[Cite as *M & T Bank v. Steel*, 2015-Ohio-1036.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101924

M & T BANK

PLAINTIFF-APPELLEE

vs.

OTIS STEEL, JR., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-810884

BEFORE: E.T. Gallagher, J., Kilbane, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: March 19, 2015

FOR APPELLANTS

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EILEEN T. GALLAGHER, J.:

{¶1} This cause came to be heard on the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Defendant-appellant, Otis Steel, Jr. ("Steel"), pro se, appeals the trial court's judgment denying his Civ.R. 60(B) motion for relief from judgment. He raises one assignment of error for our review:

> The trial court erred as a matter of law when it granted Plaintiff's motion for summary judgment on its second amended complaint and when the evidence was in opposition to the claim.

{¶2} We find no merit to the appeal and affirm.

I. Facts and Procedural History

{¶3} On May 28, 2010, Steel executed a promissory note in the amount of $68,732, plus interest at the rate of 5.75 percent per annum, payable to Allied Home Mortgage Capital Corporation ("Allied Home"). Steel executed the note in connection with a loan to purchase property located at 889 Woodview Road, Cleveland Heights, Ohio. As security for the note, Steel and Lisa Steel ("Lisa"), Steel's wife at the time, executed a mortgage granting Mortgage Electronic Registration Systems ("MERS"), as nominee for Allied Home, its successors and assigns, a mortgage on the property. The note and mortgage deed were subsequently assigned to Lakeview Loan Servicing, L.L.C., who assigned them to M & T Bank ("M & T").

{¶4} Steel defaulted on the note, and M & T filed a complaint in foreclosure against him and Lisa on July 18, 2013. In the complaint, M & T alleged that it was the holder of both the note executed by Steel and the mortgage for the real property located at 889 Woodview Road in Cleveland Heights. The complaint further alleged that Steel was in default of the note and that there was due and owing the unpaid principal balance of $65,609.66, plus interest at a rate of 5.75 percent per annum, as of January 1, 2013. M & T subsequently obtained leave to amend

the complaint to include page two of the note, which was inadvertently omitted when the original complaint was filed.

{¶5} M & T filed a motion for summary judgment on its foreclosure claim. To establish standing, M & T submitted an affidavit in which the affiant averred that M & T maintains original records and that she reviewed "the Note, Mortgage, Assignment of Mortgage and M & T's electronic servicing system." The affiant also stated that "[t]rue and exact copies of the Note, Mortgage and Assignment of Mortgage" were attached to the affidavit. Steel opposed the motion. However, on July 31, 2014, the trial court granted M & T's motion and entered a decree in foreclosure in its favor. Steel did not file an appeal from this judgment.

{¶6} On August 7, 2014, Steel filed a motion for relief from judgment, arguing he was entitled to relief pursuant to Civ.R. 60(B)(3). After receiving M & T's response to Steel's motion, the trial court denied Steel's motion for relief from judgment. Steel now appeals from that judgment.

II. Law & Analysis

{¶7} In his sole assignment of error, Steel asserts the trial court erred in granting M & T's motion for summary judgment. As previously stated, Steel did not appeal the order granting summary judgment; he appealed the denial of his Civ.R. 60(B) motion for relief from judgment. We therefore review Steel's assigned error as it relates to the denial of his motion for relief from judgment.

{¶8} Relief from judgment is governed by Civ.R. 60(B), which states, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party * * * from a final judgment, order or proceeding for the following reasons: * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party.

{¶9} To prevail on a Civ.R. 60(B) motion to vacate judgment, the moving party must demonstrate (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 (B)(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, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

{¶10} The requirements of Civ.R. 60(B) are independent and written in the conjunctive; therefore, all three must be clearly established in order to be entitled to relief. *Id*. at 151. They must be shown by "operative facts" that demonstrate the movant's entitlement to relief. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 21, 520 N.E.2d 564 (1988). Although the movant is not required to submit evidentiary material in support of the motion, the movant must do more than make bare allegations of entitlement to relief. *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996). When the movant fails to demonstrate any of the three requirements under the *GTE* test, the court must deny the motion. *Rose Chevrolet* at 20. A reviewing court will not disturb a trial court's decision regarding a Civ.R. 60(B) motion unless there is an abuse of discretion. *State ex rel. Russo v. Deters*, 80 Ohio St.3d 152, 153, 684 N.E.2d 1237 (1997).

