[Cite as *Wells Fargo Bank, N.A. v. Jarvis,* 2009-Ohio-3055.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

WELLS FARGO BANK, N.A., ETC.,	)	
	)	CASE NO. 08 CO 30
PLAINTIFF-APPELLEE,	)	
	)	
- VS. -	)	O P I N I O N
	)	
PAUL JARVIS, JR., et al.,	)	
	)	
DEFENDANTS-APPELLANTS.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 07CV958.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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For Defendants-Appellants:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: June 8, 2009

VUKOVICH, P.J.

¶{1} Defendants-appellants Paul and Kimberly Jarvis appeal the decision of the Columbiana County Common Pleas Court which granted summary judgment to plaintiff-appellee Wells Fargo Bank without ruling on appellants' counterclaim. Appellants' sole argument on appeal is that the trial court should have adjudicated the counterclaim. However, appellants never sought leave to amend their answer to add the counterclaim. Moreover, the entry of summary judgment effectively disposed of and thus mooted the content of the counterclaim. As such, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} In April 2005, appellants took out a $140,000 adjustable rate mortgage in favor of Option One Mortgage Corporation to purchase a home in Hanoverton, Ohio. As is typical, the mortgage provided that default would occur if any installment was not paid when due and that acceleration of all sums secured would be due and payable at the option of the lender. The monthly payments were due on the first of the month, with late charges to begin if the entire payment was not received by fifteen days after the due date. The first interest rate adjustment occurred in May 2007 with a June 2007 effective date; this caused the interest rate to increase from 9.25% to 12.25% and the monthly payment to increase from $1,151.75 to $1,457.76.

¶{3} Contrary to appellants' suggestion, their problems with timely payments began almost from the start of the loan. As background, we note that in just the first year, the following defaulting events occurred: the August 1, 2005 payment was not tendered until August 22; the September payment was not made until October; October's payment was not made until November; November's payment was not made until December; December's payment was late; and the March 2006 payment was not made until April.

¶{4} We further note that in 2007, appellants' payments were behind by nearly two months. In June of 2007, appellants made no payment. At the beginning

of July, they made the May 1 payment. In mid-July, they apparently attempted to make a payment for June, but their check was returned and the amounts credited had to be debited from their mortgage account. Then, a partial June payment was made at the end of August. No amounts were tendered for the July, August or September payments.

¶{5} On September 20, 2007, Wells Fargo filed a complaint in foreclosure as trustee for Option One, who thereafter assigned its interest in the mortgage and promissory note to Wells Fargo on October 1, 2007. The complaint alleged that $138,046.47 was due plus interest of $12.25% from June 1, 2007. Appellants answered without counterclaiming.

¶{6} On November 9, 2007, Wells Fargo filed a motion for summary judgment. They attached the promissory note, the mortgage, the document evidencing the assignment of the mortgage, and an affidavit of the assistant secretary of Option One, who also signed the assignment of mortgage. The affidavit noted that Option One services the loan for Wells Fargo and confirmed that the affiant has personal knowledge of the account, that the account is in default, that there is due a principal balance of $138,046.47 with 12.25% interest from June 1, 2007. A print-out of the payment history concerning the account was attached to the affidavit.

¶{7} On December 7, 2007, appellants filed a motion for extension of time to conduct discovery and to supplement their opposition brief, which they also filed that day. The brief in opposition argued that Wells Fargo had no right to file suit on September 20, 2007 because the mortgage assignment was not made until October 1, 2007 (without addressing the fact that Wells Fargo filed the complaint as a trustee for Option One). The brief suggested that a genuine issue of material fact existed on whether Wells Fargo should have filed for foreclosure because appellants had received an October 17, 2007 letter, which reset the interest rate and stated, “Thank you for continuing to be a valued customer of Option One Mortgage Corporation.”

