[Cite as *Estate of Williams v. Deutsche Bank Trust Co. Am.*, 2008-Ohio-3981.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90967

EST. OF JACQUELINE L.B. WILLIAMS

PLAINTIFF-APPELLANT

vs.

DEUTSCHE BANK TRUST CO. AMERICA

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-643245

BEFORE: Cooney, P.J., McMonagle, J., and Dyke, J.

RELEASED: August 7, 2008

JOURNALIZED:

FOR APPELLANT

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judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, P.J.:

{¶1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1.

{¶2} Plaintiff-appellant, Estate of Jacqueline Barksdale Williams ("Estate"), appeals the trial court's granting of summary judgment in favor of defendant-appellee, Deutsche Bank Trust Company America, f.k.a. Bankers Trust Company ("the bank"). Finding no merit to the appeal, we affirm.

The Foreclosure Action

{¶3} In 2004, the bank filed a foreclosure action against Jacqueline Barksdale Williams ("Barksdale Williams") and Perry Williams ("Williams") involving property located at 3451 East 149th Street in Cleveland.

{¶4} Neither Barksdale Williams nor Williams filed an answer or otherwise responded to the complaint. The bank filed a motion for default judgment and the court scheduled a hearing on the motion. The magistrate issued its decision awarding judgment for the bank. The trial court adopted the magistrate's decision and issued a notice of the foreclosure sale.

{¶5} Shortly thereafter, Barksdale Williams' son, Christopher Barksdale ("Barksdale"), filed a motion titled "motion for relief from judgment or interim stay of foreclosure" in the foreclosure action. In his motion, Barksdale argued that his mother did not convey her property rights via quitclaim deed to Williams; rather Williams obtained a fraudulent conveyance from the ailing Barksdale Williams. Barksdale further claimed that the trial court lacked jurisdiction to sell the property at foreclosure due to the filing of the Estate of Barksdale Williams.[1]

{¶6} The trial court denied his motion, and Barksdale appealed to this court. In *Deutsche Bank Trust Co. v. Barksdale Williams*, 171 Ohio App. 3d 230, 2007-Ohio-1838, 870 N.E.2d 232, we dismissed his appeal, finding that he lacked standing, because he owned no interest in the real estate and was not charged with possession of it. Therefore, he had no standing to appeal the foreclosure sale in his own name. Id. at ¶12-14.[2]

{¶7} The bank then requested that the trial court confirm the sheriff's sale.[3] The trial court granted the motion to confirm the sale, issuing a decree of

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[1] Barksdale filed an application for authority to administer the estate on April 21, 2006, more than one month after the entry of default judgment. He never filed a suggestion of death, a motion to substitute the Estate as a party in the foreclosure case, nor a motion to intervene as an heir or "interested party."

[2]Barksdale never sought to appeal our decision to the Ohio Supreme Court.

[3] The sale had occurred, but had not been confirmed due to Barksdale's appeal.

confirmation. Barksdale, neither on his own behalf nor as representative of his mother's estate, appealed the trial court's decision to confirm the sale. Instead, on December 31, 2007, he filed a motion in his mother's name to stay the eviction in the original foreclosure action. The trial court denied his motion.

The Instant Case

{¶8} Barksdale, representing himself as the "sole beneficiary and as heir, devisee, executor or administrator of the Estate" filed a separate complaint with the trial court on November 30, 2007. In his complaint, titled "Complaint for recovery [sic] of real estate from adverse possession caused by fraudulent contract and demand for jury trial," he again sought to challenge the foreclosure action.

{¶9} The bank filed a motion to dismiss, or in the alternative, a motion for summary judgment, arguing res judicata barred the complaint. The Estate filed a motion for default judgment, as well as a seven-page opposition to the bank's motion. The trial court denied the Estate's motion for default judgment and granted the bank's motion for summary judgment.

{¶10} The Estate appeals, raising two assignments of error for our review.

{¶11} In the first assignment of error, the Estate argues that the trial court erred in denying its motion for default judgment.

{¶12}In its motion, the Estate argued that the bank filed its response to the complaint one day late and, thus, it was untimely. The bank responded that it had not been served at the correct address, but became aware of the lawsuit after service on the bank's counsel.

{¶13}Although a motion to dismiss is not a responsive pleading, the bank was permitted to file the motion instead of an answer pursuant to Civ.R. 12. The rule requires that a motion for failure to state a claim upon which relief may be granted "shall be made before pleading if a further pleading is permitted." Civ.R. 12(B). *Barksdale v. Murtis H. Taylor Multi Serv. Ctr.*, Cuyahoga App. No. 82540, 2003-Ohio-5653, ¶16. Further, Civ.R. 12(A)(2) alters the time period for filing a responsive pleading once a motion is filed under the rule. Id.

{¶14}And, although res judicata is not properly raised through a motion to dismiss, it may be raised in a motion for summary judgment even when no answer has been filed. *Intl. EPDM Rubber Roofing Systems, Inc. v. GRE Ins. Group*, Sixth Dist. App.No. L-00-1293, 2001 Ohio App. LEXIS 2011.

{¶15}Civ.R. 12(A)(1) provides that a defendant must answer within 28 days after service of the summons and complaint. Pursuant to Civ.R. 6(B)(2), however, a trial court may, within its discretion, permit a tardy filing. *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.*, 72 Ohio St.3d 464, 465, 1995-Ohio-49, 650 N.E.2d 1343. We have said that a trial court does not necessarily

abuse its discretion when it permits a tardy filing even if a party has not provided an explicit reason for delay unless the other party is prejudiced by the delay. *White v. Belcher*, Cuyahoga App. No. 84214, 2004-Ohio-5873; *Howland v. Lyons*, Cuyahoga App. No. 77870, 2002-Ohio-982; *Zimmerly v. Cleveland Clinic Foundation* (July 30, 1998), Cuyahoga App. No. 73104.

{¶16}The complaint was served on counsel on December 13, 2007; thus, the answer was due was January 10, 2008, the same day the bank filed its motion to dismiss, or in the alternative, motion for summary judgment. In this case, there was a legitimate issue whether service was perfected on the bank, as was explained to the court in the bank's response to the motion. Even if the bank's response was a day late, the Estate has made no showing, nor even an allegation, of prejudice by the delay. Thus, we find that the trial court did not abuse its discretion in overruling the motion for default judgment.

{¶17}Therefore, the first assignment of error is overruled.

{¶18}In the second assignment of error, the Estate argues that the trial court erred in granting the bank's motion for summary judgment.

{¶19}The Ohio Supreme Court has established that summary judgment under Civ.R. 56 is proper when:

{¶20} "(1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it

appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Parsons v. Fleming*, 68 Ohio St.3d 509, 511, 1994-Ohio-172, 628 N.E.2d 1377; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶21} The party seeking summary judgment bears the burden of showing that no genuine issue of material fact exists for trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 330, 91 L.Ed.2d 265, 106 S.Ct. 2548; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115, 526 N.E.2d 798. Any doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138. There is no issue for trial, however, unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson v. Liberty Lobby, Inc*. (1986), 477 U.S. 242, 249-250, 91 L.Ed.2d 202, 106 S.Ct. 2505.

{¶22} In its brief, the Estate alleges that the quitclaim deed executed by Barksdale Williams and the subsequent mortgage executed by Barksdale Williams and Williams are invalid and the bank's use of these instruments to initiate the foreclosure action was improper. The Estate further alleges that Barksdale has suffered "economic loss of property" by the execution of the promissory note and

mortgage. Finally, the Estate argues that Barksdale is entitled to possession of the house.

{¶23} The bank responds that the claims made by the Estate and Barksdale are barred by the doctrine of res judicata. We agree.

{¶24} Res judicata precludes relitigating a point of law or fact that was at issue in a former action involving the same parties and decided by a court of competent jurisdiction. *State ex rel. Kroger Co. v. Indus. Comm.*, 80 Ohio St.3d 649, 651, 1998-Ohio-174, 687 N.E.2d 768. The doctrine bars all subsequent actions based on any claim arising out of the transaction or occurrence that was the subject of the previous action if a valid, final judgment rendered upon the merits exists. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, 653 N.E.2d 226, syllabus. In order for a claim to be barred on the grounds of res judicata, the new claim must share three elements with the earlier action: (1) identity of the parties or their privies; (2) identity of the causes of action; and (3) a final judgment on the merits. *Omlin v. Kaufmann & Cumberland Co., L.P.A.*, Cuyahoga App. No. 82248, 2003-Ohio-4069, citing, *Horne v. Woolever* (1959), 170 Ohio St. 178, 163 N.E.2d 378.

{¶25} We find that the new claims share all three elements with the original foreclosure action. Although Barksdale argues that he was not a "party" to the original foreclosure action, the record reflects that he was a very active participant in the original action and had ample opportunity to intervene or move to substitute the Estate as a party in the foreclosure action. We previously determined that he lacked

standing to challenge the foreclosure action because he had not filed his motion as the representative of the Estate. Thus, to the extent that Barksdale himself now seeks to challenge the foreclosure sale in a collateral proceeding, he is barred by our previous decision in *Deutsche Bank Trust Co. v. Barksdale Williams.*

{¶26} To the extent that the Estate seeks to challenge the foreclosure sale, it is barred by res judicata. At any time during the pendency of the foreclosure action, Barksdale could have entered an appearance as the administrator of the Estate or moved to intervene as an heir. The claims presented in the instant action could have been litigated in the foreclosure action. Both the foreclosure action and the instant action involve the same operative facts. Thus, the Estate's failure to assert its claims in the original foreclosure action bar the Estate from litigating the claims in this action. Moreover, the trial court entered a decree of confirmation in October 2007, long after Barksdale had applied to administer the Estate. That decree was never appealed. The Estate is barred from "bootstrapping," or trying to use the instant action as a means to circumvent the appeals process. See *Chapon v. Standard Contracting & Eng.*, Cuyahoga App. No. 88959, 2007-Ohio-4306.

{¶27} Furthermore, this court recently held in a closely analogous case that a separate action to quiet title does not lie to challenge a final judgment in a foreclosure action. *Bates v. Postulate*, Cuyahoga App. No. 90099, 2008-Ohio-2815. Bates, just like Barksdale, was aware of the foreclosure action, and took no steps to

intervene as a party. Thus, the doctrine of lis pendens barred the collateral attack on the final judgment in the foreclosure action. See R.C. 2703.26.

{¶28} The compelling arguments raised by the dissent might have merit if: 1) Barksdale had made any of these arguments, and 2) brought an appeal of the foreclosure action as the representative of the Estate, as we stated in his prior appeal.[4] He had at least 18 months to do so in the foreclosure action.

{¶29} Therefore, we find that the trial court correctly granted summary judgment. The second assignment of error is overruled.

Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

[4]Nowhere in the Estate's 15-page appellate brief does it argue that the bank should have substituted the Estate in the foreclosure action or that failure of service rendered the foreclosure judgment void.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____
COLLEEN CONWAY COONEY, PRESIDING JUDGE

ANN DYKE, J., CONCURS;
CHRISTINE T. McMONAGLE, J., DISSENTS.
(SEE ATTACHED DISSENTING OPINION.)

CHRISTINE T. McMONAGLE, J., DISSENTING:

{¶30} Respectfully, I dissent.

The Foreclosure Action

{¶31} On November 17, 2004, Deutsche Bank Trust Co. filed a foreclosure action against Jacqueline Barksdale Williams, et al., in the common pleas court. (Case No. CV-547780.) At the time of that filing, Ms. Williams had been dead for nine months. See *Deutsche Bank Trust Co. v. Williams*, 171 Ohio App.3d 230, 2007-Ohio-1838, 870 N.E.2d 232 (Stewart, J., dissenting, at ¶16).[5] Not surprisingly, the attempted certified mail service on the deceased Ms. Williams was returned "unclaimed." On January 21, 2005, the complaint and summons was sent via ordinary mail to the deceased's address.

[5]Ms. Barksdale Williams' death was obviously known to the Bank, as they named, in addition to the Williamses, the Estate Tax Division for the State of Ohio and the "unknown heirs of Jacqueline Barksdale Williams."

{¶32}On April 29, 2005, the Bank moved for default. The default hearing was set for January 26, 2006 before a magistrate. The magistrate rendered a decision on January 27, 2006, and on March 2, 2006, the court adopted the magistrate's decision, ordered judgment for plaintiff and against defendants Ms. Williams and Perry Williams, jointly and severally, for $68,050.86, and awarded the Bank a decree of foreclosure. At no time did the Bank move to substitute the estate of Ms. Williams for Ms. Williams.

{¶33}On May 12, 2006, before the house was sold in sheriff's sale, Christopher Barksdale (son of the deceased Ms. Williams) filed a motion for relief from judgment pro se, essentially arguing that the mortgage that was foreclosed upon was fraudulent and that his mother was dead. The Bank requested an extension of time to respond to Mr. Barksdale's motion. The court, however, immediately denied Mr. Barksdale's motion without opinion, and denied the Bank's request for extension of time to reply to Mr. Barksdale's motion as moot. Mr. Barksdale appealed and this court dismissed the appeal, saying he had no standing. *Deutsche Bank Trust Co.*, supra.

{¶34}After the dismissal of the appeal, Mr. Barksdale requested reconsideration of the ruling on his motion for relief from judgment, which the trial court denied. Notice of the ruling was sent to the deceased Ms. Williams; the docket ironically states that the postcard notifying her was returned "for

failure of service due to forwarding time expired."[6] Thereafter, the sale was confirmed, service and notice were continued to be made upon the deceased Ms. Williams, her son continued to object, and the court continued to ignore his objections.

This Case

{¶35}On November 30, 2007, Christopher Barksdale (now administrator of his mother's estate) filed a complaint in common pleas court against the Bank for return of the real estate wrongfully taken. He obtained service on the Bank and on December 14, 2007 filed a motion for stay of eviction. The Bank responded on December 24, 2007, and the trial court denied the motion, without opinion, on January 2, 2008. On January 10, 2008, Christopher Barksdale requested an injunction and restraining order which, without response from the Bank, was denied without opinion by the court on January 30, 2008. The Bank failed to answer Mr. Barksdale's complaint by January 8, 2008 (i.e., 28 days from service) and on January 10, 2008, the Estate moved for default. That same day (i.e., January 10, 2008), the Bank moved for dismissal or for summary judgment. *At no time did the Bank file an answer or request leave to file an answer to Barksdale's complaint.*

[6]As had Ms. Williams.

{¶36}Nonetheless, despite the fact that, to date, the Bank has *never* filed an answer in this case, the trial court denied the Estate's motion for default on January 18, 2008. Moreover, despite the fact that the Bank has never filed an answer in this case, the court granted the Bank summary judgment as follows: "[m]otion for summary judgment is granted. The court having considered all the evidence and having construed the evidence most strongly in favor of the non-moving party, determines that reasonable minds can come to but one conclusion, that there are no genuine issues of material fact, and that defendant Deutsche Bank Trust Company Americas [sic], is entitled to judgment as a matter of law." It is from this judgment that the Estate now appeals.

Law and Analysis

{¶37}The majority opinion essentially states that the judgment in the foreclosure action acts as res judicata to the instant action. But the majority ignores the following pertinent law:

{¶38}"It is accepted law that an action may only be brought against a party who actually or legally exists and has the capacity to be sued. Because a party must actually or legally exist 'one deceased cannot be a party to an action,' and a suit brought against a dead person is a nullity." *Barker v. McKnight* (1983), 4 Ohio St. 3d 125, 127, 447 N.E.2d 104. (Internal citations omitted.)

{¶39}In *Wells v. Michael*, 10th Dist. No. 05AP-1353, 2006-Ohio-5871, a motorist who hit an injured party died before being sued. The court held that the injured party's complaint was not "commenced or attempted to be commenced" under R.C. 2305.19, as service was attempted against a dead person. The court held that "where the plaintiff has named as the defendant a person who died prior to the commencement of the action, the *plaintiff* must substitute the estate of the decedent for the deceased party and has, under Civ.R. 3(A), one year from the filing of the complaint to properly serve the estate in order to commence the action."[7] Id. at ¶11, citing *Korn v. Mackey*, 2nd Dist. No. 20727, 2005-Ohio-2768, at ¶14. (Emphasis added.)

{¶40}In *Noetzel v. Hudson* (Oct. 25, 2001), 8th Dist. No. 79085, this court similarly held that the affirmative duty to open an estate in circumstances such as we have here is not upon Mr. Barksdale. Id. at 6-7. While it is clear from both the Bank's and Mr. Barksdale's pleadings that the Bank was on notice of Ms. Williams' death, it did nothing whatsoever to substitute her estate in the foreclosure case, despite its duty to do so.

[7]As this Complaint was filed November 17, 2004 and to date, no claim has been presented against the estate, suit has not been commenced within one year.

{¶41}What then of the defective judgment in the foreclosure case? Generally, failure of service renders any resulting judgment void. *Keathley v. Bledsoe* (Feb. 7, 2001), 9th App. No. 19988.

{¶42}In *Lincoln Tavern, Inc. v. Snader* (1956), 165 Ohio St. 61, 133 N.E.2d 606, the Ohio Supreme Court resolved most of the issues raised here:

> For a court to acquire jurisdiction, there must be proper service of summons or an entry of appearance, and a judgment rendered without this is null and void;
> 1. The filing of a motion to vacate is not an entry of appearance;
> 2. A judgment based upon such faulty service is void ab initio; and
> 3. A sale of real property pursuant to such a judgment is invalid and will be set aside even though such property is in the hands of a third person who is a purchaser in good faith.

{¶43}Finally, in response to the majority's conclusion that the unappealed, albeit void, judgment in the foreclosure case is res judicata in the instant case, *State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197, 884 N.E.2d 568, states:

{¶44}"Although res judicata applies to a *voidable* sentence [or judgment] and may operate to prevent consideration of a collateral attack based on a claim that could have been raised on direct appeal from the *voidable* sentence [or judgment], res judicata has not been applied to cases in which the sentence [or judgment] was *void*. Where no statutory authority exists to support a judgment,

res judicata does not act to bar a trial court from correcting the error." (Citations omitted.) Id. at 426.

{¶45}Accordingly, I would hold that Christopher Barksdale, as administrator of the Estate of Jacqueline L. Barksdale Williams, has stated a valid claim against Deutsche Bank on behalf of his mother's estate. The trial court's order of summary judgment should be reversed, as should the trial court's ruling upon the estate's motion for default, and this matter should be remanded to the trial court for further proceedings.