{¶22} "The key here is that the whole note became due upon Gullotta's breach, not just the installment he missed. There is a distinction between an action for recovery of installment payments under an installment note where the entire principal is accelerated, and an action to recover for nonpayment under an installment note where only the amount of the principal to date, and no future amount, is sought. The general rule that each missed payment in an installment loan gives rise to a separate cause of action does not hold true when there is an acceleration clause in the loan agreement:….

{¶23} "By agreeing to an acceleration clause, the parties in this case have avoided the operation of the general rule that nonpayment on an installment loan does not constitute a breach of the entire contract. In a contract with an acceleration clause, a breach constitutes a breach of the entire contract. Once Gullotta defaulted and U.S. Bank invoked the acceleration clause of the note, the contract became indivisible. The obligations to pay each installment merged into one obligation to pay the entire balance on the note." Id at paragraphs 28-29, 31.

{¶24} The Ohio Supreme Court, in *Gullotta,* further noted that although U.S. Bank's complaint had changed, the operative fact remained the same and that U.S. Bank could not save its claims from the two-dismissal rule simply by changing the relief sought in its complaint.

{¶25} In the case sub judice, all of the complaints arose from the same note, the same mortgage and the same default. From the time of appellants' original default, the entire principal became due as a result of the acceleration clause in the note. The

terms of the note and/or mortgage were never changed. As in the *Gullotta* case, from the time of appellants' original breach, appellant's owed the entire amount of the principal because of the acceleration clause.

{¶26} Based on the foregoing, we find that the two-dismissal rule of Civ.R. 41(A) applies and that res judicata barred appellee's complaint in this case.

{¶27} Appellants' two assignments of error are, therefore, sustained.

{¶28} Accordingly, the judgment of the Richland County Court of Common Pleas is reversed and this matter is remanded for further proceedings.

By: Edwards, J.

Wise, P.J. and

Delaney, J. concur

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JUDGES

JAE/d0319

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IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

BENEFICIAL OHIO, INC.	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
CHARLES LEMASTER,	:	
and	:	
DYCIE LEMASTER,	:	
Defendants-Appellants	:	CASE NO. 2008 CA 0100

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is reversed and this matter is remanded to the trial court for further proceedings. Costs assessed to appellee.

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JUDGES