

12-0704/JNR (4/10/13)

IN THE SUPREME COURT OF OHIO

WELLS FARGO BANK, N.A.

Appellee,

-VS-

ROBERT E. COGAR, et al.,

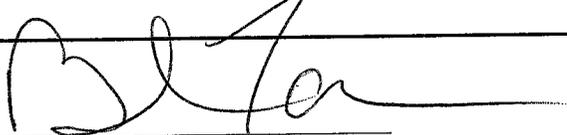
Appellants.

On Appeal from the Ashland County
Court of Appeals, Fifth Appellate
District

Court of Appeals
CASE NO.: 12-COA-022

Supreme Court Case No. 2013-0423

MEMORANDUM AGAINST JURISDICTION OF APPELLEE WELLS FARGO BANK, NA



BRADLEY P. TOMAN (0042720)
Carlisle, McNellie, Rini, Kramer & Ulrich
24755 Chagrin Blvd, Suite 200
Cleveland, Ohio 44122
(216)360-7200 Phone
(216)360-7210 fax
btoman@carlisle-law.com

Co-counsel for Plaintiff-Appellee Wells Fargo Bank, NA

Steven L. Sacks, Esq.
S. Scott Martin, Esq.
LERNER SAMPSON & ROTHFUSS
120 East Fourth Street, 8th Floor
Cincinnati, Ohio 45202
Steven.sacks@lsrlaw.com

Attorney for Defendant-Appellant Rosalie Cogar

Timothy B. Pettorini (0070107)
Critchfield, Critchfield & Johnson, Ltd.
225 North Market Street
P.O. Box 599
Wooster, Ohio 44691
(330) 264-4444
pettorini@ccj.com

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I. EXPLANATION OF WHY THIS CASE DOES NOT PRESENT A SIGNIFICANT QUESTION OF PUBLIC AND GREAT GENERAL INTEREST

It is within the discretion of this Court to determine whether a case presents a question or questions of public or great general interest. Williamson v. Rubich, 171 Ohio St. 253, 254, 168 N.E.2d 876 (1960). The heart of this matter involves assertions by a Defendant/Appellant who claimed for the first time, three years after the complaint was filed, two years after Summary Judgment was granted, and after a full hearing on her first Motion to Vacate Judgment that, "I could not say for certain that the signature on the mortgage is mine". This statement was included in an affidavit submitted in support of Defendant/Appellant's second Motion to Vacate judgment. Her first Motion to Vacate was denied after a full hearing. No appeal followed that ruling. A full hearing was also held on the second Motion to Vacate, the motion was denied, and the denial was affirmed on Appeal.

The issues raised here are not novel or even subject to multiple interpretations. The foreclosing Plaintiff established its right to enforce a note and mortgage, established a default, and was ultimately granted an *In Rem* decree in foreclosure which was upheld on Appeal. This is not a case of great public or general interest.

Further, the Appellant seeks to vacate an Entry of Summary Judgment on mere allegations of a defense, offered two years after the judgment was rendered. However, the Appellant's Brief only sites authority where default judgments were vacated. A key difference in this case is that the Appellant is attempting to vacate the granting of summary judgment. It is of great importance to deny the jurisdiction in the case due to the precedent it would set if granted. Here, the Appellant is attempting to evade the necessity of presenting the required Ohio Civil rule 56 evidence to defeat a Motion for Summary Judgment. If granted, a party would not have to respond to a summary judgment motion with Civil Rule 56 evidence.

A Motion for Default will be denied by providing mere denial of an allegation via an answer with no evidence presented. However, if evidence supporting a Motion for Summary Judgment is submitted, it must be granted unless the opposing party submits evidence contrary to the summary judgment motion. Likewise, in the Motion to Vacate the granting of a Motion for Summary Judgment, evidence must be presented. Otherwise, we will create an endless stream of litigation based on mere “allegations” not facts or evidence.

Here, the Defendant has had multiple bites of the apple. She has had two (2) full hearings on two (2) Motions to Vacate. She had the opportunity to file a Brief in Opposition to Summary Judgment and she still has presented no evidence that her signature was forged. There must be finality to litigation.

