[Cite as *Milton Banking Co. v. Dulaney*, 2010-Ohio-1907.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

The Milton Banking Company,	:	
Plaintiff-Appellant,	:	Case No: 09CA10
v.	:	
Brian W. Dulaney, et al.,	:	**DECISION AND JUDGMENT ENTRY**
Defendants-Appellees.	:	
and	:	
Chase Home Finances LLC, Successor By Merger to Chase Manhattan Mortgage Corporation,	:	
Plaintiff-Appellee,	:	
v.	:	File-Stamped Date: 4-28-10
Brian Dulaney, et al.,	:	
Defendants-Appellees.	:	

APPEARANCES:

Robert R. Miller, Wellston, Ohio, for Appellants.

William C. Martin, Jackson, Ohio, for Appellees, Brian and Shauna Dulaney.

Darryl E. Gormley, Twinsburg, Ohio, for Appellee, Chase Home Finance LLC.

Kline, J.:

{¶1} The Milton Banking Company ("MBC") and the First National Bank of Wellston ("Wellston") appeal the judgment of the trial court granting Chase Home Finance LLC ("Chase") relief from default judgment. On appeal, MBC and Wellston

contend that the trial court abused its discretion when it determined that the default judgment in this case was entered in violation of an automatic stay that applied to the homeowners, Brian and Shauna Dulaney. MBC and Wellston contend that the original default judgment against Chase adjudicated no interest of the Dulaneys, and therefore the judgment was not in violation of the automatic stay. We find that the original default judgment was entered in violation of the automatic stay, but we also find that it is a voidable judgment rather than a void judgment. As such, any relief from this judgment must satisfy the requirements of Civ.R. 60(B). The trial court failed to include any of the Civ.R. 60(B) findings in its order. Accordingly, we reverse the judgment of the trial court insofar as it fails to address the findings required under Civ.R. 60(B).

I.

{¶2} The present case is a combined appeal from two cases consolidated before the trial court.

{¶3} In the first case, MBC filed a complaint on October 10, 2006, to marshal liens against the Dulaneys' property, as well as to foreclose on its interest, naming, among other defendants, Chase. While this complaint was pending, the Dulaneys filed a petition in bankruptcy triggering the bankruptcy code's automatic stay provision. Chase failed to answer MBC's complaint, and so MBC eventually moved for a default judgment against Chase, which the trial court granted. As a result of that default judgment, the trial court cancelled Chase's mortgage in the Dulaneys' property.

{¶4} The Dulaneys' property was abandoned from the bankruptcy estate. And on January 23, 2008, Chase filed a complaint for foreclosure and declaratory judgment against the Dulaneys' property. This is the second action. MBC and Wellston were

both named as defendants in this complaint, and they filed motions to dismiss under Civ.R. 12(B)(6).

{¶5} On February 21, 2008, Chase filed a motion to vacate the default judgment in the first case pursuant to Civ.R. 60(B). Both the Civ.R. 12(B)(6) and Civ.R. 60(B) motions depended on similar legal issues. Chase contended that the default judgment was void because the Dulaneys had already entered bankruptcy before the trial court entered the default judgment. And therefore, the trial court entered the default judgment in violation of the automatic stay provision of the bankruptcy code. MBC argued that the default judgment was proper, and therefore MBC's motion to dismiss the second action under Civ.R. 12(B)(6) should have been granted. In a combined entry of June 26, 2008, the trial court found that its previous judgment granting default to MBC was void ab initio. The trial court granted Chase's motion for relief from judgment in the first case and denied MBC's motions to dismiss in the second case.

{¶6} MBC appealed this judgment to this court, but we found that this entry did not constitute a final appealable order. *Milton Banking Co. v. Dulaney*, 182 Ohio App.3d 634, 2009-Ohio-1939, at ¶8. On remand, the trial court issued a second judgment entry that incorporated its previous entry of June 26, 2008, but also added a finding that there was no just reason for delay under Civ.R. 54(B). Again, MBC appeals the entry of the trial court and raises the following assignments of error for our review: I. "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING CHASE HOME FINANCE LLC'S MOTION FOR RELIEF FROM JUDGMENT." II. "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE APPELLANTS' CIVIL RULE 12(B) MOTION." III. "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN

ORDERING A MARGINAL NOTE TO BE MADE UPON VOL. 12, PG. 1313 OF THE JACKSON COUNTY RECORD OF MORTGAGE AND THE RECORDER INDEX TO SHOW THE EFFECT OF THE TRIAL COURT'S ENTRY." IV. "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING IT HAD NO JURISDICTION TO ISSUE THE JUNE 8, 2007 DEFAULT JUDGMENT AGAINST CHASE MANHATTAN MORTGAGE CORPORATION AND THAT THE JUDGMENT OF JUNE 8, 2007 IS VOID AB INITIO AND VACATED." The Dulaneys have not filed a brief in the present appeal, but they have noted that they accept the position of MBC and Wellston.

II.

{¶7} MBC and Wellston raise four assignments of error, but their arguments concern the trial court's decisions on two separate types of motions, motions for relief from judgment under Civ.R. 60(B) and motions to dismiss under Civ.R. 12(B)(6). As such, we will separately consider those motions and organize our opinion accordingly.

A. Motions for Relief from Judgment under Civ.R. 60(B)

{¶8} We first review the trial court's decision to grant relief under Civ.R. 60(B). We review a trial court's decision to grant or deny a Civ.R. 60(B) motion for an abuse of discretion. *State ex rel. Russo v. Deters*, 80 Ohio St.3d 152, 153, 1997-Ohio-351. An abuse of discretion is more than an error in judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶9} "In order to prevail on a Civ.R. 60(B) motion for relief from judgment, the movant must establish 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.'" *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151, 1996-Ohio-54, quoting *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. "A failure to establish any one of the criteria will cause the motion to be denied." *Wine v. Wine*, Hocking App. No. 06CA6, 2006-Ohio-6995, at ¶10, citing *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174; *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20.

{¶10} The grounds for granting a motion under Civ.R. 60(B) are as follows: "(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." Civ.R. 60(B)(1)-(5).

{¶11} Chase argues that the trial court's default judgment was entered in violation of the automatic stay. "Filing a petition under the Bankruptcy Code * * * creates an estate consisting of all * * * of the debtor's property, broadly defined * * * at the moment of the filing and certain other property recaptured by the estate during the bankruptcy proceeding * * *. This property becomes the 'pot' from which all claims against the debtor * * * will be paid pursuant to the Code's priority scheme * * *. Commencement of

a suit automatically imposes a broad stay of other proceedings against the debtor and its property." *Chao v. Hosp. Staffing Services, Inc.* (C.A.6, 2001), 270 F.3d 374, 382 (internal citations omitted). This automatic stay provision protects debtors from harassment by creditors and protects creditors by preventing a rush to the courthouse. See *In re Meis-Nachtrab* (N.D.Ohio 1995), 190 B.R. 302, 306 ("The stay protects the debtor by allowing it breathing space and also protects creditors as a class from the possibility that one creditor will obtain payment on its claims to the detriment of all others."), citing *Chugach Timber Corp. v. N. Stevedoring & Handling Corp.* (C.A.9, 1994), 23 F.3d 241, 243 (other citations omitted). "The stay helps preserve what remains of the debtor's insolvent estate and [* * *] provide a systematic equitable liquidation procedure for all creditors, secured as well as unsecured, thereby preventing a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts." *Chao* at 382-83 (citations omitted).

{¶12} The automatic stay "operates as a stay applicable to all entities, of -- 1) the commencement or continuation * * * of a judicial * * * proceeding against the debtor that was * * * commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; * * * (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; (4) any act to create, perfect, or enforce any lien against property of the estate[.]" Section 362(a), Title 11, U.S.Code.

{¶13} "While the nature and extent of the debtor's interest are determined by state law once that determination is made, federal bankruptcy law dictates to what extent that

interest is property of the estate." *In re Terwilliger's Catering Plus, Inc.* (C.A.6., 1990), 911 F.2d 1168, 1172 (internal quotations omitted). "The legal and equitable title to mortgaged real estate remains in the mortgagor so long as the condition of the mortgage remains unbroken." *Levin v. Carney* (1954), 161 Ohio St. 513, 520. In addition, "[a]fter condition broken, the legal title as between the mortgagee and mortgagor is vested in the mortgagee, subject to the equity of redemption." Id. "'In the case of a mortgage in the usual form the legal estate remains in the mortgagor in possession, even after condition broken as to all the world, except the mortgagee.'" Id. at 519, quoting *Martin v. Alter* (1884), 42 Ohio St. 94, 98.

