

[Cite as *Aurora Loan Servs. v. Brown*, 2010-Ohio-5426.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

AURORA LOAN SERVICES,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2010-01-010 CA2010-05-041
- vs -	:	<u>OPINION</u> 11/8/2010
SHANNON M. BROWN, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CV74317

Manley Deas Kochalski, LLC, Kevin L. Williams, P.O. Box 165028, Columbus, Ohio 43216, for plaintiff-appellee

Shannon M. Brown and James Brown, 222 Patton Drive, Springboro, Ohio 45066, defendants

Palisades Collection, LLC, 210 Sylvan Avenue, Englewood Cliff, New Jersey 07632, defendant

Flanagan, Lieberman, Hoffman & Swaim, Emerson R. Keck, 15 West Fourth Street, Dayton, Ohio 45202, for defendant, State Department of Taxation

Christopher A. Watkins, Warren County Prosecutor's Office, 500 Justice Drive, Lebanon, Ohio 45036, for defendant, Jim Aumann, Warren County Treasurer

Jason A. Whitacre, Laura C. Infante and Kathryn M. Eyster, 4500 Courthouse Boulevard, Suite 400, Stow, Ohio 44224, for defendant-appellant, Household Realty Corp.

POWELL, J.

{¶1} Defendant-appellant, Household Realty Corporation (Household), appeals a judgment of the Warren County Court of Common Pleas sua sponte vacating an order which granted Household relief from judgment, and reinstating a default judgment against Household.

{¶2} The record reflects that on July 30, 2004, Shannon M. Brown and James Brown (collectively, the Browns) executed a mortgage and promissory note in favor of Oak Street Mortgage, LLC, for \$270,000, which was recorded with the Warren County Recorder's office on September 15, 2004. On February 15, 2008, Household became holder of this mortgage and note by virtue of a "Corporate Assignment of Mortgage," which was recorded on February 26, 2008.

{¶3} On May 12, 2009, plaintiff-appellee, Aurora Loan Services, LLC (Aurora), filed a complaint in foreclosure and for money judgment against the Browns. The complaint alleged the Browns owed \$306,000 plus interest at the statutory rate per annum from March 1, 2008 on a note and mortgage executed December 15, 2006. In its complaint, Aurora alleged it held a "valid and subsisting first lien on the Property, subject only to any lien that may be held by the County Treasurer." Further, Aurora alleged "due to a fraud orchestrated by the Borrower/title agent Shannon Brown, the Mortgage was not properly recorded in the Office of the Warren County Recorder, and loan funds were not properly distributed at the closing to satisfy the prior mortgage as required by the lender in the closing instructions."

{¶4} Because Household was an interested party, service of summons was

issued by certified mail to Household on June 11, 2009, and was received and signed by "Kevin Taylor, Household." After Household failed to respond to the complaint, the court granted default judgment in Aurora's favor and issued a decree in foreclosure on July 14, 2009. In the judgment, the court held Aurora's mortgage was "a valid and subsisting first mortgage on the Property," subject only to the lien held by the County Treasurer.

{¶15} On December 15, 2009, Household filed a motion seeking: (1) relief from judgment pursuant to Civ.R. 60(B); (2) to set aside the sheriff's sale scheduled for March 1, 2010; and (3) leave to file an answer and cross-claim. On December 21, 2009, the trial court signed a proposed entry form prepared and submitted by Household, which granted Household relief from judgment. Although the entry form referenced the "Motion of *Defendant*, Household Realty Corporation," it was signed by "Laura C. Infante * * * Attorney for *Plaintiff*[" (Emphasis added.) Due to this error, the trial court sua sponte vacated its December 21, 2009 order on December 30, 2009, stating:

{¶16} "Although the court is confident it was not intentionally done, both the motion and the submitted Order were signed by Laura C. Infante...*Attorneys for the Plaintiff* * * *. Consequently, the court signed it ex parte inferring the relief from judgment was being sponsored by the party now opposing it."

{¶17} The trial court then denied Household's motion, finding Household failed to present evidence of excusable neglect under Civ.R. 60(B)(1), and that relief was not otherwise justified under Civ.R. 60(B)(5).

{¶18} On January 29, 2010, Household renewed its Civ.R. 60(B) motion, but

incorporated several new arguments, including a claim that the entry and decree in foreclosure was void *ab initio* due to lack of proper service on Household. In February 2010, the trial court denied Household's renewed motion on the basis that it lacked jurisdiction by virtue of Household's simultaneous appeal to this court.

