

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

The Bank of New York Mellon, fka The
Bank of New York, as Trustee For the
Certificateholders of CWMBS, Inc.,
Alternative Loan Trust 2003-12CB,
Mortgage Pass Through Certificates,
Series 2003-30

Court of Appeals No. S-12-044

Trial Court No. 11 CV 1215

Appellee

v.

Jean Frey, Executor of the Estate of
of Robert Wott, deceased

DECISION AND JUDGMENT

Appellant

Decided: September 20, 2013

* * * * *

Jason A. Whitacre and T. Jeffrey Tumlin, for appellee.

Frank H. Bennett, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Jean Frey, Executor of the Estate of Robert Wott, deceased,
appeals from the November 1, 2012 judgment of the Sandusky County Court of Common

Pleas granting summary judgment to appellee, The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders of CWMBS, Inc., Alternative Loan Trust 2003-12CB, Mortgage Pass Through Certificates, Series 2003-30, and ordering the mortgage on property commonly known as 238 Elmdale Avenue, Clyde, Ohio, to be foreclosed. For the reasons which follow, we affirm.

{¶ 2} On December 15, 2011, appellee filed its second amended complaint against Robert W. Wott, and other parties having an interest in the property at issue, including in part Wott's unknown heirs, at law, devisees, legatees, executors and administrators of Wott's estate. On December 23, 2011, Frey, Executor of the Estate of Robert Wott, deceased, filed a suggestion of death stating that Wott died on March 16, 2010. His heirs included Michelle Kay Wott, his surviving spouse, and his daughters, Leah J. Williams and Laurie A. McCleary.

{¶ 3} Appellee asserted in its complaint that Wott had defaulted on payment of a promissory note and owed appellee \$70,797.07, plus interest. Wott had executed the promissory note for \$84,000 on April 24, 2003. Appellee sought judgment on the note.

{¶ 4} Appellee further asserted that the promissory note was secured by a mortgage signed by both Robert Wott and Michelle K. Wott, which was assigned to appellee on September 28, 2011, from Countrywide Home Loans, Inc. dba America's Wholesale Lender. Appellee asserted that appellant and Michelle K. Wott are the owners of the property subject to the mortgage, 238 Elmdale Avenue, Clyde, Ohio. Appellee further asserts that the legal description in the mortgage deed does not conform to the

legal description of the property due to a scrivener's error. Therefore, appellee sought reformation of the mortgage deed and deed of conveyance to include the entire legal description. Finally, appellee sought to foreclose on the mortgage.

{¶ 5} In her answer to the complaint, Frey asserted that appellee was required by law to present its claim as a creditor within six months of the date of Wott's death. Having failed to make such a claim, appellee's claim is now barred and the mortgage cannot be foreclosed.

{¶ 6} On June 7, 2012, appellee moved for summary judgment asserting that Frey neither admitted nor denied the allegations of the complaint and raised no valid defense. Therefore, appellee was entitled to judgment as a matter of law. While appellee may not be able to pursue personal judgment against the estate, appellee asserted it was not precluded from pursuing an in rem judgment against the property. On July 19, 2012, appellee moved for default judgment against Michelle Wott and the other parties who have an interest in the real property.

{¶ 7} On July 31, 2012, the court entered judgment in favor of appellee as against all defendants because they were in default for failing to file an answer to the complaint. Robert Wott, deceased, was dismissed as a party. The court ordered reformation of the mortgage deed and deed of conveyance to include the entire description of the property. The court further ordered the mortgage foreclosed to satisfy the debt owned on the promissory note.

{¶ 8} On August 13, 2012, however, Frank H. Bennett, attorney for Frey, filed an objection to the judgment asserting that there had been no scrivener's error and that he never received a copy of the motion for summary judgment and was never notified of any hearing on this case. He also asserted that Frey never received notice of the motion by ordinary mail. The court treated Bennett's motion as a Civ.R. 60(B) motion seeking relief from judgment due to surprise. On September 6, 2012, the court granted Frey additional time to file a response to the motion for summary judgment.

{¶ 9} Frey asserted in her memorandum in opposition to appellee's motion for summary for judgment that the claim for a judgment on the debt is barred because appellee failed to comply with the procedures of R.C. 2117.06 and that the statute does not provide an exception for an in rem proceeding. Frey asserts that R.C. 2117.06 is controlling because it was last enacted. Appellee argued that nothing in R.C. 2117.06 precluded it from foreclosing on the mortgage citing *Weaver v. Bank of New York Mellon*, 10th Dist. Franklin No. 11AP-1065, 2012-Ohio-4373. Furthermore, appellee argued that devisees and beneficiaries take real property subject to existing mortgage liens pursuant to R.C. 2113.52 and 2117.29.

