[Cite as *U.S. Bank N.A. v. Koodrich*, 2017-Ohio-956.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103802

U.S. BANK N.A.

PLAINTIFF-APPELLEE

vs.

RICHARD L. KOODRICH, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-808608

BEFORE: Laster Mays, J., Boyle, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 9, 2017

ATTORNEYS FOR APPELLANTS

Michael Aten
Gary Cook
17325 Euclid Avenue, Suite 4004
Cleveland, Ohio 44112

ATTORNEYS FOR APPELLEE

Gregory A. Stout
Carrie L. Davis
Reisenfeld & Associates
3962 Red Bank Road
Cincinnati, Ohio 45227

David A. Lockshaw
Dickinson Wright P.L.L.C.
150 East Gay Street, Suite 2400
Columbus, Ohio 43215

FOR SUNTRUST MORTGAGE INC.

Brett D. Kravitz
Dickinson Wright P.L.L.C.
150 East Gay Street, Suite 2400
Columbus, Ohio 43215

FOR WALDEN POINTE CONDOMINIUM OWNERS' ASSOCIATION INC.

Shannon M. McCormick
Kaman & Cusimano, L.L.C.
50 Public Square, Suite 2000
Cleveland, Ohio 44113

ANITA LASTER MAYS, J.:

{¶1} Defendants-appellants, Richard L. Koodrich and Patricia A. Koodrich (the "Koodrichs"), appeal the trial court's grant of summary judgment in favor of U.S. Bank N.A. ("U.S. Bank") for foreclosure of real property owned by the Koodrichs. The Koodrichs take particular issue with the judgment in light of the trial court's: (1) denial of their motion to withdraw their unanswered requests for admissions, proffered in support of the motion for summary judgment, and (2) entry of final judgment where the magistrate's decision mailed to the Koodrichs' counsel was returned to the court marked "undeliverable — unable to forward." We affirm the trial court's judgment.

I. BACKGROUND AND FACTS

A. History

{¶2} The Koodrichs allege that, in 2005, Midwest Mortgage Corporation ("Midwest") originated and serviced a mortgage loan ("Mortgage") secured by property located at 30998 Walden Drive, Westlake, Ohio ("Property"). The Koodrichs assert the Mortgage was unaffordable and predatory, structured to extract the maximum amount of fees, violated Midwest's underwriting guidelines and federal regulations, and did not take the Koodrichs' ability to repay into consideration. The Mortgage also contained adjustable rates, interest-only payments and a balloon-repayment feature in contravention of the terms that Midwest's representative verbally agreed to provide to the Koodrichs.

{¶3} Midwest assigned the Mortgage to Mortgage Electronic Registration Systems, Inc., ISAOA ("MERS") in October 2005. MERS assigned the Mortgage to SunTrust Mortgage, Inc. ("SunTrust") in August 2009.

{¶4} In 2009, the Koodrichs contacted SunTrust to adjust the Mortgage payment due to a reduction in household income. The Koodrichs were informed that they did not qualify for mitigation because their loan payments were current, and were advised to withhold their next payment to qualify for assistance.

{¶5} The Koodrichs submitted the completed mitigation application package provided by SunTrust. The Koodrichs received conflicting information from SunTrust over the next few months regarding the status of their mitigation package, the need to submit additional payments and information, intermingled with periodic threats to file foreclosure.

{¶6} In July 2009, a SunTrust supervisor confirmed receipt of additional financial information from the Koodrichs and informed them it had been provided directly to the loss mitigation supervisor. On August 2, 2009, the Koodrichs were informed that foreclosure was moving forward. On August 17, 2009, the Koodrichs were informed by the loss mitigation department that they had just received the Koodrichs' additional information. On August 27, 2009, SunTrust filed for foreclosure against the Koodrichs, MERS, and Walden Pointe Condominium Owners' Association

Inc. ("Walden").[1] On September 13, 2010, the case was dismissed without prejudice for failure of the mortgage investor with settlement authority to appear.

B. Instant Case

{¶7} MERS filed a corrected Mortgage assignment from MERS to SunTrust in September 2012, and on January 9, 2013, SunTrust assigned the Mortgage to U.S. Bank, who filed the instant foreclosure action on June 6, 2013, against the Koodrichs, Walden, and MERS. The parties engaged in mediation until, on July 14, 2014, the Koodrichs filed an answer and counterclaims/cross-claims against U.S. Bank, SunTrust, and Midwest for: (1) fraud, (2) unjust enrichment, (3) negligence per se, (4) negligence, (5) breach of contract, (6) breach of covenants of good faith and fair dealing, (7) violation of R.C. Chapter 1322 Ohio Mortgage Broker Act, and (8) fraud on the court. Deadlines for discovery and dispositive motions were extended to February 27, 2015 and April 30, 2015, respectively.

