

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

Sun Federal Credit Union

Court of Appeals No. F-12-015

Appellee

Trial Court No. 10CV000223

v.

Roy E. Yeager, et al.

DECISION AND JUDGMENT

Appellants

Decided: June 21, 2013

* * * * *

Matthew G. Burg, for appellee.

Alan J. Lehenbauer and Shawn M. Jones, for appellants.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Fulton County Court of Common Pleas that denied appellants' motion for Civ.R. 60(B) relief and reinstated an earlier judgment entry and foreclosure decree in favor of appellee Sun Federal Credit Union. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} This case was before this court in 2012 and, as we stated then, involves a “somewhat tortured procedural history.” We will again strive to summarize that history as succinctly as possible.

{¶ 3} On May 19, 2004, appellants Roy and Robin Yeager signed a promissory note to appellee in the amount of \$124,000. To secure payment on the note, appellants signed a mortgage on residential real property located in Swanton, Ohio. On July 16, 2010, however, appellee filed a foreclosure action against appellants, stating that “the conditions of said mortgage have been broken and the same has become absolute, and Plaintiff has fulfilled all applicable conditions precedent.” Appellants admitted that the mortgage had been recorded; their only affirmative defense was failure to state a claim. On August 1, 2011, appellee moved for summary and default judgment.

{¶ 4} On August 2, 2011, the trial court granted summary judgment to appellee and issued a judgment entry of foreclosure. The judgment contained the necessary details, including the amount of judgment and priority of liens, and was a final appealable order. However, on August 9, 2011, appellants filed a “Motion to Vacate Summary Judgment,” asserting that they had not been afforded an opportunity to reply to the motion. The trial court granted appellants’ motion to vacate on August 17, 2011, thereby vacating the August 2 judgment entry of foreclosure, and granted appellants until September 1, 2011, to reply to appellee’s motion for summary judgment. Appellants filed a memorandum in opposition to appellee’s motion for summary judgment on September 8, 2011. On September 29, 2011, the trial court granted summary judgment,

but without reissuing the August 2, 2011 judgment, which had set forth the amount of judgment and priority of liens.

{¶ 5} On October 13, 2011, appellants filed a motion for Civ.R. 60(B) relief from the September 29 judgment. On October 28, 2011, appellants filed an appeal in this court from the trial court's September 29 judgment. Upon review, this court found by judgment filed March 6, 2012, that the September 29 judgment granting foreclosure did not list the amount of the judgment or the priority of liens and therefore was not a final appealable order.

{¶ 6} Thereafter, appellants filed in the trial court a motion for leave to file instant an amended answer and a motion to reconsider and reverse the September 29, 2011 judgment. Appellee filed an opposition brief to the two motions. By judgment filed August 16, 2012, the trial court denied appellants' motion for leave to file an amended answer as untimely. Further, the court overruled appellants' motion for Civ.R. 60(B) relief, finding that it was not supported by any showing of mistake or misunderstanding of the facts or the law. Finally, the trial court stated:

The Judgment Entry and Foreclosure Decree, filed August 2, 2011, which was vacated by entry filed August 17, 2011, is proper and sustained in all respects. Thus the Judgment Entry of August 17, 2011, is hereby declared to be "null and void," and the Judgment Entry and Foreclosure Decree filed August 2, 2011 is hereby REINSTATED as a viable Judgment Entry of Foreclosure in its entirety.

{¶ 7} It is from that judgment that appellants now appeal, setting forth the following assignments of error:

I. The decision of the trial court is not final and appealable and this appeal must be dismissed.

II. The trial court lacked jurisdiction to rule on appellants' motion for relief from judgment pursuant to Civ.R. 60(B).

III. The trial court abused its discretion by denying appellants' post-summary judgment to amend their answer.

IV. The trial court erred by granting appellee's motion for summary judgment.

{¶ 8} In support of their first assignment of error, appellants assert that the trial court's August 16, 2012 judgment is not final and appealable. Appellants argue that the judgment entry "appears to be more in line with a 'decision' than an 'order,'" because it fails to actually profess judgment or employ "judgment language" to provide sufficient information to inform the parties of their obligations and the final outcome of this stage of the matter. This argument is without merit. Appellants claim that the trial court should have reissued the August 2, 2011 judgment. As quoted above, by judgment entry filed August 16, 2012, the trial court ruled that the August 2, 2011 judgment entry and foreclosure decree was "proper and sustained in all respects." The trial court then declared the August 17, 2011 judgment entry null and void and ordered that the August 2, 2011 judgment entry and foreclosure decree was "REINSTATED as a viable Judgment

Entry of Foreclosure in its entirety. * * * The Court ADOPTS its FINDINGS as its ORDER.”

{¶ 9} Upon consideration of the foregoing, we find that the trial court’s August 16, 2012 judgment entry is final and appealable. Appellants’ first assignment of error is not well-taken.

{¶ 10} In support of their second assignment of error, appellants assert that the trial court lacked jurisdiction to rule on the Civ.R. 60(B) motion they filed on October 13, 2011, requesting relief from the trial court’s September 29, 2011 order. The trial court denied the Civ.R. 60(B) motion as part of its August 16, 2012 judgment entry. Appellants essentially argue that because the September 29, 2011 judgment was not final and appealable, the trial court lacked jurisdiction to rule on a motion filed for relief from that judgment. We find, however, that the trial court had jurisdiction to rule on the motion when it considered the various filings pending before the court after this court remanded the case back upon finding the August 2, 2011 judgment entry was not final and appealable. Appellants’ argument is without merit and, accordingly, their second assignment of error is not well-taken.

{¶ 11} In their third assignment of error, appellants assert that the trial court improperly denied their post-summary judgment request to amend their answer filed March 9, 2012.

{¶ 12} Pursuant to Civ.R. 15(A), a party may amend an answer once “as a matter of course” within 28 days after it is served, provided that the trial court has not placed the

action on the trial calendar. Thereafter, the party may only amend the answer with the adverse party's written consent or after obtaining leave of court. A trial court's denial of a motion for leave to amend a pleading will not be reversed absent an abuse of discretion. *State ex rel. Askew v. Goldhart*, 75 Ohio St.3d 608, 610, 665 N.E.2d 200 (1996). This court has held that denial of a motion for leave to amend a pleading may be based upon a showing of bad faith, undue delay or undue prejudice to the opposing party. *Palmer Brothers Concrete, Inc. v. Kuntry Haven Constr., LLC*, 6th Dist. No. WD-11-033, 2012-Ohio-1875. Further, this court has held that "a court's decision with respect to a Civ.R. 15(B) motion to amend the pleadings will not be reversed absent a 'gross abuse' of discretion." *Sheperak v. Ludlow*, 6th Dist. No. F-03-011, 2004-Ohio-3155, ¶ 16, citing *State ex rel. Evans v. Bainbridge*, 5 Ohio St.3d 41, 46, 448 N.E.2d 1159 (1983).

{¶ 13} A review of the record shows that appellants raised defenses for the first time in their motion to amend which was filed after summary judgment was granted, after their Civ.R. 60(B) motion was filed, and after the premature first appeal. Specifically, appellants assert on appeal that they were entitled to raise the issue of appellee's failure to comply with the notice provisions in the note and mortgage prior to filing the foreclosure action, while also admitting that the issue of the occurrence of conditions precedent was not raised with particularity in their answer to appellee's complaint. Our review of the record reveals that appellants' request to amend their answer was untimely and therefore properly denied by the trial court. The motion was filed two years after the complaint, and after summary judgment was initially rendered. Appellee would suffer

significant prejudice by being forced to expend additional time and resources that could have been devoted to the issue had it been raised two years earlier. Accordingly, appellants' third assignment of error is not well-taken.

{¶ 14} In their fourth assignment of error, appellants assert the trial court erred by granting summary judgment for appellee because genuine issues of material fact exist concerning appellee's compliance with notice requirements under the note and mortgage.

It is well-settled that an appellate court reviews a trial court's granting of summary judgment de novo, applying the same standard used by the trial court. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989); *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment will be granted when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 15} In its motion for summary judgment, appellee asserted that the terms and conditions of the promissory note were breached by reason of non-payment. In its complaint, appellee had claimed that by reason of default there was due and owing \$99,500.65 plus interest at the rate of six percent per annum from June 1, 2009, plus late charges, and that it had fulfilled all applicable conditions precedent. In their answer, appellants did not allege that appellee failed to give them notice of default as required by the note and mortgage. Appellee further asserted on summary judgment that filing of the

complaint was sufficient declaration of the exercise of the option to accelerate the balance due and owing. Further, appellee's supervisor of loan servicing stated in her affidavit attached to the motion for summary judgment that appellee had satisfied all applicable conditions precedent.

{¶ 16} As to the conditions precedent issue, the Twelfth District has held:

Where a cause of action is contingent upon the satisfaction of some condition precedent, Civ.R. 9(C) requires the plaintiff to plead that the condition has been satisfied, and permits the plaintiff to aver generally that any conditions precedent to recovery have been satisfied, rather than requiring plaintiff to detail specifically how each condition precedent has been satisfied. In contrast to the liberal pleading standard for a party alleging the satisfaction of conditions precedent, a party denying the performance or occurrence of a condition precedent must do so specifically and with particularity. Civ.R. 9(C). A general denial of performance of conditions precedent is not sufficient to place performance of a condition precedent in issue. The effect of the failure to deny conditions precedent in the manner provided by Civ.R. 9(C) is that they are deemed admitted. *First Fin. Bank v. Doellman*, 12th Dist. NO. CA2006-02-029, 2007-Ohio-222,

¶ 20.

{¶ 17} Once the moving party has identified the issues where there is no genuine issue of material fact and the issue can be determined as a matter of law, the opposing

party must come forward with specific facts to show that there is a genuine issue for trial. Appellants' assertion in their opposition to the motion for summary judgment that they did not receive notice that they were in default is not supported by evidence sufficient to create a genuine issue of fact.

{¶ 18} Based on the foregoing, we find that summary judgment in this matter was appropriate and, accordingly, appellants' fourth assignment of error is not well-taken.

{¶ 19} On consideration whereof, the judgment of the Fulton County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellants pursuant to App.R. 24.

Judgment affirmed.

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

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.

JUDGE

James D. Jensen, J.

CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.