

[Cite as *Huntington Natl. Bank v. Dixon*, 2015-Ohio-1735.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101273

HUNTINGTON NATIONAL BANK

PLAINTIFF-APPELLEE

vs.

DEBRA DIXON, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-06-585873

BEFORE: Stewart, J., E.T. Gallagher, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: May 7, 2015

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MELODY J. STEWART, J.:

{¶1} This is an appeal from a summary judgment entered in a foreclosure action against defendant-appellees Penny and James Dixon (the “Dixons”) on their conspiracy counterclaim against plaintiff-appellee Huntington National Bank. The counterclaim alleged that Huntington conspired with another bank to deprive them of service of Huntington’s complaint in foreclosure as a means of preventing them from asserting their lien rights over the property for which foreclosure was sought. Although the Dixons raise four assignments of error, the primary focus of their appeal is that the court wrongfully denied them discovery relating to Huntington’s attempts at service by mail and that the court lacked jurisdiction to render judgment against Huntington because the Dixons dismissed their claims against Huntington before summary judgment was entered. We affirm the court’s judgment.

{¶2} Huntington National Bank brought this action on a promissory note and sought foreclosure on property owned by defendant Debra Dixon (the Dixons’ daughter). Also named as defendants were defendant Third Federal Savings and Loan and the Dixons, all of whom claimed to have a lien on the property. When certified mail service to the Dixons went unclaimed, Huntington served the complaint by publication. The Dixons did not answer the complaint and the court entered a default judgment against them. The default judgment was later vacated by agreement of the parties. Answering the complaint, the Dixons filed a counterclaim against Huntington alleging that it violated the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. 1961, et seq., by conspiring against them to deny them proper service of the complaint.¹

¹ The Dixons brought a conspiracy cross-claim against Third Federal and a third party complaint for conspiracy against the law firm that represented both Huntington and Third Federal. They later dismissed those claims without prejudice.

{¶3} A discovery dispute ensued in which the Dixons sought information from the bank's law firm concerning its decision to pursue service by publication. When Huntington filed a motion for summary judgment on the counterclaim, the Dixons offered a Civ.R. 56(F) affidavit and motion to compel discovery claiming that their inability to obtain discovery prevented them from offering evidence to oppose the motion for summary judgment. The court denied the motion to compel discovery so the Dixons voluntarily dismissed their non-compulsory counterclaim against the bank without prejudice. And to the extent that their counterclaim might be considered "compulsory," the Dixons asked the court to dismiss it without prejudice. The court ruled that the Dixons' counterclaim was a compulsory counterclaim and refused to dismiss it. It then granted Huntington's motion for summary judgment. That judgment became final upon the court's adoption of the magistrate's decision giving Huntington's lien priority over the Dixons' lien. This appeal followed.

{¶4} We first consider the Dixons' second assignment of error because it is potentially dispositive: they argue that the voluntary dismissal of their claims against Huntington was effective as to all claims, depriving the court of jurisdiction to proceed, thus rendering the summary judgment a nullity.

{¶5} As we will address in more detail in our discussion of the Dixons' first assignment of error, their RICO claim against Huntington was premised on the idea that Huntington conspired with its attorneys to attempt service by mail at an address that it knew was not a valid address for the Dixons. According to the Dixons, this allowed Huntington to serve the complaint by publication, thus ensuring that the Dixons would not answer, resulting in a default judgment entered against them. To prove that allegation, the Dixons wished to depose the attorney handling the case for Huntington and inquire into his thought process regarding service

of the complaint. After Huntington filed a motion for summary judgment, the Dixons claimed an inability to respond because they had yet to be provided with the requested discovery. When it became clear that the court would not compel the attorney to provide any more discovery, the Dixons took two steps: the first was a voluntary dismissal without prejudice of all non-compulsory counterclaims against Huntington; the second was a motion for voluntary dismissal without prejudice of all compulsory counterclaims against Huntington.

