[Cite as *Argent Mtge. Co., L.L.C. v. Phillips*, 2010-Ohio-5826.]

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

ARGENT MORTGAGE COMPANY, LLC	C.A. No. 24979
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
LISA PHILLIPS, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellants	CASE No. CV 2008 08 5636

DECISION AND JOURNAL ENTRY

Dated: December 1, 2010

CARR, Judge.

{¶1} Appellants, Lisa and Thomas Phillips ("the Homeowners"), appeal the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On August 11, 2008, Argent Mortgage Co., LLC ("Argent") filed a complaint for foreclosure against the Homeowners. Argent alleged that it was the holder of a promissory note and mortgage securing the note, and that the Homeowners had defaulted on their payment obligations. Argent attached a preliminary judicial report which did not indicate that the mortgage had been assigned to a third party. In addition, counsel for Argent filed a Certificate of Readiness with the complaint pursuant to Loc.R. 11.01, certifying that Argent is the owner of the note and mortgage upon which the complaint is founded, that all supporting documents necessary to establish separate chains of ownership are attached to the complaint, and that all assignments shown on the preliminary judicial report bear a date prior to the filing date of the

complaint. Counsel further acknowledged that "if any of the above requirements are not met or if the provided documents and information are inaccurate, the Court may cause this case to be dismissed without prejudice at the Plaintiff's cost."

{¶3} On September 8, 2008, Argent filed a motion for substitution of plaintiff pursuant to Civ.R. 17, asserting that Wells Fargo Bank, N.A. as Trustee under Pooling and Servicing Agreement dated as of August 1, 2005 Asset Backed Pass Through Certificates, Series 2005-WHQ4 ("Wells Fargo") is the real party in interest by virtue of an assignment of the mortgage. Argent attached a copy of the assignment which indicates that the mortgage was assigned to Wells Fargo on August 5, 2008, six days before Argent filed the complaint. The assignment was recorded on August 25, 2008. The trial court issued an order substituting Wells Fargo as the plaintiff on September 15, 2008.

{¶4} On October 6, 2008, the Homeowners filed an answer, generally denying the allegations in the complaint. In addition, they raised several defenses, including an assertion that Argent was not the owner of the mortgage at the time of the filing of the complaint and caused a false Certificate of Readiness to be filed, and that Argent and its assigns misled the Homeowners into executing an adjustable rate mortgage which the mortgage company knew or should have known they would be unable to pay. On October 21, 2008, the Homeowners filed a "motion to dismiss or bar remedy" because Argent's Certificate of Readiness was not accurate because Argent was not the holder of the mortgage at the time the complaint was filed. In addition, the Homeowners asserted that they never received a copy of the motion for substitution of plaintiff and that the trial court granted the motion before they had the opportunity to respond. Also on October 21, 2008, the Homeowners filed a motion to extend the time to file counterclaims

pending ruling on their motion to dismiss and the completion of initial discovery. The Homeowners did not subsequently file any counterclaims.

{¶5} The Homeowners filed a motion for mediation, asserting that the matter might be resolved "provided plaintiff is able to restructure the underlying loan to the parties' mutual satisfaction[.]" There are six orders in the record scheduling the matter for settlement conference before the court's "Foreclosure Specialist." On May 7, 2009, the Foreclosure Specialist filed a notice of disposition, returning the matter to the trial court as "Unable to resolve."

{¶6} On May 7, 2009, Wells Fargo filed a motion for summary judgment. The Homeowners responded in opposition. On June 15, 2009, the trial court issued a judgment entry, denying the Homeowners' motion to dismiss and granting Wells Fargo's motion for summary judgment. On July 13, 2009, the Homeowners filed a motion to vacate pursuant to Civ.R. 60(B) because another judge signed the May 7, 2009 judgment "for" the assigned judge. The Homeowners filed a notice of appeal the next day, divesting the trial court of jurisdiction to rule on the motion to vacate.

{¶7} On August 3, 2009, this Court dismissed the appeal by way of journal entry for lack of a final, appealable order. *Argent Mort. Co., LLC v. Phillips*, 9th Dist. No. 24851. On August 20, 2009, the trial court issued a judgment entry, granting Wells Fargo's motion for summary judgment and entering an order of foreclosure. The Homeowners filed a timely appeal, raising two assignments of error for review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED IN DENYING THE [HOMEOWNERS'] MOTION TO DISMISS OR BAR REMEDY. ARGENT LACKED STANDING TO PROSECUTE AND VIOLATED LOCAL RULE."

{¶8} The Homeowners argue that the trial court erred by denying their motion to dismiss or bar remedy because Argent was not the holder of the mortgage when it filed the complaint for foreclosure and because Argent violated Loc.R. 11.01 by filing an inaccurate Certificate of Readiness. This Court disagrees.

{¶9} Had the Homeowners moved to dismiss the complaint pursuant to Civ.R. 12, this Court would review the trial court's decision de novo. *Ohio Farmers Ins. Co. v. Akron*, 9th Dist. No. 09CA0013-M, 2010-Ohio-1348, at ¶9. The Homeowners, however, moved to dismiss the complaint solely for the reason that Argent violated Loc.R. 11.01 by filing an inaccurate Certificate of Readiness which asserted that Argent was the holder of the mortgage. The trial court allowed for the substitution of Wells Fargo as the real party in interest pursuant to Civ.R. 17(A) based on evidence that Argent had assigned the mortgage to Wells Fargo. Accordingly, the Homeowners effectively challenge the trial court's granting of Argent's motion for substitution of plaintiff pursuant to Civ.R. 17(A). "A decision to allow or prohibit ratification[, joinder or substitution] under Civ.R. 17(A) is subject to review for abuse of discretion." *Ohio Cent. RR. Sys. v. Mason Law Firm Co., L.P.A.*, 182 Ohio App.3d 814, 2009-Ohio-3238, at ¶32. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id.

{¶10} Civ.R. 17(A) states, in relevant part:

> "Every action shall be prosecuted in the name of the real party in interest. *** No action shall be dismissed on the ground that it is not prosecuted in the name of the

> real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

The Fifth District Court of Appeals emphasized that the rule requires the real party in interest to "prosecute" the claim, rather than "file" the claim. *Wachovia Bank, N.A. v. Cipriano*, 5th Dist. No. 09CA007A, 2009-Ohio-5470, at ¶38.

{¶11} Even before the Homeowners filed an answer, Argent moved to substitute Wells Fargo as the real party in interest based on an assignment executed on August 5, 2008, but not recorded until August 25, 2008, after Argent filed the complaint. The unrecorded assignment was valid, except as to subsequent bona fide purchasers for value. See *Wead v. Lutz*, 161 Ohio App.3d 580, 2005-Ohio-2921, at ¶18-19, citing R.C. 5301.25; see, also 68 Ohio Jur.3d Mortgages, Section 468. Accordingly, Wells Fargo was the real party in interest at the time of the filing of the complaint. Civ.R. 17(A), however, provides a mechanism for curing any defect by allowing for the substitution of the real party in interest. Because the real party in interest was substituted prior to the time in which the Homeowners had to file an answer or other responsive pleading, they cannot demonstrate that they were prejudiced by the substitution of the real party (plaintiff) in interest. See *Bank of New York v. Stuart*, 9th Dist. No. 06CA008953, 2007-Ohio-1483, at ¶12-13. Moreover, by the plain language of Civ.R. 17(A), Argent would have been allowed a reasonable time to substitute the real party in interest even after objection by the Homeowners.

{¶12} The Homeowners argue that Loc.R. 11.01 somehow requires dismissal of the foreclosure action when the named plaintiff files a Certificate of Readiness which fails to state that the mortgage has been assigned to another mortgagee. Loc.R. 11.01 states:

> "In actions for the marshaling and foreclosure of liens on real property or partition of real estate, a Preliminary Judicial Report shall be filed with the Clerk by the attorney for the plaintiff **at the time of the filing of the complaint.** This shall serve as evidence of the state of the record title of the real property in question. Said report may be prepared by an attorney or a competent abstractor or title company. A copy, certified by the attorney or a photographic copy of the original evidence of title, may be filed with the Clerk in lieu of the original, and shall become and remain a part of the case file. **Along with the filing of the Preliminary Judicial Report, the attorney shall file a Certificate of Readiness and any required supporting documentation, demonstrating that plaintiff is the real party in interest and the matter is ready to proceed against all necessary parties. This shall be signed by the attorney. The complaint, the Preliminary Judicial Report and the Certificate of Readiness shall be filed as separate documents at the same time and shall be separately time-stamped with the complaint being filed first.**" (Emphasis in the original.)

{¶13} Misc. No. 325 of Loc.R. 11 states that the purpose of the Certificate of Readiness is to "allow that substantial justice be done and to ensure judicial efficiency." The local rule does not provide that foreclosure cases shall or even may be dismissed if the Certificate of Readiness contains inaccurate information. The local rule does not include the express language or a form for the required Certificate of Readiness. The certificate submitted in this case includes an acknowledgement that the trial court "may" dismiss the case without prejudice if the provided documents and information are inaccurate. Accordingly, dismissal of a foreclosure action for non-compliance with Loc.R. 11.01 is discretionary with the trial court.

