

IN THE SUPREME COURT OF OHIO

| | | |
|-------------------------|---|------------------------------|
| WELLS FARGO BANK, N.A. | : | On Appeal from the |
| | : | Ashland County Court |
| Appellee | : | of Appeals, Fifth |
| | : | Appellate District |
| v. | : | |
| | : | Court of Appeals |
| ROBERT E. COGAR, et al. | : | Case No. 12-COA-022 |
| | : | |
| Appellants | : | Supreme Court Case No. _____ |

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ROSALIE COGAR

Timothy B. Pettorini (S.Ct. #0070107) (COUNSEL OF RECORD)
 Critchfield, Critchfield & Johnston, Ltd.
 225 North Market Street
 P.O. Box 599
 Wooster, Ohio 44691
 Phone: (330) 264-4444
 Fax No.: (330) 263-9278
 E-mail pettorini@ccj.com

COUNSEL FOR APPELLANT, ROSALIE COGAR

Bradley P. Toman, Esq. (S. Ct. # 0042720)
 Carlisle, McNellie, Rini, Kramer &
 Ulrich, Co., LPA
 24755 Chagrin Boulevard, Suite 200
 Cleveland, OH 44122
 Phone: 216.360.7200
 Fax: 216.360.7210

Steven L. Sacks, Esq.
 S. Scott Martin, Esq.
 LERNER SAMPSON & ROTHFUSS
 120 East Fourth Street, 8th Floor
 Cincinnati, OH 45202-4007
Steven.sacks@lsrlaw.com
Attorney for Plaintiff-Appellee

COUNSEL FOR APPELLEES, WELLS FARGO BANK, N.A.

FILED
 MAR 18 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

RECEIVED
 MAR 18 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-----------------|
| EXPLANATION OF WHY THIS CASE PRESENTS A SIGNIFICANT CONSTITUTIONAL QUESTION AND IS OF PUBLIC AND GREAT GENERAL INTEREST | 1 |
| STATEMENT OF THE CASE AND FACTS | 2 |
| ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW | 4 |
| <u>Proposition of Law No. 1: The Trial Court and Court of Appeals erred in making credibility determination in deciding Rosalie Cogar's Motion for Relief from Judgment.</u> | |
| CONCLUSION | 8 |
| PROOF OF SERVICE | 9 |
| APPENDIX | Appx. Letter |
| Opinion of the Court of Appeals Fifth Judicial District (January 31, 2013)..... | A |
| Judgment Entry of the Common Pleas Court of Ashland County, Ohio (May 16, 2012)..... | B |

EXPLANATION OF WHY THIS CASE PRESENTS A
SIGNIFICANT QUESTION OF PUBLIC AND GREAT GENERAL INTEREST

The Trial Court and the Fifth District Court of Appeals drastically altered the requirements for relief from judgment under Civil Rule 60(B). The Ohio Supreme Court set forth the requirements for relief from judgment pursuant to Civil Rule 60(B) in *GTE Automatic Elec., Inc. v. ARC Industries* (1976), 47 Ohio St. 2d 146, 150-51, 351 N.E.2d 113. As long as a defendant presents a meritorious defense and sets forth the other elements of a Civil Rule 60(B) the defendant should receive relief from the judgment. The Fifth District Court of Appeals, however, affirmed the Trial Court's decision that mandated not only a meritorious defense, but also a defense that meets the Trial Court's standards of credibility. By raising the bar to the defendant in this matter, the Fifth District has altered the long-standing of holding *GTE Automatic Electric Inc. v. ARC* and dramatically changed the landscape of post-judgment relief.

