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

Wells Fargo Bank, N.A.	Court of Appeals No. E-13-052
Appellee	Trial Court No. 2010 CV 452
v.	
Vickie L. Bluhm aka Vicki L. Rosin, et al.	**DECISION AND JUDGMENT**
Appellant	Decided: March 13, 2015

* * * * *

Scott A. King and Terry W. Posey, Jr., for appellee.

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

* * * * *

JENSEN, J.

{¶ 1} This is an appeal in a foreclosure action in which the Erie County Court of Common Pleas denied appellant's motion for relief from judgment. For the reasons that follow, we affirm.

Facts and Procedural History

{¶ 2} This foreclosure action involves the home of appellant, Vickie L. Bluhm, located at 6106 Bogart Road West, Castalia, Ohio in Erie County. On May 3, 2004, appellant purchased the home and executed a promissory note in the amount of $93,500 in favor of Franklin American Mortgage Company. As security for the note, appellant executed a real estate mortgage against the property in favor of Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Franklin. The note and the mortgage were recorded with the Erie County Recorder on May 7, 2004.

{¶ 3} Appellant fell behind in her monthly payments in February of 2010.

{¶ 4} Appellee, Wells Fargo Bank, N.A., filed a complaint in foreclosure on June 10, 2010, seeking judgment on the note, in the amount of $82,204.52 together with interest at the rate of 4.5 percent per year from February 1, 2010. Appellee also sought to foreclose the mortgage. Appellee claimed that it was the holder of the note and that it had complied with all conditions precedent. A copy of the note was attached to the complaint and indicates that it was indorsed from Franklin to appellee. Also attached to the complaint was a copy of the mortgage between appellant and MERS.

{¶ 5} On June 23, 2010, MERS assigned the mortgage to appellee.

{¶ 6} On September 9, 2010, appellee moved for summary judgment, arguing that it had established a prima facie case of foreclosure and that it was entitled to judgment as a matter of law. Attached to the motion were the note, mortgage, assignment of

mortgage, and documentation purporting to show appellant's delinquency and the principal balance due.

{¶ 7} Through her attorney, appellant opposed the motion on September 24, 2010.

{¶ 8} On February 3, 2011, the trial court entered summary judgment for appellee. The court ordered the equity of redemption foreclosed and the property sold. Appellant did not appeal the judgment.

{¶ 9} On June 14, 2011, appellee purchased the property at a sheriff's sale.

{¶ 10} On July 29, 2011, appellant, acting through new counsel, filed a motion for relief from judgment, pursuant to Civ.R. 60(B). By order dated September 4, 2013, the trial court denied the motion without explanation. Appellant appealed the judgment on September 27, 2013.[1]

{¶ 11} Appellant raises one assignment of error for our review:

> The trial court erred in granting judgment to Plaintiff.

Law and Analysis

{¶ 12} Civ.R. 60(B) provides, in part, that a court may relieve a party from a final judgment for the following reasons: "(3) fraud * * *; or (5) any other reason justifying relief from the judgment." In order to obtain relief under the rule, a movant must demonstrate that:

[1] On November 14, 2013, appellant moved to stay the writ of possession pending a decision in the instant appeal. The trial court granted her motion on December 2, 2013.

> (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).

{¶ 13} A trial court's disposition of a Civ. R. 60(B) motion is reviewed solely for an abuse of discretion. *Eubank v. Anderson,* 119 Ohio St.3d 349, 2008-Ohio-4477, 894 N.E.2d 48; *McGee v. Lynch,* 6th Dist. Erie No. E-06-063, 2007-Ohio-3954, ¶ 29. An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 14} In her sole assignment of error, appellant argues, "[t]he trial court erred in granting judgment to Plaintiff." Appellant's reference to, and challenge of, the original judgment in appellee's favor is improper. Appellant did not appeal the trial court's grant of summary judgment to appellee, and we lack jurisdiction to pass upon that ruling. *Fahey Banking Co. v. Squire,* 7th Dist. Mahoning No. 11MA178, 2012-Ohio-4211 (Arguments which assign error respecting the original judgment are inappropriate in an

appeal of a Civ.R. 60(B) decision.). Accordingly, we treat appellant's single assignment of error as a challenge to the trial court's September 4, 2013 denial of her Civ.R. 60(B) motion.

