

[Cite as *TPI Asset Mgt., L.L.C. v. McGregor*, 2011-Ohio-4052.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

TPI Asset Management, LLC,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-368 (C.P.C. No. 09CVE-11-16340)
Arthur C. McGregor et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on August 16, 2011

Adams, Babner & Gitlitz, LLC, and Bryan B. Johnson, for appellant.

Lerner, Sampson & Rothfuss, and Kimberlee S. Rohr, for appellee, Mortgage Electronic Registration Systems, Inc.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, TPI Asset Management, LLC, appeals from a judgment of the Franklin County Court of Common Pleas granting the Civ.R. 60(B) motion to vacate filed by defendant-appellee, BAC Home Loans Servicing, LP. For the following reasons, we reverse.

{¶2} In August 2009, appellant obtained a judgment lien against defendant-appellee, Arthur C. McGregor. Appellant filed a complaint against McGregor on November 2, 2009, seeking foreclosure of its judgment lien against a parcel of real estate McGregor owned in Franklin County. Appellant named several other lien holders as defendants – Mortgage Electronic Registration Systems, Inc. ("MERS"), America's Wholesale Lender, Manorcare, Inc. ("Manorcare"), Bank of America, Trauma, Inc. ("Trauma"), and the Franklin County Treasurer. According to the preliminary judicial report filed by appellant in conjunction with its complaint, MERS held a first mortgage on the subject property which was recorded on December 22, 2003. Manorcare, Bank of America, and Trauma held judgment liens against McGregor which were filed on May 20, 2004, May 8, 2007, and February 15, 2008, respectively.

{¶3} All defendants named in the complaint were served with process, including MERS, who was served on November 12, 2009. Only McGregor, Manorcare, and the Franklin County Treasurer timely filed answers.

{¶4} On January 20, 2010, appellant filed a Civ.R. 55 motion for default judgment against the non-answering defendants, including MERS. The trial court granted appellant's motion by entry filed January 21, 2010. As a result, the defaulting defendants' liens were discharged and released, and appellant's lien became first in priority subject only to the treasurer's tax lien. No appeal was taken from the default judgment. Thereafter, the trial court ordered that McGregor's property be sold at a sheriff's sale.

{¶5} On March 11, 2010, MERS filed a Civ.R. 60(B) motion to vacate the default judgment against it. On March 17, 2010, the trial court granted MERS' motion to vacate

and set aside the default judgment entered against MERS. The court further found that MERS held a first and valid mortgage on the subject property. Thereafter, MERS filed an answer on March 22, 2010. Subsequently, on March 23, 2010, appellant filed a memorandum in opposition to MERS' motion to vacate. On April 19, 2010, appellant filed a notice of appeal from the trial court's March 17, 2010 order.

{¶6} On May 4, 2010, McGregor filed a Chapter 7 bankruptcy petition, which stayed the appeal as well as the foreclosure and prompted a cancellation of the sheriff's sale. On May 26, 2010, MERS assigned the McGregor mortgage to appellee. On September 3, 2010, the bankruptcy court granted appellee's motion for relief from the bankruptcy stay. Thereafter, on September 23, 2010, the bankruptcy trustee abandoned the property, and on September 28, 2010, the bankruptcy court discharged McGregor. Thereafter, on December 6, 2010, the trial court reactivated the foreclosure action, and on December 15, 2010, granted MERS' motion to substitute appellee in its place as a party defendant.

{¶7} On February 1, 2011, this court granted MERS' motion to reactivate the appeal. Appellant filed its brief on March 4, 2011. MERS filed an appellee brief on March 28, 2011. On April 8, 2011, appellant filed a motion to strike MERS' brief, arguing that, as of December 15, 2010, the date the trial court filed its entry substituting BAC for MERS, MERS was no longer a party to the proceeding and was thus not entitled to file a brief. On April 20, 2011, MERS filed a memorandum in opposition to appellant's motion to strike, along with a motion requesting that this court substitute BAC as appellee in the instant matter and deem the appellee's brief filed by MERS as filed by BAC. On April 21,

2011, this court filed a journal entry granting MERS' motion. Appellant's motion to strike appellee's brief is thus moot.

{¶8} Appellant's appeal from the trial court's March 17, 2010 entry granting appellee's motion to vacate the default judgment sets forth two assignments of error for our review:

I. FIRST ASSIGNMENT OF ERROR – THE TRIAL COURT ERRED BY VIOLATING ITS OWN PROCEDURAL RULES, THEREBY PROHIBITING APPELLANT FROM RESPONDING TO APPELLEE'S MOTION TO VACATE.

