

[Cite as *First Horizon Home Loan Corp. v. Roberts*, 2010-Ohio-60.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. **92367**

**FIRST HORIZON HOME LOAN
CORPORATION**

PLAINTIFF-APPELLEE

vs.

BARRY D. ROBERTS, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-550238

BEFORE: Jones, J., McMonagle, P.J., and Blackmon, J.

RELEASED: January 14, 2010

**JOURNALIZED:
ATTORNEY FOR APPELLANT**

Joanne Brown
2136 Noble Road
Cleveland, Ohio 44112

ATTORNEYS FOR APPELLEES

Christopher D. Cathey
Ulmer & Berne LLP
600 Vine Street, Suite 2800
Cincinnati, Ohio 45202-2409

Elizabeth A. Harvey
Ulmer & Berne LLP
Skylight Office Tower
1660 West 2nd Street, Suite 1100
Cleveland, Ohio 44113-1448

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. 2.2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Defendants-appellants, Barry and Cybil Roberts (collectively referred to as “the Roberts”), appeal the trial court’s adoption of the magistrate’s decision granting summary judgment in favor of plaintiff-appellee, First Horizon Home Loan Corporation (“First Horizon”). Finding no merit to the appeal, we affirm.

{¶ 2} In 2002, the Roberts refinanced their home with Military Mortgage. Military Mortgage assigned and transferred its interest in the mortgage and the note securing the mortgage to First Horizon. In December 2004, First Horizon instituted a foreclosure action against the Roberts, alleging default under its promissory note and mortgage with the Roberts.¹ The trial court referred the matter to a magistrate. The Roberts filed their answer and counterclaim, seeking relief under the federal Truth-In-Lending Act (“TILA”).

{¶ 3} In June 2005, the Roberts filed a notice of bankruptcy, but did not disclose the counterclaim. In November 2005, the bankruptcy court granted bankruptcy relief to the Roberts and ordered a discharge.

{¶ 4} In June 2006, First Horizon moved for summary judgment, which the Roberts opposed.

{¶ 5} In September 2006, the Roberts moved to reopen their bankruptcy case and amend the schedule to include the counterclaim. The court allowed the Roberts to reopen the case and amend the schedule. The trustee then moved the bankruptcy court for an order authorizing him to compromise the estate’s

¹First Horizon filed an amended complaint in January 2005.

claims against First Horizon. The trial court granted that motion. See *In Re Roberts* (Bankr.Ct.Ohio 2007), Case No. 05-22342(B).

{¶ 6} In October 2007, the trustee and First Horizon executed a settlement agreement and release. The bankruptcy court granted the trustee's motion authorizing the trustee to compromise the counterclaim in the foreclosure action pursuant to the terms of the settlement agreement. First Horizon then moved for dismissal of the Roberts' counterclaim in state court, which was granted. The trial court dismissed the counterclaim with prejudice.

{¶ 7} In December 2007, the magistrate granted First Horizon's motion for summary judgment. The Roberts objected to the magistrate's decision, claiming they had the right under the TILA to rescind the entire loan transaction. They did not set forth any further objections to the magistrate's decision. In October 2008, the trial court adopted the magistrate's decision.

{¶ 8} The Roberts appeal, raising one assignment of error for our review. In their assignment of error, the Roberts argue: 1) the trial court erred in finding that First Horizon was the owner of the promissory note and mortgage, 2) the trial court erred in finding that the Roberts did not have the right to rescind the mortgage, and 3) the trial court erred in finding that First Horizon was entitled to judgment as a matter of law where the Roberts sent timely notice that they were exercising their right to rescind under the TILA.

{¶ 9} As an initial matter, the Roberts argue that First Horizon failed to establish that it had standing because the record does not show that "Military

Mortgage ever lawfully transferred possession of the note executed by [the Roberts] to [First Horizon].”

{¶ 10} First Horizon correctly notes the Roberts raise the issue of standing for the first time on appeal. A review of the Roberts’ affirmative defenses as listed in their answer discloses that none relate to standing. As such, they have waived that issue and are precluded from raising it on appeal. *Gangale v. State*, Franklin App. No. 01AP-1406, 2002-Ohio-2936, at ¶13, citing *State v. Williams* (1977), 51 Ohio St.2d 112, 364 N.E.2d 1364; *Discover Bank v. Poling*, Franklin App. No. 04AP-1117, 2005-Ohio-1543. In addition, Civ.R. 53(D)(3)(b)(iv) states that “[e]xcept for a claim of plain error, 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 has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).”

