[Cite as *Bank of Am., N.A. v. Malone*, 2012-Ohio-3585.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Bank of America, N.A., as Successor by Merger to BAC Home Loans Servicing, LP,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-860 (C.P.C. No. 10CVE09-13028)
Delisa Malone et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	
BAC Home Loans Servicing, LP,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-1085 (C.PC. No. 10CVE09-13028)
Delisa Malone et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on August 9, 2012

Reisenfeld & Associates, LPA LLC, Matthew C. Steele and *Sarah Leibel*, for appellee.

Duncan Simonette, Inc., Brian K. Duncan and *Bryan D. Thomas*, for appellants.

APPEALS from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendants-appellants, Delisa Malone and Henry Malone ("appellants"), appeal from a judgment of the Franklin County Court of Common Pleas granting default judgment on the complaint in foreclosure filed by plaintiff-appellee, Bank of America, N.A.[1] ("appellee"), and from a judgment denying appellants' motion to vacate the default judgment. Because we conclude that the trial court did not err in granting the default judgment and that the appellants failed to establish that they were entitled to relief from that judgment, we affirm.

{¶ 2} On September 3, 2010, appellee filed a complaint in foreclosure asserting that appellants were in default on a promissory note that was secured by a mortgage on real property located at 3197 Liv Moor Drive, Columbus, Ohio. Appellants requested mediation and an extension of time to file an answer to the complaint once mediation was complete. The trial court granted the mediation request and ordered an answer to be filed within 28 days of the completion of mediation. Mediation was conducted, and a mediation outcome report was filed on April 25, 2011.

{¶ 3} Appellee moved for default judgment on August 26, 2011, asserting that appellants failed to file an answer to the complaint. The trial court granted a default judgment and entered a decree of foreclosure. Appellants then filed a motion to vacate the default judgment, which the trial court denied.

{¶ 4} Appellants appeal from the default judgment and from the trial court's denial of their motion to vacate the default judgment, assigning six errors for this court's review:

> 1. THE TRIAL COURT ERRED WHEN IT FAILED TO VACATE ITS SEPTEMBER 7, 2011 JUDGMENT ENTRY BASED ON CIV.R. 60(B)(1) AND/OR (5).
>
> 2. THE TRIAL COURT ERRED WHEN IT FAILED TO VACATE ITS SEPTEMBER 7, 2011 JUDGMENT ENTRY PURSUANT TO THE TRIAL COURT'S POLICY AND "LONGSTANDING PRACTICE" WITH RESPECT TO

[1] The complaint in foreclosure was originally filed by BAC Home Loans Servicing, LP, fka Countrywide Home Loans Servicing, LP ("BAC"). Effective July 1, 2011, BAC merged with Bank of America, N.A. Pursuant to motion, on July 29, 2011, the trial court entered an order substituting Bank of America, N.A., as plaintiff.

> ADJUDICATING MATTERS ON THEIR MERITS AS OPPOSED TO PROCEDRUAL [sic] DEFECTS.
>
> 3. THE TRIAL [COURT] ERRED WHEN IT FAILED TO CONDUCT A HEARING ON DEFENDANTS' MOTION TO VACATE.
>
> 4. THE TRIAL COURT ERRED WHEN IT SET FORTH ITS NOVEMBER 10, 2011 DECISION AND ENTRY, THEREBY FAILING TO VACATE ITS SEPTEMBER 7, 2011 JUDGMENT ENTRY.
>
> 5. THE TRIAL COURT ERRED BY FAILING TO NOTIFY THE UNDERSIGNED COUNSEL THAT THE CASE WAS REACTIVATED FROM THE MEDIATION PROCESS AS THE MEDIATION OUTCOME REPORT DID NOT ADDRESS THE SAME, CONTRARY TO THE PROTOCAL [sic] OF THIS COURT, AND SUBSEQUENTLY GRANTING A DECREE IN FORECLOSURE.
>
> 6. THE TRIAL COURT ERRED BY FINDING THAT DENFENDANTS' [sic] NEGLECT IN FILING AN ANSWER WAS NOT EXCUSABLE.

{¶ 5} Appellants' first, second, fourth, and sixth assignments of error each relate to appellants' claim that the trial court erred by denying their motion to vacate the default judgment. Accordingly, we will consider these four assignments of error together.

{¶ 6} Appellants moved to vacate the default judgment pursuant to Civ.R. 60(B), which provides that, under certain circumstances, a court may relieve a party from a final judgment. We review a trial court's decision to grant or deny a motion for relief from judgment under Civ.R. 60(B) for abuse of discretion. *Winona Holdings, Inc. v. Duffey*, 10th Dist. No. 10AP-1006, 2011-Ohio-3163, ¶ 12. An abuse of discretion occurs where a trial court's decision is "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 7} A party seeking relief from judgment under Civ.R. 60(B) "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.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. The movant must establish all three of the requirements to obtain relief from judgment. *Duffey* at ¶ 13. The parties do not dispute that appellants filed their motion to vacate within a reasonable time; accordingly, we will consider only the first two prongs of the *GTE* test.

{¶ 8} The trial court denied appellants' motion to vacate on the grounds that appellants failed to satisfy the second prong of the *GTE* test, which requires appellants to establish that they are entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5). Appellants assert that they are entitled to relief under Civ.R. 60(B)(1) due to "excusable neglect." In determining whether neglect is "excusable," we must consider all of the surrounding facts and circumstances. *Duffey* at ¶ 14. "The term 'excusable neglect' is an elusive concept which has been difficult to define and to apply." *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20 (1996). The Supreme Court of Ohio has stated that "the inaction of a defendant is not 'excusable neglect' if it can be labeled as a 'complete disregard for the judicial system.' " *Id.*, quoting *GTE Automatic Elec.* at 153. We have previously held that excusable neglect is not present if the party could have prevented the circumstances from occurring. *Porter, Wright, Morris & Arthur, LLP v. Frutta Del Mondo, Ltd.*, 10th Dist. No. 08AP-69, 2008-Ohio-3567, ¶ 22. The Supreme Court has also stated that "the concept of 'excusable neglect' must be construed in keeping with the proposition that Civ.R. 60(B)(1) is a remedial rule to be liberally construed, while bearing in mind that Civ.R. 60(B) constitutes an attempt to 'strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done.' " *Colley v. Bazell*, 64 Ohio St.2d 243, 248 (1980), quoting *Doddridge v. Fitzpatrick*, 53 Ohio St.2d 9, 12 (1978).

{¶ 9} In this case, after the complaint was filed, the trial court granted appellants' request for mediation and an extension of time to file an answer once the mediation process was completed. The trial court's order provided that appellants were required to file an answer to the complaint within 28 days after the mediation. The mediation outcome report was filed on April 25, 2011, indicating that appellants had not provided the financial documents necessary for the mediation to result in a settlement offer. Appellants argue that, because the mediation outcome report did not clearly state that the

mediation was complete, they believed that the case was still within the mediation process. Therefore, appellants claim, they did not realize that an answer to the complaint was due, and their failure to file an answer constitutes excusable neglect.

{¶ 10} Assuming for the purpose of analysis that appellants believed the case was still in mediation, there is no evidence that they took any steps to provide the documentation that the mediator indicated was needed, nor that they took any steps to facilitate further mediation. Moreover, during the four-month period after the mediation outcome report was issued and prior to the motion for default judgment, appellee filed two motions for continuances and a motion to substitute the plaintiff, each of which was served on appellants' counsel. The trial court granted each of these three motions. Despite this activity, appellants assert that they believed the case was not on the court's "active" docket.

{¶ 11} We have previously held that a party generally has a duty to remain apprised of the progress of a case. *See Yoder v. Thorpe*, 10th Dist. No. 07AP-225, 2007-Ohio-5866, ¶ 11; *Honda v. Mid-West Restaurant Equip., Inc.*, 10th Dist. No. 00AP-842, (May 22, 2001). In this case, four months passed between the issuance of the mediation outcome report and the filing of the motion for default judgment. Yet it appears that appellants took no action during that period to verify the status of the foreclosure action against them. Nearly a year passed between the filing of the complaint and the motion for default judgment. Appellants' failure to file an answer does not constitute "excusable neglect" because they could have prevented the default judgment by contacting the court or the mediator to determine whether the mediation was considered to be complete and whether the time for filing an answer had begun to run.

{¶ 12} Appellants also assert that they are entitled to relief from judgment under the "any other reason justifying relief from the judgment" provision of Civ.R. 60(B)(5). "Civ.R. 60(B)(5) is intended as a catch-all provision reflecting the inherent power of a court to relieve a person from the unjust operation of a judgment, but it is not to be used as a substitute for any of the more specific provisions of Civ.R. 60(B)." *Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64 (1983), paragraph one of the syllabus. Civ.R. 60(B)(5) should only be "utilized 'in an extraordinary and unusual case when the interests of justice warrants it.' " *Social Psychological Servs., Inc. v. Magellan Behavioral Health, Inc.*, 10th

Dist. No. 10AP-326, 2010-Ohio-6531, ¶ 17, quoting *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 105 (8th Dist.1974). Appellants argue that this case is "extraordinary and unusual" because they were not afforded an opportunity to raise their meritorious defenses. However, as noted above, appellants had four months after the mediation outcome report was issued to file an answer to the complaint. Their failure to do so does not constitute extraordinary and unusual circumstances requiring relief from judgment.

{¶ 13} Appellants failed to establish that they were entitled to relief from judgment under Civ.R. 60(B)(1) or (5). Therefore, the trial court did not abuse its discretion in denying appellants' motion to vacate.

