[Cite as *Bank of New York v. Blanton*, 2012-Ohio-1597.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

BANK OF NEW YORK,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-03-019
	:	O P I N I O N
- vs -		4/9/2012
	:	
JAMES BLANTON, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2008-CVE-0639

Manley Deas Kochalski LLC, Edward M. Kochalski, P.O. Box 165028, Columbus, Ohio 43216-5028, for plaintiff-appellee

Dever Legal Services, Jonathan Dever, 9146 Cincinnati-Columbus Road, West Chester, Ohio 45069, for defendant-appellant

Mortgage Electric Registration System, 3300 SW 34th Avenue, Suite 101, Ocala, Florida 34474, Defendant

James Nichols, 123 North Third Street, Batavia, Ohio 45103, for Defendant Clermont County Treasurer

POWELL, P.J.

{¶ 1} Defendant-appellant, James Blanton, appeals the decision of the Clermont County Court of Common Pleas denying his motion to "Vacate Void Summary Judgment." Summary judgment was previously entered against him and several other parties in favor of

plaintiff-appellee, The Bank of New York as Trustee for the Certificateholders CWALT, Inc. Alternative Loan Trust 2006-30T1, Mortgage Passthrough Certificates, Series 2006-30T1 ("Bank of New York"). For the reasons outlined below, we affirm.

{¶ 2} On August 31, 2006, Blanton executed a promissory note in favor of America's Wholesale Lender in the principle amount of $460,000. The note was secured by a mortgage on a residential property. The mortgage document designated Blanton as the borrower, America's Wholesale Lender as the lender, and Mortgage Electronic Registration Systems, Inc. ("MERS") as the mortgagee, acting as a nominee for America's Wholesale Lender.

{¶ 3} On March 25, 2008, Bank of New York filed a foreclosure action against Blanton, alleging Blanton was in default on payment of the note. Bank of New York sought judgment on the note in the amount of $454,789.83, plus interest, fees, taxes, and costs, and further sought to foreclose on the mortgage. Following the filing of several amended complaints by Bank of New York and the filing of a counterclaim by Blanton, Bank of New York moved for summary judgment on its second amended complaint and Blanton's counterclaim.

{¶ 4} In his counterclaim and opposition to summary judgment, Blanton's argument rested primarily on ground that Bank of New York was not the real party in interest, and thus lacked standing to bring the foreclosure action. Blanton argued that because the original note and mortgage listed the lender as America's Wholesale Lender, America's Wholesale Lender was the real party in interest. As a result of Blanton's contention, the trial court traced the history of Blanton's loan. The trial court found that Blanton entered into the note with Countrywide Home Loans, Inc., a corporation conducting business as America's Wholesale Lender. The trial court found that this loan was then securitized and pooled with other loans. Under the pooling and servicing agreement ("PSA"), Countrywide Home Loans, Inc. sold all

its right, title, and interest to CWALT as depositor, which in turn conveyed its interest to Bank of New York as trustee for the benefit of the pool's investors. The trial court concluded that Bank of New York had ownership of the note.

{¶ 5} Blanton also asserted that because MERS acted solely as a nominee for the original lender, MERS never held any interest, and therefore could not transfer any interest to Bank of New York. In addressing his argument, the trial court explained that MERS, as nominee, holds legal title to a mortgage for the benefit of the note holder. The trial court found, in this case, MERS initially held legal title to Blanton's mortgage for the benefit of the original lender. When the note was sold, MERS retained legal title to the mortgage. However, when the beneficial interest of the mortgage transferred to Bank of New York, Bank of New York began to hold legal title to the mortgage as trustee.

{¶ 6} The trial court concluded that because Bank of New York had consolidated ownership of the mortgage and note, it was the real party in interest under Civ.R. 17(A). Consequently, the trial court granted Bank of New York's summary judgment motion. Despite an opportunity to do so, Blanton failed to appeal from this decision and order.

{¶ 7} Over a year later, on January 19, 2011, Blanton filed a motion to vacate void summary judgment. In his motion, Blanton again asserted that Bank of New York was not the real party in interest because it lacked standing. In support of his argument, he essentially alleged that America's Wholesale Lender never assigned interest in the note or mortgage to either MERS or Bank of New York and a false chain of title was created to support Bank of New York's summary judgment motion. Blanton contended that his motion was proper because standing is a jurisdictional issue and any judgment rendered by a court lacking subject-matter jurisdiction is void. On February 14, 2011, the trial court issued a decision denying Blanton's motion, finding he did not present new issues or evidence before the court than when summary judgment was granted in favor of Bank of New York in July

2009.

{¶ 8} Blanton now appeals from the trial court's denial of his motion to vacate void summary judgment, raising one assignment of error for review:

{¶ 9} IN A FORECLOSURE CASE, THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST DEFENDANT-APPELLANT WHEN APPELLEES DID NOT HAVE STANDING TO BRING THE CAUSE OF ACTION AS IT WAS NOT THE REAL PARTY IN INTEREST.

{¶ 10} Blanton argues that Bank of New York lacked standing to bring a cause of action against him because it was not the real party in interest. Blanton's specific argument on appeal is that Bank of New York is not the real party in interest because Bank of New York failed to show that the note was placed into the pool of lenders and properly endorsed pursuant to the PSA. However, regardless of Blanton's rationale, we find we are unable to discuss the merits of his appeal outside the parameters of Civ.R. 60(B).

