

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Arlington Bank,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-41
BEE, Inc. et al.,	:	(C.P.C. No. 09CVE05-7799)
Defendants-Appellees,	:	(REGULAR CALENDAR)
Mark Berman,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 9, 2010

Mark Berman, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Mark Berman, appeals from a judgment of the Franklin County Court of Common Pleas in favor of plaintiff-appellee, Arlington Bank ("bank"), in the real estate foreclosure action plaintiff filed against defendant and BEE, Inc. (collectively "defendants"). Because the trial court had subject matter jurisdiction of the bank's case against defendants and personal jurisdiction over defendants, we affirm.

I. Facts and Procedural History

{¶2} On May 22, 2009 the bank filed a complaint seeking foreclosure against defendants. The complaint alleged that the parties executed a June 8, 2001 Adjustable Rate Mortgage Note and Open-End Mortgage with a Non-Owner Occupied Rider, a December 19, 2001 Home Equity Line of Credit and Open-End Mortgage, a March 15, 2004 Promissory Note Modification, and a March 25, 2005 Adjustable Rate Mortgage Note which replaced the two previous notes ("replacement note"); the June 8, 2001 and December 19, 2001 mortgages on the property at 2815 Avati Drive, Columbus, Ohio 43207, secured the replacement note. According to the complaint, Berman signed all of the documents in both his individual capacity and in his capacity as president of Bee, Inc. The bank alleged in its first cause of action that, as a result of defendants' failure to make monthly payments after December 2008, the amount due and owing on the replacement note was \$47,762.89, with unpaid interest of 3.94 percent and late fees of \$336.54. The bank further alleged in its second cause of action that because of defendants' default, the bank was entitled to have the mortgage foreclosed.

{¶3} The replacement note is a cognovit note bearing the warning required under R.C. 2323.13(D) and containing a warrant of attorney to confess judgment. The note also contains a clause, just above the signature line, stating that "[e]ach of the undersigned hereby warrants and represents to the holder hereof that the proceeds of this loan will be used by the undersigned for business or commercial purposes and will not be used for personal, family, education or household purposes." See also "Non-Owner Occupied Rider" attached to the June 8, 2001 mortgage (stating the "[b]orrower represents that (s)he does not intend to occupy the property described in the Security

Instrument as a principal residence"). Pursuant to the confession of judgment clause in the replacement note, an attorney on May 22, 2009 answered the complaint and confessed judgment on behalf of defendants under the first cause of action of the bank's complaint.

{¶4} After defendants filed a motion to dismiss, the judge originally assigned to the case sua sponte ordered the clerk of courts on July 10, 2009 to transfer the case to the commercial docket in accordance with Temporary Rules 1.03 and 1.04 of the Rules of Superintendence for the Courts of Ohio. Following the transfer, defendants on July 17, 2009 filed an "Appeal of Transfer of Case to Commercial Docket and Motion to Reverse." (R. 47-48.) Defendants argued the case should not have been transferred to the commercial docket because not only did the bank not file a motion to transfer with its initial pleading, but the case was not commercial in nature in view of defendants' claim that the property at issue was Berman's private residence.

{¶5} The judge assigned to the case on the commercial docket filed a journal entry denying defendants' motions to dismiss and to reverse, the court stated defendants failed to set forth grounds for dismissal. The court further concluded the gravamen of the case qualified it for the commercial docket as a "dispute between business entities and an individual relating to his business activities." With that premise, the court granted a cognovit judgment in favor of the bank, noting both that the replacement note complied with R.C. 2323.13 and that an attorney appeared and confessed judgment.

{¶6} Because defendants failed to file a responsive pleading, the bank filed a Civ.R. 55(A) motion for default judgment on November 19, 2009 on its second cause of action seeking foreclosure. On December 18, 2009, the judge of the commercial docket

entered a default judgment and decree in foreclosure for the bank. The judge stated that unless the defendants paid the bank the amounts owed within three days after the entry of the decree, an order of sale would issue to the county sheriff directing him to appraise and sell the property according to law. Defendants did not make the necessary payment.

