[Cite as *1st Fid. Loan Servicing, L.L.C. v. Bellina*, 2015-Ohio-2199.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

1ST FIDELITY LOAN SERVICING, LLC,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2014-L-092**
ANDREW C. BELLINA aka ANDREW BELLINA, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 11CF 003425.

Judgment: Affirmed.

1st Fidelity Loan Servicing, LLC, c/o registered agent Laurence Schneider, 6810 North State Road 7, Coconut Creek, FL 33073 (Plaintiff-Appellee).

David N. Patterson, 33579 Euclid Avenue, Willoughby, OH 44094-3199 (For Defendants-Appellants).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants, Andrew C. Bellina and Carol A. Bellina, appeal from the judgment of the Lake County Court of Common Pleas, denying their motion for relief from judgment from the court's judgment of foreclosure.[1] For the reasons discussed below, the trial court's judgment is affirmed.

{¶2} Appellee, 1st Fidelity Loan Servicing, LLC, filed a complaint for foreclosure on December 11, 2011, for property located at 4211 Harper Street in the Village of

1. Appellee failed to file a brief and made no appearance on appeal.

Perry. Attached to the complaint were the promissory note, mortgage, and applicable assignments.

{¶3} The attachments to the complaint illustrate that on December 6, 2001, the mortgage was filed. The mortgage was assigned from Ameriquest Mortgage Company to Mortgage Electronic Registration System, Inc. ("MERS"), as nominee for JP Morgan Chase Bank National Association ("Chase"), by virtue of an Assignment of Mortgage dated December 15, 2008. On December 2, 2011, the mortgage was assigned from MERS to appellee, prior to the complaint being filed. The promissory note, attached to the complaint, indicates the following signed notation: "Pay to the order of, without recourse, Ameriquest Mortgage Company."

{¶4} Appellants were served with the complaint, and the matter was referred to mediation. A mediator's report, filed September 12, 2012, notes that the parties participated in three settlement conferences but were unable to reach a "mutually acceptable resolution." Therefore, the mediator recommended the case proceed to its resolution.

{¶5} Appellants never filed an answer or any other responsive pleading. On September 20, 2012, appellee filed a motion for default judgment. In its certificate of service, appellee indicated that the motion for default was sent to appellants on September 19, 2012. The trial court's docket states, "motion for default judgment, certificate of service, filed." The trial court did not hold a hearing on the motion. On December 11, 2012, the trial court granted the motion and awarded appellee $94,344.07, plus interest and late fees from July 26, 2010, and ordered foreclosure.

{¶6} The same day as the scheduled sheriff's sale, appellants filed a motion to set aside the decree of foreclosure. The trial court denied the motion. Appellants filed a timely appeal and assert the following assigned errors:

> [1.] The trial court erred to the prejudice of the appellants by entering judgment in favor of the appellee and denying the motion to set aside as the appellee failed to proffer competent, credible evidence to properly and sufficiently establish standing and that it was the real party in interest.
>
> [2.] The trial court erred to the prejudice of the appellants by granting and upholding the default judgment without providing proper, constitutional notice of hearing and opportunity to the appellant to be heard and defend the matter.
>
> [3.] The trial court erred to the prejudice of the appellants by entering judgment in favor of the appellee and denying the motion to set aside as the appellee lacked the capacity to sue in the state of Ohio rendering the judgment void *ab initio* or otherwise unenforceable as a matter of law and/or equity.

{¶7} Appellants' first two assignments of error address why they believe the trial court should have granted their motion to set aside the judgment. Because they are interrelated, we address them in a consolidated analysis. Appellants argue that default judgment should be set aside because the trial court did not afford them the notice required by Civ.R. 55(A). Appellants maintain they entered an appearance by way of participation in mediation and thus were entitled to the notice under Civ.R. 55(A).

{¶8} Civ.R. 55(A) states, in relevant part: "If the party against whom judgment by default is sought has *appeared* in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application." (Emphasis added.)

{¶9} Despite appellants' failure to file an answer in the action, whether the notice set forth in Civ.R. 55(A) is required depends on whether appellants "appeared."

Ohio courts have liberally interpreted the term "appeared" as it applies to Civ.R. 55(A). *Rocha v. Salsbury*, 6th Dist. Fulton No. F-05-014, 2006-Ohio-2615, ¶20. Here, the record indicates that appellants participated in mediation but were unable to reach a resolution. In its entry, the trial court found, and we agree, that appellants' participation in mediation constituted an appearance for purposes of Civ.R. 55(A). *See GMAC Mtge., LLC v. Lee*, 10th Dist. Franklin No. 11AP-796, 2012-Ohio-1157, ¶12 (despite failure to file an answer, defendants actions constituted an appearance, as defendant filed a formal request for mediation and an extension of time to answer the complaint and also participated in the requested mediation).

{¶10} Courts have held that, where a defendant makes an appearance in an action, but does not receive the requisite notice under Civ.R. 55(A), the award of default judgment is voidable and subject to being vacated under a Civ.R. 60(B) analysis. *See Natl. City Mtge. Co. v. Johnson & Assoc. Fin. Serv., Inc.,* 2d Dist. Montgomery No. 21164, 2006-Ohio-2364, ¶16.

{¶11} According to the record, appellee served a copy of the motion for default upon appellants. However, the rule contemplates a hearing when a party has entered an appearance by establishing that application for default must be served "at least seven days prior to the hearing on such application." Here, there is no indication on the docket that the trial court either scheduled a hearing on the application for default or notified appellants. Therefore, we address the trial court's determination that appellants failed to meet the requirements for relief under Civ.R. 60(B).

{¶12} Civ.R. 60(B) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment * * * 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 * * *; (4) the judgment has been satisfied, released or discharged * * *; or (5) any other reason justifying relief from the judgment. 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.

{¶13} Thus, Civ.R. 60(B) provides parties with an equitable remedy requiring a court to revisit a final judgment and possibly grant relief from that judgment when in the interest of justice. *In re Edgell*, 11th Dist. Lake No. 2009-L-065, 2010-Ohio-6435, ¶53. Civ.R. 60(B) is a curative rule that is designed to be liberally construed with the focus of reaching a just result. *Hiener v. Moretti*, 11th Dist. Ashtabula No. 2009-A-0001, 2009-Ohio-5060, ¶18. "Moreover, Civ.R. 60(B) has been viewed as a mechanism to create a balance between the need for finality and the need for 'fair and equitable decisions based upon full and accurate information.'" *Id*., quoting *In re Whitman*, 81 Ohio St.3d 239, 242 (1998).

{¶14} To prevail on a Civ.R. 60(B) motion, the movant must demonstrate: (1) the party has a meritorious defense or claim to present if the court grants relief; (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 for relief fall under Civ.R. 60(B)(1), (2) or (3), not more than one year after judgment. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.,* 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. The requirements for Civ.R. 60(B) relief are listed in the conjunctive, and if any one of the elements are not met, then the motion must be denied.

{¶15} The decision of whether to grant relief under Civ.R. 60(B) is entrusted to the sound discretion of the trial court. *Whitman, supra*, at 242, citing *Griffey v. Rajan*,

33 Ohio St.3d 75, 77 (1987). Accordingly, we review the decision of the trial court for an abuse of discretion. *Id*. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting *Black's Law Dictionary* 11 (8th Ed.2004).

{¶16} On appeal, appellants argue the trial court erred in denying their Civ.R. 60(B) motion to set aside the decree of foreclosure, as they were entitled to relief under Civ.R. 60(B)(3), (B)(4), and (B)(5). Yet, in their motion for relief from judgment filed in the trial court, appellants argued only excusable neglect under Civ.R. 60(B)(1) and the (B)(5) "catch-all provision." It is well-settled that a party may not "change the theory of [her] case and present these new arguments for the first time on appeal." *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177 (1992).

{¶17} In their Civ.R. 60(B) motion filed with the trial court, appellants argued that the default judgment should not have been granted because appellee neither had standing nor was the real party in interest. In denying their motion, the trial court found that appellants failed to present a meritorious defense and that appellants' motion failed to demonstrate that it was filed within a reasonable time, given the circumstances of the case. Appellants never established any excusable neglect for failing to file an answer, especially in view of the fact that they participated in mediation and were fully aware of the pending litigation.