¶{8} Appellants’ brief also urged that a genuine issue of material fact existed concerning the interest rate, which they believed was incorrectly adjusted at the first rate adjustment. Finally, appellants claimed that a genuine issue of material fact existed as to whether one or more payments were incorrectly applied. They opined

that the interest rate and payment issues generated the within controversy. Attached to the brief in opposition was the affidavit of Paul Jarvis, which merely stated that he believed: the interest rate had been incorrectly calculated; funds had been incorrectly applied; and, the listed plaintiff had no right to bring the action.

¶{9} On December 12, 2007, Wells Fargo filed their reply brief. First, they noted that the letter appellants received is obviously merely a standard rate adjustment letter. Wells Fargo filed suit as a trustee for Option One, and they emphasized that since the filing, Option One had assigned its rights in the mortgage to Wells Fargo. They also pointed out the prior affidavit from the agent of Option One, who signed the assignment to Wells Fargo and who acknowledged that Option One was still the servicing agent for Wells Fargo.

¶{10} As to the interest rate calculation, Wells Fargo pointed to language in the note advising that the rate may change on May 1, 2007, the rate could be adjusted every six months thereafter, the change would be effective the month after the adjustment, and the adjustment would be based upon the named major index. Wells Fargo then concluded that Paul Jarvis's general statement that the rate was miscalculated did not meet his reciprocal burden in summary judgment since he did not say how the rate had been miscalculated. This argument is also the basis for Wells Fargo's response to appellants' allegation of a misapplied payment since Paul Jarvis did not explain what payment had been misapplied, or how.

¶{11} The court also initially refused to grant summary judgment. However, the trial court granted appellants' request for an extension to conduct discovery and to supplement the brief in opposition, granting appellants until March 3, 2008.

¶{12} On March 5, 2008, appellants filed a counterclaim without seeking leave of court. The counterclaim mentioned the aforementioned October 17, 2007 letter, an October 2, 2007 letter containing reinstatement figures, and plaintiff's counsel's January 2008 advisement that appellants may be eligible for certain programs to avoid foreclosure. The statement of facts in the counterclaim alleged that Wells Fargo had no right to file the complaint when it did, that payments were not properly applied to real estate taxes, and that interest charges were not properly calculated. Based upon these allegations, their first count alleged the foreclosure action was not properly

instituted, and their second count alleged that the suit was maliciously instituted without probable cause.

¶{13} On March 17, 2008, a telephone conference was held, and the court set a non-oral hearing on the summary judgment motion for June 27, 2008 without objection. Nevertheless, appellants did not supplement their response to the summary judgment motion. On March 28, 2008, Wells Fargo filed a reply to the counterclaim, raising the fact that appellants never sought leave of court to file the counterclaim.

¶{14} On June 30, 2008, the trial court entered summary judgment in favor of Wells Fargo, finding that $138,046.47 was due on the note plus interest of 12.25% per annum as of June 1, 2007. The court ordered sale by foreclosure if payment was not rendered within three days. Appellants filed timely notice of appeal on July 30, 2008.

ASSIGNMENT OF ERROR NUMBER ONE

¶{15} Appellants' sole assignment of error provides:

¶{16} "THE TRIAL COURT'S DECISION TO ADOPT THE PROPOSED JUDGMENT ENTRY SUBMITTED BY PLAINTFF-APPELLEE CONSTITUTES REVERSIBLE ERROR."

¶{17} In their Statement of the Case, appellants note that Wells Fargo provided the court with a proposed entry at the time of its November 9, 2007 motion for summary judgment. They state that in June 2008, the court used this entry and thus failed to mention the counterclaim. Appellant's Statement of Facts is merely a copy of their counterclaim. Thereafter, the "argument" section of appellants' assignment of error is supported by two sentences, only one of which contains anything resembling actual argument in support of the assignment. Specifically, appellants propose the following argument for our review:

¶{18} "It is axiomatic under Ohio law that a properly pending Counterclaim must be adjudicated by the Trial Court. All Courts can take judicial notice of this fact."