{¶9} Household thereafter moved this court to remand the matter to the trial court. In granting Household's motion, this court remanded the matter for the limited "purpose of ruling on the renewed motion for relief from judgment, renewed motion to set aside sheriff's sale, and renewed motion for leave to file answer and cross-claim[.]" The trial court subsequently denied Household's motion on April 2, 2010.

{¶10} Household timely appeals, raising five assignments of error for review. For ease of analysis and clarity, the assignments of error will be addressed out of order.

{¶11} Assignment of Error No. 1:

{¶12} "THE TRIAL COURT ABUSED ITS DISCRETION AND EXCEEDED ITS JURISDICTION WHEN IT SUA SPONTE STRUCK AND REVERSED ITS DECEMBER 21, 2009 ENTRY."

{¶13} In its first assignment of error, Household argues the trial court lacked the inherent power to reverse its December 21, 2009 order on its own initiative.

{¶14} The record reflects the following series of events occurring between December 15 and December 30, 2009. First, on December 15, Household filed its original Civ.R. 60(B) motion for relief from judgment, to set aside the sheriff's sale, and for leave to file an answer and cross-claim. On December 17, the trial court scheduled a non-oral hearing on Household's motion to be held January 5, 2010 "in

accordance with Loc.R. 2.03(C)." However, on December 21, 2009, the trial court signed a proposed entry form prepared and submitted by Household, which granted Household's motion. Two days later, on December 23, Aurora filed its memorandum contra Household's motion. Lastly, on December 30, 2009, the trial court struck its December 21 order, explaining it granted relief based upon the mistaken impression that Aurora, not Household, supported the Civ.R. 60(B) motion. The trial court explained it had been misled by the signature line on Household's prepared entry form, which stated "Counsel for *Plaintiff*," instead of "Counsel for Defendant, Household." (Emphasis added.)

{¶15} Household argues the trial court exceeded its authority when it *sua sponte* vacated its December 21 order without an accompanying Civ.R. 60(B) motion filed by Aurora or another interested party. Household is correct in its general contention that a trial court has no authority to vacate its final orders *sua sponte*. See, e.g., *Pitts v. Dept. of Transportation*, (1981), 67 Ohio St.2d 378, 379-380. However, it is well established in Ohio that a "reviewing court is not authorized to reverse a correct judgment merely because it was reached for the wrong reason." *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, ¶46. It follows that an appellate court shall affirm a trial court's judgment that is legally correct on other grounds, that is, one that achieves the right result for the wrong reason, because such an error is not prejudicial. See *State v. Weisenbarger*, Preble App. No. CA2001-08-014, 2002-Ohio-291, at 3.

{¶16} In the case at bar, the trial court's decision to vacate its December 21, 2009 order achieved a correct result pursuant to the Warren County Court of

Common Pleas local rules, which promulgate judicial economy and sound case management.

{¶17} Civ.R. 60(B) does not establish a date on which a response to a motion for relief from judgment must be filed. However, Loc.R. 2.03 of the Warren County Court of Common Pleas provides: "[a]ny memorandum contra to a motion shall be served upon movant's trial attorney within fourteen days from the date the memorandum in support of the motion and proof of service thereof was served." See *Morrison v. Dept. of Ins.*, Gallia App. No. 01CA13, 2002-Ohio-5986, ¶27, citing *Ohio Assn. of Pub. School Emp., AFSCME AFL-CIO v. Lakewood City School Dist. Bd. of Edn.* (1994), 68 Ohio St.3d 175. Further, as a general principle, "a trial court should consider timely filed memorandums in opposition to a motion before ruling on a motion." *Morrison* at ¶27.

{¶18} The record reveals Aurora filed its opposition memorandum on December 23, 2009, eight days after Household filed its original Civ.R. 60(B) motion. Accordingly, Aurora timely filed its opposition memorandum within the fourteen-day requirement of Loc.R. 2.03. It follows that the trial court's December 21, 2009 order resulted in a judgment in Household's favor without affording Aurora the opportunity to be heard by way of its timely filed opposition memorandum. Cf. *Mortgage Electronic Registration Systems, Inc. v. Zearley*, Hocking App. No. 04CA11, 2004-Ohio-7283, ¶11-13; *Taylor-Winfield Corp. v. Winner Steel, Inc.*, Mahoning App. No. 06-MA-176, 2007-Ohio-6623, ¶31-40; *Hoecker v. Dayton & Montgomery Cty. Park Dist., et al.*, (Sept. 13, 1995), Montgomery App. No. 15141, at *3.

