

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Freedom Mortgage Corporation,	:	
	:	Nos. 08AP-761
Plaintiff-Appellee,	:	and
v.	:	09AP-162
	:	(C.P.C. No. 07CVE08-11165)
Gary G. Groom et al.,	:	
	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
(Grace Mullins,	:	
Defendant-Appellant).	:	

D E C I S I O N

Rendered on September 1, 2009

Lerner, Sampson & Rothfuss, LPA, Adam R. Fogelman and Elizabeth S. Brashear, for plaintiff-appellee.

The Legal Aid Society of Columbus, Tamara R. Parker and Jamaal Redman, for defendant-appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Grace Mullins, appeals from: (1) a judgment of the Franklin County Court of Common Pleas granting a default judgment of foreclosure in favor of plaintiff-appellee, Freedom Mortgage Corporation ("Freedom Mortgage"), and (2) a judgment of the Franklin County Court of Common Pleas denying Mullins any relief

from the default judgment of foreclosure. For the following reasons, we affirm the latter judgment, and we dismiss the appeal from the former judgment.

{¶2} In 1969, Mullins and her husband purchased a house located at 272 North 17th Street in Columbus, Ohio. Mullins continued to live in the house after her husband died in 1997. In 2000, Mullins mortgaged her home to pay for medical bills. After Mullins defaulted on her mortgage, her lender filed for foreclosure. To prevent foreclosure, Mullins sought refinancing through American Home Loans. Mullins met with Ed Mojtabaei, a loan officer for American Home Loans, to discuss her options. According to Mullins:

[Mojtabaei] told [Mullins] that to avoid losing [her] home in the foreclosure, they could put the financing in Gary Groom's name for a year and then transfer it to [Mullin's] name after a year to give [her] time to get [her] credit repaired. It was explained to [Mullins] that [she] would sell the property to Gary Groom so he would pay off [her] loan, and then Groom would immediately sell [her] home back to [her] and allow [her] to make payments under a land contract.

{¶3} The actual implementation of this scheme did not exactly mirror Mojtabaei's explanation of it. According to Mullins, she, Mojtabaei, and Groom attended a closing on December 30, 2005. Apparently, at some point prior to or during the closing, Mullins deeded the North 17th Street property to Groom. During the closing, Mullins signed a land installment contract to purchase that property back from Gary Groom for \$47,000, payable in monthly installments of \$400.

{¶4} On the same day as the closing, Groom executed a note promising to pay Freedom Mortgage \$32,040. Additionally, Groom executed a mortgage on the North 17th Street property to secure the note. The record is silent as to what Groom did with the

\$32,040, but, presumably, Groom used the loan to satisfy the prior mortgage on the property.

{¶5} A few days after the closing, Mullins tried to record the land installment contract with the Franklin County Recorder. A clerk in the Recorder's office told Mullins that she could not record the land installment contract because it did not contain a correct legal description of the property. Mullins contends that only after that conversation did it register that she had sold her house to Groom and had to buy it back.

{¶6} Mullins began making monthly payments under the land installment contract in January 2006. In September 2007, Mullins visited American Home Loans during business hours to render payment, but the office was closed. Her subsequent attempts to contact Mojtabaei and Groom failed. Thereafter, Mullins deposited her monthly payment into a savings account that she opened.

{¶7} On August 21, 2007, Freedom Mortgage filed a complaint seeking foreclosure on the North 17th Street property. Along with Groom and other individuals with an interest in the property, Freedom Mortgage named "John Doe, Unknown Occupant" as a defendant and listed the unknown occupant's address as 272 North 17th Street. On September 7, 2007, a process server personally served Mullins with the summons and complaint directed to the unknown occupant. All of the other defendants were also served.

{¶8} After receiving the summons and complaint, Mullins contacted Freedom Mortgage and explained that she had a land installment contract with Groom. Mullins offered to make her monthly payments directly to Freedom Mortgage. However, because

Mullins was not a party to either the note or mortgage, the Freedom Mortgage employee that Mullins spoke to would not discuss the matter with her.

{¶9} Neither Mullins nor any of the other defendants filed a timely answer to the complaint, so Freedom Mortgage moved for default judgment. In response, the trial court issued a judgment and decree of foreclosure on October 22, 2007.