{¶ 10} On November 1, 2012, the trial court reinstated the grant of summary judgment in favor of appellee on the authority of the *Weaver* case. Frey sought an appeal from that judgment asserting the following single assignment of error:

The Court of Common Pleas of Sandusky County Ohio committed error in it's [sic] final judgment when it found Plaintiff mortgagee could

sue all creditors including the devisees or heirs of a decedent's estate on a note and mortgage when the mortgage had failed to present a claim against decedent's estate pursuant to Ohio Revised Code Section [sic] 2117.06(A) because O.R.C. 2117.06(A) does not set forth the whole of the requirements of O.R.C. 2117.06 set forth in the appendix as Exhibit B because O.R.C. 2117.06(C) states that any claim not presented within 6 months after the death of the decedent shall be forever barred.

{¶ 11} The appellate court reviews the grant of summary judgment under a de novo standard of review. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 (2000), citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Applying the requirements of Civ.R. 56(C), we uphold summary judgment when it is clear “(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) 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, who is entitled to have the evidence construed most strongly in his favor.” *Harless v. Willis Day Warehousing Co., Inc.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

{¶ 12} We address first, the comment by appellant's counsel that he could not review the cases cited in the judgment because there was no citation to the proper reporters. Since May 1, 2002, all opinions of the Ohio Supreme Court are posted to the Supreme Court's website and reported in the Ohio Official Reports. Rep.Op.R. 2.1. The

website became the designated Ohio Official Reports for court of appeal opinions as of July 1, 2012. Rep.Op.R. 3.2. The recommended citation style is governed by the *Supreme Court's Writing Manual: A Guide to Citations, Style, and Judicial Opinion Writing for guidance on the style of documents filed with the Supreme Court*, effective July 1, 2013. S.Ct.Prac.R. 3.01. While the trial court properly used the website citations, it could have also used the official reporter citations.

{¶ 13} Appellant argues on appeal that the trial court erred as a matter of law by finding that the mortgagee can foreclose on a mortgage lien even if it failed to timely present a claim to the estate for the promissory note the decedent owed at the time of his death. Appellant argues that the debt is uncollectible because appellee failed to file a timely claim with Wott's estate as required by R.C. 2117.06 and, therefore, appellee cannot foreclose on the mortgage securing the debt.

{¶ 14} We disagree. A mortgagee has two claims for relief, one on the note and one on the mortgage. The mortgagee can combined the two claims into one action or maintain two actions because the claims are separate and distinct remedies, the first legal and the second equitable. *Maus v. Auglaize Nat. Bank of Wapakoneta*, 125 Ohio St. 32, 180 N.E. 378 (1932). When the mortgagee seeks a personal judgment against the defendant, the trial court must have in personam jurisdiction over the debtor. But, if the mortgagee only seeks a remedy against the property, the action is in rem. *Central Hyde Park Sav. & Loan Co. v. Feck*, 77 Ohio App. 343, 349, 67 N.E.2d 44 (1st Dist.1945).

{¶ 15} When the mortgagee seeks to collect the indebtedness on the note, the claim must be filed within the six-month time period of R.C. 2117.06. *LCNB Natl. Bank v. Connaughton*, 12th Dist. Butler No. CA2011-08-151, 2012-Ohio-4101, ¶ 11-13. However, if the mortgagee seeks only to foreclose the mortgage and to sell the property to satisfy the debt, there is no claim against the estate and the mortgagee may assert its claim at any time against the heirs and devisees who took the property subject to the lien. *Ambrose v. Byrne*, 61 Ohio St. 146, 55 N.E. 408 (1899), paragraphs one and two of the syllabus; *Bank of New York Mellon Trust Co, N.A. v. Loudermilk*, 5th Dist. Fairfield No. 2012-CA-30, 2013-Ohio-2296, ¶ 52; *Weaver*, 10th Dist. Franklin No. 11AP-1065, 2012-Ohio-4373, at ¶ 22; *BAC Home Loans Servicing, L.P. v. Mowery Properties, Ltd.*, 10th Dist. Franklin No. 10AP-396, 2011-Ohio-1596, ¶ 12-19; *GMAC Mtge. Corp. v. McElroy*, 5th Dist. Stark No. 2004-CA-00380, 2005-Ohio-2837, ¶ 15-16.

{¶ 16} Therefore, we find that the trial court did not err as a matter of law by granting summary judgment in favor of appellee. Appellant's sole assignment of error is not well-taken.

{¶ 17} Having found that the trial court did not commit error prejudicial to appellant, the judgment of the Sandusky County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal 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.

Mark L. Pietrykowski, J. _____

JUDGE

Arlene Singer, P.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>.