This matter is of great public interest given the explosion of foreclosure cases in Ohio. In 2011, common pleas courts in Ohio reported 71,556 new foreclosure filings. *Supreme Court & Judicial News* March 14, 2012. Recently, Ohio took part in a massive settlement involving robo-signing of mortgage documents. Teresa Dixon Murray, *LPS settles Robo-signing Foreclosure Complaints with Ohio, 45 other states*. *Cleve. Plain Dealer*, Jan 31, 2013 at A1. Ohio Attorney General Mike DeWine stated, "The practice of robo-signing caused significant damage to many Ohioans during the housing crisis when buyers were sold mortgages that they could not maintain payments on." *Id.*

In the present case, the Defendant brought forth evidence through witnesses who participated in the closing, including the closing agent and the notary who notarized the documents, that Defendant did not sign the mortgage at issue, and in fact, never physically appeared at the closing. Although this evidence clearly establishing a meritorious defense of forgery, the Trial Court ruled that the testimony and evidence lacked credibility, and denied the motion. Such a ruling alters the

purpose and spirit behind Civil Rule 60(B) and in light of the widespread abuses uncovered during the mortgage crisis this material change in the law puts a large amount of homeowners at risk.

Therefore, the decision affirming the Trial Court's credibility determination of a meritorious defense presents an issue of great public interest which the Supreme Court should consider and ultimately reverse.

STATEMENT OF THE CASE AND FACTS

On January 7, 2009, Plaintiff Wells Fargo Bank, N.A., filed a foreclosure complaint against defendants, including Defendants Robert and Rosalie Cogar. On January 28, 2010, Plaintiff obtained a judgment against Mrs. Cogar in the amount of \$227,066.05, plus interest at the rate of 5.8% per annum from September 1, 2008. Mrs. Cogar moved to vacate the default judgment and decree in foreclosure by filing an Emergency Motion to Vacate Entry Granting Summary Judgment and Decree in Foreclosure and Reformation of Mortgage on February 1, 2010. On February 4, 2010, the trial Court stayed any action to execute on the January 28, 2010 judgment until further order of the trial court. Ultimately, the trial court vacated the stay of execution of foreclosure in Judgment Entry entered on November 18, 2011. Mrs. Cogar then filed the Motion for Relief from Judgment ("Motion") on January 13, 2012. An evidentiary hearing was held on the Motion on April 27, 2012 and post-hearing briefs were submitted by the parties. Thereafter, the trial court denied the Motion in its May 16, 2012 Judgment Entry ("Judgment")(attached at Appx. B). It is from that decision that Mrs. Cogar timely appealed to the Fifth District Court of Appeals. The Fifth District in its January 31, 2103, decision, affirmed the Trial Court's decision (attached at Appx. A)

The facts of this matter established that Robert and Rosalie Cogar, husband and wife, were co-owners of property at 60 County Road 620, West Salem, Ohio, ("Property") where they have lived since 1973. Around 2000, the Cogars had paid off the debt owed on their home. On April 28, 2005, and again on May 5, 2005, Mr. Cogar signed a promissory note (collectively "Note") to

Argent Mortgage Company, LLC ("Argent") unbeknownst to Mrs. Cogar. *Id.* at ¶5. Although Mrs. Cogar did not sign the Note, on the same dates the Cogars purportedly signed mortgages securing the Notes with the Property. Argent recorded the Mortgage on May 11, 2005. On or about September 1, 2008, Mr. Cogar defaulted under the terms of the Note. Plaintiff/Appellee, Wells Fargo Bank, N.A., to whom Argent assigned the mortgage, filed a foreclosure action against the Property based upon the mortgage recorded May 11, 2005 and rerecorded June 7, 2005. Mr. Cogar died on March 27, 2010.

On or about December 1, 2011, the closing agent for the real estate transaction, Benjamin T. Lackey, came forward with an Affidavit setting forth certain facts related to the closing. Mr. Lackey indicated that during the closing, Mrs. Cogar could not have affixed her signature to the Mortgage because she was not present. The notary public present at the closing also testified that Mrs. Cogar was not present at the closing. Based upon this newly discovered evidence and the fact that Mrs. Cogar's purported signature on the Mortgage is a forgery and a misrepresentation, Mrs. Cogar is entitled to relief from judgment as set forth herein.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The Trial Court and Court of Appeals erred in making credibility determination in deciding Rosalie Cogar's Motion for Relief from Judgment.

