

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

OneWest Bank, FSB

Court of Appeals No. WD-13-092

Appellee

Trial Court No. 12 CV 454

v.

Arlene Boyer, et al.

DECISION AND JUDGMENT

Appellant

Decided: June 5, 2015

* * * * *

Bill L. Purtell, for appellee.

Arlene Boyer, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an accelerated appeal from a judgment of the Wood County Court of Common Pleas in an action in foreclosure. Pro se defendant-appellant, Arlene Boyer, appeals the trial court's order that denied a motion for a stay of the sale of the property, denied a Civ.R. 60(B) "motion to dismiss" the award of summary judgment to appellee,

OneWest Bank, FSB, and denied a motion for a hearing. Appellant now challenges that judgment through the following assignments of error:

Assignment of Error #1

The trial court erred in the denial of a motion for a stay of the sale of the property until the Defendant Appellate [sic] could appeal the denial of her 60(B) motion to dismiss the September 18, 2013 award of summary judgment and decree in foreclosure to appellee violating the Defendant-Appellant's rights to due process and equal protection under the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Art I § 16 of the Ohio Constitution.

Assignment of Error #2

The trial court erred in the denial of the Defendant-Appellant's 60(B) motion to dismiss the September 18, 2013 award of summary judgment and decree in foreclosure to appellee violating Defendant-Appellant's rights of due process and equal protection under the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Art I § 16 of the Ohio Constitution.

Assignment of Error #3

The trial court erred in the denial of the Defendant-Appellant's motion for a hearing on the 60(B) motion to dismiss the September 18, 2013 award of summary judgment and decree in foreclosure to appellee

violating the Defendant-Appellant's rights to due process and equal protection under the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Art I § 16 of the Ohio Constitution.

{¶ 2} The undisputed facts of this case are as follows. On June 21, 2012, appellee filed an action in foreclosure against appellant to obtain judgment upon a home equity conversion note and to foreclose the lien on a mortgage securing the obligations of the note. The mortgage lien was upon real property located in Custar, Wood County, Ohio. The foreclosure action was filed in response to appellant's failure to maintain insurance on the property, which constituted a material default under the terms of the loan agreement.

{¶ 3} The parties were unsuccessful in their attempts to settle the case, and on September 18, 2013, the lower court granted appellee's motion for summary judgment, finding that appellee was entitled to a judgment and decree of foreclosure as a matter of law. The court awarded appellee a judgment of \$46,153.35 on the mortgage note, found that the note was secured by the mortgage on the property, and issued a decree in foreclosure and reformation of the mortgage in rem. The judgment provided that unless the sums owing appellee and the costs of the foreclosure action were paid within three days of the judgment, "the equity of redemption of the defendant-titleholders in said real estate shall be foreclosed and the real estate sold, free of the interests of all parties herein, and an order of sale may issue to the Sheriff of this County, directing him to appraise, advertise and sell said real estate * * *."

{¶ 4} Appellant did not file a notice of appeal from the September 18, 2013 judgment, and on November 1, 2013, the lower court issued an order of sale for the property. Then, on December 2, 2013, appellant filed a Civ.R. 60(B) “motion to dismiss summary judgment and the cause of action in its entirety * * *.” She also filed a “motion for an Eight Amendment to the U.S.A. Constitution, excessive fine hearing,” and on December 13, 2013, filed a “request for emergency injunctive relief.” On December 18, 2013, the lower court issued an order denying all three motions. It is from that judgment that appellant filed her notice of appeal.

{¶ 5} In her first assignment of error, appellant asserts that the lower court erred in denying her motion to stay the sale of the property until she could appeal that court’s denial of her motion for relief from judgment.

{¶ 6} R.C. 2505.09, in conjunction with App.R. 7, provides that for a party to obtain a stay of execution of a judgment, the party must first request the stay in the trial court and post a supersedeas bond in an amount not less than the amount of the final judgment and interest. “Determining the need for the bond and its amount are discretionary matters which will not be overturned by the appellate court absent a showing of an abuse of discretion.” *Bibb v. Home Savings and Loan Co.*, 63 Ohio App.3d 751, 752, 580 N.E.2d 52 (6th Dist.1989).

{¶ 7} In the court below, appellant filed her request to stay the sale of the property but did not post a supersedeas bond. The court denied the request. Given appellant’s failure to post a bond, we cannot find that the lower court abused its discretion in denying

the request. It is worth noting that App.R. 7 allows a party to request a stay in this court once it has been denied by the trial court. In the present case, appellant filed a request to stay the sheriff's sale in this court on January 9, 2014. The property, however, had already been sold at a sheriff's sale on January 2, 2014. Accordingly, we denied appellant's motion as moot.

{¶ 8} The first assignment of error is not well-taken.

{¶ 9} Appellant's second and third assignments of error are related and will be discussed together. Appellant contends that the lower court erred in denying her Civ.R. 60(B) "motion to dismiss" and erred in failing to grant her a hearing on the motion.

{¶ 10} It is well-settled that "[a] motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion." *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987). An abuse of discretion implies that the court's attitude in reaching its decision was unreasonable, unconscionable or arbitrary. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 11} Civ.R. 60(B) provides that a court may relieve a party from a final judgment upon a showing of:

- (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.

{¶ 12} In order to obtain relief from judgment pursuant to Civ.R. 60(B), a 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 Elec., Inc. v. ARC Indus., Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

{¶ 13} Relief pursuant to Civ.R. 60(B) will be denied if the movant fails to adequately demonstrate any one of the requirements set forth in *GTE. Argo Plastic Prods. Co. v. Cleveland*, 15 Ohio St.3d 389, 391, 474 N.E.2d 328 (1984). “Although a movant is not required to support its motion with evidentiary materials, the movant must do more than make bare allegations that he or she is entitled to relief.” *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996), citing *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988). Moreover, a party moving

for relief under Civ.R. 60(B) is not automatically entitled to a hearing on the motion. Rather, to be entitled to a hearing on the motion, the party must allege operative facts that would warrant relief from judgment. *Bank of America v. McLaughlin*, 6th Dist. Erie No. E-11-057, 2012-Ohio-2341, ¶ 22. “Thus, in order to convince the court that it is in the best interests of justice to set aside the judgment or to grant a hearing, the movant may decide to submit evidentiary materials in support of its motion.” *Kay, supra*, at 20.

{¶ 14} In her motion for relief from judgment in the court below, appellant presented a rambling, nearly unintelligible argument unsupported by any factual allegations or evidentiary materials. She did not demonstrate entitlement to relief under any section of Civ.R. 60(B), and, other than in the caption of the motion, did not refer to the rule at any point in her motion. In her brief before this court, appellant primarily contests the trial court’s order granting summary judgment to appellee and asserts that genuine issues of material fact remain. As appellant never properly appealed that order, she cannot now challenge the trial court’s granting of summary judgment to appellee. Appellant further asserts that she has established a prima facie case for relief under Civ.R. 60(B)(3), fraud. Again, however, she has not alleged operative facts that would warrant relief from judgment. Accordingly, we cannot find that the lower court abused its discretion in denying appellant’s motion for relief from judgment or in failing to hold a hearing on the motion. The second and third assignments of error are not well-taken.

{¶ 15} On consideration whereof, we find that substantial justice has been done the party complaining and the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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