[Cite as *JP Morgan Chase Bank v. Ritchey*, 2015-Ohio-1606.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

JP MORGAN CHASE BANKS AS TRUSTEE, ON BEHALF OF FIRST FRANKLIN MORTGAGE LOAN TRUST 2004-FF10 ASSET-BACKED CERTIFICATES, SERIES 2004-FF10,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-L-089**
- vs -	:	
SAUNDRA M. RITCHEY, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 06 CF 001121.

Judgment: Affirmed.

Charles V. Gasior, Laura C. Infante, and *Jason A. Whitacre,* The Law Offices of John D. Clunk Co., L.P.A., 4500 Courthouse Boulevard, Suite 400, Stow, OH 44224 (For Plaintiff-Appellee).

Sam Thomas, III, Sam Thomas, III and Associates, LLC, 1510 East 191st Street, Euclid, OH 44117 (For Defendants-Appellants).

DIANE V. GRENDELL, J.

{¶1} Defendants-appellants, Saundra and William Ritchey, appeal from the August 8, 2014 Judgment Entry of the Lake County Court of Common Pleas, denying their Motion to Set Aside Summary Judgment and Emergency Motion to Stay Execution of Judgment. The issue before this court is whether a Civ.R. 60(B) motion, filed seven years after final judgment, is barred by res judicata in a foreclosure case when the

parties have already filed a direct appeal from the grant of foreclosure, as well as a previous Civ.R. 60(B) motion. For the following reasons, we affirm the judgment of the court below.

{¶2} On May 15, 2006, J.P. Morgan, as Trustee on behalf of the First Franklin Mortgage Loan Trust, filed a Complaint in the Lake County Court of Common Pleas against the Ritcheys, seeking a money judgment, a Decree of Foreclosure, and an Order of Sale for the subject premises, located in Mentor, Ohio. The Complaint alleged that the Ritcheys were in default on a Note and owed $240,143.77. The Note listed First Franklin as payee and was secured by a Mortgage Deed, signed by the Ritcheys.

{¶3} On June 20, 2006, the Ritcheys filed a Motion to Dismiss, arguing, inter alia, that J.P. Morgan failed to attach an assignment to the Complaint, showing that it was the real party in interest. The Motion to Dismiss was denied by the trial court.

{¶4} The Ritcheys filed their Answer on August 18, 2006, asserting various defenses, including that J.P. Morgan was not the real party in interest.

{¶5} On September 12, 2006, J.P. Morgan filed a Motion for Summary Judgment. Attached to the Motion was an affidavit from Vimbai Gopito, a Foreclosure Technician employed by Countrywide Home Loans, who averred that the Note and Mortgage were in default due to noncompliance with the terms of payment and that the balance due was $240,143.77. On the same date, a Final Judicial Report was filed, which included a copy of the assignment of the mortgage from First Franklin to J.P. Morgan, executed on December 20, 2005, and recorded on February 2, 2006. The Ritcheys did not file a response to J.P. Morgan's Motion.

{¶6} The court issued a Judgment Decree in Foreclosure and Corresponding Order of Sale on October 19, 2006, entering summary judgment in favor of J.P. Morgan and ordering foreclosure of the property.

{¶7} The Ritcheys filed a pro se Motion for Reconsideration on October 31, 2006. On November 20, 2006, they filed a Motion to Vacate, as well as a Notice of Appeal.

{¶8} This court affirmed the Decree in Foreclosure on August 17, 2007, in *JP Morgan Chase Bank v. Ritchey*, 11th Dist. Lake No. 2006-L-247, 2007-Ohio-4225, holding that "J.P. Morgan's burden of proof was satisfied under Civ.R. 56(C), and appellants would have a reciprocal burden, under Civ.R. 56(E), to introduce evidence to show that there was a genuine issue of material fact for trial," which it did not do. *Id.* at ¶ 36. This court also rejected arguments relating to service and the prior dismissal of a separate, related case. *Id.* at ¶ 25, 44.

{¶9} Following the appeal, the sale of the property was delayed by various issues, including multiple stays due to bankruptcy proceedings. On November 16, 2012, the Ritcheys filed a pro se Motion to Stay Sheriff's Sale, which was denied.

{¶10} On February 21, 2014, the Ritcheys filed an Emergency Motion to Stay Execution of Judgment and Order of Sale and a Motion to Set Aside Summary Judgment and Order of Sale, arguing that the trial court's judgment was void, due to, inter alia, errors in the assignment of the mortgage and standing. These Motions were denied on March 13, 2014. No appeal was taken from that judgment.

