

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

|                                |   |                            |
|--------------------------------|---|----------------------------|
| Chase Home Finance, LLC,       | : |                            |
| Plaintiff-Appellee,            | : |                            |
| v.                             | : | No. 12AP-546               |
| Daniel T. Dougherty,           | : | (C.P.C. No. 10CVE-04-5774) |
| Defendant-Appellant,           | : | (REGULAR CALENDAR)         |
| (Kimberly J. Dougherty et al., | : |                            |
| Defendants-Appellees).         | : |                            |

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D E C I S I O N

Rendered on April 11, 2013

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*Thompson Hine LLP, Laura A. Hauser and Michael L. Dillard, Jr.*, for appellee Chase Home Finance, LLC.

*Duncan Simonette, Inc., and Brian K. Duncan*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas

McCORMAC, J.

{¶ 1} Plaintiff-appellee, Chase Home Finance, LLC ("appellee"), filed a complaint in foreclosure on April 15, 2010. Defendant-appellant, Daniel T. Dougherty ("appellant") did not file an answer, and default judgment was rendered for appellee on June 3, 2010. On August 30, 2010, appellant moved to vacate the default judgment. His motion was granted on September 2, 2010.

{¶ 2} After mediation was unsuccessful in resolving the matter, on June 10, 2011, appellant filed an answer. Appellant's answer was a general denial and included a long list of affirmative defenses, including the sole defense now asserted as a basis for his assignment of error on this appeal.

{¶ 3} On March 29, 2012, almost two years after the commencement of the foreclosure action, appellee filed a motion for default judgment and a motion for summary judgment. Appellant responded by asking for additional time to conduct discovery pursuant to Civ.R. 56(F), without submitting an affidavit stating that there was a genuine issue of material fact in dispute for which discovery was needed. Appellee opposed that motion, arguing that appellant had ample time to conduct discovery during the two years that the action had been pending and that appellant failed to make the showing required under Civ.R. 56(F) for an extension of time to oppose a motion for summary judgment.

{¶ 4} On May 29, 2012, the trial court issued its decision and entry denying appellant's request for more time and granting appellee's motion for summary judgment. The trial court's decision stated the basis for denying appellant's motion for additional time for discovery, as follows:

The Court will not grant this request. [Appellant] filed his Answer on June 10, 2011 and has done nothing since. If [appellant] had wanted to conduct discovery, he should have done so in the year since he filed his Answer. [Appellant] chose not to and is now stuck with the consequences. [Appellant's] request for an extension of time is not well-taken, and is hereby DENIED.

{¶ 5} In ruling on the motion for summary judgment, the trial court first reviewed all of the facts and law in relation thereto and stated:

[Appellee] has established all of the facts necessary to be entitled to judgment in its favor and a decree in foreclosure on [appellant's] property. In response, [appellant] has argued that there are genuine issues of material fact as to [appellee's] entitlement to judgment as well as to [appellant's] defenses. [Appellant], however, has presented the Court with no actual facts to show that this is the case. As such, the Court can only rule that [appellee's] Motion for Summary Judgment is well-taken, and is hereby GRANTED. A decree in foreclosure shall be filed alongside this decision.

{¶ 6} On May 31, 2012, the trial court adopted the decision on the record with an entry granting summary judgment and awarding appellee foreclosure.

{¶ 7} In appellant's appeal, he states two assignments of error, as follows:

1. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BECAUSE TEHRE [sic] WERE GENUINE ISSUES OF MATERIAL FACT, INCLUDING BUT NOT LIMITED TO WHETHER PLAINTIFF IS A HOLDER IN DUE COURSE, WHETHER PLAINTIFF VIOLATED THE REAL ESTATE SETTLEMENT PROCEDURES ACT, THE OHIO CONSUMER SALES PRACTICES ACT, AND/OR THE FAIR DEBT COLLECTION PRACTICES ACT, ALLOCATION OF PAYMENTS, DOCTRINE OF UNCLEAN HANDS, EQUITABLE ESTOPPEL, WHETHER THE MORTGAGE WAS PROPERLY EXECUTED , BAD FAITH, FRAUD, AS WELL AS POTENTIAL COUNTERCLAIMS DISPUTING THE APPRAISAL AND AMOUNT OWED ON THE UNDERLYING LOAN.

2. THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

{¶ 8} In his appeal, appellant specifies only one of the claimed issues of material fact, which is whether appellee is a holder in due course. Other claimed issues of material fact were not described by any law or facts applicable thereto except the general claim that they present genuine issues of material fact that cast serious doubt over appellee's right to foreclose upon the residence of appellant.

{¶ 9} The law regarding the standard of review of the trial court's decision granting a motion for summary judgment is well-articulated both in Civ.R. 56 and the myriad of cases that have interpreted that rule. In appellant's argument, he recognizes, as he must, these standards. We will articulate them only briefly because it is not the standards that are at issue but the application of the standards.

{¶ 10} An appellate court reviews the lower court's summary judgment order de novo. *Hillyer v. State Farm Mut. Auto. Ins. Co.*, 131 Ohio App.3d 172, 175 (8th Dist.1999). The appellate court applies the same test as a trial court, as set forth in Civ.R. 56(C), which provides that, before summary judgment may be granted, it must be determined that "(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.*,

50 Ohio St.2d 317, 327 (1977). Both the trial court and this court have a duty to examine all appropriate materials filed by the parties before ruling on a motion for summary judgment. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358 (1992). The initial burden of producing evidence which demonstrates the fact of a genuine issue of material fact rests with the party moving for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). If any doubt exists, the issue must be resolved in favor of the nonmoving party. *Murphy* at 358-59. The nonmoving party must then rebut with specific facts showing the existence of a genuine probable issue and may not rest on the mere allegations of their pleadings. *Dresher* at 292.

