[Cite as *BAC Home Loans Servicing, LP v. Kolenich*, 2012-Ohio-5006.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

BAC HOME LOANS SERVICING, LP,	:	
Plaintiff-Appellee,	:	CASE NO. CA2012-01-001
	:	O P I N I O N
- vs -		10/29/2012
	:	
JAMES E. KOLENICH, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2009-07-3226

Carlisle, McNellie, Rini, Kramer & Ulrich Co., LPA, George J. Annos, 24755 Chagrin Boulevard, Suite 200, Beachwood, Ohio 44122, for plaintiff-appellee

James E. Kolenich and Barbara R. Kolenich, 9435 Waterstone Boulevard, #140, Cincinnati, Ohio 45249, defendants-appellants, pro se

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S. POWELL, P.J.

{¶ 1} Defendants-appellants, James E. Kolenich and Barbara R. Kolenich, acting *pro se*, appeal the Butler County Court of Common Pleas' decision on remand granting summary judgment to plaintiff-appellee, BAC Home Loans, Inc., on the Koleniches' counterclaims against BAC for its alleged violation of the Fair Debt Collection Practices Act and to quiet title

to their home. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} In 2004, James Kolenich executed a promissory note in favor of Countrywide Home Loans, Inc., in the principal amount of $144,000 to purchase a home in West Chester, Ohio. The note was secured by a mortgage on the property. The mortgage designated James Kolenich as mortgagor and Mortgage Electronic Registration Systems, Inc. ("MERS"), as mortgagee. MERS was identified in the mortgage as "a separate corporation that is acting solely as a nominee for [Countrywide] and [Countrywide's] successors and assigns." James Kolenich's wife, Barbara Kolenich, executed the mortgage to release her dower interest in the property. MERS subsequently assigned the Koleniches' note and mortgage to Countrywide's successor, BAC, a division of Bank of America.

{¶ 3} In 2009, James Kolenich stopped making payments on the note. Several months later, BAC filed a complaint against the Koleniches, demanding judgment on the note in the amount of $133,985.73 plus late fees and interest and foreclosure of the Koleniches' property. The Koleniches moved to dismiss BAC's complaint under Civ.R. 12(B)(6), arguing BAC lacked standing to bring the foreclosure action since it failed to demonstrate it was the current holder of the note and mortgage.

{¶ 4} In 2010, the trial court overruled the Koleniches' motion to dismiss, finding BAC was entitled to bring the foreclosure action against the Koleniches because BAC is the real party in interest in the case since the note and mortgage had been assigned to it by MERS, as Countrywide's nominee, and there was no break in the chain of title of the note and mortgage, which ran from Countrywide to MERS to BAC.

{¶ 5} Following the denial of their motion to dismiss, the Koleniches answered BAC's foreclosure complaint and raised several counterclaims against BAC, including that BAC had violated certain provisions in the Fair Debt Collection Practices Act ("FDCPA") in 15 U.S.C. 1692e(2), (5) and (10) and that they were entitled to have title to their property quieted in their

favor. The trial court granted BAC's motion to dismiss the Koleniches' counterclaims, and later, granted BAC's motion for summary judgment on its foreclosure claim against the Koleniches. The Koleniches appealed to this court.

{¶ 6} In 2011, this court issued its decision in *BAC Home Loans Servicing v. Kolenich*, 194 Ohio App.3d 777, 2011-Ohio-3345 (12th Dist.) ("*BAC I*"), in which we affirmed the trial court's decision to grant summary judgment to BAC on its foreclosure claim against the Koleniches but reversed its decision to dismiss the Koleniches' FDCPA and quiet title counterclaims against BAC. In doing so, we noted that the trial court, in granting BAC's motion to dismiss the Koleniches' counterclaims, relied exclusively on its previous order denying the Koleniches' motion to dismiss BAC's complaint in which the trial court had determined that BAC is the real party in interest in the matter and thus was entitled to bring a foreclosure action against the Koleniches since there was no break in the chain of title of the note and mortgage. *Id*. at ¶ 39-40. However, this court found that the trial court erred by considering its previous order when it ruled on BAC's Civ.R. 12(B)(6) motion to dismiss the Koleniches' counterclaims and that it should have confined its review of said motion to the "four corners" of the Koleniches' counterclaims. *Id*. at ¶ 40, citing *Community Hous. Network, Inc. v. Stoyer*, 10th Dist. No. 06AP-73, 2006-Ohio-5094, ¶ 6.

