

[Cite as *PNC Bank, Natl. Assn. v. Botts*, 2012-Ohio-5383.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

PNC Bank, National Association	:	
c/o Select Portfolio Servicing, Inc.,	:	
	:	
Plaintiff-Appellee,	:	12AP-256
	:	(C.P.C. No. 11CVE-1-970)
v.	:	
	:	(REGULAR CALENDAR)
Thomas N. Botts, Jr.,	:	
	:	
Defendant-Appellant,	:	
	:	
Beth J. Botts et al.,	:	
	:	
Defendants-Appellees.	:	
	:	

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D E C I S I O N

Rendered on November 20, 2012

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*McGlinchey Stafford PLLC, Monica Levine Lacks, and James S. Wertheim, for appellee PNC Bank.*

*Dann, Doberdruk & Wellen LLC, Marc E. Dann, and Grace Doberdruk, for appellant.*

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Thomas N. Botts, Jr., defendant-appellant, appeals the judgment of the Franklin County Court of Common Pleas, in which the court denied his motion to vacate judgment pursuant to Civ.R. 60(B) and motion to dismiss pursuant to Civ.R. 12(B)(1), and found moot his motion to stay the sheriff's sale.

{¶ 2} On December 27, 2004, Botts and his wife, Beth J. Botts, executed a promissory note in favor of First Franklin Financial Corporation ("First Franklin") for

\$195,200. Also on that date, Botts and his wife executed a mortgage that secured the note and encumbered the property located at 1329 Panelly Place, Westerville, Ohio 43081. The mortgage indicated that the lender was First Franklin. On September 15, 2009, First Franklin assigned the mortgage to Wells Fargo Bank, N.A., as Trustee for National City Mortgage Loan Trust 2005-1, Mortgage-Backed Certificates, Series 2005-1.

{¶ 3} On January 21, 2011, PNC Bank, National Association c/o Select Portfolio Servicing, Inc. ("PNC"), plaintiff-appellee, filed the present foreclosure action against Botts, his wife, and other entities with interests in the real property, alleging that the mortgage conveys PNC an interest in the property, PNC is an entity entitled to enforce the note, Botts and his wife had defaulted on the note, PNC had declared the debt due, and all conditions precedent to PNC's ability to enforce the mortgage had been satisfied.

{¶ 4} On October 3, 2011, PNC filed a motion for default judgment against Botts, his wife, and several other entities that had failed to file an answer or otherwise defend. On October 4, 2011, the trial court granted PNC's motion for default judgment and entered a judgment entry and decree of foreclosure. A sheriff's sale was ordered to take place on January 13, 2012.

{¶ 5} On January 11, 2012, Botts filed a motion to stay the sheriff's sale. Also on January 11, 2012, Botts filed a motion to vacate the judgment pursuant to Civ.R. 60(B) and motion to dismiss the complaint pursuant to Civ.R. 12(B)(1). The property was sold on January 13, 2012. On January 25, 2012, PNC filed separate memoranda in opposition to Botts's motion to vacate judgment and motion to dismiss.

{¶ 6} On February 21, 2012, the trial court issued a decision denying Botts's motion to vacate judgment pursuant to Civ.R. 60(B) and motion to dismiss the complaint pursuant to Civ.R. 12(B)(1) and found moot Botts's motion to stay the sheriff's sale. The trial court denied the motion to vacate judgment on the ground that Botts failed to sufficiently allege fraud under Civ.R. 60(B)(3). The court denied the motion to dismiss on the ground that standing is not jurisdictional in the present matter. The trial court found moot Botts's motion to stay the sheriff's sale because the sheriff's sale had already taken place and the Civ.R. 60(B)(3) motion upon which it was predicated was denied. Botts appeals the judgment of the trial court, asserting the following assignments of error:

[I.] IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY APPELLANTS' 60(B) MOTION TO VACATE WITHOUT HOLDING A HEARING.

[II.] THE TRIAL COURT ERRED WHEN DETERMINING THAT THE JUDGMENT WAS NOT PROCURED BY FRAUD.

[III.] APPELLANTS DID NOT WAIVE THEIR LACK OF STANDING DEFENSE BECAUSE STANDING IS JURISDICTIONAL AND CAN NEVER BE WAIVED.

(Sic passim.)