{¶ 11} Thus, we find that the Roberts did not properly raise the issue of standing. And even if they had, their argument lacks merit. First Horizon established standing by attaching the note and assignment of mortgage to its amended complaint. See *Argent Mortgage Co. v. Ciemins*, Cuyahoga App. No. 90698, 2008-Ohio-5994.

{¶ 12} In their other two arguments, the Roberts argue the trial court erred in finding that they did not have the right to rescind the mortgage because First

Horizon did not comply with the TILA and they properly notified First Horizon of their right to rescission of the mortgage and promissory note. We disagree.

{¶ 13} Once the Roberts filed bankruptcy, any “legal and equitable” interests they may have had in tangible or intangible property became property of the bankruptcy estate. See 11 U.S.C. 541(a)(1). Property of a bankruptcy estate includes causes of action that exist at the time a case commences; any cause of action automatically passes to the trustee in bankruptcy. *United States v. Whiting Pools, Inc.* (1983), 462 U.S. 198, 205, 103 S.Ct. 2309, 76 L.Ed.2d 515 and *Leffew v. Kugler* (E.D.Tenn. 1998), 220 B.R. 598, 602. In other words, once a party files for bankruptcy, “a debtor has no standing to pursue its causes of actions” as a cause of action once belonging to a debtor vests in the trustee for the estate’s benefit. *Leffew, Bauer v. Commerce Union Bank* (C.A.6, 1988), 859 F.2d 438, 441.²

{¶ 14} In this case, the trustee in the Roberts’ bankruptcy case worked under the authority of the federal bankruptcy court. That court noted in its order that the trustee had the authority to compromise the counterclaim because the counterclaim was part of the estate. Once the trustee and First Horizon agreed to settle the counterclaim, they executed a settlement agreement and release that included an agreement that the trustee would seek a dismissal of the counterclaim in state court. The bankruptcy court then issued an order authorizing the trustee

² Thus, an argument could be made that once the Roberts filed bankruptcy, they no longer retained the standing to assert their TILA-related counterclaims.

to compromise the claim against First Horizon and to dismiss the pending counterclaim in state court, noting that the Roberts did not file a written response to the trustee's motion or appear at the hearing to oppose the motion. The Roberts also did not appeal the court's order.

{¶ 15} In October 2007, the trustee in the bankruptcy case, through First Horizon, motioned the trial court to dismiss the Roberts' counterclaim. The Roberts objected, arguing that since they amended the schedule in bankruptcy court to include the counterclaim they should be able to pursue their counterclaim in state court, even though the counterclaim was property of the estate. In December 2007, the trial court granted the motion to dismiss with prejudice and denied the Roberts' motion in opposition as moot.

{¶ 16} The Roberts failed to challenge the trustee's actions in bankruptcy court, and now seek relief from this court. "Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district * * *." Section 3(B)(2), Article IV of the Ohio Constitution. Thus, this court is without authority to review the merits of the decision of the federal bankruptcy court. Any challenge to the bankruptcy court's decision should have been raised on an appeal in federal court. *Sundstrom v. Sundstrom*, Ashtabula App. No. 2005-A-0013, 2006-Ohio-486.

{¶ 17} We agree with First Horizon that in order to grant the relief the Roberts seek, which is reinstatement of their counterclaim for rescission of the

loan and damages, we would have to not only review the state trial court's dismissal of the counterclaim, but also the federal bankruptcy court's decision to grant the trustee's motion to compromise the TILA claim against First Horizon. We are without jurisdiction to review the bankruptcy court's ruling. Any objection to that decision needed to be exercised in that court.

{¶ 18} We also find no error in the court's granting of summary judgment to First Horizon. The Roberts' only objection to the magistrate's decision was based on the argument that the magistrate erred in dismissing the counterclaim, which we have already discussed and determined to have no merit.

{¶ 19} Therefore, the sole assignment of error is overruled.

{¶ 20} Accordingly, judgment is affirmed.

It is ordered that appellee recover of 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.

LARRY A. JONES, JUDGE

**CHRISTINE T. MCMONAGLE, P.J., and
PATRICIA A. BLACKMON, J., CONCUR**