{¶11} The Ritcheys filed a second Emergency Motion to Stay on July 22, 2014, along with another Motion to Set Aside Judgment, based on Civ.R. 60(B)(3), (4), and (5)

grounds. They argued that the assignment of the mortgage was invalid, J.P. Morgan lacked capacity to sue since it was not registered with the State, and that J.P. Morgan violated the Real Estate Settlement Procedures Act, the Fair Debt Collection Practices Act, and the Ohio Consumer Sales Practices Act. They also argued that J.P. Morgan failed to establish standing, citing *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214. The trial court denied these Motions in an August 8, 2014 Judgment Entry.

{¶12} The Ritcheys timely appeal and raise the following assignments of error:

{¶13} "[1.] The trial court erred to the prejudice of the Appellants by entering judgment in favor of the Appellee and denying the Motion to Set Aside as the Appellee failed to proffer competent, credible evidence to properly and sufficiently establish standing and that it was the real party in interest.

{¶14} "[2.] The trial court erred to the prejudice of the Appellants by entering judgment in favor of the Appellee and denying the Motion to Set Aside as the Appellee lacked the capacity to sue in the State of Ohio rendering the judgment void ab initio or otherwise unenforceable as a matter of law and/or equity.

{¶15} "[3.] The trial court erred to the prejudice of the Appellants by entering judgment in favor of the Appellee and denying the Motion to Set Aside as the Decree of Foreclosure was void, voidable, and/or improper pursuant to federal and Ohio law."

{¶16} "An appellate court reviews a judgment entered on a Civ.R. 60(B) motion for an abuse of discretion." (Citation omitted.) *Chase Home Fin., LLC v. Mentschukoff*, 11th Dist. Geauga No. 2014-G-3205, 2014-Ohio-5469, ¶ 18. A determination as to whether the trial court has subject-matter jurisdiction, however, is a question of law

reviewed de novo. *Smith v. Dietelbach*, 11th Dist. Trumbull No. 2011-T-0007, 2011-Ohio-4308, ¶ 14.

{¶17} In their first assignment of error, the Ritcheys argue that J.P. Morgan failed to show it was the holder of the note and a real party in interest, it had no standing, and the court's order of foreclosure was void. They also argue that there was an invalid assignment and a lack of compliance with the Pooling and Servicing Agreement.

{¶18} J.P. Morgan argues that the Ritcheys' assignments of error are barred by res judicata, since this matter has already been adjudicated on the merits.

{¶19} We hold that the Ritcheys' arguments are barred by res judicata, since they could have been raised in their direct appeal. Pursuant to the doctrine of res judicata, "an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit." (Citation omitted.) (Emphasis deleted.) *Natl. Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62, 558 N.E.2d 1178 (1990). The doctrine applies to issues that could have been raised in a party's direct appeal of a final judgment. *CitiMortgage, Inc. v. Oates*, 2013-Ohio-5077, 4 N.E.3d 1101, ¶ 14 (11th Dist.).

{¶20} "The doctrine of res judicata applies to motions made pursuant to Civil Rule 60(B)." *HSBC Bank USA, Natl. Assn. v. Bailey*, 11th Dist. Trumbull No. 2012-T-0086, 2014-Ohio-246, ¶ 14. It is well established that "[a] party may not use a Civ.R. 60(B) motion as a substitute for a timely appeal" from a final judgment. *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128, 502 N.E.2d 605 (1986), paragraph two of the syllabus.

{¶21} The Ritcheys appealed from the grant of summary judgment and Order of Foreclosure in 2006, at which time they could have raised any issues they had related to the court's judgment, including standing. *PNC Bank, Natl. Assn. v. Botts*, 10th Dist. Franklin No. 12AP-256, 2012-Ohio-5383, ¶ 19 (the defendant should have contested standing in an appeal from the decree of foreclosure rather than "raising it in a belated Civ.R. 60(B) motion"); *Mentschukoff*, 2014-Ohio-5469, at ¶ 26.

{¶22} In its recent decision in *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, the Ohio Supreme Court held that "[l]ack of standing is an issue that is cognizable on appeal, and therefore it cannot be used to collaterally attack a judgment," and noted that "the doctrine of res judicata applies to bar a party from asserting lack of standing in a motion for relief from judgment." *Id*. at paragraph two of the syllabus and ¶ 8. Since the Ritcheys had a "full opportunity to litigate [the] issue" seven years ago, it cannot be argued in a post-judgment motion. *Bank of Am., N.A. v. Gibson*, 11th Dist. Geauga No. 2014-G-3204, 2015-Ohio-209, ¶ 22.

