

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FIRST KNOX NATIONAL BANK,
DIVISION OF THE PARK
NATIONAL BANK

Plaintiff-Appellee

-vs-

MAURICE A. PETERSON, ET AL.

Defendants-Appellants

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Patricia A. Delaney, J.

Case No. 08CA28

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Knox County Court of
Common Pleas, Case No. 08FR06-0353

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

September 24, 2009

APPEARANCES:

For Plaintiff-Appellee
First Knox National Bank

For Defendant-Appellants

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Hoffman, J.

{¶1} Defendants-appellants Maurice A. Peterson and Delores Peterson appeal the December 8, 2008 Journal Entry, Judgment and Decree of Foreclosure entered by the Knox County Court of Common Pleas, which granted judgment in favor of plaintiff-appellee First Knox National Bank, and ordered Appellants' home be sold through sheriff's foreclosure sale.

STATEMENT OF THE FACTS AND CASE

{¶2} On June 6, 2001, the Petersons executed an adjustable rate note and mortgage deed with First Knox Bank in the amount of \$45,000.00, for their property located at 26261 Cavallo Road, Danville, Ohio. The mortgage was filed with the Knox County Recorder on June 13, 2001, and recorded thereafter. On August 26, 2003, the Petersons executed a promissory note and mortgage deed with Beneficial Ohio, Inc. in the amount of \$23,068.57, for the same property.¹

{¶3} Over the course of the loan with First Knox Bank, the Petersons repeatedly made late and/or incomplete payments. After the Petersons failed to make four consecutive monthly payments, First Knox Bank accelerated the note and filed a foreclosure action on June 10, 2008. The Petersons filed their answer with leave of court on July 23, 2008.

{¶4} On August 1, 2008, First Knox Bank filed a motion for summary judgment, asserting there were no genuine issues of material fact as to whether the Petersons were in default. The Petersons filed a memorandum in opposition thereto, citing

¹ Beneficial did not defend in the underlying action and the trial court entered default judgment against the company. Beneficial is not a party to this appeal.

defenses of waiver based upon First Knox Bank's acceptance of partial payment after the initiation of the foreclosure action, and upon equitable grounds as the Petersons were willing to work with the Bank to resolve the delinquent payments.

{¶15} The evidence before the trial court established, since the inception of the loan, the Petersons made at least 112 late payments. The Petersons made a partial payment in March, 2008, and did not make the monthly payments for April, May, and June, 2008. Prior to the filing of the foreclosure action, First Knox Bank advanced \$350.00 to the Petersons for payment of an insurance premium on the property. On May 2, 2008, the Petersons made a payment of \$450.00. First Knox Bank applied the payment to the overdue amount for February, 2008, and a portion of the overdue amount for March, 2008. Subsequent to the filing of the foreclosure action on July 7, 2008, August 8, 2008, and September 5, 2008, the Petersons made payments totaling \$1150.00. First Knox Bank applied these payments to the balance due and owing on the accelerated note. Even if the note had not been accelerated, and even with the \$1150.00 in payments, the Petersons still would have been in default on the note as the result of delinquent payments for July, August, and September, 2008.

{¶16} In support of their position, the Petersons submitted evidence to establish Mrs. Peterson's work hours had been cut by almost fifty percent due to her employer's inadvertence and such caused the Petersons to fall behind on their mortgage payments. Mrs. Peterson's work situation was resolved in May, 2008, and she was working the same amount of hours she had previously been and had been given a raise.

{¶7} Via Journal Entry, Judgment and Decree of Foreclosure filed December 8, 2008, the trial court granted judgment in favor of First Knox Bank and against the Petersons. The trial court further found First Knox Bank was entitled to foreclosure on the mortgage and to have the property sold at sheriff's sale.

{¶8} It is from this journal entry the Petersons appeal, raising the following assignments of error:

{¶9} "I. THE TRIAL COURT ERRED BY FAILING TO CONSIDER THE EQUITIES WHEN IT GRANTED SUMMARY JUDGMENT TO APPELLEE AFTER THE PETERSONS PROVIDED EVIDENCE TO SUPPORT THEIR EQUITY DEFENSE.

{¶10} "II. EQUITY REQUIRED THE TRIAL COURT TO DENY APPELLEE'S MOTION FOR SUMMARY JUDGMENT AS THE PETERSONS PRESENTED EVIDENCE THAT THEY COULD MAKE THE APPELLEE WHOLE AND FORECLOSURE WOULD BE UNFAIR AND UNJUST.

{¶11} "III. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AS THERE WAS A GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO THE PETERSONS' ABILITY TO MAKE APPELLEE WHOLE."

Standard of Review

{¶12} 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. Civ. R. 56(C) provides, in pertinent part:

{¶13} “Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, 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. No evidence or stipulation may be considered except as stated in this rule. 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.”