¶{19} The reference to a pending counterclaim raises the initial issue of whether the summary judgment entry is a final appealable order where a counterclaim was filed (without seeking leave) and was not specifically addressed in the entry. Notably, the court's entry does not contain language under Civ.R. 54(B), which applies in a multiple-claim action where fewer than all the claims are adjudicated. Specifically,

if a court enters final judgment as to some but not all of the claims and/or parties, the judgment is a final appealable order only upon the express determination that there is no just reason for delay. Civ.R. 54(B).

¶{20} As appellee points out, appellants attempted to bring a compulsory counterclaim, which must be contained in the answer. See Civ.R. 13(A) (arises out of the transaction or occurrence that is the subject matter of the opposing party's claim). Pursuant to Civ.R. 13(F):

¶{21} "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."

¶{22} Moreover, a party may only amend his answer as a matter of course within twenty-eight days after it is served. Civ.R. 15(A). "Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party." Id. Here, appellants did not seek leave of court and did not obtain written consent of the other party.

¶{23} Appellee, in responding to appellants' argument that the court erred in failing to adjudicate the counterclaim, argues that where an untimely counterclaim is filed without seeking leave of court, there is not a properly pending counterclaim for the court to rule on. Appellee notes that this court once held that a counterclaim filed without seeking leave does not preclude the plaintiff's voluntary dismissal of the entire case because the defendant never filed a valid counterclaim. *Hampton v. Ahmed*, 7th Dist. No. 02BE66, 2005-Ohio-1115, ¶20-22 (also noting that court cannot abuse its discretion in failing to grant leave to file counterclaim where leave had never been requested). We did not find any final appealable orders issues in *Ahmed*. This suggests that if a defendant failed to seek leave to file a counterclaim, then an order granting summary judgment to the plaintiff, which order does not address the counterclaim, is a final order as no valid counterclaim remains pending.

¶{24} There is also a well-established line of analysis that is applicable here. That is, even if all the claims are not expressly adjudicated by the trial court, if the effect of the appealed judgment renders moot the remaining claims, then the order can

be final and appealable. *General Accident Ins. Co. v. Insurance Co. of N.Am.* (1989), 44 Ohio St.3d 17, 21.

¶{25} "[A] judgment in an action which determines a claim in that action and has the effect of rendering moot all other claims in the action as to all other parties to the action is a final appealable order pursuant to R.C. 2505.02, and Civ.R. 54(B) is not applicable to such a judgment." *Wise v. Gursky* (1981), 66 Ohio St.2d 241, 243. This is true even if the order does not specifically address or expressly dispose of the other claim. Id. (entry as to plaintiff's complaint determined the action and prevented a judgment on the third-party complaint). See, also, *Central Oh. Transit Auth. v. Timson* (1998), 132 Ohio App.3d 41, 46-47 (summary judgment finding defendant to be a vexatious litigator essentially rendered moot defendant's counterclaim).

¶{26} Moreover, it has been stated that a failure to rule on appellant's pending motion for leave to amend a counterclaim (which did not even exist here) allows a presumption that the motion was overruled when the court granted summary judgment for appellee. *Columbus Mtge., Inc. v. Morton*, 10th Dist. No. 06AP-723, 2007-Ohio-3057, ¶66.

¶{27} Here, the counterclaim was based upon the same allegations raised in appellants' brief in opposition to summary judgment: that a letter implied they were not in foreclosure; that Wells Fargo was not the proper party to file the complaint at the time; that the interest rate was miscalculated; and that one or more payments were incorrectly applied. Thus, granting summary judgment to appellee based upon these issues constituted a ruling on the items contained in the counterclaim so as to make them either adjudicated or moot. Any other allegations are based on damages resulting from these claims and are thus moot upon the summary judgment as well. Consequently, even if there were no issues concerning appellants' failure to seek leave to file a counterclaim, all pending claims are considered to have been adjudicated.

