[Cite as *Metlife Home Loans v. Louy*, 2012-Ohio-6061.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

Metlife Home Loans	Court of Appeals No. F-11-019
Appellee	Trial Court No. 11CV000195
v.	
James A. Louy, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: December 21, 2012

* * * * *

Stacy L. Hart, for appellee.

George C. Rogers, for appellants.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a December 5, 2011 judgment of the Fulton County Court of Common Pleas denying a motion to vacate default judgment. On June 7, 2011, appellee, Metlife Home Loans, initiated foreclosure proceedings against appellants, James and Karen Louy, for defaulting on their home loan payments. Appellee subsequently filed an amended complaint on July 14, 2011, to correct the interest due date on the defaulted loan. Appellants proactively contacted appellee's counsel to

convey that they wished to avoid foreclosure and inquired as to their options. Based upon these communications, appellants applied for a loan modification designed to prevent foreclosure. Appellee informed appellants that their loss mitigation workout package was received.

{¶ 2} On September 20, 2011, the lower court granted appellee's motion for default judgment. Despite having contacted appellee's counsel, notifying them of their intent to avoid foreclosure, requesting a modification application, completing the application, and timely returning it, appellants were nevertheless not furnished with notice of the motion. Accordingly, appellants filed a motion to vacate the default judgment. The court denied the motion. This appeal ensued.

{¶ 3} For the reasons set forth below, this court reverses the judgment of the trial court.

{¶ 4} Appellants set forth the following sole assignment of error:

> 1. THE TRIAL COURT ERRED IN ITS JUDGMENT ENTRY OF DECEMBER 5, 2011, IN DENYING DEFENDANTS/APPELLANT'S MOTION TO VACATE THE DEFAULT JUDGMENT ENTERED SEPTEMBER 20, 2011, AS VOID, AND IN FAILING TO GRANT DEFENDANTS/APPELLANTS CIV. R. 60(B) MOTION.

{¶ 5} The undisputed facts relevant to this case are as follows:

{¶ 6} In January 1996, appellants secured a home loan in the sum of $159,000 from Alliance Mortgage, appellee's predecessor in interest to the underlying loan. In

January 2007, appellants entered into a loan modification agreement with First Horizon Home Loan Corp., who had acquired the loan. Appellee ultimately acquired the rights to the loan following several assignments.

{¶ 7} As noted, appellants defaulted upon the loan obligation. On June 10, 2011, appellants were served with a foreclosure complaint and contacted appellee's counsel via telephone to inquire as to what they could do to prevent foreclosure. Appellants were advised by appellee that they could apply for a loan modification to prevent foreclosure. On June 15, 2011, appellee's counsel sent appellants the application along with numerous financial documents to fill out and submit. Appellants timely submitted the application and documents. In addition, they were advised that further documents were needed. Appellants once again timely submitted the supplemental documents. In the midst of these actions, on July 14, 2011, appellee submitted an amended complaint against appellants and filed for default judgment once the time for answering the amended complaint elapsed.

{¶ 8} On August 22, 2011, appellants received email communications from appellee's counsel informing them that their loan modification package was received. In September 2011, given the lack of any updates or communications from appellee, appellants again called appellee. This time, they were conversely informed that the loan modification application had not been received. This was in direct contradiction to the earlier communication.

{¶ 9} On September 20, 2011, the trial court granted appellee's motion for default judgment. A sheriff's sale of appellant's home was scheduled for November 17, 2011. However, appellants had not received notice of the motion for default judgment pursuant to Civ.R. 55(A). Thus, on November 7, 2011, appellants filed a motion to vacate the judgment and decree in foreclosure and to stay the November 17, 2011 sheriff's sale. On December 5, 2011, appellants' motion to vacate was denied.

{¶ 10} Appellants' sole assignment of error claims that the trial court erred in denying the motion to vacate the default judgment. Appellants argue that they had met the definition of an "appearance" so as to trigger notice requirements by having had multiple contacts with appellee's counsel in an effort to avoid foreclosure and that the contacts were of such nature that they should have been entitled to notice of the motion for default. We agree.

{¶ 11} Civ.R. 55(A) provides that "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."

{¶ 12} The record clearly reflects that appellants contacted appellee's counsel directly on multiple occasions. The record reflects that appellee's counsel's office thereafter sent appellants the forms for a loan modification. In conjunction with these discussions, appellee's counsel contacted appellants directly, informing them that the loan modification application was submitted, and requested additional documents that

appellants submitted. While appellee argues that this "contact" was not in the nature of defense discussions, it was an attempt to resolve the dispute, which is determinative to the key issue of notification to appellants of the motion for default judgment.

{¶ 13} In *Hyway Logistic Servs., Inc. v. Ashcraft*, the Third District Court of Appeals reasoned that, "Federal courts have * * * broadly construed the analogous federal rule to include informal contacts between the parties that indicate a clear purpose to defend the suit." *Hyway Logistics Servs., Inc. v. Ashcraft*, 3d Dist. No. 5-99-40, 2000 WL 123794 (Feb. 2, 2000). The court went on to hold in pertinent part,

> AMCA and those federal cases upon which it relies support the proposition that a party "appears in the action," and is thus entitled to notice of the application for default judgment, when that party clearly expresses to the opposing party an intention and purpose to defend the suit, regardless of whether a formal filing is made, particularly when the contact is of an informal nature. *Id.*

{¶ 14} Likewise, this court has also held that notice was required when contact with the party filing its motion for default judgment had been established.

> Appellant's counsel attested to having communication with appellee's counsel on three separate occasions prior to filing appellant's motion for default judgment. Even though appellant asserts that appellee made an incorrect assumption, appellant's counsel was aware that appellee anticipated this suit would be dismissed because the tolling agreement had

been executed and provided to appellant's counsel. Moreover, appellee and her counsel attested that they were never served with a copy of appellant's motion [for default judgment]. *Chiaverini, Inc. v. Little*, 6th Dist. No. L-06-1344, 2007-Ohio-3683.

{¶ 15} In the case at hand, appellants attempted to get a loan modification to prevent the foreclosure action from proceeding against them. As such, appellee had an obligation to send appellants notice of the motion for default judgment. No such notification was made.

{¶ 16} While a defendant in a case must file a written answer or otherwise respond formally to the complaint, telephone calls to plaintiff's counsel in response to a foreclosure suit, combined with the response of counsel by sending loan modification papers to the defendants, constitutes "informal" contact with intent to defend and not neglect the suit. The trial court should have granted appellants' motion to vacate the motion for default judgment in accordance with Civ.R. 60(B).

{¶ 17} For the reasons set forth above, we find appellants' assignment of error well-taken.

{¶ 18} On consideration whereof, the judgment of the Fulton County Court of Common Pleas is reversed and remanded for proceedings consistent with this decision. Appellee is ordered to pay costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE