[Cite as *Keybank Natl. Assn. v. Liberty Holding Group, L.L.C.*, 2011-Ohio-923.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 93888**

## KEYBANK NATIONAL ASSOCIATION

PLAINTIFF-APPELLEE

vs.

## LIBERTY HOLDING GROUP, L.L.C., ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:**
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-669281

**BEFORE:** Cooney, P.J., Rocco, J., and Keough, J.

**RELEASED AND JOURNALIZED:** March 3, 2011

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COLLEEN CONWAY COONEY, P.J.:

**{¶ 1}** Defendant-appellant, The Liberty Holding Group, L.L.C. ("Liberty"), appeals the trial court's granting summary judgment in favor of plaintiff-appellee, KeyBank National Association ("KeyBank").[1] Finding no merit to the appeal, we affirm.

**{¶ 2}** In April 2005, two promissory notes (the "Notes"), with cognovit provisions and secured by two subsequent mortgages, were executed by Liberty to KeyBank.

[1]Acquired Capital I, L.P. now owns the Notes and mortgage and was substituted as a party after the appeal was filed.

**{¶ 3}** In July 2008, a certificate of judgment was filed against Liberty, which had defaulted on its repayment of both Notes. The judgment imposed a lien on the property known as 4204 Detroit Avenue ("the Property"), which is owned by Liberty.

**{¶ 4}** In September 2008, KeyBank initiated a foreclosure action on the Property to collect on its judgment. KeyBank filed a motion for summary judgment, which was reviewed by a magistrate and granted by the trial court, after Liberty's objections to the magistrate's decision were overruled.

**{¶ 5}** Liberty filed for Chapter 7 bankruptcy in March 2010. However, KeyBank obtained relief from the automatic stay, and the Property was abandoned by the bankruptcy trustee.

**{¶ 6}** Liberty now appeals, raising one assignment of error.

**{¶ 7}** In the sole assignment of error, Liberty argues that the trial court erred in adopting the magistrate's decision granting summary judgment to KeyBank. Liberty claims that two genuine issues of material fact exist, specifically, whether the notice provision of the mortgage was satisfied and whether KeyBank included all necessary parties to the action.

**{¶ 8}** Appellate review of summary judgments is de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. The Ohio Supreme Court stated the appropriate test in *Zivich v. Mentor Soccer Club* (1998), 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201, as follows:

**{¶ 9}** "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. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264, 273-274."

**{¶ 10}** Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138.

**{¶ 11}** Liberty argues that two genuine issues of material fact exist and therefore, the trial court erred in granting summary judgment. Liberty argues that KeyBank failed to comply with the mandatory notice provisions set forth in the mortgage. Liberty also argues that KeyBank failed to include a necessary party to the dispute.

**{¶ 12}** Liberty first argues that KeyBank's failure to provide Liberty with notice constitutes a breach of the mortgage agreement. We disagree. Liberty points to language in both mortgages, which states: "[a]ny notice required to be given under this Mortgage, including without limitation any notice of default and any notice of sale shall be given in writing and shall be effective when actually delivered." However, Liberty misconstrues this language in support of its contention that KeyBank was required to give notice and failed to do so. To the contrary, this language simply provides for the manner of giving notice if required under the mortgage; it does not indicate the conditions for which notice is required.

**{¶ 13}** Moreover, having thoroughly reviewed the mortgage in its entirety, neither mortgage contains the condition requiring KeyBank to give Liberty notice prior to filing a foreclosure action. It is clear from the Notes that by signing the Notes, Liberty waived notice altogether based on the cognovit language found directly before the signature line:

**{¶ 14}** "WARNING-BY SIGNING THIS PAPER YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON HIS PART TO COMPLY WITH THE AGREEMENT, OR ANY OTHER CAUSE."

**{¶ 15}** Neither the mortgages, nor the Notes, require KeyBank to provide Liberty with notice prior to filing a foreclosure action.

**{¶ 16}** Regarding KeyBank's failure to include a necessary party, Liberty argues that KeyBank should have included the Barenco Group, Ltd. ("Barenco") in the foreclosure action. We disagree.

**{¶ 17}** All parties who have any title, right, or interest in real estate, are necessary parties in a foreclosure action, *State ex rel. Squire v. Kofron* (1937), 58 Ohio App. 65, 15 N.E.2d 783; see, also, *Hembree v. Mid-Am. Fed. S. & L. Assn.* (1989), 64 Ohio App.3d 144, 152, 580 N.E.2d 1103. Barenco holds title to the property (4202 Detroit Ave.) adjacent to the Property upon which the foreclosure was filed (4204 Detroit Ave.). Liberty argues that this neighbor has "an interest in" the Property because without use of the parking lot located on the Property, patrons of 4202 Detroit Ave. will have no place to park. In addition, the side door of the Property is only accessible through the 4202 Detroit Ave. property.

**{¶ 18}** "[P]arties who claim an interest in the property *** include mortgage holders, parties who have judgment liens, or parties who may have signed contracts to purchase or lease the property." *Green v. Lemarr* (2000), 139 Ohio App.3d 414, 744 N.E.2d 212. Providers of parking and access do not constitute mortgage holders, or those with judgment liens or contracts to lease or buy. Barenco might very well be "interested in" the outcome of

the foreclosure, but it does not have "an interest" in the Property requiring that it be included as a necessary party to the action.

**{¶ 19}** Thus, the trial court did not err in adopting the magistrate's decision to grant summary judgment in favor of KeyBank because notice was not required, nor was the neighbor a necessary party.

**{¶ 20}** Accordingly, Liberty's sole assignment of error is overruled.

Judgment is affirmed.

It is ordered that appellee recover of 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.

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

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COLLEEN CONWAY COONEY, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
KATHLEEN ANN KEOUGH, J., CONCUR