[Cite as *LaSalle Bank Natl. Assn. v. Scolaro*, 2011-Ohio-1218.]

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

LASALLE BANK NATIONAL ASSOCIATION AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2007-1, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-1	C.A. No. 25084
Appellee	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
v.	
JOSEPH M. SCOLARO, et al.	CASE No. CV 2008 07 5125
Appellants	

DECISION AND JOURNAL ENTRY

Dated: March 16, 2011

CARR, Judge.

{¶1} Appellant, Joseph Scolaro, appeals the judgment of the Summit County Court of Common Pleas. This Court reverses.

I.

{¶2} On July 18, 2008, LaSalle Bank National Association (hereinafter referred to as "LaSalle"), the original plaintiff, brought this action against Scolaro seeking money judgment against Scolaro based on a January 10, 2007 promissory note in the amount of $225,250.00 plus interest at a rate of 9.60 percent per year from February 1, 2008, plus court costs, advances, and other charges allowed by law. LaSalle also sought to foreclose upon Scolaro's property based on the mortgage dated January 10, 2007. LaSalle also sued Judy E. Scolaro and the unknown spouse of Joseph Scolaro.

{¶3} The parties subsequently participated in resolution and settlement conferences. On April 16, 2009, Joseph Scolaro filed an answer in which he asserted multiple affirmative defenses. The affirmative defenses alleged LaSalle was not the proper party plaintiff, that LaSalle lacked standing, and that LaSalle failed to give proper and requisite notice to Scolaro prior to initiating foreclosure. On April 29, 2009, LaSalle filed a motion to substitute Bank of America, National Association (hereinafter referred to as "Bank of America") as the plaintiff. This motion was granted by the trial court on April 30, 2009. On June 22, 2009, Bank of America filed a motion for summary judgment, along with an affidavit in support. On August 20, 2009, after being granted an extension of time, Joseph Scolaro filed a brief in opposition with supporting affidavit, as well as his own motion for summary judgment. On September 30, 2009, Bank of America filed a reply in support of its motion for summary judgment and a response to Joseph Scolaro's motion for summary judgment. On that same day, Bank of America filed a motion for default judgment against Judy E. Scolaro and the unknown spouse of Joseph Scolaro.

{¶4} On October 9, 2009, the trial court entered a default judgment against Judy E. Scolaro and the unknown spouse. Also on October 9, 2009, the trial court granted summary judgment against Joseph Scolaro, finding that the substituted plaintiff, Bank of America, had filed a motion for summary judgment and Joseph Scolaro had filed no opposition to the motion. On November 6, 2009, Scolaro filed a notice of appeal.

{¶5} On January 28, 2010, Bank of America moved to stay the appeal and remand the matter to the trial court to correct what it described as a "clerical error" in the judgment entry from which the appeal was taken. Bank of America also requested leave to file a motion with the trial court to correct the omission of the motion for summary judgment from the record. On February 8, 2010, Scolaro responded in opposition, asking this Court to deny the portion of Bank

of America's motion requesting a remand to correct a clerical error in the judgment entry. Scolaro argued that the trial court's finding that he had not filed a response to the motion for summary judgment was not a clerical error and, thus, could not be cured upon the filing of a Civ.R. 60(A) motion. On February 19, 2010, this Court granted the motion to stay the appellate proceedings and ordered the matter "remanded to the trial court for 30 days to rule on Bank of America's anticipated Civ.R. 60(A) motion." This Court's journal entry specifically noted that the "stay and remand [would] automatically expire 30 days from the journalization of [the] order" and required that Bank of America move this Court to continue the stay if the trial court needed additional time to rule on the motion.

{¶6} On February 26, 2010, Bank of America filed with the trial court a "motion for an amended and restated judgment nunc pro tunc and revised transcript to correct clerical errors." In its motion, Bank of America invoked Civ.R. 60(A) and requested that the trial court correct its statement in the October 9, 2009 journal entry that Scolaro had not filed an opposition in response to Bank of America's motion for summary judgment. Bank of America also requested that the trial court correct the record which failed to reflect that Bank of America had filed a motion for summary judgment on June 22, 2009. Also filed on February 26, 2010, was the affidavit of Attorney April Brown, co-counsel for Bank of America. In the affidavit, Attorney Brown acknowledged that she had prepared a draft of the order granting summary judgment for the convenience of the trial court. Attorney Brown averred that in preparing this entry, she worked from a Summit County form she had previously used. Attorney Brown averred that she accidentally failed to delete the erroneous sentence from the foundational form which stated, "There has been no opposition filed in response to the *** Motion for Summary Judgment." Attorney Brown averred that "[t]he inclusion of this sentence was accidental, and it did not

reflect the procedural history of the case now before this Court." On March 15, 2010, Joseph Scolaro filed a brief in opposition to Bank of America's motion. In his brief, Scolaro argued that the aforementioned error in the judgment entry was not mistake or omission which was mechanical in nature and could not be corrected pursuant to Civ.R. 60(A). Scolaro also requested in his motion that the trial court vacate the order for sale of his property which has been issued on October 23, 2009.

{¶7} On March 19, 2010, Bank of America filed a motion to continue the stay with this Court. On March 22, 2010, the trial court issued an entry captioned "nunc pro tunc amended and restated judgment and decree in foreclosure and reformation of mortgage and deed." In the nunc pro tunc entry, the trial court noted that Scolaro had filed an answer to the complaint as well as a memorandum and affidavit in opposition to Bank of America's motion for summary judgment. The entry stated that "[a]fter due consideration of the submissions of the parties, the Court further finds that there is no genuine issue of material fact and that Bank of America is entitled to summary judgment as a matter of law."

{¶8} On March 29, 2010, Bank of America filed with this Court a notice of correction of record and motion to lift stay. On April 6, 2010, this Court issued a journal entry granting Bank of America's motion and allowing twenty days for Scolaro to either file a new merit brief or a notice of reliance upon his prior brief. On April 26, 2010, Scolaro filed a notice that he intended to rely on his prior brief.

{¶9} On appeal, Scolaro raises two assignments of error.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO THE SUBSTITUTED PLAINTIFF BANK OF AMERICA,

> NATIONAL ASSOCIATION AS IT FAILED TO CONSIDER JOSEPH SCOLARO'S RESPONSE IN OPPOSITION TO THE SUBSTITUTED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND INCORRECTLY FOUND THAT NO RESPONSE HAD BEEN FILED EVEN THOUGH A TIMELY RESPONSE AND AFFIDAVIT HAD BEEN FILED."

{¶10} In his first assignment of error, Scolaro argues the trial court erred in granting summary judgment in favor of Bank of America because it failed to consider Scolaro's response to the motion and found that no response had been filed. This Court agrees.

{¶11} 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.

{¶12} 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.

{¶13} 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.

{¶14} It is axiomatic that the non-moving party's reciprocal burden does not arise until after the moving party has met its initial evidentiary burden. To do so, the moving party must set forth evidence of the limited types enumerated in Civ.R. 56(C), specifically, "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact[.]" Civ.R. 56(C) further provides that "[n]o evidence or stipulation may be considered except as stated in this rule."

{¶15} On February 26, 2011, Bank of America filed a motion for an amended judgment pursuant to Civ.R. 60(A). In its motion, Bank of America noted the trial court's original judgment entry incorrectly stated that Scolaro had not filed a brief in opposition to Bank of America's motion for summary judgment. Bank of America characterized this error as a "misstatement" and argued that the "[t]he Judgment and Decree was not entered until several weeks after Bank of America filed its Reply to Scolaro's Memorandum in Opposition to Bank of America's Motion for Summary Judgment, thus affording this Court ample time to review and evaluate the parties' arguments." In an affidavit which was filed simultaneously to the Civ.R. 60(A) motion, counsel for Bank of America, April Brown, averred that she had prepared a draft of the judgment entry, but failed to delete the erroneous sentence.

{¶16} Civ.R. 60(A) states:

> "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court."

Within the context of Civ.R. 60(A), a "clerical mistake" is "a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney." *Paris v. Georgetown Homes, Inc*. (1996), 113 Ohio App.3d 501, 503, quoting *Dentsply Internatl., Inc. v. Kostas* (1985), 26 Ohio App.3d 116, 118. The Tenth District has stated, "The decision whether a submitted entry accurately reflects a decision rendered by the court involves the exercise of discretion by the court, and therefore is not subject to correction under Civ.R. 60(A)." *Dokari Invests., LLC v. DFG2, LLC*, 10th Dist. No. 08AP-664, 2009-Ohio-1048, at ¶16.

{¶17} In this case, the trial court's actions on remand went beyond the scope of merely correcting a clerical mistake in its original judgment entry. As noted above, once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence, the non-moving party has a reciprocal burden of responding by setting forth specific facts to demonstrate that a "genuine triable issue" exists to be litigated for trial. *Tompkins*, 75 Ohio St.3d at 449. Under this standard, the trial court's erroneous finding in its October 9, 2009 judgment entry that Scolaro had not filed a response to Bank of America's motion for summary judgment was not merely a mechanical error. Rather, it was a significant finding that was relevant in resolving the legal issue before the court. "A trial court may or may not sign prepared entries at its discretion." *State v. Sapp*, 5th Dist. No. 07CA11, 2008-Ohio-5083, at ¶27. In exercising its discretion to sign the October 9, 2009 judgment entry, the trial court confirmed that the content of the entry accurately reflected the basis for its ruling. It follows that the erroneous finding that Scolaro had not filed a response to the motion for summary judgment was not subject to correction under Civ.R. 60(A). See *Dokari* at ¶16. By requesting that the trial court issue "an amended and restated judgment nunc pro tunc," Bank of America was, in effect,

asking the trial court to reconsider a final order. It is well-settled that "motions for reconsideration of a final judgment in the trial court are a nullity." *Price v. Carter Lumber Co.*, 9th Dist. No. 24991, 2010-Ohio-4328, at ¶11, quoting *Pitts v. Ohio Dept. of Transp*. (1981), 67 Ohio St.2d 378, paragraph one of the syllabus. This Court has stated that "any order granting such a motion is likewise a nullity." *State v. Keith*, 9th Dist. No. 08CA009362, 2009-Ohio-76, at ¶8. Therefore, as the trial court's judgment entry issued on March 22, 2010 was a nullity, this Court must look to the trial court's October 9, 2009 judgment entry in reviewing Scolaro's first assignment of error.

{¶18} Turning to the merits of Scolaro's assignment of error, this Court concludes that the trial court's judgment must be reversed. As discussed above, the trial court found that Bank of America's motion for summary judgment was unopposed. The record indicates that Scolaro filed a brief in opposition to the motion for summary judgment, along with an affidavit in support, as well as a cross-motion for summary judgment, on August 20, 2009. Subsequently, on September 30, 2009, Bank of America filed a reply in support of its motion for summary judgment and a response to Joseph Scolaro's motion for summary judgment. On remand, the trial court must make substantive determinations on the competing motions for summary judgment giving consideration to all relevant submissions by the parties.

{¶19} Scolaro's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT TO THE SUBSTITUTED PLAINTIFF BANK OF AMERICA, NATIONAL ASSOCIATION AS THERE WERE GENUINE ISSUES OF MATERIAL FACT AND THE SUBSTITUTED PLAINTIFF WAS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW."

{¶20} In his second assignment of error, Scolaro argues the trial court erred in granting summary judgment to Bank of America because there were genuine issues of material fact. Because our resolution of the first assignment of error is dispositive of this appeal, this Court declines to address the Scolaro's second assignment of error as it is rendered moot. See App.R. 12(A)(1)(c).

III.

{¶21} Scolaro's first assignment of error is sustained. Scolaro's second assignment of error is rendered moot. The judgment of the Summit County Court of Common Pleas is reversed, and the cause remanded for further proceedings consistent with this decision.

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 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 Appellee.

DONNA J. CARR
FOR THE COURT

DICKINSON, P. J.
MOORE, J.
CONCUR

APPEARANCES:

MARGARET A. MCDEVITT, and JULIUS P. AMOURGIS, Attorneys at law, for Appellant.

KIMBERLY Y. SMITH, and JAMES S. WERTHEIM, Attorneys at Law, for Appellee.