

[Cite as *Bank of New York Mellon v. Ferrari*, 2015-Ohio-1116.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

THE BANK OF NEW YORK MELLON,)	
)	CASE NO. 13 CO 34
PLAINTIFF-APPELLEE,)	
)	
- VS -)	OPINION
)	
WANDA FERRARI,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court, Case No. 2012 CV 00201.
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JUDGMENT:	Affirmed.
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APPEARANCES:	
For Plaintiff-Appellee:	Attorney Amelia A. Bower Plunkett Cooney 300 East Broad Street, Suite 590 Columbus, OH 43215

For Defendant-Appellant:	Attorney Peter Horvath P.O. Box 51 Lisbon, OH 44432
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JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: March 20, 2015

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DeGENARO, J.

{¶1} Defendant-Appellant Wanda Ferrari appeals the July 12, 2013 judgment of the Columbiana County Court of Common Pleas granting Plaintiff-Appellee Bank of New York Mellon's motion for summary judgment in a foreclosure action. Ferrari argues that the trial court erred in granting BNY Mellon's motion for summary judgment because there is a genuine issue of material fact as to whether the manufactured home on her real property is a chattel and thus not subject to a mortgage or whether it is a fixture that is subject to the mortgage. Because the manufactured home is a fixture it is subject to the mortgage as a matter of law. Accordingly, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶2} In August 1998, Ferrari purchased a 2.309 acre parcel of land on Church Hill Road in Lisbon, Ohio. Contemporaneous with her purchase of the property, Ferrari purchased a manufactured home for \$44,628.00. Ferrari financed the purchase of the manufactured home with a loan from Green Tree Financial Servicing Corp nka Conseco.

{¶3} In the fall of 2002, Ferrari refinanced some debt. For purposes of that refinancing, the property and manufactured home were appraised at \$96,000.00. The appraisal stated that the property was connected to utilities and a septic system and that it has a concrete block foundation, specifically noting: "The subject property is permanently affixed to the ground." At the closing on October 18, 2002, Ferrari executed and delivered a \$52,000.00 note to American Business Mortgage Services, Inc. As security for the note, Ferrari also executed and delivered a mortgage to ABMS providing:

This Security Instrument secures to Lender * * * the following described property located in the County of Columbiana * * * which currently has the address of 41601 Church Hill Road, Lisbon, Ohio 44432.

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property, * * *.

{¶4} The loan proceeds from the \$52,000.00 refinancing were used to satisfy the

\$26,957.68 purchase-money debt to Conseco, to pay a \$5,796.00 debt to National City Bank, and resulted in a cash distribution to Ferrari of \$13,820.79. On June 6, 2011, AMBS assigned the mortgage to BNY Mellon.

{¶5} Ferrari failed to make payments on the note after December 5, 2010.

{¶6} On March 26, 2012, BNY Mellon filed a complaint against Ferrari, among others, requesting a money judgment on the promissory note and foreclosure of the mortgage. BNY Mellon alleged that Ferrari owes \$60,471.84 plus interest accruing at 3.95% per annum from December 5, 2010, along with late charges, and advances for taxes and insurance. BNY Mellon also alleged that the mortgage is a valid first lien on the property, conditions in the mortgage were broken, conditions precedent to foreclosure were satisfied and that ABMS assigned the mortgage to BNY Mellon.

{¶7} Ferrari's answer asserted, inter alia, that BNY Mellon did not have an interest in the manufactured home because it is a chattel that is not affixed to the property, and that title to her manufactured home is free and clear and not subject to the foreclosure action.

{¶8} BNY Mellon filed a motion for summary judgment, attaching the affidavit of Harrison Whittaker, Contract Management Coordinator for BNY Mellon's loan servicing agent; the note; the mortgage; a legal description of the property; an appraisal report; an assignment of the mortgage; the 1998 general warranty deed conveying the property to Ferrari; a certificate of title for the manufactured home, showing the price as \$44,628.00 and noting "lien cancelled" as of November 21, 2002; a 1998 UCC fixture financing statement for the manufactured home (listing Green Tree Financial as the assignee of the secured party); an October 4, 2002 real estate appraisal report valuing the property including the manufactured home at \$96,000.00; a HUD settlement statement for the 2002 refinance; and Ferrari's Answer to Plaintiff's Interrogatories and to Plaintiff's Request for Admissions, including exhibits. BNY Mellon asserted that as a matter of law it was entitled to judgment on the note and foreclosure of the mortgage and that the manufactured home is a fixture subject to the mortgage.

{¶9} Ferrari opposed BNY Mellon's motion for summary judgment, conceding

she was in default of payments due to BNY Mellon. However, she asserted that the manufactured home was not collateral for the loan, that she had free and clear title to it, and that it is not a fixture. In support of her brief in opposition, she attached her responses to BNY Mellon's interrogatories and request for admissions, along with the exhibits thereto. In her response to interrogatory number six, she states: "[t]itle to the trailer has not been surrendered. The trailer is not on a foundation. The trailer can be moved. The trailer is not a fixture." Exhibits to her responses included a 2012 residential real property record from the county auditor listing, for tax purposes, the value of her land as \$22,900.00, improvements as \$2,700.00 and total value as \$25,600.00, and a certificate of title for the manufactured home, showing the price as \$44,628.00 and noting "lien cancelled" as of November 21, 2002.

{¶10} The trial court, finding no just reason for delay, granted BNY Mellon summary judgment, finding:

that a certain 1999 Mansion manufactured home, Model No. MO311092, is permanently affixed to the subject premises and, therefore, is secured by the mortgage filed with the Columbiana County Recorder on October 30, 2002 and recorded in Volume 1066, Page 632 of the Mortgage Records of Said County and/or Plaintiff would nonetheless be entitled to the imposition of an equitable lien and/or constructive trust as to the 1999 Mansion manufactured home Model No. MO311092.

