

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

CHACO CREDIT UNION, INC., :
 :
Plaintiff-Appellee, : CASE NO. CA2011-05-089
 :
- vs - : OPINION
 : 3/19/2012
 :
MARY ELLEN PERRY, Deceased, et al., :
 :
Defendants-Appellants. :

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2010-04-1627

Stephen D. Miles, Vincent A. Lewis, 18 West Monument Avenue, Dayton, Ohio 45402, for plaintiff-appellee

Jeffrey W. Stueve, 12 West South Street, Lebanon, Ohio 45036, for defendant-appellant

RINGLAND, J.

{¶ 1} Defendant-appellant, Tonya Sue Payne, appeals from a decision of the Butler County Court of Common Pleas denying her motion to dismiss and granting summary judgment in favor of plaintiff-appellee, Chaco Credit Union, Inc., in a foreclosure action. For the reasons outlined below, we affirm.

{¶ 2} On April 12, 2006, Mary Ellen Perry executed a promissory note in favor of Chaco Credit Union in the principal amount of \$56,000. The note was secured by a

mortgage on property located at 1102 Sipple Avenue in Hamilton, Ohio. Payne, Perry's daughter, signed the note and mortgage as Perry's power of attorney.

{¶ 3} On October 5, 2009, Perry passed away. Payne continued to make payments on behalf of her mother. However, upon learning of Perry's death in January 2010, Chaco Credit Union refused to accept any additional payments from Payne. According to the record, no estate was opened following Perry's death.

{¶ 4} On April 12, 2010, Chaco Credit Union filed a "Complaint in Foreclosure and Marshaling of Liens" naming various defendants including Payne, Perry, and Perry's "[u]nknown heirs, legatees, devisees, executors, executrixes, administrators, administratrixes, and assignees." As part of its complaint, Chaco Credit Union alleged that it was the holder of the note secured by the mortgage that was in default for \$47,541.98. Specifically, Chaco Credit Union requested the trial court to find its mortgage to be a valid lien upon the property and order the mortgage be foreclosed, the property be sold, and the proceeds distributed.

{¶ 5} On May 20, 2010, Payne, appearing pro se, filed an answer providing a generalized explanation of the events following her mother's death. Thereafter, upon obtaining counsel, Payne filed a "Limited Notice of Appearance and Limited Answer" alleging her mother was not properly served since no estate had been opened following her death and that there was no fiduciary to accept service.

{¶ 6} On October 26, 2010, Chaco Credit Union filed a motion for default judgment and a motion for summary judgment. Chaco Credit Union also filed an affidavit in support of its motion for summary judgment alleging the mortgage payments on the note were in arrears as exhibited by attached "Exhibit 1." However, besides documents entitled "Note and Disclosure Statement" and "Mortgage" labeled "Exhibit A" and "Exhibit B," respectively, Chaco Credit Union's affidavit did not contain any documents labeled "Exhibit 1."

{¶ 7} On November 9, 2010, Payne filed a motion in opposition to summary

judgment. Payne later filed a motion to dismiss. The trial court subsequently denied Payne's motion to dismiss and granted Chaco Credit Union's motion for default judgment and motion for summary judgment on March 30, 2011.

{¶ 8} Payne now appeals from the trial court's decision denying her motion to dismiss and granting summary judgment to Chaco Credit Union, raising two assignments of error for review.

{¶ 9} Assignment of Error No. 1:

{¶ 10} THE TRIAL COURT ERRED TO THE DETRIMENT OF [PAYNE'S] INTEREST IN THE REAL PROPERTY BY GRANTING JUDGMENT ON A COMPLAINT THAT FAILED TO NAME ALL NECESSARY PARTIES.

{¶ 11} In her first assignment of error, Payne claims the trial court erred by denying her motion to dismiss. In support of this claim, Payne argues that "the suit sub judice is a nullity and must be vacated" since the suit was brought against her deceased mother as opposed to her mother's unopened estate. In essence, Payne argues that Chaco Credit Union was required to file suit against Perry's estate, something that has not been opened following her death, as a necessary party in this foreclosure action. We disagree.

{¶ 12} It is a generally accepted principle that a decedent may not be a party to an action. *Hicks v. Estate of Mulvaney*, 2nd Dist. No. 22721, 2008-Ohio-4391, ¶ 26, citing *Baker v. McKnight*, 4 Ohio St.3d 125, 127 (1983). However, contrary to Payne's claim alleging Perry's unopened estate was a necessary party, "a mortgagee is not required to make a deceased mortgagor's estate a party unless it seeks to hold the estate liable for the debt." *Ohio Sav. Bank v. Virden*, 9th Dist. App. No. 17885, 1997 WL 89222, *2 (Feb. 26, 1997), citing *McMahon v. Davis*, 10 Ohio C.D. 467, 1899 WL 698, *3 (1899). In other words, "[i]t is only when the mortgagee seeks a money judgment that the estate must be made a party to the action." *CitiMortgage, Inc. v. Bumphus*, 6th Dist. No. E-10-066, 2011-Ohio-4858, ¶ 25.

