[Cite as *Bank of New York Mellon Trust Co., N.A. v. Unger*, 2015-Ohio-769.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101598

THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A.

PLAINTIFF-APPELLEE

vs.

JAMES M. UNGER, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-802791

BEFORE: S. Gallagher, P.J., Keough, J., and McCormack, J.

RELEASED AND JOURNALIZED: March 5, 2015

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SEAN C. GALLAGHER, P.J.:

{¶1} Defendants James and Kelly Unger (the "Ungers") appeal the trial court's decision granting summary judgment upon the foreclosure action in the bank's favor. For the following reasons, we affirm.

{¶2} In a straightforward foreclosure action, the plaintiff, The Bank of New York Mellon Trust Company, National Association f.k.a. The Bank of New York Trust Company N.A., as Successor to JP Morgan Chase Bank N.A., as Trustee for RAMP 2004-RS10 ("Mellon"), filed a complaint alleging the right to foreclose on the Ungers' residential property and seeking a judgment upon the promissory note after the Ungers defaulted. A copy of the mortgage, note, and assignment were attached to the complaint, along with an affidavit of lost note indicating the original note had been conveyed to Mellon's previous attorney and had not been returned. Mellon amended the complaint on November 4, 2013, averring they were in possession of the original note again.

{¶3} The Ungers filed an answer and counterclaim reasserting, as pertinent to this appeal, a cause of action to quiet title to their residential property. The Ungers filed the identical quiet title action culminating in *Bank of New York v. Unger*, 8th Dist. Cuyahoga No. 97315, 2012-Ohio-1950, in which this court held that "the Ungers are not * * * entitled to 'quiet title' against Mellon." *Id.* at ¶ 37. The Ohio Supreme Court did not accept that case for review.

{¶4} The trial court, in the current case, granted summary judgment upon the complaint and counterclaim in favor of Mellon, determining that there were no genuine issues of material fact in regard to the complaint and the doctrine of res judicata precluded the counterclaim. It is upon this judgment that the Ungers appealed, advancing three assignments of error.

{¶5} Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. A court may grant summary judgment 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) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party." *Marusa v. Erie Ins. Co.*, 136 Ohio St.3d 118, 2013-Ohio-1957, 991 N.E.2d 232, ¶ 7.

{¶6} In their first assignment of error, the Ungers claim the trial court erred in holding that they lacked standing to defend against the claims in the complaint. The first assignment of error is premised entirely on a distorted view of the record and, therefore, is without merit.

{¶7} Upon reviewing the cited portion of the trial court's decision, it is abundantly clear that the trial court did not prevent the Ungers from defending the entire foreclosure action. Instead, and as only partially cited by the Ungers, the trial court held that the Ungers lacked standing to challenge Mellon's status as the holder of the note and mortgage because the Ungers were not a party to the assignment to Mellon. This comports with the law of this district.[1] *Everbank v. Katz*, 8th Dist. Cuyahoga No. 100603, 2014-Ohio-4080, ¶ 8, citing *Bank of New York Mellon v. Froimson*, 8th Dist. Cuyahoga No. 99443, 2013-Ohio-5574, ¶ 17, and *Unger*, 8th

[1]For the first time in the Ungers' reply brief on appeal, they cite *Slorp v. Lerner*, 6th Cir. No. 13-3402, 2014 U.S. App. LEXIS 18816 (Sept. 14, 2014), distinguishing between a third-party's standing to contest any matter that renders the assignment absolutely invalid or void, from the third-party's lack of standing to challenge the validity of the chain of title, as decided in *Livonia Properties Holdings, L.L.C. v. 12840-12976 Farmington Rd. Holdings, L.L.C.*, 6th Cir. No. 10-1782, 2010 U.S. App. LEXIS 22764 (Oct. 28, 2010). The Ungers' sole argument in the proceedings below and upon appeal was that the trial court determined that the Ungers lacked standing to challenge the foreclosure in its entirety. As already mentioned, the trial court's decision was not so broad. We cannot accept arguments raised for the first time in the reply brief on appeal. *Kleinfeld v. Huntington Natl. Bank*, 8th Dist. Cuyahoga No. 90916, 2008-Ohio-6486, ¶ 37, citing *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 1997-Ohio-71, 679 N.E.2d 706. Further, the Ungers have not cited any portions of the record upon which we can determine the scope of their standing argument. App.R. 16(A)(7). Our decision is accordingly limited in scope.

Dist. Cuyahoga No. 97315, 2012-Ohio-1950, ¶ 35. The Ungers' first assignment of error is overruled.

