[Cite as *Natl. City Bank v. Mathie*, 2009-Ohio-6506.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

NATIONAL CITY BANK Appellee v. DEBRA L. MATHIE, et al. Appellants	C.A. Nos. 06CA009030 & 06CA008961 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 05CV144288

DECISION AND JOURNAL ENTRY

Dated: December 14, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Debra Mathie obtained a loan from National City Bank, which she secured with a mortgage. When she defaulted on her payments, National City sued to foreclose on the mortgage. After Ms. Mathie answered, National City moved for summary judgment. Ms. Mathie opposed the motion, but the trial court determined that there were no genuine issues of material fact in dispute and that National City was entitled to judgment as a matter of law. Ms. Mathie has appealed, arguing that the court incorrectly granted summary judgment to National City and incorrectly denied her motion to amend her answer. This Court reverses because there are genuine issues of material fact in dispute regarding the amount of the debt and whether Ms. Mathie cured the default, and the court abused its discretion when it denied her motion to amend.

FACTS

{¶2} Ms. Mathie borrowed $86,400 from National City in 2001. The interest rate on her loan was 7.125% with monthly payments of $582.10. To secure the loan, she gave National City a mortgage on property that she owns in Vermillion.

{¶3} In September 2005, National City filed a complaint in foreclosure in Erie County, alleging that Ms. Mathie had defaulted on the loan. In November 2005, it transferred the action to Lorain County. In its amended complaint, it alleged that the amount due was "$88,075.89, together with interest at the rate of 7.125% per year from June 1, 2005, plus court costs, advances, and other charges, as allowed by law." In her Answer, Ms. Mathie denied National City's allegations and also alleged that she had made payments since June 2005. She alleged that National City's "representative accepted certified funds for mortgage payments and agreed to setting up [a] work out package."

{¶4} On February 7, 2006, National City moved for summary judgment, arguing that there were no genuine issues of material fact that the loan was in default and that the principal balance was $88,075.89. On March 2, 2006, Ms. Mathie opposed the motion, alleging in an affidavit that National City was incorrect about the principal remaining on the loan, that she had paid National City $2480, and that the loan was no longer in default.

{¶5} On March 20, 2006, National City filed a reply, explaining that the principal was higher than what was written on the original loan documents because Ms. Mathie modified the loan in 2004. It argued that she did not prove that she made any payments after June 2005 and that, even if she did, $2480 was not sufficient to cure the default. Three weeks later, Ms. Mathie filed a response. On April 25, 2006, she moved to amend her answer to assert counterclaims for abuse of process, conversion, breach of contract, and fraud. On June 5, 2006, the trial court

denied her motion to amend, granted National City's motion for summary judgment, and entered a decree of foreclosure. Ms. Mathie has appealed, assigning two errors.

SUMMARY JUDGMENT

{¶6} Ms. Mathie's first assignment of error is that the trial court incorrectly granted summary judgment to National City. She has argued that genuine issues of material fact exist regarding whether she is in default on her loan and regarding the amount owed. In reviewing a ruling on a motion for summary judgment, this Court applies the same standard the trial court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990).

{¶7} National City has argued that this Court should disregard Ms. Mathie's response to its motion for summary judgment because it was untimely. Ohio Rule of Civil Procedure 56(C) provides, in relevant part, that a motion for summary judgment "shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing, may serve and file opposing affidavits."

{¶8} The Ohio Supreme Court has determined that, "[a]lthough . . . Civ.R. 56(C) anticipates a cutoff date for a response to a motion for summary judgment, . . . the rule is not sufficiently explicit to apprise the parties of that date. Notice must come from some other source or sources." *Hooten v. Safe Auto Ins. Co.*, 100 Ohio St. 3d 8, 2003-Ohio-4829, at ¶22. "[A] trial court may provide the requisite notice in one of three ways: by setting an explicit hearing date for the summary judgment motion, by setting explicit cutoff dates for the filing of briefs and Civ.R. 56 materials, or by local rule of court which itself 'provides sufficient notice of the hearing date or submission deadlines.'" *Midland Funding L.L.C. v. Starks*, 9th Dist. No. 23966,

2008-Ohio-2963, at ¶8 (quoting *Hooten*, 2003-Ohio-4829, at ¶33). "[The] better practice is to schedule an explicit cutoff date for submission of materials on the motion for summary judgment and to set a date for any hearing. However, if a local rule provides notice of either of these dates, the trial court's scheduling of such dates is not an implicit requirement of Civ.R. 56." *Hooten*, 2003-Ohio-4829, at ¶35.

