

[Cite as *OneWest Bank, N.A. v. Unknown Heirs of Gorgeny*, 2016-Ohio-8159.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104503

ONEWEST BANK N.A.

PLAINTIFF-APPELLANT

vs.

**THE UNKNOWN HEIRS, DEVISEES, LEGATEES,
EXECUTORS, ADMINISTRATORS, SPOUSES AND
ASSIGNS AND THE UNKNOWN GUARDIANS OF MINOR
AND/OR INCOMPETENT HEIRS OF ANNA GORGENY,
ET AL.**

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-844871

BEFORE: E.A. Gallagher, J., Keough, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: December 15, 2016

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EILEEN A. GALLAGHER, J.:

{¶1} In this foreclosure action involving a reverse mortgage, plaintiff-appellant OneWest Bank, N.A. (“OneWest”) appeals the trial court rulings on its post-sale motions for supplemental distribution of funds. OneWest contends that the trial court improperly refused to order supplemental distributions to OneWest, following the sale of the property, for advances it allegedly made for insurance, appraisals and reverse mortgage costs. Finding no merit to the appeal, we affirm the trial court’s judgment.

Factual and Procedural Background

{¶2} On February 13, 2009, Anna Gorgeny entered into a home equity loan agreement (the “loan agreement”) with Financial Freedom Senior Funding Corporation (“Financial Freedom”) and executed a home equity conversion note payable to Financial Freedom and its successors and assigns (the “note”). To secure payment of the note, Gorgeny executed a mortgage on her residence located at 16647 Timberline Dr. in Strongsville, Ohio. The mortgage was recorded on February 19, 2009.¹

{¶3} The loan was a reverse mortgage such that the balance of the loan increased as Gorgeny received advances under the loan agreement. Under the terms of the loan documents, Gorgeny agreed to pay a principal amount equal to the sum of all loan advances plus interest. Under the agreement, “loan advances” include “all funds

¹The loan agreement, note and mortgage are collectively referred to herein as the “loan documents.” The mortgage and note were subject to the regulations of the United States Department of Housing and Urban Development (“HUD”). In addition to the note and mortgage executed in favor of Financial Freedom, Gorgeny executed a second note payable to the secretary of HUD evidencing her agreement to repay with interest any loan advances made by the secretary of HUD, along with a second mortgage, securing the second note.

advanced from or charged to Borrower's account under conditions set forth in this Loan Agreement, whether or not actually paid to Borrower." "Principal" and "principal balance" are defined as "the sum of all Loan Advances made as of a particular date, including interest and mortgage insurance premiums." Under the terms of the loan documents, Financial Freedom was entitled to "immediate payment in full of all outstanding principal and accrued interest" upon Gorgeny's death.

{¶4} Some time after its execution, Financial Freedom endorsed the note in blank. On May 1, 2009, Financial Freedom assigned the mortgage "together with the certain note(s) described therein," "all interest secured thereby, all liens, and any rights due or to become due thereon" to Mortgage Electronic Registration Systems, Inc. ("MERS") and its successors or assigns, as nominee for Financial Freedom Acquisition L.L.C. The assignment was recorded on October 2, 2009. On January 27, 2015, MERS, as nominee for Financial Freedom Acquisition L.L.C. and its successors and assigns, assigned "all its right, title and interest" in the mortgage to OneWest and its successors and assigns. The assignment was recorded on February 17, 2015.

{¶5} On April 29, 2015, OneWest filed a complaint in foreclosure against defendants-appellees, the unknown heirs, devisees, legatees, executors, administrators, spouses and assigns and the unknown guardians of minor and/or incompetent heirs of Anna Gorgeny, Arpad Gorgeny, Jane Doe, the spouse of Arpad Gorgeny and the United States of America, Secretary of Housing and Urban Development (collectively, "defendants"), alleging that it was entitled to enforce the note and mortgage, which had become due because of Gorgeny's death. OneWest alleged that a "principal balance" of

\$204,839.32 was due and owing as of April 3, 2015, and that the principal balance would continue to increase due to advances for monthly servicing fees, mortgage insurance premiums, “other costs as set forth under the terms of the * * * loan documents” and accrued interest that was added to the principal balance as a loan advance at the end of each month. OneWest attached copies of the loan agreement,² note, mortgage, second note and mortgage, assignments and Gorgeny’s death certificate to its complaint in support of its allegations.

