

Case Summary

Keith and Melinda McClaran appeal the trial court's judgment and grant of foreclosure to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for GMAC Mortgage Corporation.¹ We affirm.

Issues

The McClarans raise two issues, which we restate as:

- I. whether the trial court erred by denying the McClarans' motion for summary judgment, which challenged the trial court's grant of MERS's motion to reinstate its action against the McClarans; and
- II. whether the trial court abused its discretion by denying the McClarans' motion for a continuance of the summary judgment hearing.

Facts

On March 27, 2006, MERS, as nominee for GMAC Mortgage Corporation, filed a complaint on a promissory note and to foreclose a mortgage on the McClarans' property in Martinsville. In August 2007, the trial court issued an order setting a hearing for failure to prosecute the action pursuant to Indiana Trial Rule 41(E). MERS failed to appear at the October 2007 hearing, and the trial court dismissed the matter. On December 12, 2007, MERS filed a "motion to reactivate" the case.² Appellant's App. p. 126. The trial court then issued an order, which provided: "Upon Motion of Plaintiff to

¹ Although we are aware of the controversy surrounding MERS, the McClarans do not raise the issue. See Christopher L. Peterson, Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System, 78 U. CIN. L. REV. 1359 (2010).

² Neither party provided us with a copy of this motion to reactivate.

reactivate the subject cause, and for good cause shown, it is ordered that this case be reactivated to its original date of filing.” Id. at 31.

In April 2008, MERS filed a motion for summary judgment. The McClarans filed a response, arguing that: (1) the action should not have been reinstated because MERS had not filed a motion for relief from judgment under Indiana Trial Rule 60(B); and (2) alternatively, they argued that there were “several controversial assertions of fact” in their answer to MERS’s complaint. Id. at 39. In June 2008, MERS requested that the summary judgment hearing be continued indefinitely, and the trial court granted MERS’s request. The parties apparently mediated but were unable to reach an agreement.

In October 2009, MERS filed a renewed motion for summary judgment and designated evidence that the McClarans had entered into a promissory note and mortgage and had defaulted on the terms of the promissory note. The McClarans did not respond to MERS’s motion for summary judgment; rather, the McClarans filed a cross motion for summary judgment, arguing that the trial court should not have reinstated the action because MERS failed to file a motion for relief from judgment under Indiana Trial Rule 60(B). MERS failed to appear for the January 2010 hearing on the motions, and the CCS indicates that the trial court “received a call from the plaintiff’s counsel stating they had gone to the wrong courthouse.” Id. at 128. MERS filed a motion to reset the hearing, which the trial court granted.

The trial court held a rescheduled hearing on the motions for summary judgment on March 18, 2010 at 10:45 a.m. On the morning of the summary judgment hearing, the McClarans filed by facsimile a motion to continue the hearing because their counsel was

“not feeling well and will not be able to attend the hearing.” App. p. 97. The trial court denied the McClarans’ motion to continue, granted MERS’s motion for summary judgment, and denied the McClarans’ cross motion for summary judgment. Thus, the trial court granted judgment to MERS and ordered foreclosure of the property.

The McClarans filed a motion to correct error, arguing again that the trial court should not have reinstated the action after it was dismissed pursuant to Indiana Trial Rule 41(E), and MERS filed a response brief. The trial court denied the McClarans’ motion to correct error. The McClarans now appeal.

Analysis

I. McClarans’ Motion for Summary Judgment

The first issue is whether the trial court erred by denying the McClarans’ motion for summary judgment, which challenged the trial court’s grant of MERS’s motion to reinstate its action against the McClarans. Our standard of review for summary judgment is the same standard used by the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Sheehan Constr. Co. v. Cont’l Cas. Co., 938 N.E.2d 685, 688 (Ind. 2010). All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party. Sheehan, 938 N.E.2d at 688. Also, review of a summary judgment motion is limited to those materials designated to the trial court. Id.

On appeal, the McClarans argue: (1) the trial court improperly treated the dismissal as a dismissal without prejudice; (2) Indiana Trial Rule 60(B) applied but

MERS did not file a motion under that rule; (3) the trial court failed to hold a hearing pursuant to Indiana Trial Rule 60(B); and (4) MERS failed to demonstrate a meritorious claim or exceptional circumstances. However, in their motion for summary judgment, the McClarans argued only that the dismissal for failure to prosecute an action is a dismissal with prejudice and that a motion pursuant to Indiana Trial Rule 60(B) was required to reinstate the action. The McClarans argued that, because MERS did not file a motion based on Indiana Trial Rule 60(B), they were entitled to summary judgment. “Generally, a party may not raise an issue on appeal which was not raised in the trial court.” Hardiman v. Governmental Interinsurance Exch., 588 N.E.2d 1331, 1333 (Ind. Ct. App. 1992), trans. denied. “This rule also applies to summary judgment proceedings.” Id. Consequently, we will address only the arguments raised in the motion for summary judgment; the remaining arguments are waived.