{¶6} Huntington asked the court to strike the motion to dismiss the counterclaim on grounds that the Dixons essentially filed a single RICO claim that was a compulsory counterclaim. The characterization of the counterclaim as either compulsory or non-compulsory was important because the Dixons were likely aware that if they voluntarily dismissed a compulsory counterclaim, that dismissal would be with prejudice. *See Sec. Natl. Bank & Trust Co. v. Reynolds*, 2d Dist. Greene No. 2007 CA 66, 2008-Ohio-4145, ¶ 32; *Ward v. Cent. Invest. LLC*, 1st Dist. Hamilton No. C-100081, 2010-Ohio-6114, ¶ 21. Hence, their desire that the court dismiss the compulsory counterclaim without prejudice. The court ruled that the counterclaim was compulsory and denied the motion to dismiss on that basis.

{¶7} We agree with Huntington that the Dixons filed a single RICO counterclaim. As pleaded, the counterclaim stated: “[t]his is a claim” under the RICO act. The counterclaim alleged that Huntington “combined and conspired” with Third Federal and the law firm that represented both banks “to conduct or participate, directly or indirectly,” in the affairs of the law firm’s enterprise “through a pattern of racketeering activity, involving mail fraud, wire fraud, bank fraud, and money laundering predicates.”

{¶8} There were no other identifiable counterclaims filed against Huntington, so the question before the court at the time the Dixons filed their notice of dismissal was whether the

RICO counterclaim was a compulsory counterclaim. This court answered this question in the affirmative in *Dixon v. Huntington Natl. Bank*, 8th Dist. Cuyahoga No. 100572, 2014-Ohio-4079, holding that the Dixons' RICO claims against Huntington were compulsory counterclaims under Civ.R. 13(A). That appeal arose in Cuyahoga C.P. No. CV-13-806584, a case that the Dixons filed immediately after filing their notice of voluntary dismissal in this case, and without waiting for the court to determine whether their RICO claim was a compulsory counterclaim. Huntington filed a motion to dismiss in CV-13-806584 on grounds that the counterclaim was raised in the present case (Cuyahoga C.P. No. CV-06-585873) and was a compulsory counterclaim. The court granted the motion and the Dixons appealed from that ruling. Analyzing the claim under Civ.R. 13(A), the panel found that the RICO claim met both prongs of the logical relation test: the claim (1) existed at the time of Huntington's pleading in the foreclosure action, and (2) arose out of the transaction that is the subject matter of the foreclosure action. *Id.* at ¶ 34. The panel thus held that the trial judge in CV-13-806584 did not err by dismissing the counterclaim pursuant to Civ.R. 13(A). *Id.* at ¶ 36.

{¶9} The claims against Huntington in CV-13-806584 were identical to those alleged in this case, so the law-of-the-case doctrine applies. The law-of-the-case doctrine provides that the “decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.” *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404, 1996-Ohio-174, 659 N.E.2d 781, quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984).

{¶10} With this court having held that the Dixons' RICO counterclaims were compulsory counterclaims that could only be brought in the foreclosure action, the Dixons are precluded from asserting any argument in this case that its RICO counterclaim was not a compulsory

counterclaim that was subsumed within their notice of voluntary dismissal. It follows that the Dixons did not voluntarily dismiss their counterclaim against Huntington, so the court could continue to exercise jurisdiction over the matter.

{¶11} The Dixons next argue that the court abused its discretion by denying their motion to compel discovery and their motion for sanctions on Huntington's alleged discovery violations.

The motion to compel discovery was premised on Huntington's providing for deposition a witness whom the Dixons maintain was "utterly unprepared to testify" about what Huntington knew regarding the facts giving rise to the Dixons' counterclaim. The Dixons maintain that by denying the motion with Huntington's motion for summary judgment pending, the court left them with no alternative but to seek permissive dismissal of their compulsory counterclaim against Huntington.

{¶12} The discovery dispute between the Dixons and Huntington has consumed this foreclosure action. The genesis of the discovery dispute is Huntington's resorting to service by publication after attempts at certified mail service of the complaint in foreclosure failed. The Dixons did not answer the complaint following service by publication and the court entered a default judgment against them. As a sheriff's sale of the property was about to begin, the Dixons claimed that there had been a failure of service against them and sought to vacate the order of sale on that basis. The court denied the motion but informed the Dixons that it would entertain a motion for partial relief from judgment and a motion to plead. The Dixons appealed from that ruling and we held that the court erred by failing to hold a hearing before granting the default judgment against them. *See Huntington Natl. Bank v. Dixon*, 8th Dist. Cuyahoga No. 90414, 2008-Ohio-5250, ¶ 18-19.

{¶13} Following remand, the Dixons sought to compel the production of documents from Huntington’s attorneys relating to the decision to perfect service by publication. Huntington opposed that request on grounds that it involved confidential communications or protected work product. After an in camera review of the single document provided by Huntington, the court ordered that it be provided to the Dixons and that Huntington’s attorney “be prepared to offer testimony limited” on the contents of the document. On appeal from that ruling, we affirmed in part, finding that the Dixons demonstrated a “substantial need” for some of the entries contained in the document and that the court did not err by compelling production of those entries. *Huntington Natl. Bank v. Dixon*, 8th Dist. Cuyahoga No. 93604, 2010-Ohio-4668, ¶ 18. But we held that the Dixons failed to establish good cause for the production of other entries that were unrelated to the issue raised in their counterclaim and cross-claim and the court abused its discretion by ordering those entries produced. *Id.* at ¶ 19.

{¶14} Following the second remand, the parties filed a joint motion to vacate the decree of foreclosure against the Dixons — a decree that found that all necessary parties, including the Dixons, had been properly served and were properly before the court. The parties agreed to ask the court to vacate only that part of the foreclosure decree relating to the Dixons and leave intact the judgment against Debra Dixon. By so agreeing, the Dixons agreed to accept service of Huntington’s complaint and Third Federal’s counterclaim. The Dixons also agreed that they “shall waive all objections relating to service.”

{¶15} The Dixons then answered Huntington’s complaint and filed their counterclaim against Huntington. Huntington filed a motion for summary judgment on two grounds: first, that the Dixons’ agreement to waive all claims regarding service of process in their agreement to vacate the foreclosure against them mooted their counterclaim for conspiracy to deprive them of

adequate service of process; second, that the Dixons had never established their lien to Debra Dixon's property, notably failing to attach any documents to their counterclaim and cross-claim as required by Civ.R. 10(D).

{¶16} The Dixons responded to the motion for summary judgment by filing a motion to compel discovery and a notice under Civ.R. 56(F) that they were unable to respond to Huntington's motion for summary judgment because they had been denied discovery. The motions were premised on Huntington's failure to provide for deposition a representative with sufficient knowledge of why it attempted to serve the complaint on the Dixons by mail at an address that it should have known was incorrect, thus allowing it to resort to service by publication. Huntington asserted that the motion to compel discovery was untimely because the Dixons waited two months to challenge the deponent. Huntington noted that the Dixons earlier sought an extension of time in which to respond to its motion for summary judgment with the representation that they anticipated filing a motion for sanctions relating to Huntington's offering that particular witness — but the Dixons did not seek sanctions as promised.

{¶17} The court denied the motion to compel discovery, refused to stay the matter for additional discovery, and found insufficient justification for the Dixons' claim that they were unable to offer affidavits in support of their opposition to the motion for summary judgment. The court ordered the Dixons to submit their brief in opposition to the motion for summary judgment within 14 days. On the date established by the court as the deadline for responding to the motion for summary judgment, the Dixons filed their notice/motion for voluntary dismissal against Huntington.

