

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

U.S. BANK, NATIONAL ASSOCIATION :
SUCCESSOR BY MERGER TO :
FIRSTAR BANK, N.A., :

Plaintiff-Appellee, :

CASE NO. CA2011-09-063

OPINION
10/1/2012

- vs -

RICHARD E. FITZGERREL, et al., :

Defendants-Appellants. :

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2010CVE00976

Laurito & Laurito, Erin M. Laurito, 7550 Paragon Road, Dayton, Ohio 45459, for plaintiff-appellee

Richard E. Fitzgerrel, 885 Grand Cypress Court, Cincinnati, Ohio 45245, defendant, pro se

Lynn Fitzgerrel, 54 Ledgerwoods Drive, Amelia, Ohio 45102, defendant-appellant, pro se

Johnny R. Ashley, 1200 Capital Hill Road, Milford, Ohio 45150, defendant, pro se

Fifth Third Bank, 38 Fountain Square Plaza, Cincinnati, Ohio 45263, defendant, pro se

Donald W. White, Clermont County Prosecuting Attorney, 123 North Third Street, Batavia, Ohio 45103, for defendant, Clermont County Treasurer

POWELL, P.J.

{¶ 1} Defendant-appellant, Lynn Fitzgerald Ashley ("Ashley"), appeals from a decision in the Clermont County Court of Common Pleas granting summary judgment and a decree of foreclosure in favor of plaintiff-appellee, U.S. Bank. For the reasons outlined below, we affirm.

{¶ 2} Ashley's former husband, Richard E. Fitzgerald ("Fitzgerald"), was the sole owner and legal titleholder of property located in Clermont County. In 2001, Fitzgerald executed a note and mortgage in favor of Firststar Bank, N.A., which was recorded with the Clermont County Recorder on January 18, 2002. The mortgage indicates that Fitzgerald was "unmarried" at the time of execution. In fact, however, Fitzgerald was married to Ashley. There is no indication that Ashley signed or initialed the note or the mortgage, and there is no indication that she relinquished her dower rights to the property at that time.

{¶ 3} In 2003, Fitzgerald and Ashley divorced. As a part of a settlement agreement incorporated into the dissolution decree, Fitzgerald executed a quit-claim deed. The quit-claim deed reads, in part, "Richard E. Fitzgerald, a divorced man and not remarried" grants to "Richard E. Fitzgerald, a divorced man, and Lynn J. Galloway Fitzgerald, his former spouse." The separation agreement provided that Fitzgerald was to be responsible for any debt secured by the property.

{¶ 4} Eventually, Fitzgerald defaulted on the note. U.S. Bank, after becoming the holder of the note and mortgage as a result of a merger, initiated a foreclosure action on May 4, 2010. Because of her interest in the property, U.S. Bank named Ashley and any unknown spouse in the complaint for foreclosure. Ashley filed an answer asserting several defenses and counterclaims.

{¶ 5} Approximately a year after filing the initial complaint, U.S. Bank filed a motion for summary judgment against Ashley and Ashley's current spouse. On June 3, 2011,

Ashley requested a continuance for the hearing on the motion for summary judgment scheduled for June 6, 2011. Ashley appeared at the hearing on June 6, 2011, and filed a response to U.S. Bank's motion for summary judgment. Ashley's response was filed 32 days after U.S. Bank filed the motion for summary judgment. At the hearing, the trial court indicated that it would review Ashley's response despite its tardiness because U.S. Bank had received the response prior to the hearing, and then render a decision.

{¶ 6} The trial court rendered a detailed decision on July 22, 2011 granting U.S. Bank's motion for summary judgment against Ashley and her spouse, including summary judgment as to Ashley's counterclaims. The motion for summary judgment pertained only to Ashley and her spouse. Consequently, the July 22, 2011 decision did not address the rights of Fitzgerald and was not a final appealable order. On August 15, 2011, a judgment entry and decree of foreclosure addressed the rights of Ashley, her spouse, and Fitzgerald. It is from this judgment entry and decree of foreclosure that Ashley appeals, and raises two assignments of error. For convenience of analysis we will discuss Ashley's assignments of error out of order.