{¶18} Because it is dispositive, we first address the timeliness of appellants' Civ.R. 60(B) motion. "The determination of what is a reasonable time is left to the sound discretion of the trial court. * * * A movant must offer some operative facts or evidential material demonstrating the timeliness of his or her motion." *In re Brunstetter*, 11th Dist. Trumbull No. 2002-T-0008, 2002-Ohio-6940, ¶14, citing *Shell v. Cryer*, 11th

Dist. Lake No. 2001-L-083, 2002-Ohio-848. The reasonableness of the time period is dependent upon the facts and circumstances of the particular case. *Simmons v. Simmons*, 8th Dist. Cuyahoga No. 97975, 2012-Ohio-4164, ¶8. "While a party may have a possible right to file a motion to vacate a judgment up to one year after the entry of judgment, the motion is also subject to the 'reasonable time' provision." *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 106 (8th Dist.1974).

{¶19} With respect to the timeliness of the motion, the trial court stated:

> [T]he [appellants] filed their motion on September 17, 2013, almost nine months after the decree in foreclosure was filed on December 11, 2012. No credible reason was given by [appellants] for this delay in filing for relief from judgment. * * * In this case, the unjustified delay was nine months. Absent an adequate explanation, the court finds the same is unreasonable. The [appellants] failed to satisfy the timeliness element.

{¶20} The court also recognized that appellants' contention that a loan modification was forthcoming as the reason for their untimely filing was contradicted by the record. Their contention regarding the loan modification was rebutted by their admission that an agreement was never sent to them and that they never made a payment pursuant to a loan modification agreement. Further, the mediator's report, filed September 12, 2012, specifically stated: "After said settlement conferences and related follow up, it was determined that a mutually acceptable resolution could not be reached at this time. **Therefore, the mediation department recommends the case proceed to its conclusion.**" (Emphasis sic.) Appellants were aware of the pending foreclosure proceeding and that default judgment was entered against them. Further, although a Civ.R. 55(A) notice was not given to appellants, the certificate of service filed by appellee indicates that a copy of the motion was sent to appellants on or about September 20, 2012.

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

{¶22} Assuming arguendo that such motion was timely filed, appellants failed to present a meritorious defense. In their motion, appellants claimed that appellee lacked standing to bring the action; that appellee was not the real party in interest; and that the promissory note and mortgage were void.

{¶23} With respect to the lack of a meritorious defense, the trial court noted that the promissory note was endorsed in blank by an agent of Ameriquest and, thus, became bearer paper enforceable by appellee, the holder. The trial court also observed that appellee attached mortgage assignments to the complaint from Ameriquest to MERS as nominee for Chase and from MERS to appellee, dated prior to the time of the complaint. Therefore, the documentation attached to the complaint is sufficient to establish appellee was the holder of both the promissory note and mortgage when the complaint was filed. In their motion, appellants failed to present any operative facts that either refuted these claims or challenged the authenticity of either attachment.

{¶24} We further observe that it is well settled that Civ.R. 60(B) cannot be used as a substitute for direct appeal. *Doe v. Trumbull Cty. Children Serv. Bd.*, 28 Ohio St.3d 128 (1986), paragraph two of the syllabus. This court has stated that "[an appellant] cannot, however, after the opportunity for direct appellate review has passed, use Civ.R. 60(B) as a means of indirect entry into appellate review." *Am. Express Bank, FSB v. Waller*, 11th Dist. Lake No. 2011-L-047, 2012-Ohio-3117, ¶14. In summary, "a Civ.R. 60(B) motion may not be based on arguments that could have been raised on direct appeal." *Wells Fargo Bank, N.A. v. Smith*, 10th Dist. Franklin No. 09AP-559, 2009-Ohio-6576, ¶11 (citation omitted).

{¶25} In *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, the Supreme Court of Ohio addressed the propriety of raising the issue of standing in a Civ.R. 60(B)(3) motion. In *Kuchta,* the bank filed a complaint in foreclosure against the defendants. The defendants initially answered the foreclosure complaint and asserted lack of standing. The bank filed a motion for summary judgment to which the defendants did not respond. The trial court entered judgment in the bank's favor, and the defendants did not appeal the judgment. Later, however, the defendants filed a motion for relief from judgment pursuant to Civ.R. 60(B)(3). After the trial court denied the motion, the Ninth Appellate District reversed the trial court's judgment concluding that, because standing was jurisdictional, the defendants would be entitled to relief if they could establish the bank lacked standing. The Ninth District certified its decision as in conflict with a decision of the Tenth District, and the matter was accepted by the Supreme Court. *Id.* at ¶7.