A. Standard of Review

The decision to deny a motion for relief from judgment under Civ. R. 60(B) will be overturned on appeal if the trial court abuses its discretion. *Wilson v. Lee*, 172 Ohio App. 3d 791, 2007 Ohio 4542, at ¶11. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140. An abuse of discretion most commonly arises from a decision that was unreasonable. *Wilson*, 2007 Ohio 4542, at ¶11. Decisions are unreasonable if they lack a sound reasoning process to support them. *Id.*

To prevail on a motion for relief from judgment, "the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time." *GTE Automatic Elec., Inc. v. ARC Industries* (1976), 47 Ohio St. 2d 146, 150-51, 351 N.E.2d 113. In fact, the Ohio Supreme Court went so far as to declare it an abuse of discretion to deny a motion for relief in instances in which grounds for relief from judgment appear on the face of the record. *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St. 3d 18, 20. Cogar met all three requirements, and still, the trial court refused to vacate the judgment. In doing so, the trial court acted unreasonably and abused its discretion.

B. The Trial Court Abused Its Discretion in Denying Cogar Relief from Judgment.

In Cogar's case, the trial court below acted unreasonably when it refused to vacate the judgment because (1) Cogar moved to vacate the judgment in a timely manner; (2) Cogar had a

meritorious defense; and(3) Cogar established grounds for vacating the judgment under Civ. R. 60(B)(2) and (3), as set forth more fully herein.

1. Cogar Moved to Vacate the Judgment in a Timely Manner

The "reasonable time" prong of the *GTE* test requires that the movant demonstrate that he requested relief from judgment in a timely manner. Civ.R. 60(B) specifies that the motion must be made "within a reasonable time." *Adomeit v. Baltimore* (1974), 39 Ohio App. 2d 97, 106.

In this case, Cogar moved for relief from judgment within a reasonable time, and to the extent the trial court found otherwise, the trial court abused its discretion. The trial court granted Summary Judgment and Decree of Foreclosure to Plaintiff on January 28, 2010. Cogar filed her Emergency Motion to Vacate Entry Granting Summary Judgment and Decree in Foreclosure and Reformation of the Mortgage on February 1, 2010, approximately four days after the trial court granted judgment. Execution was stayed on February 4, 2010, pending further order of the court. Thereafter, the trial court issued a Judgment Entry on November 18, 2011, which vacated the prior stay on the foreclosure. Thus, Cogar filed her Motion on January 13, 2012, well within a year, in fact, only 56 days after the Court issued Judgment Entry vacating the stay on execution. Accordingly, Cogar moved to vacate the judgment in a timely manner.

2. Cogar Presented a Meritorious Defense.

Cogar also alleged a meritorious defense. To fulfill the requirement of presenting a meritorious defense, movants do not need to prove they would prevail on the merits of their claim; rather, they are required only to allege a meritorious claim or defense. *Volodkevich v. Volodkevich* (1988), 35 Ohio St. 3d 152, 154; *see also Mortgage Electronic Registration Systems, Inc. v. Kaehne*, 11th Dist. Case No. 2007-P-0033, 2008 WL 3271249, at ¶16 (noting a Civ. R. 60(B) movant need not prove he or she will prevail on their claim or defense). Cogar contends she did not sign the mortgage in question, and she was unsure of this fact until the testimony of Benjamin Lackey was

presented to corroborate her belief that she did not sign it. Accordingly, Cogar presented a meritorious defense.

Recently, in *Deutsche Bank National Trust Co. v. Lagowski*, 7th App. Dist. Case No. 10 BE 28, 2012 WL 1306447, 2012 Ohio 1684 (March 30, 2012), an appellate court held that the trial court abused its discretion in finding that the defendant failed to allege operative facts of a meritorious defense to a judgment when he testified at a Civ. R. 60(B) hearing that while he had no evidence to prove the fraud, the deed at issue was forged and the signature upon it was not his own. *Id.* at *11, ¶¶ 62-63. The appellate court acknowledged that, “For 60(B) purposes, this is where the consideration ends.” *Id.* at *11, ¶62. The trial court found the defendant’s credibility to be lacking, and on that basis determined he failed to allege a meritorious defense; however, the appellate court concluded it was “error to make this kind of a credibility determination at this stage of the proceedings; rather, these determinations are reserved for a trial on the merits, to be made by the trier of fact.” *Id.* at *11, ¶63 (emphasis added). “In essence, the trial court made [the defendant] do more than state a meritorious defense; it went further and put [the defendant] in the position of proving the defense.” *Id.* The appellate court held that “because Lagowski met all three prongs of the *GTE* test,¹ the trial court erred by denying his Civ.R. 60(B) motion.” *Id.* at *12, ¶69.

