

[Cite as *CitiMortgage, Inc. v. Slack*, 2011-Ohio-613.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94899

CITIMORTGAGE, INC.

PLAINTIFF-APPELLEE

vs.

WILLIAM J. SLACK, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-661863

BEFORE: Gallagher, J., Celebrezze, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: February 10, 2011

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SEAN C. GALLAGHER, J.:

{¶ 1} Plaintiffs-appellants William and Linda Slack appeal the judgment of the Cuyahoga County Court of Common Pleas that dismissed their counterclaim without prejudice. For the reasons stated herein, we reverse the decision of the trial court and remand the matter for further proceedings.

{¶ 2} Defendant-appellee CitiMortgage, Inc., filed a foreclosure action on June 10, 2008, alleging appellants were in default on a note and mortgage, which was secured by appellants' home. Appellants filed a counterclaim raising claims for breach of contract, fraud in the inducement, and intentional

or negligent misrepresentation. The counterclaim arose from a forbearance agreement entered between the parties in May 2007.

{¶ 3} CitiMortgage was ordered to file evidence that it had standing to file the case in accordance with the ruling in *Wells Fargo Bank, N.A. v. Jordan*, Cuyahoga App. No. 91675, 2009-Ohio-1092. In *Jordan*, this court held that a party lacks standing to bring a foreclosure action if the party cannot prove that it owned the note and mortgage on the date the complaint was filed. *Id.*

{¶ 4} CitiMortgage opted to voluntarily dismiss its claims without prejudice pursuant to Civ.R. 41(A). Thereafter, the trial court ordered appellants to file a notice of intent to proceed on their counterclaim and to demonstrate their standing to pursue their claims. Appellants eventually indicated their intent to proceed, asserted standing to pursue their counterclaim, and stated that their counterclaim was based solely upon facts and circumstances arising from the parties' forbearance agreement.

{¶ 5} On February 26, 2010, the trial court found that CitiMortgage had failed to show that the jurisdiction of the court had been properly invoked under the requirements set forth in *Jordan*, *supra*. The court determined that any judgment, including a judgment on the counterclaim, would be a nullity. For those reasons, the court dismissed all remaining claims without prejudice.

{¶ 6} Appellants filed the instant appeal challenging the dismissal of their counterclaim. This court dismissed the appeal for a lack of a final appealable order, but then reinstated the action upon appellants' unopposed motion for reconsideration. The issue was again raised in the briefing of the parties.

{¶ 7} Ordinarily, a dismissal other than on the merits that does not prevent a party from refileing is not a final appealable order. *Natl. City Commercial Capital Corp. v. AAAA At Your Serv., Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663. Although this general rule would seem to apply herein, the Ohio Supreme Court has indicated otherwise when justice so requires. The court has found that when a trial court dismisses an action for lack of jurisdiction and disposes of the case, the dismissal is a final appealable order. *Id.* at ¶ 10-12; see, also, *Cincinnati Ins. Co. v. Allstate Property & Cas. Ins. Co.*, Butler App. No. CA2009-01-017, 2009-Ohio-3540, ¶ 6; *Tuckosh v. Cummings*, Harrison App. No. 07 HA 9, 2008-Ohio-5819, ¶ 13.

{¶ 8} In this case, the trial court found that because the jurisdiction of the court was not properly invoked, it was required to dismiss all claims, and thereby disposed of the case. Pursuant to *Natl. City*, 114 Ohio St.3d 82, we find the court's order is a final appealable order in this circumstance where justice so requires. *Id.* at _ 11. Therefore, we shall address the merits of the appeal.

{¶ 9} Appellants raise one assignment of error that provides as follows: “The trial court committed reversible error by ruling that the jurisdiction of the court was never invoked and any judgment rendered in this case, including any judgments on counterclaims, would be a nullity.”

{¶ 10} In this case, the trial court dismissed appellants’ counterclaim upon a finding that the “plaintiff failed to satisfy the requirements set forth in [*Jordan*, 2009-Ohio-1092,]” such that “the jurisdiction of this court was never invoked and any judgment rendered in the within case, including any judgments rendered pursuant to defendants’ counterclaims, would be a nullity.”^{1, 2} Pursuant to *Jordan*, in order to establish standing to invoke the jurisdiction of a court in a foreclosure action, a plaintiff must show it owned the note and mortgage when the complaint was filed. *Id.*³ *Jordan* applies to the standing of a plaintiff to pursue a foreclosure action and is unrelated to jurisdiction or standing to pursue an independent counterclaim.

¹ CitiMortgage’s argument was that the dismissal for want of prosecution is not supported by the record.

² Civ.R. 41(B)(4) provides for an involuntary dismissal for lack of jurisdiction over the person or subject matter, which constitutes a failure other than on the merits.

³ We note there is a split in authority as to whether the issue of standing, or the “real party in interest” defense, in a foreclosure action may be waived if not timely asserted. See, e.g., *JPMorgan Chase Bank Trustee v. Murphy*, Montgomery App. No. 23927, 2010-Ohio-5285 ¶ 19 (standing can be waived); *Mtge. Electronic Registration Sys., Inc. v. Mosley*, Cuyahoga App. No. 93170, 2010-Ohio-2886, ¶ 17 (standing is jurisdictional and cannot be waived); *Aurora Loan Servs., L.L.C. v. Car*, Ashtabula App. No. 2009-A-0026, 2010-Ohio-1157, ¶ 18 (standing waived); *First Horizon Home Loan Corp. v. Roberts*, Cuyahoga App. No. 92367, 2010-Ohio-60 (standing waived).

{¶ 11} Under Ohio law, any claim against an opposing party, even if not arising from the same operative facts, may be raised as a counterclaim. See Civ.R. 13(B). A proper and validly asserted counterclaim is not extinguished by a plaintiff's voluntary dismissal of its claims when the court has jurisdiction to proceed on the counterclaim. *Midland Funding, LLC v. Stowe*, Columbiana App. No. 08 CO 32, 2009-Ohio-7084, ¶ 23; *Isquick v. Dale Adams Ent., Inc.*, Summit App. No. 20839, 2002-Ohio-3988, ¶ 10. *Abbyshire Constr. Co. v. Ohio Civ. Rights Comm.* (1974), 39 Ohio App.2d 125, 128-129, 316 N.E.2d 893. "As long as the court has jurisdiction of the parties and of the controversy, the counterclaim may remain pending for independent adjudication by the court following a plaintiff's voluntary dismissal of the complaint. In those circumstances, the "court retains jurisdiction over the properly asserted counterclaim which the defendant may then pursue in that court." (Internal citations and quotations omitted.) *Columbus Metro. Hous. Auth. v. Flowers*, Franklin App. No. 05AP-87 and 05AP-372, 2005-Ohio-6615, ¶ 15.

{¶ 12} In this case, appellants' counterclaim did not arise from the note or mortgage. Rather, appellants asserted claims of breach of contract, fraud, and misrepresentation arising from a forbearance agreement they entered with CitiMortgage in an earlier foreclosure action, *CitiMortgage, Inc. v. Slack*, Cuyahoga County Common Pleas Court Case No. CV-606916. The

forbearance agreement was entered in May 2007. The record does not reflect any basis for concluding the trial court could not adjudicate appellants' counterclaim independently from the complaint. Upon our review, we find that the trial court had jurisdiction of the parties and of the controversy and erred by dismissing the counterclaim.⁴

{¶ 13} Appellants' sole assignment of error is sustained.

Judgment reversed; case remanded.

It is ordered that appellants recover from appellee costs herein taxed.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
COLLEEN CONWAY COONEY, J., CONCUR

⁴ Although CitiMortgage moved for summary judgment on the merits of the counterclaim, that motion was not ruled upon by the trial court. Therefore, the merits of the claims are not before us for review.