II. STATEMENT OF THE CASE

1. The Plaintiff filed its foreclosure Complaint on January 7, 2009.
2. Defendant-Appellant Rosalie Cogar (hereinafter “Cogar”) was personally served and filed her Answer to Complaint on February 4, 2009. The Answer did not allege that Cogar did not execute the Mortgage.
3. The Plaintiff-Appellee filed its Motion for Summary Judgment on March 2, 2009.
4. The Appellant Cogar filed her Brief in Opposition to Summary Judgment on March 9, 2009 and failed to allege that she did not execute the Mortgage.
5. The Appellant Cogar filed discovery on the Plaintiff-Appellee on August 21, 2009
6. The Appellant Cogar filed a Motion to Dismiss on October 14, 2009 which was denied.
7. The Trial Court entered its final Order granting Plaintiff/Appellee’s Motion for Summary Judgment for foreclosure and reformation of Mortgage on January 28, 2010.
8. On February 1, 2010, the Appellant Cogar filed her first Motion to Vacate Judgment and to Stay foreclosure.
9. The Appellant’s current Attorney, Timothy Pettorini, filed a Notice of Appearance on behalf of Appellant Rosalie Cogar on September 9, 2010.

10. A full hearing on the First Motion to Vacate was held on June 6, 2011. Counsel for Appellant Cogar was present at the hearing.

11. The Appellant Cogar's First Motion to Vacate was denied on November 18, 2011.

12. On January 13, 2012, counsel for Cogar filed a second Motion to Vacate alleging for the first time that Appellant Cogar *may* not have executed the mortgage. The Affidavit attached to the motion stated, 'I could not say for certain that the signature on the Mortgage is mine.'

13. Plaintiff filed its Memorandum in Opposition to the second Motion to Vacate on January 20, 2012 and a Supplement to the Brief on April 9, 2012.

14. A full evidentiary hearing on the second Motion to Vacate was held on April 27, 2012.

15. The Trial Court denied the Appellant Cogar's second Motion to Vacate on May 16, 2012.

16. The Court of Appeals affirmed the Decision of the trial Court on January 31, 2013.

III. STATEMENT OF THE FACTS

Most of the relevant "facts" of this case are contained in the Statement of the Case. Of particular note are the following:

- Defendant-Appellant Cogar was represented by counsel as far back as September 9, 2010;
- Defendant-Appellant Cogar filed numerous pleadings and motions in the trial court;
- Summary judgment and a final order was granted on January 28, 2010; A full hearing on the first Motion to Vacate filed by Defendant-Appellant Cogar was held on June 6, 2011;
- A full hearing was held on the Appellant's second Motion to Vacate on April 27, 2012.

These procedural facts show that the second Motion to Vacate was not timely and that Appellant had plenty of opportunity to assert the signature defense prior to judgment, but did not. The procedural history shows that this was far from a default situation.

The Defendant-Appellant Cogar did not contest the validity of her own signature until nearly two (2) years after judgment with the current Motion to Vacate on January 13, 2012. Her contest of the mortgage execution was anything but forceful. To wit, the Affidavit of Defendant-

Appellant Cogar attached to her second Motion to Vacate states, "I *could not say for certain* that the signature on the mortgage was my signature."

The procedural history and the lack of evidence submitted by the Appellant shows that the Appellant failed on all three elements necessary to vacate a judgment. The Motion to Vacate was not timely. There was no Civil Rule 60(B) grounds to vacate the judgment. And, the Appellant did not demonstrate a meritorious defense should relief be granted.

Following are additional relevant facts and testimony from the hearing on the Second Motion to Vacate.

