[Cite as *Bank of New York Mellon v. Martin*, 2015-Ohio-2531.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

THE BANK OF NEW YORK MELLON, f.k.a. THE BANK OF NEW YORK as Trustee For The Certificate Holders, CWALT, Inc., Asset-Backed Certificates, Series 2004-16CB,	:	APPEAL NO. C-140314 TRIAL NO. A-0900779
Plaintiff-Appellant,	:	*O P I N I O N.*
vs.	:	
MARY A. MARTIN,	:	
and	:	
DONALD L. PARKS, a.k.a. DONALD L. PARKS, JR.,	:	
Defendants-Appellees,	:	
and	:	
NATIONAL CITY BANK,	:	
Defendant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed

Date of Judgment Entry on Appeal: June 26, 2015

McGlinchey Stafford and *Kimberly Y. Smith Rivera,* for Plaintiff-Appellant,

Wood & Lamping LLP and *Kevin K. Frank,* for Defendants-Appellees.

Please note: this case has been removed from the accelerated calendar.

CUNNINGHAM, Judge.

{¶1} On July 1, 2010, the trial court entered judgment in favor of plaintiff-appellant, The Bank of New York Mellon, f.k.a. The Bank of New York, as trustee for the certificate holders, CWALT, Inc., Asset-Backed Certificates, Series 2004-16CB ("Bank of New York"), on its complaint in foreclosure against defendants-appellees, Mary A. Martin and Donald L. Parks, a.k.a. Donald L. Parks, Jr., ("Martin and Parks"). While Martin and Parks had raised the issue of standing before judgment, they did not pursue an appeal from that judgment.

{¶2} Four years later, the trial court granted Martin and Parks' Civ.R. 60(B) motion for relief from judgment, finding that Bank of New York lacked standing to pursue the foreclosure action. Bank of New York now appeals from that judgment.

{¶3} Because Martin and Parks had filed a Civ.R. 60(B) motion to relitigate the issue of the bank's standing—an issue that they had raised at the start of litigation, but which they failed to appeal—the doctrine of res judicata barred their collateral attack against the judgment in foreclosure. We reverse the judgment of the trial court.

Martin and Parks Default in Mid-2008

{¶4} In 2004, Martin and Parks purchased a home in Harrison, Ohio, financed through All State Home Mortgage Inc. Martin executed a promissory note in the amount of $279,000 in favor of All State Home Mortgage. From the copy of the note attached to the complaint, it appears that Parks' signature had been crossed out and the initials "MM" have been written near the correction. The note was secured by a mortgage, also in favor of All State Home Mortgage. The mortgage was signed by both Martin and Parks.

{¶5} By mid-2008, Martin and Parks had defaulted on their repayment obligations.

Bank of New York Files For Foreclosure in January 2009

{¶6} In January 2009, Bank of New York, claiming to be the current holder of the note and mortgage, filed this action against Martin and Parks. The bank sought judgment on the note and foreclosure on the mortgage. As provided in the loan documents, Bank of New York accelerated repayment of the note. The principal due was $262,500, plus interest from August 1, 2008. The bank attached the original mortgage and note to the complaint. The record certified for our review does not indicate that Martin and Parks filed an answer to the complaint.

{¶7} In July 2009, Bank of New York moved for both default and summary judgment supported by the affidavit of Denise Bailey of Litton Loan Servicing, the bank's loan servicer. Bailey stated that Bank of New York was the holder of the note as well as the assignee of the mortgage. She stated that Martin and Parks were in default and that $262,500 was due. The bank also filed an allonge, and a recorded assignment of mortgage, executed one month prior to the filing of the complaint, which together purported to transfer the note and mortgage to Bank of New York. The motions were referred to a magistrate for resolution.

Martin and Parks First Challenge Standing in August 2009

{¶8} Martin and Parks did not oppose Bank of New York's summary-judgment motion. In August 2009, the magistrate granted summary judgment to Bank of New York. Finally, Martin and Parks made an appearance pro se, and filed a brief objection to the magistrate's decision stating that the note containing Parks' signature had been defaced and altered without their knowledge. The trial court ordered the magistrate to hold a hearing on the matter.

