[Cite as *Chenault v. Deutsche Bank Natl. Trust Co.*, 2015-Ohio-1850.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Danny Chenault et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 14AP-669 (C.P.C. No. 12CV-6237)
Deutsche Bank National Trust Co. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on May 14, 2015

The Behal Law Group LLC, and *John M. Gonzales*, for appellants.

Manley Deas Kochalski LLC, and *Matthew J. Richardson*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Plaintiffs-appellants, Danny Chenault and Linda McCreary, appeal the Franklin County Court of Common Pleas decision granting motions for summary judgment and for default judgment filed by defendants-appellees, Deutsche Bank National Trust Co. et al. Appellants also appeal the trial court's denial of their motion for summary judgment. For the following reasons, we affirm the decision of the trial court.

{¶ 2} Appellants present three errors for our consideration:

> I. The trial court erred when it allowed Deutsche Bank to prevail on a time-barred foreclosure claim that hinged on disputed facts and that was precluded as res judicata.
>
> II. The court erred in granting summary judgment to Defendants on Plaintiffs' unjust enrichment claims.

III. Deutsche Bank should not have been permitted to belatedly plead a mandatory counterclaim that it did not file on time.

{¶ 3} In 2004, appellants Danny Chenault and Linda McCreary entered into a note and mortgage, originated by IndyMac Bank, pertaining to their residence located in New Albany, Ohio. Late in 2006, IndyMac became insolvent and ceased operation, transferring a portion of its assets to Deutsche Bank National Trust. In November 2006, Deutsche Bank filed a foreclosure action after appellants defaulted on the note. Deutsche Bank received a default judgment on January 30, 2007, but moved to vacate that judgment and dismiss the foreclosure action on February 18, 2009. The purported date of the assignment of the mortgage to Deutsche Bank is December 14, 2006, so the filing was premature. From 2007 through much of 2012, payments were made on the mortgage.

{¶ 4} On February 7, 2007, Linda McCreary filed for Chapter 13 bankruptcy. IndyMac Bank F.S.B., the loan servicer, filed a claim with the bankruptcy trustee and filed an objection to confirmation of the Chapter 13 debt repayment plan. In May 2010, a Home Affordable Modification Agreement was executed between appellants and IndyMac Mortgage Services, a division of One West Bank which brought the loan current.

{¶ 5} On March 23, 2011, appellants filed a complaint against Deutsche Bank and One West Bank F.S.B. alleging negligence, fraud, breach of contract, and a truth in lending violation among other charges, but appellants voluntarily dismissed that complaint in August 2011.

{¶ 6} On May 15, 2012, appellants filed an amended complaint. In response, Deutsche Bank and One West Bank F.S.B. filed a motion to dismiss. The trial court granted a partial motion to dismiss on June 13, 2013, allowing only appellants' quiet title and unjust enrichment claims to remain. On July 19, 2013, appellants moved for judgment by default for appellees' failure to file a responsive pleading within the time required. In response, appellees moved for leave to file an answer instanter and deny judgment by default. On August 19, 2013, the trial court denied the motion for default judgment and granted leave to appellees to file an answer instanter.

{¶ 7} In 2012, appellants defaulted on the loan after the 2010 modification agreement had brought the loan current. On November 7, 2012, Deutsche Bank gave notice of possible acceleration of the loan and foreclosure if appellants failed to cure the

default. On October 1, 2013, appellees moved for leave to file an amended answer and counterclaim for foreclosure and the trial court granted leave. On October 8 2013, appellants moved for summary judgment on their claims of unjust enrichment and quiet title. In response, on April 25, 2014, appellees moved for summary judgment and default judgment on the foreclosure action. On August 22, 2014, the trial court granted appellees' motion for summary judgment on the claims of quiet title and unjust enrichment, and granted default judgment on the foreclosure claim. Appellants timely appealed the trial court's decision.

{¶ 8} Civ.R. 56(C) states that summary judgment shall be rendered forthwith if:

> [T]he pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, 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. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion * * *.

{¶ 9} Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 65-66 (1978).

{¶ 10} When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

{¶ 11} Civ.R. 56(E). Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992).

{¶ 12} De novo review is well established as the standard of review for summary judgment. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). We stand in the shoes of the trial court and conduct an independent review of the record applying the same summary judgment standard. As such, we must affirm the trial court's judgment if any of the grounds raised by the moving party, at the trial court's level, are found to support it, even if the trial court failed to consider those grounds. *See Dresher v. Burt*, 75 Ohio St.3d 280 (1996)*; Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995).