II. SECOND ASSIGNMENT OF ERROR – THE TRIAL COURT ERRED BY UNCONSTITUTIONALLY DENYING APPELLANT DUE PROCESS OF LAW.

{¶9} Since both of appellant's assignments of error relate to the propriety of the trial court's granting of appellee's motion to vacate, we shall consider them together. Appellant contends that the trial court erred, and in so doing, violated appellant's right to due process by prematurely ruling on appellee's motion to vacate in contravention of Loc.R. 21.01 of the Franklin County Court of Common Pleas. Loc.R. 21.01 provides, in pertinent part:

All motions shall be accompanied by a brief stating the grounds and citing the authorities relied upon. The opposing counsel or a party shall serve any answer brief on or before the 14th day after the date of service as set forth on the certificate of service attached to the served copy of the motion. The moving party shall serve any reply brief on or before the 7th day after the date of service as set forth on the certificate of service attached to the served copy of the answer brief. On the 28th day after the motion is filed, the motion shall be deemed submitted to the Trial Judge.

{¶10} The rule provides counsel or a party 14 days to file a brief in opposition to a motion. Here, the trial court ruled on appellee's motion to vacate only seven days after it was served on appellant.¹

{¶11} Appellee sought relief from the default judgment pursuant to Civ.R. 60(B)(1) and (5). Civ.R. 60(B) states 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; * * * 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.

{¶12} To prevail on a Civ.R. 60(B) motion, the movant must demonstrate (1) a meritorious defense or claim to present if relief is granted; (2) entitlement to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) a timely motion, i.e., "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 Indus., Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. The *GTE* requirements "are independent and in the conjunctive," and thus "the test is not fulfilled if any one of the requirements is not met." *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 1994-Ohio-107, citing *GTE* at 151.

{¶13} Although appellee's motion argued that it was entitled to relief from judgment, pursuant to both Civ.R. 60(B)(1) and (5), the focal point of the motion was on

¹ Although appellee filed the motion to vacate on March 11, 2010, the certificate of service indicates that appellee served the motion on appellant on March 10, 2010.

Civ.R. 60(B)(1). Indeed, appellee argued that it was entitled to relief because (1) it had a meritorious defense to appellant's complaint, i.e., its mortgage on the subject property was first in priority subject only to the treasurer's tax lien; (2) its failure to timely answer appellant's complaint was due to excusable neglect; and (3) its motion was filed within one year of the entry of the default judgment. In support of its excusable neglect argument, appellee submitted an affidavit from its operations manager, who stated that appellee did not timely respond to appellant's summons and complaint because it failed to comply with its own "internal procedures."

{¶14} In its rather brief order, the trial court apparently concluded that appellee established all three prongs of the *GTE* test. At oral argument, appellant essentially conceded that appellee had presented what could be deemed a meritorious defense to appellant's complaint, in that it held a valid first mortgage on the subject property which was recorded several years prior to appellant's judgment lien, and Ohio adheres to the "first in time, first in right" theory for priority of liens. See R.C. 5301.23. Appellant further effectively conceded that appellee had timely filed the motion to vacate. Thus, the issue resolves to whether appellee established that its failure to timely answer appellant's complaint was due to excusable neglect.

{¶15} To determine whether neglect is excusable under Civ.R. 60(B)(1), a court must consider "all the surrounding facts and circumstances." *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 21. Here, the trial court could not have considered "all the surrounding facts and circumstances" in assessing whether appellee had established excusable neglect because it ruled on the motion without providing appellant an

opportunity to respond to appellee's argument. As noted above, to prevail on its Civ.R. 60(B) motion, appellee was required to establish all three of the requirements set forth in *GTE*.

{¶16} "The essence of procedural due process is the right to receive reasonable notice and a reasonable opportunity to be heard." *Dedie v. FYDA Truck & Equip.* (Dec. 9, 1999), 7th Dist. No. 96 C.A. 222, citing *Whitaker v. Estate of Whitaker* (1995), 105 Ohio App.3d 46, 51. As noted above, Loc.R. 21.01 permitted appellant 14 days to respond to appellee's motion to vacate. Appellee does not dispute that the trial court ruled on the motion before the expiration of the 14-day period provided in Loc.R. 21.01. Unless notice and an opportunity to be heard are given to opposing parties, a trial court has no authority to vacate its own judgment. See *Rice v. Bethel Assoc., Inc.* (1987), 35 Ohio App.3d 133.

{¶17} We do not suggest that the substantive result will, or should, be different following further trial court review. However, we agree with appellant that it should have been provided an opportunity to be heard before the default judgment previously rendered in its favor could properly be vacated, both in accordance with Loc.R. 21.01 and in accordance with general notions of due process. Accordingly, the first and second assignments of error are well-taken.

{¶18} For the foregoing reasons, we sustain appellant's first and second assignments of error. The judgment of the Franklin County Court of Common Pleas is reversed and the cause is remanded to the trial court with instructions to consider appellant's March 23, 2010 memorandum contra, in conformity with both its Loc.R. 21.01

procedure and general notions of due process, before ruling on appellee's motion to vacate.

*Motion to strike is moot;
judgment reversed;
cause remanded with instructions.*

BROWN and DORRIAN, JJ., concur.
