

[Cite as *Chase Mtge. Co. W. v. Coleman*, 2009-Ohio-5378.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 92545**

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**CHASE MORTGAGE COMPANY WEST**

PLAINTIFF-APPELLEE

vs.

**KATHY COLEMAN, ET AL.**

DEFENDANTS-APPELLANTS

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-505359

**BEFORE:** Rocco, J., Cooney, A.J., and Dyke, J.

**RELEASED:** October 8, 2009

**JOURNALIZED:  
APPELLANT**

Kathy W. Coleman  
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**ATTORNEY FOR APPELLEE**

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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).

KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant, Kathy Coleman, appeals from a common pleas court order granting summary judgment in favor of plaintiff-appellee, Chase Mortgage Company West (“Chase”), on its complaint and on Coleman’s counterclaims. Coleman asserts that the trial court abused its discretion (1) by transferring the case from one magistrate to another, (2) by denying her motion to quash a subpoena served upon her clinical counselor, (3) by denying her motion to compel discovery of certain loan documents, (4) by failing to disqualify Chase’s counsel, (5) by dismissing her counterclaims as a discovery sanction, and (6) by granting summary judgment for Chase. We find no prejudicial error in the proceedings below and affirm the common pleas court’s judgment.

#### Procedural History

{¶ 2} In its complaint filed July 11, 2003, Chase sought a personal judgment on a promissory note executed by Coleman and also sought to foreclose on a mortgage on Coleman’s property. Coleman’s amended answer and counterclaim asserted claims for fraud, negligent and intentional interference with a business contract, intentional infliction of emotional distress, housing discrimination under state and federal law, breach of contract and “lack of consortium.” The court subsequently determined that the counterclaim failed to state a claim except for the claims of intentional

infliction of emotional distress, housing discrimination based on race, and breach of contract. The court therefore dismissed all of the counterclaims but these.

{¶ 3} Discovery was protracted and contentious. Among other things, the parties disputed Chase's right to discovery from Coleman's counselor, Myrna Gill, and Coleman's right to obtain records of her payment history from Chase. Coleman filed multiple motions on these subjects, all of which were denied by the court. In addition, Coleman failed to appear for deposition, leading Chase to file a motion for sanctions against her. Coleman asked the court to disqualify Chase's attorney because she intended to call the attorney to testify at the sanctions hearing. The court denied the motion to disqualify, but granted the motion for sanctions and dismissed Coleman's counterclaims.

{¶ 4} Chase moved for summary judgment on June 1, 2007. Coleman was given a total of fifteen months to respond to Chase's motion, allowing her time to depose Thomas Reardon, the assistant vice president of Chase whose affidavit supported Chase's motion. Even though the court stated that no further extensions would be granted after it set the final deadline of September 26, 2008, Coleman requested yet another extension of time of up to 20 days. The court did not rule on this motion, but Coleman also never sought leave to file her response within the requested 20-day period. On

November 13, 2008, the court granted Chase's unopposed motion. This appeal followed.

### Law and Analysis

{¶ 5} In her first assignment of error, Coleman claims that the court abused its discretion by removing the magistrate who was randomly assigned at the time the case was filed and reassigning the case to the chief magistrate. The judge assigned to the case ordered the reassignment of magistrates in September 2003, approximately three months after the complaint was filed and before Coleman had even answered. Coleman did not object to the reassignment until 2½ years later, in April 2006. At that point, the chief magistrate had decided a number of issues in the case; the interests of judicial economy would not have been served by returning the case to the originally assigned magistrate at that late date. Therefore, the court did not abuse its discretion by denying Coleman's motion.

{¶ 6} Coleman argues that "due process and equal protection" did not allow the court to assign a different magistrate than the one who was randomly assigned, but she does not explain this argument. The Rules of Superintendence require random assignment of cases to judges. C.P. Sup.R. 36(B)(1). We have found no such requirement for the assignment of magistrates, however. Magistrates' duties are assigned by the court, and their decisions are subject to review by the court. Consequently, a random

assignment process is not necessary to ensure impartial decisions. Although Coleman now claims the magistrate was biased, she did not move to have the magistrate removed because of bias. Accordingly, we overrule the first assignment of error.

{¶ 7} Second, Coleman urges that the court abused its discretion by denying her motion to quash Chase's subpoena to Myrna R. Gill, a licensed professional clinical counselor. Chase served several subpoenas on Ms. Gill, and Coleman filed motions to quash all of them. In this appeal, however, Coleman appears to be challenging the court's denial of her motion to quash Chase's subpoena for Gill's testimony and records for a discovery sanctions hearing to be held on April 12, 2007. Gill did not testify at this hearing. Therefore, Coleman was not prejudiced by the court's ruling. See *Standard Oil Co. v. Jones* (Nov. 19, 1975), Mahoning App. No. 75-CA-8.

{¶ 8} Third, Coleman contends that the court abused its discretion by denying her motion to compel Chase to provide discovery of "loan documents from 1994-1999 on the mortgage."<sup>1</sup> Coleman apparently claims that these

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<sup>1</sup>Coleman filed at least four motions to compel these documents. The first motion was filed November 24, 2004. Chase responded that it did not possess any account statements relating to time periods before it purchased the mortgage. The court denied Coleman's motion to compel the production of documents, finding that plaintiff had fully responded to the document requests. Coleman filed a second motion to compel on October 11, 2005, and a third motion on April 25, 2006. While the court's record is not entirely clear, it appears that the court denied these motions for lack of prosecution when Coleman failed to appear for a hearing on the motions. The fourth motion, filed July 2, 2007, was combined with a motion for an extension of time to respond to Chase's summary judgment. This combined motion

documents would have disclosed her payment history and would have shown that she owed less than Chase claimed. The court denied Coleman's original motion to compel on the ground that Chase had fully responded to Coleman's document request. Coleman does not dispute this finding. The court did not abuse its discretion by refusing to compel Chase to produce documents Coleman did not request. Furthermore, Coleman could have reconstructed her payment history from her own records, so she was not prejudiced by the denial of her motion. The third assignment of error is therefore overruled.

