[Cite as *HSBC Bank U.S.A. v. Scacchi,* 2012-Ohio-5441.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE UNDER POOLING AND SERVICING AGREEMENT DATED AS OF NOVEMBER 1, 2006, FREMONT HOME LOAN TRUST 2006-D,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2012-G-3062**
- vs -	:	
MICHELLE SCACCHI, et al.,	:	
Defendants-Appellants,	:	
THE UNITED STATES OF AMERICA, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 10F000938.

Judgment: Affirmed.

Dean Kanellis, Keith D. Weiner & Associates Co., L.P.A., 75 Public Square, 4th Floor, Cleveland, OH 44113 (For Plaintiff-Appellee).

James R. Douglass, James R. Douglass Co., L.P.A., 20521 Chagrin Boulevard, Suite D, Shaker Heights, OH 44122-9736 (For Defendants-Appellants).

Marlon A. Primes, Office of the U.S. Attorney, 801 W. Superior Avenue, Suite 400, United States Courthouse, Cleveland, OH 44113 (For Defendants-Appellees, The United States of America and The United States of America U.S. Department of Justice).

David P. Joyce, Geauga County Prosecutor, and *Bridey Matheney*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Defendant-Appellee, Treasurer of Geauga County).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants, Michelle and Richard F. Scacchi, appeal the judgment of the Geauga County Court of Common Pleas denying their Civ.R. 60(B) motion seeking relief from a default judgment, which resulted in foreclosure of their real property. For the reasons that follow, the judgment is affirmed.

{¶2} On August 6, 2010, appellee, HSBC Bank USA National Association ("HSBC"), filed a complaint for foreclosure, alleging appellants' default on a note in the sum of $235,045.35, plus interest. The record indicates appellants were successfully served, though they did not respond to the complaint. HSBC filed a motion for default judgment, and a hearing on the motion was ultimately set. On July 22, 2011, the court entered default judgment in the amount set forth in the complaint. No appeal was taken from this judgment.

{¶3} The real property, appraised at $145,000.00, was subsequently sold to HSBC at sheriff's sale for $96,667.00. After the sheriff's sale, appellants moved for relief from the default judgment, pursuant to Civ.R. 60(B). In their motion, appellants contended that HSBC lacked standing to file the complaint, and thus, the trial court lacked subject matter jurisdiction. On February 8, 2012, the court confirmed the sale. On the same day, the court denied appellants' Civ.R. 60(B) motion in a separate entry. From this denial, appellants now timely appeal and assert one assignment of error:

{¶4} "The court erred when it denied defendant[']s motion for relief from default judgment as the plaintiff failed to state a claim based upon which relief could be granted [sic]."

{¶5} In their sole assignment of error, appellants contend the trial court erred in denying their Civ.R. 60(B) motion, which sought relief from the default judgment on the grounds the trial court lacked subject matter jurisdiction.

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

{¶7} On motion and upon such terms as are just, the court may relieve a party * * * from a final judgment * * * 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 * * *; (4) the judgment has been satisfied, released or discharged * * *; 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.

{¶8} Thus, Civ.R. 60(B) provides parties with an equitable remedy requiring a court to revisit a final judgment and possibly afford relief from that judgment when in the interest of justice. *In re Edgell*, 11th Dist. No. 2009-L-065, 2010-Ohio-6435, ¶52. It is a curative rule which is to be liberally construed with the focus of reaching a just result. *Hiener v. Moretti*, 11th Dist. No. 2009-A-0001, 2009-Ohio-5060, ¶18. "Moreover, Civ.R. 60(B) has been viewed as a mechanism to create a balance between the need for finality and the need for 'fair and equitable decisions based upon full and accurate information.'" *Id.*, quoting *In re Whitman*, 81 Ohio St.3d 239, 242 (1998). Whether relief should be granted under a Civ.R. 60(B) motion is a determination entrusted to the

sound discretion of the trial court. *In re Whitman*, 81 Ohio St.3d 239, 242 (1998), citing *Griffey v. Rajan*, 33 Ohio St.3d 75, 77 (1987). As such, the standard of review is whether the trial court abused its discretion. *Id*.

{¶9} It is well founded that Civ.R. 60(B) relief is not to be used as a substitute for a direct appeal. *Doe v. Trumbull Cty. Children Services Bd.*, 28 Ohio St.3d 128, paragraph two of the syllabus (1986). *See Am. Express Bank, FSB v. Waller*, 11th Dist. No. 2011-L-047, 2012-Ohio-3117, ¶14 ("[an appellant] cannot, however, after the opportunity for direct appellate review has passed, use Civ.R. 60(B) as a means of indirect entry into appellate review"). Thus, "a Civ.R. 60(B) motion may not be based on arguments that could have been raised on direct appeal." *Wells Fargo Bank, N.A. v. Smith*, 10th Dist. No. 09AP-559, 2009-Ohio-6576, ¶11 (citation omitted).

{¶10} In this case, the trial court's July 22, 2011 foreclosure decree was a final, appealable order, pursuant to R.C. 2505.02, as it affected a substantial right and determined the action concerning the parties' rights to the subject parcel. Further, it certified there to be "no just reason for delay" pursuant to Civ.R. 54(B). *See Bank of New York Mellon Trust Co. v. Shaffer*, 11th Dist. No. 2011-G-3051, 2012-Ohio-3638, ¶41. Thus, appellant's alleged error concerning standing could have been raised in a direct appeal of the foreclosure decree. *See Deutsche Bank Natl. Trust Co. v. Richardson*, 2d Dist. Nos. 2010-CA-3 & 2010-CA-13, 2011-Ohio-1123, ¶32. ("Any error by the trial court in granting a judgment in foreclosure * * * could have been raised in a direct appeal of the court's judgment in foreclosure.") In short, appellants "cannot use a Civ.R. 60(B) motion to raise an issue that should have been raised in a direct appeal." *Id.*; *see also UBS Real Estate Secs., Inc. v. Teague*, 191 Ohio App.3d 189, 2010-Ohio-

5634 (2d Dist.), ¶16; *GMAC Mtge. LLC v. Herring*, 189 Ohio App.3d 200, 2010-Ohio-3650 (2d Dist.), ¶35.

{¶11} Assuming the merits of the Civ.R. 60(B) motion could be considered, appellants' arguments nonetheless fail. The Ohio Supreme Court has set forth a three-prong test which the movant must meet to prevail on a Civ.R. 60(B) motion. First, the motion must be timely, i.e., not more than one year after the judgment or order was entered where the grounds of relief are Civ.R. 60(B)(1)-(3); otherwise, the motion must be made within a reasonable time. Second, the party must be entitled to relief under one of the outlets in Civ.R. 60(B)(1)-(5). Third, the party must have a meritorious defense or claim to raise if relief is granted. *GTE Automatic Elec. v. ARC Industries*, 47 Ohio St.2d 146, paragraph two of the syllabus (1976). A party must satisfy each prong to be entitled to relief. *KMV V Ltd. v. Debolt*, 11th Dist. No. 2010-P-0032, 2011-Ohio-525, ¶24. If one prong is not satisfied, the entire motion must be overruled. *Id.*, quoting *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20 (1988).

{¶12} In their Civ.R. 60(B) motion before the trial court, appellants did not specifically allege which prong of Civ.R. 60(B) should afford them relief. Also, at oral argument, counsel for appellants did not attempt to explain under which prong of Civ.R. 60(B) relief had been sought. In fact, counsel noted he had no explanation as to why appellants failed to defend at the trial court level prior to default judgment, essentially abandoning any contention that the failure constituted "excusable neglect." Instead, appellants argued the trial court did not have subject matter jurisdiction because HSBC was not the real party in interest (i.e., that it lacked standing), as it was not the original

holder of the note and nothing indicated a proper transfer of the note. As such, they argued the default judgment was void.

{¶13} However, this court has previously held that lack of standing challenges the capacity of a party to bring an action—it does not challenge the subject matter jurisdiction of the trial court. *Waterfall Victoria Master Fund Ltd. v. Yeager*, 11th Dist. No. 2011-L-025, 2012-Ohio-124, ¶13; *EverHome Mtge. Co. v. Behrens*, 11th Dist. No. 2011-L-128, 2012-Ohio-1454, ¶12. *See also Aurora Loan Servs., LLC v. Cart*, 11th Dist. No. 2009-A-0026, 2010-Ohio-1157, ¶18, citing *Washington Mut. Bank v. Novak*, 8th Dist. No. 88121, 2007-Ohio-996, ¶16 (noting Civ.R. 17 is not necessary to invoke the jurisdiction of a common pleas court). Here, as the matter fell squarely within the class of cases over which the Geauga County Court of Common Pleas has subject matter jurisdiction, it was properly before the trial court. Thus, the default judgment is not void.

{¶14} Further, the failure to raise an objection as to standing at the trial court level constitutes waiver of the claim. *See Yeager*, *supra*, ¶13 (failure to raise a standing or "real party in interest" defense results in waiver of the claim); *Behrens*, *supra*, ¶15 ("we do not reach the merits of this issue because Mr. Behrens failed to challenge EverHome's standing prior to the entry of default judgment"). In this case, as the matter of standing was not timely raised before the trial court, it has been waived.

{¶15} Finally, though not framed as an individual assignment of error, appellants additionally suggest they were entitled to a hearing on the Civ.R. 60(B) motion. As appellants correctly point out, "'[i]f the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under Civ.R. 60(B),

the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion.'" *Kay v. Marc Glassman, Inc*., 76 Ohio St.3d 18, 19 (1996), quoting *Coulson v. Coulson*, 5 Ohio St.3d 12, 16 (1983). As explained above, however, appellants did not set forth specific allegations of operative facts that would warrant relief. Therefore, as a hearing is not automatically required, and as no allegations were set forth which warranted relief, the trial court did not abuse its discretion in failing to hold a hearing.

{¶16} Appellants' assignment of error is without merit. The judgment of the Geauga County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.