{¶7} Defendant filed a notice of appeal on January 15, 2010, following it with a March 2, 2010 motion to stay the foreclosure pending full determination of defendant's appeal. On March 11, 2010, we granted defendant's motion to stay the execution of the trial court's judgment pending appeal, conditioned on defendant's posting a supersedeas bond in the amount of \$50,000 with the clerk of the trial court. The conditional stay specified that, "[a]bsent a posting with the bond, the sale currently scheduled for March 12, 2010 may proceed as scheduled."

{¶8} On March 11 at 4:58 p.m., defendant filed a "Bonded Promissory Note" ("BPN"); he also delivered a copy of the BPN to the Franklin County Sheriff's Office. Being advised the BPN did not constitute a supersedeas bond, the sheriff's office proceeded with the sale, where the bank bought the property. Defendant responded on March 12, 2010 with a motion seeking that the Sheriff of Franklin County and its employees be held in contempt of this court's March 11 stay order. Defendant also filed a Motion to Withdraw or Vacate Sale Prior to Confirmation because Bee, Inc. filed a bankruptcy petition. Being formally advised on March 23, 2010 that Bee, Inc. filed a petition in bankruptcy, we stayed defendant's appeal. Once Bee, Inc.'s bankruptcy petition was dismissed, we granted the bank's motion to reactivate.

II. Assignments of Error

{¶9} On appeal, defendant assigns the following errors:

Assignment of Error #1

Assigned trial court abused discretion and erred to Appellant's prejudice when it transferred the case on Appeal to a commercial docket court.

Assignment of Error #2

Assigned trial court abused discretion and erred to Appellants prejudice when it held ex parte communication with Plaintiff's counsel regarding elements of the subject case.

Assignment of Error # 3

Assigned trial court abused discretion and erred to Appellants prejudice when it failed to grant Appellants Motion to Dismiss for "failure to state a claim on which relief could be granted" (lack of subject matter and personal jurisdiction).

Assignment of Error # 4

Assigned trial court abused discretion and erred to Appellants prejudice when it determined the case before it was a commercial case, without legally cognizable evidence or facts in support of that determination.

Assignment of Error #5

The Commercial Docket court lacked discretion and erred to Appellants prejudice by accepting assignment of a consumer case into the commercial docket court where commercial dockets *special* jurisdiction extends only to commercial matters in controversy.

Assignment of Error # 6

The Commercial Docket court, without authority to act, abused discretion and erred to Appellants prejudice by issuing judgments and orders that, under law, were void ab initio, including cognovit judgment(s), with no cognovit confession of judgment on the record, denying Appellants Motion to Dismiss entered months before in the assigned

court while simultaneously entering Default judgment in foreclosure, where Appellant was not in Default.

Assignment of Error #7

The Commercial Docket court abused discretion and erred to Appellants prejudice by failing to vacate the void judgments and orders in foreclosure, issued no notice of hearing, held no hearings, relied on evidence not competent under Civ. Rule 11, heard no Parties testimony, acted without subject matter and personam jurisdiction, failed to follow the law, issued ex parte (void) judgment(s).

{¶10} Defendant's assignments of error raise one central contention. Defendant asserts the transfer of hisr case in the trial court to the commercial docket was improper because plaintiff's case was not commercial. Defendant contends, as a result, the commercial docket lacked jurisdiction over the case or the defendants, rendering the judgment the court issued void ab initio.

III. The Appeal – Jurisdiction

{¶11} Defendant primarily contends the commercial docket in the trial court lacked both subject matter jurisdiction over the bank's case and lacked personal jurisdiction over defendants, rendering the court's judgment void. See *Beegle v. Beegle*, 10th Dist. No. 07AP-24, 2007-Ohio-4314, ¶15 (stating "[i]t is fundamental that before judgment can be entered against a party, a court of this state must be vested with both personal jurisdiction over the parties and subject matter jurisdiction over the involved claim").

{¶12} The Ohio Constitution created the courts of common pleas and granted them statewide subject matter jurisdiction. *Cheap Escape Co. v. Haddox, LLC*, 120 Ohio St.3d 493, 2008-Ohio-6323, ¶7; Section 4(A) and (B), Article IV, Ohio Constitution. The Franklin County Court of Common Pleas is a court of general jurisdiction and possesses

original jurisdiction in all civil cases in which the sum or matter in dispute exceeds the exclusive jurisdiction of county courts. R.C. 2305.01. See R.C. 1907.03(A) (granting county courts exclusive jurisdiction in civil cases where the amount in controversy does not exceed \$500 but prohibiting county courts from exercising jurisdiction over cases where the amount in controversy exceeds \$15,000). The complaint the bank filed in the trial court alleged the principal balance due on the loan was \$47,762.89, with unpaid interest of 3.94 percent as of January 1, 2009 and late fees of \$336.54. The Franklin County Court of Common Pleas had subject matter jurisdiction over the bank's complaint against defendants.

{¶13} Because, however, the bank's complaint involved a cognovit note on which the bank sought a cognovit judgment, the common pleas court also needed subject matter jurisdiction pursuant to R.C. 2323.13. R.C. 2323.13(A) states that a judgment on a "warrant of attorney shall be confessed in a municipal court having jurisdiction in such territory, provided the court has jurisdiction over the subject matter; otherwise, judgment may be confessed in any court in the county where the maker or any of several makers resides or signed the warrant of attorney." The replacement note states it was executed in Franklin County. The Franklin County Court of Common Pleas thus also had subject matter jurisdiction pursuant to R.C. 2323.13(A).

{¶14} Ohio courts may exercise either specific or general personal jurisdiction over a defendant depending on the nature of the contacts the defendant has with the forum state. *Kauffman Racing Equip., LLC v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, ¶46. Specific jurisdiction "applies when 'a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum.' "

Id. at ¶47, quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall* (1984), 466 U.S. 408, 414, 104 S.Ct. 1868, 1872. General jurisdiction exists where a defendant has such continuous and systematic contacts with the forum state that "the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state." Id. at ¶46, quoting *Bird v. Parsons* (C.A.6, 2002), 289 F.3d 865, 873.

{¶15} Within those parameters, "Ohio courts may exercise jurisdiction over a person who is a resident of Ohio," because a resident of Ohio, or an Ohio corporation, possess the requisite continuous and systematic contacts with this state. *Prouse, Dash & Crouch, L.L.P. v. DiMarco*, 116 Ohio St.3d 167, 2007-Ohio-5753, ¶5. Ohio courts thus have personal jurisdiction over defendant and his company Bee, Inc., because defendant is an Ohio resident and Bee, Inc. is an Ohio corporation. Defendant's jurisdictional contentions thus reduce to a single argument: the commercial docket lacked jurisdiction over the bank's action because the case does not involve a commercial dispute.

{¶16} Section 5(A)(1), Article IV of the Ohio Constitution provides the Supreme Court of Ohio with general superintendence over all the courts in the state. In accord with the powers the constitution granted it, the Supreme Court enacted the Rules of Superintendence for the Courts of Ohio, rules that apply to the courts of common pleas. Sup.R. 1(A). On May 6, 2008 the Supreme Court approved Temporary Rules 1.01 through 1.11 of the Rules of Superintendence for the Courts of Ohio, effective July 1, 2008.

{¶17} The temporary rules authorize certain courts of common pleas to participate in a commercial docket pilot project. Temp.Sup.R. 1.02(A). In general, cases on the

commercial docket must be civil cases that are commercial in nature. Pertinent to this appeal, the thrust of the case must relate to "[d]isputes between or among two or more business entities or individuals as to their business or investment activities relating to contracts * * * including without limitation * * * [t]he purchase, * * * or a security interest in, commercial property, whether tangible, intangible personal, or real property." Temp.Sup.R. 1.03(A)(5)(g). The commercial docket judge is not to accept a civil case into the commercial docket if the gravamen of the case relates to individual residential real estate disputes, including foreclosure actions on such property. Temp.Sup.R. 1.03(B)(12).

