[Cite as *Green Tree Servicing, L.L.C. v. St. John*, 2015-Ohio-1111.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GREEN TREE SERVICING LLC

Plaintiff-Appellee

-vs-

DWAN GORDON ST. JOHN, et al.

Defendants-Appellants

JUDGES:
Hon. John W. Wise, P. J.
Hon. Patricia A. Delaney, J.
Hon. Craig R. Baldwin, J.

Case No. 2013 CA 00092

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2011 CV 04106
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 23, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendants-Appellants
JASON WHITACRE LAW OFFICES OF JOHN CLUNK, LPA 4500 Courthouse Boulevard Suite 400 Stow, Ohio 44224	WARNER MENDENHALL LAW OFFICES OF WARNER MENDENHALL 190 North Union Street, Suite 201 Akron, Ohio 44304

Wise, P. J.

{¶1} Appellants Dwan Gordon-St. John and Deametrious St. John appeal the August 18, 2013, judgment entry of the Stark County Court of Common Pleas finding in favor of Appellee Green Tree Servicing on its Complaint for foreclosure following a bench trial.

Statement of the Facts and Case

{¶2} Appellants Dwan C. Gordon-St. John and Deametrious A. St. John are the owners of real property located at 2625 Daffodil Street NE. Canton, Ohio, 44705 ("Real Estate").

{¶3} On May 21, 2007, Dwan Gordon-St. John signed a Promissory Note in favor of National City Mortgage a division of National City Bank ("National City") in the amount of One Hundred Forty-One Thousand Five Hundred-Fifty dollars ($141,550.00). The Note was endorsed by National City to National City Mortgage Co., a subsidiary of National City Bank, and then in blank.

{¶4} The Promissory Note was secured upon the Real Estate by a mortgage given by the St. Johns to National City. The Mortgage was executed simultaneously with the Promissory Note and recorded with the Stark County Recorder's Office on June 21, 2007, as Instrument No. 200705210027662. The Mortgage was subsequently assigned to Green Tree Servicing, LLC (''Green Tree'') on March 1, 2010, and recorded with the Stark County Recorder's Office on March 3. 2010 as Instrument No. 201003030007543.

{¶5} The Note and Mortgage required the St. Johns to make monthly payments commencing on July 1, 2007, until the date of maturity, June 1. 2037. The St. Johns

failed to make those payments and Green Tree declared their loan in default and accelerated the entire balance due. The amount due and owing on the loan is $134,937.41 plus interest at the rate of 6.5% per annum from March 1, 2011, plus late charges, advances for taxes and insurance and all other expenditures recoverable under the Note and Mortgage under Ohio law.

{¶6} On December 28, 2011, Appellee Green Tree Servicing LLC filed a Complaint in Foreclosure against Appellants Dwan C. Gordon-St. John and Deametrious A. St. John.

{¶7} On January 31, 2012, the St. Johns, through counsel, filed an Answer and Counterclaim.

{¶8} The matter was referred to mediation, where it remained until August 20, 2012.

{¶9} A trial was initially scheduled for October 24, 2012, but was rescheduled to December 4, 2012. The St. Johns then moved to continue the trial, which was granted. The trial was rescheduled to December 13, 2012.

{¶10} On December 13, 2012, a bench trial was held before a Magistrate. At trial Green Tree presented evidence and one witness, Thomas Clark. In addition, Deametrious St. John testified for the St. Johns. At the conclusion of the trial, the parties were ordered to submit written Closing Statements, which they did, along with Proposed Findings of Fact and Conclusions of Law.

{¶11} On April 18, 2013, the Magistrate filed her decision, ruling in favor of Green Tree. The trial court adopted the Magistrate's Decision on that same date.

{¶12} It is from this entry which Appellants now appeal, assigning the following as error:

ASSIGNMENTS OF ERROR

{¶13} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE PLAINTIFF-APPELLEE HAD MET THE CONDITIONS PRECEDENT UNDER THE MORTGAGE CONTRACT TO FILE A FORECLOSURE ACTION.

{¶14} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING DEFENDANT-APPELLANTS A JURY TRIAL ON ISSUES BEYOND THE FORECLOSURE.

{¶15} "III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN PERMITTING AN INCOMPETENT WITNESS TO TESTIFY."

I., III.

{¶16} We first must address Appellant's failure to timely file objections to the magistrate's decision and Appellant's failure to present a transcript to the trial court for its review of Appellant's objections to the magistrate's decision. Appellants filed the transcripts of the hearings in this Court with this appeal. The trial court never had the opportunity to review the transcript when considering Appellants' objections to the magistrate's decision.

{¶17} Civ. R. 53 deals with matters referred to magistrates. Civ.R. 53(D) states in relevant part:

> ***
>
> (2) *Magistrate's order; motion to set aside magistrate's order.*
>
> (a) *Magistrate's order.*

* * *

(b) *Motion to set aside magistrate's order.* Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order.

* * *

(3) *Magistrate's decision; objections to magistrate's decision.*

* * *

(b) Objections to magistrate's decision.

(i) Time for filing. A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.