{¶26} After initially drawing the conclusion that a lack of jurisdiction does not constitute fraud for purposes of establishing a viable basis for relief under Civ.R. 60(B)(3), the Court observed:

> [B]ecause the issue of standing could have been and in fact was raised during the foreclosure proceedings, res judicata prevents the Kuchtas from using the issue to establish entitlement to relief. Ohio's Civ.R. 60(B) is substantially equivalent to Fed.R.Civ.P. 60(b), which codified the centuries-old "rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments" regardless of their finality. *Hazel-Atlas Glass Co. v. Hartford-Empire Co*., 322 U.S. 238, 244 (1944). Civ.R. 60(B) exists to resolve injustices that are so great that they demand a departure from the strict constraints of res judicata. *Id*. However, the rule does not exist to allow a party to obtain relief from his or her own choice to forgo an appeal from an adverse decision. *Ackermann v. United States*, 340 U.S. 193, 198 (1950).

Id. at ¶15.

{¶27} It is well established that a Civ.R. 60(B) motion cannot be used as a substitute for an appeal and that the doctrine of res judicata applies to such a motion. *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, ¶8-9. In this case, the Kuchtas filed a Civ.R. 60(B) motion in order to relitigate issues they could have raised at the start of litigation and which they failed to appeal. Thus, the doctrine of res judicata bars the attempted collateral attack against the judgment in foreclosure. *Kuchta*, *supra*, at ¶16.

{¶28} The Court further considered whether a challenge to standing can be asserted in a common-law motion to vacate a judgment for lack of subject matter jurisdiction. The Court recognized that the court of common pleas possesses subject matter jurisdiction over all foreclosure actions. It determined, however, that while standing is a jurisdictional requirement, "lack of standing does not affect the subject-matter jurisdiction of the court." *Id.* at paragraph three of the syllabus.

{¶29} Therefore, even assuming arguendo appellee lacked standing, such a defect would not affect the trial court's subject matter jurisdiction. Thus, the trial court's judgment was not void ab initio, and appellants' argument to the contrary is unavailing. *See id.* at ¶24. *See also Bank of Am. v. Gibson*, 11th Dist. Geauga No. 2014-G-3204, 2015-Ohio-209 (addressing substantially similar facts to those in the matter sub judice and affirming the trial court's denial of the defendant's Civ.R. 60(B) motion).

{¶30} Appellants had an opportunity to challenge appellee's standing, inter alia, during the pendency of the suit below. Appellants did not establish an injustice so great as to warrant a departure from the application of res judicata. *See Kuchta*, *supra*, at ¶15. Instead, the record simply reveals that appellants failed to file an answer to

appellee's complaint and never took advantage of an opportunity to appeal the adverse judgment. Civ.R. 60(B) "does not exist to allow a party to obtain relief from his or her own choice to forgo an appeal from an adverse decision." *Id.*

{¶31} Appellants' first and second assignments of error are without merit.

{¶32} Under the third assignment of error, appellants argue that appellee is not registered with the state of Ohio as either an Ohio corporation or a foreign corporation and, thus, lacks the capacity to sue. This is a new argument raised for the first time on appeal. As previously stated, it is well-settled that a party may not "change the theory of [her] case and present these new arguments for the first time on appeal." *Gutierrez, supra*, at 176. Appellate courts will not find that a trial court abused its discretion in denying Civ.R. 60(B) relief based upon arguments that were never presented to it. *J.P. Morgan Chase Bank v. Macejko*, 7th Dist. Mahoning Nos. 07-MA-148 & 08-MA-242, 2010-Ohio-3152, ¶36-37. Because appellants failed to raise this argument below, this court will not consider such argument on appeal.

{¶33} Appellants' third assignment of error is without merit.

{¶34} Based on the opinion of this court, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.