{¶ 14} Although the trial court did not address the first prong of the *GTE* test, which requires the moving party to demonstrate that it has a meritorious defense or claim to present if relief from judgment is granted, we will consider it briefly. "Neither a general denial in an answer nor a conclusory statement that the movant has a meritorious claim or defense to present is sufficient to satisfy the first prong of the *GTE* test." *Miller v. Susa Partnership, L.P.*, 10th Dist. No. 07AP-702, 2008-Ohio-1111, ¶ 16. The moving party " 'must allege supporting operative facts with enough specificity to allow the trial court to decide that the movant has a defense he could have successfully argued at trial.' " *Id.*, quoting *Mattingly v. Deveaux*, 10th Dist No. 03AP-793, 2004-Ohio-2506, ¶ 10. In *Miller*, we reversed a trial court's denial of a motion for relief from judgment, concluding that the moving party's memorandum and affidavits set forth operative facts that, if proven, could defeat one or more of the plaintiff's claims. *Id.* at ¶ 20. By contrast, in this case, appellants' memorandum simply asserts a list of potential meritorious defenses and references "potential" counterclaims without asserting any operative facts related to those defenses and counterclaims. The only affidavit submitted in support of the motion to vacate pertains to appellants' understanding of the mediation outcome report. Although a party is not required to prevail on the merits of a defense in order to obtain relief under Civ.R. 60(B), the movant "must do more than make bare allegations that it is entitled to relief and [has] a meritorious defense to present." *Id.* at ¶ 19. In this case, appellants' motion to vacate fails to allege sufficient operative facts to establish that they have meritorious defenses or counterclaims.

{¶ 15} Accordingly, appellants' first, second, fourth, and sixth assignments of error are without merit and are overruled.

{¶ 16} In their third assignment of error, appellants assert that the trial court erred by failing to conduct a hearing on their motion to vacate. "[I]f the Civ.R. 60(B) motion contains allegations of operative facts which would warrant relief from judgment, the trial court should grant a hearing to take evidence to verify those facts before it rules on the motion." *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151 (1996). "Conversely, an evidentiary hearing is not required where the motion and attached evidentiary material do not contain allegations of operative facts which would warrant relief under Civ.R. 60(B)." *Id*. As explained above, appellants' motion failed to allege sufficient operative facts to warrant relief under Civ.R. 60(B). Because the motion lacked allegations of sufficient operative facts, the trial court did not abuse its discretion by denying appellants' motion without conducting a hearing.

{¶ 17} Accordingly, appellants' third assignment of error is without merit and is overruled.

{¶ 18} In appellants' fifth assignment of error, they assert that the trial court erred by failing to notify them that the case was "reactivated" or returned to the "active" docket and by granting the motion for default judgment. Under Civ.R. 55(A), when a party against whom a judgment is sought fails to plead or otherwise defend as provided in the rules, the opposing party may apply to the court for a default judgment in its favor. A trial court's grant or denial of a motion for default judgment will not be reversed absent an abuse of discretion. *Equable Ascent Fin., L.L.C. v. Christian*, 196 Ohio App.3d 34, 2011-Ohio-3791, ¶ 6 (1oth Dist.). In support of the motion to vacate, appellants' counsel submitted an affidavit indicating that he had an "understanding" that the trial court had a "protocol" of notifying the parties when the mediation department sent a case back to the trial court. Appellants' counsel attached two mediation outcome reports from other unrelated cases that each included language indicating that a case or file was being sent "back to court" at the conclusion of the mediation. However, appellants do not cite to any provision of the trial court's local rules or any other authority in support of this asserted protocol. Moreover, there is nothing in the entry granting appellants' request for mediation or the order for mediation that would indicate that the case had been removed

from the trial court's "active" docket. Finally, as discussed above, appellants had a general duty to remain aware of the status of their case. Assuming that appellants did not believe that mediation was complete, the mediation outcome report clearly indicated that further documentation from appellants was needed. However, it appears that appellants took no steps to provide this documentation or otherwise seek further mediation. Likewise, appellants took no measures to verify the status of their case during the four-month period between the issuance of the mediation outcome report and the motion for default judgment. Under these circumstances, we hold that the trial court did not err by not giving appellants additional notice, in addition to the mediation outcome report, that mediation was complete and that the time for filing an answer had begun to run. Further, we conclude that the trial court did not abuse its discretion by granting a default judgment in favor of appellee. Generally, a party must answer a complaint within 28 days after service of the complaint. Civ.R. 12(A). In this case, the trial court granted appellants an extension until 28 days after mediation was completed. As explained above, the mediation outcome report was filed on April 25, 2011. Appellee filed the motion for default judgment 123 days later, on August 26, 2011. Because appellants failed to file an answer during this period, the trial court did not abuse its discretion by granting the motion for default judgment.

{¶ 19} Accordingly, appellants' fifth assignment of error is without merit and is overruled.

{¶ 20} For the foregoing reasons, appellants' six assignments of error are overruled, and the judgments of the Franklin County Court of Common Pleas are affirmed.

Judgments affirmed.

SADLER and FRENCH, JJ., concur.
