[Cite as *Argent Mtge. Co. v. Ciemins*, 2008-Ohio-5994.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90698

ARGENT MORTGAGE COMPANY, ET AL.

PLAINTIFFS-APPELLEES

vs.

MAXINE CIEMINS, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-627824

BEFORE: Blackmon, J., Sweeney, A.J., and McMonagle, J.

RELEASED: November 20, 2008

JOURNALIZED:

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellants Juris and Maxine Ciemins ("the Ciemins") appeal the trial court's denial of their motion to certify a class action lawsuit against Argent Mortgage Company, LLC ("Argent") and the trial court's decision granting Argent's motion to substitute plaintiff. The Ciemins assign the following errors for our review:

> "I. The trial court erred when it ordered on October 25, 2007, that U.S. Bank National Association as Trustee be substituted as plaintiff for plaintiff Argent Mortgage Company, LLC."
>
> "II. The trial court erred when it denied on October 23, 2007, defendant-appellants' motion to certify the class action."

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} On December 3, 2004, the Ciemins executed a promissory note and mortgage in favor of Argent. In exchange, Argent loaned the Ciemins the sum of $252,000 to refinance their existing mortgage on their primary residence located in Cleveland Heights, Ohio.

{¶ 4} On June 21, 2007, Argent filed a complaint in foreclosure against the Ciemins. In the foreclosure complaint, Argent alleged that the Ciemins were in default of the note. Argent also alleged that the Ciemins's personal obligations on the note and mortgage had been extinguished by virtue of a discharge under the United States Bankruptcy Code. In addition, Argent alleged that as a result of the discharge of the Ciemins's personal obligation on the note and mortgage, it had instituted the proceedings to enforce its security interest in the property.

{¶ 5} On July 2, 2007, Argent executed an assignment of mortgage in favor of U.S. Bank National Association ("U.S. Bank"). The assignment transferred and conveyed all of Argent's rights and interest in the Ciemins's property to U.S. Bank.

{¶ 6} On October 1, 2007, the Ciemins filed an answer and counterclaim. In their counterclaim, the Ciemins alleged that Argent had violated the Consumers Sales Practices Act by failing to provide a notice of rescission in connection with a home solicitation sale. The Ciemins also alleged that a class action would be the proper procedural mechanism for prosecuting their claim. The Ciemins motioned the court to certify a class action.

{¶ 7} On October 19, 2007, Argent, having previously assigned the mortgage and note, filed a motion to substitute U.S. Bank as plaintiff in the foreclosure action. On October 25, 2007, the trial court granted Argent's motion to substitute U.S. Bank as plaintiff in the foreclosure action and denied the Ciemins's motion to certify a class action lawsuit.

Substitution of Plaintiff

{¶ 8} In the first assigned error, the Ciemins argue the trial court erred when it granted the motion to substitute U.S. Bank as plaintiff for Argent. We disagree.

{¶ 9} This court uses the abuse of discretion standard of review when determining whether the trial court erred in granting a motion to substitute a party,

under Civ.R. 25.[1] Abuse of discretion is more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. [2]

{¶ 10} Pursuant to Civ.R. 17, a civil action must be prosecuted by the real party in interest.[3] A real party in interest is one who is directly benefitted or injured by the outcome of the case rather than one merely having an interest in the action itself.[4] The purpose behind the real party in interest rule is "to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party at interest on the same matter."[5]

{¶ 11} Civ.R. 25 authorizes the substitution of parties in the event of certain stated contingencies. Civ.R. 25(C) provides, in relevant part:

> "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. * * *"

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[1] *Young v. Merrill Lynch, Pierce, Fenner & Smith* (1993), 88 Ohio App.3d 12.

[2] *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

[3] See Civ.R. 17(A); *SWA, Inc. v. Straka*, Cuyahoga App. No. 82103, 2003-Ohio-3259, citing *State ex rel. Dallman v. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178.

[4] *Mickey v. Denk*, Cuyahoga App. No. 90484, 2008-Ohio-3983, citing *State ex rel. Village of Botkins v. Laws*, 69 Ohio St.3d 383, 387, 1994-Ohio-518.

[5] *Morelli v. Walker*, Cuyahoga App. No. 88706, 2007-Ohio-4832, citing *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 24.

Civ.R. 25(C) thus permits substitution by one who succeeds to an interest previously held by another.[6] According to Civ.R. 17(A), substitution operates as if the action had been commenced in the name of the real party in interest.[7]

{¶ 12} In the instant case, the record reveals that Argent's motion to substitute plaintiff was accompanied by a photocopy of the "Assignment," which reads in pertinent part as follows:

> "For valuable consideration, the receipt and sufficiency is hereby acknowledged, Argent Mortgage Company, LLC ("Assignor"), whose address is One City Boulevard West, Orange, CA 92868, does hereby transfer, convey, and assign unto U.S. Bank National Association as Trustee ("Assignee"), whose address is c/o HomEq Servicing Corporation, Inc., 1100 Corporate Center Drive, Raleigh, North Carolina 27607, all of its right, title, and interest in and to that certain mortgage dated December 3, 2004, recorded at Official Instrument Number 200412100795, Recorder's Office, Cuyahoga County, Ohio, together with the promissory note secured by such mortgage and all sums due and to become due on such promissory note.***"[8]

{¶ 13} The above language of the Assignment indicated that Argent transferred all interest in mortgage and promissary to U.S. Bank as Trustee. The Assignment was duly recorded at Official Instrument Number 200707180202, Recorder's Office Cuyahoga County, Ohio. Jeff Szymendera, Vice President of Argent, signed the document, and it was notarized.

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[6]See, e.g., *Boedeker v. Rogers* (2000), 140 Ohio App.3d 11, citing *Maysom L.P. v. Mayfield* (1994), 96 Ohio App.3d 543.

[7]Id.

[8]Exhibit "A" / Argent's Motion to Substitute Plaintiff.

{¶ 14} We conclude, despite the Ciemins's assertions to the contrary, that the record unequivocally established that Argent transferred both the mortgage and promissory note to U.S. Bank as Trustee. After the assignment, U.S. Bank became the real party in interest. Thus, the trial court did not abuse its discretion when it granted Argent's motion to substitute U.S. Bank as the plaintiff in the underlying foreclosure action. Accordingly, we overrule the first assigned error.

Class Certification

{¶ 15} In the second assigned error, the Ciemins argue that the trial court erred when it denied class certification. We disagree.

{¶ 16} At the outset, we are mindful that a trial judge has broad discretion when deciding whether to certify a class action.[9] Absent a showing of abuse of discretion, a trial court's determination as to class certification will not be disturbed.[10]

{¶ 17} The appropriateness of applying the abuse of discretion standard in reviewing class action determinations is grounded not in credibility assessment, but in the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own docket.[11] Nevertheless, the trial court's

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[9]*In re Consol. Mtge. Satisfaction Cases,* 97 Ohio St.3d 465, 2002-Ohio-6720, citing *Marks v. C.P. Chem. Co., Inc.* (1987), 31 Ohio St.3d 200, syllabus; *Schmidt v. Avco Corp.* (1984), 15 Ohio St.3d 310, 312-313.

[10]Id.

[11]*Hamilton v. Ohio Savings Bank*, 82 Ohio St.3d 67, 70, 1998-Ohio-365, citing *Marks*, supra; *In re Nlo, Inc.* (C.A. 6, 1993), 5 F.3d 154, 157.

discretion is not unlimited and must be bound by and exercised within the framework of Civ.R. 23. Thus, the trial court is required to carefully apply the class action requirements and conduct a vigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied.[12]

{¶ 18} Seven requirements must be satisfied before a court may certify a case as a class action pursuant to Civ.R. 23: 1) an identifiable class must exist and the definition of the class must be unambiguous; 2) the named representatives must be members of the class; 3) the class must be so numerous that joinder of all members is impractical; 4) there must be questions of law or fact common to the class; 5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; 6) the representative parties must fairly and adequately protect the interests of the class; and 7) one of the three Civ.R. 23(B) requirements must be met.[13]

{¶ 19} Civ.R. 23(B) states the following:

> "(B) Class actions maintainable. -- An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:
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> (1) the prosecution of separate actions by or against individual members of the class would create a risk of

[12]*Holznagel v. Charter One Bank* (Dec. 14, 2000), Cuyahoga App. No. 76822.

[13]Civ.R. 23(A) and (B); *Warner v. Waste Mgt., Inc.* (1988), 36 Ohio St.3d 91, 96-98.

> (a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
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> (b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
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> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action."

{¶ 20} In an action for damages, the trial court must specifically find, pursuant to Civ.R. 23(B), that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[14]

{¶ 21} The party seeking to maintain a class action has the burden of demonstrating that all factual and legal prerequisites to class certification have been

met.[15] A class action may be certified only if the court finds, after a rigorous analysis, that the moving party has satisfied all the requirements of Civ.R. 23.[16]

{¶ 22} Further, in analyzing whether the trial court abused its discretion, this court must be cognizant of the rule of law that trial courts may not engage in a merits determination regarding the extent of liability.[17] At this stage of the litigation, plaintiffs need only present a colorable claim against defendants.[18]

{¶ 23} In the instant case, the Ciemins counterclaimed under the Ohio Consumer Sales Practices Act and motioned the court to certify a class of Ohio residents, specifically, as follows:

> "Who refinanced with Plaintiff [Argent] sub prime loans that enabled them to 'cash out' proceeds of these loans, and granted to Plaintiff [Argent] a mortgage on their primary residence within fifteen (15) months before January 1, 2007 or who, at anytime before January 1, 2007, refinanced with Plaintiff sub prime loans that enabled them to 'cash out' proceeds of these loans, and granted to Plaintiff [Argent] a mortgage on their primary residence who are now defendants in a foreclosure action brought by Plaintiff [Argent] pending in the courts of this state."[19]

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[14]*Hamilton v. Ohio Savings Bank*, supra at 79.

[15]*Margulies v. Guardian Life Ins. Co.,* Cuyahoga App. No. 88056, 2007-Ohio-1601, citing *Gannon v. Cleveland* (1984), 13 Ohio App.3d 334, 335.

[16]See *Hamilton*, supra, at 70.

[17]*Ritt v. Billy Blanks Enters.*, 171 Ohio App.3d 204, 2007-Ohio-1695.

[18]Id.

[19]The Ciemins's counterclaim.

{¶ 24} Argent maintains that trial court properly denied class certification because the Ciemins failed to present a colorable claim. We agree.

{¶ 25} At the outset, we note that pursuant to R.C. 1345.22, a buyer has the right to cancel a home solicitation sale until midnight of the third business day after the day on which the buyer signs an agreement or offer to purchase.[20] R.C. 1345.21(A) defines a home solicitation sale as follows:

> "[a] sale of consumer goods or services in which the seller or a person acting for the seller engages in a personal solicitation of the sale at a residence of the buyer, including solicitations in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is there given to the seller or a person acting for the seller, or in which the buyer's agreement or offer to purchase is made at a place other than the seller's place of business."

{¶ 26} However, Argent maintains that pursuant to R.C. 1345.21(A)(7), they were not required to furnish the Ciemins with a notice of cancellation. R.C. 1345.21(A)(7) states in pertinent part as follows:

> "***It [home solicitation sale] does not include a transaction or transactions in which:
>
> "***
>
> "(7) The buyer is accorded the right of rescission by the 'Consumer Credit Protection Act,' (1968) 82 Stat. 152, 15 U.S.C. 1635, or regulations adopted pursuant to it."

{¶ 27} 15 U.S.C. 1635(a) grants a right of rescission on any mortgage loan transaction for which the borrower uses his or her principle dwelling as security.[21]

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[20]*United Consumers Club v. Griffin* (1993), 85 Ohio App.3d 210.

[21]*ContiMortgage Corp. v. Delawder* (July 30, 2001), 4th Dist. No. 00CA28.

This right of rescission generally extends to midnight of the third business day following consummation of the transaction.[22] The borrower may rescind the loan transaction entirely if the lender fails to deliver certain forms or disclose important terms accurately.[23] This right of rescission expires three days after the loan closes or upon the sale of the secured property, which ever date is earlier.[24]

{¶ 28} Here, it is undisputed that the instant transaction involved a mortgage loan whereby the Ciemins borrowed $252,000 to refinance the original loan on their principal residence. The record also indicates that the Ciemins pledged their principal dwelling as security for the mortgage loan. Thus, the transaction falls under the purview of 15 U.S.C. 1635 and is therefore exempt from the notice of cancellation requirement otherwise imposed by R.C. 1345.21(A). As such, the Ciemins failed to assert a colorable claim.

{¶ 29} Given that the Ciemins failed to assert a colorable claim, we conclude that the trial court did not abuse its discretion in denying class certification. Accordingly, we affirm the trial court's decision.

Judgment affirmed.

It is ordered that appellees recover of appellants their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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[22]Id.

[23]*Bank of N.Y. v. Jordan*, Cuyahoga App. No. 88619, 2007-Ohio-429.

[24]Id.

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

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

PATRICIA ANN BLACKMON, JUDGE

JAMES J. SWEENEY, A.J., and
CHRISTINE T. MCMONAGLE, J., CONCUR