{¶18} The Dixons maintain that Huntington violated Civ.R. 30(B)(5), that requires a corporation or partnership named as a deponent to choose one or more of its "proper employees"

to testify and that the person “so designated shall testify to matters known or available to the organization.” They argue that the employee selected by Huntington had no first-hand knowledge of the matters that were the subject of his deposition and, crucially, was not given access to a supervisor’s “defense log” that recorded information that might be related to accounts in litigation and to communications that the supervisor might have with outside attorneys. The Dixons also argue that the witness had no information on the subject matter of the deposition — the thought process used to decide the method of service and what steps Huntington took to ensure that it had the proper address for service.

{¶19} Courts have broad discretion over discovery matters. *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, ¶ 18. And we agree with Huntington that the court did not abuse its discretion by refusing to grant the motion to compel discovery on grounds that Dixons had “ample time” to conduct discovery in this case.

{¶20} As our recitation of the facts shows, the Dixons’ counterclaim against Huntington had been pending for well over one year before the Dixons sought to compel discovery. At no point during that time had the Dixons acted with the kind of alacrity in proceeding with the counterclaim that would justify their later position that Huntington was willfully impeding discovery. It was only when faced with imminent summary judgment did the Dixons actually seek to compel discovery.

{¶21} Huntington filed its motion for summary judgment on February 15, 2013. On March 8, 2013, the Dixons sought a 14-day extension of time to respond to the motion for summary judgment. They claimed that Huntington had not been forthcoming with discovery, particularly by offering for deposition a witness who they claimed was “woefully ill-prepared to

testify about critical facts in this case.” They told the court that they anticipated filing a motion to compel discovery and a request for sanctions on March 11, 2013. The court granted the motion for an extension of time to March 22, 2013. On March 22, 2013, the Dixons filed a second request for an extension of time and included counsel’s Civ.R. 56(F) affidavit explaining that the Dixons could not properly respond to the motion for summary judgment because Huntington provided an inadequate witness for deposition. The motion told the court that “[t]hese discovery matters are the subject of a Motion to Compel, for Sanctions, and other Relief being filed contemporaneously herewith.” The court granted in part the motion for an extension of time, setting an April 1, 2013 deadline for the Dixons’ response to the motion for summary judgment. The court indicated that it would not entertain any additional motions for an extension of time.

{¶22} The Dixons did not “contemporaneously” file a motion to compel discovery with the request for an extension of time in which to respond to Huntington’s motion for summary judgment as promised. Instead, they waited until April 1, 2013 (the deadline established by the court for a response to Huntington’s motion for summary judgment) to file their motion to compel discovery. In that same motion, the Dixons told the court that they were unable to respond to the motion for summary judgment, again citing the inadequacy of the person Huntington provided for deposition.

{¶23} With respect to the motion to compel discovery, the court ruled that the Dixons had been provided “ample time” to conduct discovery, particularly with respect to their ability to conduct a deposition of Huntington’s representative. The court ruled that the Dixons “failed to provide sufficient reasons for their inability to present affidavits in support of their opposition of the pending motion for summary judgment and for a Civ.R. 56(F) extension of time to obtain the

affidavits.” The court granted the Dixons an additional 14 days in which to respond to Huntington’s motion for summary judgment. The Dixons did not file a response to the motion for summary judgment, but instead sought to dismiss their counterclaim against Huntington without prejudice so that they could refile the counterclaim in a new action.

{¶24} Civ.R. 37 motions “filed after a discovery deadline are tardy.” *State ex rel. Rhodes v. Chillicothe*, 4th Dist. Ross No. 12CA3333, 2013-Ohio-1858, ¶ 22, citing *Steele v. Mara Ents., Inc.*, 10th Dist. Franklin No. 09AP-102, 2009-Ohio-5716, ¶ 33. The discovery deadline had long-since passed by the time the Dixons filed their motion to compel discovery. Indeed, they waited to file the motion to compel discovery until the date established by the court for filing a response to the motion for summary judgment — a date that had been twice extended because the Dixons complained that they could not complete discovery. Rather than seek immediate intervention from the court as a means of resolving what they believed to be Huntington’s failure to provide proper discovery when granted the extensions of time, the Dixons appeared content to wait the matter out. What purpose this waiting served is unclear — they had already informed the court that a motion to compel discovery would be forthcoming, yet the promised motion did not materialize until the last possible moment. Although not specifically stated by the court, its comment that the Dixons had been provided ample time to conduct discovery could easily support the conclusion that the untimely motion to compel discovery lacked sincerity and may simply have been an attempt to delay the prosecution of the counterclaim. In any event, we have no reason to find that the court abused its discretion by denying the tardy motion to compel discovery.