{¶ 11} First, although not specifically raised in appellant's assignments of error, we find that the trial court did not err in denying appellant's motion for an extension of time to respond to appellee's motion for summary judgment.

{¶ 12} Appellant's motion is procedurally deficient under Civ.R. 56(F). Where a party cannot respond to a motion for summary judgment and seeks a continuance of the proceedings to conduct discovery, the proper procedural device is a motion and affidavit pursuant to Civ.R. 56(F). *See BFI Waste Sys. of Ohio v. Garfield Hts.*, 94 Ohio App.3d 62, 74 (8th Dist.1994).

{¶ 13} Civ.R. 56(F) provides:

Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

{¶ 14} Appellant fails to satisfy the requirements of this rule. A motion for a continuance to conduct discovery under Civ.R. 56(F) must be supported by a proper affidavit. *State ex rel. Coulverson v. Ohio Adult Parole Auth.*, 62 Ohio St.3d 12, 14 (1991). If there is no proper affidavit, the court cannot grant relief pursuant to Civ.R. 56(F). *Id.*; *see also BFI Waste Sys.* To be proper, the affidavit must state facts essential to justify the opposition.

{¶ 15} Additionally, the trial court's judgment denying the motion for a continuance shows no reason to delay an already too-much delayed case. There was

ample time for appellant to conduct additional discovery if he chose, and no efforts were sought in that regard. Consequently, only the facts already on record will be considered in deciding whether summary judgment was properly allowed.

{¶ 16} Appellee has provided us with an appendix that fully sets forth everything that has occurred in this case that is relevant to the allowance of summary judgment. Nowhere in the record is there any explanation why the Real Estate Settlement Procedures Act, the Ohio Consumer Sales Practices Act, and/or the Fair Debt Collection Practices Act, allocation of payments, doctrine of unclean hands, equitable estoppel, whether the mortgage was properly executed, bad faith, fraud, or potential counterclaims refuting the appraisal and amount owed on the underlying home are relevant to the issues in the summary judgment motion. In the appeal herein, there is also nothing specific concerning these alleged defenses other than to state that there are genuine issues of fact regarding them. At most, additional discovery seems to be fishing expeditions. We have examined the record de novo and find nothing as to the above defenses that meet the requirement of presenting factual issues that go to the heart of the dispute.

{¶ 17} In appellant's brief, the only issue affirmatively argued is whether appellee is a holder in due course. That is the only issue that we will discuss in deciding the validity of the summary judgment motion in favor of appellee, all others having been insufficiently raised.

{¶ 18} In examining the trial court record, we note that, at the trial court level, appellant made no specific argument that appellee was not a holder in due course because it violated R.C. 1303.32(A)(2)(c) when mortgage electronic registration systems assigned the mortgage to appellee, having notice that the note was overdue. The ordinary rule is that a court of appeals cannot consider arguments and facts never alleged in the trial court. *See Armare v. Chellena Food Express, Inc.*, 10th Dist. No. 08AP-678, 2009-Ohio-147. We will not apply that argument to the summary judgment herein because the general issue of whether appellee is a holder in due course is included in the argument to the trial court. Furthermore, we must consider the summary judgment appeal de novo, and it is our duty to explore the record to see what argument is contained therein that satisfies the specificity requirement of Civ.R. 56(C).

{¶ 19} In reviewing the record, we find that appellant did not give a reason that the holder in due course doctrine would create a genuine issue of fact under R.C. 1303.32. We

find only that the issue of holder in due course was alleged only in the same general fashion as the other defenses. Appellant merely stated in his answer that appellee "has failed to attach any evidence that it is a Holder in Due Course." (Answer at 4.) Appellant failed to adduce any evidence or fact indicating that appellee is not the party entitled to enforce the note. Appellee produced a note and mortgage in proof that they were the holder of it.

{¶ 20} Ohio law provides that "the current holder of the note and mortgage is the real party in interest in foreclosure action." *Wells Fargo Bank, N.A. v. Stovall*, 8th Dist. No. 91802, 2010-Ohio-236, ¶ 15, citing *Chase Manhattan Mtge. Corp. v. Smith*, 1st Dist. No. C061069, 2007-Ohio-5874; *U.S. Bank N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178 (7th Dist.). The affidavit filed contemporaneously with appellee's motion for summary judgment establishes that "[appellee's] records contain a note executed by [appellant]. \* \* \* [Appellee] holds the note and is the servicer for the loan." (Affidavit, at 3-4; appellee's Appendix K.) There is no evidence disputing these unequivocal facts; thus, the only evidence before the trial court and this court as to appellee's status as the holder in due course is that appellee was and is the holder of the note. Since there is no genuine issue of material fact disputing that appellee had and has the right to enforce the note and mortgage, summary judgment was properly entered in favor of appellee on its foreclosure claim against appellant.

{¶ 21} Appellant's first assignment of error is overruled.

{¶ 22} Appellant's second assignment of error is overruled for the same reasons that have previously been stated in overruling the first assignment of error.

{¶ 23} For the foregoing reasons, both of appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BRYANT and DORRIAN, JJ., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).

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