{¶8} On April 30, 2015, U.S. Bank and SunTrust (the "MSJ Parties")[2] filed for summary judgment. In support of the motion, the MSJ Parties filed the unanswered requests for admissions served on the Koodrichs, deemed admitted by law, the affidavit of SunTrust Vice President Sharon Kirven ("Kirven"), and several other documents. On August 4, 2015, the trial court denied the Koodrichs' July 6, 2015 motion to withdraw

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[1] *SunTrust Mtge., Inc. v. Koodrich,* Cuyahoga C.P. No. CV-09-702613.

[2] SunTrust became the servicer for U.S. Bank after the Mortgage was assigned.

admissions, "[appellants] failed to set forth any facts or evidence in support of their motion * * * [and] the discovery deadline has passed." The Koodrichs also posed objections to the sufficiency of the Kirven affidavit attached to the MSJ Parties' motion for summary judgment.

{¶9} On October 2, 2015, the magistrate issued a decision granting summary judgment. The copy of the magistrate's decision mailed to the Koodrichs' counsel was returned on October 13, 2015, as undeliverable, unable to forward. The trial court issued a "judgment entry and decree of foreclosure" on October 20, 2015.

{¶10} This appeal followed.

II. ASSIGNMENTS OF ERROR

{¶11} The Koodrichs pose two assignments of error:

> I. The trial court erred in granting the motion for summary judgment of plaintiff-appellee U.S. Bank N.A.
>
> II. The trial court erred in adopting the magistrate's decision which was not properly served upon defendants-appellants Richard L. Koodrich and Patricia A. Koodrich or their counsel.

III. LAW AND ANALYSIS

A. The trial court erred in granting the motion for summary judgment of plaintiff-appellee U.S. Bank N.A.

1. Standard of Review

{¶12} We review a trial court's entry of summary judgment de novo, using the same standard as the trial court. *Grafton v. Ohio Edison Co.,* 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment may only be granted when the following are established: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and the conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in its favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978); Civ.R. 56(C).

{¶13} The party moving for summary judgment bears the initial burden of apprising the trial court of the basis of its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of fact on an essential element of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). "Once the moving party meets its burden, the burden shifts to the nonmoving party to set forth specific facts demonstrating a genuine issue of material fact exists." *Willow Grove, Ltd. v. Olmsted Twp.*, 8th Dist. Cuyahoga No. 101996, 2015-Ohio-2702, ¶ 14-15, citing *Dresher*. "To satisfy this burden, the nonmoving party must submit

evidentiary materials showing a genuine dispute over material facts." *Willow Grove* at ¶ 15, citing *PNC Bank v. Bhandari*, 6th Dist. Lucas No. L-12-1335, 2013-Ohio-2477.

2. Analysis

a. Withdrawal of admissions deemed admitted

{¶14} The unanswered admissions were proffered in support of the motion for summary judgment. In Ohio, "unanswered requests for admissions render the matter requested conclusively established * * * and a motion for summary judgment may be based on such admitted matter." (Internal citations omitted.) *Jade Sterling Steel Co. v. Stacey*, 8th Dist. Cuyahoga No. 88283, 2007-Ohio-532, ¶ 11. The failure to respond to the request satisfies the Civ.R. 56 written answer requirement, and also serves as a "conclusive admission pursuant to Civ.R. 36." *Id.*

{¶15} Civ.R. 36(B) allows withdrawal or amendment of admissions under certain circumstances:

> "Subject to the provision of Rule 16 governing modification of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining his action or defense on the merits." Civ.R. 36(B). Merely contesting the admissions in a motion for summary judgment meets the requirements of Civ.R. 36(B). *Balson v. Dodds*, 62 Ohio St.2d 287, 291, 405 N.E.2d 293 (1980). Civ.R. 36(B) does not require that a written motion be filed, nor does it specify when such motion must be filed. Thus, the rule leaves such matters to the discretion of the trial court.

Id.