The trial court in the instant case committed the same error with respect to Mrs. Cogar, however, unlike the court of appeals, *Deutsche Bank National Trust Co. v. Lagowski*, the Court of appeals affirmed the trial court’s decision. The trial court clearly made credibility determinations in the Judgment based upon the testimony presented at the April 27, 2012 hearing on the Motion. *See, e.g.,* Judgment, at p. 1 (“Nonetheless, the Court finds the credibility of Defendant’s witnesses to be extremely questionable, and their testimony unreliable”); p. 2 (“The Court finds the testimony of

¹ The three prongs of *GTE* were met because it was undisputed that the Lagowski motion was timely, Lagowski alleged a meritorious defense of fraud although he admitted at the Civ.R. 60(B) hearing that there was “no evidence to prove fraud,” and he was entitled to relief under Civ.R. 60(B)(1) on the basis of excusable neglect. *Id.* at *10,11, ¶61 - ¶64.

these witnesses to be untruthful..."). Based upon these improper determinations of credibility, the trial court concluded Mrs. Cogar "failed to establish any fraud in the execution of the mortgage and loan documents," and denied Mrs. Cogar's Motion. *See* Judgment, p. 2.

Therefore, Mrs. Cogar has not only alleged a meritorious defense (that, as in *Lagowski*, she did not sign the document at issue), she also presented evidence which supported it (although she was not required to do so at the Civ.R.60(B) stage of the proceedings). Further, as in *Lagowski*, it was error for the trial court to deny the Motion, in effect requiring her to prove her meritorious defense and by making credibility determinations prior to a trial on the merits.

3. Cogar is Entitled to Relief from the Judgment on the Basis of Newly Discovered Evidence per Civ. R. 60(B)(2).

As noted previously, Mrs. Cogar was unsure of whether her signature was on the mortgage until the testimony of Mr. Lackey that Mrs. Cogar was not present at the closing became known. Mr. Lackey testified:

I retained possession of the mortgage documents from the time that they were transmitted to my office until they were resubmitted back to the mortgage company. At no time were the documents out of my possession, say for a brief period of time when I left the room. During that period of time, Mrs. Cogar did not enter the building, she was not present in the building, she did not enter the parking lot, she was not there.

Additionally, he testified that Mrs. Cogar "could not have" signed the loan documents or the Mortgage. Further, the notary public present at the closing indicated that Mrs. Cogar was not present at the closing and did not sign the Mortgage before she notarized them.

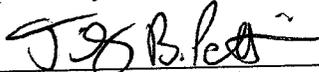
In *Countrywide Home Loans, Inc. v. Poppy*, 11th App. Dist. No. 2003-L-134, 2004 WL 2526387, 2004 Ohio 5936, the court noted that the defendants set forth "an allegation of forgery that would constitute a good defense, had the alleged evidence been newly discovered. However, they submit no evidentiary materials in the form of affidavits or otherwise with the motion to support their claim and as such, do not satisfy the rule." *Id.* at

*8, ¶44. In the instant case, Mrs. Cogar presented newly discovered evidence of her forgery defense in the form of the affidavit and the testimony of Mr. Lackey and the testimony of the notary public. Accordingly, the trial court abused its discretion by refusing to vacate the judgment on the basis of newly discovered evidence.

CONCLUSION

For the reasons set forth above, this Court should accept jurisdiction on this matter to clarify if it is proper for a Trial Court to make credibility determinations at the Civ. R. 60(B) stage in determining whether a defendant has set forth a meritorious defense. To allow the decision of the trial court and the Court of Appeals to stand will dramatically alter the standards for relief from judgment under Civil Rule 60(B) and shield those perpetuating fraud and forgery that may not immediately be apparent to homeowners.

