[Cite as *Natl. City Bank v. Abundant Life Apostolic Church* , 2004-Ohio-5372.]

[Please see amended decision at 2004-Ohio-5716.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

NATIONAL CITY BANK Appellee v. ABUNDANT LIFE APOSTOLIC, et al. Appellants	C.A. No. 04CA008447 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 03CV133947

DECISION AND JOURNAL ENTRY

Dated: October 6, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Presiding Judge.

{¶1} Defendant-Appellant Abundant Life Apostolic Church has appealed the decisions of the Lorain County Court of Common Pleas that granted summary judgment to Plaintiff-Appellee National City Bank; denied Appellant's motions for relief from judgment; and denied Appellant's motion for leave to file a brief in opposition to Appellee's motion for summary judgment. This Court affirms.

I

{¶2} On January 21, 2003, Plaintiff-Appellee National City Bank filed suit for money judgment and foreclosure against Defendant-Appellant Abundant Life Apostolic Church. In its lawsuit, Appellee claimed that it was the holder of promissory note No. 1065762, executed by Appellant on August 22, 1997, along with mortgage No. 486681, executed by Appellant on August 29, 1997. Appellee further alleged that the mortgage secured the promissory note with certain real property owned by Appellant, and that as a result of Appellant's default on the note and mortgage, $445,083.36 plus interest was due and owing. Appellant answered Appellee's complaint on April 14, 2003. On April 23, 2003, Appellee filed a motion for summary judgment. Appellant did not respond to Appellee's motion for summary judgment and the trial court granted Appellee's motion on May 14, 2003.

{¶3} On May 20, 2003, Appellant filed a motion styled "Motion for Relief from Judgment Instanter, and Motion for Pre-Trial [t]o Schedule Discovery and Briefing Schedule for Brief in Opposition." In this motion, Appellant set forth its arguments in support of its request for relief from judgment, as well as its arguments in response to Appellee's motion for summary judgment. On August 14, 2003, a hearing on Appellant's May 20, 2003 motion for relief from judgment was held at which time the trial court denied Appellant's motion. On August 22, 2003, Appellant filed a motion styled "Brief in Opposition to [Appellee's] Motion for Summary Judgment[.]" On August 28, 2003, Appellant filed its second

motion for relief from judgment styled "Motion for Relief from Judgment Instanter, and Motion for Pre-Trial [t]o Schedule Discovery and Briefing Schedule[.]" In this motion, Appellant requested relief from the trial court's August 14, 2003 decision denying Appellants May 20, 2003 motion for relief from judgment. On August 29, 2003, the trial court denied Appellant's August 28, 2003 motion for relief from judgment and struck Appellant's August 22, 2003 responsive pleading to Appellee's motion for summary judgment. When it struck Appellant's August 22, 2003 motion from the record, the trial court stated that the motion was moot because, by the time the responsive pleading was filed, the trial court had already granted Appellee's motion for summary judgment.

{¶4} Appellant timely appealed the trial court's decision. On November 5, 2003, this Court dismissed Appellant's appeal because the judgment from which it had appealed was not a final, appealable order. On December 12, 2003, Appellant filed a third motion for relief from judgment. This motion requested relief from the trial court's August 29, 2003 decision denying relief from judgment. The trial court denied Appellant's motion on January 7, 2004, and ordered Appellee to submit its foreclosure entry to the trial court. On January 16, 2004, the trial court amended, nunc pro tunc, its May 14, 2003 decision to include Civ.R. 54(B) language that "[t]here is no just reason for delay." On February 13, 2004, Appellant timely appealed the trial court's May 14, 2003 decision granting summary judgment to Appellee, as well as its August 14, 2003 and August 28,

2003 decisions denying Appellant's two separate motions for relief from judgment. Appellant has asserted four assignments of error. We have consolidated two of its assignments of error for ease of analysis.

I

Assignment of Error Number One

> "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT GRANTED [APPELLEE'S] MOTION FOR SUMMARY JUDGMENT, AS GENUINE ISSUES OF MATERIAL FACT EXISTED."

{¶5} In its first assignment of error, Appellant has argued that the trial court erred when it granted summary judgment to Appellee. Specifically, Appellant has argued that even though it did not respond to Appellee's motion for summary judgment, Appellee's evidence in support of its motion for summary judgment created a genuine issue of material fact. We disagree.

{¶6} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12. Pursuant to Civil Rule 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that

conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶7} The party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying portions of the record that demonstrate an absence of a genuine issue of material fact as to some essential element of the nonmoving party's claim. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. To support the motion, such evidence must be present in the record and of the type listed in Civ.R. 56(C). Id.