{¶ 7} On remand, BAC moved for summary judgment on the Koleniches' counterclaims. The Koleniches moved for default judgment and summary judgment on their counterclaims, arguing BAC had failed to file a timely responsive pleading or reply to their counterclaims, which, the Koleniches claimed, BAC was required to do under Civ.R. 8(B) and 12(A)(2), and therefore the averments in their counterclaims had to be deemed admitted under Civ.R. 8(D). In response, BAC requested and received leave to file a reply to the Koleniches' counterclaims.

{¶ 8} The trial court denied the Koleniches' motions for default judgment and

summary judgment on its counterclaims. The Koleniches then filed a Civ.R. 60(B) motion for relief from the trial court's 2010 order granting summary judgment to BAC on its foreclosure claim against them. The trial court denied the Koleniches' Civ.R. 60(B) motion, and later, granted summary judgment to BAC on the Koleniches' FDCPA and quiet title counterclaims.

{¶ 9} The Koleniches now appeal, assigning the following as error:

{¶ 10} Assignment of Error No. 1:

{¶ 11} THE COURT ERRED TO THE PREJUDICE OF THE DEFENDANT'S BY GRANTING PLAINTIFF BANK OF AMERICA'S MOTION FOR LEAVE TO FILE THEIR REPLY TO DEFENDANTS COUNTERCLAIMS OUTSIDE OF TIME [sic]

{¶ 12} Assignment of Error No. 2:

{¶ 13} THE COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS BY DENYING THEIR MOTION FOR DEFAULT JUDGMENT.

{¶ 14} Assignment of Error No. 3:

{¶ 15} THE COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS BY DENYING DEFENDANTS MOTION FOR SUMMARY JUDGMENT ON THEIR COUNTERCLAIMS [sic]

{¶ 16} Assignment of Error No. 4:

{¶ 17} THE COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS BY DENYING THEIR MOTION FOR RELIEF FROM JUDGMENT CIV.R. 60(B) [sic]

{¶ 18} Assignment of Error No. 5:

{¶ 19} THE COURT ERRED TO THE PREJUDICE OF THE DEFENDANTS BY GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIMS [sic]

{¶ 20} In their first assignment of error, the Koleniches argue BAC was required under Civ.R. 8(B) and 12(A)(2) to file a responsive pleading or reply to their counterclaims by July

19, 2011, and, since BAC failed to do so, the trial court was required under Civ.R. 8(D) to deem the averments in their counterclaims admitted and to grant them default judgment or summary judgment on their counterclaims as a result. The Koleniches also argue the trial court erred by allowing BAC to file a late reply to their counterclaims because BAC failed to show that its failure to file a timely reply constituted excusable neglect. We disagree with these arguments.

{¶ 21} Civ.R. 8(B) states that "[a] party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." Civ.R. 8(D) states, in pertinent part, that "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."

{¶ 22} Civ.R. 12(A)(2) states, in pertinent part:

> The plaintiff shall serve his reply to a counterclaim in the answer within twenty-eight days after the service upon him or, if a reply is ordered by the court, within twenty-eight days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (a) if the court denies the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after notice of the court's action; (b) if the court grants a motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after service of the pleading which complies with the court's order.

{¶ 23} The Koleniches assert that following this court's July 5, 2011 remand in *BAC I*, BAC was required under Civ.R. 8(B) to file a responsive pleading or reply to their counterclaims, and was required under Civ.R. 12(A)(2)(a) and 12(A)(2)(b) to file said pleading within 14 days of the date of our remand, i.e., by July 19, 2011.

{¶ 24} The Koleniches have failed to explain their argument in detail. Nevertheless, it appears they are arguing that when this court held in *BAC I* that the trial court erred in

granting BAC's motion to dismiss the Koleniches' FDCPA and quiet title counterclaims and remanded the cause to the trial court for further proceedings, we essentially were instructing the trial court to treat BAC's motion to dismiss as having been *denied*, which, in turn, would trigger the 14-day period in Civ.R. 12(A)(2)(a). The Koleniches assert that because BAC failed to file a responsive pleading or reply to their counterclaims as required by Civ.R. 8(B) and 12(A)(2), the trial court was obligated under Civ.R. 8(D) to deem the averments in their counterclaims admitted by BAC and to grant them default judgment or summary judgment on their counterclaims as a result. We find this argument unpersuasive.

