[Cite as *Third Fed. Savs. Bank v. Cox*, 2010-Ohio-4133.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93950

THIRD FEDERAL SAVINGS BANK

PLAINTIFF-APPELLEE

vs.

PAUL W. COX, JR., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-673223

BEFORE: Boyle, J., Blackmon, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: September 2, 2010

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MARY J. BOYLE, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶ 2} Defendant-appellant, Paul Cox ("Cox"), appeals from the trial court's decision granting summary judgment to plaintiff-appellee, Third Federal Savings Bank ("Third Federal"), and awarding it $24,962.95 plus interest. Finding some merit to the appeal, we affirm in part, reverse in part, and remand for further proceedings to resolve the issue of damages.

Procedural History and Facts

{¶ 3} Third Federal commenced the underlying action against Cox and his wife, defendant Saralee Cox, alleging that they defaulted under the terms of a home equity line of credit agreement executed between the parties in the amount of $25,000. The complaint alleged that they owed a principal amount of $24,962.95 plus interest.

{¶ 4} The Coxes moved to dismiss the complaint on the grounds that the home equity line at issue in this case was secured by the same property that was the subject of a pending foreclosure action. The trial court denied the motion, and Third Federal later moved for summary judgment, seeking damages of $24,962.95 plus interest. The Coxes opposed the motion, again arguing that the court lacked jurisdiction over Third Federal's claim. The Coxes further argued, in the alternative, that Third Federal failed to mitigate its damages because it stopped accepting payments from the Coxes around January 2007. As a result, they argued that Third Federal was not entitled to any interest that accrued after this date.

{¶ 5} The trial court granted Third Federal's motion for summary judgment, awarding it $24,962.95, but refused to award interest for the time period in question after finding that Third Federal failed to mitigate its damages.

{¶ 6} Cox appeals, raising the following two assignments of error:

{¶ 7} "[I.] The trial court erred in granting summary judgment where there is an earlier case pending on the same matters before the same court and the earlier case has jurisdiction over those matters.

{¶ 8} "[II.] The trial court erred in granting summary judgment where it did not accept defendant-appellant's brief denying liability and found that the appellee-plaintiff failed to mitigate damages and awarded them an unsubstantiated amount."

Jurisdiction

{¶ 9} Relying on the "jurisdictional-priority rule," Cox argues in his first assignment of error that the trial court lacked subject matter jurisdiction to award Third Federal judgment on its complaint because its claim was already pending in another foreclosure action. We disagree.

{¶ 10} The Ohio Supreme Court explained the jurisdictional priority rule as follows: "'As between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.'" *State ex rel. Racing Guild of Ohio v. Morgan* (1985), 17 Ohio St.3d 54, 56, 476 N.E.2d 1060, quoting *State ex rel. Phillips v. Polcar* (1977), 50 Ohio St.2d 279, 364 N.E.2d 33, syllabus. The rule, however, does not apply if (1) the cause of action in both cases differ, or (2) the parties in both cases differ. *State ex rel. Shimko v. McMonagle*, 92 Ohio St.3d 426, 429,

2001-Ohio-301, 751 N.E.2d 472. Thus, "if the first case does not involve the same cause of action or the same parties as the second case, the first case will not prevent the second." Id.

{¶ 11} Cox contends that "because this action directly conflicts with the jurisdiction of a previously filed action pending before a different judge of *this same court*, this second filed lawsuit must be dismissed pursuant to the jurisdictional-priority rule." (Emphasis added.) But the jurisdictional-priority rule contemplates cases pending in two different courts of concurrent jurisdiction — not two cases filed in the same court. *Jarvis v. Wells Fargo Bank*, 7th Dist. No. 09CO6, 2010-Ohio-3283, ¶16; *Republic Bank v. Flynn Prop., L.L.C.*, 8th Dist. No. 91573, 2009-Ohio-5552, ¶27; *Fenner v. Kinney*, 10th Dist. No. 02AP-749, 2003-Ohio-989, ¶14; *State ex rel. Republic Servs. of Ohio v. Pike Twp. Bd. of Trustees*, 5th Dist. Nos. 2006CA00153 and 2006CA00172, 2007-Ohio-2086, ¶47. Thus, the jurisdictional-priority rule does not apply to the facts of this case.

{¶ 12} Further, contrary to Cox's assertion, these two cases involve two separate actions — one involves a foreclosure, an action in equity, and the other involves a legal action to recover money damages under an agreement. It is well settled that "an action on a note and an action to foreclose a mortgage are two different beasts," which are not required to be brought in a single action. *Gevedon v. Hotopp*, 2d Dist. No. 20673, 2005-Ohio-4597, ¶28; see, also, *Simon v. Union Trust Co.* (1933), 126 Ohio St. 346, 185 N.E. 425; *Fifth Third Bank v.*

Hopkins, 177 Ohio App.3d 114, 2008-Ohio-2959, 894 N.E.2d 65. Therefore, because the two actions differ, and Third Federal was not required to pursue its claim for money damages in the pending foreclosure case, the trial court properly denied Cox's motion to dismiss.

