

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Nationstar Mortgage, LLC

Court of Appeals No. E-11-024

Appellant

Trial Court No. 2010 CV 0361

v.

Mark O. Fisher, et al.

DECISION AND JUDGMENT

Appellee

Decided: April 27, 2012

* * * * *

James S. Wertheim and Monica Levine Lacks, for appellant.

Daniel L. McGookey, Kathryn M. Eyster, and Lauren McGookey,
for appellee.

* * * * *

YARBROUGH, J.

I. INTRODUCTION

{¶ 1} Appellant, Nationstar Mortgage, LLC (“Nationstar”), appeals the judgment of the Erie County Court of Common Pleas which dismissed appellant’s complaint

without prejudice pursuant to Civ.R. 12(B)(6). For the reasons set forth below, we dismiss the appeal.

A. Facts and Procedural Background

{¶ 2} On May 7, 2010, Nationstar filed a complaint in foreclosure against appellee, Mark Fisher (“Fisher”), his spouse, if any, and the Erie County Treasurer. In its complaint, Nationstar alleged that Fisher signed a promissory note with a principal amount of \$96,754 with an interest rate of 6.875 percent, and a mortgage to secure the note for a property located in Monroeville, Ohio. Copies of the note and mortgage were attached to the complaint. Nationstar went on to claim that Fisher defaulted on the note, and that Nationstar now has an interest in the property. Specifically, as to the note, Nationstar stated, “10. [Nationstar] is an entity entitled to enforce the Note pursuant to Section 1303.31 of the Ohio Revised Code, and the Mortgage was given to secure the note.” Further, to demonstrate its interest in the mortgage, Nationstar claimed,

13. The terms and conditions of the Mortgage have been broken and become absolute, and [Nationstar] has declared the entire balance due and payable. All conditions precedent to [Nationstar’s] ability to enforce the mortgage have been satisfied, and [Nationstar] is entitled to foreclosure of the Mortgage.

{¶ 3} On July 1, 2010, Fisher filed an answer, counterclaim, and a jury demand. Fisher’s counterclaims alleged that Nationstar violated the Fair Debt Collection Practices Act, 15 U.S.C. Section 1692, et seq., participated in “civil conspiracy,” and is guilty of

malicious prosecution. Fisher also requested injunctive relief and punitive damages against Nationstar. On July 9, 2010, Fisher filed his first request for admissions, interrogatories, and production of documents.

{¶ 4} On July 26, 2010, Nationstar replied to Fisher’s counterclaims, and on August 20, 2010, Nationstar filed notice of its response to Fisher’s request for admissions, interrogatories, and for production of documents.

{¶ 5} Eventually, on December 16, 2010, Fisher filed his motion to dismiss pursuant to Civ.R. 12(B)(6), for “failure to state a claim on which relief may be granted.” Nationstar’s memorandum in opposition to Fisher’s motion to dismiss was filed on December 28, 2010, and the trial court’s order on Fisher’s motion was journalized on March 10, 2010. In its order, the trial court dismissed Nationstar’s complaint without prejudice “based on Plaintiff’s failure to allege in its complaint that it is the owner and holder of the subject note.” (Emphasis sic.)

B. Assignment of Error

The trial court improperly dismissed Nationstar’s Complaint in foreclosure on the ground that Nationstar did not allege that it was both the **holder and the owner** of the note – a requirement that is contrary to Ohio law. As established below, Ohio law is well settled that the *holder* of a note and mortgage is the real party in interest in a foreclosure action. Further, Ohio affords three categories of individuals (including holders) the

right to enforce an instrument, and does not require ownership for enforcement. (Emphasis sic.)

II. Analysis

A. Lack of Final and Appealable Order

{¶ 6} We must sua sponte address an issue not raised by the parties in the briefs.

{¶ 7} Appellate courts have jurisdiction to review only final orders or judgments of inferior courts in their districts. Ohio Constitution, Article IV, Section 3(B)(2); R.C. 2505.02. If an order is not final and appealable, this court has no jurisdiction to review the matter and the appeal must be dismissed.

{¶ 8} When determining whether a judgment is final and appealable, we engage in a two-step analysis. First, we determine whether the order is final within the requirements of R.C. 2505.02; second, if the order complies with R.C. 2502.02, we must decide if compliance with Civ.R. 54(B) is required. *Gen. Acc. Ins. Co. v. Ins. Co. of N. America*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989). *See also Noble v. Colwell*, 44 Ohio St.3d 92, 540 N.E.2d 1381 (1989), syllabus (“An order which adjudicates one or more but fewer than all the claims or the rights and liabilities of fewer than all the parties must meet the requirements of R.C. 2505.02 and Civ.R. 54(B) in order to be final and appealable”).

{¶ 9} It is the second prong of the test that applies to preclude review of the present case. Civ.R. 54(B) provides as follows:

When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, *the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay.* In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. (Emphasis added.)

{¶ 10} In the present case, Fisher filed a counterclaim against Nationstar. The trial court dismissed Nationstar’s claim, but did not rule on Fisher’s counterclaim, and did not include the determination pursuant to Civ.R. 54(B) that “there is no just cause for delay” in its order dismissing Nationstar’s complaint. Thus, Fisher’s action is still pending against Nationstar. Accordingly, we find that we lack a final appealable order to continue with this appeal, which must be dismissed.

III. CONCLUSION

{¶ 11} This appeal is dismissed for lack of a final and appealable order. Pursuant to App.R. 24, Nationstar is ordered to pay the costs of this appeal.

Appeal dismissed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.