

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

CITY NATIONAL BANK,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2017-L-030
MARY T. GIDES, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 2013 CF 000668.

Judgment: Affirmed.

Beth M. Miller, Levinson LLP, 4449 Easton Way, 2nd Floor, Columbus, OH 43219 (For Plaintiff-Appellee).

David M. Lynch, 333 Babbitt Road, Suite 333, Euclid, OH 44123 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} Appellants, Mary T. Gides, et al., appeal the judgment of the Lake County Court of Common Pleas, adopting the magistrate’s decision, denying their motion for relief from a judgment of the court’s previous confirmation of sale of certain real property. We affirm the court’s decision.

{¶2} On February 8, 2006, Mary T. Gides, grantor and/or Trustee of The Mary T. Gides Revocable Living Trust, obtained a loan from Imperial Capital Bank in the amount of \$456,000. Gides subsequently executed a personal guaranty to secure

repayment of the note. Gides, as trustee and as personal guarantor, defaulted in repayment on the note. And Imperial subsequently filed suit in Cuyahoga County on the note and the guaranty. Imperial moved for summary judgment and, later, appellee, City National Bank, was assigned all of Imperial's right, title, and interest to the note and guaranty. The assignment was accomplished by an allonge through an attorney-in-fact for the FDIC, the Receiver for Imperial. City National was ultimately substituted as plaintiff in the matter. Gides did not object to the assignment or the substitution.

{¶3} On September 6, 2012, the Cuyahoga County Court of Common Pleas adopted the magistrate's supplemental decision granting City National a money judgment against the trustee on the note and against Gides on the guaranty. Gides did not object to the magistrate's decision nor did she appeal the final order entering judgment in favor of City National.

{¶4} On October 22, 2012, City National obtained a judgment lien against Gides, as both trustee and personal guarantor, in Lake County premised upon the Cuyahoga County judgment. The judgment lien identified City National as the judgment lien creditor and attached property owned by Gides located at 6187 Campbell Road, Mentor, Ohio.

{¶5} On March 26, 2013, City National filed a complaint in the Lake County Court of Common Pleas to foreclose the Lake Judgment Lien on the subject property. Gides filed an answer that generally denied the allegations, but did not assert any affirmative defenses. City National filed a motion for summary judgment, which was unopposed. And, on August 12, 2013, the trial court entered summary judgment in City National's favor. Gides did not appeal this final order.

{¶6} The subject property was set for sheriff's sale and later rescheduled. In August 2016, Gides filed a motion to stay the sale pending mediation. The trial court denied the motion and the sale proceeded on September 9, 2016. City National filed a motion to confirm on October 3, 2016, to which Gides did not respond. On October 20, 2016, the sale was confirmed. Again, Gides did not file an appeal from this order.

{¶7} On October 28, 2016, however, Gides filed a motion to vacate the confirmation order, asserting she should be permitted to file a response to the motion to confirm. She maintained the trial court confirmed the sale without allowing her sufficient time to respond to City National's motion. On October 31, 2017, Gides filed a response to the motion to confirm without leave of court, claiming the confirmation should be stayed because she had filed a Civ.R. 60(B) motion for relief from the 2012 Cuyahoga County judgment. Gides argued that, if the Cuyahoga County motion was granted, the underlying judgment lien would be void and, by implication, so would the Lake County foreclosure and confirmation orders. Gides attached a copy of the Cuyahoga County motion to her motion to vacate/stay the confirmation order.

{¶8} In the Cuyahoga motion, Gides claimed that the foreclosure decree was improper because City National did not have authority to proceed as a party because the allonge, purporting to assign Imperial's interest, was defective; to wit, she asserted the individual assigning the interest as attorney-in-fact for the FDIC, Receiver for Imperial, lacked authority to effectuate the assignation because there was no proof of the individual's power of attorney.

{¶9} City National responded to each of the foregoing pleadings, arguing, inter alia, the response was not a true response to the motion to confirm, but a motion to stay confirmation pending a decision in a separate matter.

{¶10} The Cuyahoga motion for relief was ultimately denied and City National filed a notice of the judgment with the Lake County trial court in the underlying matter. The Cuyahoga judgment was premised upon the motion's untimeliness and the court's determination that Gides was attempting to use Civ.R. 60(B) as a substitute for an appeal.

{¶11} On December 1, 2016, the magistrate issued his decision in the underlying matter denying Gides' motion to vacate and motion to stay. The magistrate reviewed the grounds asserted in the Cuyahoga motion as though they had been asserted in the Lake motion(s). In his decision, the magistrate determined Gides failed to present a meritorious defense, failed to establish any grounds for relief under Civ.R. 60(B)(1)-(5), and failed to timely file the pleading. Gides filed objections to the magistrate's decision alleging the magistrate should not have found the motion untimely because, in her view, a motion for relief pursuant to Civ.R. 60(B)(5) can be filed at any time. The trial court overruled the objections and adopted the magistrate's decision. Gides now appeals and assigns the following as error:

{¶12} "The trial court improperly overruled objections to the magistrate's findings when the documents showed that the underlying foreclosure was invalid due to an allonge signature problem because the power of attorney was missing."

