[Cite as *S. Park Manor Condominiums Unit Owners' Assoc. v. Clarendon Group, Inc.*, 2017-Ohio-8491.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105672

SOUTH PARK MANOR CONDOMINIUMS UNIT OWNERS' ASSOCIATION

PLAINTIFF-APPELLEE

vs.

CLARENDON GROUP, INC.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-858828

BEFORE: Keough, A.J., E.T. Gallagher, J., and Stewart, J.

RELEASED AND JOURNALIZED: November 9, 2017

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KATHLEEN ANN KEOUGH, A.J.:

{¶1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1. The purpose of an accelerated appeal is to allow this court to render a brief and conclusory opinion. *State v. Priest*, 8th Dist. Cuyahoga No. 100614, 2014-Ohio-1735, ¶ 1.

{¶2} South Park Manor Condominiums is a 94-unit apartment-style brick building located at 13800 Fairhill Road in Shaker Heights, Ohio. Each unit owner is a member of plaintiff-appellee, South Park Manor Condominiums Unit Owners' Association (the "Association"), a nonprofit corporation that acts on behalf of the unit owners, including collecting monthly assessments and fees for maintenance, repair, and insurance of the common areas.

{¶3} Defendant-appellant, the Clarendon Group, Inc. (the "Clarendon Group"), is a commercial real estate services and advisory firm that took title to Unit No. 318 at South Park Manor Condominiums on January 31, 2013. Upon taking title to the condominium, it became a member of the Association, obligated to pay monthly fees and assessments for common expenses. When the Clarendon Group did not timely pay in full the monthly fees and assessments, the Association filed liens pursuant to R.C. 5311.18 to protect its interest in collecting the unpaid fees and assessments. In August 2015, the Clarendon Group stopped making any payments whatsoever. On February 11, 2016, the Association filed a complaint to foreclose its liens.

{¶4} The case was referred for mediation but did not settle. Subsequently, on

December 2, 2016, the Association filed a motion for summary judgment. The Clarendon Group did not oppose the motion, nor file a Civ.R. 56(F) motion seeking additional time for discovery. On January 13, 2017, the trial court entered judgment granting the Association's motion and ordering foreclosure. The Clarendon Group did not appeal from this decision.

{¶5} Instead, on March 30, 2017, nearly two and a-half months later and three days before the scheduled sheriff's sale, the Clarendon Group filed a motion to stay the sale and for relief from judgment pursuant to Civ.R. 60(B). The trial court denied the motion, and this appeal followed.

{¶6} In its single assignment of error, the Clarendon Group asserts that the trial court abused its discretion in denying its Civ.R. 60(B) motion for relief from judgment.

{¶7} A reviewing court will not disturb a trial court's decision regarding a Civ.R. 60(B) motion absent an abuse of discretion. *State ex rel. Russo v. Deters*, 80 Ohio St.3d 152, 153, 684 N.E.2d 1237 (1997). To prevail on a Civ.R. 60(B) motion for relief from judgment, the moving party must demonstrate (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 (B)(5);[1] and (3) the motion is made within a reasonable time, and where the grounds for relief are Civ.R. 60(B)(1), (2), or (3), not

[1] Those grounds are: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial under Civ.R. 59(B); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged; and (5) any other reason justifying relief from the judgment.

more than one year after the judgment was entered. *GTE Automatic Elec. v. ARC Ind.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus. If any of these three requirements is not met, the motion is properly overruled. *Svoboda v. Brunswick*, 6 Ohio St.3d 348, 351, 453 N.E.2d 648 (1983).

{¶8} In its Civ.R. 60(B) motion for relief from judgment, the Clarendon Group asserted that during the litigation, it had investigated and researched various "management issues" with the Association that allegedly impacted the amount of the assessed condominium fees, but it did not have the "specificity and details necessary to formulate a defense to the judgment amount and the impending foreclosure action." It asserted that it had recently come into possession of "various documents" regarding "mismanagement" by the Association, however, and that this newly discovered evidence would provide grounds for the Clarendon Group to challenge the judgment amount sought by the Association. It further asserted that the Association's complaint was defective because the Association had "failed to attach an accounting of the defendant's debts or evidence of the amount of the lien."

{¶9} It is well-established that Civ.R. 60(B) cannot be used as a substitute for an appeal. *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128, 502 N.E.2d 605 (1986), paragraph two of the syllabus. As this court stated recently:

> Public policy favors the finality of judgments. *Rhoads v. Greater Cleveland Regional Transit Auth.*, 8th Dist. Cuyahoga No. 92024, 2009-Ohio-2483, ¶ 5. If not appealed, a trial court's judgment must remain undisturbed pursuant to the doctrine of res judicata, which bars claims that were or could have been raised on direct appeal. *La Barbera v. Barsch*, 10 Ohio St.2d 106, 113, 227 N.E.2d 55 (1967). Thus, relief from judgment

> under Civ.R. 60(B) should be granted only in the exceptional circumstance where justice demands relief from a prior judgment. *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 105, 316 N.E.2d 469 (8th Dist.1974). For these reasons, a Civ.R. 60(B) motion may not be used as a substitute for appeal to collaterally attack a final judgment. *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 21 N.E.3d 1040, ¶ 16, citing *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, 846 N.E.2d 43, ¶ 8-9.

M & T Bank v. Steel, 8th Dist. Cuyahoga No. 101924, 2015-Ohio-1036, ¶ 13.

{¶10} Here, the Clarendon Group's remedy was to challenge the trial court's judgment by way of appeal after the trial court granted summary judgment and ordered foreclosure on January 13, 2017. Because the Clarendon Group was improperly attempting to use its Civ.R. 60(B) motion as a substitute for an appeal, the trial court did not abuse its discretion in denying the motion.

{¶11} The trial court also properly denied the motion for relief from judgment because the Clarendon Group did not demonstrate it has a meritorious defense or claim to present if relief were granted. In its motion, the Clarendon Group broadly asserted various "management issues" by the Association as a meritorious defense, but it did not provide any specific facts or details as to the alleged issues. In any event, R.C. 5311.18(B)(6) provides that in a lien foreclosure action, "it is not a defense, set off, counterclaim, or crossclaim that the unit owners association has failed to provide the unit owner with any service, goods, work, or material, or failed in any other duty." Thus, by statute, the Clarendon Group's unspecified "management issues" do not constitute a meritorious claim, defense, or setoff applicable to the foreclosure action.

{¶12} The trial court also properly denied the motion for relief from judgment

because the Clarendon Group did not demonstrate any grounds for relief under Civ.R. 60(B)(1) through (5). Although the motion failed to cite any specific provisions of the rule, we presume that the Clarendon Group was seeking relief under Civ.R. 60(B)(2) and (5).

{¶13} Civ.R. 60(B)(2) allows the court to grant relief from judgment because of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B)." Assuming that Civ.R. 60(B)(2) applies to a situation where relief is sought from summary judgment rather than from a judgment following trial,[2] the Clarendon Group did not demonstrate it was entitled to relief under Civ.R. 60(B)(2). It did not specify what documents were newly discovered nor how they demonstrated any alleged "mismanagement" by the Association relating to assessed fees, and it failed to demonstrate why this evidence could not have been discovered in the exercise of due diligence before summary judgment was granted. Furthermore, as this court pointed out in *Miles Landing Homeowners Assn.*, where a party presents no evidence to the court in opposition to a summary judgment motion, such as in this case, "the incremental effect of any newly discovered evidence is somewhat beside the point."

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[2] *See, e.g., Miles Landing Homeowners Assn. v. Harris*, 8th Dist. Cuyahoga No. 88471, 2007-Ohio-3411, ¶ 10 (addresses merits of Civ.R. 60(B)(2) claim and holds that movant did not meet her burden under the rule where she failed to specifically identify the alleged newly discovered evidence and had not opposed the summary judgment motion); *but cf. Thompson v. Russ-Pol, Inc.*, 11th Dist. Trumbull No. 4071, 1989 Ohio App. LEXIS 1544, *7 (Apr. 28, 1989) ("To the extent that the language of Civ.R. 60(B)(2) provides for a new trial on the basis of newly discovered evidence which could not have been timely obtained, this section does not appear to be a

Id. at ¶ 10. Accordingly, the trial court did not abuse its discretion by denying relief from judgment on this ground.

{¶14} Likewise, the Clarendon Group was not entitled to relief under Civ.R. 60(B)(5), which allows relief from judgment for "any other reason justifying relief from judgment." There is simply no merit to the Clarendon Group's argument that the foreclosure decree should be vacated because the Association failed to attach an accounting of the Clarendon Group's debts or evidence of the amount of the liens to its complaint. Under Civ.R. 10(D)(1), "[w]hen any claim or defense is founded on an account * * *, a copy of the account * * * must be attached to the pleading." But in this case, the Association's complaint was for foreclosure of liens for unpaid assessments, brought in accordance with R.C. 5311.18. Copies of the Association's liens were attached to the complaint as Exhibits B and C. We find no statutory authority or case law requiring the Association to attach an account history to its complaint to foreclose liens under R.C. 5311.18. Furthermore, the Association attached a copy of the Clarendon Group's account history to the affidavit accompanying its motion for summary judgment. Thus, the Clarendon Group had a copy of its account, and its argument was moot at the time it was made.

{¶15} The trial court did not abuse its discretion in denying the Clarendon Group's motion for relief from judgment. The assignment of error is overruled, and the judgment is affirmed.

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ground for relief from judgment when the original entry is one granting summary judgment.").

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE

EILEEN T. GALLAGHER, J., and
MELODY J. STEWART, J., CONCUR