{¶10} In the midst of the post-foreclosure proceedings, Mullins filed a motion asking the trial court to either vacate the October 22, 2007 judgment or grant her relief from that judgment under Civ.R. 60(B). Mullins also moved to stay the sale of the North 17th Street property. The trial court did not rule upon either motion. Consequently, the Franklin County Sheriff proceeded with the appraisal, advertisement, and sale of the property. Freedom Mortgage purchased the property for \$38,000 at public auction. On July 28, 2008, the trial court issued a judgment confirming the sale and ordering the distribution of the sale proceeds.

{¶11} Mullins appealed from the July 28, 2008 judgment. This court sua sponte stayed that appeal pending resolution of Mullins' motion to vacate or for relief from judgment. The trial court then referred the matter to a magistrate for a hearing on Mullins' motion. After an evidentiary hearing, the magistrate issued a decision concluding that: (1) the October 22, 2007 judgment was not void; (2) Mullins proved a Civ.R. 60(B) ground for relief from judgment; namely, excusable neglect under Civ.R. 60(B)(1); (3) Mullins failed to seek Civ.R. 60(B) relief in a timely manner; and (4) Mullins failed to demonstrate a meritorious defense. Given these conclusions, the magistrate recommended that the trial court deny Mullins' motion.

{¶12} Mullins filed objections to the magistrate's decision. The trial court considered Mullins' objections but did not find them persuasive. Accordingly, on February 9, 2009, the trial court adopted the magistrate's decision. Mullins appealed from the February 9, 2009 judgment, and this court sua sponte consolidated that appeal with Mullins' earlier appeal.

{¶13} In her two appeals, Mullins assigns the following errors:

[1.] THE TRIAL COURT ERRED IN UPHOLDING THE FORECLOSURE JUDGMENT AS THE COURT LACKED JURISDICTION BECAUSE FREEDOM MORTGAGE CORPORATION LACKED STANDING AND THUS COULD NOT INVOKE THE COURT'S JURISDICTION AND PLAINTIFF FAILED TO OBTAIN PROPER SERVICE UPON MRS. MULLINS.

[2.] THE TRIAL COURT ERRED IN GRANTING FORECLOSURE JUDGMENT WHEN THE RECORD EVIDENCE DID NOT DEMONSTRATE THAT THE PLAINTIFF HAD REAL PARTY STATUS.

[3.] THE TRIAL COURT ERRED IN CONCLUDING THAT MRS. MULLINS HAD NOT APPEARED IN THE ACTIONS SO AS TO BE ENTITLED TO NOTICE AND HEARING PRIOR TO THE ENTRY OF DEFAULT JUDGMENT.

[4.] THE COURT ERRED IN FINDING THAT MRS. MULLINS DID NOT BRING HER MOTION UNDER OHIO RULE OF CIVIL PROCEDURE 60(B) WITHIN A REASONABLE TIME WHERE THERE WAS EVIDENCE THAT DEMONSTRATED SHE EXERCISED REASONABLE DILIGENCE IN LIGHT OF HER PERSONAL CIRCUMSTANCES.

[5.] THE COURT ERRED IN FINDING THERE WAS NO EVIDENCE OF MERITORIOUS DEFENSE WHERE THERE WAS EVIDENCE THAT THE PARTY SEEKING FORECLOSURE REFUSED TO ALLOW CURE OF THE DEFAULT IN PAYMENT.

[6.] THE COURT ERRED IN FINDING THERE WAS NO EVIDENCE OF MERITORIOUS DEFENSE WHERE THERE WAS EVIDENCE OF AN EQUITABLE MORTGAGE.

{¶14} Mullins' first, fourth, fifth, and sixth assignments of error challenge the February 9, 2009 judgment denying her motion to vacate or for relief from judgment. These four assignments of error correlate with Mullins' second appeal, designated with appeal number 09AP-162. Mullins' second and third assignments of error directly challenge the October 22, 2007 default judgment of foreclosure. These two assignments of error correlate with Mullins' first appeal, designated with appeal number 08AP-761.