1. Alleged Meritorious Defenses

{¶ 15} Appellant alleged the following meritorious defenses in her motion before the trial court: (1) that appellee had failed to show that it was the "owner" of the promissory note; (2) that it was not "equitable to take [appellant's] home * * * under the circumstances"; (3) that the assignment of the mortgage was improper; (4) that appellee did not act in accordance with a consent judgment executed on April 4, 2012, between the nation's five largest lenders, including appellee, and the federal government; and (5) that the Ohio Attorney General's notice to appellant on October 1, 2012 advised her that she "may be entitled to receive payment under the national Mortgage Settlement."

{¶ 16} On appeal, appellant has abandoned some of those defenses and, for the first time, raised new ones. Appellant now claims: (1) that it was not equitable to foreclose; (2) that appellee did not demonstrate that it was the "holder" of the promissory note; (3) that appellee's affidavit filed in support of summary judgment was legally insufficient; (4) that the assignment of the mortgage from MERS to appellee was improper; (5) that appellee did not comply with the consent judgment; and (6) that appellee did not establish that it met conditions precedent prior to filing suit.

{¶ 17} The alleged meritorious defenses regarding appellee's holdership status, the defective affidavit and its failure to comply with conditions precedent are new arguments.

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, 602 N.E.2d 622 (1992). 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. Accordingly, we do not consider appellant's alleged meritorious defenses regarding the affidavit, appellee's holdership status, and conditions precedent. Because appellant failed to raise them below, she has waived them on appeal.

{¶ 18} This leaves the following alleged defenses for our review: appellant's equities defense, the improper assignment, and the consent judgment. A party need only allege a meritorious defense; the party need not prove that she will prevail. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988).

{¶ 19} First, appellant claims that, under Ohio law, "in considering the equities [in this case], foreclosure is not an appropriate remedy." Appellant argues she "could not have been more diligent in attempting to cure her default and have her loan reinstated" but that appellee "has refused time and time again to do so." Appellant states that she will face a greater loss if equitable relief is unfairly granted to appellee whereas appellee, as a "multibillion dollar corporation," will suffer only slightly.

{¶ 20} We cannot say that the trial court abused its discretion in rejecting appellant's equities defense. Appellant does not dispute that she was in default on the

note or that the note contained an acceleration clause. Under similar circumstances, this court has declined to find that foreclosure was an inequitable remedy. *Bank of New York Mellon Trust Co. v. Fox,* 6th Dist. Ottawa No. OT-11-046, 2012-Ohio-6245, ¶ 13. The fact that appellee is a large corporation does not "render its contractual right to collect a debt unworthy of judicial enforcement against entities and individuals with fewer resources. The proper administration of justice may require a *level* playing field, but it does not require a playing field tilted against litigants with more economic resources." (Emphasis in original.) *U.S. Bank N.A. v. Rex Station Ltd.,* 2d Dist. Montgomery No. 26019, 2014-Ohio-1857, ¶ 14, *appeal not allowed,* 140 Ohio St.3d 1418, 2014-Ohio-3785, 15 N.E.2d 885.

{¶ 21} Next, appellant argues that the assignment of the mortgage from MERS to appellee is "invalid on its face" because, according to appellant, it was "recorded six years before it was executed." (Emphasis in original.) The record does not support appellant's argument. The record discloses that appellant entered into the mortgage agreement on May 3, 2004 with MERS, that the mortgage was recorded on May 7, 2004, and six years later, on June 23, 2010, that MERS assigned the mortgage to appellee. We see no impropriety in the assignment. Moreover, that the mortgage was assigned after the filing of the complaint need not be fatal to a foreclosure action. *U.S. Bank, N.A. v. McGinn*, 6th Dist. Sandusky No. S-12-004, 2013-Ohio-8, ¶ 21, citing *Aurora Loan Servs., LLC v. Louis*, 6th Dist. Lucas No. L-10-1289, 2012-Ohio-384, ¶ 34. Appellant's invalid assignment defense fails as matter of fact and law.

