

[Cite as *GMAC Mtge., L.L.C. v. Lee*, 2012-Ohio-1157.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| GMAC Mortgage, LLC,                            | : |  |
| Plaintiff-Appellee,                            | : |  |
| v.   | : |  |
| Robert E. Lee,                                 | : | No. 11AP-796<br>(C.P.C. No. 10CVE-02-1672) |
| Defendant-Appellant,                           | : | (REGULAR CALENDAR)                         |
| State of Ohio, Department of Taxation et al.,: |   |  |
| Defendants-Appellees.                          | : |  |

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D E C I S I O N

Rendered on March 20, 2012

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*Carpenter Lipps & Leland LLP, David A. Wallace, and Joel E. Sechler, for plaintiff-appellee.*

*Jump Legal Group, LLC, John Sherrod, and Sarah Williams, for defendant-appellant.*

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**APPEAL from the Franklin County Court of Common Pleas.**

FRENCH, J.

{¶ 1} Defendant-appellant, Robert E. Lee ("Lee"), appeals the judgment of the Franklin County Court of Common Pleas, which denied his second motion for relief from judgment, in a foreclosure action initiated by plaintiff-appellee, GMAC Mortgage, LLC ("GMAC"). For the following reasons, we affirm.

## **I. BACKGROUND**

{¶ 2} GMAC filed its foreclosure complaint against Lee on February 3, 2010, and Lee was personally served on February 9, 2010. Lee responded by filing a request for mediation and for an extension of time to answer on February 26, 2010. The trial court referred this matter for mediation and ordered all proceedings stayed pending mediation. A mediation outcome report, filed April 12, 2010, indicated that the parties were unable to resolve this case.

{¶ 3} On May 18, 2010, GMAC filed a motion for default judgment. GMAC's certificate of service indicates that GMAC mailed a copy of its motion to Lee on May 17, 2010. The trial court granted GMAC's motion and entered a default judgment and decree of foreclosure on May 21, 2010. Lee did not appeal the judgment.

{¶ 4} On June 22, 2010, an attorney entered an appearance on behalf of Lee and filed a motion for relief from judgment and for leave to file an answer to GMAC's complaint. In his motion, Lee asserted that his family had agreed to provide assistance with his mortgage payment until he obtained employment. On July 29, 2010, the trial court issued a decision denying Lee's motion for relief from judgment. The court found that Lee did not demonstrate a meritorious defense or entitlement to relief under one of the bases set forth in Civ.R. 60(B). In its decision, the trial court instructed GMAC's counsel to prepare and submit a proposed judgment entry, but the trial court never filed a judgment entry denying Lee's motion. Lee did not file a notice of appeal regarding the denial of his motion for relief from judgment.

{¶ 5} GMAC purchased Lee's property at a sheriff's sale on August 27, 2010, and the trial court confirmed the sale on September 22, 2010.

{¶ 6} On February 14, 2011, one of Lee's current attorneys filed a notice of appearance, a second motion for relief from judgment, and a motion for an emergency stay. Lee's second motion for relief from judgment was broader in scope and raised different issues than his first. Whereas Lee's first motion asserted that relief was justified based on his family's agreement to assist with his mortgage payments, his second motion primarily argued that the default judgment was improper because he did

not receive at least seven days notice of GMAC's motion for default judgment, as required by Civ.R. 55(A). He also argued that he was entitled to relief (1) under Civ.R. 60(B)(1) as the result of excusable neglect, based on allegations that GMAC told him not to worry about the foreclosure lawsuit, and (2) under Civ.R. 60(B)(2) and (5) based on newly-discovered evidence that purportedly demonstrated that an affidavit submitted by GMAC was fraudulent and constituted a fraud on the court. As to the latter, Lee argued that the affiant, Jeffrey Stephan, a GMAC employee, was a "robo-signer" and that his affidavit was fraudulent, based upon documents from other cases, and other states, involving affidavits signed by Stephan. Lee alleged, as a meritorious defense, that GMAC may lack standing to pursue foreclosure because the assignment to GMAC was "potentially invalid."

{¶ 7} The trial court denied Lee's motions for relief from judgment and for a stay on April 25, 2011. The court did not discuss the notice requirement of Civ.R. 55(A) but found that Lee failed to establish either that he filed his motion for relief from judgment within a reasonable time or that he had a meritorious defense to GMAC's claims. The trial court issued a final judgment entry denying Lee's motions on August 23, 2011, and Lee filed a notice of appeal.