¶{28} For all and any of the reasons set forth above, the entry of summary judgment is a final appealable order notwithstanding the trial court's failure to address the counterclaim or the lack of Civ.R. 54(B) language. See *General Accident,* 44 Ohio St.3d at 21; *Wise*, 66 Ohio St.2d at 243. This analysis also disposes of appellant's

sole argument that the trial court erred by failing to expressly adjudicate a pending counterclaim.

¶{29} That is, *whether leave to file the counterclaim is presumed to have been denied or whether there was no pending counterclaim due to the failure to seek leave or whether the summary judgment implicitly ruled upon and mooted the counterclaim, there is no error by the court in failing to explicitly mention the counterclaim.*

¶{30} Furthermore, this court may disregard an assignment of error presented for review if the party raising it fails to argue the assignment separately in the brief, as required under App.R. 16(A). App.R. 12(A)(2). Pursuant to App.R. 16(A)(7), appellant's brief shall contain an argument containing the contentions of appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies.

¶{31} Appellants' brief states, "[i]t is axiomatic under Ohio law that a properly pending Counterclaim must be adjudicated by the Trial Court." To support an assignment of error with this sole sentence constitutes a "lack of briefing." See *Hawley v. Ritley* (1988), 35 Ohio St.3d 157, 159 ("lack of briefing" under assignment of error justifies disregarding it). As appellee points out, the brief is also deficient in that it cites no law in support of this statement or any other statement. See, e.g., *State v. Tri-State Group, Inc.*, 7th Dist. No. 03BE61, 2004-Ohio-4441, ¶25 (appellants have not provided us with a legal argument demonstrating why summary judgment was inappropriate); *Meerhoff v. Huntington Mtge. Co.* (1995), 103 Ohio App.3d 164, 169 (court disregards assignment of error where argument is mere two sentences and no legal authorities are presented to support argument). The only other sentence in appellant's argument, stating that we can take judicial notice of the law, does not solve this problem.

¶{32} Finally, as appellee points out, appellants' brief does not set forth any argument concerning appellee's summary judgment motion. That is, the only claim in appellants' brief is that the trial court erred in issuing an order which ignored its counterclaim; essentially a one-sentence argument.

¶{33} "If an argument exists that can support this assignment of error, it is not this court's duty to root it out." *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, ¶94, citing *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349. "Errors not argued in a brief will be regarded as having been abandoned." *Loukinas v. Roto-Rooter Services Co.*, 167 Ohio App.3d 559, 2006-Ohio-3172, ¶9. See, also, *Helman v. EPL Prolong, Inc.* (2000), 139 Ohio App.3d 231, 240-241.

¶{34} Notably, when appellee's brief pointed out this issue of our limited review, appellants then cut-and-pasted their brief in opposition to summary judgment into their reply brief. However, a reply brief is not the place for briefing new substantive arguments that were not raised in appellant's brief. See App.R. 16(C).

¶{35} Otherwise, an appellee would be better off not filing a brief at all as they are the party who tipped off appellants about their failures. Additionally, to hold otherwise, would result in a total deprivation of appellee's right to respond to what appellants end up arguing is the main issue on appeal.

¶{36} Thus, we do not permit reply briefs to rectify omissions in an appellate brief; this is especially so in a civil case. See *Scibelli v. Pannunzio*, 7th Dist. No. 02CA175, 2003-Ohio-3488, ¶11; *Julian v. Creekside Health Ctr.*, 7th Dist. No. 03MA21, 2004-Ohio-3197, ¶81. See, also, *State v. Clark* (1988) 38 Ohio St.3d 252, 258 (even in a criminal case, the Supreme Court has held that appellate court did not err in refusing to address issue raised only in reply brief which claimed to clarify assignment of error but actually raised an entirely new assignment of error).

¶{37} For the foregoing reasons, appellants' assignment of error is overruled, and the judgment of the trial court is hereby affirmed.

Waite, J., concurs.
DeGenaro, J., concurs.