{¶ 7} Assignment of Error No. 2:

{¶ 8} THE TRIAL COURT ERRED BY GRANTING U.S. BANK'S MOTION FOR SUMMARY JUDGMENT.

{¶ 9} First we note that the burden of affirmatively demonstrating error on appeal and substantiating the arguments in support of the error is upon Ashley as the appellant. *Wells Fargo Bank, N.A. v. Baldwin*, 12th Dist. No. CA2011-12-227, 2012-Ohio-3424, ¶ 10. While Ashley's arguments on appeal and in the pleadings below are convoluted in regard to summary judgment, we have distilled them into essentially two arguments. First, Ashley argues that U.S. Bank is not entitled to judgment as a matter of law because the mortgage is invalid since it does not contain her signature. Second, Ashley asserts that there is a

genuine issue of material fact regarding whether her dower interest in the property is barred or has been waived. We disagree.

{¶ 10} We review a trial court's ruling on a summary judgment motion de novo. *PNC Mtge. v. Innis*, 12th Dist. No. CA2010-10-013, 2011-Ohio-5594, ¶ 7. Civ.R. 56 sets forth the summary judgment standard and requires that there be no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion being adverse to the nonmoving party. *Slowey v. Midland Acres, Inc.*, 12th Dist. No. CA2007-08-030, 2008-Ohio-3077, ¶ 8. The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978).

{¶ 11} After the moving party satisfies its burden, the burden shifts to the nonmoving party, as set forth in Civ.R. 56(E). *PNC Mtge.* at ¶ 8. The nonmoving party "may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing the existence of a genuine triable issue." *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385 (1996). "A dispute of fact can be considered 'material' only if it affects the outcome of the litigation." *PNC Mtge.* at ¶ 8.

{¶ 12} After reviewing the record, U.S. Bank's motion for summary judgment and supporting exhibits and affidavit effectively established its right to relief because of default. However, Ashley asserts that there is a genuine issue of material fact regarding the validity of the mortgage because it lacks her signature. A mortgage of a person who is married must be signed, acknowledged, and certified. R.C. 5301.01 and 5301.04. There is no indication that the failure of a *spouse* to sign a mortgage invalidates that mortgage. See R.C. 5301.01 and 5301.04. In fact, even when a mortgage is defectively executed, it is still enforceable between the parties. See *Wells Fargo Fin. Ohio v. Lieb*, 2d Dist. No. 23688, 2011-Ohio-1988, ¶ 18; *Lasalle Bank, N.A. v. Zapata*, 184 Ohio App.3d 571, 2009-Ohio-3200, ¶ 21-22

(6th Dist.). Additionally, when any document intends to mortgage an interest in property, it is not effective to a non-title-holding spouse's dower interest unless the spouse also signed the mortgage. *Std. Fed. Bank v. Staff*, 168 Ohio App.3d 14, 2006-Ohio-3601, ¶ 21 (1st Dist.). Consequently, the failure of Ashley to sign the mortgage document did not invalidate the mortgage, but granted her a dower interest in the property. See *First Natl. Assn. v. Parker*, 8th Dist. No. 88534, 2007-Ohio-3066; *Cent. Natl. Bank v. Perry*, 8th Dist. No. 56831, 1990 WL 40581 (Apr. 5, 1990).

{¶ 13} This brings us to Ashley's second argument that there is a genuine issue of material fact as to whether her dower interest in the property was barred or waived. A "spouse is entitled to a one-third dower interest in real property unless it has been relinquished or barred." *Std. Fed. Bank* at ¶ 20; R.C. 2103.02. However, R.C. 2103.02 also provides that a dower interest terminates upon the granting of an absolute divorce. Because a decree of dissolution has the same effect on dower rights as a divorce, the dissolution of a marriage also terminates a spouse's dower interest in real property. See R.C. 3105.65(B). Furthermore, those who acquire a possessory interest in real property take with constructive notice of instruments of title that are recorded. *Sky Bank-Ohio Bank Region v. Sabbagh*, 161 Ohio App.3d 133, 2005-Ohio-2517, ¶ 15 (2d Dist.).

{¶ 14} In this case, Ashley initially had a dower interest in the property because she was married to Fitzgerald at the time he executed the mortgage. However, there is no dispute that a final decree of dissolution was entered in 2003, which ultimately terminated any dower interest Ashley had in the property. Consequently, there is no genuine issue of material fact regarding Ashley's dower interest. Ashley's interest at the time of U.S. Bank's motion for summary judgment was not a dower interest. Ashley became a titleholder as the result of Fitzgerald executing a quit-claim deed conveying the property to himself and Ashley, his ex-spouse. At the time the quit-claim deed was executed, the mortgage on the property was

already recorded. As a result, Ashley had constructive notice of the mortgage. Consequently, Ashley failed to meet her burden establishing a genuine triable issue. The trial court did not err in granting U.S. Bank's motion for summary judgment. Ashley's second assignment of error is overruled.

{¶ 15} Assignment of Error No. 1:

{¶ 16} THE TRIAL COURT ERRED BY NOT GRANTING A CONTINUANCE TO LYNN ASHLEY.

{¶ 17} Ashley argues that the trial court erred by not granting her continuance because there was a short time between her receipt of the summary judgment motion and her request for a continuance and there are genuine issues of material fact that needed to be resolved.¹ We disagree.

{¶ 18} The decision to grant or deny a continuance is within the sound discretion of the trial court. *State v. Unger*, 67 Ohio St.2d 65, 66 (1981); *In re R.S.*, 12th Dist. No. CA2011-03-053, 2011-Ohio-4247, ¶ 16. "An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion." *Unger* at 66. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). In ruling upon a motion for a continuance, "the trial court balances the court's interest in controlling its docket and the public's interest in an efficient judicial system with the possibility of prejudice to the defendant." *In re R.S.* at ¶ 16. The trial court may consider factors such as the length of the delay requested, prior requests for continuances, the inconvenience to the parties, witnesses, counsel, and the court, whether

1. Ashley also appears to argue in her brief that she requested a continuance to obtain further discovery. However, in her reply brief, Ashley states: "Appellee asserts that I asked for a continuance to obtain discovery. This is not true. * * * I did not need to obtain any further discovery." Consequently, we did not address this argument.

the movant contributed to the circumstances giving rise to the request for a continuance, and other relevant factors depending on the facts of the case. *Id.*; *State v. Landrum*, 53 Ohio St.3d 107, 115 (1990).

{¶ 19} In this case, while there is no indication in the record that Ashley previously asked for a continuance, the inconvenience to the parties and the court is arguably great. Ashley filed the motion for continuance on a Friday, and the hearing was scheduled for the following Monday. According to the file stamp on the motion, the continuance was filed at 4:12 p.m. on June 3, 2011, and the hearing was scheduled at 8:30 a.m. on June 6, 2011. In addition to avoiding pronounced inconvenience to U.S. Bank and controlling the trial court's docket, we cannot see how the trial court's failure to grant the continuance prejudiced Ashley. Despite filing the continuance, Ashley appeared at the June 6, 2011 hearing. The trial court considered her memorandum in opposition to U.S. Bank's motion for summary judgment. Ashley argues that there were genuine issues of material fact regarding the validity of the mortgage lien. However, she alleges that "[t]he bank took the mortgage subject to the dower rights of the wife at the time of the execution of the mortgage," and concedes that if "the bank [had] obtained the release of dower on the mortgage document, then summary judgment would have been just." As discussed above, her dower interest was barred at the time of the dissolution decree. Consequently, we cannot say the trial court abused its discretion in not granting Ashley's continuance because it did not prejudice Ashley. Ashley's first assignment of error is overruled.

{¶ 20} Judgment affirmed.

PIPER and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.