## **II. ASSIGNMENTS OF ERROR**

{¶ 8} Lee asserts the following assignments of error:

1. The trial court erred by failing to void its judgment entry as void *ab initio* since [Lee] did not receive service of the motion for default judgment until after the trial court granted it, despite that he had appeared in the action prior to the filing of the motion for default judgment.
2. The trial court abused its discretion in denying [Lee's] motion for relief from judgment pursuant to Civ. R. 60(B).
3. The trial court erred in entering default judgment against [Lee] without affording him due process of law.
4. The trial court erred by failing to hold an oral hearing on [Lee's] motion for relief from judgment.

### III. DISCUSSION

#### A. First Assignment of Error

{¶ 9} By his first assignment of error, Lee argues that the default judgment is void ab initio. The authority to vacate a void judgment is an inherent power possessed by Ohio courts and is not derived from Civ.R. 60(B). *Patton v. Diemer*, 35 Ohio St.3d 68 (1988), paragraph four of the syllabus. A void judgment "cannot be vitalized by the failure to appeal," and vacation of a void judgment does not depend upon compliance with Civ.R. 60(B). *Miller v. Miller*, 154 Ohio St. 530, 539 (1951); *Freedom Mtge. Corp. v. Mullins*, 10th Dist. No. 08AP-761, 2009-Ohio-4482, ¶ 19. Accordingly, we consider whether the trial court's default judgment is void and, therefore, subject to vacation despite Lee's failure to appeal that judgment and regardless of whether Lee satisfied the requirements for relief under Civ.R. 60(B).

{¶ 10} Lee argues that the default judgment is void because the trial court did not afford him the notice required by Civ.R. 55(A). With respect to entry of default judgment, Civ.R. 55(A) provides, in pertinent part, as follows:

If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application.

By its plain language, Civ.R. 55(A) prohibits a default judgment against a party who has "appeared in the action" unless that party receives written notice of the application for judgment at least seven days prior to the hearing on the application. *Am. Communications of Ohio, Inc. v. Hussein*, 10th Dist. No. 11AP-352, 2011-Ohio-6766, ¶ 9. When the trial court fails to comply with Civ.R. 55(A), entry of default judgment is improper. *AMCA Internatl. Corp. v. Carlton*, 10 Ohio St.3d 88, 91 (1984).

{¶ 11} Applicability of the Civ.R. 55(A) notice requirement hinges on whether Lee appeared in this action, despite his failure to file an answer. We liberally construe the term "appeared" when applying Civ.R. 55(A). *Am. Communications* at ¶ 10, citing *Columbus Mgt. Co. v. Nichols*, 10th Dist. No. 92AP-191 (Aug. 4, 1992). Ohio courts, for example, have held that a defendant's settlement negotiations with the plaintiff's

attorney constituted an appearance, as did an exchange of letters in which a defendant expressed an intention to contest a claim. *See Am. Communications* at ¶ 11, citing *Miami Sys. Corp. v. Dry Cleaning Computer Sys., Inc.*, 90 Ohio App.3d 181, 185 (1st Dist.1993) and *Justice v. Sears, Roebuck & Co.*, 2d Dist. No. 8658 (Sept. 4, 1984). In *Am. Communications*, this court held that the defendant's email to plaintiff's counsel, requesting an extension of time to answer, and informal settlement negotiations amounted to an appearance and triggered the Civ.R. 55(A) notice requirement. "Where a party becomes aware by means of informal contacts, correspondence or negotiations that the opposing party intends to actively defend the suit, this constitutes an appearance which requires seven days advance notice to that party before a default judgment may be taken." *Columbus Mgt. Co.*

{¶ 12} Given our broad interpretation of the term "appeared," we conclude that Lee's actions in this case constituted an appearance. Lee filed a formal request for mediation and for an extension of time to answer GMAC's complaint. Lee also participated in the requested mediation and was engaged in discussions with GMAC to resolve this action through a loan modification. As a result of that conduct, Lee was entitled to written notice of GMAC's motion for default judgment seven days prior to the trial court's hearing on that motion. Although GMAC argues that Lee was not entitled to notice because he had not filed an answer, that argument is directly contrary to the distinction in Civ.R. 55(A) between filing a pleading and otherwise appearing in an action. Because the trial court granted GMAC's motion for default judgment two days after GMAC filed it and three days after GMAC mailed it to Lee, the record indicates that Lee did not receive the required seven-day notice.

{¶ 13} Our determination that the trial court failed to comply with Civ.R. 55(A) does not, itself, answer the question of whether the court's judgment is void ab initio. The Supreme Court of Ohio has distinguished between void and voidable orders, stating that orders "which are erroneous for \* \* \* lack of jurisdiction are void and subject to collateral attack, whereas those which are erroneous for other than jurisdictional reasons are merely voidable and not subject to collateral attack." *State ex rel. Beil v.*

*Dota*, 168 Ohio St. 315, 319-20 (1958). There, the court held that an erroneous exercise of judicial power did not result in a void judgment where the trial court possessed subject matter and personal jurisdiction.

{¶ 14} Lee has not argued that the trial court lacked jurisdiction. The trial court obtained personal jurisdiction over Lee as a result of personal service of process, and the trial court undisputedly possessed subject matter jurisdiction to determine GMAC's foreclosure action. Thus, the default judgment is not void for lack of jurisdiction.

{¶ 15} This court has previously held that, where a party who has appeared in an action is not afforded notice of a hearing on a motion for default judgment, the default judgment is voidable. *Hall v. Parcels of Land Encumbered with Delinquent Tax Liens*, 10th Dist. No. 96APE11-1552 (June 5, 1997), quoting *Billiter v. Winship*, 10th Dist. No. 93AP-176 (Sept. 28, 1993). "A procedural defect, such as failure to give notice as required, may be sufficient to afford relief from a default judgment on appeal or for relief under Rule 60(b) \* \* \*, however the error should not usually be treated as so serious as to render the judgment void." *Hall*, quoting *Winfield Assoc., Inc. v. Stonecipher*, 429 F.2d 1087, 1091 (10th Cir.1970). In *Hall*, we held that a default judgment entered without the notice required by Civ.R. 55(A) was voidable, as opposed to void, and that a Civ.R. 60(B) analysis was required to determine the defendant's entitlement to relief. See also *Fenner v. Kinney*, 10th Dist. No. 02AP-749, 2003-Ohio-989, ¶ 17, citing *Lexis-Nexis, Div. of Reed Elsevier, Inc. v. Robert Binns Assoc., Inc.*, 10th Dist. No. 98AP-228 (Dec. 1, 1998). Because the defendant in *Hall* did not establish the requirements of Civ.R. 60(B), we affirmed the default judgment despite the trial court's failure to provide the notice required by Civ.R. 55(A).

{¶ 16} Based on the foregoing authority, we conclude that the default judgment in this case is not void ab initio, despite the lack of Civ.R. 55(A) notice. Rather, the judgment is voidable and was subject to reversal on appeal or to relief under Civ.R. 60(B). Because the trial court's judgment was not void ab initio, we overrule Lee's first assignment of error.

### **B. Second Assignment of Error**

{¶ 17} By his second assignment of error, Lee avers that the trial court abused its discretion by denying his second Civ.R. 60(B) motion for relief from judgment. To prevail on a Civ.R. 60(B) motion, the movant must demonstrate the following: (1) the party has a meritorious defense or claim to present if the court grants relief; (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 for relief fall under Civ.R. 60(B)(1), (2) or (3), not more than one year after judgment. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. The law favors disposition of cases on the merits, and courts should resolve doubt, if any, as to the establishment of a meritorious defense or a ground for relief in favor of the movant. *Coover Constr. Co., Inc. v. Johnson*, 10th Dist. No. 82AP-305 (Aug. 24, 1982), citing *Colley v. Bazell*, 64 Ohio St.2d 243 (1980). We will reverse a trial court's decision to grant or deny a motion under Civ.R. 60(B) only if the court abused its discretion. *Ohio Neighborhood Fin., Inc. v. Massey*, 10th Dist. No. 10AP-1020, 2011-Ohio-2165, ¶ 6. Abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 18} Before addressing the trial court's determination that Lee failed to meet the prerequisites for relief under Civ.R. 60(B), we first consider whether the doctrine of res judicata precluded relief. Res judicata generally precludes "relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction." *Reasoner v. Columbus*, 10th Dist. No. 04AP-800, 2005-Ohio-468, ¶ 5, citing *State ex rel. Kroger Co. v. Indus. Comm.*, 80 Ohio St.3d 649, 651 (1998). Res judicata also "prevents the successive filings of Civ.R. 60(B) motions [for] relief from a valid, final judgment when based upon the same facts and same grounds or based upon facts that could have been raised in the prior motion." *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, ¶ 8, quoting *Beck-Durell Creative Dept., Inc. v. Imaging Power, Inc.*, 10th Dist. No. 02AP-281, 2002-Ohio-5908,

¶ 16. Res judicata does not, however, bar successive Civ.R. 60(B) motions where the subsequent motion is based on different facts, asserts different grounds for relief, and it is not certain that the movant could have previously raised the issues presented. *Coulson v. Coulson*, 5 Ohio St.3d 12, 17 (1983); *Chase Manhattan Bank v. Jenkins*, 10th Dist. No. 06AP-1192, 2007-Ohio-3622, ¶ 24.

{¶ 19} A judgment entry denying a Civ.R. 60(B) motion for relief from judgment is final and appealable, and, where a party fails to file a timely appeal under App.R. 4(A), res judicata applies to bar further litigation of the issues. *Deutsche Bank Natl. Trust Co. v. Pandey*, 10th Dist. No. 10AP-39, 2010-Ohio-3746, ¶ 12, citing *Colley* and *State v. Redwine*, 12th Dist. No. CA2009-12-045, 2010-Ohio-3468, ¶ 14. Here, however, the trial court did not issue a final judgment entry denying Lee's first Civ.R. 60(B) motion. Instead, the trial court issued an interlocutory decision on the motion and instructed GMAC's counsel to submit an entry for the court's approval. Where a trial court's decision indicates that a formal entry is to follow, the time to appeal does not begin to run until the trial court journalizes a subsequent entry on the same subject. *Fraternal Order of Police Lowell Thomas Lodge No. 130 v. Greenville*, 2d Dist. No. 998 (Jan. 27, 1981), citing *Millies v. Millies*, 47 Ohio St.2d 43 (1976). Thus, unlike the defendant in *Deutsche Bank*, Lee did not fail to file a timely appeal from the denial of his previous motion for relief from judgment because the court did not issue a final, appealable judgment entry with respect to that motion. Accordingly, res judicata does not bar Lee's second motion for relief from judgment, as a successive motion. We therefore turn to the specific requirements for relief under Civ.R. 60(B).

{¶ 20} In denying Lee's second motion for relief from judgment, the trial court determined that Lee failed to set forth operative facts demonstrating that he had a meritorious defense to GMAC's claims or that his motion was timely. With respect to timeliness, the trial court recognized that Lee filed his second motion for relief from judgment more than eight months after the court entered default judgment and more than six months after the trial court issued its decision denying Lee's first motion for relief from judgment. The trial court stated that Lee failed to identify any reason for not



seeking relief sooner and held that merely filing the motion within one year does not demonstrate that the motion was filed within a reasonable time. The question of whether a movant has met the burden of establishing the timeliness of a Civ.R. 60(B) motion is within the sound discretion of the trial court, and we will not disturb the trial court's ruling absent an abuse of that discretion. *Cooper v. Cooper*, 9th Dist. No. 2741-M (Nov. 4, 1998).

{¶ 21} Civ.R. 60(B) incorporates a two-part standard regarding the timeliness of a motion for relief from judgment. For relief under Civ.R. 60(B)(1), (2) or (3), the movant must seek relief "within a reasonable time, *and* \* \* \* not more than one year after the judgment." (Emphasis added.) Relief under Civ.R. 60(B)(4) and (5) is not subject to the one-year limitation, but must still be sought within a reasonable time. Just because a Civ.R. 60(B) motion is filed within one year of the underlying judgment does not mean the motion was filed within a reasonable time. *EMC Mtge. Corp. v. Pratt*, 10th Dist. No. 07AP-214, 2007-Ohio-4669, ¶ 8, citing *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 106 (8th Dist.1974).