{¶14} Pursuant to the above rule, a trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw different conclusions from the undisputed facts, *Houndshell v. American States Insurance Company* (1981), 67 Ohio St.2d 427. The court may not resolve ambiguities in the evidence presented. *Inland Refuse Transfer Company v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law, *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301.

{¶15} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the

record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim, *Drescher v. Burt* (1996), 75 Ohio St.3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist, *Id.* The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App.3d 732.

{¶16} It is based upon this standard we review the Petersons' assignments of error.

I, II

{¶17} The issues raised in the Petersons' first and second assignments of error are intertwined; therefore, we shall address these assignments of error together. In their first assignment of error, the Petersons maintain the trial court erred in granting summary judgment in favor of First Knox Bank without considering the equities the Petersons presented in their defense. In the second assignment of error, the Petersons contend equity required the trial court to deny First Knox Bank's motion for summary judgment as the Petersons presented evidence they could make First Knox Bank whole; therefore, the equities weighed against foreclosure.

{¶18} A foreclosure requires a two step process. "Once a court has determined that a default on an obligation secured by a mortgage has occurred, it must then consider the equities of the situation in order to decide if foreclosure is appropriate." *Rosselot v. Heimbrock* (1988), 54 Ohio App.3d 103, 105-106 (Citation omitted).

{¶19} The Petersons submit, once the trial court found First Knox Bank had established the elements of a foreclosure, to wit: the Petersons owed monies to the Bank, the mortgage was a valid lien on the property, and the conditions of the note and mortgage had been breached, the trial court was then required to evaluate the equities of the situation in order to determine whether foreclosure was the appropriate remedy. The Petersons assert the trial court failed to undertake an analysis of the equities of the situation; therefore, summary judgment in favor of First Knox Bank was inappropriate.

{¶20} Recently, in the *Bank of New York as Trustee v. Dobbs* (September 8, 2009), Knox App. 2009CA000002, unreported, this Court addressed a similar issue. The appellants in *Dobbs* appealed the trial court's granting summary judgment in favor of the Bank of New York and ordering their home be sold through a sheriff's foreclosure sale. After the *Dobbs*' appellants fell behind on their mortgage payments, they entered into a repayment plan with their mortgage holder. The mortgage holder unilaterally cancelled the repayment plan despite the fact the appellants were current with the agreed upon payments. The appellants attempted to negotiate a new repayment plan, however, the mortgage company filed a foreclosure action. The mortgage company offered to stop the foreclosure if the appellants paid \$4000.00. Although the appellants had the ability to make regular payments on the mortgage, they could not afford to pay the lump sum of \$4000.00.

{¶21} The foreclosure action proceeded with the mortgage holder filing a motion for summary judgment. The trial court granted the motion, and ordered the property be sold at a sheriff's sale. The appellants in *Dobbs* appealed to this Court, assigning error in the trial court's granting equitable relief without any explicit or implicit indication it had

weighed the equities in the situation. This Court found a lender and borrower both have equitable rights in a foreclosure action, and a trial court's task in weighing the equities is to determine whether a borrower should be given more time in which to redeem the property. *Id.* at para. 50. In *Dobbs*, this Court noted, "weighing the equities should not involve rewriting the mortgage contract for the parties." *Id.* This Court explained, although trial courts have occasionally considered other aspects of equity in deciding a foreclosure action, the appellants had not come forward with evidence legally sufficient to create a genuine issue of material fact as to whether there were equitable considerations which would affect the trial court's decision on the foreclosure action. *Id.* at para. 52.

{¶22} We find the rationale set forth in *Dobbs* is applicable herein. Prior to the filing of the foreclosure action and during the subsequent proceedings, the Petersons were never current with their mortgage payments. The fact First Knox Bank accepted payments from the Petersons after the filing of the action did not constitute a waiver of any of the Bank's rights under the mortgage. There was never a new repayment agreement between the parties. Additionally, we find the Petersons did not affirmatively demonstrate the trial court did not consider the equities. We presume the trial court considered such unless the record reveals an affirmative demonstration to the contrary.

{¶23} The Petersons' first and second assignments of error are overruled.

III

{¶24} In their third assignment of error, the Petersons submit the trial court erred in granting summary judgment in favor of First Knox Bank as genuine issues of material fact exist as to their ability to make the bank whole.

{¶25} We find the Petersons' ability to make First Knox Bank whole does not create a genuine issue of material fact, but rather such is a factor to be weighed by the trial court in determining whether foreclosure is the appropriate remedy. The fact the Petersons had the ability to make the Bank whole does not excuse the fact they had repeatedly failed to do so in the past.

{¶26} The Petersons' third assignment of error is overruled.

{¶27} The judgment of the Knox County Court of Common Pleas is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Delaney, J. concur

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin

HON. W. SCOTT GWIN

s/ Patricia A. Delaney

HON. PATRICIA A. DELANEY