{¶15} We will address the earlier filed appeal first, so we begin our analysis with the second and third assignments of error. By her second assignment of error, Mullins argues that Freedom Mortgage did not establish itself as a real party in interest, and therefore, the trial court erred in entering a foreclosure judgment in its favor. By her third assignment of error, Mullins argues that the trial court erred in granting the default judgment of foreclosure without first providing her with notice and a hearing. As Mullins failed to timely appeal from the October 22, 2007 default judgment of foreclosure, we lack the jurisdiction to consider these arguments.

{¶16} A decree and judgment of foreclosure is a final appealable order. *Third Natl. Bank v. Speakman* (1985), 18 Ohio St.3d 119, 120, citing *Oberlin Savings Bank v. Fairchild* (1963), 175 Ohio St. 311; *Ohio Dept. of Taxation v. Plickert* (1998), 128 Ohio App.3d 445, 446-47. To perfect an appeal from a final appealable order, an appellant must file a notice of appeal within the time period prescribed in App.R. 4(A). Failure to comply with App.R. 4(A) is a jurisdictional defect and is fatal to any appeal. *In re H.F.*,

120 Ohio St.3d 499, 2008-Ohio-6810, ¶17; *Bond v. Village of Canal Winchester*, 10th Dist. No. 07AP-556, 2008-Ohio-945, ¶11.

{¶17} Here, Mullins did not appeal from the October 22, 2007 default judgment of foreclosure. Mullins' first appeal arises, instead, from the judgment confirming the sale and ordering the distribution of the sale proceeds. However, the arguments raised in the second and third assignments of error attack the default judgment of foreclosure, not the judgment of confirmation and distribution. Because Mullins did not timely appeal from the default judgment of foreclosure, this court lacks jurisdiction to review the merits of any arguments challenging that judgment. *Am. Business Mtge. Servs., Inc. v. Barclay*, 10th Dist. No. 04AP-68, 2004-Ohio-6725, ¶7-8; *RCR Servs., Inc. v. Ceranowski* (Jan. 16, 1992), 10th Dist. No. 91AP-450. Accordingly, we dismiss appeal number 08AP-761.¹

{¶18} We next turn to Mullins' first assignment of error, by which she argues that the trial court erred in not vacating the default judgment of foreclosure. Mullins contends that the default judgment of foreclosure is void because the trial court had neither subject matter jurisdiction over the controversy nor personal jurisdiction over Mullins when it entered that judgment. We disagree.

{¶19} Absent proper service of process, a trial court lacks jurisdiction to enter a judgment, and if it nevertheless renders a judgment, that judgment is a nullity and void ab initio. *Lincoln Tavern, Inc. v. Snader* (1956), 165 Ohio St. 61, 64; *First Resolution Invest. Corp. v. Davis*, 10th Dist. No. 05AP-328, 2005-Ohio-4976, ¶9. Likewise, a judgment rendered without subject matter jurisdiction is also a nullity and void ab initio. *Patton v.*

¹ When an appellant files an appeal solely to collaterally attack an earlier, unappealed final judgment, a court must dismiss the appeal as untimely. *Key v. Mitchell*, 81 Ohio St.3d 89, 91, 1998-Ohio-643 (dismissing an appeal from a denial of a Civ.R. 60(B) motion when the appellant only challenged the merits of the judgment from which he sought Civ.R. 60(B) relief).

Diemer (1988), 35 Ohio St.3d 68, 70; *Bright v. Family Med. Found., Inc.*, 10th Dist. No. 02AP-1443, 2003-Ohio-6652, ¶10. The authority to vacate such void judgments originates from the inherent power possessed by Ohio courts, not Civ.R. 60(B). *Patton*, 70. Thus, the trial court's determination of a common-law motion to vacate does not turn on Civ.R. 60(B)'s requirements that the movant file timely and present a meritorious defense. *TCC Mgt., Inc. v. Clapp*, 10th Dist. No. 05AP-42, 2005-Ohio-4357, ¶10; *Gupta v. Edgecombe*, 10th Dist. No. 03AP-807, 2004-Ohio-3227, ¶12.