{¶ 22} Lee's second motion for relief from judgment only vaguely addressed the issue of the timeliness. In the context of attempting to demonstrate excusable neglect under Civ.R. 60(B)(1), Lee stated that he would have engaged an attorney sooner had he known that there would be no loan modification and had he known about the Stephan affidavit before January 24, 2011. Lee's assertion that he would have engaged an attorney sooner had he known that GMAC would not agree to a loan modification does not explain any delay beyond the trial court's entry of default judgment. Moreover, Lee did engage an attorney within one month after the default judgment, prior to filing his first motion for relief from judgment. Lee offers no explanation for not raising the trial court's failure to give appropriate notice under Civ.R. 55(A) in his first motion for relief from judgment. All of the facts upon which that argument rests were in the record at the time the trial court entered default judgment and could have been raised in a direct appeal from the default judgment. Those facts were also available to Lee and his attorney when Lee filed his first motion for relief from judgment. Lee also claims that

he could not have discovered that the Stephan affidavit was fraudulent prior to his discussions with his current attorneys, but that conclusory assertion is insufficient to establish the reasonableness of Lee's delay, especially in light of the failure to previously raise Civ.R. 55(A).

{¶ 23} The relief provided by Civ.R. 60(B) is equitable in nature, and a party must act diligently to be entitled to it. *Morris v. Grubb*, 2d Dist. No. 15177 (Mar. 8, 1996). Failure to seek relief from judgment for a substantial period of time after the movant is aware of the grounds for relief demonstrates a lack of due diligence. *Id.* Upon review, we cannot conclude that the trial court acted unreasonably, arbitrarily or unconscionably by concluding that Lee failed to meet his burden of establishing the timeliness of his second motion for relief from judgment. The requirements for Civ.R. 60(B) relief are listed in the conjunctive; if any one is not met, the motion must be denied. *Billiter*, 10th Dist. No. 93AP-176. Having concluded that the trial court did not abuse its discretion by determining that Lee did not establish the timeliness of his second motion, we need not address the remaining requirements for Civ.R. 60(B) relief. For these reasons, the trial court did not err in denying Lee's second motion for relief from judgment. Therefore, we overrule Lee's second assignment of error.

### **C. Third Assignment of Error**

{¶ 24} Lee's third assignment of error stems from the trial court's entry of default judgment rather than from its denial of Lee's motion for relief from judgment. Specifically, he maintains that the trial court's failure to comply with Civ.R. 55(A) constituted a violation of his rights to due process. As stated in our discussion of Lee's first assignment of error, the failure to comply with Civ.R. 55(A) renders the default judgment voidable, but not void. A voidable judgment is subject to direct appeal and to the provisions of Civ.R. 60(B). *Wagenbrenner v. Wagenbrenner*, 10th Dist. No. 10AP-933, 2011-Ohio-2811, ¶ 12. Lee, however, failed to file a timely appeal from the entry of default judgment, and we, therefore, lack jurisdiction to consider Lee's argument stemming directly from that judgment. Moreover, we have already determined that the trial court did not abuse its discretion by denying Lee's second motion for Civ.R. 60(B)

relief. For these reasons, in addition to the reasons expressed with respect to Lee's previous assignments of error, we overrule Lee's third assignment of error.

**D. Fourth Assignment of Error**

{¶ 25} In his final assignment of error, Lee argues that the trial court erred by not affording him a hearing before ruling on his second motion for relief from judgment. This court has long recognized that, if a movant alleges operative facts which, if true, would warrant setting aside a judgment, a trial court may not deny a motion for relief from judgment without first conducting a hearing and making a factual determination of the alleged grounds for relief. *Reaper v. Plaza Properties, Inc.*, 10th Dist. No. 93APE09-1222 (May 12, 1994). A trial court may, however, deny a Civ.R. 60(B) motion without granting an evidentiary hearing when the motion is untimely. *Bednar v. Bednar*, 20 Ohio App.3d 176 (9th Dist.1984); *Busselle v. Redden's Auto Body & Garage*, 8th Dist. NO. 85824, 2005-Ohio-4011, ¶ 12. Having determined that Lee did not allege operative facts regarding the timeliness of his second motion for relief from judgment, the trial court did not abuse its discretion by denying Lee's motion without holding a hearing. Accordingly, we overrule Lee's fourth assignment of error.

**IV. CONCLUSION**

{¶ 26} For the foregoing reasons, and having overruled each of Lee's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN, P.J., and KLATT, J., concur.

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