{¶ 7} We will address Botts's first and second assignments of error together, as they are related. Botts argues in his first assignment of error that the trial court abused its discretion when it denied the motion to vacate pursuant to Civ.R. 60(B) without holding a hearing. Botts argues in his second assignment of error that the trial court erred when it determined that the judgment was not procured by fraud. In order to prevail on a motion for relief from judgment under Civ.R. 60(B), the movant must demonstrate three prongs of the *GTE* test, which are: (1) a meritorious claim or defense; (2) entitlement to relief under one of the five grounds listed in the rule; and (3) the timeliness of the motion. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 150-51 (1976). This court will not disturb a trial court's decision concerning motions filed under Civ.R. 60(B) absent an abuse of discretion. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20 (1988). An abuse of discretion connotes an attitude by the court that is arbitrary, unconscionable or unreasonable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983).

{¶ 8} The grounds for relief under Civ.R. 60(B) are: (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 (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 rule further provides that the motion for relief must be made within a reasonable time and that for

reasons (1), (2), and (3) it cannot be made more than one year after the judgment, order or proceeding was entered or taken. Civ.R. 60(B).

{¶ 9} There is no requirement that a moving party submit evidentiary materials, such as an affidavit, to support his or her motion for relief. *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 103 (8th Dist.1974). But good legal practice dictates that the moving party submit relevant evidence to demonstrate operative facts, as sufficient factual information is necessary to warrant a hearing on the motion. *Id.* at 104.

{¶ 10} However, a party who files a Civ.R. 60(B) motion for relief from judgment is not automatically entitled to a hearing on the motion. *Id.* at 105. "If the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under Civ.R. 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion." *Id.* Moreover, "[i]t is an abuse of discretion for the trial court to overrule a Civ.R. 60(B) motion for relief from judgment without first holding an evidentiary hearing where the motion and affidavits contain allegations of operative facts which would warrant relief under Civ.R. 60(B)." *Twinsburg Banking Co. v. RHEA Constr. Co., Inc.*, 9 Ohio App.3d 39 (9th Dist.1983), syllabus.

{¶ 11} In the present case, Botts's motion to vacate was based upon fraud under Civ.R. 60(B)(3). Botts argues that, because he alleged a meritorious defense, it was an abuse of discretion to deny him relief from judgment without a hearing. Botts's meritorious defense to the foreclosure was that PNC was not the owner and holder of his note and mortgage and, thus, had no right to foreclose. Botts claims a hearing would have provided him the opportunity to challenge the authenticity of the documents submitted by PNC, subpoena witnesses, address the "new" version of his note and allonges, and confront PNC. Specifically, Botts argues that PNC never submitted the proper evidence of ownership of the note and mortgage at the time the complaint was filed. Botts contends the note was never endorsed in blank or directly to PNC by the original lender, First Franklin, so PNC was not a proper holder of the note. Botts also argues the assignment of mortgage was to a securitized trust not registered with the Securities and Exchange Commission ("SEC"), and included no indication that PNC was entitled to enforce it. Botts also asserts that the mortgage attached to the complaint was granted to First Franklin, and PNC was not mentioned in the mortgage. The assignment of mortgage attached to the

complaint, Botts contends, was incapable of assigning the note because notes cannot be assigned in Ohio; rather, they must be negotiated.

{¶ 12} Although in his brief Botts argues at length that he presented a meritorious defense under the first prong of the *GTE* test, the trial court agreed that Botts had presented a meritorious defense. The court found there was a meritorious defense that PNC lacked standing to prosecute the underlying foreclosure action because the documents attached to the complaint did not demonstrate that PNC was the holder of the note, and the mortgage attached to the complaint indicated that it was assigned to Wells Fargo Bank, N.A., as Trustee for National City Mortgage Loan Trust 2005-1, Mortgage-Backed Certificates, Series 2005-1. The court also indicated it did not consider the documents attached as exhibits A and B to PNC's memoranda contra because they were unauthenticated and not relevant to the state of the documentation at the time of default judgment.

{¶ 13} The trial court also agreed that Botts's motion to vacate was timely under the third prong of the *GTE* test. The court concluded that three months was not an unreasonable amount of time, especially in light of the fact that the motion was filed prior to the sheriff's sale.

