[Cite as *U.S. Bank v. Blank*, 2015-Ohio-1687.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, NATIONAL ASSOCIATION AS TRUSTEE AS SUCCESSOR BY MERGER TO LASALLE BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-HY5,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-A-0036**
- vs -	:	
LOIS M. BLANK, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas.
Case No. 2012 CV 692.

Judgment: Affirmed.

David A. Wallace, *Karen M. Cadieux*, and *Tyler K. Ibom*, Carpenter Lipps & Leland, LLP, 280 Plaza, Suite 1300, 280 North High Street, Columbus, OH 43215 (For Plaintiff-Appellee).

Bruce M. Broyles, 5815 Market Street, Suite 2, Youngstown, OH 44512 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Lois M. Blank, appeals the judgment of the Ashtabula County Court of Common Pleas denying her Civ.R. 60(B) motion seeking relief from judgment,

which resulted in foreclosure of her real property. Ms. Blank sought relief pursuant to Civ.R. 60(B)(1), arguing excusable neglect in failing to respond to the motion for summary judgment filed by appellee, U.S. Bank National Association, as trustee ("U.S. Bank").[1] Within her brief on appeal, Ms. Blank also includes a motion to vacate the trial court's judgment as void, arguing lack of subject matter jurisdiction. For the following reasons, we affirm the decision of the trial court.

{¶2} On August 7, 2012, U.S. Bank filed a complaint in foreclosure, alleging Ms. Blank's default on a note in the sum of $866,388.28, plus interest. The following documents were attached to the complaint: a copy of the note, mortgage, and rider, listing Washington Mutual Bank, FA as the lender; and a copy of assignment of the mortgage to U.S. Bank from JP Morgan Chase Bank, National Association successor in interest by purchase from FDIC as Receiver of Washington Mutual Bank, fka Washington Mutual Bank, FA ("JP Morgan"). Ms. Blank filed an answer to the complaint on October 11, 2012, defending the action on three grounds: (1) U.S. Bank did not send a notice of default in compliance with the terms of the note; (2) U.S. Bank did not send a notice of acceleration in compliance with the terms of the note; (3) the note and mortgage were not transferred to the Trust (for which U.S. Bank is the Trustee) in the manner required or within the time required by the Trust's governing documents.

{¶3} On April 18, 2013, U.S. Bank filed a motion for summary judgment. Ms. Blank did not file a response to the motion. After months of joint status conferences and attempts at loan modification, the trial court granted the motion in favor of U.S. Bank

1. U.S. Bank's full designation is: U.S. Bank National Association, as trustee, successor in interest to Bank of America, National Association as trustee as successor by merger to LaSalle Bank, National Association as trustee for WAMU Mortgage Pass-Through Certificates Series 2007-HY5.

and entered a decree of foreclosure on August 28, 2013. Ms. Blank did not appeal this decision.

{¶4} On September 13, 2013, Ms. Blank filed a Civ.R. 60(B) motion for relief from judgment. Her attorney filed an affidavit on the same date, averring that he inadvertently neglected to file an answer to the motion for summary judgment due to a calendaring error. On motion of Ms. Blank, the trial court stayed all proceedings in the matter, including the pending sheriff's sale. U.S. Bank filed a brief in opposition to the motion for relief from judgment on January 28, 2014. The trial court overruled the motion without a hearing on May 19, 2014.

{¶5} Ms. Blank timely appealed and asserts one assignment of error for our review, as well as a motion to vacate void judgment. We first consider her assignment of error, which states:

{¶6} "The trial court abused its discretion in denying Lois M. Blank's motion for relief from judgment without a hearing."

{¶7} Civ.R. 60(B) provides, in pertinent 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; * * * 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.

This is 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. Lake No. 2009-L-065, 2010-Ohio-6435, ¶53. It is a curative rule which is to be liberally construed with the focus of reaching a just result. *Hiener v. Moretti*, 11th Dist.

Ashtabula 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).

{¶8} 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*, *supra*, at 242. As such, our standard of review is whether the trial court abused its discretion. *Id*.

