

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Wells Fargo Bank, N.A.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-559 (C.P.C. No. 07CVE11-15559)
Ernest Smith, Jr., et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on December 15, 2009

Thompson Hine LLP, Scott A. King, and Jason P. Bichsel, for appellee.

Law Offices of Marcell Rose Anthony, LLC, and Marcell Rose Anthony, for appellants.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellants, Ernest Smith, Jr., John Turner, Sr., Eyvonne Smith, and Mary Turner (collectively "appellants"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas denying their motion for relief from judgment filed pursuant to Civ.R. 60(B). For the reasons that follow, we affirm.

{¶2} Appellee, Wells Fargo Bank, N.A. ("appellee"), filed this action seeking foreclosure of a mortgage secured by real property in Canal Winchester. The complaint stated that the note secured by the mortgage was in the names of Ernest Smith, Jr., and John Turner, Sr., with Eyvonne Smith and Mary Turner being named as other parties who may have an interest in the property. The complaint named as other defendants who might have an interest in the property the Franklin County Treasurer, the Lehman Estates Homeowners Association, and the Ohio Department of Taxation. The homeowners association filed an answer and cross-claim against appellants, and the Franklin County Treasurer filed an answer. Appellants filed an answer, which they subsequently amended to assert a counterclaim against appellee asserting claims for abuse of process, intentional or negligent misrepresentation, and bad faith.

{¶3} Appellee filed an amended motion for summary judgment seeking judgment on its complaint and on appellants' counterclaim. The motion included evidentiary materials supporting the motion, including an affidavit by one of appellee's employees setting forth the default on the mortgage and the amount owed. Appellants filed a memorandum contra, which included appellants' own evidentiary materials, including affidavits asserting that payments had been tendered for the mortgage. Appellee filed a reply memorandum.

{¶4} On January 26, 2009, the trial court issued an entry granting appellee's motion for summary judgment on its foreclosure claim and on appellants' counterclaim. The entry stated that it was a final appealable order, and included language that there was no just cause for delay. Appellants did not file a notice of appeal regarding this entry.

{¶5} On February 11, 2009, appellants filed a Civ.R. 60(B) motion seeking vacation of the January 22, 2009 entry. The motion alleged as grounds for relief that the trial court had made a mistake of fact or law and that the judgment had been obtained by fraud. The motion further alleged that a meritorious defense existed in that payment for the mortgage had been tendered by appellants and improperly refused by appellee.

{¶6} The trial court referred the Civ.R. 60(B) motion to a magistrate for a hearing. The magistrate conducted that hearing on April 13, 2009. Eyvonne Smith testified at the hearing regarding attempts she had made to tender payment for the mortgage during the years 2006 and 2007, which she testified were refused by appellee because they were not made by certified check. The hearing also included testimony regarding a class action lawsuit filed in federal court against appellee by the National Association for the Advancement of Colored People on behalf of African Americans, asserting violations of the Fair Housing Act, the Equal Credit Opportunity Act, and the Civil Rights Act.

{¶7} Subsequently, the magistrate issued a decision denying appellants' Civ.R. 60(B) motion. The magistrate concluded that the trial court's January 26, 2009 entry was a final judgment, and that appellants were improperly using Civ.R. 60(B) as a means to challenge the correctness of that judgment, rather than raising a challenge by way of direct appeal. Appellants filed objections to the magistrate's decision, disagreeing with the magistrate's conclusions that the January 26, 2009 entry was a final appealable order and that Civ.R. 60(B) cannot be used as a replacement for a direct appeal. The trial court overruled appellants' objections to the magistrate's decision and adopted the magistrate's decision as its own.

{¶8} Appellants then filed this appeal, and assert three assignments of error:

I. WHETHER THE COURT ERRED WHEN IT PRECLUDED APPELLANTS' RULE 60(B) MOTION BASED UPON DOE V. TRUMBULL CTY. CHILDREN SERVICES BD. AS A MATTER OF LAW, AND FURTHER WHETHER THERE IS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION BASED UPON RACE BY PRECLUDING APPELLANTS' RULE 60(B) MOTION AS A MATTER OF LAW.

II. WHETHER APPELLANTS SATISFIED THE REQUIREMENTS OF A RULE 60(B) MOTION AND WHETHER THE COURT ERRED IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW BY REQUIRING HARD EVIDENCE OF PAYMENTS SUCH AS RECEIPTS WHEN THE BANK STATEMENTS, CHARTS, EXHIBITS AND TESTIMONY WERE GOOD, RELIABLE AND PROBATIVE SUFFICIENT EVIDENCE.

III. WHETHER THE COURT ERRED BY NOT VACATING THE SUMMARY JUDGMENT GRANTED TO APPELLEE BANK AND OTHERWISE ORDERING A TRIAL, AND BY SO FAILING, THE COURT DENIED APPELLANTS DUE PROCESS AND EQUAL PROTECTION BASED UPON RACE AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

{¶9} Appellants' assignments of error are interrelated, and will therefore be addressed together. The trial court did not conduct the analysis generally applied to Civ.R. 60(B) motions, but instead concluded that appellants' Civ.R. 60(B) motion was being used improperly as a substitute for a direct appeal. The trial court cited *Doe v. Trumbull Cty. Children Servs. Bd.* (1986), 28 Ohio St.3d 128, for this proposition. Appellants argue that *Doe* is distinguishable, arguing that that case involved a Civ.R. 60(B) motion that was both untimely, and failed to satisfy the requirements for Civ.R. 60(B). Instead, appellants point to our decision in *Miller v. Ohio Dept. of Transp.*, 10th Dist. No. 02AP-1035, 2003-Ohio-4681, to argue that a Civ.R. 60(B) motion is always an alternative to a direct appeal.

{¶10} Initially, we note that *Miller* does not stand for the proposition appellants advance. *Miller* involved an action for contribution in a personal injury case filed by the city of Sandusky against the state in the Court of Claims. The Court of Claims dismissed, but in a subsequent decision in a different case decided one year later, we held that the basis for the dismissal was incorrect. *Treese v. Delaware* (1994), 95 Ohio App.3d 536. Nine years later, the city of Sandusky filed a Civ.R. 60(B) motion seeking to reopen the Court of Claims case based on *Treese*, which was denied. We cited *Doe* for the exact proposition of law at issue here: that a Civ.R. 60(B) motion cannot be used as a substitute for a direct appeal. *Miller* at ¶13. We stated that the city had two options at the time of the original judgment: file a timely direct appeal of the Court of Claims' dismissal in 1993, or file a Civ.R. 60(B) motion within a reasonable time of our decision in *Treese* in 1994 that made it clear that the dismissal had been incorrect; since the city had done neither of those things, we concluded that the Civ.R. 60(B) motion was untimely. *Id.* Thus, our recognition of Civ.R. 60(B) as an option in that case was based on the fact that a clarification of the law had been rendered after the time for filing a direct appeal. It was not a recognition that Civ.R. 60(B) is always an alternative to the filing of a direct appeal.

{¶11} In addition to *Miller*, Ohio courts have consistently recognized that a Civ.R. 60(B) motion is not a substitute for a direct appeal. *Citimortgage, Inc. v. Clardy*, 10th Dist. No. 06AP-1011, 2007-Ohio-2940, ¶7. Applying this principle, a Civ.R. 60(B) motion may not be based on arguments that could have been raised on direct appeal. *Chase Manhattan Bank, N.A. v. Elliott* (Apr. 9, 2007), 5th Dist. No. 2006-CA-255. Where a Civ.R. 60(B) motion is predicated on a mistake, the mistake may not be an alleged error in the trial court's reasoning or logic in rendering the judgment from which relief is sought.

Karnofel v. Girard Police Dept., 11th Dist. No. 2009-T-0045, 2009-Ohio-4446. The reason behind this principle is that it is the function of the appellate courts to correct legal errors committed by the trial court. *Elliott v. Smead Mfg. Co.*, 4th Dist. No. 08CA13/08AP13, 2009-Ohio-3754. A party moving for relief from a judgment pursuant to Civ.R. 60(B) must allege new grounds for relief, rather than use the arguments it lost under the judgment as the basis for relief. *Elyria Twp. Bd. of Trustees v. Kerstetter* (1993), 91 Ohio App.3d 599.

{¶12} In this case, both at the trial court and on appeal, the basis for appellants' Civ.R. 60(B) motion is their argument that the trial court erred when it granted appellee's motion for summary judgment. Appellants argued that Civ.R. 60(B) relief was appropriate on the grounds of mistake and fraud; however, the arguments set forth in support of the claims of mistake and fraud are a repetition of the arguments set forth in their memorandum contra appellee's motion for summary judgment. Appellants argue extensively about the evidentiary materials attached to their memorandum contra appellee's motion for summary judgment, which they claim show that payments had been tendered to and improperly rejected by appellee. Therefore, appellants' use of Civ.R. 60(B) was nothing more than an attempt to reargue the merits of the summary judgment motion and not a proper use of Civ.R. 60(B). Thus, the trial court correctly concluded that appellants were improperly using Civ.R. 60(B) as a substitute for a direct appeal.

{¶13} Appellants attempt to distinguish this case from the cases holding that Civ.R. 60(B) cannot be used as a substitute for a direct appeal because those cases involved situations where the time for direct appeal had passed, and the parties were attempting to avoid the effect of the appeal time passing by filing Civ.R. 60(B) motions.

Appellants are correct that their Civ.R. 60(B) motion was filed prior to the expiration of the time during which a direct appeal could have been filed. However, in our view, the logic behind requiring the filing of a direct appeal to address errors in the trial court's reasoning, rather than using Civ.R. 60(B) to address such errors, applies regardless of when the Civ.R. 60(B) motion was filed, because it remains the function of the appellate courts to correct errors such as those alleged by appellants as the basis for their motion for relief from judgment.

{¶14} Appellants further argue that they were not required to file a direct appeal, because the trial court's decision was not a final appealable order. Appellants correctly point out that the decision on appellee's motion for summary judgment disposed of appellee's claims and appellants' counterclaim, but did not dispose of the cross-claim filed by the homeowner's association. However, the court expressly stated in its entry granting summary judgment that there was no just cause for delay, thereby making the entry a final appealable order. Civ.R. 54(B).

{¶15} Finally, appellants argue that the trial court's refusal to allow the use of a Civ.R. 60(B) motion constitutes a violation of the due process and equal protection provisions of the United States Constitution. Appellants cite *Horne v. Flores* (2009), ___ U.S. ___, 129 S.Ct. 2579. That case involved an application of a provision in Fed.R.Civ.P. 60(b)(5) that allows for vacation of a judgment that is based on an earlier judgment that has been vacated or reversed. The case does not support appellants' contention that the trial court's application of the law governing Civ.R. 60(B) somehow violated appellants' constitutional rights. We note that in their assignments of error, appellants suggest that the trial court's application of the law governing Civ.R. 60(B) was

somehow motivated by racial discrimination, although they do not specifically argue this in their brief. We fail to discern how the trial court's decision could in any way be characterized as being motivated by racial discrimination.

{¶16} Appellants' three assignments of error are overruled. Having overruled appellants' assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and KLINE, JJ., concur.

KLINE, J., of the Fourth Appellate District, sitting by assignment in the Tenth Appellate District.