(ii) Specificity of objection. An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

(iii) Objection to magistrate's factual finding; transcript or affidavit. An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

(iv) Waiver of right to assign adoption by court as error on appeal. Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).

{¶18} This Court has held, "where an appellant fails to provide a transcript of the original hearing before the magistrate for the trial court's review, the magistrate's findings of fact are considered established and may not be attacked on appeal." *Doane v. Doane,* 5th Dist. Guernsey No. 00CA21, 2001 WL 474267 (May 2, 2001); *State v. Leite,* 5th Dist. Tuscarawas No. 1999AP090054, 2000 WL 502819 (Apr. 11, 2000); *Fogress v. McKee,* 5th Dist. Licking No. 99CA15, 1999 WL 668580(Aug. 11, 1999); and *Strunk v. Strunk,* 5th Dist. Muskingum No. CT96–0015, 1996 WL 787981(Nov. 27, 1996). When a party objecting to a magistrate's decision has failed to provide the trial court with the evidence and documents by which the trial court could make a finding independent of the report, the appellate court is precluded from considering the transcript of the hearing submitted with the appellate record. *State ex rel. Duncan v. Chippewa Twp. Trustees,* 73 Ohio St.3d 728, 1995–Ohio–272.

{¶19} Accordingly, we review Appellants' assignments of error only to analyze whether the trial court abused its discretion in reaching specific legal conclusions based upon the established facts. *He v. Zeng,* 5th Dist. Licking No. 2009–CA–00060, 2010–Ohio–2095, ¶ 23.

{¶20} We note that authority exists in Ohio law for the proposition that Appellant's failure to object to the magistrate's decision does not bar appellate review of "plain error." *See R.G. Real Estate Holding, Inc. v. Wagner,* 2nd Dist. Montgomery App. No. 16737, 1998 WL 199628(Apr. 24, 1998); *In re Ortego,* 5th Dist. Tuscarawas No. 1999AP05003, 2000 WL 330069(Mar. 8, 2000); *Batsch v. Tress,* 11th Dist. Portage No. 2000–P–0022, 2001–Ohio–4343. However, the Supreme Court has cautioned against the over application of plain error analysis:

{¶21} "The plain error doctrine originated as a criminal law concept. In applying the doctrine of plain error in a civil case, reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings. *Schade,* 70 Ohio St.2d at 209, 24 O.O.3d at 317, 436 N.E.2d at 1003; *LeFort v. Century 21–Maitland Realty Co.* (1987), 32 Ohio St.3d 121, 124, 512 N.E.2d 640, 643; *Cleveland Elec. Illum. Co. v. Astorhurst Land Co .* (1985), 18 Ohio St.3d 268, 275, 18 OBR 322, 327–328, 480 N.E.2d 794, 800."

{¶22} Here, Appellants challenge the magistrate's factual finding that Appellee provided Appellants with Notice of Default and that the Appellee's witness was competent to testify as to its business records related to the loan account in this matter.

{¶23} As stated above, by failing to file objections to the magistrate's decision below, Appellants have waived their ability to challenge the magistrate's factual findings on appeal. Upon review, we find that this case does not present exceptional circumstances that rise to the level of plain error. The magistrate properly applied the correct legal standards for each claim Appellant raised to the facts it found.

{¶24} Accordingly, we overrule Appellants' First and Third Assignments of Error.

II.

{¶25} In their Second Assignment of Error, Appellants argue that the trial court erred in denying them a jury trial on the non-foreclosure issues. We disagree.

{¶26} Section 1, Article V, Ohio Constitution, provides in part that "[t]he right of trial by jury shall be inviolate * * *." This right has not been extended, however, to all civil actions. In particular, it is well established that parties to an equitable action are not entitled to a jury trial as a matter of right. *City Loan & Sav. Co. v. Howard* (1984), 16 Ohio App.3d 185, 475 N.E.2d 154, paragraph two of syllabus. A foreclosure action is equitable in nature and may be heard by a court. *Id.* at 186, 475 N.E.2d 154. As the Ohio Supreme court stated in *Alsdorf v. Reed* (1888), 45 Ohio St. 653, 17 N.E. 73:

{¶27} "Where, in such action, the prayer is for an ordinary decree of foreclosure and order of sale, the action is one for relief other than money only; and, although an issue of fact may be joined on a plea by the garnishee * * *, neither party is entitled to demand a jury for the trial of the issue, and either may appeal from a final judgment rendered against him in the action." *Id.* at paragraph two of the syllabus.

{¶28} An exception to the general rule that a party is not entitled to a jury trial in foreclosure actions applies when there is a claim for a personal judgment against a party. See *Sec. Fed. Sav. & Loan of Iowa v. King* (Aug. 25, 1983), Cuyahoga App. Nos. 44864 and 45071; *Grapes v. Barbour* (1898), 58 Ohio St. 669, 675, 49 N.E. 306. There was no claim in this case for a personal judgment against Appellants; therefore, they were not entitled to a jury trial.

{¶29} Appellants' Second Assignment of Error is overruled.

{¶30} Based on the foregoing, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

By: Wise, P. J.

Delaney, J., and

Baldwin, J., concur.

JWW/d 0312