[Cite as *Plymouth Park Tax Servs. v. Sayler*, 2010-Ohio-675.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93174

PLYMOUTH PARK TAX SERVICES

PLAINTIFF-APPELLEE

vs.

BETH SAYLER, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-584940

BEFORE: McMonagle, J., Gallagher, A.J., and Kilbane, J.

RELEASED: February 25, 2010
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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendants-appellants Beth and John Sayler appeal the trial court judgment adopting the magistrate's decision, ordering foreclosure of the subject property, and granting judgments in favor of plaintiff-appellee Plymouth Park Tax Services, LLC. We affirm.

{¶ 2} Plymouth Park initiated this tax certificate foreclosure action in February 2006. The named defendants were: (1) Beth Sayler; (2) the unknown spouse, if any, of Beth Sayler; (3) Paul T. Sayler, Jr.; (4) Patricia M. Sayler; (5) Portfolio Recovery Associates; (6) the unknown tenant, if any, of the subject property; and (7) James Rokakis, Cuyahoga County Treasurer. Service was completed on John Sayler on June 13, 2006 and on Beth Sayler on March 30, 2007. On May 11, 2007, Beth Sayler sought leave until June 22, 2007 to plead to the complaint. On July 26, 2007, she sought leave until September 14, 2007 to plead to the complaint. The court granted her second request. The case was referred to a magistrate.

{¶ 3} In October 2007, Plymouth Park filed motions for statutory attorney fees and default judgment. The default was sought against all the Sayler defendants and Portfolio Recovery Associates. A hearing on the motions was scheduled for December 6, 2007. Prior to December 6, however,

all the Sayler defendants requested, and were granted, leave to file their answers instanter.

{¶ 4} A hearing was held on December 6, as previously scheduled, and as a result of that hearing the court ordered Plymouth Park to file two necessary tax lien certificates. Beth and John Sayler did not appear at the hearing.

{¶ 5} On January 11, 2008, Plymouth Park filed a motion for summary judgment. On February 1, 2008, the magistrate issued a decision granting the summary judgment motion against the Sayler defendants and default against Portfolio Recovery Associates. On February 11, Beth and John Sayler filed a motion for extension of time to respond to Plymouth Park's summary judgment motion and objections to the magistrate's decision; as a result of that filing, the magistrate's decision was withdrawn and Beth and John Sayler were granted until March 21, 2008 to file their opposition to the summary judgment motion.

{¶ 6} On March 21, Beth and John Sayler filed a motion for extension of time to respond to the summary judgment motion. The court denied their motion stating, "the case has been pending over 2 years, defendant titleholders failed to appear at the December 2007 hearing to raise issues, factual or otherwise, and plaintiff's motion for summary judgment has been pending over 10 weeks." The court subsequently adopted the magistrate's

decision and entered judgment in favor of Plymouth Park and against Beth and John Sayler.

{¶ 7} In their first assignment of error, Beth and John contend that the trial court erred by not allowing them additional time to respond to the summary judgment motion. We disagree.

{¶ 8} We review a trial court's denial of a motion for extension of time under an abuse of discretion standard. *Johnson v. Univ. Hosp. Case Med. Ctr.*, Cuyahoga App. No. 90960, 2009-Ohio-2119, ¶ 5. An abuse of discretion connotes more than a mere error in judgment; it signifies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 9} As already stated, Plymouth Park filed its summary judgment motion on January 11, 2008; it was granted prematurely on February 1.[1] Accordingly, the entry granting the motion was withdrawn and Beth and John Sayler were granted until March 21 to file their opposition. The March 21 date afforded Beth and John Sayler 70 days to respond to the motion. On March 21, however, Beth and John Sayler filed a motion for extension of time. Denying Beth and John's request for an extension beyond the 70 days was not an abuse of discretion.

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[1]Loc.R. 11.0 (I)(1) of the Court of Common Pleas of Cuyahoga County, General Division, provides 30 days for a party to oppose a summary judgment motion.

{¶ 10} Moreover, we are not persuaded by Beth and John Sayler's contention that the court used an invalid address for Beth during the proceedings and John was never properly named. "Failure to timely advise a trial court of possible error, by objection or otherwise, results in a waiver of the issue for appeal." *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121, 679 N.E.2d 1099. These issues were not raised below and therefore were waived. Moreover, both Beth and John answered the complaint and participated in the litigation. Notice, therefore, was never an issue.

