[Cite as *Wachovia Bank, N.A. v. Cipriano*, 2009-Ohio-5470.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WACHOVIA BANK, N.A, AS TRUSTEE FOR CHASE MANHATTAN MORTGAGE 2003-4

Plaintiff-Appellee

-vs-

GENE CIPRIANO, ET AL.

Defendants-Appellants

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 09CA007

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 07CV000298
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 13, 2009

APPEARANCES:

For Plaintiff-Appellee

NELSON M. REID
VLADIMIR P. BELO
100 South Third Street
Columbus, OH 43215-4291

For Defendants-Appellants

GENE CIPRIANO, PRO SE
200 East Del Monte Avenue
Clewiston, FL 33440

Farmer, P.J.

{¶1} On June 19, 2003, appellant, Gene Cipriano, executed a balloon note with Chase Manhattan Mortgage Corporation, promising to pay $112,950.00 plus interest at 6.75% per annum. The note was secured by a mortgage on real property located at 707 Oakland Boulevard in Cambridge, Ohio.

{¶2} On June 14, 2007, a foreclosure action commenced against appellant and The Order of Infinity Sole (by virtue of being a current titleholder of the subject property), as payments on the loan had been in default since March of 2007. On June 19, 2007 and recorded on June 29, 2007, the subject note and mortgage were assigned to appellee, Wachovia Bank, N.A. as trustee for Chase Manhattan Mortgage 2003-4.

{¶3} On September 27, 2007, appellee filed a motion for summary judgment against appellant. Appellant did not file an opposition to the motion. By entry filed October 25, 2007, the trial court granted appellee's motion for summary judgment.

{¶4} On November 8, 2007, appellee filed a motion for default judgment against The Order of Infinity Sole for failure to file an answer. By entry filed November 9, 2007, the trial court found The Order of Infinity Sole to be in default, granted appellee summary judgment, and ordered the subject property sold in order to satisfy the debt obligation.

{¶5} On November 15, 2007, appellant filed a motion to deny motion for summary judgment. By entry filed November 16, 2007, the trial court construed the filing as a Civ.R. 60(B) motion for relief from judgment, and set the matter for hearing. On January 29, 2008, the trial court stayed all proceedings to allow the parties to pursue a forbearance agreement which would permit appellant to become current.

{¶6} On July 18, 2008, the case was moved to the active docket, as the parties were unable to reach an agreement. A hearing was scheduled for September 15, 2008 on all outstanding motions. Appellant and The Order of Infinity Sole failed to appear. By docket entry filed September 16, 2008, the trial court denied appellant's Civ.R. 60(B) motion from relief from judgment, and took the matter of reinstating the previous summary judgment entry granting summary judgment to appellee under advisement pending the filing of a preliminary judicial report.

{¶7} On October 17, 2008, appellee filed a preliminary judicial report and a final judicial report describing the state of record title of the subject property.

{¶8} On December 22, 2008, the trial court filed a renewed entry granting summary judgment and decree in foreclosure. On January 2, 2009, appellant filed a motion to set aside summary judgment and decree in foreclosure. By entry filed January 29, 2009, the trial court denied the motion.

{¶9} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶10} "IT WAS ERROR FOR THE LOWER COURT TO ENTER SUMMARY JUDGMENT AND ORDER OF FORECLOSURE, ON 22 DECEMBER 2008, IN FAVOR OF APPELLEE HEREIN, WHERE APPELLEE, WACHOVIA BANK NA, DID NOT MEET THE STANDARD FOR SUMMARY JUDGMENT, BECAUSE THERE WAS NO EVIDENCE WHATSOEVER, IN THE LOWER COURT CASE INDICATING THAT APPELLEE WAS BY ANY MEANS ENTITLED TO JUDGMENT BY ANY FACT OF RECORD OR BY ANY LAW CITED OR INFERRED."

II

{¶11} "IT WAS ERROR FOR THE LOWER COURT TO ENTER SUMMARY JUDGMENT AND ORDER OF FORECLOSURE IN FAVOR OF APPELLEE, WHERE APPELLEE HAD FAILED, NEGLECTED AND REFUSED TO ESTABLISH ITS STANDING BEFORE THE COURT AND MERELY ASSERTED A CLAIM ENTIRELY DEVOID OF SUPPORTING EVIDENCE AND FURTHER **ADMITTED IN THE FIRST PARAGRAPH OF THE COMPLAINT, THAT SUCH EVIDENCE WAS, NON-EXISTENT.**"

III

{¶12} "IT WAS ERROR FOR THE LOWER COURT TO GRANT SUMMARY JUDGMENT AND FORECLOSURE IN FAVOR OF APPELLEE, WHERE APPELLEE WACHOVIA BANK NA, HAD FAILED, NEGLECTED AND REFUSED TO PROVIDE ANY EVIDENCE TO SUGGEST THAT IT WAS A REAL PARTY IN INTEREST."