{¶23} In addition, prior to filing the July 22, 2014 Motion that is the subject of this appeal, the Ritcheys had already filed a February 21, 2014 Motion to Set Aside, which the court denied on March 13, 2014. They failed to appeal that ruling, yet raised similar issues in their present Motion, including standing and the validity of the mortgage assignment. "[R]es judicata prevents the successive filings of Civ.R. 60(B) motions [for] relief from a valid, final judgment when based upon the same facts and same grounds or based upon facts that could have been raised in the prior motion." (Citation omitted). *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, 846 N.E.2d 43, ¶ 8.

{¶24} It must also be emphasized that the timeliness of the Ritcheys' Civ.R. 60(B) Motion is questionable, given the delay of over seven years in filing it, and that it raises issues (the lack of standing, capacity, and violations of consumer sales practices and lending acts) which would have been apparent during the foreclosure proceedings. Under Civ.R. 60(B)(4) and (5), the primary grounds raised in the motion, it was required to be "made within a reasonable time."

{¶25} Although the Ritcheys argue that the judgment of foreclosure was void, due to a lack of standing, this assertion has been rejected by this court repeatedly. *Mentschukoff*, 2014-Ohio-5469, at ¶ 23; *Deutsche Bank Natl. Trust Co. v. Santisi*, 11th Dist. Trumbull No. 2013-T-0048, 2013-Ohio-5848, ¶ 33-38; *Bailey*, 2014-Ohio-246, at ¶ 28. In the recent *Kuchta* decision, the Ohio Supreme Court held that a "lack of standing does not affect the subject-matter jurisdiction of the court" and does not render the judgment void. 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, at paragraph three of the syllabus and ¶ 25. The other issues raised, such as the lack of compliance with the pooling agreement, are not grounds to void the judgment and no basis is provided for why they could not have been argued in the direct appeal.

{¶26} The first assignment of error is without merit.

{¶27} In their second and third assignments of error, the Ritcheys allege various reasons why the trial court's judgment of foreclosure was improper and that genuine issues of material fact remain.

{¶28} We emphasize that the present appeal is not the appropriate avenue to argue the merits of whether summary judgment was proper. The Ritcheys were able to do so upon their direct appeal in 2006, regardless of whether they actually did. Civ.R.

60(B) motions exist to correct "injustices that are so great that they demand a departure from the strict constraints of res judicata," not to raise belated arguments that could have been pursued previously. *Gibson*, 2015-Ohio-209, at ¶ 16. The Ritcheys cannot be permitted to continue to raise arguments in perpetuity or there will be no finality in this matter. These claims are barred by res judicata, as more thoroughly outlined above.

{¶29} In their second assignment of error, the Ritcheys assert that the Decree was void, presumably arguing that this issue can be raised at any time, since J.P. Morgan failed to show that it was a registered corporation in the State of Ohio. However, they provide no argument as to why this issue could not have been raised previously. The case they cite, *Citibank (S.D.) NA v. Rowe*, 9th Dist. Lorain No. 12CA010217, 2013-Ohio-523, involves a direct appeal from a summary judgment ruling, not from a ruling on a 60(B) motion filed many years after final judgment. While the Ritcheys argue that a lack of capacity to sue should render the judgment void, they cite no law to support this contention. Since a lack of capacity is an affirmative defense that can be waived if not raised, there is no basis for an assertion that it can be raised at any time or in a delayed, repetitive 60(B) motion. *See State ex rel. Downs v. Panioto*, 107 Ohio St.3d 347, 2006-Ohio-8, 839 N.E.2d 911, ¶ 30.

{¶30} Similarly, in their third assignment of error, the Ritcheys contend that "summary judgment was void as genuine issues of material facts existed" as to whether J.P. Morgan violated acts related to fair treatment in debt collection, settlement, and sales practices. Essentially, the Ritcheys proceed as though this is a direct appeal from the grant of summary judgment. They advance no argument to support why these

issues could not have been argued in the direct appeal. The Ritcheys themselves assert in their brief that they raised such violations in their Answer. Civ.R. 60(B) is not a procedure to reargue summary judgment or raise "contentions [that] merely challenge the correctness of the court's decision on the merits." *Blasco v. Mislik*, 69 Ohio St.2d 684, 686, 433 N.E.2d 612 (1982).

{¶31} The second and third assignments of error are without merit.

{¶32} For the foregoing reasons, the Judgment Entry of the Lake County Court of Common Pleas, denying the Ritcheys' Motion to Set Aside Summary Judgment and Emergency Motion to Stay Execution of Judgment, is affirmed. Costs to be taxed against appellants.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.