No. L-98-1110
Court of Appeals of Ohio, Sixth District, Lucas County

David Pheils Assoc. v. Palmer

2009 Ohio 3491
Decided Jul 17, 2009

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Trial Court Nos. CI88-0289, CI89-0200.

David R. Pheils, Jr., for appellees.

David P. Rupp, Jr. and Peter D. Short, for appellant.

DECISION AND JUDGMENT

HANDWORK, J.

{¶ 1} This case is before the court on appeal from a judgment of the Lucas County Court of Common Pleas, wherein, on December 17, 1997, appellees, David R. Pheils, Jr. and Associates, were awarded a judgment in the amount of $305,103.59, plus costs in the amount of $11,211.22. Appellant, Ok Sun Palmer, filed a notice of
2 appeal from that judgment on April 2, 1998. Appellees then filed a motion to dismiss that *2 appeal as being untimely. We disagreed. See *David Pheils Assoc. v. Palmer* (June 22, 1998), 6th Dist. No. L-98-1110.

{¶ 2} On August 31, 1998, appellant filed a motion to vacate the scheduled oral argument on this cause and notified this court of her voluntary petition for bankruptcy filed in the federal court. On September 8, 1998, we ordered that this appeal be stayed until appellant informed this court that the bankruptcy proceedings were completed. *David Pheils Assoc. v. Palmer (Sept.* 8, 1998), 6th Dist. No. L-98-1110. Said notification was provided in August 2008, and this cause is now decisional. Appellant asserts the following errors occurred in the proceedings below:

{¶ 3} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT IN AWARDING PLAINTIFF COSTS IN THIS CASE OF ELEVEN THOUSAND TWO HUNDRED ELEVEN AND 12/1000 DOLLARS ($11,211.12)"

{¶ 4} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT IN ORDERING THE PAYMENT OF THE JUDGMENT OF THREE HUNDRED FIVE THOUSAND, ONE HUNDRED THREE AND 59/100 DOLLARS ($305,103.59) FROM THE SUPERSEDEAS BOND."

{¶ 5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT IN ORDERING PAYMENT OF COSTS AND THE JUDGMENT IN THIS CASE WITHOUT A HEARING OR DEFENDANT
3 OTHERWISE BEING GIVEN AN OPPORTUNITY TO BE HEARD UPON BOTH ISSUES." *3

{¶ 6} Prior to any consideration of appellant's assignments of error, we shall address the arguments raised in appellees' appellate brief that allegedly support a claim that this court lacks the jurisdiction to review this cause.

{¶ 7} Appellees first argue, as they previously argued in a motion to dismiss this appeal, that appellant's notice of appeal was untimely filed. Upon a consideration of appellees' prior motion, we found that the instant appeal was not untimely. See *Pheils, Jr. and Assoc. v. Palmer* (June 22, 1998), 6th Dist. No. L-98-1110. Appellees further maintain that the instant appeal is moot because the judgment in this cause was satisfied. We have already determined that said appeal was not moot. See *Pheils, Jr. and Assoc. v. Palmer* (Jan. 6, 2009), 6th Dist. No. L-98-1110. Because this court already considered and decided both of the abovementioned issues raised by appellees in their brief, we conclude that these contentions are, in reality, untimely "motions" for reconsideration of our June 22, 1998 and January 6, 2009 decisions and shall, therefore, not address them. See App. R. 26(A).

{¶ 8} In addition, appellees assert that OK Sun Palmer is no longer the real party in interest because she assigned her interest to David Palmer who, according to appellees, was pursuing appellant's claims in the common pleas court. Appellees attached an unauthenticated, uncertified "Answer and Counterclaim" filed in Lucas County Court of Common Pleas Case No. CI-98-1508, which appears to be a foreclosure action brought
4 in order to satisfy appellees' judgment. In that answer and counterclaim, David Palmer *4 indicates that he is the "lawful assignee" of OK Sun Palmer and a "defendant by assignment." Evid. R. 1005 restricts secondary evidence offered to prove the contents of a public record, in this case, the record of a lawsuit, to either a certified copy of the record or an uncertified copy supported by the sworn testimony of a person with knowledge who testifies that the copy is true and correct. *State v. Flege*, 2d Dist. No. 06-CA-113, 2007-Ohio-2134, ¶ 37. Accordingly, we cannot consider this document and find appellees' argument in regard to the real party in interest in this cause is meritless.