{¶ 14} However, as explained above, to warrant a hearing on a Civ.R. 60(B) motion, Botts was also required to allege operative facts justifying relief under any of the grounds set forth in Civ.R. 60(B)(1) through (5). *See Thompson v. Dodson-Thompson*, 8th Dist. No. 90814, 2008-Ohio-4710, ¶ 22 (trial court did not abuse discretion in denying motion for relief from judgment without a hearing where appellant failed to allege operative facts justifying relief under any of the grounds set forth in Civ.R. 60(B)(1) through (5), thereby failing the second prong of the *GTE* test). In the present case, the trial court found that Botts failed to allege sufficient facts to show he satisfied the second prong from the *GTE* test; that is, Botts did not demonstrate he was entitled to relief under Civ.R. 60(B)(3). Botts's arguments, as summarized by the court, were that the note was never negotiated to PNC, and the assignment of mortgage attached to the complaint indicates it was assigned to Wells Fargo Bank as trustee for a securitized trust that is not registered with the SEC. The court concluded that, while this information presented cause for concern about the quality of PNC's recordkeeping, the issues raised did not constitute

fraud or misconduct in obtaining the judgment but were, at best, claims or defenses related to the underlying action, which Civ.R. 60(B)(3) does not encompass. The court found that, at the very least, Botts could not establish PNC's intent to mislead either him or the court into believing that the mortgage was actually assigned to Wells Fargo as trustee, because PNC could not have foreclosed on the mortgage if the court had believed such. Moreover, the court stated that whether the securitized trust is or was registered with the SEC was not a matter upon which the court relied in granting default judgment to PNC; rather, an affidavit in support indicated that PNC was the holder of the note and mortgage.

{¶ 15} In seeking vacation of the judgment, Botts relied on Civ.R. 60(B)(3), which authorizes a court to vacate its prior final judgment or order for "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." The fraud or misconduct contemplated by Civ.R. 60(B)(3) is fraud or misconduct on the part of the adverse party in obtaining the judgment by preventing the losing party from fully and fairly presenting his defense, not fraud or misconduct which in itself would have amounted to a claim or defense in the case. *State Alarm, Inc. v. Riley Indus. Servs.*, 8th Dist. No. 92760, 2010-Ohio-900, ¶ 21; *First Merit Bank, N.A. v. Crouse*, 9th Dist. No. 06CA008946, 2007-Ohio-2440, ¶ 32; and *LaSalle Natl. Bank v. Mesas*, 9th Dist. No. 02CA008028, 2002-Ohio-6117, ¶ 15. Fraud on an adverse party may exist when, for example, a party presents material false testimony at trial, and the falsity is not discovered until after the trial. *Seibert v. Murphy*, 4th Dist. No. 02CA2825, 2002-Ohio-6454.

{¶ 16} Botts's contention that PNC committed fraud under Civ.R. 60(B)(3) when it commenced the foreclosure action even though it did not own his note and mortgage is a matter that should have been presented as a claim or defense by Botts in the underlying foreclosure action. The same issue was presented in *Wells Fargo Bank, N.A. v. Brandle*, 2d Dist. No. 2012CA0002, 2012-Ohio-3492, and *Brandle* has identical facts to those in the present case. In that case, the court concluded that the homeowners failed to allege the type of fraud encompassed by Civ.R. 60(B)(3), finding:

There is no basis to find that Wells Fargo's alleged fraud or misrepresentation that it owned the note or mortgage in any

way prevented the Brandles from fully and fairly presenting that defense in a pleading responsive to Wells Fargo's complaint. Instead of presenting that defense, the Brandles failed to plead or appear in the action, and they offer no reason for their failure to do that. The Brandles may not now rely on their failure to appear as a basis to convert a defensive claim they didn't plead to a claim of fraud or misconduct on which to vacate the judgment that was granted Wells Fargo pursuant to Civ.R. 60(B)(3).

*Id.* at ¶ 14.

{¶ 17} Similarly, in *GMAC Mtge., L.L.C. v. Herring*, 189 Ohio App.3d 200, 2010-Ohio-3650 (2d Dist.), the homeowners, who did not file a responsive pleading until after default judgment had been rendered, asserted that the mortgage company engaged in fraud against them under Civ.R. 60(B)(3) by falsely maintaining that it was the owner and holder of the mortgage when the foreclosure complaint was filed and by manufacturing an assignment of mortgage so that it would appear that the mortgage company held the mortgage at the time the complaint was filed when, in fact, it did not. The homeowners also asserted that the mortgage company engaged in fraud by recording an assignment of mortgage that was so filled with flagrant and fraudulent irregularities that one could only believe the mortgage company did not become a holder of the mortgage until after the complaint was filed. The homeowners argued that, because the mortgage company was not the owner and holder of the note when the complaint was filed, it was not the real party in interest and could not institute the foreclosure action against them. However, the appellate court in *Herring* concluded that the homeowners did not demonstrate that they had a basis for relief from the judgment under Civ.R. 60(B)(3), as the homeowners did not claim that their failure to respond to the foreclosure complaint or the trial court's judgment was the product of any fraud. The court also found that any irregularities in the assignment of mortgage could have been identified and raised in the trial court in a responsive pleading, and the homeowners cannot blame the mortgage company for their inaction in failing to challenge the mortgage company's status as a real party in interest sooner.