{¶8} In their second assignment of error, the Ungers claim the complaint, filed on March 11, 2013, was filed after the expiration of the six-year statute of limitations pursuant to R.C. 1303.16(A). R.C. 1303.16(A) provides that "an action to enforce the obligation of a party to pay a note payable at a definite time shall be brought * * * within six years after the accelerated due date." It is undisputed that the accelerated due date of the note was May 9, 2007, 30 days after the notice of default provided the Ungers with an opportunity to cure their default, at that point totaling $12,749.14 from the aggregation of several missed payments between January 1, 2007 and the April default notice.

{¶9} The Ungers argue that the statute of limitations accrued from their first missed payment in January 2007 without producing evidence that Mellon accelerated the due date of the entire balance before the April 2007 notice of default. Statute of limitations is an affirmative defense. Civ.R. 8(C). The Ungers, therefore, bore the burden of demonstrating the accelerated due date of their mortgage loan. Mellon provided evidence demonstrating that they accelerated the due date of the entire remaining balance owed to May 7, 2007, less than six years before filing the complaint, based on the express terms of the mortgage. The Ungers failed to present any evidence, instead claiming their failure to make the periodic payment in January 2007 was the accelerated due date. This illogically presumes that defaulting on the monthly obligation automatically resulted in the entire amount owed being immediately accelerated and is also contrary to the terms of the mortgage.

{¶10} Defaulting on the monthly obligation is not the same as accelerating the due date of the entire balance unless the note provides for such an occurrence. As Mellon's evidentiary

submission makes clear, as of April 7, 2007, the Ungers had the option of curing the default, by remitting $12,749.14 for the missed monthly payments, in order to put their account in good standing. Pursuant to the terms of the letter, it was only upon their failure to cure the default that the entire balance owed on the note was accelerated. In light of the fact that the Ungers failed to present any evidence that the note was accelerated earlier than May 2007, their second assignment of error is overruled.

{¶11} Finally, in their third assignment of error, the Ungers claim that Mellon's foreclosure action was prohibited by the doctrine of res judicata. In the alternative, they claim their quiet title action should not be precluded by the res judicata doctrine. We find no merit to the third and final assignment of error.

{¶12} Under the doctrine of res judicata, "'[a] valid final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.'" *Ford Motor Credit Co. v. Collins,* 8th Dist. Cuyahoga No. 101405, 2014-Ohio-5152, ¶ 11, citing *Hughes v. Calabrese,* 95 Ohio St.3d 334, 2002-Ohio-2217, 767 N.E.2d 725, ¶ 12, and *Kelm v. Kelm*, 92 Ohio St.3d 223, 227, 2001-Ohio-168, 749 N.E.2d 299.

{¶13} In *Unger*, 8th Dist. Cuyahoga No. 97315, 2012-Ohio-1950, this court held that the Ungers' mortgage was not a cloud on the title for the purposes of their quiet title action, a final decision upon the merits of the claims raised by the Ungers against Mellon. The Ungers have provided no argument or citation to authority to substantiate their claim that this court's decision resolving their quiet title claim was not a final judgment. App.R. 16(A)(7). The trial court correctly applied the principle of res judicata against their counterclaim advancing the same quiet title action as disposed of in the earlier decision.

{¶14} Further, although Mellon unsuccessfully filed two foreclosure actions before the current iteration, none of the previous cases ended with a final judgment. The first foreclosure action was dismissed for lack of standing; Mellon was not the real party in interest at the time the original complaint was filed. The second case was dismissed without prejudice for the failure to prosecute, a dismissal otherwise than on the merits. As the Ungers concede, the previous actions were all dismissed without prejudice. The Ungers now claim that lack of standing is a judgment upon the merits, citing *Lewis v. Cleveland*, 8th Dist. Cuyahoga No. 95110, 2011-Ohio-347, ¶ 19, and *Natl. City Commercial Capital Corp. v. AAAA at Your Serv., Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663, respectively dealing with the lack of subject matter and personal jurisdiction. Neither case stands for the proposition of law the Ungers claimed and is contrary to established case law. As the Ohio Supreme Court has distilled to a simple proposition, generally, "the dismissal of an action because one of the parties is not a real party in interest or does not have standing is not a dismissal on the merits for purposes of res judicata." *State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968, ¶ 51. The Ungers have provided no citations to the record or authority to avoid application of this general principle. App.R. 16(A)(7). The third and final assignment of error is overruled.

{¶15} There being no genuine issue of material fact, the decision of the trial court granting summary judgment in favor of Mellon and against the Ungers 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 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., and
TIM McCORMACK, J., CONCUR