Respectfully submitted,

By: 

Timothy B. Pettorini, Counsel of Record

COUNSEL FOR APPELLANT,
ROSALIE COGAR

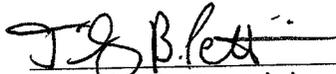
PROOF OF SERVICE

I certify that a copy of the foregoing was sent by ordinary U.S. mail to the following on this

15th day of March, 2013.

Steven L. Sacks, Esq.
S. Scott Martin, Esq.
LERNER SAMPSON & ROTHFUSS
120 East Fourth Street, 8th Floor
Cincinnati, OH 45202-4007
Steven.sacks@lsrlaw.com
Attorney for Plaintiff-Appellee

Bradley P. Toman, Esq.
Carlisle, McNellie, Rini, Kramer &
Ulrich, Co., LPA
24755 Chagrin Boulevard, Suite 200
Cleveland, OH 44122



Timothy B. Pettorini

COUNSEL FOR APPELLANT,
ROSALIE COGAR

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

2013 JAN 31 AM 10:45

ANNETTE SHAW
CLERK OF COURTS
ASHLAND, OHIO

WELLS FARGO BANK, N.A.

Plaintiff-Appellee

-vs-

ROBERT E. COGAR, ET AL

Defendants-Appellants

JUDGES:

Hon. Patricia A. Delaney, P.J.

Hon. William B. Hoffman, J.

Hon. Sheila G. Farmer, J.

Case No. 12-COA-022

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common
Pleas, Case No. 09CFR010

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

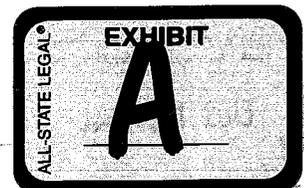
APPEARANCES:

For Plaintiff-Appellee

BRADLEY P. TOMAN
24755 Chagrin Boulevard
Suite 200
Cleveland, OH 44122

For Defendants-Appellants

TIMOTHY B. PETTORINI
225 North Market Street
P.O. Box 599
Wooster, OH 44691



Farmer, J.

{¶1} On January 7, 2009, appellee, Wells Fargo Bank, NA, filed a foreclosure action against Robert Cogar and his wife, appellant herein, Rosalie Cogar, for failure to pay on a promissory note secured by a mortgage.

{¶2} On March 2, 2009, appellee filed a motion for summary judgment. By entry filed January 28, 2010, the trial court granted the motion and awarded appellee as against appellant \$227,066.05 plus interest.

{¶3} On February 1, 2010, appellant filed an emergency motion to vacate the judgment and to stay the foreclosure. The trial court stayed its decision on February 4, 2010. Mr. Cogar died on March 27, 2010. The trial court vacated the stay on November 18, 2011.

{¶4} On January 13, 2012, appellant filed a second motion to vacate the judgment, claiming newly discovered evidence and fraud pursuant to Civ.R. 60(B)(2) and (3). A hearing was held on April 27, 2012. By judgment entry filed May 16, 2012, the trial court denied the motion.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶6} "THE TRIAL COURT ERRED IN DENYING ROSALIE COGAR'S MOTION FOR RELIEF FROM JUDGMENT."

I

{¶7} Appellant claims the trial court erred in denying her motion for relief from judgment pursuant to Civ.R. 60(B)(2) and (3) as her motion was timely, she presented a

meritorious defense, and she presented grounds for vacating the judgment based on newly discovered evidence. We disagree.

{¶18} A motion for relief from judgment under Civ.R. 60(B) lies in the trial court's sound discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75 (1987). In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983). Appellant based its Civ.R. 60(B) motion on "newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B)" and "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." Civ.R. 60(B)(2) and (3). In *GTE Automatic Electric Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus, the Supreme Court of Ohio held the following:

To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken.

{¶9} In its judgment entry filed May 16, 2012, the trial court found no "factual basis" for appellant's assertion that she did not sign the promissory note:

This example is but one of many inconsistencies in the witness testimony that suggest the Defendant's witnesses were untruthful in their testimony. Rosalie Cogar testified on cross examination to a number of documents that she claimed bore her forged signature, inferring that Robert Cogar had signed her name without her knowledge. Yet, when confronted with her denial that it was her signature situated on documents that were signed well after Mr. Cogar's death, including pro se pleadings filed in this matter, she could not explain how her signature could have gotten on the documents. Again, the Court finds the testimony of Rosalie Cogar to be untruthful.