1. The Mortgage at issue is dated May 6, 2005. See exhibit B to Complaint.
2. The Notary Ramona Hess notarized 1,500 to 3,000 documents and had not worked since 2007. (Transcript April 27, 2012 Vacate Hearing, Page 15, Line 2, 21).
3. The other witness of Defendant-Appellant Cogar, Benjamin Lacky spent 9 months in jail for passing bad checks. (Transcript Page 45, Line 15-17).
4. The witness Benjamin Lacky was outside smoking when the mortgage was signed and notarized. (Transcript Page 57, Line 4-10).
5. The witness Benjamin Lacky has some type of relationship with Defendant-Appellant Cogar's daughter. See May 16, 2012 Judgment Entry.
6. Defendant-Appellant Cogar could not remember whether or not she signed a number of documents that were presented to her at that hearing (Transcript Page 78, Line 1-6, Transcript Page 79, Line 25, Transcript Page 82, Line 13-16, Transcript Page 83, Line 4).
7. Defendant-Appellant Cogar benefited from the Plaintiffs mortgage as it satisfied a prior \$184,000.00 mortgage on the property. Defendant-Appellant Cogar admitted that this mortgage on her property was paid off. (Transcript Page 90, Line 34 and Settlement Statement submitted with Defendant's exhibits.)
8. The Affidavit of Defendant-Appellant Cogar specifically states that she cannot recall whether or not she signed the Plaintiff's mortgage. See exhibit A to Appellant's second Motion to Vacate.
9. No affidavit or evidence was submitted by the Defendant-Appellant Cogar prior to the granting of summary judgment that she did not sign the mortgage.
10. The Defendant-Appellant Cogar failed to present any allegation or evidence at the hearing on her first Motion to Vacate or in opposition to the Appellee's Motion for Summary Judgment that she did not sign the mortgage.

The Trial Court's taking evidence and finding that the Appellant could not prevail on the merits was just one of many grounds to deny the second Motion to Vacate. The Motion was not timely. There was no 'newly discovered evidence' or other 60(B) grounds to vacate the

judgment as the Appellant would have known at all times whether or not she signed the mortgage. No evidence was submitted prior to the granting of Summary Judgment in favor of the Appellee. And lastly, the claim is barred because the Appellant did not assert the signature issue as an Affirmative Defense as required by Ohio Revised Code 1303.36.

IV. LAW AND ARGUMENT

The decision of the Trial Court and Court of Appeals must be affirmed on a multitude of grounds. Each if standing alone, provided adequate support for the trial court's decision to deny Appellant's Motion to Vacate. The trial court did not abuse its discretion and the judgment was affirmed by the Court of Appeals.

The Defendant-Appellant Cogar's Motion to Vacate attempts to introduce evidence in opposition to summary judgment, two years after the Trial Court granted the Motion. Next, the Motion to Vacate fails on all three (3) elements necessary to vacate a judgment even if she can get by the procedural issue of failing to introduce evidence in opposition to Appellee's Summary Judgment Motion and failing to file an appeal. The Motion to Vacate was not timely, no Civil Rule 60(B) grounds were given, and the Defendant-Appellant Cogar did not demonstrate that she could prevail even if the decision was vacated.

The standard for review of a denial of a Motion to Vacate is abuse of discretion. The Trial Court held a full hearing and did not abuse its discretion when denying the second Motion to Vacate.

Lastly, ORC 1303.36 bars the claim because it requires the issue of authenticity of signature to be affirmatively pled or waived. Here, the Answer of the Appellant actually admitted to signing the mortgage.

Each of the above grounds, if standing alone, provided adequate support for the Trial Court's decision denying Appellant's Motion to Vacate.

A. AFFIDAVITS SUBMITTED AFTER RULING ON A MOTION FOR SUMMARY JUDGMENT CANNOT BE CONSIDERED

The Final Entry granting summary judgment and foreclosure was filed on January 28, 2010. This Entry granted the summary judgment motion which was filed by Plaintiff-Appellee on March 2, 2009.

The summary judgment motion was highly contested and opposed by the Defendant Cogars. An objection to the Motion for Summary Judgment was filed by Defendant-Appellant Cogar on March 9, 2009. On March 31, 2009, "Motion for Extension of Time" was filed by Defendant-Appellant Cogar. On July 7, 2009, a "Motion to Stay" and a "Notice of Intent to Appeal" was filed by both Rosalie Cogar and Robert Cogar. On October 14, 2009, a "Motion for Reconsideration" and "Motion to Dismiss" was filed by both Rosalie Cogar and Robert Cogar. The first Motion to Vacate the grant of Summary Judgment was filed by the Cogars on February 1, 2010.

The Plaintiff's Motion for Summary Judgment was highly contested by the Defendants. However, no Affidavit or other Civil Rule 56 evidence was submitted setting forth the defense that Rosalie Cogar did not sign the mortgage until the second Motion to Vacate was filed by the Appellant Cogar on January 13, 2012.