{¶14} In other words, the mortgagor, in this case the Dulaneys, maintained some legal and equitable interest in the property in question. The mortgagees (Chase, MBC, and Wellston) all gained an interest in the legal title of the property upon the condition broken.

{¶15} MBC and Wellston both argue that any interest that Chase possessed was separable from the property of the bankruptcy estate. The automatic stay only stays actions against the property of the debtor's estate, and the default judgment in the first case was against Chase's interest and not the debtor's interest. Milton and Wellston argue that therefore the default judgment did not violate the automatic stay. Therefore, Milton and Wellston conclude that the trial court abused its discretion in granting relief from its own valid final judgment.

{¶16} However, we have little difficulty in determining that the default judgment violated the automatic stay. When the trial court granted default judgment, it cancelled Chase's mortgage on the Dulaneys' property. *Milton Banking Co.* at ¶4. This

cancellation indicates that the nature of the action was one to enforce a security interest against property owned by the debtors. This clearly violates the automatic stay provision. Section 362(a)(4), Title 11, U.S.Code. The fact that the debtor benefited is immaterial. The automatic stay does not merely stay actions where a debtor loses. As we noted above, the automatic stay does not exist solely to protect the debtor. Rather, it exists to protect both the debtor and the creditors by providing for the orderly disposition of the debtor's assets.

{¶17} Therefore, we find that the default judgment entered in this case was entered in violation of Section 362(a)(4), Title 11, U.S.Code. There is some disagreement in the law of whether an order entered in violation of the automatic stay is a void or a voidable order. The significance of this distinction is that Civ.R. 60(B) has no application to void orders. Civ.R. 60(B) Staff Comment ("It should be noted that Rule 60(B), unlike Federal Rule 60(b), does not provide for vacation of a *void* judgment. * * * Any court has inherent power to vacate a void judgment[.] * * * In effect then Rule 60(B) deals with vacation of *voidable* judgments.") (emphasis sic); *Patton v. Diemer* (1988), 35 Ohio St.3d 68, at paragraph four of the syllabus.

{¶18} The United States Sixth Circuit Court of Appeals has previously held that actions that violate the automatic stay are merely voidable rather than void. *Easley v. Pettibone Michigan Corp.* (C.A.6, 1993) 990 F.2d 905, 909-10. However, a subsequent opinion of the Sixth Circuit has stated that actions that violate the stay are in fact void. See *Chao* at 384 (noting that actions that violate the automatic stay "will be declared void *ab initio*.").

{¶19} We are satisfied that the present law of the Sixth Circuit is that actions that violate the automatic stay are voidable rather than void. The later decision of the Sixth Circuit Court of Appeals cannot serve to overturn a prior decision. Loc.R. 206(c) of the Sixth Circuit Court of Appeals; see, also, *Salmi v. Sec. of Health and Human Services* (C.A.6, 1985) 774 F.2d 685, 689 ("A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision."). In any event, lower courts of the Sixth Circuit have generally followed *Easley* when considering whether actions that violate the automatic stay are voidable rather than void. See, e.g., *In re Sanderfer* (E.D.Tenn. 2004), 51 Collier Bankr.Cas.2d 1415; *In re Camacho* (E.D.Mich. 2004), 311 B.R. 186, 192; *In re Dupuy* (E.D.Tenn. 2004) 308 B.R. 843, 848; *In re Thompson* (S.D.Ohio 2001), 273 B.R. 143, 144; *In re Smith* (E.D.Mich. 1998), 224 B.R. 44, 46; *In re Elder-Beerman Stores Corp.* (S.D.Ohio 1996), 195 B.R. 1019, 1024. We find only two unpublished lower court decisions in the Sixth Circuit citing *Chao* for the principle that actions in violation of the automatic stay are void. *In re Moxon* (E.D.Mich. Mar. 31, 2006), Case No. 05-74864; *In re Moore* (N.D.Ohio Mar. 20, 2009), Case No. 08-11498.

{¶20} The Sixth Circuit in *Easley* noted that the majority of federal circuit courts of appeals concluded that actions that violate the automatic stay were void rather than voidable. *Easley* at 909, citing *Raymark Industries, Inc. v. Lai* (C.A.3, 1992), 973 F.2d 1125, 1132; *In re Schwartz* (C.A.9, 1992), 954 F.2d 569, 574; *In re Calder* (C.A.10, 1990), 907 F.2d 953, 956; *In re 48th Street Steakhouse, Inc.* (C.A.2, 1987), 835 F.2d 427, 431; *Matthews v. Rosene* (C.A.7, 1984), 739 F.2d 249, 251; *In re Smith Corset*

Shops, Inc. (C.A.1, 1982), 696 F.2d 971, 976; *Borg-Warner Acceptance Corp. v. Hall* (C.A.11, 1982), 685 F.2d 1306, 1308. The Fifth and the Sixth Circuit Courts of Appeals have held that actions that violate the automatic stay are voidable rather than void. *Easley* at 909, citing *Sikes v. Global Marine* (C.A.5, 1989), 881 F.2d 176, 178. The Federal Circuit Court of Appeals, in an unclear opinion, appears to follow the Fifth and Sixth Circuits. *Bronson v. United States* (F.C.C.A.1995), 46 F.3d 1573, 1578-79 (stating "[w]e do not accept a general rule of 'voidness' of all violations of the automatic stay").

{¶21} The Federal Circuit noted that the United States Supreme Court had previously characterized actions undertaken in violation of the automatic stay as being void. Id. at 1577, citing *Kalb v. Feuerstein* (1940), 308 U.S. 433, 438. The *Bronson*, *Easley*, and *Sikes* Courts distinguished *Kalb* on the basis of changes in the Bankruptcy Code. *Bronson* at 1578; *Easley* at 911; *Sikes* at 179, fn. 2. In 1978, the United States Congress enacted the Bankruptcy Reform Act, and one of the provisions of this act afforded a bankruptcy court the authority to annul the automatic stay. *Easley* at 911, fn. 4. This order to annul the automatic stay may "operate retroactively, thus validating actions taken by a party at a time when he was unaware of the stay." *Easley* at 910 (internal quotations omitted).

{¶22} The Sixth Circuit reasoned that void meant "'an instrument or transaction [that] is nugatory and ineffectual so that nothing can cure it,'" and void also meant "'of no legal force or effect and so incapable of confirmation or ratification.'" *Easley* at 909 (alterations in original), citing Black's Law Dictionary (6 Ed.1990) 1573; Webster's Third International Dictionary (1971) 2562. By contrast voidable meant "'not void in itself'" and also "'capable of being adjudged void, invalid, and of no force[.]'" *Easley* at 909,

citing Black's Law Dictionary (6th ed. 1990) 1574, Webster's Third International Dictionary (1971) 2562. Therefore, the Sixth Circuit reasoned that if the bankruptcy court could issue an order retroactively validating transactions that violate the automatic stay, then those transactions must be voidable rather than void. For if they were void, then under the definitions cited, any attempt to validate them would be ineffectual.

{¶23} Ohio Courts have also split in considering this issue. The First, Second, Third, and Eighth District Courts of Appeals have held that actions undertaken in violation of the automatic stay are void. *Curtis v. Payton* (Feb. 5, 1999), Greene App. No. 98-CV-49; *Hershberger v. Morgan* (1996), 112 Ohio App.3d 105, 107; *Salem v. Central Trust Co.* (1995), 102 Ohio App.3d 672, 675; *Lowenborg v. Oglebay Norton Co.*, Cuyahoga App. Nos. 88396 & 88397, 2007-Ohio-3408, at ¶30. However, the Ninth and Tenth District Courts of Appeals have held that actions that violate the automatic stay are merely voidable. *Cardinal Federal Sav. & Loan Assn. v. Michaels Bldg. Co.* (May 8, 1991), Summit App. No. 14521; *US Bank Nat. Assn. v. Collier*, Franklin App. No. 08AP-207, 2008-Ohio-6817, at ¶36.

{¶24} The Sixth Circuit's determination is not binding on this court. However, it is binding on the federal bankruptcy and district courts of Ohio. Notwithstanding the fractured state of the law, we believe that we would best promote uniformity in the law by finding that actions taken in violation of the automatic stay are voidable rather than void. As such, we defer to the determination of the Sixth Circuit Court of Appeals. Were we to do otherwise, orders could be determined to be void or voidable depending on whether the litigant was in federal or state court. Of course, in any action spanning

both courts, the federal construction will control because of the Supremacy Clause. *Chao* at 384, citing *Raymark Industries* at 1132.

{¶25} Therefore, we find that the trial court erred when it determined that the order issued in this case is void ab initio. But "'[b]y repeated decisions of this court it is the definitely established law of this state that where the judgment is correct, a reviewing court is not authorized to reverse such judgment merely because erroneous reasons were assigned as a basis thereof.'" *State v. Chesser*, Athens App. No. 06CA18, 2006-Ohio-6297, at ¶19, quoting *Hayes v. City of Toledo* (1989), 62 Ohio App.3d 651, 653 (other citations omitted). Consequently, we must consider whether the trial court's order may satisfy the requirements of Civ.R. 60(B).

{¶26} The law is well settled in Ohio that, although a court may vacate a void order on the basis of inherent authority, Civ.R. 60(B) provides the exclusive means of vacating voidable judgments. Civ.R. 60(B) ("The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules."); *Sperry v. Hlutke* (1984), 19 Ohio App.3d 156, 158. See, also, *In re Bowers*, Franklin App. No. 07AP-49, 2007-Ohio-5969, at ¶9; *Thomas v. Fick* (June 7, 2000), Summit App. No. 19595; *McIntyre v. Braydich* (Dec. 5, 1997), Trumbull App. No. 96-T-5602; *Davis v. Davis* (Mar. 26, 1992), Cuyahoga App. Nos. 60224 & 60751.

{¶27} We therefore look to the order issued by the trial court in this case to determine whether its findings satisfy the requirements of *GTE Automatic Elec., Inc*. The order's finding that the default judgment was entered in violation of the automatic stay might satisfy Civ.R. 60(B)(5). Chase apparently has made arguments under the other grounds for relief listed in Civ.R. 60(B), but neither side has provided us with the

original motions. Even though the order might establish the existence of grounds for relief under Civ.R. 60(B)(5), nothing in the order establishes either that Chase had a meritorious claim or defense or that the motion was made within a reasonable time. As such, we sustain MBC and Wellston's first, third, and fourth assignments of error.

B. Motions to Dismiss under Civ.R. 12(B)(6)

{¶28} We overrule MBC and Wellston's assignments of error in regard to their Civ.R. 12(B)(6) motions at this time. A motion to dismiss under Civ.R. 12(B)(6) tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. Of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73. Furthermore, "[i]n determining whether a complaint states a claim upon which relief may be granted, all factual allegations are presumed to be true and all reasonable inferences are made in favor of the nonmoving party." *Lovett v. Carlisle*, 179 Ohio App.3d 182, 2008-Ohio-5852, at ¶10 (citations omitted). However, the record sent from the trial court contains neither the motions to dismiss nor the original complaint in the second action. As such, the record does not contain items necessary for our review of this assignment of error, and we therefore presume the regularity of the proceedings below and affirm the judgment of the trial court. See, e.g., *Rini v. Dyer*, Scioto App. No. 07CA3180, 2008-Ohio-4172, at ¶23, citing *Natl. City Bank v. Beyer*, 89 Ohio St.3d 152, 160, 2000-Ohio-126. We, therefore, overrule MBC and Wellston's second assignment of error.

III.

{¶29} In conclusion, we sustain MBC and Wellston's first, third, and fourth assignments of error insofar as the trial court failed to address the findings required under Civ.R. 60(B). We overrule MBC and Wellston's second assignment of error.

Accordingly, we affirm in part and reverse in part the judgment of the trial court. This cause is remanded to the trial court for further proceedings consistent with this opinion.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED IN PART, REVERSED IN PART, and this cause BE REMANDED to the trial court for further proceedings consistent with this opinion. Appellants shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Jackson County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J.: Concurs in Judgment and Opinion.
McFarland, P.J.: Concurs in Judgment Only as to Assignment of Error I, III, IV; Dissents as to Assignment of Error II.

For the Court

BY:_____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.