{¶9} The trial court did not set a hearing date for the summary judgment motion or a cutoff date for Ms. Mathie's response. Furthermore, the Lorain County Common Pleas Court does not have a local rule regarding motion practice. While Local Rule 9 addresses "[t]ime limitations," it merely provides that "[t]he time allowed or permitted for the performance of any act shall be as established by the Ohio Rules of Civil and Criminal Procedure . . . ." Because the Supreme Court has concluded that Rule 56(C) does not provide sufficient notice of the submission deadline for a response to a motion for summary judgment, it follows that Local Rule 9 is also insufficient to provide a party with adequate notice. See *Hooten v. Safe Auto Ins. Co.*, 100 Ohio St. 3d 8, 2003-Ohio-4829, at ¶22. This Court, therefore, concludes that, because there was no deadline for Ms. Mathie's response to the motion for summary judgment, National City's argument that it was late is without merit.

{¶10} Ms. Mathie attached an affidavit to her response that alleged that the principal owed on her loan was not $88,057.89, that National City accepted a $2480 payment from her in October 2005, and that she was no longer in default. She explained that, assuming she did not make regular monthly payments after June 2005, she owed $582.10 for July, August, September, and October. The total for those four months would be $2328.40, which is less than the $2480 payment she made in October.

{¶11} In its reply, National City argued that Ms. Mathie had not made any payments since July 2005 and that she "miscalculated the amount owed . . . by failing to factor in late charges, escrow advances, fees, and costs which accumulated during the four months of non-payments." It also argued that Ms. Mathie had forgotten that she modified the loan in 2004, which increased the principal of the loan to $88,704.13. It attached a copy of the alleged modification documents to its reply.

{¶12} Ms. Mathie responded, requesting that National City's reply be stricken. She argued that it was improper for National City's lawyer to testify and that a copy of the loan modification should have been attached to the complaint, not National City's reply brief. She also alleged that she had recently received a $2480 check from National City with the notation "For Misapplication Reversal."

{¶13} Rule 56(C) of the Ohio Rules of Civil Procedure "controls the materials that the court may consider when it determines whether summary judgment is appropriate." *Modon v. Cleveland*, 9th Dist. No. 2945-M, 1999 WL 1260318 at *2 (Dec. 22, 1999). "Specifically, the court is only to consider 'the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact[.]'" *Dunigan v. State Farm Mut. Auto. Ins. Co.*, 9th Dist. No. 03CA008283, 2003-Ohio-6454, at ¶10 (quoting Civ. R. 56(C)). Under certain circumstances, the court may consider other documents. "The proper procedure for introducing evidentiary matter not specifically authorized by Rule 56(C) is to incorporate it by reference in a properly framed affidavit pursuant to Rule 56(E)." *Trubiani v. Graziani*, 9th Dist. No. 2629-M, 1998 WL 46795 at *2 (Jan 21, 1998).

{¶14} National City did not incorporate the loan modification documents it attempted to submit by reference in an affidavit, as required by Rule 56(C). Because Ms. Mathie objected to

the documents, this Court will not consider them. See *Richardson v. Auto-Owners Mut. Ins. Co.*, 9th Dist. No. 21697, 2004-Ohio-1878, at ¶29 (noting that a court may consider a document not of the type enumerated in Rule 56(C) if the other party does not object). For the same reason, this Court will not consider the documents Ms. Mathie attached to her response to National City's reply.

{¶15} The evidence presented by Ms. Mathie in her response to National City's motion for summary judgment demonstrates that genuine issues of material fact exist regarding whether she is in default and regarding the principal remaining on the loan. The mortgage provides that Ms. Mathie has "the right to have enforcement of this Security Instrument discontinued" under certain conditions. One of those conditions is that she has paid "all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred." In her affidavit, she alleged that she paid National City $2480, that it accepted her payment, and that she was "not in default." She also alleged that the principle balance was not $88,057.89.

{¶16} In its reply, National City argued that, even if Ms. Mathie paid $2480, it was insufficient to cure the default because it did not "factor in late charges, escrow advances, fees, and costs which accumulated during the four months of non-payments." National City, however, did not offer any evidence regarding the amount of those expenses. In addition, Ms. Mathie alleged that she made the $2480 payment "pursuant to an agreement with National City." National City did not offer any evidence to show that it did not enter into a workout plan with Ms. Mathie or that the amount Ms. Mathie was supposed to pay under the plan was different than the amount she said she paid.

{¶17} National City also argued in its reply that the reason the principal balance is higher than what is written on the Note is because Ms. Mathie modified the loan. National City,

however, did not properly submit any evidence to show that the loan had been modified. This Court, therefore, concludes that Ms. Mathie established that genuine issues of material fact exist and that National City is not entitled to judgment as a matter of law. Ms. Mathie's first assignment of error is sustained.

MOTION TO AMEND

{¶18} Ms. Mathie's second assignment of error is that the trial court incorrectly denied her motion to amend. After National City filed its reply in support of its motion for summary judgment, Ms. Mathie attempted to amend her answer to assert counterclaims for abuse of process, conversion, fraud, and breach of contract.

{¶19} Rule 15(A) of the Ohio Rules of Civil Procedure provides that a party may amend a pleading to which no response is permitted within twenty-eight days after it is filed or by leave of court. "A motion for leave to amend a pleading . . . should be granted 'freely' when justice so requires." *Hoover v. Sumlin*, 12 Ohio St. 3d 1, paragraph one of the syllabus (1984) (quoting Civ. R. 15(A)).

{¶20} "The decision of whether to grant a motion for leave to amend a pleading is within the discretion of the trial court." *Turner v. Cent. Local Sch. Dist.*, 85 Ohio St. 3d 95, 99 (1999). "This discretion is tempered somewhat, for the Civil Rules instruct the courts to exercise it liberally." *Weber v. Oriana House Inc.*, 9th Dist. No. 17162, 1995 WL 623068 at *1 (Oct. 25, 1995). According to the Ohio Supreme Court, "a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party." *Hoover v. Sumlin*, 12 Ohio St. 3d 1, 6 (1984).

{¶21} In her attempted amendment, Ms. Mathie noted that National City originally filed its complaint in Erie County in September 2005. She alleged that, in October 2005, she paid

$2480 to National City, which was the amount its customer counseling department told her to pay. National City, however, did not credit the payment to her account or return her check. She also alleged that, even though National City maintained in court filings that it never received a payment from her, in March 2006, it sent her a check for the amount she had paid. She based some of her counterclaims on her allegation that National City improperly held onto her payment for six months, misrepresented the terms of her workout plan, and breached the terms of that plan. She based another counterclaim on her allegation that, because the loan modification documents were not properly executed, National City owed her any sums she had paid over $582.10 per month.

{¶22} Ms. Mathie has argued that the court should have allowed her to amend her answer because her counterclaims were based on acts that National City committed "during the course of the pending litigation," including its submission of "a different document upon which liability was based." Rule 13(E) of the Ohio Rules of Civil Procedure provides that "[a] claim which either matured or was acquired by the pleader after serving [her] pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleadings." At the time Ms. Mathie moved to amend her answer, no discovery deadlines or trial date had been set. Her counterclaims were based, at least partially, on events that had occurred while the action was pending, including her claim that National City breached the terms of her workout plan. This Court has held that a trial court abuses its discretion if it does not allow a defendant to amend its answer to request enforcement of a purported settlement agreement. *Sampson v. Hudson Pre-Cast Props. Inc.*, 31 Ohio App. 3d 277, 278 (1986). Moreover, the court did not make a finding of "bad faith, undue delay or undue prejudice [to National City]." *Hoover v. Sumlin*, 12 Ohio St.

3d 1, 6 (1984). Accordingly, it abused its discretion when it denied Ms. Mathie's motion to amend. Ms. Mathie's second assignment of error is sustained.

CONCLUSION

{¶23} The trial court incorrectly granted summary judgment to National City and incorrectly denied Ms. Mathie's motion to amend her answer. The judgment of the Lorain County Common Pleas Court is reversed, and this matter is remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
BELFANCE, J.
CONCUR

APPEARANCES:

D. JEFFREY RENGEL, and THOMAS R. LUCAS, attorneys at law, for appellant.

ADAM R. FOGELMAN, attorney at law, for appellee.