Affidavits submitted after ruling on the Motion for Summary Judgment cannot be considered. Rollman v. A.P.W.P., 1991 WL 16013 (Ohio App. 1 Dist.); Thompson, Hine and Flory v. Pingue Properties, Inc. and Nu-Trend Homes, Inc., 1996 Ohio App. LEXIS 1346. Holzer Clinic v. Simpson, 1998 WL 241887 (Ohio App. 4th App Dist.)

The Courts have specifically held that Affidavits filed with a Motion to Reconsider or Vacate a grant of Summary Judgment cannot be considered. The Court of Appeals in Rollman, supra, held as follows at pages 1 and 2;

...the Affidavits attached to APWO's 'Motion for Reconsideration' were clearly untimely filed Under Civil Rule 56(C), which requires that affidavits opposing Summary Judgment be filed prior to the hearing on the matter. This same section provides that no evidence may be considered except as stated in the rule. Thus, absent a finding of excusable neglect under Civil Rule 6(B), APWO's affidavits submitted as part of its 'Motion for Reconsideration' should not have been considered by the trial court. Citing, Tyes, supra; and Personal Services, supra.

The Cuyahoga County Court of Appeals in a case directly on point, affirmed the granting of summary judgment by the trial court and specifically held that the affidavits submitted after a Motion for Summary Judgment has been granted cannot be considered. Tyes v. Otis Elevator, 1983 WL 4683 (Ohio App. 8th Dist.).

Defendant's Brief claims that the court's granting of summary judgment was a "surprise" to the Defendant. The Defendants in Tyes, Supra made the same claim. The Court of Appeals in affirming the grant of summary judgment addressed the issue as follows at page 4;

If Tyes was unable to timely obtain Mr. Krieger's Affidavit, Rule 56(F) offered a provision for obtaining an appropriate continuance...

Tyes made no attempt to employ Rule 56(F) prior to the Court's ruling. This tardy attempt to submit a post judgment affidavit is expressly prohibited by Rule 56....

Tyes failed to take advantage of the provisions of Rule 56(F) under which he might have sought a continuance to obtain the Affidavit of Mr. Krieger. Tucker v. Webb Corp., 4 Ohio St. 3rd 121 (1983) and Benjamin v. Deffett Rentals, 66 Ohio St. 2d 86 (1981). Having knowingly and voluntarily disregarded the express provisions of Rule 56, Plaintiff may not tardily claim that if he had complied with the rule, summary judgment might have been avoided. See, Gates Mills Investment Co. vs. Pepper Pike, 59 Ohio App. 2d 155.

Here, the Appellant did not submit an Affidavit in opposition to summary judgment until two (2) years judgment and nearly three (3) years after the Motion for Summary Judgment was filed.

The Appellant opposed the Plaintiff's summary judgment motion on other grounds. The Appellant Cogar filed her first Motion to Vacate the Judgment on other grounds. The Appellant

cannot now get another slice of the apple when she failed to appeal the judgment and has already had a prior Motion to Vacate denied.

B. NONE OF THE ELEMENTS NECESSARY TO VACATE THE JUDGMENT ARE PRESENT

Pursuant to the Ohio Supreme Court in GTE Automatic Electric Inc. vs. Arc Industries, 47 OS 2d 146, to prevail on a Motion to Vacate Judgment the movant must demonstrate each of the following three elements:

- A. The party has a meritorious defense or claims to present if relief is granted;
- B. The party is entitled to relief under one of the grounds stated in Civil Rule 60(B)(1) through (5); and
- C. The motion is made within a reasonable time, and, where the grounds for relief are Civil Rule 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken.

All three elements are necessary to vacate a judgment. Here, *none* of the elements are present.

1. THERE ARE NO 60(B) GROUNDS TO VACATE THE JUDGMENT

Here, the Defendant-Appellant claims newly discovered evidence as grounds to vacate the judgment.

The Appellant Cogar had plenty of time to oppose the summary judgment motion, and did. The Appellant Cogar knew at all times whether or not she signed the mortgage. This is not newly discovered evidence. Numerous court filings were made by the Appellant Cogar, yet the execution issue was never raised

Counsel entered an appearance on behalf of Mrs. Cogar in the case on September 9, 2010. It cannot be classified as newly discovered evidence as to whether Mrs. Cogar executed the mortgage when the Motion to Vacate was not filed until January 13, 2012. There is no newly discovered evidence.

There was nothing new about this case or the evidence when the second Motion to Vacate was filed on January 13, 2012.

2. THE MOTION TO VACATE WAS NOT TIMELY

The Final Entry in this case was filed January 28, 2010. The Defendant-Appellant filed her first Motion to Vacate on February 1, 2010 which was denied. Then on January 13, 2012, nearly two years after judgment, the Defendant-Appellant filed another Motion to Vacate. No appeal was filed by Appellant on the final order granting summary judgment. No Appeal of the denial of the first Motion to Vacate was filed.

ORC 60(B) requires the Motion to Vacate to be filed in the following time frame:

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. The motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

Here, the Motion to Vacate was not filed within one year, is not timely filed and should be denied.

3. THE APPELLANT DID NOT DEMONSTRATE A MERITORIOUS DEFENSE TO THE COMPLAINT.

Even if the Appellant can get by the first two prongs of the elements necessary to vacate judgment, even if Appellant can get by his failure to file evidence or Affidavit prior to the granting of summary judgment, even if she can get past the requirement of O.R.C. 1336.09 that the demand of a signature must be affirmatively pled, Appellant still failed to “demonstrate a meritorious claim or defense” to the complaint required to vacate a judgment. Rese Chevrolet v. Adams, 56 Ohio St. 3d 17, 20.

Here, the Appellant benefited from the Plaintiff/Appellee’s mortgage as it paid off the prior mortgage on the property. The Appellee has the first lien due to equitable subrogation. No facts were alleged in opposition.

Next, the Appellee failed to “demonstrate” that she has a “meritorious claim” regarding execution. A full evidentiary hearing was conducted and it was found that the claim had no merit.

Had this been a Motion to Vacate a default judgment, a lower standard may have been in place. The cases cited by the Appellant all deal with vacating a default judgment. To defeat a default motion, one must merely file an answer denying the allegations of the complaint or alleging sufficient affirmative defenses.

Likewise, to vacate a default judgment it makes sense that one must merely allege operative facts to defend the claim. Deutsche Bank vs. Lagowski, 2012 Ohio 1684.

The 10th District Court of Appeals in Oberkonz v. Gosha, 2002 Ohio 5572 (Lexis 5584) made the distinction that evidence need not be submitted to vacate a default judgment at Page 2:

A proffered defense is a meritorious defense against a default judgment in an Ohio R. Civ. P. 60(B) motion when it states a defense to the claims of relief set forth in the complaint and the defense is not a sham.

See also, Amzee Corp v. Comerica Bank, 2002 Ohio 3084, at P. 20.

The vacation of default judgment only requires proffering a defense because that is all that is necessary to defeat a motion for default. Here, the Appellant was required to submit evidence sufficient to show she could defeat the summary judgment motion. She did not.

The Oberkonz, Supra Court also held that the defense cannot be a sham. The Trial Court essentially found that the signature claim of the Appellee was a sham. The Appellee fails on setting forth a meritorious defense to the Complaint.

a) The Defendant received the benefit of the Note and Mortgage

The Defendant-Appellant Cogar admitted on cross-examination to executing a prior \$184,500.00 mortgage that was filed against the subject property on May 4, 2004. There is no issue that this Mortgage attached to Mrs. Cogar’s interest in the property. Mrs. Cogar admitted

that this mortgage has been satisfied. See Plaintiff's Exhibit B submitted at the May 6, 2012 hearing on Motion to Vacate.

This mortgage was satisfied from the proceeds of the Plaintiff's mortgage. Mrs. Cogar enjoyed the benefits of the Plaintiff's note and mortgage as it satisfied an existing valid lien against her property. This was established by the testimony at the hearing and Settlement Statement for the mortgage introduced into evidence. The Plaintiff's Note and Mortgage is enforceable due to equitable subrogation and unjust enrichment.

The Supreme Court of Ohio has consistently held that the equitable nature of a foreclosure proceeding cannot support the unjust enrichment of a junior lien holder as a result of a mistake by an unsuspecting party which discharges a lien. To prevent such unjust enrichment, the Ohio Supreme Court has applied the doctrine of equitable subrogation. Pursuant to equitable subrogation, the lien of a satisfied prior mortgage remains enforceable to prevent the unjust enrichment of a junior mortgage even if the prior mortgage has been canceled of record. Federal Union Life Insurance v. Deitsch, (1934) 127 Ohio St. 505; Union Trust Co. v. Lessovitz, (1931) 51 Ohio App 69 (8th Dist., Cuyahoga); Pease Co. v. Huntington Natl. Bank, (1985) 24 Ohio App. 3d 227 (10th Dist., Franklin).

The Appellant has no defense to the Plaintiff's Complaint even if the judgment was vacated.

b) A meritorious defense was not presented.

The Appellant presented two witnesses at the hearing on the Motion to Vacate. The Trial Court determined that both lacked credibility. The trial Court found the testimony of the Notary, Ramona Hess, not to be credible. This witness had notarized thousands of documents and is now on disability, yet claimed to remember whether or not she notarized a document in 2005.

Next, we have the testimony of Benjamin Lackey, the “smoking man”. The closing agent claims that he remembered all details of the closing even though he was out smoking during the closing. The closing agent had served jail time for passing bad checks and lacked any credibility. He likewise no longer works but receives disability payments. His motivation and truthfulness are up for debate. Likewise, the ‘smoking man’ did not file the mortgage. He gave the mortgage back to the closing agent for recording. He had a relationship with Appellant’s daughter. The trial Court correctly assigned his testimony no credibility.

More importantly, Appellant Cogar could not remember what she signed seven years ago. On direct examination from her attorney, Appellant Cogar had no problem denying signing every document presented to her.

However, on cross-examination, without preparation, Mrs. Cogar could not remember what she signed and what she did not sign. Her testimony was clear that she could not remember what she signed seven years ago. This testimony is consistent with her Affidavit which states that she could not say for certain whether she signed the Plaintiff’s mortgage. The Affidavit of Rosalie Cogar is attached to her second Motion to Vacate as Exhibit A.

c) The Claim is barred by O.R.C. 1303.36

O.R.C. 1303.36 requires a party who denies signing a document to plead it as an Affirmative Defense. O.R.C. 1303.36 reads in pertinent part as follows:

- (A) 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.

Here, a full hearing was held and Rosalie Cogar could still do no better than her Affidavit stating that she could not say for certain that she signed the mortgage.

A general denial is insufficient to put the genuineness of a signature at issue. Dryden v. Dryden, 86 OApp 3d 707. Here, the Defendant Cogar did not raise the validity of his signature as an Affirmative Defense. The issue cannot be raised now.

The presumption of validity of a signature exists until sufficient evidence to the contrary is presented. Ohio Citizens Bank v. Venture Mental. 63 OMisc 2d 223; Baes v. Stallworth, 26 OApp 2d 223.

Here, not only did the Defendant-Appellant Cogar fail to plead the affirmative defense, she admitted to the validity of the Plaintiff-Appellee's mortgage in her Answer to Complaint. The Defendants failed to raise the execution 'issue' in the numerous Briefs opposing Summary Judgment. The Appellant's own Affidavit even failed to assert that she did not execute the mortgage. The testimony on cross-examination of the Appellant Cogar was that she could not remember what she signed and what she did not sign seven years ago.

The Appellant claims she cannot remember what she signed. The Appellant received the benefit of the mortgage, The Appellant cannot prevail even if the judgment is vacated. The Motion to Vacate fails on all three (3) necessary elements.

The Decision of the trial Court denying the Motion to vacate should be affirmed.

C. THERE WAS NO ABUSE OF DISCRETION

The standard necessary to reverse a denial of a Motion to Vacate is abuse of discretion. Rose Chevrolet v. Adams (1988) 36 Ohio St. 3017. Here, an abundance of evidence and authority supported the trial Court's decision.

First, procedurally the hearing on the Motion to Vacate did not ever need to take place. The Appellant failed to submit the evidence regarding execution of the mortgage in opposition to the summary judgment motion filed by the Plaintiff/Appellee. The Appellant failed to appeal the

granting of summary judgment. The Appellant previously filed a Motion to Vacate which was denied.