The trial court scheduled a hearing pursuant to Indiana Trial Rule 41(E) for failure to prosecute the action. After MERS failed to appear at the hearing, the trial court dismissed the action. Indiana Trial Rule 41 provides:

(E) Failure to prosecute civil actions or comply with rules. Whenever there has been a failure to comply with these rules or when no action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff’s costs if the plaintiff shall not show sufficient cause at or before such hearing. Dismissal may be withheld or reinstatement of dismissal may be made subject to the condition that the plaintiff comply with these rules and diligently prosecute the action and upon such terms that the court in its discretion determines to be necessary to assure such diligent prosecution.

(F) Reinstatement following dismissal. For good cause shown and within a reasonable time the court may set aside a dismissal without prejudice. A dismissal with prejudice may be set aside by the court for the grounds and in accordance with the provisions of Rule 60(B).

The trial court's order dismissing MERS's action did not specify whether it was with or without prejudice. Indiana Trial Rule 41(B) provides: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision or subdivision (E) of this rule and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits." We have held that dismissals for failure to prosecute an action are dismissals with prejudice unless otherwise provided by the court's order. Davidson v. Am. Laundry Mach. Div., Martin Sales, McGraw-Edison Co., 431 N.E.2d 546, 549 (Ind. Ct. App. 1982). Thus, reinstatement of MERS's action could only be in accordance with Indiana Trial Rule 60(B).

According to the McClarans, MERS failed to file its motion for reinstatement pursuant to Indiana Trial Rule 60(B). However, we do not know whether the McClarans' claim is correct because they failed to designate any evidence in support of their assertion. The only document referenced and apparently attached to their motion for summary judgment was the trial court's order reinstating the action. The McClarans failed to designate MERS's motion for reinstatement to the trial court or any other evidence regarding the reinstatement or dismissal. We are prohibited from reversing summary judgment orders on the ground that there is a genuine issue of material fact

unless the material facts and relevant evidence were specifically designated to the trial court. Ind. Trial Rule 56(H); Rosi v. Bus. Furniture Corp., 615 N.E.2d 431, 434 (Ind. 1993). The McClarans failed to do so and failed to meet their burden of demonstrating that they were entitled to summary judgment.

II. McClarans' Motion for Continuance

Next, the McClarans argue that the trial court abused its discretion by denying their motion for a continuance of the summary judgment hearing. The decision whether to grant or deny a continuance lies within the sound discretion of the trial court, and we will not overturn its decision on appeal absent clear abuse of that discretion. Scott v. Crussen, 741 N.E.2d 743, 746 (Ind. Ct. App. 2000), trans. denied. Additionally, “[t]he moving party must be free from fault and show that his rights are likely to be prejudiced by the denial.” Id.

According to the McClarans, the trial court should have granted their motion for extension of time, which was faxed to the trial court on the morning of the hearing, because their counsel was “not feeling well” and was not “able to attend the hearing.” App. p. 97. The McClarans point out that the trial court had earlier granted a continuance of the summary hearing for MERS after its counsel went to the wrong courthouse for the hearing.

In this situation, the trial court could have granted the McClarans' motion for a continuance, but we cannot say that it abused its discretion by denying the motion. As we noted in McGuire v. Century Sur. Co., 861 N.E.2d 357, 360 (Ind. Ct. App. 2007), counsel for the McClarans should not have assumed that the motion would be granted.

“In fact, without having received immediate notice from the trial court that the motion would be granted, counsel should have assumed it would be denied and acted accordingly.” McGuire, 861 N.E.2d at 360 n.2. Moreover, the McClarans have failed to demonstrate that they were prejudiced by the denial of the motion for a continuance. The trial court did not abuse its discretion by denying the motion to continue.

Conclusion

The trial court did not err by denying the McClarans’ motion for summary judgment or their motion to continue the summary judgment hearing. We affirm.

Affirmed.

RILEY, J., and DARDEN, J., concur.