{¶19} Reviewing the evidence before us, we cannot say Household was

prejudiced when the trial court vacated its December 21 order. The trial court issued this order under the impression that Aurora, not Household, supported the Civ.R. 60(B) motion. However, after relief was granted, Aurora filed its memorandum contra the Civ.R. 60(B) motion, thus exposing the trial court's mistake. By vacating the December 21 order, the trial court provided a fair forum in which to consider *both* parties' timely filed arguments, thereby adhering to the principles of effective case management promulgated by Loc.R. 2.03(B). See *Portage Broom & Brush Co. v. Zipper* (Aug. 17, 1994), Summit App. No. C.A. 16409, at *1. We decline to overturn this decision when the facts and circumstances of this case indicate the trial court achieved a sound result pursuant to clearly established local rules.

{¶20} However, even if Aurora had not timely filed its opposition memorandum, we would still affirm the judgment of the trial court. The Supreme Court of Ohio has held "[i]ndependent of statutory provisions and notwithstanding the general rule limiting the court's authority over judgments to the term at which they were rendered, [courts have] power to correct nonjudicial mistakes in [their] proceedings and may annul within a reasonable time, orders and judgments inadvertently or improvidently made." See *In re Estate of Earley*, Washington App. No. 00CA34, 2001-Ohio-2586, at *3, quoting *In re Estate of Gray* (1954), 162 Ohio St. 384, 390. Orders should be vacated when "the court has been deceived or is laboring under a mistake or misapprehension as to the state of the record or as to the existence of other extrinsic facts upon which the action is predicated." *Early* at 3; *Gray* at 384.

{¶21} As previously discussed, when signing the December 21 order, the trial

court was mistaken as to which party sought relief from judgment. By subsequently vacating the order, the trial court exercised its inherent power to correct an order inadvertently made in the absence of all relevant and timely filed arguments. In light of its mistake, the trial court did not err when it vacated its December 21 order and subsequently considered all relevant information prior to denying Household's original Civ.R. 60(B) motion on its merits.

{¶22} For the foregoing reasons, Household's first assignment of error is overruled.

{¶23} Assignment of Error No. 3:

{¶24} "THE UNDERLYING JUDGMENT IS VOID AB INITIO DUE TO A LACK OF SERVICE OF PROCESS UPON APPELLANT."

{¶25} In its third assignment of error, Household argues the record does not support the presumption of valid service, and as a result, the underlying judgment entry and decree in foreclosure is void *ab initio*.

{¶26} We find Household failed to preserve any alleged error concerning improper service. A party waives its right to appeal an error when the issue could have been brought to the attention of the trial court at a time when such error could have been avoided or otherwise corrected. See *Fite v. Fite* (Apr. 24, 2000), Brown App. No. CA99-07-022, at 5. See, also, Civ.R. 12(H). Further, "res judicata prevents the successive filings of Civ.R. 60(B) motions [for] relief from a valid, final judgment when based upon the same facts and same grounds or based upon facts that could have been raised in the prior motion." *Harris v. Anderson*, 109 Ohio St.3d 101, 102, 2006-Ohio-1934, ¶8.

{¶27} In the case at bar, Household's first responsive pleading consisted of its original Civ.R. 60(B) motion filed December 15, 2009. However, this motion did not contain any allegations of operative fact regarding improper service. In fact, the only reference made to service was the following: "this Court's docket reflects that its certified mail service of the Complaint on Household Realty Corporation was stamped by 'Kevin Taylor,' on June 11, 2009."

{¶28} Such a statement hardly suggests improper service. See, e.g., *Elyria Twp. Bd. of Trustees v. Kerstetter* (1993), 91 Ohio App.3d 599, 601 ("the movant must allege operative facts with enough specificity to allow the court to decide whether it has met that test[.]"); *GTE*, 47 Ohio St.2d at 150-151.

{¶29} It was not until Household renewed its Civ.R. 60(B) motion in January 2010 that it argued the judgment was void *ab initio* due to lack of service. At this point, however, Household was merely attempting to raise numerous new arguments¹ without demonstrating they were the product of "newly discovered evidence," or if so, why the evidence could not, with due diligence, have been earlier discovered. See 63 Ohio Jurisprudence 3d (2010) 522, Newly Discovered Evidence as Ground for Relief; Civ.R. 60(B)(2). Thus, because Household's renewed Civ.R. 60(B) motion was based on either the same facts or facts that could have been raised in its original Civ.R. 60(B) motion, we hold its renewed motion was barred by res judicata. See *Harris*, 109 Ohio St.3d at 102.

{¶30} Accordingly, Household's third assignment of error is overruled.

2. In its renewed Civ.R. 60(B) motion, Household asserted three additional arguments: (1) the trial court's default judgment was void *ab initio* due to improper service; (2) Aurora's memorandum contra Household's original motion for relief from judgment was untimely filed; and (3) the trial court's July 14, 2009 disposition of Aurora's complaint in foreclosure did not adjudicate or dispose of all claims.

{¶31} Assignment of Error No. 2:

{¶32} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER THE EQUITABLE ARGUMENT PRESENTED BY APPELLANT PURSUANT TO OHIO CIVIL RULE 60(B)(5) IN SUPPORT OF THE CONTENTION THAT IT IS ENTITLED TO RELIEF FROM JUDGMENT."

{¶33} In its second assignment of error, Household argues it demonstrated that it was entitled to relief pursuant to Civ.R. 60(B)(5), "based on the theories of equity and justice."

{¶34} A trial court's decision to grant or deny a Civ.R. 60(B) motion for relief from judgment will not be reversed on appeal absent an abuse of discretion. See *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 1994-Ohio-107; *Owen v. Owen*, Butler App. No. CA2009-10-260, 2010-Ohio-2708, ¶13. An abuse of discretion is more than an error of law or judgment; it implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶35} To prevail on a Civ.R. 60(B) motion for relief from judgment, the movant must demonstrate: (1) a meritorious claim or defense; (2) entitlement 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 Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 150-151. A movant must meet all three requirements to succeed on its motion. See *Pelton*, 70 Ohio St.3d at 174.

{¶36} Turning to the facts of the case at bar, it is undisputed that Household's

original Civ.R. 60(B) motion was timely and asserted a meritorious defense in the form of a "valid first lien" on the Browns' property. Thus, the sole remaining issue is whether Household demonstrated it was entitled to relief under Civ.R. 60(B)(1)-(5).

{¶37} Household first argued it was entitled to relief under Civ.R. 60(B)(1). Aside from the facts alleged in its brief, Household presented copies of the note, mortgage, addendum to the note, and the assignment of the mortgage. While these documents demonstrated Household's meritorious defense of a "valid first lien" on the Brown's property, they established nothing with respect to excusable neglect or corporate delay. Thus, the trial court properly held Household failed to submit operative facts demonstrating grounds for relief under Civ.R. 60(B)(1).

{¶38} As an alternative argument, Household argues the trial court should have considered its motion as one brought under Civ. R. 60(B)(5), which allows courts to set aside judgments for "any other reason justifying relief from the judgment." Specifically, Household argues the trial court erred in denying its motion for relief without first making "factual determination[s]" regarding its argument under Civ.R. 60(B)(5).

{¶39} Civ.R. 60(B)(5) is a catch-all provision that reflects the inherent power of a court to relieve a party from the unjust operation of a judgment. *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, paragraph one of the syllabus. However, the grounds for invoking Civ.R. 60(B)(5) must be substantial and the provision is not to be used as a substitute for any of the more specific provisions of Civ.R. 60(B). *Id.* at paragraphs one and two of the syllabus. Moreover, "[i]t is well-established that the 'other reason' clause of Civ.R. 60(B) will not protect a party who ignores its duty to

protect its interest." *Mount Olive Baptist Church v. Pipkins Paints* (1979), 64 Ohio App.2d 285, 289.

{¶40} Although a movant is not required to submit evidentiary material satisfying Civ.R. 56 standards in support of the Civ.R. 60(B) motion, a movant must do more than make bare allegations of entitlement to relief. See *Bank One, NA v. Ray*, Franklin App. No. 04AP907, 2005-Ohio-3277, ¶18; *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. The question of whether to hold an evidentiary hearing on a Civ.R. 60(B) motion is addressed to the sound discretion of the trial court. *Schneider v. Gunnerman* (Aug. 16, 1999), Fayette App. Nos. CA98-11-019, CA99-03-009, at 1. The Ohio Supreme Court has held it is an abuse of discretion for the trial court to deny a hearing "where grounds for relief from judgment are sufficiently alleged and are supported with evidence which would warrant relief from judgment." *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 19, 1996-Ohio-430 (also stating "[i]f the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under Civil Rule 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion[.]"); *Your Financial Community of Ohio, Inc. v. Emerick* (Oct. 21, 1997), 123 Ohio App.3d 601, 606-609; *Standard Register Co. v. Bumper Café* (Apr. 25, 1991), Franklin App. No. 90AP-1016, 1991 WL 64959, at *2.

{¶41} Our review of Household's Civ.R. 60(B)(5) motion finds Household presented sufficient operative facts to warrant an evidentiary hearing on the motion. As previously discussed, Household satisfied the first and third prongs of the *GTE* test by asserting a meritorious defense of a "valid first lien" and a timely-filed motion.

See *GTE*, 47 Ohio St.2d at 150-151.

{¶42} As to the second *GTE* prong, we find Household argued the trial court's judgment was "unjust" in a manner that could justify relief under Civ.R. 60(B)(5). Specifically, Household argued the default judgment inequitably estopped it from enforcing its lien, thus permitting the Browns to escape the consequences of default. In so arguing, Household called into question the trial court's finding that Aurora's mortgage was "a valid and subsisting *first* mortgage on the Property." (Emphasis added.) The trial court gave no basis for this holding, which destroyed Household's mortgage lien and inexplicably elevated Aurora's lien above Household's. Our review of Aurora's foreclosure complaint reveals no allegations of fault, negligence, or other wrongdoing attributable to Household that would permit Aurora to receive priority over Household's lien. Rather, Aurora's sole allegations of wrongdoing were related to fraud committed by Shannon Brown, who precluded a proper recording of Aurora's mortgage, represented herself as a "qualified title agent" promising title insurance, and used the funds for "purposes other than those laid out in the closing instructions."

{¶43} In the absence of allegations of fraud or fault attributable to Household, we are unaware of a basis for granting Aurora relief that disposed of Household's lien in the manner provided. Such a basis is precisely the issue Household seeks to litigate during a Civ.R. 60(B) evidentiary hearing. Cf. *Metropolitan Securities Co. v. Orlow* (1923), 107 Ohio St. 583, 591 ("The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction * * * unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him, in a court of law or equity, to a subsequent claimant[.]").

{¶44} Although the evidentiary materials filed in support of Household's Civ.R. 60(B)(5) motion were unsworn, we find they sufficiently presented operative facts demonstrating the validity of Household's underlying claim. We therefore hold the trial court abused its discretion by overruling Household's Civ.R. 60(B)(5) motion for relief from judgment without holding an evidentiary hearing.

{¶45} Accordingly, Household's second assignment of error is sustained.

{¶46} Assignment of Error No. 4:

{¶47} "THE TRIAL COURT ABUSED ITS DISCRETION AND EXCEEDED ITS JURISDICTION BY RECLASSIFYING APPELLANT'S JANUARY 29, 2010 RENEWED MOTION OR [sic] RELIEF FROM JUDGMENT, RENEWED MOTION TO STAY SHERIFF'S SALE AND RENEWED MOTION FOR LEAVE TO FILE ANSWER AND CROSS-CLAIM AS A MOTION FOR RECONSIDERATION IN LIGHT OF THIS APPELLATE COURT'S ORDER GRANTING APPELLANT'S MOTION FOR LIMITED REMAND AND ORDERING THE TRIAL COURT TO RULE ON THE COMBINED RENEWED MOTION."

{¶48} Assignment of Error No. 5:

{¶49} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT UNILATERALLY DEEMED APPELLANT'S JANUARY 29, 2010 RENEWED MOTION FOR RELIEF FROM JUDGMENT, RENEWED MOTION TO STAY SHERIFF'S SALE AND RENEWED MOTION FOR LEAVE TO FILE ANSWER AND CROSS-CLAIM AS A MOTION FOR RECONSIDERATION AND SUBSEQUENTLY ISSUING A RULING ON THE DEEMED MOTION."

{¶50} Based on our resolution of the second assignment of error, Household's

fourth and fifth assignments of error are rendered moot. App.R. 12(A)(1)(c).

{¶51} Judgment affirmed in part, reversed in part, and remanded.

YOUNG, P.J., and BRESSLER, J., concur.