{¶ 13} The first assignment of error is overruled.

Summary Judgment Award

{¶ 14} In his second assignment of error, Cox argues that the trial court erred in granting summary judgment because genuine issues of material fact exist as to whether he defaulted under the agreement and the amount owed under the agreement.

{¶ 15} In reviewing a trial court's ruling on a motion for summary judgment, this court applies the same standard a trial court is required to apply in the first instance, i.e., whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829, 586 N.E.2d 1121. In applying this standard, evidence is construed in favor of the nonmoving party, and summary judgment is appropriate if reasonable minds could only conclude that judgment should be entered in favor of the movant. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 686-87, 653 N.E.2d 1196. Before the trial court may consider whether the moving party is entitled to judgment as a matter of law,

however, it must determine whether there are genuine issues of material fact for trial. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶12.

{¶ 16} Under Civ.R. 56, the moving party "'bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.'" *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164, quoting *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. The nonmoving party then has a reciprocal burden to set forth specific facts, by affidavit or as otherwise provided by Civ.R. 56(E), which demonstrate that there is a genuine issue for trial. *Byrd* at ¶10.

{¶ 17} Third Federal moved for summary judgment and attached three exhibits in support: (1) home equity line of credit agreement signed by the Coxes, (2) deposition transcript of Paul Cox, and (3) deposition transcript of Saralee Cox. Relying on these exhibits, Third Federal argued that it was entitled to judgment as a matter of law because "neither Defendant refutes signing the Agreement, stopping making payments on the Agreement, nor the balance owed to Plaintiff on the Agreement."

{¶ 18} Cox argues on appeal that genuine issues of material fact exist that preclude summary judgment on both the issue of his liability under the agreement as well as the amount of money owed. He contends that, contrary to Third

Federal's assertion, he did not concede defaulting under the loan in his deposition or the amount of damages owed.

{¶ 19} Our review of the record reveals, however, that Cox admitted in his answer that he had defaulted under the terms and conditions of the home equity line of credit. This admission conclusively establishes his liability. Moreover, his deposition testimony was consistent with his admission; he acknowledged not having paid on the equity line for over a year despite still owing on the equity line. We next turn to the issue of damages.

{¶ 20} Initially, we note that Cox never opposed Third Federal's claim that $24,962.95 was due under the agreement, apart from any interest that had accrued. But this alone does not relieve Third Federal of its burden. Indeed, there is no default summary judgment under Ohio law. *Maust v. Palmer* (1994), 94 Ohio App.3d 764, 769, 641 N.E.2d 818.

{¶ 21} Here, the only evidence offered as to damages was Cox's own deposition testimony where he stated that he did not have any reason to dispute the balance that Third Federal "suggests" as being owed. Specifically, the excerpt relied on by Third Federal is as follows:

{¶ 22} "Q. [Third Federal's attorney] Do you know how much is owed on the equity line?

{¶ 23} "A. [Paul Cox] No, I really don't.

{¶ 24} "Q. Do you know the last time that you made a payment?

{¶ 25} "A. Right before we went to trial on foreclosure.

{¶ 26} "Q. And when was that?

{¶ 27} "* * *

{¶ 28} "A. It was a year ago last summer.

{¶ 29} "Q. So as a follow-up to the deposition today, I'd like you to get any documents that you have that show what you think the balance is.

{¶ 30} "A. Okay.

{¶ 31} "Q. Our clients suggest that the balance is $24,962.95.

{¶ 32} "A. Yes.

{¶ 33} "Q. Do you have any reason to dispute that?

{¶ 34} "A. No, I don't."

{¶ 35} Construing this evidence in a light most favorable to the nonmoving party, i.e., Cox, we do not find that this establishes the amount of damages as a matter of law. Third Federal, the moving party, has the burden of establishing the amount of damages owed under the agreement. Notably, it did not offer an affidavit of an account representative or any account statements to establish the amount owed. And while Cox indicated during his deposition that he had no reason to dispute the amount that Third Federal "suggested" as being owed, he never admitted to the amount of damages during the deposition. Nor did he admit to a balance of $24,962.95 in his answer. Instead, Cox candidly disclosed in his deposition that he did not know how much was owed. Based on the evidence

submitted, we find that Third Federal failed to carry its burden and establish the amount owed.

{¶ 36} The second assignment of error is sustained in part as to the issue of damages.

Judgment affirmed in part and reversed in part. Case is remanded for further proceedings to determine the amount owed under the agreement.

It is ordered that appellee and appellant share the 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.

MARY J. BOYLE, JUDGE

PATRICIA ANN BLACKMON, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR