

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

First National Bank of Bellevue

Court of Appeals No. OT-13-024

Appellee

Trial Court No. 13 CV 020E

v.

NE Port Investments, LLC, et al.

Appellees

DECISION AND JUDGMENT

[Anita Barsan, David Barsan, Betty Oprian,
Russell White—Appellants]

Decided: April 25, 2014

* * * * *

Kenneth R. Resar, for appellees Gene F. Molnar, Trustee, and
Mary E. Molnar, Trustee.

Jack Morrison, Jr. and Thomas R. Houlihan, for appellants.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Ottawa County Court of Common Pleas, which denied appellants’ motion to intervene. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellants set forth the following single assignment of error:

The trial court erred in refusing to allow David and Anita Barsan and Russell White and Betty Oprian to intervene in this matter.

{¶ 3} The following undisputed facts are relevant to this appeal. This case stems from the 2008 sale of the NE Port Marina property along Lake Erie. The marina was sold by Gene and Mary Molnar for \$2 million to David and Anita Barsan, Russell White, and Betty Oprian. These individuals collectively comprise the ownership group of NE Port Investments, LLC (“NE Port”).

{¶ 4} To secure full funding for the purchase, NE Port first obtained a loan from First National Bank of Bellevue (“Bank”) in the amount of \$1,200,000. The remaining balance of the purchase price was funded through the execution of an \$800,000 promissory note issued by NE Port to Gene and Mary Molnar. The note was secured with a second mortgage on the subject real property.

{¶ 5} On January 16, 2013, the Bank filed a foreclosure complaint against NE Port as a result of NE Port’s failure to make the payments required pursuant to the terms of the promissory note. NE Port failed to file an answer.

{¶ 6} Subsequently, on February 25, 2013, the Bank filed a motion for default judgment. On April 16, 2013, it was granted. Notably, the record reflects that appellants and their counsel received written notice of all pending actions via ordinary mail and certified mail. Of significance, the record further reflects that appellants not only executed the underlying note as individual guarantors, but they also executed a cognovit

note in this matter from which judgment was made against them in 2012 in Summit County. They knew or should have known of their interest in this matter prior to judgment.

{¶ 7} The record reflects that their ability to make a timely intervention in a matter in which they had a clear and known interest was in no way compromised or undermined. Nevertheless, no action was taken to intervene in conformity with the requisite time frame.

{¶ 8} On August 9, 2013, approximately two and one-half months after the motions for default judgment in the underlying foreclosure action had been granted to both the Bank and the original sellers, appellants filed their untimely motion to intervene from which this case arises. On September 5, 2013, the trial court denied the motion to intervene. This appeal ensued.

{¶ 9} Civ.R. 24(A) mandates that intervention must be done in a “timely” manner. In conjunction with Civ.R. 24(A), controlling caselaw establishes that whether a Civ.R. 24 motion to intervene may be found to be timely depends upon an examination of various enumerated factors relevant to each individual case. *Norton v. Sanders*, 62 Ohio App.3d 39, 42, 574 N.E.2d 552 (9th Dist.1989); *NAACP v. New York* (1973), 413 U.S. 345, 366, 93 S.Ct. 2591, 37 L.Ed.2d 648.

{¶ 10} Specifically, the following factors are considered in determining timeliness: (1) the point to which the suit had progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed

intervenor knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure after he knew or reasonably should have known of his interest in the case to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention. *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1228 (6th Cir.1984). Lastly, we review the trial court's decision on the timeliness of a motion to intervene under an abuse of discretion standard. *State ex rel. First New Shiloh Baptist Church v. Meagher*, 82 Ohio St.3d 501, 696 N.E.2d 1058 (1998).

{¶ 11} The record reflects the fact that appellants failed to file for intervention in this foreclosure suit until 72 days after final judgment had been entered and the date for the sheriff's sale had been scheduled.

{¶ 12} The record further reflects that appellants own all of the membership units of NE Port, and that the summons and foreclosure complaint was served upon them in January 2013. Appellants further alleged in their own motion to intervene that their potential claim arose on October 12, 2012, when the Summit County Court of Common Pleas released \$391,741.04 to First National Bank of Bellevue and applied these garnished funds to reduce the indebtedness of NE Port. These garnished funds were seized from various accounts owned by appellants after First National Bank of Bellevue obtained a cognovit judgment against appellants.

{¶ 13} The record reflects that by the time the motion for intervention had been filed, any and all potential interests in the real property had been established by the court

and the matter was set for sheriff's sale. It is unmistakable that prejudice would result to the enumerated mortgage and lienholders if the sale and judgment were vacated to enable the court to consider appellants' claims to establish and prioritize equitable liens.

{¶ 14} Finally, appellants would have been unable to establish any unusual circumstances militating in favor of intervention after judgment had been taken in this foreclosure suit.

{¶ 15} Wherefore, we find that appellants failed to comport with Civ.R. 24(A)(2), had no legal basis sufficient to overcome that failure, and thus the trial court did not abuse its discretion in denying appellants' untimely motion to intervene. Appellants' sole assignment of error is found not well-taken.

{¶ 16} The decision of the Ottawa County Court of Common Pleas is hereby affirmed. Appellants are ordered to pay the 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.

First Natl. Bank of Bellevue
v. NE Port Invests., LLC
C.A. No. OT-13-024

Arlene Singer, J.

JUDGE

Thomas J. Osowik, 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>.