Notwithstanding the legal authority asserted by the parties as to whether this Court has the legal authority to grant Defendant's motion, the Court specifically finds that there is no factual basis which justifies relief pursuant to Civ.R. 60(B). Defendant has failed to establish any fraud in the execution of the mortgage and loan documents.

{¶10} We note the trial court did not address the timeliness of the motion, filed some two years after the final judgment. The issue of timeliness is critical to our discussion. The "newly discovered evidence" was appellant questioning the validity of her signature. This issue was an affirmative defense that should have been raised in

the pleadings. R.C. 1303.36 governs proof of signatures and status of holder in due course. Subsection (A) states the following:

Unless specifically denied in the pleadings, in an action with respect to an instrument, the authenticity of, and authority to make, each signature on an instrument is admitted. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the party claiming validity but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or becomes incompetent at the time of the trial on the issue of the validity of the signature. If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person under section 1303.42 of the Revised Code.

{¶11} Appellant did not raise the issue of the validity of her signature in her pleadings. In her February 4, 2009 answer to the complaint, appellant admitted to the validity of the mortgage, and that she had an interest in the subject property as a titleholder.

{¶12} The trial court entered final judgment on January 28, 2010 by granting summary judgment to appellee. Appellee had filed a motion for summary judgment on

March 2, 2009. The basis of the motion was the mortgage and the note, attached to the motion as Exhibits A and B. In response, appellant and her husband filed separate pro se objections on March 9, 2009, claiming "fraud and predatory lending" and requesting discovery and a trial. No claim relative to the validity of appellant's signature on the note was made. Numerous other filings (motions for stay of judgment, injunction, and to dismiss) were filed pro se raising bare allegations of fraud and dower interests, all unsupported by evidentiary quality materials as required by Civ.R. 56. *Cogswell v. Cardio Clinic of Stark County, Inc.*, 5th Dist. No. CA-8553 (October 21, 1991).

{¶13} As previously noted, final judgment was granted on January 28, 2010, and appellant did not raise the issue of the validity of her signature until the filing of her Civ.R. 60(B) motion on January 13, 2012.¹ In her affidavit attached to her motion as Exhibit A, appellant averred: "I do not recall ever attending a closing around May of 2005" and "I could not say for certain that the signature on the mortgage was my signature."

{¶14} Also attached to the motion is the affidavit of the closing agent, Benjamin T. Lackey (Exhibit C). Mr. Lackey averred appellant was not present at the closing, but the documents contained her notarized signature. Appellant's counsel, Timothy B. Pettorini, stated he did not know of Mr. Lackey's involvement until December 1, 2011 (Exhibit B). What is curiously lacking in Mr. Pettorini's affidavit is his knowledge of appellant's assertion that she could not say "for certain" that the signature on the mortgage was her signature.

¹We note appellant had filed a motion to vacate on February 1, 2010, but the motion focused on the assignment of the note and mortgage and requested mediation.

{¶15} During the evidentiary hearing held on April 27, 2012, appellant stated on direct that she could not tell if it was her signature on the mortgage (Exhibit A). T. at 66. She claimed her husband could have signed her name, but she was not sure. T. at 68-69. At the time of the hearing, appellant's husband was deceased. Appellant claimed no knowledge of the subject foreclosure action prior to Mr. Cogar's death on March 27, 2010. T. at 65.

{¶16} Given the statements in the affidavits, we conclude to dismiss the motion outright on timeliness would have been in error. Although the timeline is suspect, we cannot say the trial court erred in proceeding to a hearing.

{¶17} Appellant argues once she presented testimony, the trial court should have granted her Civ.R. 60(B) motion and should not have addressed the issue of credibility. Appellant argues determinations on credibility are not within the scope of a trial court's authority in a Civ.R. 60(B) motion. In support of this claim, appellant cites the cases of *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18 (1996), and *Deutsche Bank National Trust Co. v. Lagowski*, 7th Dist. No. 10 BE 28, 2012-Ohio-1684.