{¶9} Two days before the December 2009 hearing, Martin and Parks filed a motion to dismiss the complaint on grounds that Bank of New York had committed a fraud upon the court when it brought this action "with knowledge prior to the [filing of the complaint, that it lacked] standing and [could not] prove ownership of

the mortgage note." They also filed a "Motion of Evidentiary Hearing" in which they alleged that Bank of New York did not own, possess, or control the note or mortgage. Neither motion was properly supported. Neither indicated proof of service upon the bank. *See* Civ.R. 5(B)(3).

{¶10} At the hearing, Parks argued that Bank of New York lacked standing to prosecute the foreclosure action because the assignments had been filed after the commencement of the action. Parks reiterated that his name had been "scratched off the note" without his knowledge.

{¶11} Nonetheless, the magistrate issued a December 17, 2009 decision denying Martin and Parks' motions, and again granting summary judgment to Bank of New York. Construing the facts most strongly against the bank, the magistrate determined that no questions of material fact remained as to whether Martin and Parks were in default, whether they owed $262,566.60 plus interest from August 1, 2008, and whether Bank of New York was the holder of the note and mortgage. The magistrate concluded that Bank of New York was entitled to judgment and a decree in foreclosure.

{¶12} Martin and Parks, still appearing pro se, filed an objection to the magistrate's decision in which Martin declared that "I have the right to know that the foreclosing bank is the bank that holds the note." Once assured of that fact, Martin stated that she would apply for a loan modification.

{¶13} On July 1, 2010, the trial court journalized an order overruling the objection and adopting the magistrate's December 17, 2009 decision granting summary judgment to Bank of New York.

Martin and Parks Forgo Appeal of the July 2010 Judgment

{¶14} Having retained legal counsel, Martin and Parks filed a timely notice of appeal from the trial court's judgment. In the body of their notice of appeal, Martin and Parks offered an unnecessarily detailed explanation of the basis of their

challenge to the trial court's judgment. *See* App.R. 3(D). They reiterated that the judgment was flawed because Bank of New York had failed to produce an original copy of the promissory note, and that the note had been materially altered by the removal of Parks' signature from the note.

{¶15} Two months later, Martin and Parks voluntarily dismissed their appeal. The record on review provides no explanation for this action.

Four Years Later, The Trial Court Sets Aside Its July 2010 Judgment

{¶16} In August 2011, 11 months after dismissing the appeal, Martin filed a petition for bankruptcy, and Bank of New York provided notice of an automatic stay of the proceedings under 11 U.S.C. 362(a). Nonetheless, in January 2012, 18 months after the trial court had entered judgment against them, Martin and Parks filed a Civ.R. 60(B)(5) motion for relief from judgment. While the motion was pending, Martin informed the trial court that she had voluntarily dismissed her bankruptcy case, and that the automatic stay had been lifted.

{¶17} In their Civ.R. 60(B) motion, Martin and Parks renewed their argument that Bank of New York had failed to demonstrate that it had standing to bring a foreclosure action. They maintained, in belated opposition to Bank of New York's July 2009 summary-judgment motion, that (1) the supporting affidavit of Denise Bailey had not been made on personal knowledge, (2) portions of the affidavit were false, and (3) thus the affidavit had failed to "be reliable as a whole, sufficient to provide the evidentiary support" for the entry of summary judgment. They also alleged deficiencies in the record of transfer of the note and mortgage from All State Home Mortgage to Bank of New York.

{¶18} In May 2013, the magistrate denied the motion for relief from judgment. At Martin and Parks' request, the magistrate prepared findings of fact and conclusions of law, including his conclusions that their motion had not been timely filed and that Martin and Parks had failed to set forth evidence of a

meritorious defense. Martin and Parks filed timely objections to the magistrate's decision.

{¶19} One year later, the trial court sustained Martin and Parks' objections. The trial court explained that since a party's lack of standing in a foreclosure action renders any judgment void for lack of subject-matter jurisdiction, Martin and Parks' challenge to Bank of New York's standing had not been waived and could be raised at any time, even by a motion to set aside the judgment.

{¶20} Ratifying the argument that Martin and Parks had made throughout the proceedings, the court found that Bank of New York may have acquired the note after the complaint had been filed, and that the allonge purporting to assign interest in the note was defective. Since a foreclosing plaintiff must have standing at the time a suit is commenced, *see Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 3, the trial court ordered its July 2010 judgment set aside and dismissed Bank of New York's then five-year-old complaint without prejudice. Bank of New York timely appealed.

Can Standing Be Challenged By A Civ.R. 60(B) Motion?

