[Cite as *Wells Fargo Bank, N.A. v. Bischoff*, 2014-Ohio-967.]

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

Wells Fargo Bank, N.A	Court of Appeals No. WD-13-045
Appellee	Trial Court No. 2012 CV 0577
v.	
Eric S. Bischoff, et al.	**DECISION AND JUDGMENT**
Appellant	Decided: March 14, 2014

* * * * *

Scott A. King and Nicholas W. Myles, for appellee.

Guadalupe Castro, pro se.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, Guadalupe Castro, appeals the judgment of the Wood County Court of Common Pleas, granting appellee's, Wells Fargo Bank, N.A., motion for default judgment in the underlying foreclosure action. For the reasons more fully set forth below, we affirm.

A. Facts and Procedural Background

{¶ 2} On April 8, 2004, Castro's husband, Eric Bischoff, executed a note in the amount of $85,000 in favor of Ohio Savings Bank. On that same day, Bischoff executed a mortgage in favor of Mortgage Electronic Registration Systems (MERS) to secure payment on the note. Some time later, Ohio Savings Bank indorsed the note in blank. After Bischoff defaulted on the note and mortgage by failing to make the required payments, Wells Fargo instituted foreclosure proceedings by filing its complaint on October 9, 2007. In its complaint, Wells Fargo named Bischoff and "Jane Doe, the unknown spouse of Eric Bischoff" as defendants.

{¶ 3} Two weeks after the complaint was filed, Wells Fargo entered into a loan modification agreement with Bischoff whereby the loan was reinstated under new terms. As a result of the new agreement, Wells Fargo dismissed the action.

{¶ 4} Bischoff subsequently defaulted on his obligations under the loan modification agreement. Consequently, Wells Fargo filed another complaint in foreclosure on August 25, 2008. On March 9, 2009, Wells Fargo dismissed its second foreclosure action against Bischoff under Civ.R. 41(A)(1). The reasons for its dismissal of the 2008 action are unclear from the record.

{¶ 5} Bischoff later defaulted a third time. As a result of the default, Wells Fargo filed another foreclosure action in October 2010. On February 6, 2012, the trial court dismissed the action. Six months later, Wells Fargo filed its complaint in the present action. In its complaint, Wells Fargo named both Bischoff and Castro as defendants.

They were each successfully served with copies of the complaint. Neither party retained counsel. Bischoff filed an answer pro se, which was not signed by Castro. Bischoff's answer does not reference Castro and does not attempt to respond on her behalf. Castro failed to file her own answer.

{¶ 6} Following some initial motion practice, on January 16, 2013, Bischoff filed a motion for summary judgment, arguing that he was entitled to judgment in his favor under the double dismissal rule. Specifically, Bischoff contended that Wells Fargo was precluded from refiling the present action after its claims had already been dismissed on three prior occasions. Wells Fargo responded by arguing that the double dismissal rule did not apply because the first dismissal was pursuant to a loan modification, and the third dismissal was by order of the court. Before the trial court issued its decision on Bischoff's motion for summary judgment, Wells Fargo filed its own motion for summary judgment. Along with its motion, Wells Fargo submitted the affidavit of its vice president of loan documentation, Amanda Weatherly, who testified that Bischoff was in default of his obligations under the note and mortgage, as modified by the loan modification agreement. The affidavit was accompanied by copies of the note, mortgage, loan modification agreement, and payment history.

{¶ 7} On May 28, 2013, after considering the competing motions for summary judgment, the trial court granted Wells Fargo's motion and denied Bischoff's motion. The trial court's decision also disposed of claims involving Genoa Banking Company and the Wood County Treasurer regarding outstanding liens against the subject property.

However, Wells Fargo's claims against Castro were not addressed in the trial court's order. Although such claims remained pending, the trial court stated: "This Judgment Entry constitutes a final, appealable Order. There is no just cause for delay for purposes of Ohio Civ.R. 54."

{¶ 8} On May 29, 2013, Wells Fargo filed a motion for default judgment against Castro, noting that Castro failed to file an answer despite being successfully served. The trial court granted Wells Fargo's motion on the following day.

{¶ 9} On July 5, 2013, Bischoff and Castro filed their notice of appeal, challenging the trial court's grant of summary judgment as it related to Bischoff and the grant of default judgment against Castro. We subsequently dismissed Bischoff's appeal of the trial court's grant of summary judgment since it was untimely filed. Thus, our review in this appeal is limited to the trial court's grant of default judgment in favor of Wells Fargo.

B. Assignments of Error

{¶ 10} On appeal, Castro asserts the following assignments of error:

> FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED BY GRANTING APPELLEE'S MOTION FOR DEFAULT JUDGMENT AGAINST APPELLANT CASTRO.
>
> SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED BY NOT DISMISSING THE INSTANT CASE WHEN

PRESENTED WITH THE LACK OF SUBJECT MATTER JURISDICTION, AND ABUSED [ITS] DISCRETION.

II. Analysis

{¶ 11} In her first assignment of error, Castro argues that the trial court erred in granting Wells Fargo's motion for default judgment. In supporting her argument, Castro alleges that she "appeared" in the underlying proceedings so as to trigger the notice requirement set forth in Civ.R. 55(A).[1]

{¶ 12} We review a trial court's decision granting a motion for default judgment for an abuse of discretion. *Tikaradze v. Kenwood Garden Apts.*, 6th Dist. Lucas No. L-11-1217, 2012-Ohio-3735, ¶ 6, citing *Huffer v. Cicero*, 107 Ohio App.3d 65, 74, 667 N.E.2d 1031 (4th Dist.1995). An abuse of discretion connotes that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 13} Civ.R. 55 sets forth the standard applicable to requests for default judgment. Relevant to this appeal, Civ.R. 55(A) provides, in pertinent part:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to

[1] Castro also argues that "summary judgment should be reversed as all claims had not been adjudicated." However, because Bischoff's appeal of the trial court's grant of summary judgment was dismissed as untimely, the trial court's summary judgment decision is not before this court. Thus, we decline to consider Castro's summary judgment argument.

