[Cite as *Wells Fargo Bank, N.A. v. Perkins*, 2011-Ohio-3790.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Wells Fargo Bank, N.A.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-1022 (C.P.C. No. 09CV08-12771)
Marianne F. Perkins et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on August 2, 2011

Thompson Hine LLP, *Scott A. King* and *John B. Kopf*, for appellee.

Marianne Perkins and *James Perkins*, pro se.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendants-appellants, Marianne F. and James J. Perkins, appeal a judgment of the Franklin County Court of Common Pleas denying them Civ.R. 60(B) relief from a judgment in favor of plaintiff-appellee, Wells Fargo Bank, N.A. ("Wells Fargo"). For the following reasons, we affirm the trial court's judgment.

{¶2} On August 24, 2009, Wells Fargo filed a complaint alleging that the Perkins had defaulted on a promissory note secured by a mortgage on the Perkins' house. Wells Fargo sought judgment on the note and foreclosure on the mortgage. After mediation

proved unsuccessful, Wells Fargo moved for summary judgment. The Perkins failed to respond to Wells Fargo's motion. On March 5, 2010, the trial court granted Wells Fargo summary judgment, rendered judgment against the Perkins, jointly and severally, in the amount of $277,133.40, plus interest and costs, and ordered the sale of the Perkins' house.

{¶3} At the same time that Wells Fargo was pursuing the foreclosure action, the Perkins were attempting to sell their house. In January 2010, the Perkins informed Wells Fargo that they wished to sell the house through a short sale. Wells Fargo told the Perkins that it would have to approve the short sale.

{¶4} On February 28, 2010, the Perkins entered into a real estate sales contract with a potential buyer and forwarded that contract to Wells Fargo. According to the Perkins, the short-sale review process lasted approximately three months, during which Wells Fargo subjected the Perkins to hours of telephone runaround and repeatedly requested the same information. Finally, in late May 2010, Wells Fargo informed the Perkins that they did not need its approval to proceed with the sale of their house because the offer that was submitted would satisfy the mortgage loan in full. The Perkins then sought and received approval of the short sale from the second lienholder, Fifth Third Bancorp ("Fifth Third"). Although the Perkins scheduled a closing, the potential buyer backed out of the deal prior to the closing date.

{¶5} On September 20, 2010, the Perkins filed a Civ.R. 60(B) motion requesting that the trial court grant them relief from its March 5, 2010 judgment. In their motion, the Perkins claimed that Wells Fargo breached its fiduciary duty to them and made an intentional misrepresentation when it told them in January 2010 that it would have to

approve a short sale. In a decision and judgment entry dated October 19, 2010, the trial court denied the Perkins' motion, stating:

> The Court's review is limited solely to the claims set forth in the action and the judgment rendered. In this instance, the claims giving rise to this action are defendants' default on their mortgage payments. As a result of the undisputed default, plaintiff requested and the Court entered judgment against defendants. In their request for relief, defendants do not assert that they have a meritorious defense to the judgment against them. They do not deny that they were and remain in default of their mortgage payments. As a matter of law, the Court cannot review and pass judgment upon the parties' interactions surrounding the attempted short sale of the subject property.

Decision and judgment entry, at 3.

{¶6} The Perkins now appeal the October 19, 2010 judgment, and they assign the following errors:

> [1.] The trial court erred in not allowing material evidence involving Appellant Perkins short sale to be reviewed. Specifically, the trial court erred by determining that the short sale misrepresentation occurred after the Decree of Foreclosure and, therefore, did not have bearing on the foreclosure action.
>
> [2.] The trial court erred in finding that the Perkins did not present 'operative facts' and only general allegations or conclusions.
>
> [3.] The trial court erred in asserting that the Perkins did not have a meritorious defense to the foreclosure judgment against them.
>
> [4.] Newly discovered evidence that an affidavit submitted by Wells Fargo was materially altered three months after it was executed, but before it was submitted to court.
>
> [5.] Newly discovered evidence of a Wells Fargo affidavit which was signed by a known robo-signer.