{¶20} Appellate courts review the denial of a motion to vacate under an abuse of discretion standard. *TCC Mgt., Inc.*, ¶9; *Miley v. STS Sys., Inc.*, 153 Ohio App.3d 752, 2003-Ohio-4409, ¶7. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶21} In the case at bar, Mullins argues that the trial court lacked subject matter jurisdiction because Freedom Mortgage did not have the standing necessary to invoke the court's jurisdiction. However, "[l]ack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court." *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 1998-Ohio-275. See also *Brown v. Columbus City Schools Bd. of Ed.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, ¶4; *Washington Mut. Bank v. Beatley*, 10th Dist. No. 06AP-1189, 2008-Ohio-1679, ¶10. Although Freedom Mortgage may have lacked standing, that deficiency is not jurisdictional and, consequently, could not void the default judgment of foreclosure. We therefore conclude that the trial court did not err in refusing to vacate the default judgment of foreclosure due to the purported absence of subject matter jurisdiction.

{¶22} Second, Mullins argues that service on her failed, leaving the trial court without personal jurisdiction over her. Mullins, however, never raised this argument before the trial court. "A question of personal jurisdiction may not be raised for the first time on appeal." *Fields v. Stange*, 10th Dist. No. 03AP-48, 2004-Ohio-1134, ¶9. See also *Linguist v. Drossel*, 5th Dist. No. 2006 CA 00119, 2006-Ohio-5712, ¶10; *Grieger v. Weatherspoon*, 6th Dist. No. E-01-046, 2002-Ohio-1868, ¶20. As Mullins did not argue the lack of personal jurisdiction before the trial court, she waived that argument for purposes of appeal.

{¶23} In sum, both of Mullins' jurisdictional arguments are unavailing. Accordingly, we overrule Mullins' first assignment of error.

{¶24} The rest of Mullins' assignments of error challenge the trial court's denial of Civ.R. 60(B) relief. In order to succeed on a Civ.R. 60(B) motion, the movant must demonstrate that:

(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 (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 Industries, Inc. (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. Should the movant fail to satisfy any one of these requirements, a court must deny Civ.R. 60(B) relief. *Svoboda v. City of Brunswick* (1983), 6 Ohio St.3d 348, 351. Appellate courts review a decision denying a Civ.R. 60(B) motion for abuse of discretion. *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, ¶7.

{¶25} By Mullins' fifth assignment of error, she argues that the trial court erred in denying her Civ.R. 60(B) relief because she identified a meritorious defense based upon Freedom Mortgage's refusal to allow her to cure Groom's default in payment. We disagree.

{¶26} The magistrate found that Mullins had no right to cure Groom's default because neither the land installment contract nor the note and mortgage obligated Freedom Mortgage to accept Mullins' payments. Thus, the magistrate concluded that no meritorious defense existed based upon a right to cure. In her objections to the magistrate's decision, Mullins did not argue that the magistrate erred in reaching that conclusion. Failure to object to a magistrate's conclusion of law bars an appellant from assigning as error on appeal the trial court's adoption of that legal conclusion. Civ.R. 53(D)(3)(b)(iv) ("Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion * * * unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).").

{¶27} Moreover, on appeal, Mullins apparently concedes that, legally, she has no right to cure. Nevertheless, Mullins asserts that, as a matter of equity, the trial court could have denied Freedom Mortgage a foreclosure because Freedom Mortgage did not allow Mullins to cure Groom's default. In essence, Mullins attempts to transform her legal defense based upon a right to cure into an equitable defense. Mullins, however, cannot change the theory behind the defense and present this new argument for the first time on appeal. *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections* (1992), 65 Ohio St.3d 175, 177.

{¶28} Because Mullins failed to timely assert either a legal or equitable defense based upon her alleged right to cure, she cannot now argue those defenses on appeal. Accordingly, we overrule Mullins' fifth assignment of error.

{¶29} By Mullins' sixth assignment of error, she argues that the trial court erred in failing to find that the existence of an equitable mortgage constituted a meritorious defense. We disagree.