{¶18} We disagree with this assertion. The *Kay* case cited by appellant is distinguishable from the facts sub judice because in that case, the trial court did not conduct a hearing after being presented with affidavits therefore, testimony was not presented testing the truthfulness of the affidavits. Our decision in *Cogswell*, supra, is consistent with the Supreme Court of Ohio's reasoning.

{¶19} In *Deutsche Bank*, at ¶63, our brethren from the Seventh District stated that credibility was not an issue at a Civ.R. 60(B) motion hearing:

However, the trial court found Lagowski's credibility to be lacking, and on that basis determined that he failed to allege a meritorious defense. It is error to make this kind of credibility determination at this stage of the proceedings; rather, these determinations are reserved for a trial on the merits, to be made by the trier of fact. In essence, the trial court made Lagowski do more than state a meritorious defense; it went further and put Lagowski in the position of proving the defense. And when Lagowski failed to do so, the trial court denied the motion to vacate. Thus, the trial court abused its discretion in finding that Lagowski failed to allege operative facts to support a meritorious defense to the judgment.

{¶20} We find this conclusion to totally emasculate the purpose of a hearing. What purpose is the placing of a witness under oath if it is not to test the witness's credibility? An evidentiary hearing by its very nature revolves around truthfulness and believability. The very nature of a Civ.R. 60(B) hearing places the burden of proof upon the movant. To totally disregard the issue of credibility at a Civ.R. 60(B) hearing is to ignore the purpose of the hearing.

{¶21} On the issue of credibility sub judice, we find it involves two basic questions. The first question was timeliness of the motion and whether there was newly discovered evidence and secondly, whether the claim of fraud was a valid defense.

{¶22} The trial court's decision is unclear as to which issue it was addressing. In reviewing the transcript and the lengthy docket spanning some three years, we find appellant's testimony that she did not know about the foreclosure action until March of

2010 to be incredible. Appellant stated her husband usually collected the mail prior to his death and it was "laying on my countertop in the house" when she returned from work. T. at 73. After her husband died in March of 2010, she collected the mail and worked up until July 2010. T. at 72. Appellant's affidavit did not specifically assert that the signature was not hers, and she testified during the hearing that she could not tell if the signature was hers. These facts, along with her previous motion to vacate on February 1, 2010, numerous hearings after the death of her husband, and the fact that the trial court's decision would have been mailed to her address prior to the entry of appearance by her trial counsel on September 9, 2010, belie appellant's assertion that the validity of her signature was "newly discovered evidence" and negate her claim that the motion was timely.

{¶23} Upon review, we find the trial court did not err in denying appellant's Civ.R. 60(B) motion for relief from judgment.

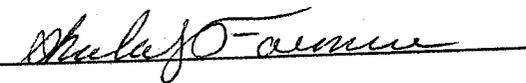
{¶24} The sole assignment of error is denied.

{125} The judgment of the Court of Common Pleas of Ashland County, Ohio is hereby affirmed.

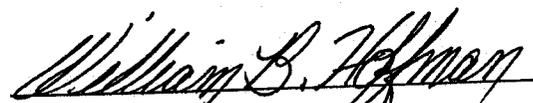
By Farmer, J.

Delaney, P.J. and

Hoffman, J. concur.







JUDGES

FILED APPEALS COURT

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

2013 JAN 31 AM 10:45

ANNETTE SHAW
CLERK OF COURTS
ASHLAND, OHIO

WELLS FARGO BANK, N.A.

Plaintiff-Appellee

-vs-

ROBERT E. COGAR, ET AL.

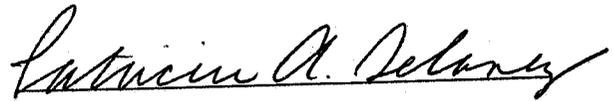
Defendants-Appellants

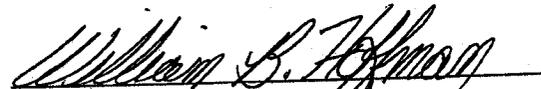
JUDGMENT ENTRY

CASE NO. 12-COA-022

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Ashland County, Ohio is affirmed. Costs to appellant.