Summary Judgment

{¶11} In her sole assignment of error, Ferrari asserts:

{¶12} "The trial court erred by granting summary judgment to the appellee Bank with respect to the manufactured home."

{¶13} Civ.R. 56 provides that summary judgment is only proper when, viewing the evidence most strongly in favor of the non-moving party, the movant demonstrates that reasonable minds can only conclude no genuine issue as to any material fact remains to be litigated and the moving party is entitled to judgment as a matter of law. *Doe v.*

Shaffer, 90 Ohio St.3d 388, 390, 738 N.E.2d 1243 (2000). A fact is material when it affects the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999). "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). The nonmoving party has the reciprocal burden of specificity and cannot rest on the mere allegations or denials in the pleadings. *Id.* at 293. An appellate court reviews a trial court's summary judgment decision de novo, applying the same standard used by the trial court. *Ohio Govt. Risk Mgt. Plan v. Harrison*, 115 Ohio St.3d 241, 2007–Ohio–4948, 874 N.E.2d 1155, ¶15.

{¶14} The mortgage covers "all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property, * * *." Ferrari primarily asserts that the manufactured home is a chattel and thus not subject to the mortgage, and therefore foreclosure is improper as matter of law. BNY Mellon counters that the manufactured home is a fixture and therefore subject to the mortgage.

{¶15} "A fixture is an item of property which was a chattel but which has been so affixed to realty for a combined functional use that it has become a part and parcel of it." *Holland Furnace Co. v. Trumbull Sav. & Loan Co.*, 135 Ohio St. 48, 48, 19 N.E.2d 273 (1939). The Fifth District recently discussed the definition of a fixture, relying on time-tested Ohio Supreme Court precedent: "Classification as a fixture requires three elements: (1) '[a]ctual annexation to the realty, or something appurtenant thereto;' (2) '[a]ppropriation to the use or purpose of that part of the realty with which it is connected;' and (3) '[t]he intention of the party making annexation, to make the article a permanent accession to the freehold....' " *J & J Oil & Gas, Inc. v. MDR Properties II, L.L.C.*, 5th Dist. No. 13CA23, 2014-Ohio-3119, ¶16, quoting *Teaff v. Hewitt*, 1 Ohio St. 511, 530 (1853).

{¶16} With regard to the first element, "a chattel may be considered a fixture even though only slightly attached to the realty[.]" *Masheter v. Boehm*, 37 Ohio St.2d 68, 73,

307 N.E.2d 533 (1974). And with regard to the third element:

Although there need be no formal declaration of intent by the annexer, it is generally held that the intent to have annexed property be considered as a part of the realty must be accompanied by some positive act or course of action clearly demonstrating the intent before the result will be as the annexer intended.

Id. at 75.

{¶17} Here, the 2002 appraisal of the property demonstrates that the manufactured home was attached to a well and septic system, has a concrete block foundation and states expressly that "[t]he subject property is permanently affixed to the ground." In addition, Ferrari admitted that the manufactured home had not been moved since the 2002 refinancing. Finally, the manufactured home was appraised as part of the real estate in 2002, permitting Ferrari to obtain the loan, and evidence of her intent to treat the manufactured home as a fixture.

{¶18} Ferrari's self-serving interrogatory responses stating: "[t]he trailer is not on a foundation. The trailer can be moved. The trailer is not a fixture," do not create genuine issues of material fact. A non-movant's own self-serving assertions, whether made in an affidavit, deposition or interrogatory responses, cannot defeat a well-supported summary judgment motion when not corroborated by any outside evidence. *White v. Sears, Roebuck & Co.*, 10th Dist. No. 10AP-294, 2011-Ohio-204, ¶10. Accordingly, there are no genuine issues of material fact and the manufactured home is a fixture as a matter of law.

{¶19} Nonetheless, Ferrari asserts that her failure to surrender the manufactured home's certificate of title to the Columbiana County Clerk of Courts somehow renders the mortgage on the manufactured home invalid. Ferrari did produce a certificate of title for the manufactured home, showing the price as \$44,628.00 and noting "lien cancelled" as of November 21, 2002. However, "failure to surrender a certificate of title of a manufactured home to a county clerk is not a necessary prerequisite to a valid fixture being created in a mobile home." *Rickett v. Ohio Real Estate Adviser Bd.*, 10th Dist. No.

07AP-667, 2008-Ohio-3169, ¶33. This is because there is a distinction between classification for tax purposes, see R.C. 5701.02, and the common law fixture analysis. See *also* 1993 Ohio Atty.Gen.Ops. No 385 ("the surrender of the title is the *result* of the transformation of the manufactured home to real property status and *not* * * * *the cause* of the transformation.")

{¶20} Finally, Ferrari argues that the 2012 residential real property record from the county auditor, which values for tax purposes the land as \$22,900.00, and improvements as \$2,300.00, is evidence that the mortgage did not cover the manufactured home. However, the plain language of the mortgage states that Ferrari mortgaged the real property located at 41601 Church Hill Road and "fixtures *now or hereafter a part of* the property." (Emphasis added.) Because it is a fixture as a matter of law as discussed above, the mortgage includes the manufactured home.

{¶21} In conclusion, Ferrari's sole assignment of error is meritless. As a matter of law, the manufactured home is a fixture on the real property at issue and thus subject to the mortgage. The trial court correctly granted BNY Mellon's motion for summary judgment. Accordingly, the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

Waite, J., concurs.