{¶30} Generally, where a party conveys a deed absolute on its face as security for a debt, equity requires a court to construe the deed as a mortgage, thereby preserving the mortgagor's right to redemption. *Wilson v. Giddings* (1876), 28 Ohio St. 554, 566-67; *Kaeser v. Gross*, 1st Dist. No. C-010507, 2002-Ohio-4050, ¶18-20. In other words, a court will consider a deed to be an equitable mortgage if the parties intended the transfer of the property to serve as security for a loan, and not as an actual sale. *Id.*; *Hegler v. Grove* (1900), 63 Ohio St. 404, paragraph one of the syllabus ("Where a conveyance is made by a debtor to a creditor to secure the latter in what he owes him, * * * and the conveyance is taken by the creditor in good faith, for his own security and no other purpose, such conveyance is an equitable mortgage * * *").

{¶31} Here, Mullins asserts that Groom only possessed an equitable mortgage, and not a valid title to the North 17th Street property. Absent a valid title, Mullins argues that Groom could not effectively mortgage the property. Mullins therefore contends that Freedom Mortgage has a defective mortgage that it cannot use to foreclose upon the property.

{¶32} To demonstrate a meritorious defense, a movant must allege supporting operative facts with enough specificity to allow the court to decide that the movant has a

defense she could have successfully argued at trial. *Miller v. Susa Partnership, L.P.*, 10th Dist. No. 07AP-702, 2008-Ohio-1111, ¶16. Consequently, in the case at bar, Mullins had to allege that she only conveyed the deed to secure the "loan"² from Groom, not to effectuate an outright sale. The operative facts showing Mullins' intent, however, belie the existence of an equitable mortgage. Even Mullins—with her limited grasp of the transaction's specifics—understood that Groom would mortgage the North 17th Street property once he received the deed to the property. In fact, the entire transaction hinged upon Groom's ability to obtain financing on the property, which required him to actually own the property. Thus, Mullins could not have merely intended for Groom to hold the deed as security for the "loan" advanced to Mullins. As a result, an equitable mortgage never arose. We therefore conclude that the trial court did not abuse its discretion in finding that Mullins did not have a meritorious defense based upon an alleged equitable mortgage between her and Groom. Accordingly, we overrule Mullins' sixth assignment of error.

{¶33} Tangentially, we note that the argument underlying Mullins' sixth assignment of error includes assertions that Mullins has other meritorious defenses, including a defense based upon the alleged forgery of Mullins' name on the deed. These arguments, however, do not relate to Mullins' sixth assignment of error. Pursuant to App.R. 12(A)(1)(b), appellate courts "[d]etermine [an] appeal on its merits on the

² The "loan" in this case would be the \$32,040 Groom received from Freedom Mortgage and presumably used to pay off Mullins' original mortgage on the North 17th Street property.

assignments of error set forth in the briefs under App.R. 16 * * *." Thus, this court rules on assignments of error only, and will not address mere arguments. *In re Estate of Taris*, Franklin App. No. 04AP-1264, 2005-Ohio-1516, ¶5. Accordingly, we refuse to consider any of the arguments unrelated to the sixth assignment of error.

{¶34} By Mullins' fourth assignment of error, she argues that the trial court erred in concluding that she did not file her Civ.R. 60(B) motion within a reasonable time. As we stated above, a party seeking relief under Civ.R. 60(B) must demonstrate each of the three requirements of that rule—(1) a meritorious defense, (2) a timely motion, and (3) a Civ.R. 60(B) ground. Because we have concluded that the trial court did not err in finding that Mullins lacked a meritorious defense, we can affirm the trial court's judgment without consideration of the other Civ.R. 60(B) requirements. Accordingly, we find Mullins' fourth assignment of error moot.

{¶35} For the foregoing reasons, we overrule Mullins' first, fifth, and sixth assignments of error and find Mullins' fourth assignment of error moot. We affirm the February 9, 2009 judgment of the Franklin County Court of Common Pleas denying Mullins any relief from the default judgment of foreclosure. Moreover, we dismiss appeal number 08AP-761 because in that appeal Mullins only seeks review of a judgment from which she failed to timely appeal.

*Judgment affirmed in Case No. 09AP-162;
Case No. 08AP-761 dismissed.*

FRENCH, P.J., and CONNOR, J., concur.