{¶11} The timeliness of Steel's motion for relief from judgment is not at issue since he filed it within one week of the court's order granting M & T's motion for summary judgment. Further, "a mortgagee's lack of standing to bring an action in foreclosure, if established, would constitute a meritorious defense to the action." *Bank of Am. v. Kuchta*, 141 Ohio St.3d 75,

2014-Ohio-4275, 21 N.E.3d 1040, ¶ 11. Therefore, the issue presented in this case lies in the second prong of the *GTE* test, which Steel attempted to establish pursuant to Civ.R. 60(B)(3).

A. Alleged Fraud

{¶12} Steel argues the trial court erred in granting M & T's motion for summary judgment and thus should have granted his motion for relief from judgment because M & T did not have standing to sue him. He contends the copy of the mortgage attached to the complaint identifies a mortgagee other than M & T and that, therefore, M & T had no standing to bring this foreclosure action.

{¶13} Public policy favors the finality of judgments. *Rhoads v. Greater Cleveland Regional Transit Auth.*, 8th Dist. Cuyahoga No. 92024, 2009-Ohio-2483, ¶ 5. If not appealed, a trial court's judgment must remain undisturbed pursuant to the doctrine of res judicata, which bars claims that were or could have been raised on direct appeal. *LaBarbera v. Batsch*, 10 Ohio St.2d 106, 113, 227 N.E.2d 55 (1967). Thus, relief from judgment under Civ.R. 60(B) should be granted only in the exceptional circumstance where justice demands relief from a prior judgment. *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 105, 316 N.E.2d 469 (8th Dist.1974). For these reasons, a Civ.R. 60(B) motion may not be used as a substitute for appeal to collaterally attack a final judgment. *Kuchta* at ¶ 16, citing *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, 846 N.E.2d 43, ¶ 8-9.

{¶14} Steel argues he was entitled to relief from judgment pursuant to Civ.R. 60(B)(3), which allows a judgment to be set aside if it has been obtained by "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." He contends M & T committed fraud by attaching to the complaint unauthenticated copies of the

note and mortgage that identify a mortgagee other than M & T.[1] However, the fraud, misrepresentation, or other misconduct contemplated by Civ.R. 60(B)(3) involves deceit or misconduct where "the party seeking relief was taken by surprise when false testimony was given and was unable to meet it or did not know of its falsity until after trial." *Caron v. Caron*, 10th Dist. Franklin No. 98AP-369, 1998 Ohio App. LEXIS 5653 (Dec. 3, 1998), citing *Abrahamsen v. Trans-State Express, Inc.*, 92 F.3d 425, 428 (6th Cir.1996). In other words, the movant must show more than misrepresentation or false testimony; he must show misconduct that prevented him from fully and fairly presenting his defense. *Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, at ¶ 13.

{¶15} Here, Steel could see from the copies of the note and mortgage attached to the complaint if someone other than M & T was the assignee of the mortgage. Steel also had the opportunity to conduct discovery to ascertain the identity of the mortgagee before filing a brief in opposition to M & T's motion for summary judgment. Thus, Steel had the opportunity to present a fraud defense prior to the final judgment. Therefore, Steel's argument that M & T's motion for summary judgment should not have been granted, and thus should have been vacated, is barred by the doctrine of res judicata. *Kuchta* at ¶ 16.

B. Attachments to Foreclosure Complaint

{¶16} Steel also argues the trial court should not have granted M & T's motion for summary judgment because M & T failed to authenticate the copies of the note and mortgage attached to the complaint with an affidavit.

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[1] Despite Steel's argument to the contrary, the mortgage attached to the complaint, which was later authenticated by affidavit attached to M & T's motion for summary judgment, contains a corporate assignment dated June 19, 2013, that identifies M & T as the assignee of the mortgage.

{¶17} Civ.R. 10(D), which governs attachments to pleadings, provides that a copy of an account or written instrument must be attached to a complaint if the claim "is founded on an account or other written instrument." Civ.R. 10(D)(1). However, Civ.R. 10(D)(1) does not require the attached account or instrument be verified or authenticated by affidavit. By contrast, Civ.R. 10(D)(2) specifically requires that complaints containing medical, dental, optometric, or chiropractic claims must "include one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability." The Ohio Supreme Court, who promulgates the Ohio Rules of Civil Procedure, could have required that notes and mortgages attached to complaints be verified by affidavit if that were its intent, as it clearly is with respect to certain claims of professional malpractice. Therefore, there is no requirement that a plaintiff provide an affidavit authenticating the note and mortgage attached to a complaint in foreclosure.

{¶18} The sole assignment of error is overruled.

Conclusion

{¶19} Therefore, because Steel failed to litigate his fraud defense in the trial court, the defense is barred by res judicata. And since there was no requirement that M & T verify copies of the note or mortgage attached to the complaint with an affidavit, the lack of verification of those instruments was not a valid ground for vacating the judgment in foreclosure.

{¶20} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR