

[Cite as *Wachovia Bank of Delaware v. Jackson*, 2010-Ohio-3970.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WACHOVIA BANK OF DELAWARE

Plaintiff-Appellee

-vs-

IRENE P. JACKSON, ET AL.

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Patricia A. Delaney, J.

Case No. 2010CA00038

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Common
Pleas Court, Case No. 2009CV00832

JUDGMENT:

Reversed and remanded

DATE OF JUDGMENT ENTRY:

August 23, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, P.J.

{¶1} Defendant-appellant Irene P. Jackson appeals the Judgment Entry of the Stark County Court of Common Pleas granting summary judgment in favor of Plaintiff-appellee Wachovia Bank of Delaware, N.A., fka First Union National Bank of Delaware fka First Union Home Equity Bank, N.A. (hereinafter “Wachovia”).

STATEMENT OF THE CASE

{¶2} On February 26, 2009, Wachovia filed a complaint seeking foreclosure of real property located at 530 6th Street Southwest, Massillon, Ohio against Appellant. Appellant filed an answer with the trial court on April 8, 2009.

{¶3} On April 23, 2009, the trial court referred the matter to mediation.

{¶4} On January 20, 2010, Wachovia filed a motion for summary judgment.

{¶5} Via Judgment Entry of January 21, 2010, the trial court granted Wachovia’s motion for summary judgment, granting foreclosure and ordering sale of the property. The judgment entry states there is no just reason for delay.

{¶6} On February 2, 2010, Appellant filed a response to Wachovia’s motion for summary judgment.

{¶7} On February 4, 2010, the trial court again granted summary judgment in favor of Wachovia, and ordered Wachovia file an entry in accordance therewith.

{¶8} On February 19, 2010, Appellant filed a notice of appeal with this Court, assigning as error:

{¶9} “I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AND ORDER OF SALE FOR MY HOME PRIOR TO THE TIME RUNNING FOR ME TO RESPOND TO PLAINTIFF [SIC]-APPELLEE’S MOTION FOR SUMMARY JUDGMENT.

{¶10} “II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS THERE WERE GENUINE ISSUES OF MATERIAL FACT REMAINING TO BE PROVED BY PLAINTIFF APPELLEE.

{¶11} “III. THE TRIAL COURT ERRED IN NOT PROPERLY AND ADEQUATELY CONSIDERING MY RESPONSE TO PLAINTIFF-APPELLEE’S MOTION FOR SUMMARY JUDGMENT SINCE THEY HAD ALREADY IMPROPERLY GRANTED SUMMARY JUDGMENT AND ORDER OF SALE APPROXIMATELY TWO WEEKS BEFORE MY RESPONSE WAS DUE.”

I.

{¶12} In the first assignment of error, Appellant argues the trial court erred in granting summary judgment and ordering sale of the property prior to the time allowed by rule for her to respond to Wachovia’s motion for summary judgment.

{¶13} Ohio Civil Rule 56 governs the filing of motions for summary judgment, and reads:

{¶14} “(C) Motion and proceedings

{¶15} “The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing, may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or

stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.”

{¶16} The trial court herein granted Wachovia’s motion for summary judgment the day after the motion was filed with the trial court; thereby, failing to allow Appellant an opportunity to respond to the motion.

{¶17} Upon review of the trial court’s January 21, 2010 Judgment Entry, we find the same constituted a final appealable order. The February 4, 2010 entry is not substantively different from the January 21, 2010 final appealable order, and does not indicate it is a nunc pro tunc order. Therefore, absent proceeding in accordance with Civil Rule 60(B), the trial court’s January 21, 2010 entry divested the trial court of jurisdiction. The trial court lacked jurisdiction to enter its judgment on February 4, 2010.

{¶18} Because we find the trial court’s January 21, 2010 Judgment was issued after less than the minimum 14 day period prescribed in Civ.R. 56(C), we sustain Appellant’s first assignment of error.

II, III.

{¶19} Based upon our analysis and disposition of Appellant’s first assignment of error, we find Appellant’s second and third assignments of error premature.

Farmer, J., dissenting

{¶21} I respectfully dissent from the majority's opinion. I would find because the notice of appeal was filed on February 19, 2010 after the February 4, 2010 granting of the motion for summary judgment, the issue as to the February 4, 2010 judgment is ripe for review. In fact, the notice of appeal notes that the "judgment being appealed" are the January 21, and February 4, 2010 judgments.

{¶22} Under the standard of review for summary judgment, I would affirm the granting of the motion for summary judgment. Appellant's claim that appellee is not the proper party to initiate the action is significantly refuted by the affidavit of Noriko Colston, assistant secretary for Barclays Capital Real Estate, Inc., attorney-in-fact for appellee. See, Colston Aff. attached to the January 20, 2010 Motion for Summary Judgment as Exhibit C; See also, Exhibits A and B attached to the Notice of Merger/Name Change filed January 20, 2010.

{¶23} I would affirm the trial court's decision.

s/ Sheila G. Farmer

HON. SHEILA G. FARMER

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WACHOVIA BANK OF DELAWARE	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
IRENE P. JACKSON, ET AL.	:	
	:	
Defendant-Appellant	:	Case No. 2010CA00038

For the reason stated in our accompanying Opinion, the January 21, 2010 Judgment Entry of the Stark County Court of Common Pleas is reversed, and the matter remanded for further proceedings in accordance with the law and our Opinion. Costs to Appellee.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY