

[Cite as *U.S. Bank v. Malyuk*, 2015-Ohio-2385.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101472

U.S. BANK

PLAINTIFF-APPELLEE

vs.

DANIEL L. MALYUK, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-12-776324

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

RELEASED AND JOURNALIZED: June 18, 2015

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LARRY A. JONES, SR., P.J.:

{¶1} Defendants-appellants, Daniel and Debra Malyuk, filed a notice of appeal contending that the trial court erred in granting summary judgment in favor of plaintiff-appellee, U.S. Bank, N.A., as Trustee for Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2007-EQ1 (“U.S. Bank”). For the reasons that follow, their assignments of error are moot and the judgment of the trial court is affirmed.

Procedural History

{¶2} In 2005, the Malyuks purchased property on Burleigh Road in Garfield Heights. To finance the purchase, Daniel Malyuk executed a promissory note in the amount of \$104,000, payable to EquiFirst Corporation. As security for the note, the Malyuks executed a mortgage on the property in favor of Mortgage Electronic Registration Systems, Inc. (“MERS”).

{¶3} The Malyuks stopped making payments on the mortgage in the summer of 2010. In 2011, MERS assigned the mortgage to U.S. Bank. In February 2012, U.S. Bank filed a foreclosure action against the Malyuks and the Burleigh Road property.

{¶4} In March 2012, U.S. Bank filed an amended complaint. The Malyuks moved for leave to file an answer and counterclaim, which the trial court granted. Their counterclaim asserted claims for violation of the Fair Debt Collection Practices Act and the Ohio Consumer Sales Practices Act, invasion of privacy, and fraud. U.S. Bank moved to dismiss the counterclaims. The trial court granted its motion on the invasion of

privacy claim. U.S. Bank then moved for summary judgment.

{¶5} The magistrate set the matter for an evidentiary hearing after which the magistrate granted the bank's motion for summary judgment on the Malyuks' counterclaims. The Malyuks filed objections, but the trial court adopted the magistrate's decision. The magistrate issued a second decision granting U.S. Bank's motion for summary judgment. The Malyuks again objected, but the trial court adopted the magistrate's second decision.

{¶6} The Malyuks filed a timely notice of appeal and raised the following four assignments of error for our review:

- I. The Magistrate erred by holding an evidentiary hearing on July 1, 2013 when summary judgment on the plaintiff's complaint was denied on April 18, 2013.
- II. The Court erred when it did not dismiss the case when plaintiff was unable to demonstrate that it was the holder of the note when suit was filed.
- III. The Court erred when it ordered a foreclosure upon a mortgage deed that was assigned by a defunct entity.
- IV. The Court erred when it equated a demonstration of standing with a demonstration of liability.

{¶7} After oral argument was held in this court, U.S. Bank filed a motion to remand the case to the trial court. In its motion, U.S. Bank stated that it had entered into a loan modification agreement with the Malyuks under which the note and mortgage had been modified and reinstated; thus, the bank sought to vacate the foreclosure judgment on its complaint. This court granted the motion, stayed the case, and remanded it to the trial

court.

{¶8} The trial court subsequently entered an order granting U.S. Bank's motion to vacate the foreclosure, but noted that the court's judgment on the Malyuks' counterclaims remained undisturbed.

{¶9} The Malyuks' contend that, in addition to appealing the foreclosure judgment, they also appealed the trial court's decision to grant summary judgment on their counterclaims. We cannot find, however, any evidence of the Malyuk's intent to appeal the trial court's decision to grant summary judgment on their counterclaims. In their notice of appeal, the Malyuks' indicated that they were appealing the court's journal entry and judgment entry adopting the magistrate's decision, which granted summary judgment in favor of U.S. Bank on its claims and on the Malyuks' counterclaims. But the Malyuk's brief on appeal is devoid of any mention or argument as to their counterclaims. In their first assignment of error, the Malyuks argue that the trial court erred in holding an evidentiary hearing rather than setting the matter for a jury trial on the issue of whether U.S. Bank had standing to properly invoke the court's jurisdiction. In the second assignment of error, the Malyuks claim that the trial court erred in finding that U.S. Bank had standing to file the foreclosure complaint. In the third assignment of error, the Malyuks argue that the assignment of mortgage was insufficient because EquiFirst filed dissolution papers with the North Carolina Secretary of State in 2010, but the assignment of mortgage was not executed until 2011. In the fourth assignment of error, the Malyuks challenge the admission of supporting evidence that the court allowed into evidence. In

none of these assigned errors do the Malyuks argue that the trial court erred in granting summary judgment on their counterclaims.

{¶10} App.R. 12(A)(2) provides that an appellate court “may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A).” App.R. 16(D) states:

[r]eferences in the briefs to parts of the record shall be to the pages of the parts of the record involved * * * . If reference is made to evidence, the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

And App.R. 16(A)(7) provides that the appellant’s brief shall include

[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies.

{¶11} The Malyuks’ brief set forth arguments solely as to why they believed the trial court erred in granting summary judgment in favor of U.S. Bank on the bank’s complaint for foreclosure. None of the assignments of error discuss, cite applicable authorities or statutes, or make any arguments with regard to the Malyuks’ counterclaims. Their counterclaims are not mentioned in their main appellate brief and only one counterclaim, the Fair Debt Collection Practices Act, is mentioned, but not discussed or argued, in their reply brief.¹

¹ The mention consists of the following statement: “Because the magistrate held that a genuine issue of fact existed on Appellee’s claim for foreclosure it was axiomatic that a material issue

{¶12} If an argument exists which can support an assignment of error, it is not this court's duty to root it out. *Citta-Pietrolungo v. Pietrolungo*, 8th Dist. Cuyahoga No. 85536, 2005-Ohio-4814, ¶ 35, citing *Cardone v. Cardone*, 9th Dist. Summit Nos. 18349 and 18673, 1998 Ohio App. LEXIS 2028 (May 6, 1998). The Malyuks' have rendered appellate review difficult; this struggle is made more complicated by the fact that they have completely failed to cite to the places in the record which support their position. *See* App.R. 16(A)(6) and (7).

{¶13} Although we recognize that cases are best decided on their merits; because the Malyuks have no assigned error relating to their counterclaims and have completely failed to discuss their counterclaims on appeal, we decline to consider them.

{¶14} In light of the remand and the trial court's decision to grant U.S. Bank's motion to vacate foreclosure judgment, the assignments of error are moot.

{¶15} Judgment 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 issue out of this court directing the Cuyahoga County Court of Common Pleas 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.

of fact also existed on the Appellants Daniel and Debra Malyuk's counterclaim for violations of the Fair Debt Collection Practices Act." Appellants' reply brief, p. 4.

LARRY A. JONES, SR., PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and
PATRICIA ANN BLACKMON, J., CONCUR