{¶6} The United States filed an answer disclaiming any interest in the property and, on September 29, 2015, OneWest filed a motion for default judgment as to the remaining defendants and a decree in foreclosure. The motion was unopposed and the trial court granted the motion. On October 15, 2015, the trial court entered judgment and a decree of foreclosure (the “foreclosure order”), ordering that the property be sold and that after the payment of costs, property taxes and related assessments, interest and penalties, \$204,839.32 be paid to OneWest out of the proceeds of the sale. The trial court’s judgment entry further provided:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that there may be due plaintiff sums advanced under the terms of its Note and Mortgage to pay real estate taxes, hazard insurance premiums, and property protection, which sums are to be determined upon further order.

IT IS FURTHER ORDERED, that the plaintiff shall recover further sums advanced pursuant to the terms of the note, loan agreement and mortgage, to be added to the principal balance, plus compounding principal interest on that increasing principal balance at the monthly-adjustable rate as provided

²The copy of the loan agreement attached to the complaint is incomplete. It does not include the exhibits referenced in the loan agreement. The exhibits purportedly identify, among other things, the payment plan and the monthly servicing fee authorized under the loan agreement.

for in the note, which additional sums are to be determined upon further order.

{¶7} OneWest was the successful bidder at the March 14, 2016 sheriff's sale and purchased the property for \$225,000. On March 16, 2016, OneWest filed a "motion for extension of time to file motion for reimbursement of advances pursuant to R.C. 5301.233," claiming that it was "currently determining the final accounting of advancements for the payment of taxes, assessments, insurance premiums and/or costs incurred for the protection of the mortgaged property." OneWest requested "an additional 60 days" "to put evidence of the same before the Court." The trial court granted the motion in part, stating that OneWest had until April 7, 2016, to move for advances and that failure to do so would result in the court confirming the sale.

{¶8} On April 7, 2016, OneWest filed a motion for a supplemental order of distribution (the "original motion"), requesting that the court "include a distribution for the amounts advanced by plaintiff to protect the subject real property including the payment of real estate taxes and hazard insurance on the premises." In support of its motion, OneWest attached an affidavit from Elizabeth Birk, an assistant secretary for CIT Bank, N.A. f.k.a. OneWest (the "Birk affidavit"), in which she listed \$23,607.81 in "advances," which "[a]ccording to CIT Bank, N.A. f.k.a. OneWest Bank N.A.'s business records" had been made for the property and that she asserted "remain unpaid, are secured by the Mortgage, and represent the balance of advances for the protection of the Property."

{¶9} On April 22, 2016, the trial court granted OneWest's motion in part and denied it in part. The trial court granted OneWest's motion as to the \$4,985.84 it

advanced for taxes and \$2,365 it advanced for inspections, for a total of \$7,350.84, concluding that “[s]aid amounts are permissible under R.C. 5301.233” and amended the order of distribution in the decree of foreclosure to include such sums. However, the trial court denied its motion as to the remaining categories of “advances,” on the grounds that “plaintiff’s motion and attached affidavit were either vague or plaintiff failed to demonstrate how other charges are recoverable under the above statute.” That same date, the trial court entered a journal entry confirming the sale.

{¶10} Two-and-a-half weeks later, OneWest filed a second motion for supplemental order of distribution (the “second motion”) “in order to include a distribution for the amounts advanced by plaintiff pursuant to its reverse mortgage loan.” The motion was supported by the previously filed Birk affidavit and a memorandum in support. OneWest argued that it was entitled to a distribution of the remaining \$16,256.97 held by the trial court for (1) advances for insurance under R.C. 5301.233, the loan documents and the trial court’s October 15, 2015 foreclosure order, (2) advances for appraisals as “costs incurred for the protection of the property” under the terms of the mortgage and the trial court’s October 15, 2015 foreclosure order and (3) advances for “reverse mortgage costs,” including accrued interest, monthly servicing fees, mortgage insurance premiums, interest on monthly transactions and MIP on monthly transactions under the loan documents and the trial court’s October 15, 2015 foreclosure order. On May 11, 2016, the trial court denied the second motion, stating that “the court has already determined money for advances and confirmed the within sale on 4/22/16.”

{¶11} OneWest appealed the trial court's April 22, 2016 and May 11, 2016 orders, raising the following sole assignment of error for review:

The trial court erred by denying Appellant's Motions for Supplemental Order of Distribution entered on April 22, 2016 and May 11, 2016, respectively.