> [6.] Newly discovered evidence that Wells Fargo may have lacked Standing to bring action against the Perkins.

{¶7} We will address the Perkins' second assignment of error first. By that assignment of error, the Perkins argue that the trial court erred in finding that they did not present operative facts to support their Civ.R. 60(B) motion. As the trial court did not err in the manner asserted, we find this argument unavailing.

{¶8} To prevail on a Civ.R. 60(B) motion, a party must demonstrate that: (1) it has a meritorious claim or defense to present if the court grants it relief; (2) it is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) it filed the motion within a reasonable time, and, when relying on a ground for relief set forth in Civ.R. 60(B)(1), (2), or (3), it filed the motion 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, 150-51. With regard to the first element of the *GTE* test, a party need only allege a meritorious claim or defense, it need not prove that it will prevail on that claim or defense. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20; *GMAC Mtge., L.L.C. v. Herring*, 189 Ohio App.3d 200, 2010-Ohio-3650, ¶32; *Meglan, Meglan & Co., Ltd. v. Bostic*, 10th Dist. No. 05AP-831, 2006-Ohio-2270, ¶8. Although proof of success is not required, the party must support its alleged claim or defense with operative facts that have enough specificity to allow the trial court to judge the merit of the claim or defense. *Miller v. Susa Partnership, L.P.*, 10th Dist. No. 07AP-702, 2008-Ohio-1111, ¶16; *Chirico v. Home Depot*, 10th Dist. No. 05AP-217, 2006-Ohio-291, ¶10; *Bostic* at ¶8. Mere general allegations or broad conclusions are insufficient to warrant relief. *Herring* at ¶32; *Lakhi v. Healthcare Choices & Consultants*, 10th Dist. No. 07AP-904, 2008-Ohio-1378, ¶20.

{¶9} In the case at bar, the trial court denied the Perkins' Civ.R. 60(B) motion because they failed to state a meritorious defense. The trial court, however, did not fault the Perkins for omitting sufficient operative facts and instead relying on general allegations. Rather, the trial court ruled against the Perkins because the operative facts that they alleged could only establish a counterclaim, and not a defense, to Wells Fargo's foreclosure action. A counterclaim " 'is affirmative in nature, and asserts a separate cause of action, while [a defense] serves to preclude recovery by asserting facts that defeat the plaintiff's right to recovery.' " *BAC Home Loans Servicing, L.P. v. Hall*, 12th Dist. No. CA2009-10-135, 2010-Ohio-3472, ¶18 (quoting *Riley v. Montgomery* (June 30, 1983), 12th Dist. No. 88). The trial court, thus, did not commit the error assigned and, consequently, we overrule the second assignment of error.

{¶10} Because the Perkins' first and third assignments of error are interrelated, we will address them together. By these assignments of error, the Perkins argue that the trial court erred in concluding that they did not demonstrate a meritorious defense.

{¶11} The decision to grant or deny a Civ.R. 60(B) motion rests in the trial court's sound discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An appellate court will not reverse such a decision absent an abuse of that discretion. Id.

{¶12} Civ.R. 60(B) attempts to strike a balance between two conflicting principles: first, that a judgment ending litigation is final and, second, that litigation should lead to a just result. *Rose Chevrolet* at 21; *Herring* at ¶30. The requirement that a defendant demonstrate a meritorious defense serves an important role in achieving that balance. A prima facie showing of a meritorious defense is necessary to assure the court that vacating a judgment in favor of the plaintiff will not, in the end, prove to be a futile gesture.

Boyd v. Bulala (C.A.4, 1990), 905 F.2d 764, 769. If the defendant presents no meritorious defense, "then nothing but pointless delay can result from reopening the judgment." *TCI Group Life Ins. Plan v. Knoebber* (C.A.9, 2001), 244 F.3d 691, 697. Thus, unless a defendant can demonstrate a meritorious defense, the scales tip in favor of preserving a final judgment for the plaintiff.

{¶13} Ohio courts have split regarding whether a counterclaim qualifies as a meritorious defense. The Eighth District Court of Appeals has concluded that the existence of a counterclaim cannot justify the nullification of a final judgment. *ATAC Corp. v. Lindsay* (Jan. 16, 1997), 8th Dist. No. 70293; *Regal Ents., Inc. v. Fowler* (Dec. 17, 1992), 8th Dist. No. 63700; *Urbana College v. Conway* (1985), 29 Ohio App.3d 13, 16. But see *Mazepa, Inc. v. Krueger* (May 15, 1997), 8th Dist. No. 70472 (holding that because the defendant's counterclaim directly affected the validity of the judgment entered, the defendant had alleged a meritorious defense). In *Conway*, the plaintiff filed suit against a military service member to recover unpaid tuition fees. Id. at 14. When the service member failed to answer the complaint, the trial court granted the college a default judgment. Id. The service member subsequently filed a Civ.R. 60(B) motion for relief from judgment and asserted in an accompanying affidavit that he had a meritorious defense to the college's claim "in that plaintiff caused his loss of V.A. education benefits through plaintiff's negligence." Id. at 16. The Eighth District Court of Appeals concluded that this allegation described a counterclaim, not a defense, to the college's claim. Id. The court then stated that:

> Neither Ohio nor federal law provides relief from a judgment in order to assert an independent claim, even though it may arise from the same transaction. The serviceman failed to justify reopening a judgment on a claim he apparently could

> not challenge. Neither he nor the judicial system benefits from a trial about an undisputed debt. * * * Hence, this serviceman did not properly invoke either Ohio or federal procedures which required the trial court to vacate its prior judgment.

Id.

{¶14} The Second District Court of Appeals has reached the opposite conclusion, holding that "the existence of possible counterclaims and set offs [is] sufficient to constitute a meritorious defense within the meaning of Civ.R. 60(B)." *Martin v. Bruce* (Oct. 24, 1983), 2d. Dist. No. 83 CA 13. See also *Mellon Bank, N.A. v. Friedlander's, Inc.* (May 3, 1982), 2d Dist. No. 7101. In both *Martin* and *Mellon Bank*, the plaintiffs obtained default judgments on claims for money due under a contract. In seeking relief from those judgments, the defendants asserted that the plaintiffs owed them money under a contract different and separate from the contract for which the plaintiffs recovered damages. The Second District Court of Appeals concluded that the defendants' demonstration of counterclaims satisfied the first element of the *GTE* test.

{¶15} This conflict between the Eighth and Second District Courts of Appeals is further complicated by the general rule that a counterclaim is not a meritorious defense to a cognovit judgment. *Baker Motors, Inc. v. Baker Motors Towing, Inc.*, 183 Ohio App.3d 223, 2009-Ohio-3294, ¶13; *Shuford v. Owens*, 10th Dist. No. 07AP-1068, 2008-Ohio-6220, ¶20; *Kistner v. Cameo Countertops, Inc.*, 6th Dist. No. L-04-1128, 2005-Ohio-1883, ¶6. But see *McDonald Investments, Inc. v. Fearn*, 5th Dist. No. 01CAE08039, 2002-Ohio-898 (deeming counterclaims to be meritorious defenses where the parties' entire dispute, including the plaintiff's action for a cognovit judgment, was subject to arbitration

under the parties' contract). In cases where a defendant seeks relief from a cognovit judgment, courts reason that:

> [A] counterclaim or set-off is, in effect, a claim "that would reduce or satisfy the amount due on the note"; and relief from cognovit judgment is "granted only to the defendant who has a *defense* to the action. The distinction is clear. A counterclaim is not a defense. It assumes the existence of the plaintiff's claim, and seeks relief by way of a cross demand."

Natl. City Bank v. Mulinex, 6th Dist. No. L-05-1066, 2005-Ohio-5460, ¶20 (emphasis sic) (quoting *Cambridge Production Credit Assn. v. Shaner* (May 8, 1997), 5th Dist. No. CA-351).

{¶16} In light of this contradictory precedent, we conclude that Ohio law provides no definitive rule regarding whether a counterclaim constitutes a meritorious defense.[1] As the parties to this appeal have not presented any argument regarding this issue, we decline to resolve it here. Instead, we will assume, without deciding, that a counterclaim can be a meritorious defense. Thus, we turn to the question of whether the counterclaims the Perkins alleged have sufficient merit to justify the reopening of the judgment in Wells Fargo's favor.

{¶17} First, the Perkins' claim that Wells Fargo breached its fiduciary duty to them when it told them that it would have to approve a short sale of the Perkins' house. To prevail on a claim for breach of fiduciary duty, a party must establish: (1) the existence of

[1] Like Ohio law, federal law is also conflicting on this issue. Compare *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.* (C.A.4, 1988), 843 F.2d 808, 812 ("A meritorious defense requires a proffer of evidence which would permit a finding for the defaulting party or which would establish a valid counterclaim.") with *Hampton v. Am. Plumbing & Sewer, Inc.* (Jan. 3, 1996), N.D.Ill. No. 95 C 1836, affirmed, (C.A.7, 1996), 95 F.3d 1154 ("A counterclaim on an unrelated matter does not satisfy the meritorious defense requirement.") and *Savin Corp. v. C.M.C. Corp.* (N.D.Ohio 1983), 98 F.R.D. 509, 512 (holding that a counterclaim that arises out of the same transaction as the original complaint and alleges a breach of the contract underlying the original complaint qualifies as a meritorious defense).

a duty arising from a fiduciary relationship, (2) a failure to observe that duty, and (3) an injury proximately resulting therefrom. *Wells Fargo Bank, N.A. v. Sessley*, 188 Ohio App.3d 213, 2010-Ohio-2902, ¶36. "When there is no fiduciary relationship between the parties, a breach-of-fiduciary-duty claim necessarily fails." Id.

{¶18} A "fiduciary relationship" is a relationship " 'in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.' " *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, ¶16 (quoting *In re Termination of Emp. of Pratt* (1974), 40 Ohio St.2d 107, 115). Generally, the relationship between a debtor and creditor is not a fiduciary relationship. Id. at ¶17; *Sessley* at ¶36. A fiduciary relationship can only arise between a debtor and creditor under special circumstances. *Groob* at ¶22; *LaSalle Bank, N.A. v. Kelly*, 9th Dist. No. 09CA0067-M, 2010-Ohio-2668, ¶26-27. As provided by R.C. 1109.15(E), "[u]nless otherwise expressly agreed in writing, the relationship between a bank and its obligor, with respect to any extension of credit, is that of a creditor and debtor, and creates no fiduciary or other relationship between the parties."

{¶19} In the case at bar, the Perkins have not alleged the existence of any document wherein Wells Fargo agreed to act as the Perkins' fiduciary. Absent proof of such a document, no fiduciary relationship exists between the parties and, consequently, the Perkins' counterclaim for breach of fiduciary duty cannot succeed. Therefore, we conclude that that counterclaim does not constitute a meritorious defense.

{¶20} Second, the Perkins claim that Wells Fargo made an intentional misrepresentation when it told them that it would have to approve a short sale. To establish a claim for intentional misrepresentation, a party must prove: (1) a

representation or, where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent to mislead another to rely upon it; (5) justifiable reliance upon the representation; and (6) an injury proximately caused by the reliance. *Nichols v. Schwendeman*, 10th Dist. No. 07AP-433, 2007-Ohio-6602, ¶27.

{¶21} In a short sale, a mortgage holder allows the homeowner to sell his or her property for less than the full amount due on the mortgage loan secured by the property. *Cattell v. Lake Cty. Bd. of Revision*, 11th Dist. No. 2009-L-161, 2010-Ohio-4426, ¶23. The mortgage holder agrees to release its mortgage lien on the property in return for the proceeds from the sale of the property, even though the proceeds are less than the mortgage loan balance.

{¶22} Under Ohio law, a "prior contractual obligation may be discharged by a subsequent agreement, whether through novation, abandonment, release, settlement, or simple modification of the original agreement." *Donofrio v. Whitman*, 191 Ohio App.3d 727, 2010-Ohio-6406, ¶33. Whatever the form of the subsequent agreement discharging the prior contractual obligation, it is only enforceable if there is a meeting of the minds as to its essential elements. *Minister Farmers Cooperative Exchange Co. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, ¶28; *Morgan v. Mikhail*, 10th Dist. No. 08AP-87, 2008-Ohio-4598, ¶67. " 'In order for a meeting of the minds to occur, both parties to an agreement must mutually assent to the substance of the exchange.' " Id. at ¶67 (quoting *Miller v. Lindsay-Green, Inc.*, 10th Dist. No. 04AP-848, 2005-Ohio-6366, ¶63).

{¶23} In the case at bar, section 1 of the Perkins' mortgage required them to pay all debt owed and charges due under the promissory note. Section 23 of the mortgage required the payment of all sums owed under the promissory note before the mortgage holder would release the mortgage lien. In order to effectuate a short sale, the Perkins needed Wells Fargo to agree to discharge them from their contractual obligation to pay the total amount due on their mortgage loan and release the mortgage lien in exchange for less than the full amount due. Thus, when Wells Fargo told the Perkins that it would have to approve a short sale, it was merely informing the Perkins of what Ohio law required for a short sale to occur. Without Wells Fargo's assent to a subsequent agreement relieving the Perkins of their obligation to fulfill the mortgage terms, the Perkins remained bound by to the terms of the mortgage. Under those terms, the Perkins could not transfer clear title to a buyer unless they first paid the entire mortgage loan balance. To avoid this result, the Perkins needed Wells Fargo to assent to different contractual terms. Therefore, Wells Fargo's representation that it would have to approve a short sale was not false.

{¶24} Ultimately, Wells Fargo's approval proved unnecessary because the contract price for the purchase of the Perkins' home exceeded the amount due on the mortgage loan. The Perkins' "short sale" was not a short sale as to Wells Fargo; it was only a short sale as to Fifth Third, the second lienholder. Although the amount of the purchase price removed the necessity for Wells Fargo's approval, it did not render Wells Fargo's earlier representation false. Therefore, we conclude that the Perkins' counterclaim for intentional misrepresentation does not constitute a meritorious defense.

{¶25} As neither of the Perkins' counterclaims qualifies as a meritorious defense, we find that the trial court did not abuse its discretion in denying the Perkins' Civ.R. 60(B) motion. Accordingly, we overrule the Perkins' first and third assignments of error.

{¶26} By the Perkins' fourth, fifth, and sixth assignments of error, they argue that Civ.R. 60(B) relief is appropriate because they have newly discovered evidence that Wells Fargo: (1) submitted to the trial court an affidavit that it altered after the affiant signed it, (2) relied on affidavits signed by alleged "robo-signers," and (3) lacked standing to bring the foreclosure action. The Perkins did not make any of these arguments before the trial court. A party who fails to raise an argument before the trial court waives its right to assert that argument in the appellate court. *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, ¶34; *State v. Randlett*, 10th Dist. No. 06AP-1073, 2007-Ohio-3546, ¶20. Moreover, we cannot find that the trial court abused its discretion in denying Civ.R. 60(B) relief based on arguments never presented to it. *Brewer v. Brewer*, 10th Dist. No. 09AP-146, 2010-Ohio-1319, ¶24; *Chase Manhattan Mtge. Corp. v. Edney*, 10th Dist. No. 06AP-1015, 2007-Ohio-4590, ¶10. We thus overrule the Perkins' fourth, fifth, and sixth assignments of error.

{¶27} For the foregoing reasons, we overrule all of the Perkins' assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and CONNOR, J., concur.