{¶ 18} As these cases make clear, the fraud alleged by Botts in the present case is not the type of fraud contemplated by Civ.R. 60(B)(3). Botts could have presented his

claims that PNC was not the holder of the note and mortgage before the trial court but chose to not appear in the action. It is clear Botts was not prevented from fully and fairly presenting his defense due to any fraud by PNC. *See, e.g., US Bank Natl. Assn. v. Marino*, 5th Dist. No. 2011CAE11 0108, 2012-Ohio-1487, ¶ 16 (appellant's argument that bank had no standing because it was not the holder of the note at the time the foreclosure complaint was filed was not viable under Civ.R. 60(B)(3), as the adverse party must have prevented the complaining party from fully and fairly presenting its case or defense, and the appellant had the opportunity to participate in the litigation, to file an answer, and to participate in discovery, but chose to not file an answer or any other response).

{¶ 19} In essence, what Botts seeks to do in the present case is contest the underlying default judgment and decree in foreclosure based upon his claim that PNC committed fraud by asserting they were the real party in interest. A decree and judgment of foreclosure is a final appealable order. *Freedom Mtge. Corp. v. Mullins*, 10th Dist. No. 08AP-761, 2009-Ohio-4482, ¶ 16, citing *Third Natl. Bank of Circleville v. Speakman*, 18 Ohio St.3d 119, 120 (1985), citing *Oberlin Sav. Bank v. Fairchild*, 175 Ohio St. 311 (1963); and *Ohio Dept. of Taxation v. Plickert*, 128 Ohio App.3d 445 (11th Dist.1998). It is well-settled law in Ohio that a motion for relief from judgment cannot be a substitute for an appeal. *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128 (1986), paragraph two of the syllabus. *See also BAC Home Loans Servicing, L.P. v. Cromwell*, 9th Dist. No. 25755, 2011-Ohio-6413, ¶ 12 (argument raised under Civ.R. 60(B)(3) that mortgage company misrepresented it had standing should have been addressed in prior pleadings and raised in a timely filed appeal from the trial court's order granting judgment and entering foreclosure). Thus, Botts could have filed an appeal from the decree of foreclosure contesting PNC's standing instead of raising it in a belated Civ.R. 60(B) motion. For all of the foregoing reasons, we find the trial court did not err when it denied the motion to vacate pursuant to Civ.R. 60(B) without holding a hearing and determined that the judgment was not procured by fraud. Therefore, Botts's first and second assignments of error are overruled.

{¶ 20} Botts argues in his third assignment of error that he did not waive his lack-of-standing defense because standing is jurisdictional and can never be waived. The real issue Botts raises in this assignment of error is that the trial court erred when it denied his

motion to dismiss pursuant to Civ.R. 12(B)(1) when an assignment of mortgage to PNC was never filed with the trial court prior to judgment. In his motion to dismiss, Botts argued that the trial court lacked subject-matter jurisdiction because PNC did not have standing to bring the action as a non-holder of the note and mortgage at the time of the filing of the complaint. In denying Botts's motion to dismiss, the trial court found that lack of standing can be cured after the complaint is filed, and PNC asserted in its complaint that it was entitled to enforce the note and mortgage and submitted an affidavit in support of default judgment that it was the holder of the note and mortgage.

{¶ 21} Civ.R. 12(B)(1) permits dismissal where the trial court lacks jurisdiction over the subject matter of the litigation. The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint. *Milhoan v. E. Local School Dist. Bd. of Edn.*, 157 Ohio App.3d 716, 2004-Ohio-3243, ¶ 10 (4th Dist.); *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80 (1989). We review an appeal of a dismissal for lack of subject-matter jurisdiction under Civ.R. 12(B)(1) de novo. *Moore v. Franklin Cty. Children Servs.*, 10th Dist. No. 06AP-951, 2007-Ohio-4128, ¶ 15. A trial court is not confined to the allegations of the complaint when determining its subject-matter jurisdiction under Civ.R. 12(B)(1), and it may consider pertinent material. *Southgate Dev. Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St.2d 211 (1976), paragraph one of the syllabus.

{¶ 22} This court has before found that the plaintiff's lack of standing is not a matter subject to dismissal pursuant to Civ.R. 12(B)(1). In *Washington Mut. Bank v. Beatley*, 10th Dist. No. 06AP-1189, 2008-Ohio-1679, this court addressed a defendant's motion to dismiss pursuant to Civ.R. 12(B)(1) on the basis of the plaintiff's lack of standing in the context of a foreclosure action and found:

The trial court's dismissal pursuant to Civ.R. 12(B)(1) appears to be based on appellant's lack of standing or lack of capacity to sue. However, neither standing nor capacity to sue challenges the subject matter jurisdiction of a court in this context. *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 77 ("Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court."); *Country Club Townhouses-North Condominium Unit Owners Assn. v. Slates* (Jan. 24, 1996), Summit App. No. 17299 ("Capacity to sue or be sued does not equate with the

jurisdiction of a court to adjudicate a matter; it is concerned merely with a party's right to appear in a court in the first instance."); see, also, *Benefit Mtg. Consultants, Inc. v. Gencorp, Inc.* (May 22, 1996), Summit App. No. 17488 ("Capacity to sue is not jurisdictional."). These issues are properly raised by a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. See *Woods v. Oak Hill Community Med. Ctr., Inc.* (1999), 134 Ohio App.3d 261, 267 (noting that dismissal for lack of standing is a dismissal pursuant to Civ.R. 12[B][6]); *Bourke v. Carnahan*, Franklin App. No. 05AP-194, 2005-Ohio-5422, at ¶ 10 ("Elements of standing are an indispensable part of a plaintiff's case."); *Kiraly v. Francis A. Bonanno, Inc.* (Oct. 29, 1997), Summit App. No. 18250 (affirming Civ.R. 12[B][6] dismissal of complaint for plaintiff's lack of capacity to sue).

Because standing and capacity to sue do not challenge the subject matter jurisdiction of a court, the trial court erred when it dismissed appellant's complaint on these grounds pursuant to Civ.R. 12(B)(1). Dismissal pursuant to this rule focuses on a court's subject matter jurisdiction over the claims raised in the complaint, not the standing or capacity of the plaintiff to bring those claims. Cf. *Moore*, quoting *Vedder v. Warrensville Hts.*, Cuyahoga App. No. 81005, 2002-Ohio-5567, at ¶ 15 ("The issue of subject-matter jurisdiction involves 'a court's power to hear and decide a case on the merits and does not relate to the rights of the parties' "). Our review of the record reveals no support for the proposition that the trial court lacked subject matter jurisdiction over this foreclosure action.

*Id.* at ¶ 10-11. See also *Bank of New York v. Baird*, 2d Dist. No. 2012-CA-28, 2012-Ohio-4975, ¶ 20-22 (in foreclosure action challenging bank's standing, denial of Civ.R. 12(B)(1) motion to dismiss was proper because lack of standing does not challenge the subject-matter jurisdiction of the court). Thus, Botts could not rely upon lack of standing as the basis for his Civ.R. 12(B)(1) motion, and the trial court could have denied it on this ground.

{¶ 23} Nevertheless, we note that Botts argues under this assignment of error that the trial court erred when it found that PNC's lack of standing could be cured after the complaint was filed. The Supreme Court of Ohio very recently decided *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, \_\_\_ Ohio St.3d \_\_\_, 2012-Ohio-5017, and determined

that lack of standing may not be cured after the complaint is filed. Thus, the trial court's statement here, in this respect, was erroneous. Nevertheless, because we have found that lack of standing may not be challenged in a Civ.R. 12(B)(1) motion to dismiss, we need not delve further into the trial court's findings with respect to this issue. Therefore, we find the trial court did not err when it denied Botts's motion to dismiss, pursuant to Civ.R. 12(B)(1), although we find denial was proper on a different basis than that relied upon by the trial court. For all of these reasons, Botts's third assignment of error is overruled.

{¶ 24} Accordingly, Botts's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

CONNOR and DORRIAN, JJ., concur.

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