[Cite as *Natl. City Bank v. Pizzie*, 2012-Ohio-220.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

NATIONAL CITY BANK,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-034**
- vs -	:	
NANCY PIZZIE, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 CF 003985.

Judgment: Affirmed.

Scott A. Kane and *Robert A. Amicone, II*, Squire, Sanders & Dempsey (US) LLP, 221 E. Fourth Street, Suite 2900, Cincinnati, OH 45202 (For Plaintiff-Appellee).

Dennis M. Callahan, 8000 Plaza Boulevard, Suite 203, Mentor, OH 44060 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Nancy Pizzie, appeals the judgment of the Lake County Court of Common Pleas denying her motion to vacate a default judgment pursuant to Civ.R. 60(B)(5). For the reasons discussed below, we affirm.

{¶2} In June 2005, appellant executed two adjustable rate promissory notes payable to "First Franklin A Division of Nat. City Bank of In" (herein after "First Franklin"). The first note, which is at issue, was for a 30-year term in the amount of $112,000. First Franklin assigned both notes to First Franklin Financial Corporation

(herein after "FFFC") on September 1, 2005. On December 18, 2008, FFFC assigned the notes to National City Bank (herein after "NCB"). When the promissory notes were assigned to NCB, appellant's payments had been delinquent for approximately one year.

{¶3} NCB filed a complaint for foreclosure on December 22, 2008, against various defendants, including FFFC. The complaint stated that "on December 18, 2008 the Mortgage, together with the Note, was assigned from First Franklin Financial Corporation to National City Bank."

{¶4} The day after the filing of the complaint, NCB was acquired by PNC Bank, National Association. Although properly served with the complaint, appellant failed to file an answer. As a result, NCB moved for default judgment, which was granted by the trial court in February 2009.

{¶5} Thereafter, appellant filed a motion to vacate the default judgment on October 18, 2010. In said motion, appellant claimed that NCB was not the real party in interest as required by Civ.R. 17(A) and that the mortgage and note were part of a "residential mortgage backed trust" created by FFFC.

{¶6} In denying her motion to vacate, the trial court noted that appellant "failed to demonstrate that she has a meritorious defense or claim to present if relief is granted, that she is entitled to relief under Civ.R. 60(B)(5) or that her motion was made within a reasonable time." The trial court stated that appellant had not set forth any operative facts; instead, appellant's assertions were speculative, and she failed to provide supporting affidavits or evidence to substantiate her allegations. Further, the trial court recognized that "NCB's standing to sue is shown by the executed and recorded assignment of the note and mortgage[.] The assignments allowed NCB to foreclose."

The trial court also reasoned that appellant's motion "was filed approximately twenty months after default judgment was awarded." Even though appellant was aware of the pending matter, she never raised the issue of standing during this two-year period.

{¶7} Appellant filed a timely notice of appeal and assigns the following errors for our review:

{¶8} "[1.] The trial court committed prejudicial error in denying defendant-appellant's Civil Rule 60(B)(5) motion to vacate judgment by finding in error that appellant's allegations were speculative, without evidentiary basis, and that appellant provided no evidence to support those allegations.

{¶9} "[2.] The trial court committed prejudicial error in denying defendant-appellant's Civil Rule 60(B)(5) motion to vacate judgment, when the court failed to find that appellant's allegations that the named plaintiff was not a real party in interest and, further, that a false and fictional plaintiff, supported by a false and fraudulent recorded mortgage assignment, had been created, and that this justified vacation of judgment under Civil Rule 60(B)(5).

{¶10} "[3.] The trial court committed prejudicial error in denying defendant-appellant's Civil Rule 60(B)(5) motion to vacate judgment in finding that appellant failed to demonstrate that she had a meritorious defense, and in finding that appellant had not made her motion within a reasonable time."

{¶11} As all of appellant's assigned errors relate to the trial court's denial of her motion to vacate the default judgment, we address them in a consolidated analysis.

{¶12} The decision to grant or deny a Civ.R. 60(B) motion is entrusted to the sound discretion of the trial court. *In re Whitman*, 81 Ohio St.3d 239, 242 (1998), citing *Griffey v. Rajan*, 33 Ohio St.3d 75, 77 (1987).

{¶13} Relief from judgment may be granted pursuant to Civ.R. 60(B), which states, in part:

{¶14} "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment."

{¶15} Regarding the moving party's obligations for a Civ.R. 60(B) motion, the Supreme Court of Ohio has held:

{¶16} "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." *GTE Automatic Elec. v. ARC Industries*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus.

{¶17} As stated in Civ.R. 60(B)(5), relief is to be granted for "any other reason justifying relief from the judgment." Civ.R. 60(B)(5) is a catch-all provision which reflects "the inherent power of a court to relieve a person of the unjust operation of a judgment."

(Citation omitted.) *Smith v. Smith*, 8th Dist. No. 83275, 2004-Ohio-5589, ¶16. It is "only to be used in an extraordinary and unusual case when the interests of justice warrants it." *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 105 (8th Dist.1974).

{¶18} On appeal, appellant reiterates the arguments made in her motion to vacate, to wit: that NCB is not a real party in interest as required by Civ.R. 17(A), that "the assignment of the mortgage to [NCB] and that the affidavit in support of default judgment were a sham and false," and that "the note and mortgage were owned by an unnamed 'residential mortgage backed trust.'"