> the court therefor * * *. If the party against whom judgment by default is sought has appeared in the action, [she] shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application.

{¶ 14} We have previously defined an "appearance" under Civ.R. 55(A) as "an overt action by the party that clearly expresses an intention and purpose to defend the suit." *CitiMortgage v. Bumphus*, 197 Ohio App.3d 68, 2011-Ohio-4858, 966 N.E.2d 278, ¶ 35 (6th Dist.), citing *AMCA Internatl. Corp. v. Carlton*, 10 Ohio St.3d 88, 91, 461 N.E.2d 1282 (1984).

{¶ 15} Here, Castro contends that she "appeared" by signing the summons and complaint for herself and Bischoff, and attending a pretrial conference and a deposition. However, she fails to explain how her signature on the summons and complaint clearly expresses her intent to defend the suit. Rather than evincing a desire to defend the suit, such action merely conveys the fact that she received service of process. Further, Castro offers no explanation as to what specific actions she took at the pretrial conference and deposition that would demonstrate her intent to defend the suit. We hold that mere attendance at such proceedings, without more, is insufficient to express an intent to defend the suit.

{¶ 16} Under the Rules of Civil Procedure, even nonparties may be required to appear for a deposition. Therefore, it is clear that having one's deposition taken does not express intent to defend the suit. As to Castro's presence at a pretrial conference, the

record fails to indicate that she participated in any meaningful manner in the pretrial proceedings. On the contrary, the trial court's entry following the pretrial conference merely reflects that Castro was present. Under the facts of this case, we find that Castro's actions did not constitute an "appearance" under Civ.R. 55(A). Consequently, the trial court was not required to notify her of the pending motion for default judgment prior to granting such motion.

{¶ 17} Accordingly, Castro's first assignment of error is not well-taken.

{¶ 18} In her second assignment of error, Castro argues that the trial court erroneously failed to dismiss Wells Fargo's complaint, which was allegedly refiled for a fourth time in violation of the double dismissal rule. Wells Fargo acknowledges that it has filed three prior actions in foreclosure against Bischoff relating to the property that is the subject of the present action. However, it argues that the double dismissal rule is not implicated in this case because the first action was dismissed following a loan modification agreement between the parties, and the third action was dismissed by order of the court.

{¶ 19} The double dismissal rule is set forth in Civ.R. 41(A)(1) as follows:

> Subject to the provisions of Civ. R. 23(E), Civ. R. 23.1, and Civ. R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant;

(b) filing a stipulation of dismissal signed by all parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that *a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court*. (Emphasis added.)

{¶ 20} Regarding the application of the double dismissal rule to foreclosure actions, the Supreme Court of Ohio has stated:

Civ.R. 41(A) would not apply to bar a third claim if the third claim were *different* from the dismissed claims. As the court in [*EMC Mtge. Corp. v. Jenkins*, 164 Ohio App.3d 240, 2005-Ohio-5799, 841 N.E.2d 855 (10th Dist.)] pointed out, there are examples from Ohio courts where successive foreclosure actions were indeed considered to be different claims. In those cases, however, the underlying agreement had significantly changed or the mortgage had been reinstated following the earlier default. In *Aames Capital Corp. v. Wells*, 9th Dist. Summit No. 20703, 2002 WL 500320 (Apr. 3, 2002), the mortgagor argued that res judicata barred a second foreclosure action on the same note and mortgage.

> In the first foreclosure action, the trial court had ruled against the mortgagee and required it to reinstate the note and mortgage. The mortgagee filed its second foreclosure action when the mortgagor failed to make payments on the reinstated note. The court in *Aames* held, "As the bases for the two complaints were different, the present action is not barred by res judicata." *Aames* at *5. (Emphasis sic.) *U.S. Bank Natl. Assn. v. Gullotta*, 120 Ohio St.3d 399, 2008-Ohio-6268, 899 N.E.2d 987, ¶ 33.

{¶ 21} Regarding Wells Fargo's dismissal of its first complaint, we find the court's reasoning in *Gullotta* to be instructive, and conclude that the basis for Wells Fargo's first complaint was different from its complaint in the present action. Indeed, the dismissal of the first action resulted in the modification and reinstatement of the note and mortgage. Thus, the subject of the present action is Bischoff's default on the *modified* note and mortgage. Since the claim in the present action was different than the claim in the first action, the double dismissal rule is not implicated by Wells Fargo's dismissal of the first action. *Id.* Further, since the third dismissal was by order of the court, it does not trigger the double dismissal. *See Olynyk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878, 868 N.E.2d 254, ¶ 31 (holding that "the double-dismissal rule of Civ.R. 41(A)(1) applies only when both dismissals were notice dismissal under Civ.R. 41(A)(1)(a)"). Leaving only one qualifying dismissal remaining, we conclude that Wells Fargo did not violate the double dismissal rule.

{¶ 22} Accordingly, Castro's second assignment of error is not well-taken.

III. Conclusion

{¶ 23} For the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed. Castro is 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.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE