

[Cite as *Countrywide Home Loans, Inc. v. Caldero*, 2009-Ohio-4999.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92381

COUNTRYWIDE HOME LOANS, INC.

PLAINTIFF-APPELLEE

vs.

MADELINE CALDERO, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-656220

BEFORE: Cooney, A.J., Rocco, J., and Stewart, J.

RELEASED: September 24, 2009

JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Defendants-appellants, William and Madeline Caldero (collectively referred to as “the Calderos”), appeal the trial court’s adoption of the magistrate’s decision granting summary judgment in favor of plaintiff-appellee, Countrywide Home Loans, Inc. (“Countrywide”). Finding no merit to the appeal, we affirm.

{¶ 2} In April 2008, Countrywide instituted a foreclosure action against the Calderos, alleging default under its promissory note and mortgage with the Calderos.¹ Countrywide moved for summary judgment with documentation in support, and the Calderos opposed.² The trial court granted summary judgment in favor of Countrywide and ordered the magistrate to issue a decision “making specific findings as to the rights and liabilities of the parties.” On August 29, 2008, the magistrate found that Countrywide is entitled to a decree in foreclosure because no genuine issues of material fact exist. On September 15, 2008, the Calderos objected to the

¹The trial court referred the matter to a magistrate.

²The Calderos’ brief in opposition consisted of one paragraph stating that: “[t]he information submitted thus far [by Countrywide] does not satisfy the requirements to dispense with a trial on the merits in a foreclosure proceeding or give defendants a basis upon which to respond.” The Calderos did not attach an affidavit or any documents supporting their position or rebutting Countrywide’s evidence.

magistrate's decision, without including an affidavit or transcript in support of their objections. The trial court overruled the Calderos' objections and adopted the magistrate's decision in October 2008.

{¶ 3} The Calderos now appeal, raising two assignments of error for our review. In the first assignment of error, they argue that the trial court erred in adopting the magistrate's decision without meeting the strictures of Civ.R. 53. In the second assignment of error, they argue that the trial court improperly granted summary judgment in favor of Countrywide.

{¶ 4} Countrywide argues that the Calderos waived these arguments by failing to timely object to the magistrate's decision and by failing to file an affidavit or transcript with their objections. We agree.

{¶ 5} Under Civ.R. 53(D)(3)(b)(i), "a party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during the fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i)." Any "objection to a factual finding * * * shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available." Civ.R. 53(D)(3)(b)(iii).

{¶ 6} Furthermore, the "magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's

adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).” Civ.R. 53(D)(3)(a)(iii).

{¶ 7} In the instant case, a review of the record reveals that the Calderos objected to the magistrate’s decision more than fourteen days after the decision was filed. Furthermore, they failed to support their objections with a transcript or affidavit as required by Civ.R. 53(D)(3)(b)(iii). Additionally, the following language appears at the end of the magistrate’s decision: “A party shall not assign as error on appeal the Court’s adoption of any findings of fact or conclusion of law unless the party timely and specifically objects to that finding or conclusion as required by Civ.R. 53(D)(3)(b)(i).”

{¶ 8} In *State ex rel. Booher v. Honda of Am. Mfg., Inc.*, 88 Ohio St.3d 52, 2000-Ohio-269, 723 N.E.2d 571, the Ohio Supreme Court held that a party is barred from raising any error on appeal connected with the trial court’s adoption of a magistrate’s finding of fact or conclusion of law unless that party timely objected to that decision. See, also, *Gee How Oak Tin Assn. v. Chang Yick, Inc.*, Cuyahoga App. No. 89228, 2007-Ohio-6199. “It is well

settled law in Ohio that if a party fails to object to a conclusion of law or finding of fact issued by a magistrate, the party is precluded from then raising the issue for the first time on appeal.” *Cahill v. Phelps*, Lake App. No. 2000-L-201, 2001-Ohio-8765.

{¶ 9} Because the Calderos failed to timely object to the magistrate’s findings and failed to include an affidavit or transcript in support of their objections, we find that they have waived their right to appeal any error connected with the trial court’s adoption of the magistrate’s decision.³

{¶ 10} Accordingly, the first and second assignments of error are overruled.

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.

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

³We also note that the cursory responses in the Calderos’ opposition to summary judgment and their objections to the magistrate’s decision were not enough to satisfy their burden.

COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

MELODY J. STEWART, J., CONCURS;
KENNETH A. ROCCO, J., DISSENTS (WITH SEPARATE OPINION).

KENNETH A. ROCCO, J., DISSENTING:

{¶ 11} On August 26, 2008, the common pleas court itself determined that there was no genuine issue as to any material fact and that the plaintiff was entitled to judgment as a matter of law. The magistrate did not make this determination. The court only assigned the magistrate to “issue a magistrate’s decision making specific findings as to the rights and liabilities of the parties.” In my opinion, the Calderos did not waive their right to appeal the *common pleas court’s* decision by their untimely objection to the magistrate’s findings. I believe we are obligated to review the decision to grant summary judgment de novo, applying the same standard the trial court applied.

{¶ 12} Countrywide had the initial obligation to demonstrate that there were no genuine issues of material fact and that it was entitled to judgment as a matter of law. See, e.g., *Dresher v. Burt* (1996), 75 Ohio St.3d 280. I do not believe that it did so. The affidavit supporting the motion for summary judgment was cursory at best. The only documentary evidence attached to it was a copy of the note and the mortgage. A copy of the assignment of these instruments to Countrywide was attached to a supplemental affidavit.

{¶ 13} Countrywide's affiant asserted that Countrywide had elected to accelerate the debt because of the claimed default. However, the note by its terms required Countrywide to provide notice to the Calderos that it would accelerate the debt if the Calderos did not pay the overdue amount by a date certain. There is no evidence that Countrywide provided this notice.

{¶ 14} Although Countrywide claimed that the amount due was \$45,423.34, it did not explain how it reached this amount. There was no evidence of the payments Countrywide or its predecessors received or the charges they assessed against the Calderos' account. Evidence is needed to prove the amount of the debt due.

{¶ 15} I would find that Countrywide failed to demonstrate that there were no genuine issues as to any material fact, either as to liability or as to the amount of the debt. Therefore, I would reverse the common pleas court's judgment.