

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

The Bank of New York Mellon FKA	:	
The Bank of New York, as Trustee for	:	
the Certificatedholders CWABS, Ind.,	:	
Assetbacked Certificates, Series 2005-4,	:	
	:	
Plaintiff-Appellee,	:	No. 11AP-157
	:	(C.P.C. No. 10CVE-02-2932)
v.	:	
	:	(REGULAR CALENDAR)
George M. Stefanidis,	:	
	:	
Defendant-Appellant.	:	
	:	

D E C I S I O N

Rendered on December 15, 2011

Manley Deas Kochalski, LLC, Andrew C. Clark and Angela D. Kirk, for appellee.

Duncan Simonette, Inc., and Brian K. Duncan, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, George M. Stefanidis, appeals from the January 19, 2011 order of the Franklin County Court of Common Pleas denying his motion to vacate judgment. Because the trial court did not abuse its discretion in denying appellant's motion to vacate, we affirm.

{¶2} On February 24, 2010, plaintiff-appellee, The Bank of New York Mellon, filed a complaint in foreclosure against appellant. Initially, the parties attempted to resolve the action by mediation. However, mediation was unsuccessful, and appellant filed an answer. Ultimately, appellee filed a motion for summary judgment. Appellant did not oppose appellee's motion for summary judgment. The trial court entered summary judgment in favor of appellee on September 27, 2010.

{¶3} On December 30, 2010, appellant filed a combined motion to vacate the trial court's judgment pursuant to Civ.R. 60(B)(1) and (5), to stay the sheriff's sale, and for leave to oppose the motion for summary judgment and/or for leave to file an amended answer. Without holding a hearing, the trial court denied appellant's motion to vacate and motion for leave to oppose appellee's motion for summary judgment and motion to amend his answer. Because appellee voluntarily withdrew its order for sale, the trial court deemed appellant's motion to stay the execution of the sale moot.

{¶4} Appellant now appeals, assigning the following errors:

1. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO VACATE THE UNDERLYING JUDGMENT AS DEFENDANT/APPELLANT MADE THE REQUISITE SHOWING UNDER CIV.R. 60(B) IN HIS MOTION TO VACATE, SPECIFICALLY CIV.R. 60(B)(1) AND (5).
2. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO TAKE HEED OF THE UNDERLYING POLICY OF OHIO COURTS AND "LONGSTANDING PRACTICE" WITH RESPECT TO ADJUDICATING MATTER ON THEIR MERITS AS OPPOSED TO PROCEDURAL DEFECTS.
3. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ADDRESS, OR EVEN CONSIDER, ALLEGATIONS OF OPERATIVE FACTS WHICH DEMONSTRATE THAT DEFENDANTS WERE ENTITLED TO RELIEF UNDER CIV.R. 60(B).

4. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING DEFENDANT/APPELLANT'S REQUEST FOR AN ORAL HEARING ON HIS MOTION TO VACATE, DESPITE THE FACT THAT THERE WERE ALLEGATIONS OF OPERATIVE FACTS WHICH WOULD WARRANT RELIEF UNDER CIV. R. 60(B).

{¶5} Because appellant's four assignments of error are interrelated, we will address them together.

{¶6} Civ.R. 60(B) provides, in relevant part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.
* * *

{¶7} It is well-settled that in order to prevail upon a motion, pursuant to Civ.R. 60(B), a movant must demonstrate all of the following: "(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., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of

the syllabus. The moving parties failure to satisfy any of the three requirements will result in the motion being overruled. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20.

{¶8} Further, "[t]he decision to grant or deny a Civ.R. 60(B) motion is left to the sound discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion." *Richardson v. Richardson*, 10th Dist. No. 07AP-287, 2007-Ohio-6642, ¶7. "An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable." *Classic Bar & Billiards, Inc. v. Samaan*, 10th Dist. No. 08AP-210, 2008-Ohio-5759, ¶10, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶9} Additionally, "if the Civ.R. 60(B) motion contains allegations of operative facts that would warrant relief from judgment, the trial court should grant a hearing to take evidence to verify those facts before it rules on the motion." *Mattingly v. Deveaux*, 10th Dist. No. 03AP-793, 2004-Ohio-2506, ¶7; *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 19. "If the material submitted by the movant in support of a motion for relief from judgment under Civil Rule 60(B) contains no operative facts or meager and limited facts and conclusions of law, it will not be an abuse of discretion for the trial court to overrule the motion and refuse to grant a hearing." *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, paragraph four of the syllabus.

{¶10} Here, appellant contends that the trial court abused it discretion in denying his Civ.R. 60(B) motion because he alleged facts demonstrating (1) excusable neglect; (2) a meritorious defense; and (3) his motion was filed within a reasonable time. Because

it is dispositive of his appeal, we first address whether appellant alleged any operative facts demonstrating a meritorious defense.

{¶11} The only allegations appellant makes with respect to a meritorious defense to the claims brought by appellee are as follows:

* * * Defendant was not afforded an opportunity to raise his valid claims and defenses, including, but not limited to, disputes regarding, among other things, the validity of the mortgage as it may not have been properly executed, the appraised value of the property, the amount allegedly due and owing under the mortgage, and whether plaintiff is in fact a holder in due course pursuant to Ohio law.

(Appellant's December 30, 2010 motion to vacate, supporting memorandum and affidavit in support, at 3.)

{¶12} Assuming without deciding that appellant alleged operative facts demonstrating excusable neglect and that he filed his motion within a reasonable time, appellant's allegations are insufficient to demonstrate a meritorious defense. In essence, appellant's motion and supporting affidavit contain no operative facts, which, if proven, would demonstrate a meritorious defense. At best, appellant alleges only the possibility of various defenses, without any factual assertions whatsoever. There are no specific factual allegations that would support an assertion that the mortgage was not properly executed or that the appellee was not a holder in due course. Nor are there any specific factual allegations concerning the appraised value of the property or the amount due and owing on the note. " 'If a party who seeks relief from judgment does not present operative facts or presents facts of limited or meager quality, then a trial court is justified in denying relief because that party has failed to meet its burden of asserting facts entitling the party to relief.' " *Cook Family Invests. v. Billings*, 9th Dist. No. 05CA008689, 2006-Ohio-764,

¶13, quoting *Hagaman v. Hagaman* (Mar. 29, 1995), 9th Dist. No. 16861, ¶3-4. Furthermore, a party seeking relief from judgment cannot present "mere general allegations." *Society Natl. Bank v. Val Halla Athletic Club & Recreation Ctr., Inc.* (1989), 63 Ohio App.3d 413, 418.

{¶13} Given appellant's failure to allege any operative facts, which, if proven, would demonstrate a meritorious defense, the trial court did not abuse its discretion in denying appellant's motion to vacate without a hearing. Therefore, we overrule appellant's four assignments of error. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and SADLER, J., concur.