IV

{¶13} "IT WAS ERROR FOR THE LOWER COURT TO GRANT SUMMARY JUDGMENT AND FORECLOSURE IN FAVOR OF APPELLEE, WHERE ALL THE EVIDENCE OF RECORD IN THE LOWER COURT CASE, PROVED THAT APPELLEE IS NOT THE REAL PARTY IN INTEREST, HAS NO EQUITABLE INTEREST, OR LAWFUL RIGHT IN THE BONA FIDE ORIGINAL INSTRUMENTS OR IN THE REAL PROPERTY OF APPELLANT."

V

{¶14} "IT WAS ERROR ON THE PART OF THE LOWER COURT TO ENTER SUMMARY JUDGMENT AND DECREE OF FORECLOSURE IN FAVOR OF THE

APPELLEE HEREIN, BECAUSE THE ENTIRE WEIGHT OF ALL ACTUAL AND UNCONTESTED EVIDENCE IN THE LOWER COURT CASE PLAINLY ESTABLISHES THAT APPELLEE HEREIN, WACHOVIA BANK NA, WAS NOT ENTITLED TO JUDGMENT AND WAS NOT ENTITLED TO FORECLOSE ON THE REAL PROPERTY OF APPELLANT."

VI

{¶15} "IT WAS ERROR FOR THE LOWER COURT TO GRANT SUMMARY JUDGMENT AND DECREE OF FORECLOSURE TO APPELLEE IN THIS MATTER WHERE APPELLEE NEGLECTED, FAILED AND REFUSED TO PROVIDE EVEN COLORABLE SUBJECT MATTER, BECAUSE APPELLEE HAD NEVER AT ANY TIME, EVER PROVIDED ANY EVIDENCE TO ESTABLISH THE EXISTENCE OF ANY SUBJECT MATTER IN THE LOWER COURT."

VII

{¶16} "IT WAS ERROR FOR THE LOWER COURT TO GRANT SUMMARY JUDGMENT AND FORECLOSURE TO APPELLEE IN THIS MATTER BECAUSE, WITHOUT SUBJECT MATTER JURISDICTION EVERY ACT OF THE (SIC)."

{¶17} It is necessary to address the actual entry appealed from. All of the assignments of error attack the trial court's granting of summary judgment to appellee. The trial court originally granted summary judgment in favor of appellee as against appellant on October 25, 2007. On January 29, 2008, the trial court stayed the matter in anticipation of a settlement. On December 22, 2008, the trial court filed a renewed entry granting summary judgment and decree in foreclosure. Thereafter, on January 2, 2009, appellant filed a motion to set aside summary judgment and decree in

foreclosure. By entry filed January 29, 2009, the trial court denied the motion, finding the following:

{¶18} "The Court finds that an Evidentiary Hearing was held on September 15, 2008 on Defendant's Motion for Relief from Judgment pursuant to Civil Rule 60(B). Defendant could have raised any claims or defenses at that time. However, Defendant failed to appear at the hearing. Therefore, the Court finds Defendant's claims at this late date are not well-taken."

{¶19} On February 6, 2009 appellant filed his notice of appeal, citing the January 29, 2009 entry. Pursuant to App.R. 4(A), an appeal must be filed "within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure."

{¶20} Although appellant challenges the trial court's granting of summary judgment to appellee, we conclude the subject matter appealed from is limited to the trial court's January 29, 2009 denial of appellant's motion to set aside summary judgment and decree in foreclosure which in effect was a Civ.R. 60(B) motion for relief from judgment. It is under this standard of review that we shall examine the assignments of error.

{¶21} Civ.R. 60(B) states the following:

{¶22} "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; (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 (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; 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. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation."

{¶23} A motion for relief from judgment under Civ.R. 60(B) lies in the trial court's sound discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. In *GTE Automatic Electric Inc. v. ARC Industries,* Inc. (1976), 47 Ohio St.2d 146, paragraph two of the syllabus, the Supreme Court of Ohio held the following:

{¶24} "To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has 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."

I, II, III, IV, V, VI, VII

{¶25} Appellant's assignments of error will be reviewed collectively. As noted supra, the only entry appealed in a timely manner is the trial court's entry filed January 29, 2009. In said entry, the trial court denied appellant's motion to set aside the summary judgment ruling and decree in foreclosure. Appellant's motion filed January 2, 2009 set forth four issues to substantiate his arguments:

{¶26} "5. Further the court in granting Summary Judgment and Foreclosure to Plaintiff has erred, in that, Plaintiff, WACHOVIA BANK N.A.//CHASE MANHATTAN MORTGAGE has never at any time provided any evidence whatsoever to show a colorable interest in or equitable right to foreclose upon the Real Property of Defendant.

{¶27} "6. Further Defendants have entered and with this Motion do re-enter their sworn evidence that Plaintiff, WACHOVIA BANK N.A.//CHASE MANHATTAN do not posses (sic) and are neither the holders, nor the holders in due course of the bona fide original Debt Instrument or the Original Security Instrument in this matter.

{¶28} "7. The UNCONTESTED FACT that Plaintiff, WACHOVIA BANK N.A.//CHASE MANHATTAN has no right to foreclose upon the real property of Defendant is a matter of record and therefore stands to show that the Order, Judgment and Foreclosure, is Plain and Reversible Error, on the part of the Court.