{¶9} The Ohio Supreme Court has set forth a three-prong test that the movant must meet to prevail on a Civ.R. 60(B) motion. First, the motion must be timely: where the grounds of relief are Civ.R. 60(B)(1)-(3), as here, not more than one year after the judgment or order was entered. Second, the party must be entitled to relief based on one of the reasons set forth in Civ.R. 60(B)(1)-(5). Third, the party must establish it has a meritorious defense or claim to present in the event relief is granted. *GTE Automatic Elec. v. ARC Industries*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. A party must satisfy each prong to be entitled to relief; if one prong is not satisfied, the entire motion must be overruled. *KMV V Ltd. v. Debolt*, 11th Dist. Portage No. 2010-P-0032, 2011-Ohio-525, ¶24, quoting *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20 (1988).

{¶10} There is no dispute that Ms. Blank's motion for relief was filed in a timely manner, within weeks of the trial court entering its decree in foreclosure.

{¶11} We first address whether Ms. Blank established sufficient operative facts to constitute a meritorious defense. A moving party need only allege a meritorious

defense; it need not prove that it will prevail on that defense. *See Rose Chevrolet, supra*, at ¶20.

{¶12} Ms. Blank asserts the mortgage assignment to U.S. Bank was invalid because it was accomplished in violation of the governing documents of the trust, i.e. the Pooling and Service Agreement ("PSA"), and thus U.S. Bank is not the real party in interest. This alleged defense is not meritorious, however, because Ms. Blank does not have standing to make this argument. "[W]hen a mortgagor * * * is not a party to the transfer agreement, and her contractual obligations under the mortgage are not affected in any way by the assignment, the mortgagor lacks standing to challenge the validity of the assignment." *Deutsche Bank Natl. Trust Co. v. Rudolph*, 8th Dist. Cuyahoga No. 98383, 2012-Ohio-6141, ¶25, citing *Bank of N.Y. Mellon Trust Co. v. Unger*, 8th Dist. Cuyahoga No. 97315, 2012-Ohio-1950, ¶35; as followed in *Waterfall Victoria Master Fund Ltd. v. Yeager*, 11th Dist. Lake No. 2012-L-071, 2013-Ohio-3206, ¶21.

{¶13} Ms. Blank urges us to abandon this court's precedent on this issue. However, the majority of the case law cited within Ms. Blank's appellate brief does not affect our analysis as it is not binding authority within our jurisdiction. The remaining case law cited by Ms. Blank, even from within Ohio's appellate districts, is simply not on point. *See, e.g., Bank of N.Y. v. Blanton*, 12th Dist. Clermont No. CA2011-03-019, 2012-Ohio-1597 (not reaching the question of meritorious defense); *Wells Fargo Bank NA v. Freed*, 3d Dist. Hancock No. 5-12-01, 2012-Ohio-5941 (holding the Trustee did not have standing due to other deficiencies); *Bank of N.Y. Mellon v. Baird*, 2d Dist. Clark No. 2012-CA-28, 2012-Ohio-4975 (holding a PSA applies to the transfer of promissory notes, not to the assignment of mortgages).

{¶14} Further, "[i]t is well established that a Civ.R. 60(B) motion cannot be used as a substitute for an appeal and that the doctrine of res judicata applies to such a motion." *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, ¶16, citing *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, ¶8-9. Ms. Blank argues she is not using her motion for relief as a substitute for direct appeal. She asserts, rather, that a direct appeal would have been unsuccessful because she did not oppose the motion for summary judgment. This argument is without merit. The trial court's entry granting summary judgment in favor of U.S. Bank was a final, appealable order, and nothing precluded Ms. Blank from challenging the merits of that decision. Ms. Blank filed her motion for relief in order to raise an issue she previously raised in her answer to U.S. Bank's complaint, to wit: lack of compliance with the PSA. Thus, it is an argument that was at least raised at the trial court when it entered judgment for U.S. Bank; a judgment Ms. Blank failed to appeal. "Thus, the doctrine of res judicata bars [her] attempted collateral attack against the judgment in foreclosure." *Id*. In addition, although Ms. Blank has argued this point on appeal, the trial court did not rely on this principle as a basis for its decision.

{¶15} Consequently, Ms. Blank is unable to demonstrate that she has a meritorious defense to raise if Civ.R. 60(B) relief was granted. Therefore, it is not necessary for us to reach the issue of excusable neglect. The trial court did not abuse its discretion in denying her motion.

{¶16} Ms. Blank's sole assignment of error is without merit.

{¶17} Included in Ms. Blank's appellate brief is a common law motion to vacate void judgment. She argues, for the first time on appeal, that U.S. Bank lacked standing

to bring the complaint, and therefore, the trial court lacked subject matter jurisdiction. She cites the Ohio Supreme Court's holding in *Schwartzwald*, which held that "standing is a 'jurisdictional requirement.'" *Fed. Home Loan Mtge. Corp v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶22. Ms. Blank's "position hinges on the inference that [the Court's] use of the term 'jurisdiction' in *Schwartzwald* necessarily connoted 'subject-matter jurisdiction.' This inference is incorrect." *Kuchta, supra,* at ¶21.

{¶18} After Ms. Blank's brief was filed, the Supreme Court decided a certified conflict on the issue and clarified its *Schwartzwald* decision: it held that "a court of common pleas that has subject-matter jurisdiction over an action does not lose that jurisdiction merely because a party to the action lacks standing." *Id*. at ¶17. The *Kuchta* Court went on to state:

> Standing is certainly a jurisdictional requirement; a party's lack of standing vitiates the party's ability to invoke the jurisdiction of a court—even a court of competent subject-matter jurisdiction—over the party's attempted action. But an inquiry into a party's ability to invoke a court's jurisdiction speaks to jurisdiction over a particular case, not subject-matter jurisdiction.

Id. at ¶22 (citations omitted). "If a court possesses subject-matter jurisdiction, any error in the invocation or exercise of jurisdiction over a particular case causes a judgment to be voidable rather than void." *Id.* at ¶19 (citations omitted).

{¶19} The allegation that U.S. Bank did not have standing to initiate the foreclosure complaint against Ms. Blank has no effect on the Ashtabula County Court of Common Pleas' subject matter jurisdiction over the foreclosure action. *See id*. at ¶23. Accordingly, the judgment of the Ashtabula County Court of Common Pleas is not void ab initio.

{¶20} Ms. Blank's motion to vacate is overruled, and the judgment of the Ashtabula County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶21} I respectfully dissent. The majority finds that Ms. Blank is unable to demonstrate that she has a meritorious defense to raise if Civ.R. 60(B) relief was granted. As a result, the majority holds it is not necessary for this court to reach the issue of excusable neglect. For the reasons stated, I disagree.

{¶22} "We review a trial court's decision to grant or deny a motion for relief from judgment for abuse of discretion. *Cefaratti v. Cefaratti*, 11th Dist. Lake No. 2004-L-091, 2005-Ohio-6895, ¶11. Regarding this standard, we recall the term 'abuse of discretion' is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 * * * (1925). An abuse of discretion may be found when the trial court 'applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.' *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 * * * (8th Dist.)." (Parallel citations omitted.) *Household Realty Corp. v. Gunter*, 11th Dist. Lake No. 2014-L-003, 2014-Ohio-4313, ¶21.

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

{¶24} "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; * * * 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."

{¶25} "'(***) The concept of "excusable neglect" must be construed in keeping with the proposition that Civ.R. 60(B)(1) is a remedial rule to be liberally construed[.]'" *Perry v. G.M.C.*, 113 Ohio App.3d 318, 321 (10th Dist.1996), quoting *Colley v. Bazell,* 64 Ohio St.2d 243, 248 (1980).

{¶26} "'It is well-settled that in order to prevail on a motion for relief from judgment pursuant to Civ.R. 60(B), the movant must demonstrate the following: (1) a meritorious claim or defense if relief is granted; (2) entitlement to the relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) timeliness of the motion. *GTE Automatic Elec., Inc. v. ARC Industries, Inc*. (1976), 47 Ohio St.2d 146, * * *, paragraph two of the syllabus. (Parallel citation omitted.) *Cefaratti, supra*, at ¶10.

{¶27} "'With regard to the first element of the GTE test, a moving party need only allege a meritorious defense; it need not prove that it will prevail on that defense. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, * * * (* * *) (1988); *GMAC Mtge., LLC. v. Herring*, 189 Ohio App.3d 200, 2010-Ohio-3650, * * *, (* * *) ¶32 (2d Dist)." (Parallel citations omitted.) *Gunter, supra,* at ¶24-25.

{¶28} In this case, the majority correctly points out that Ms. Blank's motion for relief was filed in a timely manner, within weeks of the trial court entering its decree in foreclosure. Thus, one of the three prongs of the *GTE* test was met, i.e., timeliness of

the motion. However, contrary to the majority's position with respect to the other two prongs, excusable neglect under Civ.R. 60(B)(1) and meritorious defense, this writer believes that they have also been satisfied.