{¶ 22} Finally, appellant argues that the consent judgment entered into between the federal government and appellee provides a meritorious defense to her in this foreclosure action. The "National Mortgage Settlement" was a consent decree entered into between the United States and five mortgage servicers, including appellee. *See United States v. Bank of America, N.A.*, D.D.C. No. 12-CV-0361 (Apr. 5, 2012). Appellant's attempt to invoke the consent judgment must fail because she is not a party to the consent judgment and therefore lacks standing to enforce it or to use it as a defense in a foreclosure action. *Starkey v. JP Morgan Chase Bank, N.A.*, S.D.Ohio No. CR No. 1:13-CV-694, 2013 WL 6669268 (Dec. 18, 2013), *aff'd Starkey v. JPMorgan Chase Bank, NA*, 573 Fed.Appx. 444 (6th Cir.2014). *See also Walsh v. JPMorgan Chase Bank, NA*, D.D.C. No. CV 14-0774, 2014 WL 6808629 (Dec. 4, 2014), citing *McCain v. Bank of America*, 13 F.Supp.3d 45, 54 (D.D.C.2014) (The consent judgment "simply does not create a private right of action allowing third parties, such as the plaintiff, to bring claims for alleged violations.").

{¶ 23} For these reasons, appellant failed to demonstrate the existence of a meritorious defense if relief from judgment was granted.

2. Grounds for Relief

{¶ 24} The second element of a Civ.R. 60(B) motion requires a showing that the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5). Appellant alleges fraud by appellee and claims relief under Civ.R. 60(B)(3) and (5).

{¶ 25} Civ.R. 60(B)(3) authorizes a court to vacate its prior judgment for "fraud * * * misrepresentation or other misconduct of an adverse party." As recently explained by the Ohio Supreme Court, "the fraud, misrepresentation, or other misconduct contemplated by Civ.R. 60(B)(3) refers to deceit or other unconscionable conduct committed by a party to obtain a judgment and does not refer to conduct that would have been a defense to or claim in the case itself." *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 13, *reconsideration denied*, 140 Ohio St.3d 1523, 2014-Ohio-5251, 20 N.E.3d 370. *See also PNC Bank, Natl. Assn. v. Botts*, 10th Dist. Franklin No. 12-AP-256, 2012-Ohio-5383, ¶ 15 (Civ.R. 60(B)(3) contemplates misconduct by an adverse party "in obtaining the judgment by preventing the losing party from fully and fairly presenting his defense, not fraud or misconduct which in itself would have amounted to a claim or defense in the case.").

{¶ 26} In support of her fraud claim, appellant states that appellee misrepresented itself as the "proper party to foreclose" which "was made falsely, as [appellee] knew it was not the owner of [the] mortgage." Second, appellant alleges that appellant "filed a clearly invalid Assignment of Mortgage in order to establish it was the proper party to foreclose."

{¶ 27} At best, appellant has alleged defenses related to the underlying action. That may explain why appellant identified the same facts in support of her meritorious defenses as those in support of her grounds for relief. In any event, appellant has not alleged, much less presented evidence, that appellee committed fraud in obtaining the

judgment and/or that such fraud prevented appellant from presenting her defense(s) in a responsive pleading and/or opposition to appellee's motion for summary judgment. Therefore, appellant's claims do not provide a claim for relief under Civ.R. 60(B)(3).

{¶ 28} Appellant also complains that appellee committed fraud by representing to her that "her better option was a loan modification, and that it would not foreclose." Appellant's claim—that appellee represented that it would not foreclose—is belied by the fact that at the time of the alleged representation, the complaint in foreclosure was pending before the trial court. Moreover, there is no evidence that any settlement negotiations between the parties prevented appellant from having a fair opportunity to present her defense(s). *PNC Mortgage v. Oyortey*, 5th Dist. Delaware No. 11CAE100093, 2012-Ohio-3237 (Mortgagors' belief that they did not have to address the pending foreclosure action because they were in negotiations with mortgagee does not constitute fraud under Civ.R. 60(B)(3).) Appellant may not rely on appellee's purported statement that it would not foreclose as a ground for relief.

{¶ 29} In sum, in the absence of any evidence that the foreclosure judgment was procured by fraud, appellant has no grounds for relief under Civ.R. 60(B)(3).

{¶ 30} Appellant also claims protection under Civ.R. 60(B)(5), the so-called "catch-all" provision which provides that a court may relieve a party from a final judgment for "any other reason justifying relief from the judgment." Appellant alleges that appellee committed "fraud on the court" in support of her Civ.R. 60(B)(5) argument. As this court has explained,

> 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." *Bank of Am. v. McLaughlin*, 6th Dist. Erie No. E-11-057, 2012-Ohio-2341, ¶ 14, quoting *Coulson v. Coulson*, 5 Ohio St.3d 12, 15, 448 N.E.2d 809 (1983).

{¶ 31} Appellant does not allege any fraudulent acts by an officer of the court. Absent such evidence, appellant may not rely on Civ.R. 60(B)(5) as a basis to vacate the judgment.

3. Timeliness

{¶ 32} The third and final element of a Civ.R. 60(B) motion requires that it "shall be made within a reasonable time, and for [a motion brought pursuant to Civ.R. 60(B)(3)] not more than one year after the judgment * * *."

{¶ 33} Whether a Civ.R. 60(B) motion is filed within a reasonable time depends on the facts and circumstances of the particular case. *Scotland Yard Condominium Assn. v. Spencer*, 10th Dist. Franklin No. 05AP-1046, 2007-Ohio-1239, ¶ 33. The movant bears the burden of submitting factual material which demonstrates the timeliness of the motion. *Rotroff v. Rotroff*, 6th Dist. Fulton No. F-06-019, 2007-Ohio-2391, ¶ 13, citing

Youssefi v. Youssefi, 81 Ohio App.3d 49, 53, 610 N.E.2d 455 (9th Dist.1991). A determination of what constitutes a "reasonable time" is a matter of discretion for the trial court. *Weatherspoon v. Kuhlman*, 6th Dist. Ottawa No. OT-08-007, 2009-Ohio-2919, ¶ 10.

{¶ 34} Here, appellant suggests that the motion is timely because judgment for appellee was entered in February of 2011 and her motion for relief was filed in July of 2011. Appellant articulates no facts to explain the six month delay in filing her motion. We are not persuaded that the six month delay was reasonable under the circumstances of this case. Absent any evidence put forth explaining the delay, we cannot say that appellant satisfied her burden that a six month delay was reasonable in this case. *See Herlihy Moving and Storage, Inc. v. Nickison*, 10th Dist. Franklin No. 09AP-831, 2010-Ohio-6525, ¶ 15, ("[A]n unexplained or unjustified delay in making the motion [four months] after discovering a ground for relief may put the motion beyond the pale of a reasonable time."). *See also Teneric L.L.C. v. Zilko*, 8th Dist. Cuyahoga No. 91410, 2009-Ohio-1363, ¶ 18 (Trial court abused its discretion in granting relief, in part, to party who filed for relief four months after judgment where certificate of service demonstrated that party had received notice of adverse judgment.).

{¶ 35} Appellant failed to demonstrate any of the required *GTE* elements for a Civ.R. 60(B) motion, much less all three. Upon review of the matter, we conclude that the trial court did not abuse its discretion in denying appellant's motion for relief from judgment. Appellant's assignment of error is found not well-taken.

{¶ 36} Having found appellant's assignment of error not well-taken, we hereby affirm the judgment of the Erie County Court of Common Pleas. Costs are assessed to appellant in accordance with App.R. 24.

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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

James D. Jensen, J.
CONCUR. _____
JUDGE