

[Cite as *Advantage Bank v. Gayhart*, 2011-Ohio-1129.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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| ADVANTAGE BANK, F.K.A. | : | |
| GERMANTOWN FEDERAL SAVINGS | : | |
| AND LOAN | : | C.A. CASE NO. 23883 |
| Plaintiff-Appellee | : | |
| | : | T.C. CASE NO. 2007-CV-9069 |
| vs. | : | |
| | : | (Civil Appeal from |
| COY GAYHART, et al. | : | Common Pleas Court) |
| Defendants-Appellants | : | |

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O P I N I O N

Rendered on the 11th day of March, 2011.

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GRADY, P.J.:

{¶ 1} Defendants, Coy and Terri Gayhart appeal, from a declaratory judgment finding that the Gayharts owe \$40,946.09, on a promissory note secured by a mortgage.

{¶ 2} In 1979, the Gayharts executed a promissory note in favor of Germantown Federal Savings and Loan Association in the amount

of \$50,000. The note was secured by a mortgage on real property owned by the Gayharts. The note provides for a payment schedule, interest at the rate of 11% per annum, and late charges.

{¶ 3} The Gayharts fell in arrears in their obligation and the bank commenced a foreclosure action. In January of 2006, the Gayharts paid the bank \$40,000. The bank dismissed its foreclosure action, stating that the payment had "brought current the mortgage loan."

{¶ 4} A second foreclosure action was filed on October 26, 2007, by Advantage Bank, f.k.a. Germantown Federal Savings and Loan. The bank alleged a default by the Gayharts of their obligation on the note. The bank asked for a judgment in the amount of \$54,476.83, plus interest, late charges, advances for taxes and insurance, and court costs.

{¶ 5} The Gayharts filed an answer setting up defenses of accord and satisfaction and real party in interest. They also filed a counterclaim for a declaratory judgment finding that their debt to the bank had been paid in full and that their mortgage should therefore be discharged.

{¶ 6} Advantage Bank and the Gayharts filed motions for declaratory judgment on the respective claims and defenses. The court denied the bank's motion. The court granted summary judgment to the Gayharts on their real party in interest defense. The court

denied the Gayharts' motion for summary judgment on their counterclaim for a declaratory judgment.

{¶ 7} A bench trial was held on January 21, 2010 on the Gayharts' counterclaim. On January 22, 2010, the trial court entered judgment, declaring that the Gayharts owed \$40,946.09 on the promissory note, plus interest at the rate of 11% per annum from January, 2006, plus escrow items advanced. The Gayharts filed a notice of appeal.

ASSIGNMENT OF ERROR

{¶ 8} "THE TRIAL COURT ERRED IN FINDING THE BALANCE OF THE PROMISSORY NOTE WAS \$40,946.09."

{¶ 9} The Gayharts first argue that the trial court "erred in permitting Advantage Bank, through an officer, to establish material facts though [sic] leading questions on direct examination by its own attorney. *** It is material and error here because it did not just develop other testimony but helped establish what the trial court considered to be a sufficient basis to adopt other testimony of the same witness and come to its conclusion." Brief, p. 9.

{¶ 10} Evid.R. 611(C) states, in pertinent part: "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. * * * " "The exception 'except as may be necessary to develop his testimony'

is quite broad and places the limits upon the use of leading questions on direct examination within the sound judicial discretion of the trial court." *State v. Lewis* (1982), 4 Ohio App.3d 275, 278.

{¶ 11} "'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 12} "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprises, Inc v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

{¶ 13} The Gayharts identify questions on pages 23 to 25 of the trial transcript as leading questions that the trial court should not have allowed. These leading questions were asked during Advantage Bank's direct examination of its employee, Lance Bennett.

All but one of these questions related to the names of various companies that were ultimately merged into Advantage Bank. The

trial court had previously granted summary judgment to the Gayharts on their defense that Advantage Bank had failed to show that it was the real party in interest, as holder of the Gayharts' note.

{¶ 14} The sole, material issue being tried on the counterclaim was what amount the Gayharts owed on their promissory note, to which these leading questions in no way referred. With respect to any error assigned, it must be shown that the complaining party was prejudiced by the error. *Bond v. Bond*, Miami App. No. 04CA8, 2004-Ohio-7253, ¶15, citing *Smith v. Fletcher* (1967), 12 Ohio St.2d 107. The error assigned with respect to the questions asked did not affect the Gayharts' substantial rights in prosecuting their counterclaim. Harmless errors, that is, errors that do not affect substantial rights, must be disregarded by the reviewing court. Civ.R. 61; R.C. 2309.59.

{¶ 15} The other leading question cited by the Gayharts does relate to the ultimate issue in the declaratory judgment counterclaim. The question and answer were as follows:

{¶ 16} "Q All right. Back to the question. There was a \$50,000 loan, and 30 years ago, and it's the bank's position that as of today the Gayharts owe \$75,887?

{¶ 17} "MR. EAGLE: Objection, Your Honor.

{¶ 18} "THE COURT: Overruled.