{¶ 11} Blanton's argument on appeal rests on the premise that standing is a jurisdictional issue. Because Blanton asserts that standing is jurisdictional, he presumes that the issue of whether Bank of New York has standing may be properly raised at any time. However, we have held that the issue of standing is not jurisdictional, but rather procedural. *Washington Mut. Bank, F.A. v. Wallace*, 194 Ohio App.3d 549, 2011-Ohio-4174 (12th Dist.); *Robbins v. Warren*, 12th Dist. No. CA95-11-200, 1996 WL 227477 (May 6, 1996). *See also State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70 (1998); *BAC Home Loans Servicing, L.P. v. Cromwell*, 9th Dist. No. 25755, 2011-Ohio-6413. Because a lack of standing does not implicate jurisdiction, the trial court's initial decision granting summary judgment in favor of Bank of New York is not void, but merely voidable. *See State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 6; *Eisenberg v. Peyton*, 56 Ohio App.2d 144, 148 (8th Dist.1978); *Huebner v. Scott*, 12th Dist. No. CA92-06-014, 1992 WL 340964, *2 (Nov. 23, 1992).

Accordingly, the trial court's initial decision regarding summary judgment is valid and binding and may not be collaterally attacked except under the provisions of Civ.R. 60(B). *Huebner* at *2. Any issues appealed from the trial court's decision denying Blanton's motion to vacate void summary judgment falling outside of the parameters of Civ.R. 60(B) are barred by res judicata as they could have been raised on direct appeal. *Id*. Consequently, in order for Blanton to possibly be entitled to relief, we must construe his motion to vacate void summary judgment as a Civ.R. 60(B) motion.

{¶ 12} An appellate court will not disturb a trial court's decision regarding a Civ.R. 60(B) motion absent a showing of an abuse of discretion. *Veidt v. Cook*, 12th Dist. No. CA2003-08-209, 2004-Ohio-3170, ¶ 14, *citing Strack v. Pelton*, 70 Ohio St.3d 172, 174 (1994). An abuse of discretion occurs when the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 13} Civ.R. 60(B) provides in 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 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.

{¶ 14} To prevail on a Civ.R. 60(B) motion, the movant must demonstrate that

> 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 (1976), paragraph two of the syllabus. The moving party fails the test outlined by *GTE* by not meeting any one of the three requirements. *Fitzwater v. Woodruff*, 12th Dist. No. CA2006-01-001, 2006-Ohio-7040, ¶ 10; *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20 (1988).

{¶ 15} When applying the requirements needed to prevail under Civ.R. 60(B), under the first prong, Blanton's contention that Bank of New York is not the real party in interest, if correct, might be construed as a meritorious defense. *GMAC Mtge., L.L.C. v. Herring*, 189 Ohio App.3d 200, 2010-Ohio-3650, ¶ 39 (2nd Dist.). However, Blanton ultimately fails under the second and third prongs.

{¶ 16} Under the second prong, Blanton did not expressly assert that he was entitled to relief under any of the grounds stated in Civ.R. 60(B)(1) through (5) in his motion to vacate void summary judgment or on appeal. However, Blanton contended that his motion was "based upon the fraudulent inconsistencies and inadequacies of [Bank of New York's] complaint, mortgage, note, assignment of documents attached to [Bank of New York's] complaint documenting lack of real party in interest of [Bank of New York] before the Court," giving some semblance of asserting that he is entitled to relief under Civ.R. 60(B)(3) due to fraud. Despite this contention, Blanton explicitly denied any reliance on Civ.R. 60(B) and stated that "the authority to vacate a void judgment is not derived from Ohio R. Civ. P. 60(B)." In any event, Blanton failed to demonstrate he is entitled to relief for reasons not previously before the trial court supporting an allegation of fraud. *See Cromwell*, 9th Dist. No. 25755, 2011-Ohio-6413, at ¶ 12.

{¶ 17} Under the third prong, Blanton failed to assert any reason why his motion was not filed within a reasonable time when it was filed more than a year after the trial court's initial grant of summary judgment to Bank of New York. *See Strack*, 70 Ohio St.3d 172, at 175; *City of Middletown v. Roy*, 12th Dist. No. CA86-02-015, 7 WL 16585, *3 (Sept. 8, 1987).

{¶ 18} Furthermore, Blanton asserts the same argument, that Bank of New York is not the real party in interest, in his opposition to Bank of New York's motion for summary judgment, his motion to vacate void summary judgment, and this appeal. While asserting slightly different rationales in each instance, his contentions are all variations on the same theme. In essence, Blanton's argument is one that could, and should, have been raised in a timely direct appeal from the decision granting Bank of New York summary judgment in 2009. *See Doe v. Trumbull Cty. Children's Services Bd.*, 28 Ohio St.3d 128 (1986), paragraph two of the syllabus (holding a party may not use a Civ.R. 60(B) motion as a substitute for a timely appeal); *Zaring v. Lyons*, 12th Dist. No. CA95-09-163, 1996 WL 56038, *1 (Feb. 12, 1996).

{¶ 19} In light of the foregoing, we cannot conclude that the trial court's decision finding Blanton did not present any new issues or evidence for review in his motion to vacate void summary judgment was arbitrary, unreasonable, or unconscionable. We therefore find the trial court did not abuse its discretion in denying Blanton's motion to vacate void summary judgment.

{¶ 20} Accordingly, Blanton's sole assignment of error is overruled.

{¶ 21} Judgment affirmed.

PIPER and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.