{¶16} An appellate court applies an abuse of discretion standard to a Civ.R. 36(B) analysis, which is a determination that the trial court's decision was arbitrary, unreasonable or unconscionable, to a trial court's denial or grant of a motion to withdraw admissions. *Sylvester Summers, Jr. Co., L.P.A. v. E. Cleveland*, 8th Dist. Cuyahoga No. 98227, 2013-Ohio-1339, ¶ 13, citing *Aetna Cas. & Sur. Co. v. Roland*, 47 Ohio App.3d 93, 547 N.E.2d 379 (10th Dist.1988).

{¶17} Withdrawal of admissions may be permitted where: (1) it will aid in presenting the merits of the case; and (2) the requesting party is unable to convince the court that it will be prejudiced in maintaining the action by the withdrawal. *6750 BMS, L.L.C. v. Drentlau*, 2016-Ohio-1385, 62 N.E.3d 928, ¶ 14 (8th Dist.), citing *Balson v. Dodds,* 62 Ohio St.2d 287, 405 N.E.2d 293 (1980), paragraph two of the syllabus. "This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice." *6750 BMS* at ¶ 14.

{¶18} The determination of whether to allow withdrawal of, or late responses to, admissions is wholly within the trial court's discretion. *Id.* at ¶ 15, citing *Szigeti v. Loss Realty Group*, 6th Dist. Lucas No. L-03-1160, 2004-Ohio-1339, ¶ 19, and *Sandler v. Gossick*, 87 Ohio App.3d 372, 622 N.E.2d 389 (8th Dist.1993).

{¶19} Appellant's sole factual basis in support of the motion to withdraw is that:

> [I]t is immaterial that, per the certificate of service of the document attached to Plaintiff's motion for summary judgment as Exhibit A, such requests

> were ostensibly served upon Defendants by attorneys not of record herein, at an incomplete address for Defendants' counsel, and without the electronic copies required by Civ.R. 36. Rather, Defendants must be permitted to withdraw any default admissions because the requests are directed to subvert the merits by requesting that Defendants admit directly that the allegations of the complaint are meritorious, when Defendants' averments in their answer were already sufficient to indicate that such requests were denied. *Aetna Cas. & Sur. Co. v. Roland*, 47 Ohio App.3d 93, 547 N.E.2d 379 (10th Dist.1988).

{¶20} While we recognize the importance of having cases decided on the merits, there is also the consideration of advocacy and diligence. The MSJ Parties have documented efforts by email, letter, and record alluding to telephone calls to the Koodrichs' counsel, to obtain discovery responses from the Koodrichs. In contrast, as U.S. Bank argues in its appellate brief, the Koodrichs have introduced no evidence justifying the failure to respond, or made any effort to explain the lack of response. In fact, the Koodrichs did not seek to explain even by a reply brief in this action.

{¶21} We agree with the trial court's findings that the Koodrichs have offered no facts or evidence in support of their motion to withdraw, a motion that was filed months after the discovery deadline has passed. The trial court did not abuse its discretion when it denied appellant's motion to withdraw admissions.

b. Affidavit of Kirven is insufficient to establish U.S. Bank's entitlement to summary judgment as a matter of law

{¶22} The Koodrichs advance that the affidavit of Kirven is insufficient because it does not detail her job responsibilities or explain how or why a SunTrust employee is familiar with the records of U.S. Bank. The motion for summary judgment states on its face it is filed on behalf of U.S. Bank and SunTrust. SunTrust's response to the

Koodrichs' first set of interrogatories, requests for admissions, and request for production of documents is also attached to the summary judgment motion describing negotiation and transfer of the Mortgage and accompanying promissory note:

> American Midwest then endorsed the Note to SunTrust, who subsequently sold the Note to U.S. Bank, with an Allonge dated October 31, 2012 reflecting same. The Mortgage was later assigned to U.S. Bank, N.A. via the Assignment, recorded on January 15, 2013 in Instrument 201301150437, Cuyahoga County, Ohio Recorder. SunTrust is the servicer of the Loan. SunTrust further states that the Mortgage, Note, Allonge and Assignments, each of which are attached to the Complaint, speak for themselves.

{¶23} Kirven's affidavit supports the information documented in the discovery responses attached to the motion for summary judgment. Kirven describes her position with SunTrust as the servicer of the loan for U.S. Bank. Kirven also was the signatory on the January 28, 2015 discovery responses issued to the Koodrichs on behalf of SunTrust and U.S. Bank.