{¶ 9} Fourth, Coleman argues that the court abused its discretion by denying her motion to disqualify Chase's counsel. In April 2006, Coleman asked the court to disqualify Chase's counsel because Coleman intended to call him to testify about the parties' discussions on discovery matters at a hearing on the parties' motions for sanctions. At the time the motion to disqualify was filed, the former Code of Professional Responsibility still applied. DR 5-102(B) provided:

"If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client."

{¶ 10} The mere fact that a party expresses her intent to call an opposing attorney as a witness does not require the attorney to withdraw. Coleman does not explain how counsel's testimony would have been prejudicial to Chase, his

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was granted "in part," with respect to the extension of time, presumably meaning that the court overruled the motion to compel.

client. “The spirit of the rule will not be served if a movant's assertion that the [attorney's] testimony \* \* \* may be or will be prejudicial is sufficient grounds for disqualification. Rather, the moving party bears the burden of demonstrating the likelihood that prejudice will or might result.” *Freeman v. Kulicke & Soffa Indus., Inc.* (E.D. Pa. 1978), 449 F.Supp. 974, 978, cited with approval in *Pilot Corp. v. Abel*, Franklin App. No. 01AP-1204, ¶13. Therefore, she has failed to demonstrate that the court abused its discretion by denying her motion to disqualify. The fourth assignment of error is overruled.

{¶ 11} The fifth and sixth assignments of error contend that the court erred by adopting the magistrate's decision to dismiss Coleman's counterclaim as a sanction for failing to appear for deposition. The magistrate's decision of April 16, 2007 described the factual background for this ruling. Chase scheduled Coleman's deposition for August 10, 2005, two days before the deadline to complete non-expert depositions. Coleman's counsel asked Chase to reschedule, and they agreed to conduct the deposition on August 15. Coleman refused to attend the rescheduled deposition because it was after the deadline for non-expert depositions. However, she said she would agree to the deposition if plaintiff agreed to allow her to depose a representative of Chase after the scheduled discovery deadline. Chase refused. Coleman failed to appear for deposition on August 15.

{¶ 12} The magistrate determined that:



“Ms. Coleman failed to appear at her rescheduled deposition of which she and her counsel had proper notice. Her refusal was not for some legitimate reason but, rather, was an attempt to coerce plaintiff to permit a deposition of plaintiff’s representative after the court’s deadline for such discovery. Her refusal to abide by her own commitment to extend the discovery deadline after that deadline had expired was clearly an act of bad faith. Accordingly, the Magistrate finds that an appropriate sanction for Ms. Coleman’s refusal to attend her deposition is the dismissal of her counterclaims with prejudice pursuant to Civ.R. 37(D) and Civ.R. 37(B)(2)(c).”

{¶ 13} In her objections to the magistrate’s decision, Coleman claimed that the magistrate’s findings were factually incorrect. However, there was no evidence before the magistrate to support her argument; indeed, Coleman did not even attend the hearing. Nor did Coleman attempt to demonstrate that she could not, with reasonable diligence, have produced the evidence for consideration by the magistrate. See Civ.R. 53(D)(4)(d). Therefore, the trial court did not abuse its discretion by overruling this objection and adopting the magistrate’s decision.

{¶ 14} Coleman also maintains that the magistrate lacked jurisdiction to conduct the sanctions hearing or to rule upon the parties’ motions for sanctions because an appeal was pending from the denial of her motions to quash Chase’s subpoena to Myrna Gill. Even if this order was appealable (which it was not), the appeal would not have divested the trial court of jurisdiction to rule on unrelated matters such as the motions for sanctions. *Yee v. Erie Cty. Sheriff’s Dept.* (1990), 51 Ohio St.3d 43, 44. Therefore, the magistrate had jurisdiction to hear

and decide the motions for sanctions. The fifth and sixth assignments of error are overruled.

{¶ 15} Finally, Coleman argues that the court erred by granting summary judgment for Chase. We review a court order granting summary judgment de novo, applying the same standard of review the trial court applied. “Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor.” *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369, 1998-Ohio-389.

{¶ 16} Chase filed its motion for summary judgment on June 1, 2007. Attached to the motion was the affidavit of Chase Assistant Vice President Thomas Reardon. Coleman was given numerous extensions to respond to this motion, and was also given leave to take Reardon’s deposition. Even after Coleman was told that “[n]o further extensions” would be granted, she asked for another 20 days to depose Reardon and respond to the motion for summary judgment, but did not file her response within the requested time. On November 13, 2008, the court finally granted Chase’s unopposed motion.

{¶ 17} The evidence attached to Chase’s motion for summary judgment, though minimal, demonstrated that there were no genuine issues of material fact and that Chase was entitled to judgment as a matter of law. Reardon’s affidavit

demonstrated that Chase was the holder of Coleman's note and mortgage, that Coleman failed to make her monthly payment on the mortgage on March 1, 2003 and failed to make any payment thereafter, that the amount due on the mortgage was \$83,744.26 plus interest at the rate of 8.5% from February 1, 2003 plus late fees and other charges, and that Chase had elected to accelerate the debt. Coleman presented no evidence demonstrating that there was a genuine issue of material fact for trial. Therefore, the court did not err by granting summary judgment to Chase.

Affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

KENNETH A. ROCCO, JUDGE

COLLEEN CONWAY COONEY, A.J., and  
ANN DYKE, J., CONCUR