

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Harris, N.A.,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-722 (C.P.C. No. 09CV06-9071)
Sylvia H. Douglas et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 29, 2012

Selph Law, Ltd., and Theran J. Selph, Sr., for appellant.

Zacks Law Group, LLC, Benjamin S. Zacks, James R. Billings and Robin L. Jindra, for appellees Sylvia H. and Marius Douglas.

Plunkett Cooney, Amelia A. Bower and David L. Van Slyke, for appellee BB&T Mortgage Company.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Plaintiff-appellant, Harris, N.A., appeals from a judgment of the Franklin County Court of Common Pleas that granted defendants-appellees, Sylvia H. Douglas, Marius Douglas, and BB&T Mortgage Company ("BB&T"), relief from a judgment against them. For the following reasons, we affirm.

{¶ 2} Sylvia is married to Marius. On September 4, 2007, Sylvia purchased property located in Reynoldsburg, Ohio. To acquire the funds to purchase the property, Sylvia executed a promissory note in the amount of \$118,800 in favor of CSMC Inc., which did business as Central States Mortgage ("Central States"). A mortgage secured the

loan. Central States recorded the mortgage with the Franklin County Recorder's Office on September 27, 2007.

{¶ 3} Central States assigned the Douglasses' mortgage to Interim Funding, L.L.C. ("Interim"). Interim recorded the assignment with the recorder's office on February 15, 2008.

{¶ 4} Interim assigned the Douglasses' mortgage to Amcore Bank ("Amcore"). Amcore recorded the assignment with the recorder's office on August 29, 2008.

{¶ 5} In the fall of 2008, Sylvia decided to refinance the property, and she again turned to Central States for a mortgage loan. ACS Title and Closing Services ("ACS") conducted the closing on the second loan and mortgage. In preparation for the closing, ACS obtained from Interim a payoff statement and assurance that Interim would release its interest in the Douglasses' property after receipt of the payoff amount. Because Amcore—not Interim—was the mortgage holder of record, ACS asked Central States how it could acquire a payoff statement from Amcore. Central States passed along ACS's inquiry to Interim. In response, Interim stated that the first mortgage would "be cleared with the payoff" to Interim. Defendant BB&T Mortgage Company's Motion for Relief from Judgment, Exhibit I. Interim also stated that Amcore would assign the mortgage back to Interim, and then Interim would record a satisfaction of mortgage.

{¶ 6} At the October 17, 2008 closing, Sylvia executed a promissory note in the amount of \$123,000 in favor of Central States. Central States recorded the mortgage that secured the loan with the recorder's office on October 22, 2008.

{¶ 7} After the closing, ACS tendered a check in the amount of \$120,858.34 to Interim to pay off the first loan. Interim cashed the check. Interim did not forward any of the funds to Amcore, nor did Interim secure a reassignment of the mortgage from Amcore.¹ On November 25, 2008, Interim recorded a satisfaction of mortgage with the recorder's office.

{¶ 8} Central States assigned the Douglasses' second mortgage to BB&T. On June 2, 2009, BB&T recorded the assignment with the recorder's office.

¹ Interim's failure to forward funds from the Douglasses' refinancing to Amcore was the subject of a lawsuit, which included claims for conversion and fraudulent transfer, that Amcore initiated against Interim and its members in a Wisconsin court.

{¶ 9} Amcore filed a foreclosure and breach of contract action against the Douglases on June 17, 2009. In its complaint, Amcore alleged that it had not received any proceeds from the refinancing, and thus, Sylvia had defaulted on the payment obligations of the note and mortgage. Amcore also alleged that it had not authorized Interim to release the mortgage, making the satisfaction of mortgage void. In addition to the Douglases, Amcore named BB&T as a defendant in its action, and it sought a declaratory judgment that its mortgage was senior to BB&T's mortgage.

{¶ 10} Marius, acting pro se, filed an answer to Amcore's complaint. Marius contended that he and his wife had timely paid amounts due under the original note and mortgage, as well as the second note and mortgage. Neither Sylvia nor BB&T answered Amcore's complaint.

{¶ 11} On March 24, 2010, Amcore moved for default judgment as to Sylvia and BB&T, and summary judgment as to all defendants. No defendant responded to Amcore's motion. In a June 15, 2010 decision, the trial court granted Amcore's motion.

{¶ 12} Amcore then moved to substitute Harris as plaintiff. Amcore explained that substitution was necessary because the Federal Deposit Insurance Corporation had closed Amcore and assigned Amcore's assets to Harris. The trial court granted Amcore's motion.

{¶ 13} On June 23, 2010, the trial court issued a judgment entry and decree in foreclosure. In addition to granting judgment against Sylvia in the amount of \$128,790.40, the trial court also found that the first mortgage was not satisfied with funds from the October 2008 refinancing and that Harris held a valid and subsisting first mortgage lien on the Douglases' property.

{¶ 14} On July 23, 2010, the Douglases moved for relief from judgment pursuant to Civ.R. 60(B)(5). Subsequently, BB&T moved for relief from judgment pursuant to Civ.R. 60(B)(1). The trial court granted both motions, entering judgment in favor of the Douglases on May 19, 2011 and in favor of BB&T on July 28, 2011.

