

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Deutsche Bank National Trust Co.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-39 (C.P.C. No. 07CVE07-9593)
Nirmala Pandey,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 12, 2010

Reisenfeld & Associates, LPA LLC, Sallie A. Conyers and Matthew C. Steele, for appellee.

Nirmala Pandey, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Nirmala Pandey, appeals from a judgment of the Franklin County Court of Common Pleas denying her Civ.R. 60(B) motion for relief from

judgment. Because the trial court properly denied defendant's Civ.R. 60(B) motion as barred by res judicata, we affirm.

I. Procedural History

{¶2} Plaintiff filed a complaint in foreclosure against defendant on July 20, 2007. Although the case was transferred briefly in 2008 to the inactive docket, a motion to reactivate was granted by order filed on December 3, 2008. Because defendant filed no responsive pleading, plaintiff filed a Civ.R. 55 motion for default judgment against defendant on December 22, 2008. The trial court granted the motion and entered a judgment and decree of foreclosure on January 2, 2009.

{¶3} On April 14, 2009, defendant, through counsel, filed a motion both to vacate the trial court's judgment and decree of foreclosure and to vacate or cancel the sheriff's sale scheduled for April 24, 2009. Defendant's motion asserted plaintiff's attempt to complete residence service on her was defective, as the service indicated her mother signed for the documents. Defendant pointed out her mother had been deceased since 1992. The trial court denied the motion, advising that until defendant could show the "service of Plaintiff's Complaint on Seeshina Mishsa was not reasonably calculated to gain service on Defendant, the Court must presume valid service." (May 22, 2009 Decision & Entry, 2.) The court thus saw "no reason to vacate its January 2, 2009 decree in foreclosure and Defendant's motion must be denied." (May 22, 2009 Decision & Entry, 2.)

{¶4} Defendant filed, through counsel, a second motion to vacate on July 8, 2009, asserting she did not know Seeshina Mishsa, who signed for the documents purportedly left at her residence. Defendant thus again claimed plaintiff failed to achieve proper residence service on her. The trial court issued a decision and entry on August 18, 2009 denying defendant's motion to vacate filed on July 8, 2009. In denying the motion, the court explained that defendant failed to present a cogent reason why "this person would be in her home or why this person is signing for her mail." (Aug. 18, 2009 Decision, 2.) Because the trial court was "not satisfied with the evidence presented by Defendant," the court decided it would "not vacate its January 2, 2009 decree in foreclosure." (Aug. 18, 2009 Decision, 2.) On October 23, 2009, the court filed an entry confirming the sale and ordering distribution of sale proceeds.

{¶5} On November 6, 2009, defendant, representing herself, filed a Civ.R. 60(B) motion asserting again that she never was properly served with the summons and complaint through residence service. The trial court filed a decision and entry on December 16, 2009 denying defendant's motion. The court noted it "has denied Defendant's previous two motions. There are no new arguments made in the present motion. The Court will not entertain an endless stream of motions based upon the exact same strain of arguments." (Dec. 16, 2009 Decision, 1.) Observing that "[j]udgments need to be final," the court advised defendant that if she "cannot accept the Court's judgment in this matter[,] she needs to take it to the Court of Appeals. Once again, the Court will not grant Defendant's motion." (Decision, 1.)

II. Assignments of Error

{¶6} Defendant timely appeals from the trial court's December 16, 2009 entry and assigns the following errors:

ERROR NO. 1: The court erred when it did not vacate plaintiff's default judgment despite Defendant Nirmala Pandey's compliance with all three prongs required in GTE V. ARC.

ERROR NO. 2: The Trial court erred as a matter of law and abused its discretion when it did not consider the substance of Appellant's motion to set aside the judgment. The court erroneously surmised that there is in existence the signature of the purported recipient of the service in the court record when there is none.

ERROR NO. 3: The Trial court erred as a matter of law and abused its discretion when it denied the motion to vacate as it lacked jurisdiction. Appellant asserts that the service was improper, therefore, the court did not acquire jurisdiction and all its decisions were void ab initio.

ERROR NO. 4: The Trial court erred when it denied right of due process. Appellant asked the court to grant her opportunity to defend herself in the foreclosure case but denial of the motion to set aside the default judgment was the denial of her due process.

III. Plaintiff's Motion to Dismiss

{¶7} Plaintiff filed a motion to dismiss defendant's appeal. Plaintiff contends that because defendant failed to file her notice of appeal within 30 days of the trial court's judgment of May 22, 2009 denying defendant's April 14, 2009 motion to vacate, defendant's appeal is untimely under App.R. 4(A).

{¶8} To vest this court with jurisdiction over her appeal, defendant was required under App.R. 4(A) to file a notice of appeal within 30 days of the trial court's judgment. Defendant undisputedly failed to do so with respect to the trial court's decision of (1)

May 22, 2009, denying defendant's April 14, 2009 motion to vacate the judgment of foreclosure, and (2) the trial court's August 18, 2009 decision overruling defendant's July 8, 2009 motion to vacate judgment. Because defendant did not appeal from those judgments within 30 days, we lack jurisdiction to consider them. *State v. Myers*, 9th Dist. No. 08CA0041, 2009-Ohio-2082 (dismissing for lack of jurisdiction because the appeal was untimely).

{¶9} Defendant, however, filed a notice of appeal on January 15, 2010, appealing from the trial court's December 16, 2009 decision and entry denying her November 6, 2009 motion to vacate judgment under Civ.R. 60(B). Because defendant filed her notice of appeal within 30 days of the trial court's judgment, her appeal is timely and we have jurisdiction to consider whether the trial court properly denied defendant's November 6, 2009 motion. *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 245 (concluding denial of a motion to vacate or for relief from judgment is a final appealable order); *Browder v. Shea*, 10th Dist. No. 04AP-1217, 2005-Ohio-4782, ¶10 (noting appellate courts have jurisdiction to review only final orders, judgments or decrees). Plaintiff's motion to dismiss is denied.

IV. Defendant's Appeal

{¶10} Defendant contends the trial court erred in denying her November 6, 2009 motion to vacate the judgment and decree of foreclosure. Although defendant assigns four errors in the trial court's judgment, the doctrine of res judicata resolves defendant's appeal and supports the trial court's judgment.

{¶11} "[A] final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them." *State ex rel. Schneider v. Bd. of Edn. of N. Olmsted City School Dist.* (1988), 39 Ohio St.3d 281, 281-82, quoting *Johnson's Island, Inc. v. Bd. of Twp. Trustees* (1982), 69 Ohio St.2d 241, 243. Application of the doctrine of res judicata does not depend on whether the original claim explored all possible theories of relief. *Hamrick v. DaimlerChrysler Motors*, 9th Dist. No. 03CA008371, 2004-Ohio-3415, ¶13, citing *Brown v. Dayton*, 89 Ohio St.3d 245, 248, 2000-Ohio-148.

{¶12} Defendant filed three motions to set aside the trial court's judgment, and each raised the same issue: whether plaintiff achieved proper residence service on defendant under the Civil Rules of Procedure. The trial court denied her first motion on May 22, 2009. A judgment denying a motion to vacate judgment is appealable. *Colley*, supra. Failure to appeal the judgment makes it final, and res judicata applies to bar further litigating the issue. *State v. Redwine*, 12th Dist. No. CA2009-12-045, 2010-Ohio-3468, ¶14.

{¶13} We recognize the trial court's May 22, 2009 Decision and Entry may have suggested to defendant the judgment was not final, as the trial court stated that until defendant could show service of the complaint on Seeshina Mishsa was not reasonably calculated to gain service on defendant, the court would presume service was

accomplished. Despite that language, the trial court specifically stated the motion was denied.

{¶14} Were any lingering doubt remaining, the trial court's decision and entry on defendant's second motion used more conclusive language. In clarifying its rationale, the trial court noted that "Defendant has never explained to the Court why this person would be in her home or why this person is signing for her mail." (Decision & Entry, 2.) The trial court explicitly stated "the Court is not satisfied with the evidence presented by Defendant and *will not vacate its January 2, 2009 decree in foreclosure.*" (Emphasis added.) (Decision & Entry, 2.) Once again, because the trial court's order denying defendant's motion to vacate was a final order, it was immediately appealable. *Kelm v. Kelm* (1992), 73 Ohio App.3d 395, 399. When defendant failed to appeal from that judgment within 30 days, it became final. With its finality, the doctrine of res judicata became applicable.

{¶15} As a result, when defendant filed her third motion to vacate, the one from which she appealed and raised the same issue determined in the first and second motions, the trial court properly denied it on the basis of res judicata. As the trial court explained in its judgment on defendant's third motion to vacate, "[t]here are no new arguments made in the present motion. The Court will not entertain an endless stream of motions based upon the exact same strain of arguments. Judgments need to be final." (Decision & Entry, 1.)

{¶16} In the final analysis, the trial court rendered a final judgment, at the very least when it denied defendant's second motion to vacate and arguably when it denied her first motion to vacate, on precisely the same grounds raised in her third motion to

vacate. Accordingly, the doctrine of res judicata bars her third motion to vacate. *Coulson v. Coulson* (1983), 5 Ohio St.3d 12, 17 (holding res judicata applies when a motion to vacate judgment or relief from judgment has been denied and a party brings a similar motion that raises either the same issues or issues that could have been asserted in the first motion). The trial court properly denied defendant's third motion to vacate because res judicata bars it.

{¶17} Accordingly, defendant's four assignments of error are overruled, and the judgment of the trial court is affirmed.

*Motion to dismiss denied;
judgment affirmed.*

KLATT and McGRATH, JJ., concur.
