[Cite as *Middlebrooks v. Bank of Am.*, 2013-Ohio-1592.]

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

Ronald Middlebrooks, et al.

Plaintiffs

v.

Bank of America

Defendant

[Joanna E. Baron, Esq.—Appellant]
[Creditus Lending 2 LP—Appellee]

Court of Appeals No. L-12-1098

Trial Court No. CI0201006998

DECISION AND JUDGMENT

Decided: April 19, 2013

* * * * *

Joanna E. Baron, pro se.

Todd V. McMurtry and Margaret E. Cunningham, for appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which sanctioned counsel for plaintiffs $1,960 for frivolous conduct in violation of R.C. 2323.51. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} In 2010, Ronald and Lois Middlebrooks, property owners in Lucas County, Ohio, filed a complaint through counsel to quiet title or, in the alternative, receive a declaratory judgment against defendant, Bank of America. The Middlebrooks asserted that their mortgage loan, which was then held by Bank of America, was the subject of two prior foreclosure actions which were allegedly dismissed voluntarily by notice pursuant to Civ.R. 41(A)(1). Thus, they claimed that future foreclosure filings in connection with the subject property were barred by the Civ.R. 41(A)(1)(a) "double dismissal rule" and the Ohio saving statute.

{¶ 3} Any potential legitimate basis from which to assert such a claim would necessitate a record of evidence that contained some objective basis from which it could be argued that the same foreclosure filing against the Middlebrooks was voluntarily dismissed twice by notice pursuant to Civ.R. 41(A)(1)(a). The record is plainly devoid of any such evidence.

{¶ 4} Appellee, Creditus Lending 2, filed a motion for leave to intervene and to file an answer. Creditus is the current holder of the Middlebrooks' mortgage loan. Over the Middlebrooks' objections, the trial court granted Creditus leave to intervene and to file an answer to the complaint.

{¶ 5} Creditus subsequently filed a motion for summary judgment given that the record clearly shows that two voluntary dismissals by notice of the same foreclosure case against the Middlebrooks, or even two voluntary dismissals by notice of any foreclosure case against the Middlebrooks, did not occur. On the contrary, the record clearly shows

that the two foreclosure filings that served as the purported basis of the complaint pertained to different lenders during different default periods and only one of them was voluntarily dismissed by notice pursuant to Civ.R. 41(A)(1)(a).

{¶ 6} There was simply no reasonable way to construe the evidence as supporting the application of the double dismissal rule to this case. Accordingly, the trial court dismissed the Middlebrooks' complaint against Creditus and Bank of America, with prejudice, and granted summary judgment in favor of Creditus. In July 2011, Creditus filed a motion for an award of attorney's fees pursuant to R.C. 2323.51 as a sanction against counsel for plaintiffs for filing and pursuing a frivolous action. That motion was granted in March 2012. This appeal ensued.

{¶ 7} Appellant Joanna E. Baron, counsel for plaintiffs, sets forth the following three assignments of error:

I. Whether the Appellant's legal arguments were frivolous?

II. Whether the Judgment of the Trial court was an abuse of discretion?

III. Whether the Trial Court erred in Denying the Appellant's Motion for Default Judgment

{¶ 8} The following undisputed facts are relevant to this appeal. On October 6, 2010, the Middlebrooks filed a declaratory judgment action through counsel. It was asserted by counsel, despite no evidentiary support, that two prior foreclosure filings involving the property were voluntarily dismissed by notice pursuant to Civ.R.

41(A)(1)(a) so as to trigger the double dismissal rule and bar a future foreclosure filing. However, the facts in no way supported this contention.

{¶ 9} The record conversely showed that the first foreclosure proceeding brought in 2001 by Ameriquest Mortgage was actually dismissed pursuant to Civ.R. 41(A)(2), not Civ.R. 41(A)(1)(a). The second underlying foreclosure proceeding was filed in April 2008, by Bank of America. This second filing pertained to a different default period. It was filed by a different lender and was rooted in a separate cause of action. This proceeding was dismissed in June 2008 pursuant to Civ.R. 41(A)(1)(a).