{¶ 25} The Koleniches' interpretation of Civ.R. 12(A)(2)(a) and 12(A)(2)(b) is at odds with the plain meaning of those provisions. Civ.R. 12(A)(2) requires a plaintiff to serve his reply to a counterclaim within 28 days after the counterclaim is served upon him or if a reply is ordered by the court, within 28 days after service of the order unless the court otherwise directs. These time limits are altered when a motion permitted under Civ.R. 12 has been filed, such as a motion to dismiss for lack of subject matter jurisdiction or personal jurisdiction, Civ.R. 12(B)(1) and 12(B)(2), or failure to state a claim upon which relief can be granted, Civ.R. 12(B)(6). If the motion is *denied*, a responsive pleading, delayed because of service of the motion, must be filed within 14 days after "notice of the court's action." Civ.R. 12(A)(2)(a). If the motion is *granted*, a responsive pleading, delayed because of service of the motion, must be served within 14 days "after service of the pleading which complies with the court's order." Civ.R. 12(A)(2)(b).

{¶ 26} In this case, the trial court, in 2010, *granted* BAC's Civ.R. 12(B)(6) motion to dismiss the Koleniches' counterclaims for failure to state a claim upon which relief could be granted. Therefore, Civ.R. 12(A)(2)(a) cannot apply since that provision applies only when the trial court *denies* a motion brought under Civ.R. 12. Moreover, while Civ.R. 12(A)(2)(b) governs situations in which the trial court *grants* a motion brought under Civ.R. 12, the 14-

day time limit set forth in that provision is triggered only "after service of the pleading which complies with the court's order." The Koleniches have failed to explain how issuance of a remand by this court qualifies as "service of the pleading which complies with the court's order," which would trigger the 14-day time limit.

{¶ 27} There is nothing in Civ.R. 12(A)(2) that provides any express guidance as to what to do in situations like the one here, where the trial court has entered final judgment in the case, but the court of appeals reverses that judgment and remands the matter to the trial court for further proceedings consistent with the court of appeals' opinion. Therefore, the Koleniches' reliance on the 14-day time limits in Civ.R. 12(A)(2)(a) and 12(A)(2)(b) is misplaced. Moreover, since the time limits established in Civ.R. 12(A)(2) do not apply in this type of situation where the trial court is proceeding on remand from an appellate court, BAC's request for leave to file a reply to the Koleniches' counterclaims cannot be deemed to have been late. Additionally, there was no need for BAC to establish, or for the trial court to find, that BAC's failure to file its reply to the Koleniches' counterclaims earlier than it did, constituted excusable neglect.

{¶ 28} Under Article IV, Section 3(B)(2) of the Ohio Constitution, an appellate court has such jurisdiction as may be provided by law to review and affirm, modify or reverse judgments or final orders issued by a trial court within its appellate district. When an appellate court issues a decision reversing a trial court's judgment or final order, the appellate court issues a "mandate" to the trial court to act in conformity with the appellate court's ruling on appeal, and it is the responsibility of the trial court to follow that mandate on remand. *Bridge v. Park Natl. Bank*, 169 Ohio App.3d 384, 388-389, 2006-Ohio-5691, ¶ 18 (10th Dist.). *See also*, App.R. 27 (a certified copy of court of appeals' judgment entry remanding cause to trial court constitutes the court of appeals' "mandate" to the trial court).

{¶ 29} In *BAC I* at ¶ 40, we held that the trial court erred in granting BAC's Civ.R.

12(B)(6) motion to dismiss the Koleniches' FDCPA and quiet title counterclaims because it (1) failed to confine its review of said motion to the "four corners" of those counterclaims, and (2) did not convert BAC's motion to dismiss into a motion for summary judgment nor provide notice of the conversion to the parties thereby preventing the Koleniches with an opportunity to present evidentiary materials under Civ.R. 56 to defend against BAC's summary judgment motion. *Id*. Consequently, we reversed the trial court's dismissal of the Koleniches' FDCPA and quiet title counterclaims and remanded the matter for further proceedings consistent with our opinion.

{¶ 30} Subsequently BAC moved for summary judgment on the Koleniches' counterclaims less than two weeks after we remanded the cause to the trial court. The trial court granted BAC's motion for summary judgment on the Koleniches' counterclaims after providing them with ample opportunity to gather evidentiary material under Civ.R. 56 so that they could defend against BAC's motion for summary judgment. Under these circumstances, the trial court fully complied with this court's mandate on remand.

{¶ 31} Therefore, the Koleniches' first assignment of error is overruled.