{¶19} In its judgment entry, the trial court concluded that appellant failed to "present any evidence that the note and mortgage were transferred into a residential mortgage trust." In her brief, however, appellant argues that she provided "substantial evidence that the note and mortgage were part of a residential mortgage backed trust." Appellant cites to her motion to vacate and again states the following 11 arguments to support this assertion:

{¶20} "1. [FFFC] did not [obtain] home mortgages for its own account. It [obtained] tens of thousands of mortgages with book values totaling billions of dollars. These were placed in so-called trusts and securitized.

{¶21} "2. Throughout all the years the payments were always made to a specific address at Allegheny Center Mall in Pittsburg[h].

{¶22} "3. Unknown numbers on the mortgage assignments is evidence of that the mortgages are part of residential mortgages backed pools or trusts.

{¶23} "4. Security Connections in Idaho created and then signed both the 2005 mortgages assignments and the December 2008 assignments used in the foreclosure.

{¶24} "5. The plaintiff's law firm is a high volume mortgage foreclosure firm that has previously involved false plaintiffs and false assignments.

{¶25} "6. It is contrary to logic that [in] its last hours National City Bank would purchase a small, non-performing mortgage from FFFC that required immediate foreclosure action.

{¶26} "7. [PNC] was never substituted as Plaintiff for National City Bank.

{¶27} "8. The plaintiff's law firm in an unguarded moment identified its 'client' not as National City Bank but as Home Loan Services, Inc.

{¶28} "9. The repeated issuance and recall of foreclosure sale warrants [is not] consistent with a single bank with a mortgage. The repeated delays indicate a loan servicer handling a pool of thousands of residential mortgages. For various reasons it is pacing the foreclosure auctions.

{¶29} "10. The second mortgage was not claims to have been purchased by National City Bank. Instead the supposed owner, [FFFC] was named a defendant and never answered.

{¶30} "11. The affidavit of the supposed individual with knowledge of the account, filed in support of judgment, says there is due exactly $112,000. This is amount is also alleged in the complaint. This is the face of the mortgage." (Sic. throughout.)

{¶31} After enumerating the above arguments, appellant asserts that she has met the burden of providing operative facts, which consist of "the logical inferences from the case pleadings, affidavits, exhibits and judicial reports."

{¶32} As this court stated in *Collins Fin. Serv. v. Murray*, 11th Dist. No. 2008-P-0095, 2009-Ohio-4619, ¶17, "a movant is not required to attach evidentiary material to

his motion for relief from judgment. *** [I]f evidentiary material is not submitted to support a Civ.R. 60(B) motion, the movant runs the risk the trial court will not grant the motion."

{¶33} Although appellant claims the mortgage is part of a securitized trust, she has failed to provide anything more than conclusory statements that are unsupported by the record. The record establishes that the note was assigned to NCB on December 18, 2008. At the time of the assignment, appellant had been delinquent in payments for nearly a year. Although appellant makes much of the fact that NCB would not have acquired a non-performing note, this argument is unfounded and pure speculation on the part of appellant. Further, the record establishes the reasons for the recall of "foreclosure sale warrants." Therefore, we find that the trial court did not abuse its discretion in determining that "there is no obvious meritorious claim of defense on the face of [appellant's] motion to warrant relief."

{¶34} Next, appellant argues that "the truthful identity of the real party in interest must be disclosed," again maintaining the mortgage is part of a securitized trust. Additionally, appellant asserts that a fraud was committed on the court, as a "false party plaintiff" was created.

{¶35} In *Midwest Business Capital v. RFS Pyramid Mgt., LLC*, 11th Dist. No. 2011-T-0030, 2011-Ohio-6214, ¶19-23, this court stated:

{¶36} "Civ.R. 17(A) requires that every civil action 'be prosecuted in the name of the real party in interest.' A 'real party in interest' has been defined as any individual or entity who has a real interest in the subject matter of the litigation and not a mere interest in the action itself, i.e., 'one who is *directly* benefitted or injured by the outcome

of the case.' (Emphasis sic.) *** Where the action has not been initiated or pursued by the real party in interest, Civ.R. 17(A) provides:

{¶37} "'No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.'

{¶38} "***

{¶39} "*** Civ.R. 25(C) provides that the proceedings *may* be continued by or against the original party, '[t]he rule does not require that a substitution of parties be made.' Rather, the decision to substitute a party or parties is a matter within the trial court's discretion. If a court determines a transfer of interest has occurred, it may substitute parties pursuant to Civ.R. 25(C)." (Citations omitted.)

{¶40} As previously indicated, FFFC assigned the note to NCB. NCB, as the real party in interest, filed a complaint in foreclosure. After the merger, PNC, as the successor in interest, became the legally interested party. *Id.* at ¶21. Pursuant to Civ.R. 25(C), however, the proceedings may be continued by the original party.

{¶41} Further, because appellant alleges a fraud on the court, the appropriate subsection to file the relief from judgment is Civ.R. 60(B)(3). A motion under Civ.R. 60(B)(3), however, must be filed not more than one year after the judgment. Therefore, appellant's motion, filed 20 months after the judgment, was untimely under Civ.R. 60(B)(3).

{¶42} Lastly, appellant alleges the trial court abused its discretion in finding that her motion was not made within a reasonable time. With respect to the timeliness of the motion, the trial court stated:

{¶43} "[Appellant's] motion was filed approximately twenty months after default judgment was awarded, six months after the fourth sheriff's sale was ordered and almost two years after the complaint was filed. The court issued a final appealable order that she failed to timely contest. This court also finds that [appellant] was well aware of the foreclosure against her."

{¶44} Given our standard of review, we cannot find that the trial court abused its discretion in finding appellant's motion untimely.

{¶45} Appellant's first, second, and third assignments of error are without merit. Based on the opinion of this court, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.