{¶24} We also observe that we have not required that Civ.R. 56(E) summary judgment affidavits based on personal knowledge aver that the affiant compared the documents with the originals. *Wells Fargo Bank v. Sowell*, 2015-Ohio-5134, 53 N.E.3d 969, ¶ 16 (8th Dist.). Further, where an affiant avers that he or she has personal knowledge of a transaction, "this fact cannot be disputed absent evidence to the contrary." *Household Realty Corp. v. Henes*, 8th Dist. Cuyahoga No. 89516, 2007-Ohio-5846, ¶ 12, citing *Papadelis v. First Am. Sav. Bank*, 112 Ohio App.3d 576, 579, 679 N.E.2d 356 (8th Dist.1996).

{¶25} The Koodrichs' argument regarding Kirven's affidavit lacks merit. We find that the trial court did not err in granting the motion for summary judgment in favor of the MSJ Parties. Appellant's first assignment of error is overruled.

B. The trial court erred in adopting the magistrate's decision which was not served upon the Koodrichs or their counsel

{¶26} The Koodrichs argue that the address the magistrate's decision was mailed to was incorrect, and that the court was on notice of that fact for at least four months prior to that time via the motion for enlargement of time filed by the Koodrichs on June 1, 2015. The Koodrichs assert in their argument that the address has "automatically been updated even prior to that [time] upon its first use in the electronic filing system."

{¶27} The service certificate for the magistrate's decision reflects an address for the Koodrichs' counsel of "20525 Center Ridge Road, Rocky River, OH 44116." The magistrate's decision was sent to that address on October 2, 2015. The October 13, 2015 court docket entry reflects that the magistrate's decision was returned by the U.S. Postal Service for failure of service, "return to sender not deliverable as addressed unable to forward mail." The October 20, 2015 judgment entry lists the final disposition as "judgment entry and decree of foreclosure," assessing costs to the Koodrichs. There is no accompanying opinion.

{¶28} Civ.R. 53(D)(3)(a)(iii) provides:

> A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys no later than three days

> after the decision is filed. A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

{¶29} Thus, the purpose of the objections is to allow a party to protect their rights on appeal. The Koodrichs cite *Ulrich v. Mercedes-Benz, USA, L.L.C.*, 9th Dist. Summit No. 23550, 2007-Ohio-5034, for the premise that they suffered prejudice due to the delivery of the magistrate's decision to an invalid address. In considering this issue, we are aware that two addresses appear in the record for counsel for the Koodrichs. In fact, one filing by the Koodrichs contains a Lakeside Avenue, Cleveland address on one page, and the Rocky River address from which the magistrate's decision was returned as undeliverable on another. "Under the invited error doctrine, a party may not take advantage of an alleged error that the party induced or invited the trial court to make." *Yuse v. Yuse,* 8th Dist. Cuyahoga No. 89213, 2007-Ohio-6198, ¶ 14, citing *State v. Woodruff*, 10 Ohio App.3d 326, 327, 462 N.E.2d 457 (2d Dist.1983).

{¶30} The record in this case does not reflect an attempt by the Koodrichs to seek relief from the trial court due to the failure to receive the decision. However, the record reveals that the instant appeal was timely filed, thus protecting the Koodrichs' arguments posed before the trial court.

{¶31} In the instant case, we affirmed the trial court's denial of the Koodrichs' motion to withdraw the admissions deemed admitted. As a result, the Koodrichs have

conceded to the requisite elements for the grant of foreclosure, and the Koodrichs have no viable defense. Thus, the Koodrichs are unable to demonstrate prejudice.

{¶32} Finally as to the issue of prejudice, we conduct a de novo review of the Koodrichs' challenge to the trial court's grant of summary judgment. We do so without giving deference to a trial court's decision, and based on a thorough review of the entire record. Consequently, the Koodrichs have not demonstrated prejudice to their legal rights. *See Levy v. Seiber*, 2016-Ohio-68, 57 N.E.3d 331, ¶ 21 (12th Dist.), citing *Settlers Walk Home Owners Assn. v. Phoenix Settlers Walk, Inc.*, 12th Dist. Warren Nos. CA2014-09-116, CA2014-09-117, and CA2014-09-118, 2015-Ohio-4821, ¶ 15.

{¶33} The second assignment of error is overruled.

IV. CONCLUSION

{¶34} The trial court's order is affirmed.

It is, therefore, ordered that appellees recover from 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.

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ANITA LASTER MAYS, JUDGE

MARY J. BOYLE, P.J., and
SEAN C. GALLAGHER, J., CONCUR