{¶ 32} In their second and third assignments of error, respectively, the Koleniches argue the trial court erred in denying their motions for default judgment and summary judgment because, under Civ.R. 8(D), BAC's failure to file a timely responsive pleading to their counterclaims constituted an admission of the averments therein, and therefore they were entitled to default judgment or summary judgment on their counterclaims. However, the Koleniches have conceded that if this court overrules their first assignment of error, which we in fact have done, these assignments of error will be rendered moot. Therefore, we need not decide the Koleniches' second and third assignments of error. *See* App.R. 12(A)(1)(c).

{¶ 33} In their fourth assignment of error, the Koleniches argue the trial court erred in denying their Civ.R. 60(B) motion for relief from the trial court's 2010 grant of summary

judgment to BAC on its foreclosure claim against them.

{¶ 34} To prevail on a Civ.R. 60(B) motion for relief from judgment, the moving party must demonstrate that (1) it has a meritorious claim or defense to present if relief is granted; (2) it is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1)-(5); and (3) it made the motion within a reasonable time, and where the grounds for relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken. *Crown Property Consultants, Inc. v. USI Storage, LLC*, 12th Dist. No. CA2006-12-322, 2007-Ohio-4736, ¶ 9.

{¶ 35} A trial court's ruling on a Civ.R. 60(B) motion is reviewed under an abuse-of-discretion standard, and therefore the trial court's decision will not be reversed unless it is arbitrary, unconscionable or unreasonable. *Id*. at ¶ 10.

{¶ 36} In support of their argument, the Koleniches point to the deposition testimony of BAC's litigation specialist, Seth Downing, who testified that the Koleniches' loan was bought by the Federal National Mortgage Association or "Fannie Mae," within a few days of the loan's origination in 2004. Downing also acknowledged that BAC received "bailout money" from the federal government's Troubled Assets Relief Program or "TARP."

{¶ 37} The Koleniches assert that Downing's testimony was sufficient to establish all the elements they needed to prove in order to prevail on their Civ.R. 60(B) motion, because, in addition to having brought the motion within a reasonable time, they have a "meritorious defense" to present to BAC's foreclosure claim in that BAC cannot prove it suffered damages as a result of the Koleniches' default on the note and mortgage since Downing testified that BAC received TARP bailout money. They also argue that (1) Downing's testimony constitutes the discovery of "new evidence," for purposes of Civ.R. 60(B)(2); (2) as a result of BAC's having received "collateral source payments relevant to the debt at issue," i.e., TARP bailout money, the 2010 summary judgment rendered against them has been "satisfied" for

purposes of Civ.R. 60(B)(4); and (3) it would be inequitable to allow BAC "the windfall recovery of third party payments and the seizure of [their] home," and therefore they are entitled to relief under the "catch-all" provision in Civ.R. 60(B)(5). We find the Koleniches' argument unpersuasive.

{¶ 38} It is well-settled that the real party in interest in a foreclosure action is the current holder of the note and mortgage. *See, e.g.*, *Everhome Mtge. Co. v. Rowland*, 10th Dist. No. 07AP-615, 2008-Ohio-1282, ¶ 12. The current holder of the note and mortgage is entitled to bring a foreclosure action against a defaulting mortgagor even if the current holder is not the owner of the note and mortgage. *See* R.C. 1303.31(A) (a "'[p]erson entitled to enforce' [a negotiable] instrument" includes "the holder of the instrument[,]") and R.C. 1303.31(B) ("[a] person may be a 'person entitled to enforce' the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument").

{¶ 39} In this case, the evidence established that BAC is the current holder of the Koleniches' note and mortgage, and therefore BAC was entitled to bring a foreclosure claim against the Koleniches when they defaulted on their note. Downing testified in his deposition that the Koleniches' note, within days of its origination in 2004, was "bundled" or "pooled" with perhaps as many as several thousand others, and the total debt from the loans was sold to investors like Fannie Mae. The Koleniches' note and mortgage remained titled to Countrywide, which serviced the debt, until MERS, as Countrywide's nominee, assigned the note and mortgage to BAC. BAC, as the current holder of the note and mortgage, brought a foreclosure action against the Koleniches after they defaulted on the note. Contrary to what the Koleniches allege, while the *debt* associated with the note and mortgage was sold to Fannie Mae, the note and mortgage were never assigned to Fannie Mae. Moreover, the sale of the debt associated with the note and mortgage did not affect BAC's status as the current holder of the note. Therefore, BAC was entitled to bring the foreclosure action against the

Koleniches to enforce the note and foreclose on the mortgage. *See* R.C. 1303.31(A)-(B) and *Rowland*, 2008-Ohio-1282 at ¶ 12.

{¶ 40} Furthermore, the Koleniches have failed to present any authority, and we are aware of none, that supports their contention that because BAC received "collateral source payments," such as the TARP bailout money, it should be precluded from prevailing in its foreclosure action against them. They also have failed to present any evidence to show that the 2010 judgment awarding BAC foreclosure of the Koleniches' property and $133,985.73 plus late fees and interest has been "satisfied" so as to entitle them to relief under Civ.R. 60(B)(4). Lastly, it is well-settled that the grounds for invoking the "catch-all" provision in Civ.R. 60(B)(5) "should be substantial" and that the provision is not to be used as a substitute for any of the other, more specific provisions of the rule. *Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64, 66 (1983). Here, the Koleniches have clearly failed to present any substantial grounds that would entitle them to relief.

{¶ 41} Given the foregoing, the Koleniches' fourth assignment of error is overruled.

{¶ 42} In their fifth assignment of error, the Koleniches argue the trial court erred in granting summary judgment to BAC on their counterclaims, since there was evidence to show that BAC violated the FDCPA by concealing that Fannie Mae, not BAC, was entitled to bring a foreclosure claim against them. The Koleniches further argue that these same reasons establish that a genuine issue of material fact exists as to their quiet title claim, as well. These arguments lack merit.

{¶ 43} A trial court may grant summary judgment to a moving party under Civ.R. 56 when (1) there is no genuine issue of material fact remaining to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, who is entitled to have the evidence construed most strongly in his favor. *BAC I*, 2011-Ohio-3345 at ¶ 17, citing

Zivich v. Mentor Soccer Club, Inc., 82 Ohio St.3d 367, 369-370 (1998).

{¶ 44} This court reviews a trial court's decision on a motion for summary judgment *de novo*, which means that we review the judgment independently and without deference to the trial court's determinations. *First Horizon Home Loans v. Sims*, 12th Dist. No. CA2009-08-117, 2010-Ohio-847, ¶ 18.

{¶ 45} Both of the Koleniches' counterclaims are dependent on their contentions that BAC did not have standing to bring a foreclosure action against them on the note and mortgage and that they are entitled to receive credit for any money BAC received as a result of TARP bailout money. We reject these arguments for the same reasons stated in response to the Koleniches' fourth assignment of error: BAC, as the current holder of the note and mortgage, had standing to bring a foreclosure action against the Koleniches, *see Rowland*, 2008-Ohio-1282 at ¶ 12, and R.C. 1303.31, and the Koleniches have not presented any authority, and we are aware of none, that supports their contention that because BAC received TARP bailout money, it should be precluded from prevailing in its foreclosure action against them.

{¶ 46} Accordingly, the Koleniches' fifth assignment of error is overruled.

{¶ 47} Judgment affirmed.

PIPER, J., concurs.

RINGLAND, J., concurs separately.

RINGLAND, J. concurring separately.

{¶ 48} I concur with the judgment of the majority. I write separately, however, on the issue of standing. While I agree that appellee's receipt of TARP funds in this case does not create an issue of standing, I nevertheless find issues of standing unresolved, albeit not

specifically raised.

{¶ 49} I note that the loan was assigned to appellee through MERS, with MERS acting as "nominee." While Ohio courts have not defined a nominee in this particular context, Black's Law Dictionary defines a nominee as "[a] person designated to act in place of another, usu. in a very limited way" and as "[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others." Black's Law Dictionary 1076 (8th Ed.2004). Based upon that definition, the legal status of a nominee depends on the context of the relationship of the nominee to its principal. I find that the relationship of MERS and the lender is akin to that of an agency relationship. However, in reviewing the mortgage, MERS is listed as both the nominee (agent) and the mortgagee (principal). It is axiomatic that an entity cannot be both an agent and a principal, otherwise there is no agency relationship. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. Cin. L. Rev. 1359, 1375 (2010). Further, I have difficulty in determining how MERS, a recording entity devised by mortgage bankers to avoid paying state recording fees, is able to transfer or assign legal or equitable title while having no interests or property rights in the land. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 Wm. & Mary L. Rev. 111, 116-118 (2011). Arguably, the lack of ownership of the note and the inability to assign such interest violates the long held legal principle that the mortgage and debt are inseparable. *See Carpenter v. Longan*, 83 U.S. 271, 274 (1872). This court has not addressed that issue squarely, although we have discussed MERS standing as it relates to the timing of filing a MERS assignment. *See BAC Home Loans Servicing LP v. Hall*, 12th Dist. No. CA2009-10-135, 2010-Ohio-3472. As such, this issue remains for another day and another case.