

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Countrywide Home Loans,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 04AP-171
v.	:	(C.P.C. No.02CVE02-8988)
	:	
Lisa Barclay et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellants,	:	
	:	
John Doe, unknown spouse of	:	
Lisa Barclay et al.,	:	
	:	
Defendants-Appellees.	:	
	:	

O P I N I O N

Rendered on November 30, 2004

Lerner, Sampson & Rothfuss, and *Thomas L. Henderson*, for
appellee.

Lisa Barclay, pro se.

APPEAL from the Franklin County Court of Common Pleas.

McCORMAC, J.

{¶1} On October 11, 2002, Countrywide Home Loans, plaintiff-appellee, commenced a foreclosure action in the Franklin County Court of Common Pleas against defendants-appellants, Lisa Barclay and others (not including Ajamu M. Kafele who was not a named defendant and never appeared in the action). On December 17, 2002, a default judgment in the form of a judgment entry and decree of foreclosure was rendered

and entered by the trial court against defendant-appellant Barclay. The court entered a notice of a final appealable order on that day. A sheriff's sale of the subject real property was held on April 2, 2003. The sale was confirmed by judgment entry on May 9, 2003. No appeal was taken from the decree of foreclosure nor the confirmation of the sheriff's sale.

{¶2} On October 30, 2003, Barclay filed a "verified motion to vacate foreclosure sale and all orders/judgments of court and set aside fraudulent conveyance of property." Countrywide filed a "motion to strike defendant's motion to vacate judgment; or in the alternative, plaintiff's memorandum in opposition to defendant's motion to vacate judgment." The trial court granted Countrywide's motion to strike on November 20, 2003. Thereafter, on January 22, 2004, the trial court denied Barclay's motion to vacate foreclosure sale on all orders/judgments.

{¶3} Barclay and Kafele filed a notice of appeal on February 20, 2004.

{¶4} Barclay and Kafele assert the following six assignments of error:

1. The Trial Court erred to the prejudice of Defendants-Appellants when it entered judgment for foreclosure, denied motion to vacate, and confirmation of sale of the property for benefit of Plaintiff where there is a Lis Pendens in place by the Defendants requiring that the status quo of the property be maintained and not sold.
2. The Trial Court erred to the prejudice of Defendants-Appellants when it entered judgment for foreclosure, denied motion to vacate, and confirmation of sale for Plaintiff and the Plaintiff is not holder in due course of a claim against Defendants or the subject property, and one entitled to enforce an instrument.
3. The Trial Court erred to the prejudice of Defendants-Appellants when it entered judgment for foreclosure, denied motion to vacate, and confirmation of sale for Plaintiff without

allegation and evidence of an economic injury, by way of an evidentiary hearing, from the supposed breach of contract.

4. The Trial Court erred to the prejudice of Defendants-Appellants when it entered judgment for foreclosure, denied motion to vacate, and confirmation of sale for Plaintiff while the Defendants were not subject to debt collection action by the Attorney-Debt Collector on behalf of the Plaintiff pursuant to the rights, privileges, and immunities enumerated in the Fair Debt Collection Practices Act-15 U.S.C. §1692 et seq.

5. The Trial Court erred to the prejudice of Defendants-Appellants when it entered judgment for foreclosure, denied motion to vacate, and confirmation of sale to deprive Defendants of their property interest without affording them due process and equal protection of law and denied Defendants their rights, privileges, immunities under, not limited to, the U.S. Constitution.

6. The Trial Court erred to the prejudice of Defendants-Appellants when it failed to vacate the foreclosure judgment and sale, and set aside a fraudulent conveyance of the property.

{¶15} Appellants' first four assignments of error all relate to the validity of the judgment for foreclosure and all contain allegations that could have been asserted from a timely appeal of that judgment. App.R. 4(A) sets forth the time requirements for filing a notice of appeal. It provides that, in a civil case, a party has 30 days from the date of the service of the notice of the judgment order appealed. In this case, the appeal is out of time in regard to the judgment of foreclosure and confirmation of the sale, and there is no subject jurisdiction in this court to hear those matters. A Civ.R. 60(B) motion does not extend the time for filing an appeal and may not be used as a substitute for a timely appeal. *Doe v. Trumbull Cty. Children Services Bd.* (1986), 28 Ohio St.3d 128, paragraph two of the syllabus.

{¶6} Matters concerning the doctrine of Lis Pendens and whether Barclay was a holder in due course, whether economic injury is an element of foreclosure action, as well as whether the Fair Debt Collection Practices Act was violated, all could have been raised on direct appeal of the foreclosure judgment and confirmation of sale, and are not properly before this court.

{¶7} The only judgment of the trial court which was appealed within the required 30-day time limit was the trial court's denial to vacate the foreclosure judgment and sale of the property.

{¶8} Assignments of Error No. Five and Six pertain to the trial court overruling Barclay's Civ.R. 60(B) motion. The standard of review on appeal of a motion to vacate pursuant to Civ.R. 60(B) is an abuse of discretion. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97. Abuse of discretion connotes more than an error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶9} The trial court did not abuse its discretion in denying Barclay's motion to vacate because the motion totally failed to meet the requirements for obtaining relief from judgment. In order to prevail on a motion for relief for judgment, pursuant to Civ.R. 60(B), the movant must demonstrate that: (1) he has a meritorious claim or defense; (2) he is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) his motion for relief is made within a reasonable time. *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. The movant must establish the above requirements by operative facts presented in a form that meets evidentiary standards such as affidavits, depositions, transcripts of evidence, written

stipulations or other evidence given under oath. *East Ohio Gas Co. v. Walker* (1978), 59 Ohio App.2d 216, 220.

{¶10} Barclay failed to identify any factual evidence that would satisfy any of the five grounds upon which relief could be granted pursuant to Civ.R. 60(B)(1) through (5). Moreover, she failed to articulate what defense she had to the foreclosure. The burden is on the moving party to allege operative facts that would constitute a meritorious defense if found to be true. *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 247. It is important to note that Barclay never denied a default on the mortgage payments. She allegedly ignored the complaint because she thought she had no lawful duty to formally respond to the complaint because of the attorney debt collector's non-compliance with the Fair Debt Collection Practices Act and a claimed lack of subject-matter jurisdiction (Appellant's brief at 4.) Because the summons and complaint were properly served on Barclay, her intentional disregard of the complaint and relevant law and rules of procedure is not a meritorious defense. Therefore, it was not an abuse of discretion for the trial court to deny the motion.

{¶11} Under Assignment of Error No. Five, Barclay raises the issue of whether she was entitled to a hearing as a matter of due process before the trial court denied her motion to vacate. Under Ohio law, the trial court is not required to grant a hearing on a motion for relief from judgment, *Gaines & Stern Co., L.P.A. v. Schwarzwald, Robiner, Wolf & Rock Co., L.P.A.* (1990), 70 Ohio App.3d 643, when movant has not presented operative facts that show she would have a meritorious defense if the motion were granted. Hence, there was no need for the trial court to hold a hearing to take evidence

and either verify or discredit asserted facts. See *Conley v. Conley* (1992), 81 Ohio App.3d 725.

{¶12} Appellants' first four assignments of error are overruled for lack of subject-matter jurisdiction, appellants' fifth and sixth assignments of error are overruled on the merits, and the judgment of the Franklin County Court of Common Pleas is affirmed.

{¶13} Although appellee's motion to dismiss the appeal of Kafele is moot, for the reasons previously stated, we will comment briefly upon appellee's motion to dismiss his appeal for the reason that he was not a party to the foreclosure. If it were necessary, this motion would be sustained as Kafele was not named as a party defendant to the foreclosure and he never intervened in the action. There is nothing on the record to indicate that he had a recognizable interest in the foreclosed property.

{¶14} The judgment of the trial court is affirmed.

Judgment affirmed.

BOWMAN and KLATT, JJ., concur.

McCORMAC, J., retired of the Tenth Appellate District,
assigned to active duty under authority of Section 6(C), Article
IV, Ohio Constitution.