{¶14} The local rule states that the preliminary judicial report is evidence of the "record title" of the real property. Loc.R. 11.01. In this case, record title remained with Argent at the time of the filing of the complaint because the assignment had not yet been recorded. Once the assignment was recorded as required by R.C. 5301.25, Argent quickly filed its motion to substitute the assignee as the real party in interest pursuant to Civ.R. 17(A). Given Argent's status as the holder of record title at the time of the filing of the complaint, and its timely motion for substitution of the real party in interest after recording of the assignment, this Court cannot

say that the trial court abused its discretion by granting the motion for substitution of Wells Fargo as the real party in interest pursuant to Civ.R. 17(A). The real party in interest was substituted prior to the time in which the Homeowners had to file an answer or other responsive pleading, so the Homeowners were not prejudiced by the substitution. Under these circumstances, the trial court did not err by denying the Homeowners' motion to dismiss or bar remedy. This first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR WELLS FARGO."

{¶15} The Homeowners argue that the trial court erred by granting summary judgment in favor of Wells Fargo. This Court disagrees.

{¶16} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶17} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶18} To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.

Dresher v. Burt (1996), 75 Ohio St.3d 280, 293. Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins* (1996), 75 Ohio St.3d 447, 449.

{¶19} The Homeowners make four arguments in support of their assertion that the trial court erred by granting summary judgment in favor of Wells Fargo. They first argue that the judgment entry awarding summary judgment to Wells Fargo is either void or voidable because it was not signed by the judge to whom the case had been assigned. The argument is not well taken.

{¶20} The Homeowners assert that they filed a Civ.R. 60(B) motion to vacate the original order granting summary judgment, and that the trial court never ruled on the motion. They fail to note, however, that they filed their initial notice of appeal the next day, thereby divesting the trial court of jurisdiction to rule on the motion to vacate. In the absence of remand by this Court, a trial court is divested of jurisdiction to rule on a pending motion to vacate pursuant to Civ.R. 60(B) after the appellant has filed a notice of appeal. *Johnsen v. Johnsen* (Oct. 6, 1993), 9th Dist. No. 16023.

{¶21} This Court dismissed the initial appeal for lack of a final, appealable order because the judgment entry failed to enter an order of foreclosure and fully resolve the foreclosure issues. *Argent Mort. Co., LLC v. Phillips* (Aug. 3, 2009), 9th Dist. No. 24851. A trial court may revisit an order "at any time before the entry of judgment adjudicating all the

claims and the rights and liabilities of all the parties." Civ.R. 54(B); see, also, *Simkanin v. Simkanin*, 9th Dist. No. 22719, 2006-Ohio-762, at ¶7. Because the June 15, 2009 order ruling on the motion for summary judgment was not final, the trial court was free to revisit those issues. On August 20, 2009, it did just that. The trial court again granted summary judgment in favor of Wells Fargo and addressed all necessary foreclosure issues. The August 20, 2009 judgment entry was signed by the judge to whom the case had been assigned. Because the final order from which the Homeowners appeal was signed by the appropriate judge, their argument that this Court must vacate that order as void or voidable is not well taken.

{¶22} Second, the Homeowners argue that the trial court erred by granting summary judgment in favor of Wells Fargo because Argent was not the real party in interest when it filed the complaint, and substitution of Wells Fargo was error. This Court has already concluded that substitution of Wells Fargo as the real party in interest was proper pursuant to Civ.R. 17(A). Accordingly, the Homeowners' argument in this regard is not well taken.

{¶23} Third, the Homeowners argue that summary judgment was improper because Wells Fargo failed to cooperate in good faith in the settlement conferences. The Homeowners argue that Wells Fargo evidenced a lack of good faith because (1) its representative participated by phone in the settlement conferences, and (2) it refused to accept any amount in settlement less than what the Homeowners owed. Lisa Phillips submitted her affidavit in opposition to the motion for summary judgment in which she averred that she never personally spoke with any Wells Fargo representative outside of the telephone settlement conference. She further averred that her family finances had been destroyed by settlement payments to the IRS, and that she and her husband could not afford to pay past due charges and monthly mortgage payments as Wells Fargo required. Ms. Phillips averred that Wells Fargo did not participate in good faith in the

settlement conferences only because they would not accept the Homeowners' request for a mortgage loan and offer to make payments consistent with their current financial situation.

{¶24} The Homeowners have failed to explain how a creditor's insistence on payment in full of an undisputed debt constitutes a lack of good faith. Moreover, Ms. Phillips did not identify in her affidavit the amount that she and her husband offered to pay to satisfy their debt. She simply averred that Wells Fargo rejected payments "consistent with our current finances." Given that Ms. Phillips had averred that her finances had been "destroyed" because of high settlement payments to the IRS, this Court cannot conclude that Wells Fargo acted in the absence of good faith when they rejected the Homeowners' settlement offer. Accordingly, the Homeowners' argument that summary judgment was inappropriate because Wells Fargo failed to engage in settlement negotiations in good faith is not well taken.

{¶25} Finally, the Homeowners argue that the trial court erred by granting summary judgment in favor of Wells Fargo because the Homeowners' claim of predatory lending foreclosed summary judgment.

{¶26} In their answer to the complaint, the Homeowners alleged the following defense: "Plaintiff and its predecessors and assigns mislead [sic] Defendants into executing an adjustable rate mortgage which they knew or should have known would result in Defendants' inability to pay to their damage in amounts yet undetermined." The Homeowners moved for an extension of time in which to file counterclaims, where they might have alleged a claim of predatory lending. They never filed any counterclaims, however.

{¶27} Civ.R. 8(C) provides, in relevant part that "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation." This Court reviews

the trial court's refusal to treat a defense raised in an answer as a counterclaim for an abuse of discretion. See *Nycoll Credit Union, Inc. v. Jurick* (May 10, 1991), 11th Dist. No. 90-L-14-056.

{¶28} The Homeowners referred to the second defense in their answer as an independent claim alleging predatory lending for the first time in their opposition to the motion for summary judgment. At no other time, including in their motion for an extension of time to file counterclaims, did they mention "predatory lending." The Homeowners informed the trial court early on that they would likely file subsequent counterclaims. At the time they filed their answer, they were clearly aware of facts which led them to believe that they had been misled. Nevertheless, they declined to assert any counterclaims, opting instead to defer any such filing until a later date. Accordingly, the Homeowners have not demonstrated that their designation of a "predatory lending claim" as merely a defense constitutes "mistake" implicating the remedial purposes of Civ.R. 8(C). Moreover, the trial court need only consider a mistakenly designated defense as a counterclaim "if justice so requires." Under the circumstances, this Court cannot conclude that the trial court abused its discretion by refusing to recognize the Homeowners' vague assertion that they were misled into executing an adjustable rate mortgage as a counterclaim.

{¶29} Moreover, even if "predatory lending" might be considered as a defense to the foreclosure action, the Homeowners failed to meet their reciprocal burden of presenting evidence demonstrating that a "genuine triable issue" remained for litigation. See *Tompkins*, 75 Ohio St.3d at 449.

{¶30} Wells Fargo appended the affidavit of its representative with personal knowledge of the note and mortgage at issue in this case. The representative averred that the note and mortgage were in default, and that the principal sum and interest were due.

{¶31} In defense, Ms. Phillips averred that Argent informed her that the terms of the adjustable rate mortgage were "a good deal for us[.]" She averred that Argent claimed that the house had appraised for at least $112,500.00 in June 2005, although she later learned that "the house had a county appraised value in 2005 of $86,900.00 and in 2009 a county appraised value of $79,640.00." She did not aver that Argent represented the appraisal as having been conducted by the county. Moreover, she did not aver that she and her husband could not meet their payment obligations as they stood at the commencement of their loan repayment, or that she and her husband informed Argent that they could not afford payment amounts implicated by a higher rate of interest. Most significantly, Ms. Phillips averred that they became unable to pay their mortgage due to the destruction of their finances because of unexpectedly high settlement payments they owed to the IRS for delinquent taxes. At no time did Ms. Phillips aver that she and her husband were not aware that the interest on their mortgage loan would increase, or that she was unaware of the minimum and maximum interest rates under the loan. Accordingly, the Homeowners failed to meet their reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *Tompkins*, 75 Ohio St.3d at 449. Accordingly, the trial court did not err by granting summary judgment in favor of Wells Fargo.

{¶32} The Homeowners' second assignment of error is overruled.

III.

{¶33} The Homeowners' assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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 Summit, 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 Appellants.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, P. J.
DISSENTS, SAYING:

{¶34} I respectfully dissent, as I do not believe we should reach the merits of this appeal absent demonstration from the Appellants that their appeal has not been rendered moot due to their intervening bankruptcy proceedings. If the issues raised in Appellants' appeal have been resolved by the bankruptcy proceedings, this opinion would be advisory in nature. "This court is loath to issue advisory opinions which do not serve to materially advance correct disposition of the matter on appeal. We will not issue a decision which does not affect the case before us."

(Internal quotations and citations omitted.) *State ex rel. Louthan v. City of Akron*, 9th Dist. No. 23351, 2007-Ohio-241, at ¶8.

APPEARANCES:

MARK H. LUDWIG, Attorney at Law, for Appellants.

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