Next, the Appellant failed on all three (3) elements necessary to vacate a judgment. The Motion was filed nearly two (2) years after the Final Order and well over a year after the Appellant was represented by counsel. It would not be an abuse of discretion for denying the Motion to vacate for being untimely.

No Civil Rule 60(B) grounds to vacate the judgment were presented. There was no newly discovered evidence.

The evidence supports the trial Court's decision that the Appellant could not prevail even if the Judgment is vacated. The Appellant's own Affidavit says she cannot remember if she signed the mortgage in question. The testimony was that she could not remember what documents she signed.

The Appellant benefited from the Appellee's mortgage.

The trial Court did not find the Appellant's witnesses credible. This determination by the trial Court that the witnesses were not credible is not up for review on Appeal.

When we review the sufficiency of the evidence, we do not on appeal reweigh the credibility of the witnesses. State v. Yarbrough, 95 Ohio St.3d 227, 2002 Ohio 2126, ¶79, 767 N.E.2d 216.

In reviewing a trial Court's weighing of competing evidence and credibility determination, we are guided by a presumption that the trial Court's factual findings are correct. State v. Wilson, 113 Ohio St. 3d 382, 2007 Ohio 2202, P24, 865 N.E.2d 1264. This is due in part to the fact that the trial Court occupies the best position from which to review the witnesses and observe their demeanor, voice inflection, gestures, eye movements, etc. *Id.* We cannot reverse a civil judgment merely because we hold a different opinion on the weight of the evidence presented to the trial Court and the credibility of the witnesses. *Id.*

There was no abuse of discretion by the trial Court in denying the Motion to Vacate. Abuse of discretion is defined by the Ohio Supreme Court as: an unreasonable, arbitrary, or unconscionable use of discretion, or as a view or action that no conscientious judge could

honestly have taken. State v. Cunningham, 113 Ohio St.3d 108, 2007 Ohio 1245, 863 N.E.2d 120, P 25.

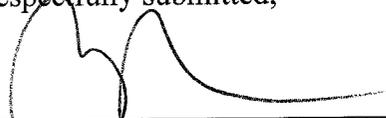
Here, in no way can the denial of this second motion to vacate filed by the Appellant Cogar be considered an abuse of discretion. The facts, law, and Ohio Rules of Civil Procedure all support the trial Court's decision.

When reviewing a trial court's decision regarding a Civ.R. 60(B) motion, an appellate court will not reverse that decision unless the trial court abuses its discretion. State ex rel. Russo v. Deters, 80 Ohio St. 3d 152, 153, 1997 Ohio 351, 684 N.E.2d 1237 (1997). An abuse of discretion implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Id.*

V. CONCLUSION

The trial Court did not abuse its discretion in denying the Defendant-Appellant Cogar's Motion to Vacate. The Court of Appeals properly affirmed the decision. There is no issue of great public importance. Quite the opposite It is important that people respond to Motion for Summary Judgment with evidence and that judgment has finality. Jurisdiction should be denied.

Respectfully submitted,



Carlisle, McNellie, Rini, Kramer &
Ulrich Co., L.P.A.

By: Bradley P. Toman (0042720)
Co-Counsel for Plaintiff-Appellee
24755 Chagrin Blvd., Suite 200
Cleveland, OH 44122-5690
216-360-7200 Phone
216-360-7210 Facsimile

CERTIFICATE OF SERVICE

A copy of the foregoing was served on the following parties and/or counsel by Ordinary
U.S. Mail this 19th day of April, 2013:

Timothy B. Pettorini
225 North Market Street
P.O. Box 599
Wooster, Ohio 44691
Attorney for Defendant Rosalie Cogar

Steven Sacks
LERNER, SAMPSON & ROTHFUSS
120 East Forth Street
Cincinnati, Ohio 45202
Co-counsel for Wells Fargo Bank, N.A.

Andrew S. McIlvaine
200 Smokerise Drive, Suite 200
Wadsworth, Ohio 44281



CARLISLE, MCNELLIE, RINI,
KRAMER & ULRICH CO., L.P.A.
BY: BRADLEY P. TOMAN (0042720)
Co-counsel for Plaintiff-Appellee