

[Cite as *GMAC Mtge. Corp. v. Germano*, 2011-Ohio-1044.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

GMAC MORTGAGE CORP.

C. A. No. 25393

Appellee

v.

JOHN GERMANO

APPEAL FROM JUDGMENT
ENTERED IN THE
AKRON MUNICIPAL COURT
COUNTY OF SUMMIT, OHIO
CASE No. 09 CV 06675

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 9, 2011

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} John Germano sued GMAC Mortgage Corporation for improperly applying his mortgage payments and obtained a default judgment against it. Mr. Germano and GMAC later entered into a settlement agreement, under which GMAC allegedly agreed to pay Mr. Germano \$1000 in exchange for Mr. Germano’s release of any claims or judgments that he had against it. When Mr. Germano later executed on the default judgment and garnished one of GMAC’s bank accounts, GMAC sued him for breach of settlement agreement. The municipal court granted summary judgment to GMAC. Mr. Germano has appealed, arguing that he was not properly served, that Summit County was not an appropriate venue, that the municipal court incorrectly denied him the right to engage in discovery, and that the court incorrectly granted summary judgment to GMAC. We reverse because genuine issues of material fact exist regarding the terms of the settlement agreement.

SERVICE AND VENUE

{¶2} Mr. Germano’s second and third assignments of error are that the municipal court incorrectly allowed GMAC’s action to proceed even though it did not properly serve him and Summit County was not a proper venue. Mr. Germano has argued that GMAC did not follow the rules for service by publication under Rule 4.4 of the Ohio Rules of Civil Procedure and that venue was not proper because he lives in Florida. GMAC has argued that the municipal court correctly determined that Mr. Germano forfeited those defenses.

{¶3} “The Ohio Rules of Civil Procedure address how and when defenses and objections must be raised.” *Gliozzo v. Univ. Urologists of Cleveland Inc.*, 114 Ohio St. 3d 141, 2007-Ohio-3762, at ¶7. Under Rule 12(B) of the Ohio Rules of Civil Procedure, “[e]very defense . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1.”

{¶4} “In addition to determining how and when defenses must be raised, [Civil Rule 12] explains how defenses may be waived.” *Gliozzo v. Univ. Urologists of Cleveland Inc.*, 114 Ohio St. 3d 141, 2007-Ohio-3762, at ¶8. Under Civil Rule 12(H)(1)(b), “[a] defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof” According to the Ohio Supreme Court, the defenses of insufficiency of service of process and venue are forfeited “if a motion is made raising other Civ.R. 12(B) defenses and [they are] not included in that motion or, if there is no

such motion, if [they are] not raised by separate motion or included in the responsive pleading.” *Glozzo*, 2007-Ohio-3762, at ¶9.

{¶5} When Mr. Germano filed his answer on December 3, 2009, he did not list insufficient service or improper venue as defenses. He also did not file a separate motion raising those defenses on or before that same day. We, therefore, conclude that Mr. Germano forfeited his right to argue that he was not properly served and that Summit County was not a proper venue. *Glozzo v. Univ. Urologists of Cleveland Inc.*, 114 Ohio St. 3d 141, 2007-Ohio-3762, at ¶9; *Nicholson v. Landis*, 27 Ohio App. 3d 107, 109 (1985) (“[I]t is essential that a party asserting improper venue must make such assertion at the earliest possible moment[.]”). Mr. Germano’s second and third assignments of error are overruled.

SUMMARY JUDGMENT

{¶6} Mr. Germano’s first and sixth assignments of error are that the municipal court incorrectly granted summary judgment to GMAC. In reviewing a municipal court’s ruling on a motion for summary judgment, we apply the same standard a municipal court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990).

{¶7} GMAC moved for summary judgment, arguing that there was no genuine issue of material fact that Mr. Germano and it entered into a settlement agreement, under which Mr. Germano agreed to release any claims and judgments he had against it. “[A] valid settlement agreement is a contract between parties, requiring a meeting of the minds as well as an offer and an acceptance thereof.” *Rulli v. Fan Co.*, 79 Ohio St. 3d 374, 376 (1997); see *Kostelnik v. Helper*, 96 Ohio St. 3d 1, 2002-Ohio-2985, at ¶16 (“Essential elements of a contract include an

offer, acceptance, contractual capacity, consideration . . . , a manifestation of mutual assent and legality of object and of consideration.”) (quoting *Perlmutter Printing Co. v. Strome Inc.*, 436 F. Supp. 409, 414 (N.D. Ohio 1976)).

{¶8} In support of its motion, GMAC submitted an affidavit of one of its employees, alleging that Mr. Germano agreed to accept \$1000 in settlement of his claims against GMAC. The employee also alleged that Mr. Germano and GMAC entered into a written settlement agreement that was signed by the parties. The employee further alleged that GMAC tendered a \$1000 check to Mr. Germano, which Mr. Germano negotiated. GMAC attached a copy of the alleged settlement agreement as an exhibit to the employee’s affidavit.

{¶9} Mr. Germano opposed the motion for summary judgment, arguing that he did not sign the agreement as represented by GMAC and noting that the agreement submitted by GMAC was not signed by GMAC. According to Mr. Germano, his original lawsuit was for \$15,000. In an affidavit that he submitted in support of his opposition to the motion for summary judgment, Mr. Germano alleged that the settlement negotiations concerned only the amount GMAC would pay him in addition to the judgment he had already obtained. He also alleged that GMAC’s lawyer told him before he entered into the settlement agreement that GMAC would not move to vacate the default judgment.

{¶10} GMAC has argued that “[t]here is no dispute that the settlement agreement attached to [its] complaint and motion for summary judgment is authentic, was signed by [it] and [Mr.] Germano, and was filed with the Court in the [previous] Lawsuit.” GMAC’s argument, however, is not supported by the record. The copy of the alleged settlement agreement that is attached to GMAC’s complaint is signed by Mr. Germano and a GMAC employee, but is missing pages. That copy of the agreement is missing a list of recitals and the first seven

“[t]erms,” including, presumably, the term describing what claims or judgments Mr. Germano agreed to release. The copy of the alleged settlement agreement attached to GMAC’s motion for summary judgment is not signed by GMAC, suggesting, when viewed in conjunction with the copy attached to the complaint and Mr. Germano’s affidavit, that it is not the final version of the settlement agreement.

{¶11} Mr. Germano has established that a genuine issue of material fact exists regarding whether the settlement agreement attached to GMAC’s motion for summary judgment was the parties’ actual agreement. See *Stone v. Cazeau*, 9th Dist. No. 07CA009164, 2007-Ohio-6213, at ¶16 (“A nonmoving party may defeat a properly supported motion for summary judgment with his own affidavit that demonstrates the existence of genuine issues of material fact.”). Mr. Germano’s first and sixth assignments of error are sustained.

DISCOVERY EXTENSION

{¶12} Mr. Germano’s fourth and fifth assignments of error are that the municipal court incorrectly denied him the right to conduct additional discovery before ruling on GMAC’s motion for summary judgment. In light of the resolution of Mr. Germano’s other assignments of error, his fourth and fifth assignments of error are moot and are overruled on that basis. See App. R. 12(A)(1)(c).

CONCLUSION

{¶13} The municipal court incorrectly granted summary judgment to GMAC. The judgment of the Akron Municipal Court is reversed, and this matter is remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Akron Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
BELFANCE, J.
CONCUR

APPEARANCES:

JOHN K. GERMANO, pro se, Appellant.

ANGELA PAUL WHITFIELD, and JOEL E. SECHLER, Attorneys at Law, for Appellee.