{¶13} Gides sought relief from the order confirming the sheriff's sale. In support, she maintained the Cuyahoga judgment, upon which the judgment lien was premised, was invalid. As a result, Gides argues the judgment lien, upon which the Lake County foreclosure action and ultimate sheriff's sale were grounded, were similarly invalid. She therefore concludes the trial court erred in failing to grant her motion for relief from the confirmation order.

{¶14} A party moving for relief pursuant to Civ.R. 60(B) has the following obligations:

{¶15} “To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) 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 Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus.

{¶16} As stated in Civ.R. 60(B)(5), relief is to be granted for “any other reason justifying relief from the judgment.” Civ.R. 60(B)(5) is a catch-all provision, which reflects “the inherent power of a court to relieve a person of the unjust operation of a judgment.” *Smith v. Smith*, 8th Dist. Cuyahoga No. 83275, 2004-Ohio-5589, ¶16.

{¶17} Gides, in her brief, claims the allonge assigning Imperial’s interest to City National was invalid and, as a result, City National did not have capacity to proceed. An initial problem with appellant’s argument is it addresses an alleged problem with the judgment entered in the Cuyahoga case. It does not challenge the sale or confirmation process that was the subject of the underlying Lake case. Gides’ argument is not germane to the proceedings from which this appeal is taken and is, at best, misplaced.

{¶18} Furthermore, capacity relates to whether an individual may properly sue, either as an entity or on behalf of another. *Church at Warren v. Warzala*, 11th Dist. Trumbull No. 2016-T-0073, 2017-Ohio-6947, ¶15, citing *Mousa v. Mt. Carmel Health Sys., Inc.*, 10th Dist. Franklin No. 12AP-737, 2013-Ohio-2661, ¶12; see also *Natl. City Mtge. v. Skipper*, 9th Dist. Summit No. 24772, 2009-Ohio-5940, ¶11; *Wanamaker v.*

Davis, 2d Dist. Greene No. 2005-CA-151, 2007-Ohio-4340, ¶42 (stating that capacity to sue refers to the eligibility of a person to commence an action). Capacity to sue is not a jurisdictional requirement. *Skipper, supra*, at ¶11. Lack of capacity is an affirmative defense. *Id.* at ¶12. Thus, a capacity challenge is waived if a party does not specifically raise it in his answer. *State ex rel. Downs v. Panioto*, 107 Ohio St.3d 347, 2006-Ohio-8, ¶30; see also Civ.R. 9(A) (“[w]hen a party desires to raise an issue as to * * * the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment * * *.”)

{¶19} Gides did not raise City National’s capacity issue in the Cuyahoga case. She attempted to raise the issue in a motion to vacate the Cuyahoga judgment, but the Cuyahoga County Court of Common Pleas denied the motion on the basis of, inter alia, the doctrine of res judicata. That issue is now moot and Gides cannot utilize the same failed argument as a basis for compromising the otherwise valid foreclosure and/or confirmation process in the underlying Lake case.

{¶20} Moreover, assuming Gides is attempting to challenge City National’s standing, that argument also fails. A person lacks standing unless he has a real interest in the subject matter of the action. *Id.* at ¶ 22, 979 N.E.2d 1214. A person has such an interest if he has suffered an injury by the defendant. *Fed. Home Loan Mtge. Corp. v. Schwartwald*, 134 Ohio St.3d 13, 979 N.E.2d 1214, 2012–Ohio–5017, ¶22. Because a real party in interest is an individual who has suffered an injury in a matter, a party lacks standing if it is not a real party in interest. See also *Pinzone v. Pinzone*, 11th Dist. Lake No.2011-L-133, 2012-Ohio-6126, ¶16 (recognizing that standing is similar in nature to a real party in interest and, therefore, the two terms and their underlying principles are used interchangeably) *Wells Fargo Bank, N.A. v. Sessley*, 188 Ohio App.3d 213, 2010-

Ohio-2902, ¶12 (10th Dist .) The issue of standing speaks to a party’s ability to invoke a court’s jurisdiction and therefore relates to a court’s jurisdiction over a specific case, not a court’s subject-matter jurisdiction. *Bank of America, N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, ¶22. Hence, “lack of standing is an issue that is cognizable on appeal, and therefore it cannot be used to collaterally attack a judgment.” *Id.* at ¶25.

{¶21} Gides was able to raise the issue of City National’s standing in the Cuyahoga case; she did not and did not file an appeal from that judgment. That issue is res judicata and cannot form the basis of a Civ.R. 60(B)(5) motion.

{¶22} Even if Gides’ Civ.R. 60(B) motion was deemed timely, she has failed to advance a meritorious claim or defense justifying relief from the confirmation under the “catch-all” provision.

{¶23} Gides’ assignment of error lacks merit.

{¶24} For the reasons discussed in this opinion, the judgment of the Lake County Court of Common Pleas adopting the magistrate’s decision is affirmed.

DIANE V. GRENDALL, J.,

THOMAS R. WRIGHT, J.,

concur.