

[Cite as *Grove Court Condominium Unit Owners' Assn. v. Hartman*, 2011-Ohio-218.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94910

GROVE COURT CONDOMINIUM UNIT OWNERS' ASSOCIATION

PLAINTIFF-APPELLEE

vs.

DOROTHY M. HARTMAN, ET AL.

DEFENDANTS-APPELLEES

[Appeal by Appellant Wells Fargo Bank, N.A.]

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-611180

BEFORE: Gallagher, P.J., Kilbane, A.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: January 20, 2011
ATTORNEYS FOR APPELLANT

For Wells Fargo Bank, N.A.

Deanna C. Stoutenborough
Romi T. Fox
M. Elizabeth Hils
Lerner, Sampson & Rothfuss
120 E. Fourth Street, 8th Floor
Cincinnati, OH 45202

Scott A. King
Terry W. Posey, Jr.
Thompson Hine LLP
P.O. Box 8801
2000 Courthouse Plaza, N.E.
Dayton, OH 45401-8801

Dale S. Smith
Thompson Hine LLP
3900 Key Center
127 Public Square
Cleveland, OH 44114

ATTORNEYS FOR APPELLEES

For Grove Court Condominium Unit Owners' Association

James C. Wrentmore
Singerman, Mills, Desberg & Kauntz Co., LPA
3401 Enterprise Parkway
Suite 200
Beachwood, OH 44122
Kevin M. Fields

Darcy Mehling Good
Robert E. Kmiecik
Kimberly L. Strauss
Kaman & Cusimano, LLC
50 Public Square
Suite 2000
Cleveland, OH 44113

For Dorothy M. Hartman, et al.

Elizabeth A. Meers
1370 Ontario Street
Suite 2000
Cleveland, OH 44113-1726

For Plymouth Park Tax Services

Jason P. Hager
Douglass & Associates Co., LPA
4725 Grayton Road
Cleveland, OH 44135

For Dino Selvaggio

Alexander E. Goetsch
Megan R. Miller
Cavitch, Familo & Durkin Co., LPA
1300 East Ninth Street
20th Floor
Cleveland, OH 44114

For Third Federal Savings & Loan Association

Third Federal Savings & Loan Association
Legal Department
7007 Broadway Avenue
Cleveland, OH 44105

SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellant Wells Fargo Bank, N.A. (“Wells Fargo”) appeals the judgment of the Cuyahoga County Court of Common Pleas that denied its emergency motion to intervene. For the reasons stated herein, we affirm.

{¶ 2} This is a foreclosure action that was instituted by plaintiff Grove Court Condominium Owners’ Association, Inc. (“Grove Court”), on December 28, 2006. At the time the action was filed, defendants Dorothy and Richard Hartman (“the Hartmans”) owned two condominiums, units 307 and 405, in the Grove Court condominium development, located at 1900 Grove Court in Cleveland. They acquired ownership to the units in 1986 through separate and distinct instruments. Unit 405 is the subject property in this matter.

{¶ 3} After purchasing the units, the Hartmans added an internal stairway to connect the units in accordance with Grove Court’s declaration and Ohio law. They did not combine the units into a single unit for legal and tax purposes. Rather, the units retained their separate addresses and parcel numbers.

{¶ 4} In 2005, the Hartmans obtained refinancing from Wells Fargo. The legal description on the mortgage and title commitment only included unit 307. There was no recorded interest on unit 405.

{¶ 5} On December 28, 2006, Grove Court filed this foreclosure action against the Hartmans. Grove Court sought to foreclose on a certificate of lien recorded against unit 405, for unpaid maintenance fees and condominium

assessments. The parties named in the action were consistent with the preliminary judicial report, which did not show any mortgages of record on unit 405.

{¶ 6} On August 7, 2007, Grove Court filed an unopposed motion for summary judgment against the Hartmans. On October 22, 2007, the trial court adopted a magistrate's decision, granted Grove Court judgment against the Hartmans, and issued a decree of foreclosure.

{¶ 7} In the meantime, Wells Fargo had initiated foreclosure proceedings on unit 307 on June 8, 2007. After discovering this action, Wells Fargo filed an emergency motion to intervene, motion for relief from judgment and to vacate sale, and motion to quiet title. The motion was filed two months after judgment had been granted to Grove Court, four days prior to the scheduled foreclosure sale, and almost a year after the case had commenced. Wells Fargo did not attach any pleading to the motion to intervene.

{¶ 8} In its motion, Wells Fargo asserted that it had issued a refinance loan to the Hartmans in October 2005, that the parties intended the loan to be secured by both units 307 and 405, and that as a result of a scrivener's error, only unit 307 was identified in the legal description on the mortgage. Wells Fargo sought an order recognizing that it had a superior lien interest in unit 405.