{¶29} "8. Defendant therefore Moves the Court to Recall, Rescind, Reverse, and Set Aside the Order, Summary Judgment and Decree in Foreclosure, entered in error to

the benefit of Plaintiff WACHOVIA BANK N.A.//CHASE MANHATTAN on 22 December 2008."[1]

{¶30} By entry filed July 15, 2008, the trial court scheduled a hearing for September 15, 2008 to hear all of appellant's pleadings. The trial court stated "several of the pleadings are unsigned by the Defendant and are captioned In Admiralty Court and cite the Uniform Commercial Code." The trial court referred to these pleadings as "militia pleadings." All parties were ordered to be present. As the September 16, 2008 docket entry notes, appellant failed to appear. None of the issues presented in the various motions filed by appellant prior to the September 15, 2008 hearing were raised in appellant's January 2, 2009 motion.

{¶31} We note appellant never responded to the original motion for summary judgment which the trial court granted by entry filed October 25, 2007. On November 15, 2007, appellant filed a motion to deny motion for summary judgment. By entry filed November 16, 2007, the trial court accepted appellant's untimely filing and construed the filing as a Civ.R. 60(B) motion for relief from judgment, and set the matter for hearing, the September 15, 2008 hearing.

{¶32} We note a Civ.R. 60(B) motion for relief from judgment is not a substitute for appeal. *Doe v. Trumbull County Children Services Board* (1986), 28 Ohio St.3d 128, paragraph two of the syllabus. Appellant did not file an appeal on the trial court's September 16, 2008 entry denying his motion for relief from judgment or the trial court's December 22, 2008 entry renewing the granting of summary judgment and decree in

[1]Appellant also made arguments involving appellee's failure to file certain documents pursuant to trial court order. The trial court found appellee had complied with the order, but due to clerical error, were not placed in the file in a timely manner. See, Entry filed January 29, 2009.

foreclosure. Instead, appellant filed a motion on January 2, 2009 raising issues he never before raised in the matter.

{¶33} Pursuant to Civ.R. 60(B), appellant must demonstrate a reason to set aside an entry of the trial court. The only subsection applicable to appellant's arguments is (B)(5) which is "any other reason justifying relief from the judgment."

{¶34} Having raised a Civ.R. 60(B)(5) issue, appellant must establish a likelihood of success on the merits. Appellant argues appellee is not a real party of interest, is not a holder in due course of his note and mortgage, and is not entitled to summary judgment. Appellant supports his position by citing to a case from the United States District Court, *In Re Foreclosure Cases,* (N.D.Ohio 2007), Case Nos. 1:07CV2282, 07CV2532, 07CV2560, 07CV2602, 07CV2631, 07CV2638, 07CV2681, 07CV2695, 07CV2920, 07CV2930, 07CV2949, 07CV2950, 07CV3000, 07CV3029.

{¶35} Appellant argues that at the time of the filing of the complaint, appellee was not the holder or owner of the note and mortgage. Appellee does not contest the fact that the original note and mortgage were held by Chase Manhattan Mortgage Corporation. Said note was not filed with the complaint, but was filed on October 16, 2007 to fulfill the requirements of Civ.R. 10, prior to the trial court granting summary judgment. The final judicial report filed on October 17, 2008 demonstrates that the assignment of the note to appellee was signed on June 19, 2007 and recorded on June 29, 2007. At the time of the filing of the original complaint on June 14, 2007, appellee was not the holder of the note.

{¶36} Appellee was the real party of interest and holder of the note prior to any judgment entered via summary judgment. The affidavit filed by appellee with the motion for summary judgment established these facts.

{¶37} We note up to and including the summary judgment motion and subsequent entry, appellant never objected to the real party of interest or the holder of the note.

{¶38} Pursuant to Civ.R. 17(A), the real party of interest shall "prosecute" the claim. The rule does not state "file" the claim:

{¶39} "Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his name as such representative without joining with him the party for whose benefit the action is brought. When a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of this state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

{¶40} Furthermore, the trial court had subject matter jurisdiction regardless of who filed the action. It is undisputed that appellant signed the note, the note was in default, and the subject property was within the trial court's jurisdiction.

{¶41} Upon review, we find the trial court was correct in denying appellant's January 2, 2009 motion.

{¶42} Assignments of Error I, II, III, IV, V, VI, and VII are denied.

{¶43} The judgment of the Court of Common Pleas of Guernsey County, Ohio is hereby affirmed.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ John W. Wise

s/ Patricia A. Delaney

JUDGES

SGF/sg 0819

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

WACHOVIA BANK, N.A, AS TRUSTEE FOR CHASE MANHATTAN MORTGAGE 2003-4	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
GENE CIPRIANO, ET AL.	:	
Defendants-Appellants	:	CASE NO. 09CA007

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Guernsey County, Ohio is affirmed. Costs to appellant Gene Cipriano.

_s/ Sheila G. Farmer_____

__s/ John W. Wise_____

_s/ Patricia A. Delaney_____

JUDGES