JUDGES

IN

2012 MAY 16 PM 3:15

IN THE COURT OF COMMON PLEAS, ASHLAND COUNTY, OHIO
GENERAL DIVISION

CLERK OF COURTS
ASHLAND, OHIO

| | | |
|------------------------|---|---------------------|
| WELLS FARGO BANK, NA, | : | |
| | : | |
| Plaintiff, | : | CASE NO. 09-CFR-010 |
| | : | |
| vs. | : | |
| | : | |
| | : | JUDGMENT ENTRY |
| | : | |
| ROSALIE COGAR, et al., | : | |
| | : | |
| Defendants. | : | |

This matter came before the Court on April 27, 2012 for a hearing on the motion of Defendant Rosalie Cogar, requesting relief from judgment pursuant to Civ. R. 60(b). Present for the hearing were Attorney Toman, appearing on behalf of the Plaintiff, Defendant Rosalie Cogar, and Attorney Pettorini, appearing on behalf of Defendant Cogar. Whereupon the parties presented witness testimony and offered exhibits into evidence. The hearing was concluded. The Court granted the parties until the close of business on Friday, May 11, 2012 to submit post-hearing memoranda and supporting legal authority. Both parties submitted memoranda.

Defendant Rosalie Cogar, as a basis for her motion, asserts that she did not sign the mortgage document, and that the mortgage was obtained through fraud. The only witness testimony presented during the hearing on Defendant's motion was offered by Defendant Cogar. Plaintiff did not present any witnesses. Nonetheless, the Court finds the credibility of Defendant's witnesses to be extremely questionable, and their testimony unreliable.

Ramona Hess, for example, testified that when she notarized the mortgage deed, the only signature to which she attested was that of Robert Cogar. Rosalie Cogar's signature was not on the document. However, Benjamin T. Lackey, the loan closing agent, testified that he received the executed mortgage document directly from Ms. Hess, who was seated directly across from him at a table, and that when he

Hon. Ronald P. Forsthoefel, Judge, Common Pleas Court of Ashland County, C

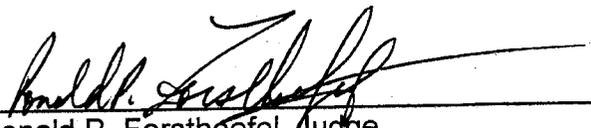


received the document, it included the notarized signature of Rosalie Cogar. Mr. Lackey inferred that Rosalie Cogar's signature could have been placed on the document while he was briefly absent from the room to smoke a cigarette. Ms. Hess, however, testified that she never saw anyone affix Rosalie Cogar's signature on the mortgage document before transferring possession to Mr. Lackey. The Court finds the testimony of these witnesses to be untruthful, and notes that while not more fully developed during cross examination, apparently Mr. Lackey has or had some form of personal relationship with Ms. Cogar's daughter.

This example is but one of many inconsistencies in the witness testimony that suggest the Defendant's witnesses were untruthful in their testimony. Rosalie Cogar testified on cross examination to a number of documents that she claimed bore her forged signature, inferring that Robert Cogar had signed her name without her knowledge. Yet, when confronted with her denial that it was her signature situated on documents that were signed well after Mr. Cogar's death, including pro se pleadings filed in this matter, she could not explain how her signature could have gotten on the documents. Again, the Court finds the testimony of Rosalie Cogar to be untruthful.

Notwithstanding the legal authority asserted by the parties as to whether this Court has the legal authority to grant Defendant's motion, the Court specifically finds that there is no factual basis which justifies relief pursuant to Civ. R. 60(B). Defendant has failed to establish any fraud in the execution of the mortgage and loan documents. The Court therefore finds the Defendant's motion not well taken and OVERRULES the same. The stay of proceedings previously ordered by this Court is further vacated, and the Plaintiff is free to proceed with appropriate sale proceedings.

It is so Ordered.



Ronald P. Forsthoefel, Judge

cc: Attorney Pettorini
Attorney Toman