{¶ 9} Before the motion was ruled upon, unit 405 was sold at a sheriff's sale to Dino Selvaggio for \$76,667. Thereafter, a court magistrate issued an order denying Wells Fargo's motion to intervene. The trial court confirmed the sale on June 6, 2008.

{¶ 10} Various distributions were made from the proceeds of the sale, including \$10,256.49 to Grove Court in satisfaction of its judgment. A portion of the funds remain pending with the clerk of court.

{¶ 11} Wells Fargo filed objections to the magistrate's decision. On February 26, 2010, the trial court overruled the objections, adopted the magistrate's decision, and denied Wells Fargo's motion to intervene. The trial court, through the adopted decision, found that Wells Fargo's motion failed to attach a pleading detailing its claim as required by Civ.R. 24(C). The court further found the motion raised a number of new liability issues that would operate to severely prejudice the ability of Grove Court to satisfy its judgment, that Wells Fargo did not maintain an interest in the subject property, and that the motion was untimely.

{¶ 12} Wells Fargo has appealed the trial court's decision. In its sole assignment of error, Wells Fargo claims "[t]he trial court erred in denying the motion to intervene."

{¶ 13} Wells Fargo asserts that it had a right to intervene in this action pursuant to Civ.R. 24(A)(2), which provides for intervention of right in civil

cases. The rule provides as follows: “Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.” Civ.R. 24(A)(2).¹

{¶ 14} The rule is to be liberally construed in favor of intervention. *State ex rel. Watkins v. Eighth Dist. Court of Appeals*, 82 Ohio St.3d 532, 534, 1998-Ohio-190, 696 N.E.2d 1079. Nevertheless, the putative intervenor still bears the burden of establishing the right to intervene.

{¶ 15} In this case, Wells Fargo claims that it has an interest in the subject property. Although its alleged interest was not recorded and does not appear of record, Wells Fargo asserts that this was the result of a scrivener’s error and that it has a legal or equitable lien on the property that is superior to other interests.

{¶ 16} In interpreting analogous Fed.R.Civ.P. 24(a)(2), federal courts have stated that intervention of right requires the interest to be “direct,

¹ The Ohio Supreme Court has recognized that “Ohio courts have applied an abuse of discretion standard for all of the Civ.R. 24(A)(2) intervention of right requirements.” *State ex rel. First New Shiloh Baptist Church v. Meagher*, 82 Ohio St.3d 501, 503 fn. 1, 1998-Ohio-192, 696 N.E.2d 1058. However, we observe that there is in fact some split in authority as to whether the review for intervention of right is de novo.

substantial, and legally protectable.” *U.S. v. Vasi* (Mar. 6, 1991), N.D. Ohio Nos. 5:90 CV 1167 and 5:90 CV 1168; *Grubbs v. Norris* (C.A. 6, 1989), 870 F.2d 343, 346. Ohio courts have found the same requirements implicit in Civ.R. 24(A)(2). *Duryee v. PIE Mut. Ins. Co.* (Dec. 1, 1998), Franklin App. No. 98AP-535; *Fairview Gen. Hosp. v. Fletcher* (1990), 69 Ohio App.3d 827, 591 N.E.2d 1312. Further, the Ohio Supreme Court specifically has stated that the claimed interest under Civ.R. 24(A)(2) must be one that is “legally protectable.” *State ex rel. Dispatch Printing Co. v. Columbus*, 90 Ohio St.3d 39, 2000-Ohio-8, 734 N.E.2d 797; *In re Schmidt* (1986), 25 Ohio St.3d 331, 336, 496 N.E.2d 952.

{¶ 17} In this case, the trial court determined that the documentation provided by Wells Fargo only demonstrates that its mortgage encumbers a wholly different parcel than the parcel at issue in this matter. The court found that without the exercise of the court’s equitable power of reformation, Wells Fargo has no interest in the subject property.

{¶ 18} We recognize that Wells Fargo does not have a present interest in the property and that its claimed interest is contingent on a determination of the merits of the issues it seeks to raise in the action.² However, even

² We note that “equity will allow reformation of a written instrument for the erroneous omission of a material provision so that the instrument will evince the actual intention of the parties.” *Berardi v. Ohio Turnpike Comm.* (1965), 1 Ohio App.2d 365, 368, 205 N.E.2d 23.

assuming that Wells Fargo's claimed interest is a direct, substantial and legally protectable interest, we still find that the trial court did not error in denying the motion to intervene on the grounds that a required pleading was not attached to the motion and the motion was untimely.

{¶ 19} Civ.R. 24(C) mandates that the motion to intervene “shall be accompanied by a pleading, as defined in Civ.R. 7(A) setting forth the claim or defense for which intervention is sought.” Civ.R. 7(A) defines a pleading as a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, or a third-party answer. No such pleading accompanied the motion to intervene filed by Wells Fargo.

{¶ 20} The Ohio Supreme Court has repeatedly held that a motion to intervene is properly denied when the “motion is not accompanied by a pleading setting forth the claim or defense for which intervention is sought” as mandated by Civ.R. 24(C). *State ex rel. Sawicki v. Court of Common Pleas of Lucas Cty.*, 121 Ohio St.3d 507, 2009-Ohio-1523, 905 N.E.2d 1192, ¶ 21; *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144, 1995-Ohio-269, 656 N.E.2d 1277.³ Thus, we do not find that the trial court erred in denying the motion on this ground.

³ Insofar as this court found that the failure to attach a pleading was not fatal to intervention in *Crittenden Court Apt. Assoc. v. Jacobson/Reliance*, Cuyahoga App. Nos. 85395 and 85452, 2005-Ohio-1993, that case is distinguishable. In that case, the purpose for intervention “did not include the addition of any new liability or damages issues to the litigation,” and the proposed intervenor explained in its motion its reason for

{¶ 21} “The timeliness of a motion to intervene pursuant to Civ.R. 24(A) is a matter within the sound discretion of the trial judge.” *Univ. Hosps. of Cleveland, Inc. v. Lynch*, 96 Ohio St.3d 118, 2002-Ohio-3748, 772 N.E.2d 105, ¶ 47. When determining the timeliness of the motion, the court should consider the following factors: “(1) the point to which the suit has progressed, (2) the purpose for which intervention is sought, (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case, (4) the prejudice to the original parties due to the proposed intervenor’s failure after he or she knew or reasonably should have known of his or her interest in the case to apply promptly for intervention, and (5) the existence of unusual circumstances militating against or in favor of intervention.” *Id.*, quoting *Triax Co. v. TRW, Inc.* (C.A.6, 1984), 724 F.2d 1224, 1228.

{¶ 22} “Intervention after final judgment has been entered is unusual and ordinarily will not be granted.” *Meagher*, 82 Ohio St.3d at 504, 1998-Ohio-192, 696 N.E.2d 1058. However, intervention after final judgment may be allowed when the intervenor has no other alternative remedy and intervention is the only way to protect the intervenor’s rights. See *Owens v.*

not attaching an intervening complaint as follows: “Because [proposed intervenor] has no separate and independent claims to assert in this litigation, it is neither necessary or appropriate that it submit a pleading in conjunction with this motion as described in [Civ.R. 24(C)].” *Id.* at ¶ 6. These are not the circumstances presented herein.

Wright (Feb. 18, 1993), Cuyahoga App. No. 64031; *Likover v. Cleveland* (1978), 60 Ohio App.2d 154, 159, 396 N.E.2d 491. Ultimately, the determination of whether a Civ.R. 24 motion to intervene is timely depends on the facts and circumstances of the case. *Meagher*, 82 Ohio St.3d at 503, 1998-Ohio-192, 696 N.E.2d 1058.

{¶ 23} In this case, Wells Fargo did not observe the alleged scrivener's error at the time it received the title commitment or when the mortgage was recorded. It did not seek to intervene in this action until nearly a year after the case was filed, two months after final judgment was granted to Grove Court, and only four days before a scheduled sheriff's sale of the subject property. Also, the motion was filed six months after Wells Fargo had filed its own foreclosure action against only unit 307. Wells Fargo sought to vacate the judgment, to interject newly contested issues into the matter, and to claim a potential superior interest in the subject property that would require the court to exercise its equitable powers to reform Wells Fargo's mortgage. As a judgment had already been imposed, with priority interests established, allowing intervention would operate to prejudice the original parties. Further, the subject property was sold to Mr. Selvaggio.

{¶ 24} Considering the facts and circumstances of this case, we find the trial court did not abuse its discretion in denying Wells Fargo's motion to

intervene after judgment.⁴ Accordingly, Wells Fargo's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from 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. Case remanded to the trial court for execution of sentence.

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

SEAN C. GALLAGHER, PRESIDING JUDGE

MARY EILEEN KILBANE, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

⁴ The facts and circumstances in *Rokakis v. Martin*, 180 Ohio App.3d 696, 2009-Ohio-369, 906 N.E.2d 1200, a case relied on by Wells Fargo, were different from this matter. In *Martin*, the intervenor was a valid lienholder with a junior interest in the property to those already named in the action, its interest could be paid out of the excess sale proceeds remaining on deposit with the court, and its intervention would not operate to prejudice the original parties to the foreclosure action.