[Cite as *Deutsche Bank Natl. Trust Co. v. Germano,* 2011-Ohio-3122.]

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR FIRST FRANKLIN MORTGAGE LOAN TRUST 2006-FF8, ASSET BACK CERTIFICATES, SERIES 2006-FF8,	:	**MEMORANDUM OPINION**
	:	**CASE NO. 2010-P-0081**
Plaintiff-Appellee,	:	
- vs -	:	
JOHN GERMANO et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Portage County Court of Common Pleas Case No. 2007 CV 01092

Judgment: Appeal dismissed.

Rebecca R. Shrader, Manley, Deas & Kochalski, L.L.C., P.O. Box 165028, Columbus, OH 43216-5028 (For Plaintiff-Appellee).

John Germano, pro se, P.O. Box 4832, Akron, OH 44310 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} On November 10, 2010, appellant, John K. Germano, filed a pro se notice of appeal. Mr. Germano appeals an October 12, 2010 judgment of the Court of Common Pleas of Portage County, in which the trial court granted summary judgment and a decree of foreclosure to appellee, Deutsche Bank National Trust Company, as Trustee for First Franklin Mortgage Loan Trust 2006-FF8, Asset Backed Certificates Series 2006-FF8 (“Deutsche Bank”).

{¶2} Upon review of the record, this court noticed that Mr. Germano's counterclaim, filed on November 19, 2007, had not been dismissed. On May 11, 2010, we, *sua sponte*, ordered Mr. Germano to show cause as to why this appeal should not be dismissed for lack of a final appealable order. On June 6, 2011, Mr. Germano filed his response in which he acknowledged that the appealed order is not, in fact, a final appealable order. He thus concedes the jurisdictional issue.

{¶3} According to Section 3(B)(2), Article IV of the Ohio Constitution, a judgment of a trial court can be immediately reviewed by an appellate court only if it constitutes a "final order" in the action. *Germ v. Fuerst*, 11th Dist. No. 2003-L-116, 2003-Ohio-6241, ¶3. If a lower court's order is not final, then an appellate court lacks jurisdiction to review the matter and the matter must be dismissed. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am*. (1989), 44 Ohio St.3d 17, 20. "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United* States (1945), 324 U.S. 229, 233 (superceded on other grounds). In Ohio, a judgment must satisfy the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B), to be final and appealable.

{¶4} Civ.R. 54(B) provides that:

{¶5} "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."

{¶6} It is well established that in a matter where multiple claims and/or parties are involved, a judgment entry that enters final judgment as to one or more, but fewer than all, of the pending claims is not a final appealable order in the absence of Civ.R. 54(B) language stating that "there is not just reason for delay [.]" *Girard v. Leatherworks Partnership,* 11th Dist. No. 2001-T-0138, 2002-Ohio-7276, ¶17, citing *Ensell v. Mtge. Serv. Corp.* (Aug. 11, 2000), 11th Dist. No. 99- A-0051, 2000 Ohio App. LEXIS 3660, *4. See, also, *Kessler v. Totus Tuus, L.L.C.*, 11th Dist. No 2007-A-0028, 2007-Ohio-3019, ¶7.

{¶7} In the instant matter, while the trial court granted Deutsche Bank's motion for summary judgment on its claims (Deutsche Bank did not seek summary judgment on Mr. Germano's counterclaim), it is clear that the trial court's order did not dispose of Mr. Germano's counterclaim, which is therefore still pending. Although the October 12, 2010 judgment entry does contain Civ.R. 54(B) language, "the mere incantation of the required language does not turn an otherwise non-final order into a final appealable order." *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 96.

{¶8} It has been observed that, notwithstanding a deferential standard to be used when considering the finality of an order containing Civ.R. 54(B) language, "courts of appeals have rejected trial courts' invocation of Rule 54(B), particularly when there is

much overlap between the claims adjudicated and the claims that remain pending and where the court of appeals believes that the fractured appellate process is not in the interest of 'sound judicial administration.'" Painter & Pollis, Ohio Appellate Practice (2010-2011 Ed.), 50, Section 2:8. A trial court may abuse its discretion in certifying a Civ.R. 54(B) claim for appeal when the facts are intertwined with an unresolved counterclaim. *Harness v. D. Jamison & Assocs.* (June 25, 1997), 1st Dist. No. C-960735, 1997 Ohio App. LEXIS 2719, *4, citing *Noble*, supra.

{¶9} Mr. Germano asserts counterclaims that are very much intertwined with the foreclosure action brought against him by Deutsche Bank. He asserts, inter alia, claims of breach of the mortgage contract and failure to credit his account accurately. If Mr. Germano were to prevail on these counterclaims, his liability to Deutsche Bank would be affected and foreclosure of the property may be an inappropriate remedy. Considerable overlap exists between the foreclosure claim already adjudicated and the counterclaims that remain pending. Therefore, adjudication of all claims between the two parties best serves judicial economy and justice. *See Harness* at *4. Fracturing the appellate process, in this particular case, is not in the interest of "sound judicial administration." *Penn v. Esham*, 4th Dist. No. 07CA3170, 2008-Ohio-434, ¶12.

{¶10} Moreover, the Supreme Court of Ohio has held that "[i]n an action upon a note secured by a mortgage, the defendant is entitled to interpose all counterclaims and defenses he may have against the creditor." *Marion Production Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, 270 (internal citations omitted). See, also, *Harness*, supra. "It is reasonably well-settled in Ohio that a court which has before it both a claim and a

counterclaim cannot enter a final judgment in favor of either party until both claims have been determined." Id.

{¶11} Based on the foregoing analysis, we find that no final, appealable order was issued and we lack jurisdiction to consider this appeal.

{¶12} Appeal dismissed.

DIANE V. GRENDELL, J.,

THOMAS W. WRIGHT, J.,

concur.