{¶ 11} We are also not persuaded by Beth and John's citation to the portion of the court's judgment that references their failure to appear at the December 2007 hearing and their contention that the reference in effect waived their right to oppose the summary judgment motion. The December 2007 hearing was *before* Plymouth Park had even filed its motion for summary judgment. The court's reference to their failure to appear at that hearing, which did not involve summary judgment, therefore did not constitute a forfeiture of their right to oppose the motion. In fact, the court subsequently withdrew its first decision granting summary judgment to Plymouth Park and granted Beth and John time to respond, irrespective of the fact that they did not appear at the December 2007 hearing.

{¶ 12} Additionally, Beth and John claim that summary judgment was improper because they raised affirmative defenses in their answer. They

make this same argument in their third assignment of error. Under Civ.R. 56(E), a party opposing a summary judgment motion may not rest on its pleadings; rather, the party must set forth specific facts showing that there is a genuine issue of material fact. Beth and John did not do that here.

{¶ 13} In light of the above, the first and third assignments of error are overruled.

{¶ 14} For their second assigned error, Beth and John contend that the court erred by not holding a case management conference. Loc.R. 21.0 of the Court of Common Pleas of Cuyahoga County, General Division, provides as follows: "A pretrial conference shall be conducted in all civil cases prior to being scheduled for trial, except in actions for injunctions, foreclosures, marshalling of liens, partition, receiverships and appeals from administrative agencies." In accordance with that rule, the second assignment of error is overruled.

{¶ 15} In their final assignment of error, Beth and John contend that the court's order to Plymouth Park (after the December 2007 hearing) to file two tax certificates not previously filed was in violation of R.C. 5721.37, because they were denied their right to contest the certificates and Plymouth Park was exempted from its responsibility of proving that it met the statutory requirements for perfecting them. We disagree.

{¶ 16} The tax certificates at issue here were purchased under R.C. 5721.33 and therefore were governed by R.C. 5721.37(A)(2). That section provides in relevant part that, "a certificate holder other than a county land reutilization corporation may file with the county treasurer a notice of intent to foreclose, on a form prescribed by the tax commissioner, provided the parcel has not been redeemed * * * and at least one certificate respecting the certificate parcel, held by the certificate holder filing the request for foreclosure and eligible to be enforced through a foreclosure proceeding, has not been voided * * *." R.C. 5721.37(A)(2).[2]

{¶ 17} Accordingly, a certificate holder who obtained the certificate under R.C. 5721.33 may obtain a notice of intent to foreclose and proceed with a foreclosure action so long as "at least one certificate respecting the certificate parcel" was eligible. Here, Plymouth Park attached as exhibits to its complaint two of the tax certificates and a notice of intent to foreclose. In accordance with the statutory requirement just stated, those submissions were sufficient and the later submission of the other tax certificates relative to the subject property was proper.

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[2]Further, R.C. 5721.37(C)(2), also governing certificates purchased under R.C. 5721.33, provides in relevant part that, "if the certificate parcel has not been redeemed, *at least one certificate respecting the certificate parcel*, held by the certificate holder filing the notice of intent to foreclose and eligible to be enforced through a foreclosure proceeding, has not been voided * * *, a notice of intent to foreclose has been filed, and the payment required under division (B) of this section has been made, the county treasurer shall certify notice to that effect to the private attorney." (Emphasis added.)

{¶ 18} Finally, Beth and John Sayler's contention that they were denied the right to require Plymouth Park to "prove that it has met the statutory requirements" for perfecting the tax certificates is without merit. R.C. 5721.37(F) provides in pertinent part that "[t]he tax certificate purchased by the certificate holder is presumptive evidence in all courts and boards of revision and in all proceedings, including, without limitation, at the trial of the foreclosure action, of the amount and validity of the taxes, assessments, charges, penalties by the court and added to such principal amount, and interest appearing due and unpaid and of their nonpayment."

{¶ 19} Accordingly, the burden was on Beth and John Sayler to rebut the presumptive evidence of the tax certificates, and if they had successfully done so, the burden would have shifted to Plymouth Park to prove the validity of the certificates. Beth and John did not rebut the presumptive validity of the certificates, however.

{¶ 20} The fourth assignment of error is therefore overruled.

It is ordered that appellee recover from appellants 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.

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR