[Cite as *Wells Fargo Bank, N.A. v. Baldwin*, 2012-Ohio-3424.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

WELLS FARGO BANK, NA,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-12-227
	:	O P I N I O N
- vs -		7/30/2012
	:	
THOMAS A. BALDWIN, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2011-01-0225

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POWELL, P.J.

{¶ 1} Homeowners fighting foreclosure with claims the bank orally agreed to modify their mortgage contract now appeal the grant of summary judgment to the bank. We find summary judgment was appropriate, in part, because there was no evidence presented that the oral modification was supported by consideration.

{¶ 2} Wells Fargo Bank, N.A. filed a complaint in Butler County Common Pleas Court

alleging that Thomas A. and Chrishelle Baldwin were in default on a note secured by a mortgage for the Baldwins' property. In their amended answer, the Baldwins alleged that Wells Fargo "promised a proposal for a loan modification agreement, if [the Baldwins] made certain payments for a period of six months." They stated in their amended answer that they complied by making the six payments, but Wells Fargo "never presented a loan modification proposal," and, instead, sought foreclosure. The Baldwins claimed they were ready, willing and able to comply with a reasonable modification arrangement and "have now been presented, through counsel, with a loan modification 'package.'"

{¶ 3} Wells Fargo moved for summary judgment based on the default in payments on the note. The Baldwins opposed the motion by alleging they had an oral agreement with Wells Fargo. They claimed a Wells Fargo representative told them that after they made six-months of payments, the arrearage on the note would be added to the "end of the loan to extend the time."

{¶ 4} While they did not refer to the affidavit in their response, the Baldwins filed an affidavit the same date, averring that they were not able to comply with the full payments on the promissory note due to financial problems in 2009 and 2010 and alleging the oral modification.

{¶ 5} Wells Fargo challenged the alleged oral agreement by arguing such an agreement lacked consideration, and by citing the parol evidence rule and the Statute of Frauds. In its decision, the trial court indicated that it considered all evidence submitted. The trial court did not specifically list the Baldwins' summary judgment response and affidavit.

{¶ 6} The trial court granted summary judgment, finding the Baldwins defaulted on the promissory note and mortgage, and Wells Fargo was entitled to summary judgment. The trial court granted a decree in foreclosure. The Baldwins raise a single assignment of error on appeal, as follows:

{¶ 7} THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO PLAINTIFF-APPELLEE, AS DEFENDANTS-APPELLANTS PRESENTED A GENUINE QUESTION OF MATERIAL FACT.

{¶ 8} Summary judgment is proper when there is no genuine issue of material fact remaining for trial, the moving party is entitled to judgment as a matter of law, and reasonable minds can come only to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. *See* Civ.R. 56(C); *see also Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978); *Walters v. Middletown Properties Co.*, 12th Dist. No. CA2001-10-249, 2002-Ohio-3730, ¶ 9-10. In reviewing a trial court's ruling on summary judgment, a court of appeals conducts an independent review of the record and stands in the shoes of the trial court. *Mergenthal v. Star Banc Corp.*, 122 Ohio App.3d 100, 103 (12th Dist.1997).

{¶ 9} According to their brief, the Baldwins do not contest that they were in default on the note. Instead, they assert there was an oral agreement to modify the note or that Wells Fargo was supposed to produce a modification plan. The Baldwins do not, however, provide any supporting legal authority regarding the formation or validity of this oral agreement.

{¶ 10} The burden of affirmatively demonstrating error on appeal and substantiating one's arguments in support thereof falls upon the Baldwins as appellants. *Rathert v. Kempker*, 12th Dist. No. CA2010-06-043, 2011-Ohio-1873, ¶ 12. It is not an appellate court's duty to "root out" or develop an argument that can support an assignment of error, even if one exists. *Rathert*; *South Russell v. Upchurch*, 11th Dist. Nos. 2001-G-2395, 2396, 2003-Ohio-2099.

{¶ 11} We will assume for purposes of this appeal that the Baldwins' assignment of error is referring to a fact question about the oral modification agreement.

{¶ 12} The statute of frauds in Ohio is codified in R.C. 1335.05 and states in relevant

part that no action shall be brought whereby to charge the defendant upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, or upon an agreement that is not to be performed within one year from the making thereof "unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized."

{¶ 13} "This statute serves to ensure that transactions involving a transfer of realty interests are commemorated with sufficient solemnity." *N. Coast Cookies, Inc. v. Sweet Temptations, Inc.*, 16 Ohio App. 3d 342, 348 (8th Dist.1984). "A signed writing provides greater assurance that the parties and the public can reliably know when such a transaction occurs. It supports the public policy favoring clarity in determining real estate interests and discourages indefinite or fraudulent claims about such interests." *Id*.

{¶ 14} Even if the Baldwins were able to avoid any Statute of Frauds concerns with this oral modification, for a verbal agreement to have the effect of altering or modifying the terms of a prior written contract, it must be a valid and binding contract itself, resting upon some new and distinct consideration. *Thurston v. Ludwig*, 6 Ohio St. 1, 6-7 (1856); *Hanna v. Groom*, 10th Dist. No. 07-AP-502, 2008-Ohio-765, ¶ 27-28.

{¶ 15} Consideration is a benefit to the party promising, or a loss or detriment to the party to whom the promise is made, and benefit means that promisor, in return for his promise, has acquired a legal right to which he had not been previously entitled, and detriment means that promisee in return for his promise forbears from exercising some legal right he is previously entitled to exercise. *Yardmaster, Inc. v. Orris*, 11th Dist. No. 9-305, 1984 WL 7415 (June 29, 1984).

{¶ 16} A promise to do what the promisor is already bound to do cannot be a consideration, for, if a person gets nothing in return for his promise but that to which he is

already legally entitled, "the consideration is unreal." *Shannon v. Universal Mortgage & Disc. Co.*, 116 Ohio St. 609, 621 (1927). As a general rule, therefore, the performance of, or promise to form, an existing legal obligation is not a valid consideration. *Id.*

{¶ 17} In other words, a court will not find that an agreement is supported by adequate consideration if a party has a preexisting duty to perform the obligations assumed under the contract. *Van Meter v. Stebner*, 9th Dist. No. 2348-M, 1994 WL 716230 (Dec. 28, 1994). Neither the promise to do a thing, nor the actual doing of it will constitute a sufficient consideration to support a contract if it is merely a thing which the party is already bound to do, either by law or a subsisting contract with the other party. *Id.*; *Hanna*, 10th Dist. No. 07-AP-502, 2008-Ohio-765 at ¶ 27-28 (past consideration is no consideration).

{¶ 18} A contract cannot be unilaterally modified, and parties to a contract must mutually consent to a modification. *Hanna*. However, to the extent that an oral agreement of modification of an existing contract -- although without consideration -- has been acted upon by the parties, it is binding upon them and may not be repudiated. *Thurston.*

{¶ 19} Construing the evidence most favorably for the Baldwins as the nonmoving party, we find that reasonable minds can come to but one conclusion and that conclusion is adverse to the Baldwins. As was previously noted, a signed writing provides evidence that a modification occurred and discourages indefinite claims about this transaction. *See N. Coast Cookies*, 16 Ohio App. 3d 342 at 348. In the instant case, the Baldwins presented no evidence to preclude summary judgment with regard to the mutual consent to and consideration for the oral modification agreement.

{¶ 20} The Baldwins' oral agreement to make payments for six months on the note was their pre-existing duty under the original note and mortgage. Their duty to repay the note is the same as it was under the original note, and the Baldwins presented no evidence to indicate otherwise. *See Rhoades v. Rhoades*, 40 Ohio App.2d 559, 562 (1st Dist.1974);

see Eastep v. Eastep, 12th Dist. No. CA86-10-140, 1987 WL 7919 (Mar. 16, 1987) (if a transaction involves more than a mere cumulative promise to pay an already overdue indebtedness, money actually paid may constitute consideration); *but see Turnbull v. Brock*, 31 Ohio St. 649 (1877) (part payment of a debt already due is not a sufficient consideration for an agreement to extend the time for the payment of the residue).

{¶ 21} The record indicates the Baldwins were already contractually obligated to make monthly mortgage payments and presented no evidence these modification payments differed in any way from their previous obligation on the note. We are also aware the Baldwins alleged in their amended answer that they were presented with a "modification package" through counsel. However, the Baldwins did not offer the modification package to the trial court, failed to provide any evidence of this package in the record, and, therefore, we cannot consider it. See *City of Cleveland v. Moffie*, 8th Dist. Nos. 69395-69398, 1996 WL 517636 (Sept. 12, 1996); App.R. 9.

{¶ 22} And finally, the couple failed to submit any evidence that would indicate Wells Fargo engaged in subsequent conduct acknowledging the alleged modification or its mutual assent to the modification. *Thurston*, 6 Ohio St. at 6-7; *see Wells Fargo Bank, N.A. v. Smith*, 11th Dist. No. 2010-T-0051, 2012-Ohio-1672; *see also Bank of New York Mellon v. Ackerman*, 2nd Dist. No. 24390, 2012-Ohio-956 (fact that loan modification discussions were ongoing did not bar the bank from seeking foreclosure).

{¶ 23} Accordingly, we find summary judgment for Wells Fargo was appropriate and the Baldwins' single assignment of error is overruled.

{¶ 24} Judgment affirmed.

HENDRICKSON, J., concurs.

PIPER, J., dissents.

PIPER, J., dissenting.

{¶ 25} While an appellate court has no obligation to "root out" or develop an argument to support an appellant's assignment of error, the Baldwins have demonstrated that there are genuine issues of material fact regarding whether there was an oral modification to the mortgage contract. Therefore, I respectfully dissent from the majority opinion.

{¶ 26} The majority correctly states that an oral modification requires separate consideration. However, the Baldwins averred that as part of the oral modification, they agreed to move any arrearages on the note to the back of the loan, "extending the maturity date on the note." While the Baldwins may have had a pre-existing duty to pay according to the original terms of the loan, such consideration did not include an extended maturity date or any of the compounded fees and interest payments resulting from extending the maturity date.

{¶ 27} Even if the oral modification lacked any form of consideration, a "gratuitous oral agreement to modify a prior contract is binding if it is acted upon by the parties and if a refusal to enforce the modification would result in a fraud or injury to the promisee." *Pingue v. Durante*, 10th Dist. No. 95APG09-1241, 1996 WL 239642, *3 (May 9, 1996) citing *Smaldino v. Larsick*, 90 Ohio App.3d 691, 698 (11th Dist.1993) and *Thurston v. Ludwig*, 6 Ohio St. 1 (1856), syllabus.

{¶ 28} The record is clear that the Baldwins made the six payments and were presented with a loan modification "package." Wells Fargo does not dispute these facts. If Wells Fargo is permitted to foreclose on the Baldwins' home despite agreeing to modify the mortgage and accepting the six modified payments, there is a patently-clear injury to the Baldwins. As this court has stated, "although two parties enter into 'a contract, no limitation self-imposed can destroy their power to contract again.'" *Fields Excavating, Inc. v. McWane*,

Inc., 12th Dist. No. CA2008-12-114, 2009-Ohio-5925, ¶ 16, quoting *Beatty v. Geggenheim Exploration Co.*, 225 N.Y. 380, 381 (1919). "This is because parties to a contract possess, and never cease to possess, the freedom to contract even after the contract has been executed and what the parties have consented to do, they can later consent to abandon." *Fields Excavating* at ¶ 16.

{¶ 29} The majority overlooks the modification agreement referenced in both the answer and affidavit attached to the Baldwins' summary judgment response and requires the actual production of the modification package before willing to consider its existence. However, Wells Fargo does not deny the existence of a modification and the record indicates that the Baldwins acted upon the terms set forth in the modification. The majority suggests the payments or original consideration may not have been altered by the modification package. However, such is an impossibility when the terms of the modification required six specific payments and an extended maturation date. While the majority may require a greater showing of different or new consideration, "once the presence of such consideration is shown, a court will not inquire into the adequacy of the consideration except in cases of fraud or unfair treatment. Valuable consideration may consist of either a detriment to the promisee or a benefit to the promisor." *Software Clearing House, Inc. v. Intrack, Inc*., 66 Ohio App3d 163, 175 (10th Dist.1990). According to the modification and the extended payment term tacked on to the end of the loan, the Baldwins would be making payments, along with any compounded interest, after the terms of the original loan would have already expired. This is certainly a detriment to the Baldwins and a benefit to Wells Fargo. At a bare minimum, these comprise genuine issues of material fact going to the Baldwins' assertions. The Baldwins' affidavit demonstrates that Wells Fargo is not entitled to judgment as a matter of law.

{¶ 30} The fact that the parties acted upon the oral modification also raises genuine

issues of material fact regarding Wells Fargo's reliance on the parol evidence rule and the Statute of Frauds.

{¶ 31} Wells Fargo argues first that the parol evidence rule applies and therefore bars the court from considering any evidence past the original note and mortgage. However, the parol evidence rule is specific to oral negotiations or agreements made before or contemporaneous to the written agreement. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 2000-Ohio-7. "The rule prohibits the introduction of evidence of a prior or contemporaneous oral statement to vary the terms of a written agreement; however, it has no application to evidence regarding a subsequent oral modification of a written agreement or to the waiver of contractual terms by language or conduct." *Uebelacker v. Cincom Systems, Inc.*, 48 Ohio App.3d 268, 273 (1st Dist.1988).

{¶ 32} Regarding the Statute of Frauds, the doctrine of part performance can take a contract out of the Statute of Frauds in cases involving real estate and the promise to marry.

> Ohio courts have consistently recognized the doctrine of part performance as an exception to the statute of frauds. "When applicable, this doctrine operates to remove a contract from the operation of the statute of frauds. In order to remove a contract from the statute of frauds pursuant to the doctrine of part performance, the party that is relying on the agreement must have undertaken 'unequivocal acts * * * which are exclusively referable to the agreement and which have changed his position to his detriment and make it impossible or impractical to place the parties in statu [sic] quo.' "Thus, a party seeking to establish part performance must demonstrate that he has performed acts in exclusive reliance on the oral contract, and that such acts have changed his position to his prejudice."

(Internal citations omitted.) *Spectrum Benefit Options, Inc. v. Medical Mutual of Ohio*, 174 Ohio App.3d 29, 2007-Ohio-5562, ¶ 43 (4th Dist.).

{¶ 33} Based on this legal standard, there are genuine issues of material fact regarding the possible settlement alluded to in the Baldwins' amended answer in regard to the modification packet, and whether the Baldwins' six consecutive payments constitute

performance of the oral modification agreement.

{¶ 34} Construing the evidence in a light most favorable to the Baldwins, as I am required to do in a summary judgment action, the Baldwins "have now been presented" with the modification package, and such modification would represent the new note terms. Foreclosure upon the original note and mortgage without taking into consideration the modification would render foreclosure unwarranted. Or, the undisputed fact that the Baldwins paid six payments according to the terms set by Wells Fargo have demonstrated that they have performed acts in exclusive reliance on the oral modification agreement. The six payments according to the oral modification agreement have changed the Baldwins' position to their prejudice because they still face foreclosure after making six payments according to oral modification. One cannot help but wonder why the Baldwins would make the payments according to the modification agreement if Wells Fargo had not first agreed to stop foreclosure proceedings upon the successful completion of six payments. Either way, there are genuine issues of material fact that require litigation.

{¶ 35} I would also note my unease regarding whether the trial court properly considered the Baldwins' affidavit or motion in opposition to summary judgment. The trial court granted summary judgment, but appears to have done so through a judgment entry created by Wells Fargo. As noted by the majority, the trial court's entry made no reference to the Baldwins' brief opposing summary judgment or to the Baldwins' affidavit. The trial court did not analyze whether the loan modification process created any issue of fact. Regardless of the trial court's written decision, our review of a motion for summary judgment requires a de novo review. After reviewing the record and applicable case law, I believe that the Baldwins have fulfilled their burden to demonstrate that there are genuine issues of material fact that require additional litigation. As such, Wells Fargo is not entitled to judgment as a matter of law, and I dissent from the majority's holding to the contrary.