{¶ 10} Yet another successor lender, Creditus, the successor holder of the mortgage, filed leave to intervene in 2010. The two actual foreclosure filings that served as the purported basis of the motion for declaratory judgment involved different lenders, different loans default periods, and different causes of action. More importantly, only one of them was dismissed pursuant to Civ.R. 41(A)(1)(a). As such, the underlying facts could not reasonably be interpreted as potentially triggering the double dismissal rule and thereby barring an otherwise proper foreclosure refiling.

{¶ 11} Given underlying facts and a procedural history facially adverse to the basis of the complaint, Creditus filed a motion for summary judgment against the Middlebrooks. Summary judgment was granted. The trial court found that the record clearly showed that two voluntary dismissals had not occurred. The record further showed the two subject foreclosure filings involved different lenders and different

defaults, clearly removing them from any potential application of the double dismissal rule. Notably, the Middlebrooks did not appeal that judgment.

{¶ 12} Appellant's first two assignments of error are based on the common legal premise that the trial court erred by finding her arguments to be frivolous. As such, they will be addressed simultaneously. She asserts the trial court abused its discretion in determining her arguments to be frivolous. Appellant asserts that the arguments were based on existing case law, that she did not misstate the law, and that she did not have inadequate facts to support the double dismissal claim. We are not persuaded.

{¶ 13} Appellant asserts that the filing of the underlying complaint to quiet title was based upon a reliance of the double dismissal rule and the arguments were not frivolous.

{¶ 14} Frivolous conduct has been defined as conduct of a party to a civil action that "is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law." R.C. 2323.51(A)(2)(a)(ii). Appellant also cites *Orbit Electronics* which held that if no reasonable lawyer would have brought the claim in light of existing law, then the claim is frivolous. *Orbit Electronics, Inc. v. Helm,* 167 Ohio App.3d 301, 2006-Ohio-2317, 855 N.E.2d 91 (8th Dist.).

{¶ 15} To establish whether appellant's arguments were indeed frivolous, we must first establish whether the double dismissal rule applies. The first foreclosure case in this

matter was dismissed at the request of the plaintiff, Ameriquest, pursuant to Civ.R. 41(A)(2). The second case in this action was dismissed at the request of appellee, Bank of America, pursuant to Civ.R. 41(A)(1)(a). The Ohio Supreme Court has unambiguously held "that the double-dismissal rule contained in Civ.R. 41(A)(1) does not apply to a plaintiff's dismissal of claims pursuant to Civ.R. 41(A)(2)." *Olynyk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878, 868 N.E.2d 254, ¶ 31. Accordingly, the double dismissal rule clearly does not and could not apply to this case.

{¶ 16} Because the facts and case law clearly dictate that the double dismissal rule could not conceivably apply as purported by appellant, it cannot be said that counsel's arguments were based on existing case law. As such, it cannot be found that a reasonable lawyer would have brought the claim to quiet title.

{¶ 17} Appellant's arguments in support of the quiet title claim were correctly found to be wholly unsupported and frivolous. Wherefore, we find that the trial court did not abuse its discretion. We find appellant's first two assignments of error not well-taken.

{¶ 18} Appellant's third assignment asserts that the trial court erred in denying a motion for default judgment. This argument is wholly based upon a never appealed judgment issued on June 10, 2011. App.R. 4(a) states that an appeal must be filed within 30 days of the service of judgment. This appeal was not filed until April 5, 2012, well beyond the 30-day filing deadline. Thus, this claim is not properly before this court on appeal. However, even assuming arguendo that this assignment is properly under

consideration, based upon our holdings in response to the first two assignments of error, the third assignment of error would be likewise not well-taken.

{¶ 19} Based upon the forgoing, the judgment of the Lucas County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

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.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, 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.