{¶8} Once the moving party's burden has been satisfied, the burden shifts to the non-moving party, as set forth in Civ.R. 56(E). Id. at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings, but instead must point to or submit some evidentiary material to demonstrate a genuine dispute over the material facts. *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115.

{¶9} Furthermore, "an appellate court must affirm summary judgment if there were any grounds to support it." *Ashley v. Baird*, 9th Dist. No. 21364, 2003-Ohio-2711, at ¶12, citing *McKay v. Cutlip* (1992), 80 Ohio App.3d 487, 491.

{¶10} In the instant matter, Appellant has argued that summary judgment was improper because a genuine issue of material fact existed as to whether or not its debt to Appellee had been satisfied. In response, Appellee has argued that its motion for summary judgment presented substantial, unrefuted evidence that

Appellant was in default on its promissory note and mortgage held by Appellee, and that Appellee was therefore entitled to summary judgment.

{¶11} Our review of the record reveals that Appellee's cause of action stemmed from Appellant's default on mortgage No. 486681. In its motion for summary judgment, Appellee argued that because of Appellant's default on the note and mortgage, Appellee was entitled to a judgment of foreclosure on mortgage No. 486681. In support of its argument, Appellee attached an affidavit from Joan Wane ("Wane"), an employee of Appellee and the supervisor of Appellant's loan, to its motion for summary judgment. In her affidavit, Wane stated that Appellant was in default of promissory note No. 1065762 which was secured by mortgage No. 486681; that the balance of said note had been accelerated; and that as a result, $445,083.36 plus interest was due and owing on the note. Appellant did not respond to Appellee's motion for summary judgment.

{¶12} This Court has previously held that "[i]n the absence of evidence controverting the averments as to the amount owed, an affidavit stating simply that the loan is in default is sufficient for purposes of Civ.R. 56." *Charter One Mtge. Corp. v. Keselica*, 9th Dist. No. 04CA008426, 2004-Ohio-4333, ¶16. As Appellant failed to refute Appellee's assertion that it owned Appellee $445,083.36 pursuant to the terms of the promissory note, Wane's affidavit served to establish the amount that was due and owing on Appellant's note and mortgage. Id.; see, also, *Dresher*, 75 Ohio St.3d at 293. As a result, we conclude that reasonable

minds could come to but one conclusion, namely that Appellee was entitled to judgment as a matter of law on its complaint for money judgment and foreclosure. Appellant's first assignment of error lacks merit.

Assignment of Error Number Two

> "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT REFUSED TO GRANT [APPELLANT'S] MOTION FOR RELIEF FROM JUDGMENT, WHEREIN IT SPECIFICALLY SET FORTH [APPELLANT'S] QUESTION OF MATERIAL FACT, (RELEASE OF MORTGAGE AS RECORDED) AND THEN DECIDED SAME, WHEREBY IMPROPERLY DECIDING QUESTIONS OF FACT.

Assignment of Error Number Three

> "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND AN ABUSE OF DISCRETION WHEN IT REFUSED TO GRANT [APPELLANT'S] MOTION FOR RELIEF FROM JUDGMENT, AS [APPELLANT] HAD PROPERLY SET FORTH A BASIS TO GRANT SAME.

{¶13} In its second and third assignments of error, Appellant has argued that the trial court abused its discretion when it refused to grant Appellant's motion for relief from judgment pursuant to Civ.R. 60(B). Specifically, Appellant has argued that it presented sufficient evidence that its claim for relief should have been granted because its claim met the legal test as set forth in *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. We disagree.

{¶14} Civ.R. 60(B) governs motions for relief from judgment, and 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; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under [Civ.R 59(B)]; (3) fraud ***, 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." (Alterations sic.)

{¶15} A movant must demonstrate three factors in order to obtain relief from judgment pursuant to Civ.R. 60(B): (1) a meritorious defense or claim if relief is granted; (2) entitlement to relief under Civ.R. 60(B)(1)-(5); and (3) that the motion was filed within a reasonable time, with a maximum time being one year from the entry of judgment if the movant alleges entitlement to relief under Civ.R. 60(B)(1)-(3). *GTE*, 47 Ohio St.2d 146, paragraph two of the syllabus. "These requirements are independent of one another and in the conjunctive." *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174. Thus, if the movant fails to satisfy any one of these requirements, the trial court must deny the motion. Id.