{¶ 13} In this case, Chaco Credit Union was not seeking to hold Perry or her unopened estate liable for the debt. In turn, the only necessary parties to the foreclosure action were Perry's "heirs, devisees, grantees, or assignee[s], for these are the only persons interested in the equity that is to be foreclosed." See *Ohio Sav. Bank*, 1997 WL 89222 at *2; see also *CitiMortgage, Inc.*, 2011-Ohio-4858 at ¶ 26-27; *Rinehart v. Wilkes*, 10th Dist. No. 84AP-952, 1985 WL 10297, *2 (May 23, 1985). As a result, because Payne, Perry's daughter, as well as any unknown heirs, devisees, grantees, and assignees were named defendants in the complaint, we agree with the trial court's decision finding Chaco Credit Union "named the appropriate parties to this foreclosure action and may proceed accordingly." Payne's first assignment of error is therefore overruled.

{¶ 14} Assignment of Error No. 2:

{¶ 15} THE TRIAL COURT ERRED TO THE DETRIMENT OF [PAYNE'S] INTEREST IN THE REAL PROPERTY BY GRANTING [CHACO'S] MOTION FOR SUMMARY JUDGMENT.

{¶ 16} In her second assignment of error, Payne argues that the trial court erred by granting summary judgment to Chaco Credit Union. We disagree.

{¶ 17} This court reviews a trial court's ruling on a motion for summary judgment de novo. *PNC Mtge. v. Innis*, 12th Dist. No. CA2010-10-013, 2011-Ohio-5594, ¶ 7. Pursuant to Civ.R. 56(C), a trial court may grant summary judgment only when: (1) there is no genuine issue of any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence submitted can only lead reasonable minds to a conclusion which is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). The party moving for summary judgment bears the initial burden of demonstrating no genuine issue of material fact exists. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107. Once this burden is met, the nonmoving party must then present evidence to show

that there is some issue of material fact yet remaining for the trial court to resolve. *Williams v. McFarland Properties, L.L.C.*, 177 Ohio App.3d 490, 2008-Ohio-3594, ¶ 7 (12th Dist.). In determining whether a genuine issue of material fact exists, the evidence must be construed in the nonmoving party's favor. *Touhey v. Ed's Tree & Turf, L.L.C.*, 194 Ohio App.3d 800, 2011-Ohio-3432, ¶ 7 (12th Dist.).

{¶ 18} Initially, Payne argues that the trial court erred by granting summary judgment to Chaco Credit Union because it failed to attach "Exhibit 1" to its affidavit in support of its motion for summary judgment, a document that apparently showed the mortgage payments were in arrears. In support of this claim, Payne argues that the trial court cannot "simply take [Chaco Credit Union] at their word." However, while we may agree that Chaco Credit Union failed to attach this exhibit to its affidavit, Payne readily admits that Chaco Credit Union has refused to accept any payments from her upon learning of her mother's death in January 2010. The fact that the mortgage payments were in arrears at the time Chaco Credit Union filed its complaint was therefore clearly not in dispute. Accordingly, Payne's first argument is overruled.

{¶ 19} Next, Payne argues that the trial court erred by granting summary judgment to Chaco Credit Union because "the payments are only in arrears because [it] refused payment" from her. However, according to the note and mortgage deed, it was Perry, and not Payne, who was required to make these payments. Moreover, because no estate had been opened on Perry's behalf, Chaco Credit Union had no obligation to accept any payments on the note from Payne. It is well-established that "[o]nce a default * * * has occurred under the terms of a mortgage and mortgage note, and once the mortgage and mortgage note have been accelerated, the holder of the mortgage note (i.e. the mortgagee) is entitled to judgment." *Charter One Mortg. Corp. v. Keselica*, 9th Dist. No. 04CA008426, 2004-Ohio-4333, ¶ 23. Such is the case here. Payne's second argument is therefore overruled.

{¶ 20} Finally, Payne argues that the trial court erred by granting summary judgment to Chaco Credit Union because "equitable principles" do not support the foreclosure action. However, despite highlighting her general frustration with the foreclosure proceedings, Payne has not presented any evidence to establish a genuine issue of material fact that would preclude Chaco Credit Union from receiving a judgment in its favor as a matter of law. As noted above, Chaco Credit Union has a legally protected interest provided for by the note and mortgage deed that allow it to foreclose on the property. Therefore, Payne's third argument is overruled.

{¶ 21} In light of the foregoing, having found no error in the trial court's decision granting summary judgment to Chaco Credit Union, Payne's second assignment of error is overruled.

{¶ 22} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.