{¶18} The superintendence rules addressing case assignments to judges on the commercial docket are not jurisdictional. Rather, they are only "housekeeping rules which are of concern to the judges of the several courts but create no rights" in the parties to the action. *State v. Bristow*, 4th Dist. No. 07CA3186, 2009-Ohio-523, ¶¶38-40, quoting *State v. Gettys* (1976), 49 Ohio App.2d 241, 243 (internal quotation marks omitted). The commercial docket in the Franklin County Court of Common Pleas was and remains part of the common pleas court and has both subject matter jurisdiction over this case and personal jurisdiction over the defendants as does any other judge of the court. Defendant's jurisdictional argument lacks merit.

{¶19} Moreover, the bank's action against defendants properly was assigned to the commercial docket. R.C. 2323.13, addressing cognovit notes, applies various factors to determine whether a document evidences a consumer loan, since courts have no jurisdiction after January 1, 1974 to render a judgment based on a warrant of attorney to confess judgment contained in an instrument which is a consumer loan or consumer transaction. R.C. 2323.13(E). R.C. 2323.13(E)(1) defines a consumer loan as "a loan to a

natural person and the debt incurred is primarily for a personal, family, educational, or household purpose." See *Shore W. Constr. Co. v. Sroka* (1991), 61 Ohio St.3d 45, 48 (determining R.C. 2323.13(E)(1) "sets forth essentially four elements in the definition of consumer loan: (1) there must be a 'loan'; (2) to a 'natural person'; (3) by which a debt is incurred; (4) for primarily personal, family, educational or household purposes)."

{¶20} Here, while the complaint does not specifically allege the cognovit note did not arise from a consumer loan, the replacement note attached to the complaint contains a provision stating the proceeds of the loan will be used for business or commercial purposes and will not be used for personal, family, education or household purposes. In concluding the bank's case appropriately was assigned to the commercial docket, the court noted from the complaint and its attachments that (1) the dispute was "between business entities and an individual relating to his business activities," (2) the Non-Owner Occupied Rider attached to the June 8, 2001 mortgage stated the borrower did not intend to occupy the property as a principal residence, and (3) the language from the Replacement Note stated the proceeds would be used for business or commercial purposes. Citing those factors, the judge concluded "this case does not appear, as Mr. Berman purports, to be an individual real estate foreclosure action that is typically not accepted into the Commercial Docket." (Judgment entry, 4.)

{¶21} Apart from the factors the trial court cited, the attachments to the complaint reveal defendant signed the notes in his individual capacity and as an officer of Bee, Inc. His so signing the documents further undermines, under the second prong of *Shore W.*, defendant's contentions that the loans evidence a consumer transaction. See *Brown-Graves Co. v. Caprice Homes, Inc.*, 9th Dist. No. 20689, 2002-Ohio-945 (determining the

loan at issue was not a consumer loan pursuant to *Shore W.* because "the cognovit noted [sic] was signed by Kenneth Thornburg as president of Caprice-Homes, Inc., and Kenneth and Molly Thornburg, in their individual capacities").

{¶22} Defendant also contends the original judge erred in sua sponte transferring the bank's case against defendants to the commercial docket because defendants were given no opportunity for notice or a hearing, findings of fact or conclusions of law, or their endorsement. Defendant further asserts the transfer violated Temp.Sup.R. 1.04(B)(1) which requires the attorney filing a case qualifying for the commercial docket to include in the initial pleading a motion to transfer the case to that docket.

{¶23} While the bank's attorneys did not file such a motion, the omission is not determinative, as Temp.Sup.R. 1.04(B)(1) is not the only mechanism for transferring a case to the commercial docket. Temp.Sup.R. 1.04(B)(3) provides that if the gravamen of the case qualifies for the commercial docket, and "no attorney representing a party in the case files a motion for transfer of the case to the commercial docket, and if the case is assigned to a non-commercial docket judge, the judge shall sua sponte request the administrative judge to transfer the case to the commercial docket." Here, the case qualified for the commercial docket, the attorney filing the case did not submit a motion to transfer, the case was assigned to a non-commercial docket judge, and that judge sua sponte requested the administrative judge to transfer the case to the commercial docket. (Order to Transfer Case to Commercial Docket, R. 31-32.) The administrative judge approved the transfer on July 10, 2009. The common pleas court thus complied with the rule, which does not require notice and a hearing, findings of fact or conclusions of law, or defendants' knowledge or endorsement.

{¶24} In the final analysis, the trial court had subject matter jurisdiction over this case and personal jurisdiction over the defendants. The original trial judge properly transferred the case to the commercial docket, as the case dealt with a non-consumer loan and dispute concerning a security interest in investment property. Accordingly, we overrule defendants' assignments of error.

IV. Motions

A. Defendant's March 12, 2010 Order to Withdraw or Vacate Sale Prior to Confirmation

{¶25} Defendant moved this court to withdraw or vacate the foreclosure sale of the property due to the bankruptcy petition filed by Bee, Inc. On March 23, 2010, we stayed this appeal pending release from the United States Bankruptcy Court. On April 2, 2010, the United States Bankruptcy Court for the Southern District of Ohio dismissed Bee, Inc.'s bankruptcy petition for non-compliance with that court's Notice of Deficient Filing. We thus vacated our stay on August 9, 2010 and granted the bank's motion to reactivate the case. Because the bankruptcy petition was dismissed, defendant's motion to vacate the foreclosure sale due to the bankruptcy proceedings is denied.

B. Defendant's March 18, 2010 Demand for Judgment

{¶26} Defendant requests that we issue judgment in his favor pursuant to App.R. 18(C) because the bank failed to file a responsive brief. App.R. 18(C) outlines the consequences of a failure to file an appellate brief.

{¶27} According to the rule, if an appellee fails to file its brief within the time provided under the rule, or within the time as extended, the appellee will not be heard at oral argument except by permission of the court upon a showing of good cause submitted

in writing prior to argument. Further, in determining the appeal, the court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action.

{¶28} Defendant is not entitled to judgment in his favor because the bank failed to file a brief. The bank's failure to file a brief means it was not heard at oral argument and we may, but are not compelled to, accept defendant's statement of the facts and issues as correct. Because defendant's brief and assigned errors do not sustain a reversal of the trial court's judgment, defendant's argument under App.R. 18(C) is unpersuasive and his motion is denied.

C. The Bank's March 5, 2010 Motion to Dismiss Appellant's Appeal

{¶29} The bank asks that we dismiss defendant's appeal pursuant to Loc.App.R. 9(E), for failure to comply with the time requirement in App.R. 18(A). Although Loc.App.R. 9(E) states that failure to comply with the appellate rules shall be deemed good cause for dismissal of an appeal, in this pro se appeal we decline to find defendants' eight-day delay in filing warrants dismissing their appeal. The bank's motion is denied.

D. Defendant's March 12, 2010 Motion for Contempt

{¶30} Defendant's motion for contempt requests that we find the Franklin County Sheriff's office and its employees, its agents, or both in contempt, asserting the sheriff's office employees disobeyed our order to stay the foreclosure sale, conditioned on defendant's filing a \$50,000 supersedeas bond. The motion was referred to a magistrate for consideration apart from the merits of defendant's appeal.

{¶31} Similarly, defendant's requests for various writs will be addressed separately from his appeal.

V. Disposition

{¶32} Having overruled all of defendant's assignments of error, we affirm the judgment of the trial court.

Motions denied; judgment affirmed.

TYACK, P.J., and SADLER, J., concur.