{¶25} The third assignment of error complains that the court erred by denying the Dixons’ request for findings of fact and conclusions of law on a decision issued February 11,

2014. The Dixons argue that the magistrate made “bare-bones” findings that simply referred to them having “some claim” on the subject property and that their claim was inferior to the liens established by Third Federal and Huntington. They maintain that the magistrate should have made a finding regarding the priority and amount of their lien.

{¶26} Huntington correctly notes that at no point have the Dixons asserted a claim based on their alleged lien against the property owned by Debra Dixon. Nor, for that matter, have the Dixons established by proof the priority of their alleged lien or even the dollar amount that they are allegedly owed by Debra Dixon. The Dixons’ counterclaim against Huntington was premised on an alleged conspiracy to deny them service of the complaint in foreclosure related to a purported lien. The Dixons’ arguments that the magistrate failed to specify the value of an unstated lien is without merit.²

{¶27} Finally, the Dixons’ fourth assignment of error complains that the court failed to give them leave to file supplemental objections to the magistrate’s decision.

{¶28} Civ.R. 53(D)(3)(B)(i) requires objections to a magistrate’s decision to be filed within 14 days of the decision. There is no provision in the rule allowing a party to file provisional objections subject to supplementation at a later time,³ nor did the Dixons

² We are aware that in *Bank of Am., N.A. v. Flowers*, 10th Dist. Franklin No. 14AP-451, 2014-Ohio-5249, the Tenth District Court of Appeals found as non-final language similar to that used by the magistrate in this case to the effect that there would be “no finding at this time” as to the lien asserted by a party “except to note that” the claimed lien would be “transferred to the proceeds derived from the sale of said premises, after the payment of costs of the within action, taxes due and payable and the amount found due Plaintiff, and the same is hereby ordered continued until further order.” *Id.* at ¶ 15. That case is not applicable, however, because the Dixons have not pursued any claim relating to their alleged lien.

³ There is a rule in domestic relations division cases that allows a party to file preliminary objections when a transcript of the proceedings is unavailable before the expiration of the allowed time for filing objections to a magistrate’s decision. Loc.R. 27.1(c) of the Domestic Relations Division of the Cuyahoga County Court of Common Pleas states: “A party filing objections that require a transcript must file his or her objections within the fourteen (14) day time period set forth above, and must include notice of intent to file supplemental objections after the transcript has been filed, for which leave will automatically be granted.”

characterize their objections as “preliminary” because they needed to secure a transcript of the hearing in order to formulate objections to the evidence. In fact, the only basis for seeking an extension of time was that their counsel was engaged in a trial in a different case.

{¶29} The magistrate released his decision on February 11, 2014. The Dixons filed their “preliminary” objections on February 25, 2014. In those objections, the Dixons informed the court that they “will supplement these preliminary objections within seven days.” Eight days later the Dixons sought an extension of time in which to file supplemental objections. The court denied the motion for an extension of time, noting that the Dixons failed to request an additional period of time in which to file objections before the time period for filing objections had lapsed.

{¶30} The court did not abuse its discretion by refusing to grant additional time for the Dixons to file “supplemental” objections to the magistrate’s decision. Apart from the motion for an extension of time being untimely, the initial objections gave no reason why the Dixons would supplement their initial objections at a later date. Without giving the court any basis for understanding why they did not file all of their objections at once, the decision to deny the motion for an extension of time was not arbitrary or irrational.

{¶31} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the court of common pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to
Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

EILEEN T. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR