[Cite as *Bank of Am. v. McLaughlin*, 2012-Ohio-2341.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Bank of America, N.A.	Court of Appeals No. E-11-057
Appellee	Trial Court No. 2007-CV-0774
v.	
Rhonda D. McLaughlin, et al.	**DECISION AND JUDGMENT**
Appellant	Decided: May 25, 2012

* * * * *

Scott A. King, Kip T. Bollin, and James L. DeFeo, for appellee.

Daniel L. McGookey, Kathryn M. Eyster, and Lauren McGookey, for appellant.

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PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Rhonda McLaughlin, appeals the June 28, 2011 judgment of the Erie County Court of Common Pleas which denied her Civ.R. 60(B) motion for relief from judgment. Because we find that the trial court did not abuse its discretion, we affirm.

{¶ 2} The history of this case is as follows. On August 31, 2007, appellee, Bank of America, N.A., filed a complaint in foreclosure against appellant alleging that she defaulted on her note which had a balance of $39,801.27, and requesting that the mortgage be foreclosed. The complaint stated that appellee was a holder and owner of the note. Appellee also filed a copy of the note and mortgage.

{¶ 3} On September 12, 2007, appellant, pro se, filed a letter, which was deemed her answer, with the court. In the letter she stated that she had been facing financial difficulties and that she was in the process of filing for disability benefits. Appellant stated that she was trying to pay appellee.

{¶ 4} On January 16, 2008, appellee filed a motion for summary judgment. In support, appellee filed the affidavit of Rhonda Weston, vice president of Bank of America, who stated that she had custody of appellant's account and that such records are kept in the regular course of business by persons with knowledge of the events. Weston stated that appellee was holder of the note and mortgage and that appellant was in default of the note and mortgage.

{¶ 5} On August 14, 2008, the trial court noted that a forbearance agreement had been reached as a result of settlement conferences. The court stated that if the matter was not resolved by October 31, 2008, the date of the expiration of the agreement, then the summary judgment briefing schedule would resume. The parties were not able to reach an agreement and on December 16, 2008, the court granted summary judgment and

entered a decree in foreclosure. The property was sold on June 8, 2010, and an order confirming the sale was filed on August 19, 2010.

{¶ 6} Thereafter, on March 17, 2011, appellant, represented by counsel, filed a motion for relief from judgment under Civ.R. 60(B)(5). Appellant argued that appellee's use of a "robo-signer" or, as defined by appellant, an individual who signs large volumes of affidavits or other legal documents used in foreclosures so the defaulting homeowner can be quickly removed, perpetrated a fraud upon the court. Appellant contended that the affidavit was not properly admissible under Civ.R. 56(E) and, without it, appellee failed to demonstrate that it was the real party in interest because the note was endorsed by Firstar, the loan originator, in blank. Appellant further argued that the motion was filed within a "reasonable" time because she was recently made aware of the use of robo-signers.

{¶ 7} In opposition, appellee argued that appellant presented no evidence that the affidavit in support of its motion for summary judgment was, in fact, robo-signed and that appellant admitted she was in default on the loan. Appellee also argued that appellant did not demonstrate a fraud on the court because she did not claim that an "officer" of the court participated in the fraud; thus, the motion was time-barred. Further, appellee asserted that as a holder of the note, it was a real party in interest.

{¶ 8} On June 9, 2011, appellant filed a motion for leave to supplement her motion to add the argument that appellee failed to comply with conditions precedent involving the Department of Housing and Urban Development ("HUD") regulations for loans

insured by the Fair Housing Administration ("FHA") and which were adopted in the Fannie Mae servicing guidelines.

{¶ 9} On June 28, 2011 the trial court denied appellant's motion for relief from judgment and also denied appellant's motion for leave to supplement. Denying appellant's motion for relief, the court noted that because appellant did not allege that counsel acted fraudulently, fraud upon the court was not a valid basis for relief under Civ.R. 60(B)(5). The court further found that the motion was not filed within a reasonable time. The court noted that appellant's fraud claim properly fell under Civ.R. 60(B)(3) and, thus, was time-barred. The court stated that even assuming, arguendo, that the claim fell under Civ.R. 60(B)(5), it was still untimely because appellant knew of the robo-signer issue for six months prior to filing the motion.

{¶ 10} As to appellant's motion to supplement, the court found that nothing in the supplemental materials changed the fact that appellant failed to show entitlement to relief under Civ.R. 60(B)(1)-(5), or that the motion was timely. This appeal followed.

{¶ 11} Appellant now raises the following assignment of error for our review:

> The trial court erred in denying McLaughlan's motion for relief from judgment, erred in denying McLaughlin leave to file supplemental memorandum in support of her motion for relief from judgment, and erred when it failed to hold an evidentiary hearing.

{¶ 12} To be entitled to relief from judgment 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, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

If any one of the three *GTE* requirements is not met, the motion should be overruled. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988). A trial court's decision on a motion for relief from judgment under Civ.R. 60(B) will not be reversed on appeal absent an abuse of discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987); *McGee v. Lynch*, 6th Dist. No. E-06-063, 2007-Ohio-3954, ¶ 29.

{¶ 13} As specifically stated in the trial court's judgment, its decision rested on finding that appellant failed to demonstrate the second and third *GTE* prongs; thus, we will focus on whether the court abused its discretion in so finding. The court first found that appellant failed to demonstrate entitlement to relief under Civ.R. 60(B)(5). Relief under Civ.R. 60(B)(5), or the "catchall" provision, is justified only where relief cannot be demonstrated under the reasons listed in Civ.R. 60(B)(1)-(4). Ohio courts have routinely said that Civ.R. 60(B)(5) is not to be used as a substitute for any other more specific provisions of Civ.R. 60(B)(1)-(4). *Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d

64, 66, 448 N.E.2d 1365 (1983). The catchall provision should only be used in rare cases where substantial grounds exist to justify relief. *Wiley v. Gibson*, 125 Ohio App.3d 77, 81, 707 N.E.2d 1151 (1st Dist.1997).

{¶ 14} Discussing the distinction between the relief from judgment available under Civ.R. 60(B)(3), fraud, and fraud upon the court which is available under Civ.R. 60(B)(5), the Supreme Court of Ohio noted that "in the usual case, a party must resort to a motion under Civ.R. 60(B)(3). Where an officer of the court, *e.g.*, an attorney, however, actively participates in defrauding the court, then the court may entertain a Civ.R. 60(B)(5) motion for relief from judgment." *Coulson v. Coulson*, 5 Ohio St.3d 12, 15, 448 N.E.2d 809 (1983). *See Eubank v. Mardoian*, 9th Dist. No. 11CA009968, 2012-Ohio-1260.

{¶ 15} In a case factually similar to appellant's, the bank filed a complaint for foreclosure alleging the debtor was in default on the note. *U.S. Bank Natl. Assn. v. Spicer*, 3d Dist. No. 9-11-01, 2011-Ohio-3128, ¶ 5. In January 2009, the court entered a decree in foreclosure and order of sale. *Id.* at ¶ 6. Nineteen months after the order, appellant filed a Civ.R. 60(B) motion for relief from judgment. Thereafter, appellant filed multiple supplements to the motion which included the argument that the bank had no standing to bring the foreclosure action and that the individuals who signed the affidavits in support of foreclosure were robo-signers. *Id.* at ¶ 18. Appellant claimed entitlement to relief under Civ.R. 60(B)(5) alleging that the bank was perpetrating a fraud upon the court. *Id.* at ¶ 22.

{¶ 16} Affirming the denial of the appellant's motion for relief from judgment, the court found that the appellant's arguments aligned with the traditional concepts of fraud which is specifically addressed under Civ.R. 60(B)(3). *Id.* at ¶ 42. Thus, the motion for relief was untimely. *Id.*

{¶ 17} Even assuming that the motion for relief from judgment could properly be brought under Civ.R. 60(B)(5), we agree that it was not filed within a reasonable time. In her motion for relief from judgment, appellant argued that the motion was timely because she had just learned of the robo-signing practice. Appellant, however, knew of the practice in October 2010, when she filed a federal lawsuit against appellee. The motion for relief was not filed until March 2011. Accordingly, we find that the court did not err when it found that appellant's motion was untimely.

{¶ 18} Alternatively, if the motion could have been pursued under Civ.R. 60(B)(5), we find that appellant failed to demonstrate a meritorious claim or defense to appellee's foreclosure action. In her motion, appellant argued that due to the bank's robo-signing practice, the affidavit attached to the motion for summary judgment was not valid. Appellant then argued that without the affidavit, appellee failed to establish that it was the real party in interest.

{¶ 19} First, we note that appellant, in her answer, admitted that she owed the debt to appellee. Next, we note that although appellant attached and referenced several news articles and cases where the affiant allegedly robo-signed affidavits in other cases, she presented no evidence that it occurred in this case. *See Spicer*, *supra*, at ¶ 41. Finally,

appellee alleged it was the holder of the note and attached the assignment from Firstar to the complaint. Although disputed by appellant, the holder of a note endorsed in blank is entitled to enforce it simply by possessing it. *See U.S. Bank, N.A. v. Coffey*, 6th Dist. No. E-11-026, 2012-Ohio-721.

{¶ 20} Although we find that the court did not err in finding that appellant failed to satisfy two of the *GTE* prongs, we will briefly address her arguments that, had appellant been permitted to file her supplemental memorandum, she would have demonstrated a meritorious defense. The arguments raised in the supplemental memorandum concern HUD regulations regarding federally-insured home loans. Specifically, appellant argued that because appellee failed to offer her a face-to-face meeting prior to commencing the foreclosure action, the HUD mandated condition precedent had not been met. Appellant does not argue that her loan was FHA insured; rather, she asserts that Fannie Mae has adopted the HUD regulations in its 2010 servicing guidelines.

{¶ 21} We note that the servicing guidelines, as stated by appellant, were promulgated to provide "all appropriate foreclosure alternatives." In addition, the version relied upon by appellant was enacted in April 2010; the decree of foreclosure was filed in November 2008. Reviewing the record, such alternatives were provided prior to the judgment granting appellee's motion for summary judgment and decree in foreclosure. As stated previously, in its August 14, 2008 judgment entry, the court noted that the parties had met in a series of four settlement conferences which culminated in a

forbearance agreement expiring in October 2008. The agreement was reached in order to allow appellant time to submit any change in financial information and to explore any federal relief options. Appellant was offered alternatives to foreclosure. In addition, appellant failed to raise the alleged condition precedent as a defense to the foreclosure action.

{¶ 22} Finally, appellant contends that the trial court erred by denying her motion for relief from judgment without first conducting an evidentiary hearing. A trial court abuses its discretion by failing to conduct a hearing where the movant alleges operative facts which would warrant relief under Civ.R. 60(B). *Society Natl. Bank v. Val Halla Athletic Club & Recreation Ctr., Inc.*, 63 Ohio App.3d 413, 418, 579 N.E.2d 234 (9th Dist.1989), citing *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 316 N.E.2d 469 (8th Dist.1974). Because appellant failed to allege operative facts which would warrant relief from judgment, the trial court did not err when it denied appellant's motion without conducting a hearing.

{¶ 23} Based on the foregoing, we find that the trial court did not abuse its discretion in denying appellant's Civ.R. 60(B) motion for relief from judgment and in failing to conduct a hearing on the motion. Appellant's assignment of error is not well-taken.

{¶ 24} On consideration whereof, we find that substantial judgment was done the party complaining and the judgment of the Erie County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. ______________________________ JUDGE

Mark L. Pietrykowski, J.

Stephen A. Yarbrough, J. ______________________________ JUDGE
CONCUR.

______________________________ JUDGE

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