{¶29} Ms. Blank asserts a calendaring error made by her attorney constitutes excusable neglect. Ms. Blank's attorney averred in his affidavit that he also represents Ms. Blank in another foreclosure action in the same county. Ms. Blank's attorney indicated he mistakenly believed he filed the necessary opposition to the summary judgment motion in this case, but in fact he filed an opposition in the other case. He further stated that but for this mistaken review of his calendar, he would have filed a memorandum in opposition to the motion. The same day Ms. Blank's attorney filed his affidavit, he faxed to the trial court her motion for relief from judgment.

{¶30} The conduct of Ms. Blank's attorney and the conduct of Ms. Blank herself must be examined together to determine whether excusable neglect has occurred. *See Griffey v. Rajan*, 33 Ohio St.3d 75, 78 (1987). The mistake of neglect being imputed upon the client does not mean that the client is precluded from obtaining relief from judgment under Civ.R. 60(B)(1).

{¶31} Based upon the record and the facts presented, I believe Ms. Blank is entitled to relief from judgment as a result of "mistake, inadvertence, surprise or excusable neglect" under Civ.R. 60(B)(1). Ms. Blank's counsel merely confused the two pending cases and thought he had previously filed the required pleading. This constitutes excusable neglect especially in light of the multiple settlement conferences that had occurred and including the fact that the parties were negotiating a loan modification during those conferences. There was no "complete disregard of the judicial

system" in this case. Ms. Blank should not suffer prejudice due to her attorney's excusable neglect.

{¶32} In addition, this writer believes Ms. Blank established sufficient operative facts to constitute a meritorious defense. Ms. Blank contends the mortgage assignment to U.S. Bank was invalid because it was accomplished in violation of the governing documents of the Trust, and therefore, U.S. Bank is not the real party in interest. Ms. Blank presented documentary evidence that demonstrated that the note and mortgage were transferred to the Trust after the closing date. Ms. Blank contends that U.S. Bank did not possess an interest in the note and mortgage, and thus, lacked standing at the time the complaint was filed.

{¶33} The majority holds that Ms. Blank's defense is not meritorious because she, as the mortgagor, does not have standing to make this argument. In support, the majority cites to two Eighth District cases, *Deutsche Bank Natl. Trust Co. v. Rudolph*, 8th Dist. Cuyahoga No. 98383, 2012-Ohio-6141, and *Bank of N.Y. Mellon Trust Co. v. Unger*, 8th Dist. Cuyahoga No. 97315, 2012-Ohio-1950, as well as to "this court's precedent on this issue" in *Waterfall Victoria Master Fund Ltd. v. Yeager*, 11th Dist. Lake No. 2012-L-071, 2013-Ohio-3206. This writer notes that in *Yeager*, my colleague and fellow panel member, Judge Diane V. Grendell, concurred in judgment only and I dissented with a dissenting opinion. In my dissent, I noted the following:

{¶34} "I respectfully disagree that a mortgagor faced with foreclosure should not be allowed to raise a failure of the assignment of the note and/or mortgage between the original mortgagee, and an alleged subsequent assignee.

{¶35} "I do believe that the cases relied on by the majority are premised upon different facts than the case at bar. The majority cites to the decisions of the Eighth District in *Rudolph*, 2012-Ohio-6141, and *Unger*, 2012-Ohio-1950, * * * for the proposition that a mortgagor lacks standing to challenge the validity of the assignment of a note and/or mortgage. * * * I find this reliance misplaced.

{¶36} "* * * In foreclosure actions, the burden to establish a prima facie case, including standing, rests upon the mortgagee or its assignee. [*Fed. Home Loan Mtge. Corp. v.*] *Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, ¶20-28 [(later distinguished by *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275)].

{¶37} "* * *

{¶38} "* * * Mortgagors should be allowed to attack the validity of an assignment between a mortgagee and assignee: indeed, pursuant to *Schwartzwald*, assignees should be required to prove they received the note and/or mortgage through a valid assignment." *Yeager, supra,* at ¶37-42 (O'Toole, J., dissenting).

{¶39} Upon review of the case at bar, this writer finds that Ms. Blank presented a meritorious defense. Thus, I believe the trial court erred in denying her Civ.R. 60(B) motion. I would reverse and remand.

{¶40} For the foregoing reasons, I respectfully dissent.