[Cite as *Fifth Third Mtge. Co. v. Sardella,* 2011-Ohio-6458.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Fifth Third Mortgage Company,	:	
Plaintiff-Appellee,	:	
		No. 11AP-276
v.	:	(C.P.C. No. 10CVE03-4599)
Linda Sardella,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 15, 2011

Lerner, Sampson & Rothfuss, Stacy L. Hart and *Ellen L. Fornash*, for appellee.

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

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Defendant-appellant, Linda Sardella ("appellant"), appeals from the March 16, 2011 judgment of the Franklin County Court of Common Pleas, wherein the trial court adopted the magistrate's decision denying appellant's motion to vacate and/or set aside judgment. For the following reasons, we affirm.

{¶2} The present appeal stems from an action filed on March 24, 2010 by Fifth Third Mortgage Company[1] ("appellee"), seeking to foreclose upon a mortgage secured by

[1] In its complaint filed March 24, 2010, appellee is listed as "Fifth Third Mortgaeg Company." However, appellee corrected this error on April 12, 2010, through an order substituting "Fifth Third Mortgage Company" as party plaintiff.

real property located at 3685 Abney Road, Columbus, Ohio 43207. (See Complaint, Exhibit B.) In its foreclosure complaint, appellee alleged that appellant defaulted under the terms of the note secured by the mortgage, and the mortgage itself, owing $84,998.86, together with interest at a rate of 4.75 percent per year from November 1, 2009, plus court costs, advances, and other charges as allowed by law. (See Complaint.)

{¶3} The record reflects that, on April 1, 2010, appellant's brother, Phil Harris, accepted service of the summons and complaint at appellant's residence located at 3685 Abney Road, Columbus, Ohio 43207. Further, the magistrate's decision indicates that, at the evidentiary hearing regarding appellant's Civ.R. 60(B) motion, appellant testified that she received notice from the court and that her brother accepted the summons at her residence and gave it to her.[2] (See Magistrate's Decision, 3-4.) Civ.R. 4.1(C), states, in relevant part, that "[r]esidence service shall be effected by leaving a copy of the process and the complaint, or other documents to be served, at the usual place of residence of the person to be served with some person of suitable age and discretion then residing therein." Here, the personal service return reflects that, on April 1, 2010, Phil Harris, resident, was served with the foreclosure complaint.

{¶4} Additionally, the magistrate's decision also indicates that, on March 31, 2010, appellee perfected service of the summons and complaint upon appellant via certified mail. We note that, although the record does not contain a scanned copy of the return of certified mail service upon appellant, the certified copy of the docket does

[2] Although the record indicates that the evidentiary hearing before the magistrate, which included appellant's testimony regarding service, was recorded, appellant failed to file a transcript of that hearing, pursuant to App.R. 9(B), as part of the record with this court. Therefore, because we cannot independently review the transcript, we must accept the magistrate's findings regarding service as true. See *Andy Estates Dev. Corp. v. Payne* (Dec. 10, 1991), 10th Dist. No. 91AP-396.

indicate successful service.[3] The record is void of any evidence that appellant filed an answer to appellee's complaint.

{¶5} On May 11, 2010, appellee filed a motion for default judgment. On May 12, 2010, the trial court granted appellee's motion, and on May 14, 2010, the trial court journalized its judgment and decree in foreclosure. Further, on May 26, 2010, the trial court issued an order of sale for 3685 Abney Road, Columbus, Ohio 43207. On July 13, 2010, appellee filed a notice of sheriff's sale informing all parties that the sale would take place on August 27, 2010 at 9:00 a.m. On August 11, 2010, appellee filed its proof of publication in The Daily Reporter regarding the details of the pending sale. On August 31, 2010, the trial court ordered the Franklin County Sheriff to appraise, advertise, and sell 3685 Abney Road, Columbus, Ohio 43207.

{¶6} On August 27, 2010, appellee purchased 3685 Abney Road, Columbus, Ohio 43207 at sheriff's sale for $58,000, and, in a journal entry filed September 15, 2010, the trial court approved and confirmed the sale.

{¶7} On November 5, 2010, appellant filed a motion pursuant to Civ.R. 60(B)(1) and (5), seeking to vacate the trial court's May 12, 2010 entry granting default judgment and the September 15, 2010 entry confirming the sale of the real property. In the affidavit attached to her motion, appellant alleged that she: (1) did not receive service of and/or understand the complaint; (2) did not receive service of and/or understand service of the notice of sheriff's sale; (3) did not receive service of and/or understand service of the motion for default judgment; (4) was in continuing negotiations with the lender;

[3] App.R. 9(A) states, in relevant part, that "[t]he original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases."

(5) believed the foreclosure proceedings would be stayed based upon a communication from Freddie Mac regarding a foreclosure prevention seminar on August 28, 2010, one day after the scheduled sheriff's sale; and (6) disputed the appraised value of the property, the amount allegedly due and owing under the mortgage, and whether appellee is a holder in due course. (See Affidavit of Linda Sardella attached to Motion to Vacate.) We note here that, in her brief, appellant raises the issue of not receiving service of and/or not understanding the complaint. However, as addressed in further detail below, appellant fails to make an argument to this court regarding the same.

{¶8} On November 15, 2010, appellee filed a reply in opposition to appellant's Civ.R. 60(B) motion, contending that appellant (1) failed to raise a meritorious defense to the foreclosure; (2) cannot establish excusable neglect for failing to participate in the action due to receiving a letter from a third party after the action has concluded; and (3) does not meet the reasonable time requirement set forth in Civ.R. 60(B). (See Reply in Opposition, 1.) Further, on November 19, 2010, appellant filed a memorandum contra appellee's reply in opposition.

{¶9} On December 1, 2010, the trial court journalized an entry referring this matter to a magistrate for an oral hearing because appellant claimed that she did not receive service of the complaint, the motion for default judgment, or notice of the sheriff's sale. On February 22, 2011, a magistrate of the trial court held an evidentiary hearing and, subsequently, on February 24, 2011, issued a decision denying appellant's motion. In his decision, the magistrate found that appellant did not meet the criteria set forth in Civ.R. 60(B)(1) and/or (5), for relief from judgment, because appellant: (1) was properly served with the complaint, motion for default judgment, and notice of sheriff's sale;

(2) ignored the pending lawsuit for nearly six months; and (3) failed to set forth a meritorious defense to the foreclosure action. (Magistrate's Decision, 3-7.) Further, the magistrate's decision stated that "[a]ny attorney or party pro se whose e-mail address is noted above has received this document electronically. The original will be filed within 24 hours of the time noted on the e-mail transmittal message." (Magistrate's Decision, 9.) The e-mail address of appellant's counsel, Brian K. Duncan, bduncan@duncansimonette.com, was noted, along with the e-mail addresses of appellee's counsel and the Franklin County Treasurer. (Magistrate's Decision, 9.) Appellant did not file objections to the magistrate's decision.

{¶10} On March 16, 2011, the trial court adopted the magistrate's decision, stating that, pursuant to Civ.R. 53(E)(4)(a), " '[t]he court may adopt the magistrate's decision if no written objections are filed unless it determines that there is an error of law or other defect on the face of the magistrate's decision.' " The trial court noted that no written objections had been filed by March 10, 2011, and that "there are no errors of law or other defects in the Magistrate's Decision." (Decision and Entry Adopting the Magistrate's Decision, 2.) Therefore, the trial court denied appellant's motion to vacate and/or set aside the May 12 and September 15, 2010 judgments. (Decision and Entry Adopting the Magistrate's Decision, 2.) Again, the decision and entry adopting the magistrate's decision states that "[a]ny attorney or party pro se whose e-mail address is noted above has received this document electronically. The original will be filed within 24 hours of the time noted on the e-mail transmittal message." Appellant's counsel Brian K. Duncan's e-mail address was listed, bduncan@duncansimonette.com, along with the e-mail addresses of appellee's counsel and the Franklin County Treasurer. (Decision and Entry Adopting the

Magistrate's Decision, 3.) We note that both the magistrate's decision and the decision and entry adopting the magistrate's decision list the same e-mail address for appellant's counsel.

{¶11} On March 25, 2011, appellant filed a timely notice of appeal setting forth the following assignments of error for our consideration:

> 1. THE TRIAL COURT ERRED WHEN IT FAILED TO PROPERLY SERVE DEFENDANT AND/OR THE UNDERSIGNED COUNSEL WITH A COPY OF THE MAGISTRATE'S FEBRUARY 24, 2011 DECISION; THEREBY DEFENDANT WAS NOT AFFORDED THE OPPORTUNITY TO OBJECT TO SAID DECISION PRIOR TO THE COURTS [SIC] DECISION/ENTRY DATE MARCH 16, 2011.
>
> 2. ASSUMING ARGUENDO THAT THIS COURT FAILS TO UPHOLD APPELLANT'S FIRST [ASSIGNMENT] OF ERROR, THE TRIAL COURT ERRED WHEN IT FAILED TO VACATE ITS MAY 12, 2010 JUDGMENT ENTRY BASED ON CIV. R. 60(B)(1) AND (5).
>
> 3. ASSUMING ARGUENDO THAT THIS COURT FAILS TO UPHOLD APPELLANT'S FIRST ASSIGNMENT OF ERROR, THE TRIAL COURT ERRED WHEN IT FAILED TO VACATE THE SEPTEMBER 15, 2010 CONFIRMATION OF SALE.

{¶12} For ease of discussion, we address appellant's assignments of error out of order beginning, in part, with appellant's second assignment of error. At this time, we will only address that part of appellant's second assignment of error regarding appellant's allegation with respect to not receiving service of the underlying complaint. (See appellant's brief, 6.) We address this first because determination of whether appellant was served with the complaint may be dispositive.

{¶13} In her brief, appellant alleges that she "did not receive and/or understand the underlying [c]omplaint," and, as evidence, attaches an affidavit from her Civ.R. 60(B)

motion stating the exact same thing. (See appellant's brief, 6.) Although appellant makes this allegation, she fails to further support it with any specific legal arguments or cite to any relevant authority, or statute. (See generally appellant's brief.) App.R. 16(A)(7) states, in relevant part, that "[t]he appellant shall include in its brief, under the headings and in the order indicated, all of the following: * * * [a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." Therefore, with respect to this issue, appellant has not met her burden of affirmatively demonstrating error on appeal. See App.R. 16(A)(7). Notwithstanding the foregoing, we shall review this issue as if on the merits.

{¶14} Here, appellant states that she "did not r*eceive and/or understand the underlying complaint*," but does not provide any further discussion to clarify these conflicting allegations. (Emphasis added.) Obviously, the legal implications of these two allegations drastically differ with regard to the disposition of this matter. As stated above, the magistrate found that appellant testified that she received notice from the court and that her brother (Phil Harris), accepted the summons at appellant's residence and gave it to her. (See Magistrate's Decision, 3-4.) Further, the personal service return reflects that, on April 1, 2010, Phil Harris, resident, was served with the foreclosure complaint. In addition, the magistrate found that, on March 31, 2010, appellee perfected service of the summons and complaint upon appellant via certified mail. Based upon the foregoing, we agree with the magistrate's conclusion that appellant was properly served with the summons and underlying complaint.

{¶15} We now address appellant's first assignment of error regarding service of the February 24, 2011 magistrate's decision. In her first assignment of error, appellant argues that, pursuant to Civ.R. 53(D)(3)(a)(iii), she was never served with the February 24, 2011 magistrate's decision, thereby denying her the opportunity to object prior to the trial court's March 16, 2011 decision and entry adopting the magistrate's decision. (Appellant's brief, 2.) In response, appellee contends that appellant's counsel was properly served with notice of the magistrate's decision at the same e-mail address listed on appellant's motion to vacate and notice of appeal: bduncan@duncansimonette.com. (Appellee's brief, 5.) Further, appellee contends that, pursuant to Civ.R. 53(D)(5), appellant could have moved for an extension of time to file objections to the magistrate's decision after receiving a copy of the trial court's decision and entry. (Appellee's brief, 6.)

{¶16} Civ.R. 53(D)(3)(a)(iii) states that:

> A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys no later than three days after the decision is filed. A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).

{¶17} In addition, Civ.R. 53(D)(3)(b)(iv) states that:

> Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R.

> 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).

{¶18} Further, " '[a] trial court's failure to comply with Civ.R. 53 constitutes grounds for reversal only if the appellant shows the alleged error has merit and the error worked to the prejudice of the appellant.' " *Skydive Columbus Ohio, LLC v. Litter*, 10th Dist. No. 09AP-563, 2010-Ohio-3325, ¶6, quoting *In re Estate of Hughes* (1994), 94 Ohio App.3d 551, 554, citing *Erb v. Erb* (1989), 65 Ohio App.3d 507, 510. In order to determine whether, pursuant to Civ.R. 53, the alleged error worked to the prejudice of the appellant, courts often consider whether: (1) the violation prevented the appellant the opportunity of filing objections to the magistrate's decision; and (2) the trial court was able to conduct an independent analysis of the magistrate's decision. Id., quoting *Ulrich v. Mercedes-Benz USA, LLC*, 9th Dist. No. 23550, 2007-Ohio-5034, ¶13, citing *Ford v .Gooden*, 9th Dist. No. 22764, 2006-Ohio-1907, ¶13.

{¶19} Appellee cites to *Watley v. Dept. of Rehab. and Corr*., 10th Dist. No. 06AP-1128, 2007-Ohio-1841, in support of its argument that, pursuant to Civ.R. 53(D)(5), appellant should have moved the trial court to set aside the magistrate's decision or to extend the time for filing objections to the magistrate's decision prior to filing the instant appeal. In *Watley* at ¶10, this court held that:

> In the unusual circumstance that service of a magistrate's decision is not made, or is served in an untimely manner, Civ.R. 53(D)(5) provides that either party may, "for good cause shown," move the trial court to set aside the magistrate's decision or to extend the time for filing objections to the report.

" 'Good cause' includes, but is not limited to, a failure by the clerk to timely serve the party seeking the extension with the magistrate's order or decision." Civ.R. 53(D)(5).

{¶20} In *Watley* at ¶9, we note that the magistrate's decision and subsequent judgment entry indicate that the appellant was served with carbon copies of the magistrate's decision and, further, the court of claims docket lists entries that service was made. Nevertheless, the appellant in *Watley* argued that he did not receive the magistrate's decision. Id. In addressing the appellant's argument, this court relied upon the July 1, 2006 amendment to Civ.R. 53(D)(5), stating "[i]nstead of filing objections or moving the trial court for an extension of time, [the appellant] chose to file a notice of appeal. It is axiomatic, therefore, that he cannot assign as error specific objections to the magistrate's decision before this court." Id. at ¶13. Further, we stated, "because Civ.R. 53(D)(5) already provides him with an adequate remedy, this court cannot craft an alternative remedy than the one provided." Id. at ¶14.

{¶21} In the present matter, unlike *Watley*, the record does not reflect that the clerk of courts served the parties with copies of the magistrate's February 24, 2011 decision. However, the magistrate's decision indicates that copies were sent to appellant's counsel by e-mail and also lists a physical address for appellant's counsel, along with physical addresses for appellee's counsel and the assistant prosecuting attorney. (Magistrate's Decision, 9-10.) Appellant's counsel claims that he never received a copy of the magistrate's decision in order to file timely objections. (See Motion to Stay Foreclosure Proceedings, Exhibit A, Affidavit of Brian K. Duncan.) Therefore, we must determine whether the alleged service violation prevented appellant from filing objections to the magistrate's decision and whether the trial court was able to conduct an independent analysis of the magistrate's decision.

{¶22} First, we find that the alleged service issue did not prevent appellant from filing objections to the magistrate's decision. The record indicates that appellant filed her notice of appeal on March 25, 2011, only nine days after the trial court journalized its March 16, 2011 decision and entry adopting the magistrate's decision. In *Watley* at ¶12, we took judicial notice that the appellant received the trial court's judgment entry because "he filed his notice of appeal a mere seven days later." Additionally, the record reflects that appellant's counsel received a copy of the trial court's March 16, 2011 decision and entry at his law office. (See Motion to Stay Foreclosure Proceedings, Exhibit A, Affidavit of Brian K. Duncan.) At that time, appellant could have moved for an extension of time, pursuant to Civ.R. 53(D)(5), to file objections to the magistrate's decision.

{¶23} Second, we find that the alleged issues regarding service did not prevent the trial court from conducting an independent analysis of the magistrate's decision. In its decision and entry, the trial court specifically stated that "[u]pon a careful review of the record, the Court finds that there are no errors of law or other defects in the Magistrate's Decision." (Decision and Entry Adopting the Magistrate's Decision, 2.) Further, this court cannot cite to any evidence suggesting that the trial court did not carefully review the record as stated in its decision and entry. Therefore, based upon the trial court's contention that it carefully reviewed the record, we believe that the trial court conducted an independent analysis of the magistrate's decision.

{¶24} We note that in *Roberts v. Skaggs*, 1st Dist. No. C-070298, 2008-Ohio-1954, the First District Court of Appeals also interprets Civ.R. 53(D)(5) and, in doing so, discusses our decision in *Watley*. In *Roberts* at ¶1, 17, the clerk served copies of the April 4, 2007 magistrate's decision upon the appellant, the appellee, and the appellee's

attorney, thereby "triggering the * * * 14-day limit for filing objections." However, pursuant to Civ.R. 5(B), the clerk failed to serve a copy of the decision upon appellant's attorney. Id. at ¶1, 15. The appellant did not notify her attorney regarding the magistrate's decision, and the time ran for filing timely objections. Id. at ¶17. Upon learning of the magistrate's decision, the appellant's attorney filed a notice of appeal, followed by untimely objections. The filing of the appeal "divested the trial court of jurisdiction to revisit its decision and to consider [the appellant's] objections." Id.

{¶25} In its discussion regarding Civ.R. 53(D)(5), the First District Court of Appeals cited *Watley*, stating:

> The Tenth Appellate District, in *Watley v. Dept. of Rehab. & Corr.*, suggested the new provision provides an adequate remedy to correct a defect in the clerk's service of the magistrate's decision and that a party's failure to move for an extension of time to file objections after learning of the magistrate's decision always precludes a party from alleging defective service on appeal.

Id. at ¶20. However, the First District stated that it is "reluctant to read Civ.R. 53(D)(5) so broadly," because, in *Roberts*, the appellant's attorney did not learn of the magistrate's decision until after the "important time limits had expired," thus impairing the appellant's rights to challenge the magistrate's decision under Civ.R. 53 and denying her due process. Id. at ¶21, 22. The First District further reasoned that, in some instances involving service issues, such as those where a magistrate's decision may be "untimely" served pursuant to Civ.R. 53(D)(3)(a)(iii) because it was served later than three days after the decision is filed, the appellant still has the time to file timely objections. Id. at ¶21. The facts in the present matter are similar to those in *Roberts*, in that the time limit for fling

objections to the magistrate's decision had expired prior to appellant's attorney learning of the magistrate's decision. But such are the facts in *Watley* as well.

{¶26} Also, like in *Watley*, instead of moving the trial court, pursuant to Civ.R. 53(D)(5), for an extension of time to file a motion to set aside the magistrate's decision or to file objections to the magistrate's decision, appellant filed the instant appeal. Although we find the First District's reasoning regarding the differing scenarios of "untimeliness" under Civ.R. 53(D)(5) compelling, we are bound by stare decisis and, thus, must follow this court's precedent. Therefore, as set forth in *Watley*, because appellant failed to act in accordance with Civ.R. 53(D)(5), appellant has waived any alleged errors, except those constituting plain error. See *Skydive* at ¶12; see also Civ.R. 53(D)(3)(b)(iv).

{¶27} Appellant's first assignment of error is overruled.

{¶28} Based upon the foregoing, pursuant to Civ.R. 53(D)(3)(b)(iv), we now analyze appellant's second and third assignments of error under the plain error doctrine.

{¶29} In *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 1997-Ohio-401, the Supreme Court of Ohio addressed the application of the plain error doctrine in civil matters, stating, "[i]n applying the doctrine of plain error in a civil case, reviewing courts must proceed with the utmost caution, limiting the doctrine strictly to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice." Therefore, "appellate courts must proceed * * * only '* * * where the error seriously affects the basic fairness, integrity, or public reputation of the judicial process itself.' " *Skydive* at ¶13, citing *Unifund CCR Partners v. Hall*, 10th Dist. No. 09AP-37, 2009-Ohio-4215, ¶22, quoting *Goldfuss* at 121. "Indeed, the plain error doctrine implicates errors in the judicial process where the error is clearly apparent on the face of

the record and is prejudicial to the appellant." *Skydive*, citing *Reichert v. Ingersoll* (1985), 18 Ohio St.3d 220, 223.

{¶30} In her second and third assignments of error, appellant raises the following arguments: (1) the trial court erred in failing to vacate its May 12, 2010 judgment based upon Civ.R. 60(B)(1) and/or (5); and (2) the trial court erred in failing to vacate its September 15, 2010 order confirming the sale of appellant's real property pursuant to R.C. 2329.26(A)(1). However, in her brief, appellant has not even alleged plain error or the existence of a defect that is clearly apparent on the face of the February 24, 2011 magistrate's decision or March 16, 2011 trial court's decision. See *In re Estate of Sheares*, 10th Dist. No. 07AP-02, ¶11. Further, upon review of the February 24, 2011 magistrate's decision and the March 16, 2011 trial court's decision, this court cannot point to a clearly apparent defect on the face of either decision. As previously stated, even if appellant did not receive service of the magistrate's decision in time to file objections, Civ.R. 53 (D)(5) provided appellant with a procedural mechanism in which she could have addressed these issues.

{¶31} Based upon the foregoing, this matter does not represent an extremely rare case where exceptional circumstances require the application of the plain error doctrine in order to prevent a manifest miscarriage of justice. Therefore, we do not find that the trial court committed plain error in its February 24 and March 16, 2011 decisions.

{¶32} Notwithstanding the fact that appellant failed to allege plain error, we briefly address the remaining arguments set forth in appellant's second assignment of error, as well as the arguments set forth in appellant's third assignment of error.

{¶33} In her second assignment of error, appellant argues that the magistrate should have vacated the May 12, 2010 judgment based upon Civ.R. 60(B)(1), mistake, inadvertence, surprise or excusable neglect, and/or (B)(5), any other reason justifying relief from judgment. In support of this contention, appellant raises the same arguments as set forth in her Civ.R. 60(B) motion before the trial court: (1) she did not receive notice of the motion for default judgment; (2) she did not receive notice of the sheriff's sale; and (3) she received a correspondence from Freddie Mac regarding a foreclosure prevention seminar and "believed that this Seminar would prevent foreclosure or at least stay the underlying proceedings until the end of the program." (Appellant's brief, 6; see also Motion to Vacate, 2.) In addition, in her brief and Civ.R. 60(B) motion, appellant listed several alleged meritorious defenses, without providing any supporting operative facts: (1) whether appellee is a holder in due course, (2) Ohio Consumer Sales Practices Act and Real Estate Settlement Procedures Act violations, (3) disputing the appraisal, (4) disputing the amount owed on the underlying loan, and (5) disputing how the funds were applied. (Appellant's brief, 7, Motion to Vacate, 2.)

{¶34} In her third assignment of error, appellant argues that the September 15, 2010 confirmation of sale should be vacated because: (1) the sheriff's sale was not held in accordance with R.C. 2329.26(A)(1), and (2) appellant did not have notice of the sheriff's sale. (Appellant's brief, 9.)

{¶35} In his decision, the magistrate found that appellant:

> [C]ompletely ignored and disregarded the Court and judicial system for nearly six months. Such neglect is inexcusable. Likewise [appellant] has not shown mistake, inadvertence, or surprise. That is, [appellant] has not shown that she misunderstood the summons that clearly stated an answer

> was due within 28 days from service or that she misunderstood that default judgment would follow upon failure to answer as stated on the face of the Summons. Nor did she claim inadvertence or surprise. Accordingly, this Court finds [appellant] has not met the threshold requirement for relief pursuant to Civ.R. 60(B)(1).

(Magistrate's Decision, 7.) Further, the magistrate found that appellant failed to set forth a meritorious defense because, by her own admission, appellant had missed a mortgage payment and, at the evidentiary hearing, appellant failed to demonstrate: (1) any irregularity with the sheriff's sale, (2) any error in the court's default judgment entry, and (3) any error in the court's confirmation of sale. (Magistrate's Decision, 7.) Finally, the magistrate found that, pursuant to Civ.R. 60(B)(5), "[appellant] has made no showing to this Court why justice demands the Court excuse the simple act of answering a complaint where there is no showing sufficient to excuse such act or any attempt to perform the act." (Magistrate's Decision, 8.)

{¶36} We agree with the magistrate's conclusions regarding appellant's failure to meet the threshold requirements for relief pursuant to Civ.R. 60(B)(1) and/or (5) because appellant failed to set forth operative facts proving excusable neglect, or any other reason justifying relief from judgment, as to the May 12, 2010 decision and entry and the September 15, 2010 confirmation of sale.

{¶37} Appellant's second and third assignments of error are overruled.

{¶38} For the foregoing reasons, all three of appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and TYACK, JJ., concur.

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