

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DEBORAH PARKER	:	JUDGES:
	:	William B. Hoffman, P.J.
Defendant-Appellant	:	Julie A. Edwards, J.
	:	Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2008 CA 00133
EMC MORTGAGE GROUP	:	
	:	
Plaintiff-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil Appeal From Stark County Court Of
Common Pleas Case No. 2008 CV 01291

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: August 31, 2009

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

DEBORAH PARKER
5241
Gardendale Ave., N.E.
Canton, Ohio 44714

EDWARD M. KOCHALSKI
MANLEY DEAS KOCHALSKI, LLC
P.O. Box 165028
Columbus, Ohio 43216-5028

Edwards, J.

{¶1} Defendant-appellant, Deborah Parker, appeals from the May 21, 2008, Judgment Entry and Decree in Foreclosure.

STATEMENT OF THE FACTS AND CASE

{¶2} On or about March 21, 2005, appellant Deborah Parker executed and delivered to Long Beach Mortgage Company a promissory note in the principal amount of \$48,400.00. On the same date, appellant Deborah Parker and Thomas M. Parker executed and delivered a mortgage deed granting Long Beach Mortgage Company a good and valid lien on the subject property. Appellee JPMorgan Chase Bank, N.A., as Trustee for Certificateholders of Bear Stearns Asset Based Securities Trust 2006-3, Asset Based Certificates, Series 2006-3, as a result of a series of assignments, is the holder of the note and mortgage.

{¶3} On March 12, 2008, appellee filed a complaint for foreclosure against appellant, Deborah Parker, and against Thomas M. Parker, Aultman Hospital and the Stark County Treasurer. Appellant was served with a copy of the summons and complaint by certified mail on March 15, 2008.

{¶4} On April 16, 2008, appellant filed a counterclaim. Appellant's counterclaim did not include a certificate of service and was not served on appellee or any other party.

{¶5} Subsequently, on May 19, 2008, appellee filed a Motion for Default Judgment against appellant and the other defendants. A Judgment Entry and Decree in Foreclosure was filed on May 21, 2008.

{¶6} Appellant filed a Notice of Appeal on June 20, 2008. While appellant, in her brief, does not set forth any assignments of error, appellant appears to argue that the trial court erred in granting default judgment against her because she had answered the complaint in a timely fashion.

{¶7} We review a trial court's decision concerning a default judgment under an abuse of discretion standard. *Huffer v. Cicero* (1995), 107 Ohio App.3d 65, 74, 667 N.E.2d 1031. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶8} Civ.R. 55(A) states, in relevant part, as follows: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefore; but no judgment by default shall be entered against a minor or an incompetent person unless represented in the action by a guardian or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application...."

{¶9} As is stated above, appellant filed a counterclaim on April 16, 2008. However, appellant's counterclaim did not contain a certificate of service and was not served on the other parties. Moreover, no proof of service was separately filed.

{¶10} Civ.R. 5 (D) states as follows: "All papers, after the complaint, required to be served upon a party shall be filed with the court within three days after service, but

depositions upon oral examination, interrogatories, requests for documents, requests for admission, and answers and responses thereto shall not be filed unless on order of the court or for use as evidence or for consideration of a motion in the proceeding. Papers filed with the court shall not be considered until proof of service is endorsed thereon or separately filed. The proof of service shall state the date and manner of service and shall be signed in accordance with Civ. R. 11.” (Emphasis added).

{¶11} In *Erie Ins. Co. v. Bell*, Lawrence App. No. 01 CA 12, 2002-Ohio-6139, Erie Insurance Company filed a complaint against Jerry Bell. Bell, who was pro se, filed an answer that lacked a certificate of service. The trial court treated the answer as properly served upon the plaintiffs. The plaintiffs then filed a motion for default judgment in which they argued that Bell’s answer did not comply with Civ.R. 5(A). After the trial court denied the motion, a trial was held and the trial court found in favor of Bell.

{¶12} Erie Insurance appealed, arguing that the trial court had erred in considering Bell’s answer because it did not comply with Civ.R. 5(A). The *Erie* court found that Bell’s answer did not comply with Civ.R. 5(A) because the answer did not contain a certificate of service. *Id.* at ¶ 24. The *Erie* court concluded that because Bell’s answer lacked a certificate of service, and one was never filed with the trial court, the trial court could not have properly considered his answer and erred in denying the motion for default judgment and in proceeding to trial.

{¶13} Because appellant’s counterclaim did not contain a certificate of service and no proof of service was separately filed, the trial court acted properly in not considering the same and in granting appellee’s motion for Default Judgment.

{¶14} Appellant’s sole assignment of error is, therefore, overruled.

{¶15} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Delaney, J. concur

JUDGES

JAЕ/d0428

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

DEBORAH PARKER

Defendant-Appellant

-VS-

EMC MORTGAGE GROUP

Plaintiff-Appellee

JUDGMENT ENTRY

CASE NO. 2008 CA 00133

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellant.

JUDGES