{¶ 9} We now turn to a determination of the merits of appellant's assignments of error. Appellant argues all three of her assignments of error together. She asserts that the trial court abused its discretion in ordering, without any statutory support or a hearing, the payment of a judgment in the amount of $305,103.59, inclusive of prejudgment interest, and $11, 211.12 in costs to appellees from a supersedeas bond. As to costs, she challenges, for the first time on appeal, some of the particular costs awarded to appellant.

{¶ 10} We shall initially address the question of whether the court below erred in ordering appellant to pay the costs of litigation and the judgment in this cause without holding a hearing. Appellees filed their motion seeking the costs of litigation and the judgment in their favor on September 2, 1997. An itemized list of costs is appended to the affidavit in support of that motion. The motion has a certificate of service indicating that it was mailed to appellant's attorney on September 3, 1997. On September 12, 1997, appellant filed a memorandum in
5 opposition to appellees' motion, asking only that the *5 trial court defer any decision on the motion until an appeal of the jury verdict to the Ohio Supreme Court was decided.

{¶ 11} On December 16, 1997, the trial court issued its judgment awarding appellees the $305,103.59 judgment and costs in the amount of $11,211.12 for a total of $316,314.71. The court ordered that the total award was to be paid from a supersedeas bond posted by appellant. On February 25, 1998, appellant filed a "supplemental memorandum in opposition" to appellees' motion for payment from the supersedeas bond. According to appellant, she was not timely served with a copy of the court's December 16, 1997 judgment. Therefore, she claimed that she never filed her second memorandum in opposition to appellees' motion until December 29, 1997. This latter document, which was admittedly filed after the trial court's judgment awarding costs was journalized, is not in the record of this appeal. As a result, we must conclude that appellants failed to file a

timely objection to the alleged lack of hearing on the matter of fees and costs thereby waiving her right to raise this issue for the first time on appeal. *Taylor v. Johnson* (May 25, 1995), 8th Dist. No. 67585. Consequently, appellant's third assignment of error is found not well-taken.

{¶ 12} Appellant's only argument in support of her second assignment of error is that the trial court erred in ordering final judgment to be paid from the supersedeas bond without holding a hearing. Again, appellant neither timely filed a specific objection to this procedure nor requested a hearing, thereby waiving her right to
6 raise this question for *6 the first time on appeal. See *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121. Appellant's second assignment of error is found not well-taken. Moreover, due to the fact that appellant failed to object to the specific costs requested by appellees at the appropriate time, she waived this issue for purposes of appeal. Id. Appellant's first assignment of error is found not well-taken.

{¶ 13} We acknowledge that under the law, we could utilize the plain error doctrine in deciding this cause. Nevertheless, the Ohio Supreme Court limited the application of this doctrine in civil cases. That is, the *Goldfuss* court held:

{¶ 14} "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." Id. at the syllabus.

{¶ 15} In applying this holding here, we find that the trial court's alleged error in the present case does not rise to the level expressed in *Goldfuss* and decline to apply the plain error exception. Therefore, the judgment of the Lucas County Court of Common Pleas is affirmed. The costs of this appeal are assessed to appellant pursuant to App. R. 24(A).

7 JUDGMENT AFFIRMED. *7

A certified copy of this entry shall constitute the mandate pursuant to App. R. 27. See, also, 6th Dist. Loc. App. R. 4.

1 Peter M. Handwork, J., Arlene Singer, J., Thomas J. Osowik, J., CONCUR. *1