{¶ 13} Appellants first argue that the trial court erred in three different ways in allowing Deutsche Bank to prevail on its foreclosure claim: (1) the claim was time-barred; (2) Deutsche Bank failed to file a claim in the bankruptcy case; and (3) the facts are in dispute as to whether the note was properly assigned to Deutsche Bank. We address first whether there are any facts in dispute about whether the note and mortgage were properly assigned to Deutsche Bank and whether Deutsche Bank now properly holds these instruments.

{¶ 14} Deutsche Bank submitted an affidavit with a copy of the note. (R. 175, Appellees' Motion for Summary Judgment, Rebecca Marks' affidavit, exhibit A.) Appellants do not contest that Deutsche Bank possesses the note. The note is a "blank endorsement" payable to the bearer. The note, therefore, may be negotiated and transferred. R.C. 1303.25(B). Deutsche Bank is the holder of the note since the bank is in possession of the negotiable instrument made payable to the bearer. R.C. 1301.201(B)(21)(a). " 'Person entitled to enforce' an instrument means any of the following persons: (1) The holder of the instrument; (2) A nonholder in possession of the instrument who has the rights of a holder; (3) A person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 1303.38 or division (D) of section 1303.58 of the Revised Code." R.C. 1303.31(A). Deutsche Bank is therefore entitled to enforce the note.

{¶ 15} Deutsche Bank also submitted a copy of the mortgage, assignment of the mortgage, loan modification agreement, payment history, and demand letter giving notice of possible acceleration and foreclosure. (R. 175, Appellees' Motion for Summary Judgment, Rebecca Marks affidavit, exhibits B, C, D, E, and F.) Appellants argue that the December 14, 2006 assignment is invalid due to a number of errors. Stephen Broviak, who Deutsche Bank claims executed the assignment, could not confirm that the signature on the assignment was his, stating that he did not recall signing the document, and the stamped name "Steve Broviak," that appears by the signature line, is not how he signs his name; rather, he uses the name "Stephen." (R. 99, Affidavit of Stephen Broviak.) The notary for the assignment has no record of the assignment or any document for Steve Broviak in his journal of notarial acts and states that there is no notary seal. (R. 98, Affidavit of Ryan Weik.) Appellants made the argument that the signature of the assignment is invalid in its May 9, 2014 Memorandum Contra to appellees' Motion for Summary Judgment.

{¶ 16} However, even if the December 2006 assignment of the mortgage is fraudulent, under Ohio Law, Deutsche Bank can still enforce the note and the mortgage. Pursuant to R.C. 1309.203(G), "[t]he attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien." "Thus, by operation of law, transfer of the mortgage occurs at the point the note is negotiated." *United States Bank Natl. Assn. v. Gray*, 10th Dist. No. 12AP-953, 2013-Ohio-3340, ¶ 35. Even if the assignment of the mortgage was invalid, Deutsche Bank would still be entitled to enforce the mortgage because the "physical transfer of the note endorsed in blank, which the mortgage secures, constitutes an equitable assignment of the mortgage, regardless of whether the mortgage is actually (or validly) assigned or delivered." *Deutsche Bank Natl. Trust Co. v. Najar*, 8th Dist. No. 98502, 2013-Ohio-1657, ¶ 65; *Gray* at ¶ 32. Thus, whether the assignment was fraudulent is not relevant in this case since it does not affect summary judgment. *Turner v. Turner*, 67 Ohio St.3d 337 (1993) (Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment).

{¶ 17} Appellants also argue that Deutsche Bank is barred by res judicata either for not participating in the bankruptcy in 2007, or for not being a party to the loan modification in 2010. We have already determined that Deutsche Bank as processor of the note has the right to enforce both the note and the mortgage. Further, Deutsche Bank is seeking foreclosure based on appellants' 2012 default on the loan well after the bankruptcy had concluded. Therefore, Deutsche Bank's motions for summary judgment and motion for default judgment are not barred by res judicata.

{¶ 18} Appellants argue that Deutsche Bank's motions are barred by the six-year statute of limitations from the time when the note was accelerated in June 2006. "[A]n action to enforce the obligation of a party to pay a note payable at a definite time shall be brought within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date." R.C. 1303.16(A). Appellants argue that even if Deutsche Bank can enforce the note, they are time barred since the note was accelerated in 2006, more than six years before Deutsche Bank filed for foreclosure on April 25, 2014. As stated, the loan was in default in 2012 and Deutsche Bank notified appellants of the default and the intent to accelerate in a letter dated November 7, 2012. (R. 175, Appellees' Motion for Summary Judgment, Rebecca Marks affidavit, exhibit F.) Thus, the foreclosure action was brought within six years of when the note was accelerated. Deutsche Bank's motion is not time barred. To find otherwise would not encourage banks and borrowers to work out mortgages once a note has been accelerated. The foreclosure is only based on the 2012 default. We also note that the foreclosure action would have been blocked while an automatic stay in Linda's bankruptcy was in effect.

{¶ 19} Having determined that Deutsche Bank can enforce the note and that motion for default judgment is not time barred or precluded by res judicata, we find the foreclosure claims were properly granted.

{¶ 20} The first assignment of error is overruled.

{¶ 21} In their second assignment of error, appellants argue that the trial court erred in granting summary judgment against their claim of unjust enrichment. Appellants argue that Deutsche Bank did not have the right to collect payments. Appellants argue that the assignment of the note and mortgage from IndyMac was invalid

referring to the signatures on the assignment and the missing notary seal. We review the trial court's decision on this issue de novo.

{¶ 22} "The elements of unjust enrichment or quasi-contract are: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." *Saraf v. Maronda Homes, Inc.*, 10th Dist. No. 02AP-461, 2002-Ohio-6741, ¶ 10, citing *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183 (1984). However, when a written contract between the parties addresses the matter in dispute, the contract governs the parties' performance, unless the contract is void due to illegality, fraud, or otherwise cannot govern the relationship. *Saraf* at ¶ 12.

{¶ 23} We have found that the note between Deutsche Bank and the Appellants is valid and thus governs the relationship. Appellants' motion for summary judgment on unjust enrichment was properly denied.

{¶ 24} The second assignment of error is overruled.

{¶ 25} Appellants' argue in their third assignment of error, that the trial court improperly permitted Deutsche Bank to file a mandatory counterclaim of foreclosure after time had expired.

{¶ 26} On August 19, 2013, the trial court denied appellants' motion for default judgment and granted leave to appellees to file an answer instanter. On October 1, 2013, appellees moved for leave to file an amended answer and counterclaim for foreclosure. The trial court granted leave on December 20, 2013, and Deutsche Bank filed its answer and counterclaim on March 10, 2014.

{¶ 27} Appellants argue that the appellees' foreclosure action is a compulsory counterclaim governed by Civ.R. 13(A) while Deutsche Bank claims that the foreclosure action issue is governed by Civ.R. 15(A).

{¶ 28} As noted above, appellants argue that counterclaim of foreclosure was mandatory and governed by Civ.R. 13(A) which provides in pertinent part: "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." "The purpose of Civ.R. 13(A) requiring a party to file a counterclaim is to enable a court to settle all related claims in

one action and thereby avoid a wasteful multiplicity of litigation on claims which arise from a single transaction or occurrence." *State ex rel. Massaro Corp. v. Court of Common Pleas of Franklin Cty.*, 65 Ohio App.3d 428, 430 (10th Dist.1989).

{¶ 29} Deutsche Bank's foreclosure action clearly arises out of the same transaction and occurrence but it sought leave of the trial court to amend its claim as permitted by Civ.R. 13(F), which provides as follows: "When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment."

{¶ 30} Civ.R.15(A) provides that a party may amend its pleading by leave of court and "[t]he court shall freely give leave when justice so requires." Civ.R. 15(A). Whether to grant a motion for leave to amend a pleading is within the discretion of the trial court. *Wilmington Steel Products, Inc. v. Cleveland Electric Illuminating Co.*, 60 Ohio St.3d 120 (1991). While Civ.R. 15(A) allows for liberal amendment, motions to amend pleadings should be refused if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party. *Turner v. Cent. Loc. Sch. Dist.*, 85 Ohio St.3d 95, 99 (1999). The trial court granted Deutsche Bank leave pursuant to Civ.R. 13(F) and 15(A). The trial court did not abuse its discretion as justice would require this claim of foreclosure to be a part of this litigation. We take into account that no trial had taken place, and extreme likelihood that a foreclosure claim would be forthcoming and that appellants point to no undue delay or prejudice suffered and do not argue that appellees' delay was in bad faith.

{¶ 31} The third assignment of error is overruled.

{¶ 32} We deny appellees' February 5, 2015 motion to strike a portion of appellants' reply brief.

{¶ 33} Having denied the motion to strike and having overruled the three assignments of error, the decision of the Franklin County Court of Common Pleas is affirmed.

Motion to strike denied; judgment affirmed.

SADLER and DORRIAN, JJ., concur.