{¶21} In two interrelated assignments of error, Bank of New York contends that the trial court erred in granting Martin and Parks' Civ.R. 60(B) motion for relief from the July 2010 judgment. The gravamen of their argument is that Martin and Parks had repeatedly raised the question of standing in the trial court. The magistrate and trial court had found their arguments unavailing. And Martin and Parks could have pursued a direct appeal of the court's July 2010 judgment, but chose not to. Thus, the doctrine of res judicata bars them from challenging standing by means of a collateral attack on the final judgment. We agree.

{¶22} As a preliminary matter, we note that on appeal Martin and Parks maintain that the trial court properly granted their Civ.R. 60(B) motion. But they also argue, in the alternative, that the trial court's July 2010 judgment adopting the

magistrate's decision was not a final order. Martin and Parks contend that if the trial court's July 2010 order was not final and appealable, they could not have sought an appeal from that order, and thus the doctrine of res judicata would not operate to bar their motion to set aside the judgment.

{¶23} Were we to adopt this position, Martin and Parks' victory would be a hollow one indeed. Under Civ.R. 60(B), a court may only relieve a party from a "final judgment, order or proceeding." If the trial court had never entered a final order from which an appeal could have been taken, the trial court would have been unable to entertain the Civ.R. 60(B) motion which granted Martin and Parks the relief that they had sought. *See Hadassah v. Schwartz*, 1st Dist. Hamilton No. C-110699, 2012-Ohio-3910 (holding that a Civ.R. 60(B) motion is improper when the trial court is not presented with a final judgment).

{¶24} Martin and Parks' objection to the 2010 judgment, as expressed in oral argument, was that the judgment was so short that they could not discern the basis for the trial court's decision. But there is no requirement that the trial court explain or justify its ruling. *E.g.*, *Alexander v. LJF Mgt.*, 1st Dist. Hamilton No. C-090091, 2010-Ohio-2763, ¶ 13 (holding that Civ.R. 53(D)(4), 54(A), and 58(A) require no more than a clear and concise announcement of the trial court's judgment). Martin and Parks can point to nothing in this record to support their contention that the entry fails to satisfy the requirement of a final order.

Kuchta *and Relief Under Civ.R. 60(B)*

{¶25} To succeed on a motion for relief from judgment under Civ.R. 60(B), a movant must establish (1) a meritorious defense, (2) entitlement to relief under one of the grounds set forth in the rule, and (3) that the motion was made within a reasonable time. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus. All three prongs must be met before relief from judgment can be granted.

{¶26} We review a trial court's decision to grant or deny relief from judgment under an abuse-of-discretion standard. Reversal is warranted only when the court's decision was unreasonable, arbitrary, or unconscionable. An unreasonable decision is one that no sound reasoning process supports. *See Steinriede v. Cincinnati*, 1st Dist. Hamilton No. C-100289, 2011-Ohio-1480, ¶ 5, citing *AAAA Ents. Inc. v. River Place Community Urban Redev. Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶27} Without deciding whether there was any justification for an 18-month delay in filing the Civ.R. 60(B) motion, it is undisputed that Bank of New York's lack of standing to bring this action in foreclosure, if properly established, would constitute a meritorious defense to the action. *See Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, at ¶ 40; *but see Wells Fargo Bank, N.A. v. Horn*, Slip Opinion No. 2015-Ohio-1484, syllabus (holding that proof of standing "may be submitted subsequent to the filing of the complaint"). Our focus, then, is on the second prong of the *GTE* analysis: whether Martin and Parks were entitled to relief under Civ.R. 60(B)(5).

{¶28} In *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, the Ohio Supreme Court recently answered that inquiry in the negative. In *Kuchta*, after the bank seeking foreclosure had filed its complaint, it filed evidence reflecting that assignment of the note and mortgage had occurred after the filing of the complaint. *Id.* at ¶ 2-3. The homeowners answered the foreclosure complaint and asserted that the bank lacked standing. *Id.* But the homeowners failed to respond to the bank's summary-judgment motion and did not pursue an appeal from the judgment. *Id.* at ¶ 3-4.

{¶29} The homeowners ultimately sought relief from judgment pursuant to Civ.R. 60(B)(3). *Id.* at ¶ 5. They argued that the bank's lack of standing at the time of filing the foreclosure established both their entitlement to relief due to fraud

or misconduct and a meritorious defense to the underlying action. *Id*. at ¶ 12. The trial court denied the motion. The appellate court reversed the trial court concluding that, because standing was jurisdictional, the homeowners would be entitled to relief if the bank's lack of standing was demonstrated. *Id*. at ¶ 5.

{¶30} The Ohio Supreme Court rejected the argument that a party's lack of standing in a foreclosure action renders the judgment void ab initio for lack of subject-matter jurisdiction. While standing is required in order to invoke the jurisdiction of the court over a particular action, "lack of standing does not affect the subject-matter jurisdiction of the court." *Id*. at paragraph three of the syllabus.

{¶31} The court continued that because the alleged fraud and misconduct by the bank had not prevented the homeowners from appearing and raising defenses, including lack of standing, the homeowners had not established their entitlement to relief due to fraud under Civ.R. 60(B)(3). *Id*. at paragraph one of the syllabus. Because the issue of standing had been raised during the foreclosure proceedings, res judicata prevented the homeowners from using the issue to establish entitlement to relief. While "Civ.R. 60(B) exists to resolve injustices that are so great that they demand a departure from the strict constraints of res judicata," the court held that "the rule does not exist to allow a party to obtain relief from his or her own choice to forgo an appeal from an adverse decision." *Id*. at ¶ 15, citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244, 64 S.Ct. 997, 88 L.Ed. 1250, (1944), and *Ackermann v. United States*, 340 U.S. 193, 198, 71 S.Ct. 209, 95 L.Ed. 207 (1950).

{¶32} It is well established that a Civ.R. 60(B) motion cannot be used as a substitute for timely appeal. *E.g., Interntl. Lottery v. Kerouac*, 102 Ohio App.3d 660, 668, 657 N.E.2d 820 (1st Dist.1995). Thus, while a party's lack of standing can be challenged in the course of the foreclosure proceedings themselves or on direct appeal of the judgment, res judicata bars a party from asserting a lack of standing in

a collateral attack on a final judgment in foreclosure. *Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, at paragraph two of the syllabus.

{¶33} While Martin and Parks' motion for relief from judgment was brought under Civ.R. 60(B)(5), and not (B)(3), we hold that the *Kuchta* analysis controls in this case. *See Bank of New York Mellon v. McMasters*, 11th Dist. Lake No. 2014-L-112, 2015-Ohio-1769, ¶ 15; *see also J.P. Morgan v. Sponseller*, 9th Dist. Summit No. 27244, 2014-Ohio-5533, ¶ 10.

Martin and Parks Not Entitled to Relief Under Civ.R. 60(B)

{¶34} Here, as in *Kuchta*, the homeowners filed a Civ.R. 60(B) motion in order to relitigate an issue that they had raised in the trial court. Martin and Parks first raised the standing issue one month after Bank of New York sought summary judgment in July 2009. They continued to raise that defense until the trial court entered summary judgment in Bank of New York's favor in July 2010. And they failed to prosecute an appeal from that judgment. The doctrine of res judicata bars their collateral attack against the judgment in foreclosure. *Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, at paragraph two of the syllabus; *see Frazier v. Cincinnati School of Med. Massage*, 1st Dist. Hamilton No. C-060359, 2007-Ohio-2390, ¶ 45.

{¶35} Martin and Parks could not rely on their standing argument to vacate the adverse foreclosure judgment pursuant to Civ.R. 60(B), because the rule cannot be used as a substitute for an appeal. *Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, at ¶ 16. Thus, they were unable to establish that they were entitled to relief under Civ.R. 60(B)(5). *See GTE Automatic Elec., Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113, at paragraph two of the syllabus.

{¶36} Because Martin and Parks cannot establish that they are entitled to relief under Civ.R. 60(B)(5), there is no sound reasoning process supporting the trial court's decision to grant the motion. We hold that the trial court abused its

discretion in granting relief under the rule. *See Steinriede*, 1st Dist. Hamilton No. C-100289, 2011-Ohio-1480, at ¶ 5; *see also AAAA Ents.*, 50 Ohio St.3d at 161, 553 N.E.2d 597. The assignments of error are sustained.

Conclusion

{¶37} Having sustained Bank of New York's assignments of error, we reverse the May 4, 2014 judgment of the trial court granting Martin and Parks' Civ.R. 60(B) motion, and reinstate the trial court's July 1, 2010 judgment.

Judgment reversed.

HENDON, P.J., and **FISCHER, J.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.