{¶16} The standard of review used to evaluate the trial court's decision to deny or grant a Civ.R. 60(B) motion is an abuse of discretion. *State ex rel. Russo v. Deters* (1997), 80 Ohio St.3d 152, 153. 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. The court abuses its discretion if it grants relief in a case where the movant has not demonstrated all three factors in its motion. *Mitchell v. Mill Creek Sparkle Mkt., Inc.* (June 29, 1999), 7th Dist. No. 97 CA 230, 1999 Ohio App LEXIS 3153, at *4, citing *Russo*, 80 Ohio St.3d at 154. If, however, the materials submitted by the parties clearly establish the movant is entitled to relief, then the motion should be granted. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 104.

{¶17} In Appellant's first motion for relief from judgment, filed May 20, 2003, Appellant asked the trial court to vacate its decision granting summary judgment to Appellee because "the claims of [Appellee] have been previously satisfied and a satisfaction of mortgage has been previously given to [Appellant] by [Appellee]." In response, Appellee argued that although Appellant presented evidence that a mortgage had been satisfied, said evidence showed that a mortgage other than mortgage No. 486681 had been satisfied.

{¶18} In support of its argument that mortgage No. 486681 had been satisfied, Appellee relied upon a document entitled "Satisfaction of Mortgage" which it attached to its May 20, 2003 motion for relief from judgment. The "Satisfaction of Mortgage" document appears to have been issued by a bank. However, the "Satisfaction of Mortgage" document related to mortgage No. 970485410 bearing the date August 22, 1997. The mortgage which gave rise to the instant appeal was mortgage No. 486681 bearing the date August 29, 1997.

Assuming, arguendo, that the "Satisfaction of Mortgage" document proved that a mortgage had been satisfied, it failed to prove that mortgage No.486681, the mortgage at issue in the instant matter, had been satisfied. The "Satisfaction of Mortgage" document relied upon by Appellant is irrelevant to the instant matter and failed to show that Appellant had a meritorious defense if relief were granted pursuant to Civ.R. 60(B). As a result, the trial court did not abuse its discretion when it denied Appellant's May 20, 2003 motion for relief from judgment.

{¶19} Next we turn to Appellant's August 28, 2003 motion for relief from judgment. In this motion, Appellant argued that it had "set forth in its [August 22, 2003] brief in opposition and memorandum in support a valid defense" to Appellee's motion for summary judgment. However, by journal entry dated August 29, 2003, the trial court struck Appellant's August 22, 2003 brief from the record. Because Appellant's August 22, 2003 brief was not in the record and properly before the trial court, this Court must disregard any arguments presented in the brief. *State v. Iafornano*, 9th Dist. No. 01CA007967, 2002-Ohio-5550, ¶41; see, also, App.R. 9(A). As Appellant relied upon its August 22, 2003 brief to support its claim that it had a meritorious defense if relief were granted pursuant to Civ.R. 60(B), the trial court did not abuse its discretion when it denied Appellant's August 28, 2003 motion for relief from judgment.

{¶20} Appellant's second and third assignments of error are without merit.

Assignment of Error Number Four

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND AN ABUSE OF DISCRETION WHEN IT REFUSED TO GRANT [APPELLANT'S] MOTION FOR LEAVE TO FILE A BRIEF IN OPPOSITION TO [APPELLEE'S] MOTION FOR SUMMARY JUDGMENT."

{¶21} In its fourth assignment of error, Appellant has argued that the trial court abused its discretion when it refused to grant its motion for leave to file a brief in opposition to Appellee's motion for summary judgment. Specifically, Appellant has argued that it should have been permitted to file a response to Appellee's motion for summary judgment even after the trial court had already granted Appellee's motion for summary judgment. We disagree.

{¶22} Our careful review of the record reveals that Appellant never responded to Appellee's motion for summary judgment. In addition, Appellant did not request an extension of time in order to respond to Appellee's motion for summary judgment, nor did it file a motion requesting leave to file a brief in opposition to Appellee's motion for summary judgment. Thus we are perplexed as to how the trial court could have abused its discretion by denying a motion that was never filed.[1]

[1] Appellant appears to have argued that its practice of incorporating its response to Appellee's motion for summary judgment into its motions for relief from judgment should be construed as filing a motion requesting leave to file. We reject this interpretation. Instead, we see Appellant's practice of incorporation as an attempt to bypass the requirements of Civ.R. 56(E) and bootstrap its untimely response to Appellee's motion for summary judgment to its motions for relief from judgment.

{¶23} Based on the foregoing, the trial court was well within its sound discretion when it struck Appellant's August 22, 2003 motion in response to Appellee's motion for summary judgment as moot. Appellant's fourth assignment of error is without merit.

III

{¶24} Appellant's four assignments of error are overruled. The judgment of the trial court is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this

judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

BETH WHITMORE
FOR THE COURT

SLABY, J.
BATCHELDER, J.
CONCUR

APPEARANCES:

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