{¶ 19} "THE WITNESS: With interest, late charges, negative

escrows, principle (sic) balance, yes, that would be the total amount due." (Tr. 25.)

{¶ 20} Although this leading question and answer related to a material issue in the trial, the witness subsequently testified in greater detail concerning the amount the Gayharts owed on their promissory note and the basis for that assertion. In short, the leading question was followed by other questions that required the witness to provide facts and data to support his answer. The trial court did not abuse its discretion in allowing this leading question, and the Gayharts were not materially prejudiced by the trial court's decision to allow the question.

{¶ 21} The Gayharts also argue that the trial court erred in determining that the balance due on the promissory note was \$40,946.09 instead of some lesser amount. In essence, the Gayharts argue that the trial court's finding is against the manifest weight of the evidence. "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279, at syllabus.

{¶ 22} At the trial, Coy Gayhart testified that he made a \$40,000 payment to Advantage Bank in January of 2006, but conceded that he had failed to make any payment during the prior three years.

(Tr. 13-16.)

{¶ 23} Lance Bennett, a Credit Administration Manager at Advantage Bank, testified that he reviewed the loan and payment records relating to the Gayharts' account. Bennett testified that after crediting the Gayharts with the \$40,000 payment in January of 2006, there remained an outstanding principal balance of \$40,946.09. He explained that the \$40,000 payment in January of 2006 had been applied to first pay interest and negative escrows, and that the remainder was applied to reduce the principal balance.

According to Bennett, the Gayharts failed to make any payments from 2002 through 2005. (Tr. 31, 39-40, 44-48.) During his testimony, Bennett referred to a printout of payments and charges made on the Gayharts' note. The printout was admitted in evidence.

{¶ 24} The Gayharts argue that the trial court erred in finding an amount due of \$40,946.09 because a prior statement by Advantage Bank established that the Gayharts had made all the necessary payments on the promissory note as recent as January of 2006. The evidence presented by the Gayharts consisted of a January 10, 2006 memorandum in support of a motion to dismiss a counterclaim that was filed by Advantage Bank in the prior foreclosure action. In the memorandum, Advantage Bank stated: "Defendants, Coy H. Gayhart and Terri Gayhart have brought current the mortgage loan which is the subject of the cross claim in the foreclosure action

and therefore the cross claim ought to be dismissed without prejudice." (Dkt. 50.) No other pleading or filing from that action is included in the record before us.

{¶ 25} Lance Bennett testified that "brought current" is a term used in the ordinary course of his business and "means that in that particular case a loan had paid its interest up to date and brought any principle (sic) payments up to date that were due, and negative escrows, if they're due." (Tr. 55-56.)

{¶ 26} Based on the evidence presented to it, the trial court found:

{¶ 27} "So the words that are important here that the parties I think stressed in the argument are the words 'brought current,' 'loan brought current.' I think these rules of law can be applied to those words here.

{¶ 28} "It's the Court's view that those words are not ambiguous, that they have a specific meaning known to parties to loan transactions, and that that meaning is indicated by witness Mr. Bennett here. That essentially is that parties to these contracts know or should know that there is a schedule, if you will, or as it's called an amortization, and that interest is, I believe the phrase is front-end loaded. That when loans are paid off and these amortization schedule, the interest is being paid off first, so large amounts of interest is being paid, followed

by later on, if payments are current or made regular or made pursuant to the schedule, then larger amounts of principle (sic) are being paid down at the end of the loan.

{¶ 29} "Mr. Gayhart did not testify that he had any understanding that 'brought current' means something other than what would be the typical practice with the handling of a mortgage loan. He really did not give any testimony himself on what he understood the settlement agreement to be, so I think we can utilize the plain meaning of 'brought current' as established by what might be generally known by people; or if we have to, we can resort to the law that allows extrinsic evidence of the trade usage of that term to be utilized.

{¶ 30} "So in this case, on a declaratory judgment counterclaim of the defendant, the Court declares that what is owed is \$40,946.09 plus 11% interest per annum from January of 2006, plus any escrow items, such as taxes and insurance, that have been advanced by the plaintiff." (Tr. 64-66.)

{¶ 31} The meaning of "brought current" to which Bennett testified could mean that the amounts due on the note, of all kinds and whenever owed, were paid in full. However, the Gayharts offer no evidentiary support for that sweeping interpretation concerning their obligation. Rather, they urge that Advantage Bank's statement must be construed as a form of judicial admission that

would require a finding that they owe less than the balance the court found.

{¶ 32} The court was not required to construe the bank's earlier statement as a judicial admission, when Bennett's testimony that the Gayharts yet owed \$40,946.09, and how he arrived at that amount, was before the court. The court could credit that testimony, which is competent, credible evidence going to all the essential elements of the declaratory judgment the Gayharts requested. The judgment is therefore not against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Const. Co.* No abuse of discretion in the trial court's judgment is demonstrated.

{¶ 33} The assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, J. and FAIN, J. concur.

Copies mailed to:

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Hon. Timothy N. O'Connell