Law and Analysis

{¶12} OneWest argues that the trial court made both legal and factual errors in denying its motions for a supplemental order of distribution. It argues that the trial court erred, as a matter of law, in concluding that OneWest could recover only advances authorized under R.C. 5301.233 and asserts that OneWest was entitled to recover its other claimed advances because they were authorized under the terms of the loan documents. It also claims that the trial court "lacked authority" to deny OneWest's motions for a supplemental order of distribution because a supplemental distribution was authorized by the trial court's October 15, 2015 foreclosure order. With respect to the trial court's factual findings, OneWest argues that the trial court's determination that OneWest's claimed advances were "vague" and that the Birk affidavit did not adequately support its claimed advances was against the manifest weight of the evidence.

{¶13} We review questions of law pursuant to a de novo standard of review, without deference to the trial court's determination. *See, e.g., Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 34 ("Courts review questions of law de novo."); *BP Communications Alaska v. Cent. Collection Agency*, 136 Ohio App.3d 807, 812, 737 N.E.2d 1050 (8th Dist.2000) ("de novo appellate review

means that the court of appeals independently reviews the record and affords no deference to the trial court's decision").

{¶14} When reviewing the manifest weight of the evidence, we weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17-20. We are guided by the presumption that the trial court's findings were correct and will not reverse the trial court's judgment if it is supported by some competent, credible evidence going to all the essential elements of the case. *Domaradzki v. Sliwinski*, 8th Dist. Cuyahoga No. 94975, 2011-Ohio-2259, ¶ 6, citing *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984); *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶15} Under R.C. 2329.31(A), prior to confirming a foreclosure sale, the trial court is required to "careful[ly] examin[e]" the proceedings to determine the legality of the sale "in all respects." As part of this examination, the trial court must determine whether amounts claimed to have advanced by the mortgagee for taxes, insurance, property protection or other items are accurate and properly recoverable by the mortgagee. *See, e.g., CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, ¶ 36.

{¶16} To the extent OneWest sought a distribution from the proceeds of the sale of additional sums it allegedly advanced that were not included in the trial court's October

15, 2015 foreclosure order, OneWest had the burden of timely submitting evidence establishing that it, in fact, had advanced the sums for which it sought a supplemental order of distribution, that its recovery of those sums was authorized by R.C. 5301.233 and/or the loan documents and that the advances fell within the categories of supplemental distributions authorized under the foreclosure decree.

{¶17} R.C. 5301.233 provides:

In addition to any other debt or obligation, a mortgage may secure unpaid balances of advances made, with respect to the mortgaged premises, for the payment of taxes, assessments, insurance premiums, or costs incurred for the protection of the mortgaged premises, if such mortgage states that it shall secure such unpaid balances. A mortgage complying with this section is a lien on the premises described therein from the time such mortgage is delivered to the recorder for record for the full amount of the unpaid balances of such advances that are made under such mortgage, plus interest thereon, regardless of the time when such advances are made.

{¶18} Upon a careful review of the record, we find that OneWest's failure to recover all of its claimed advances lies not, as OneWest argues, in the trial court's failure to recognize that OneWest could recover advances for both "reverse mortgage costs" authorized under the loan documents and the categories of advances specifically identified in R.C. 5301.233 or its "stray[ing] from the evidence" in its denial of OneWest's motions for a supplemental order of distribution, but rather, OneWest's failure to meet its burden of timely submitting sufficient evidence supporting its claim for such advances.

{¶19} The trial court denied OneWest’s original motion on the grounds that “plaintiff’s motion and attached affidavit were either vague or plaintiff failed to demonstrate how other charges are recoverable under [R.C. 5301.233].” That “the terms of the Loan Agreement * * * specifically contemplate[d] the collection of Loan Advances” for the items requested by One West, as OneWest argues, does not negate the fact that OneWest did not timely submit a request for reimbursement of such advances, supported by evidence establishing its entitlement to reimbursement for such advances, to the trial court.

{¶20} In its motion for extension of time to seek reimbursement of advances, OneWest sought an extension of time only for reimbursement of advances “pursuant to R.C. 5301.233,” indicating that it was still determining the advances it had made “for the payment of taxes, assessments, insurance premiums and/or costs incurred for the protection of the mortgaged property.” It made no reference to any additional advances for which it sought reimbursement pursuant to the loan documents for “reverse mortgage costs.”

{¶21} In support of its original motion, OneWest attached only the Birk affidavit. In her affidavit, Birk itemized \$23,607.81 in “advances,” broken down into nine categories of “payments,” which “[a]ccording to CIT Bank, N.A. fka OneWest Bank N.A.’s business records” had been made for the property and “remain[ed] unpaid.” These advances consisted of: (1) \$1,360.58 in “monthly mortgage insurance premiums” from December 31, 2014 to March 14, 2016; (2) \$8,299.28 in “monthly interest” from December 31, 2014 to March 14, 2016; (3) \$525.00 in “monthly servicing fees” from January 1, 2015 to

March 1, 2016; (4) \$5,234.92 in “insurance” on April 23, 2015 and February 8, 2016; (5) \$4,985.84 for “taxes” on September 18, 2015; (6) \$2,365.00 for inspections from February 24, 2015 to March 1, 2016; (7) \$800.00 for “appraisals” on July 14, 2015 and March 1, 2016; (8) \$32.21 for “interest on monthly transaction” from December 31, 2014 to March 14, 2016; and (9) \$4.98 for “MIP on monthly transactions” from December 31, 2014 to March 14, 2016.

{¶22} In its original motion, OneWest requested only that the trial court “include a distribution for the amounts advanced by plaintiff to protect the subject real property including the payment of real estate taxes and hazard insurance on the premises.” No request was made for distribution for interest, mortgage insurance premiums, servicing fees or any other “reverse mortgage costs.” No memorandum was submitted in support of the original motion. Neither Birk’s affidavit nor the motion itself — which was two sentences long — contained any further explanation of the alleged “advances” listed in the affidavit, including the reason for what they were paid or the basis upon which OneWest claimed it was entitled to reimbursement for such advances. Accordingly, the trial court did not err in failing to order a supplemental distribution to OneWest for advances for the reverse mortgage costs because such advances were not specifically requested by OneWest in its original motion.

{¶23} Although OneWest requested a further distribution for such advances in its second motion for a supplemental order of distribution, that motion was untimely. The trial court gave OneWest until April 7, 2016, to move for advances and indicated that failure to do so would result in the court confirming the sale. OneWest has not claimed

that the trial court's refusal to consider any requests for advances made after April 7, 2016 was error.

{¶24} Furthermore, OneWest's second motion was filed after the trial court had entered its confirmation of sale. A confirmation of sale order is a final order. Because the sale had already been confirmed at the time OneWest filed its second motion, the trial court properly denied that motion.

{¶25} Moreover, to the extent that OneWest sought a supplemental order of distribution for advances allegedly made prior to April 3, 2015, OneWest's request is inconsistent with the allegations of its complaint that stated that the "principal balance" as of April 3, 2015 was \$204,839.32. Under the loan agreement — and as OneWest points out in its brief — "accrued interest is added to the principal balance as a loan advance at the end of each month." Likewise, mortgage insurance premiums and loan servicing fees were charged on a monthly basis and deemed "loan advances" that became part of the principal balance under the loan agreement. OneWest has not offered any explanation for this apparent discrepancy.

{¶26} With respect to OneWest's request for reimbursement of advances for "appraisals" on July 14, 2015 and March 1, 2016, OneWest claims that "appraisals are commonly performed by mortgage lenders to ensure the condition of the property is good in order to protect the property from potential damage" but, it offered no evidence supporting that contention below and indeed provided no explanation whatsoever of its alleged advances for "appraisals" in its original motion or supporting affidavit.

{¶27} Likewise, with respect to OneWest’s request for reimbursement of \$5,234.92 in “insurance” advances on April 23, 2015 and February 8, 2016, OneWest could have — and should have — provided additional details in its original motion and supporting affidavit regarding the “insurance” advances for which it sought reimbursement. OneWest specifically identified advances for “hazard insurance” as one of the categories of advances for which it was seeking reimbursement in its original motion. It could perhaps be reasonably assumed, particularly given that the advances listed for “insurance” in the Birk affidavit are separate from those listed for “monthly mortgage insurance premiums,” that the “insurance” advances listed in the Birk affidavit were the advances for “hazard insurance” to which OneWest referenced in its original motion. The trial court, in the absence of clear evidence to the contrary, was not required to make that assumption. Further, the Birk affidavit set forth only the dates on which the “payments” for “insurance” were made; it does not indicate the time period such advances covered. As such, it is unclear why OneWest would have advanced the same amount — \$2,617.46 — for insurance premiums on April 23, 2015, as it did on February 8, 2016, particularly when the property was, at that time, scheduled to be sold at a sheriff’s sale.

{¶28} Accordingly, we cannot state, based on the record before us, that the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The trial court’s conclusion that OneWest did not establish its entitlement to reimbursement for advances for “appraisals,” “insurance” or reverse mortgage costs was not against the manifest weight of the evidence. OneWest’s assignment of error is overruled.

{¶29} Judgment affirmed.

It is ordered that appellees recover from appellant the 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.

EILEEN A. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
MARY J. BOYLE, J., CONCUR