{¶ 15} Harris now appeals from the judgments, and it assigns the following errors:

1. On July 28, 2011, the Trial Court erred in granting Appellee BB&T Mortgage Company a/k/a Branch Banking & Trust Company's Motion for Relief from Judgment, filed on October 3, 2010 in the Foreclosure.

2. On May 19, 2011, the Trial Court erred in granting Appellees Sylvia and Marius Douglas' Motion for Relief from Judgment, filed on July 23, 2010 in the Foreclosure.

{¶ 16} By its first assignment of error, Harris challenges the trial court's decision to grant BB&T's Civ.R. 60(B)(1) motion for relief from the June 23, 2010 judgment. 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.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. If the moving party fails to demonstrate any of these three requirements, the trial court should overrule the motion. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20 (1988).

{¶ 17} Because the law favors disposition of cases by a trial on the merits, courts should resolve doubt as to the establishment of a meritorious defense or a ground for relief in favor of the moving party. *Peter M. Klein Co. v. Dawson*, 10th Dist. No. 10AP-1122, 2011-Ohio-2812, ¶ 9; *Miller v. Susa Partnership, L.P.*, 10th Dist. No. 07AP-702, 2008-Ohio-1111, ¶ 16. A trial court exercises its discretion when ruling on a Civ.R. 60(B) motion, and thus, an appellate court will not disturb such a ruling absent an abuse of discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75, 77 (1987). An abuse of discretion involves more than an error of law or judgment; it connotes an attitude that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 18} With regard to the first element of the *GTE* test, a moving party need only allege a meritorious defense; it need not prove that it will prevail on that defense. *Rose Chevrolet* at 20; *GMAC Mtge., L.L.C. v. Herring*, 189 Ohio App.3d 200, 2010-Ohio-3650, ¶ 32 (2d Dist.); *Meglan, Meglan & Co., Ltd. v. Bostic*, 10th Dist. No. 05AP-831, 2006-Ohio-2270, ¶ 8. Although proof of success is not required, the moving party must support its alleged defense with operative facts that have enough specificity to allow the trial court to judge the merit of the defense. *Miller* at ¶ 16; *Bostic* at ¶ 8. A proffered defense is meritorious if it is not a sham and when, if true, it states a defense in part, or in whole, to the claims for relief set forth in the complaint. *Miller* at ¶ 15; *Bostic* at ¶ 8.

{¶ 19} Here, to establish its meritorious defense, BB&T alleges that Interim was Amcore's agent for the purpose of collecting amounts due under the first note and mortgage. Because Interim received funds sufficient to pay off the first note and mortgage, BB&T asserts that the note was satisfied and the mortgage terminated. Thus, according to BB&T, Harris has no basis on which to pursue its foreclosure and breach of contract action.

{¶ 20} In response, Harris argues that Interim was not Amcore's agent. Harris maintains that ACS transmitted the proceeds from the refinancing to the wrong party, and thus, the first mortgage continued to encumber the property after the refinancing. Moreover, Harris contends that Sylvia breached the note by failing to remit payment as promised.

{¶ 21} Whether an entity is an agent is a question of fact. *Damon's Missouri, Inc. v. Davis*, 63 Ohio St.3d 605, 612 (1992). We need not resolve the factual dispute over Interim's agency status at this point in the proceedings. As we stated above, a moving party establishes a meritorious defense if it alleges facts, which *if true*, present a defense to the claims set forth in the complaint. Thus, we will accept the facts that BB&T alleges and adjudge the legal viability of the defense arising from those facts.

{¶ 22} In an agency relationship, an agent has the power to bind the principal by his actions, and the principal has the right to control the actions of the agent. *Shalash, Inc. v. Liquor Control Comm.*, 10th Dist. No. 04AP-420, 2004-Ohio-5841, ¶ 19. As a general matter, "the agent stands in the shoes of the principal." *Am. Fin. Corp. v. Fireman's Fund Ins. Co.*, 15 Ohio St.2d 171, 174 (1968). Based on these legal principles, if Interim was Amcore's agent for the purpose of receiving amounts owed under the first note and mortgage, then Interim's receipt of the loan payoff could defeat Harris's claims. Therefore, we conclude that the trial court did not abuse its discretion in determining that BB&T alleged sufficient operative facts to support a meritorious defense.

{¶ 23} With regard to the second element of the *GTE* test, a moving party must establish one of the five grounds for relief set forth in Civ.R. 60(B)(1) through (5). Here, BB&T sought relief under Civ.R. 60(B)(1), which allows a trial court to relieve a party from a judgment on a showing of "mistake, inadvertence, surprise or excusable neglect." The Supreme Court of Ohio has defined "excusable neglect" in the negative, stating "that the

inaction of a defendant is not 'excusable neglect' if it can be labeled as a 'complete disregard for the judicial system.' " *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20 (1996), quoting *GTE Automatic Elec., Inc.* at 153. The inquiry into whether a moving party's inaction constitutes excusable neglect must take into consideration all the individual facts and circumstances in each case. *Colley v. Bazell*, 64 Ohio St.2d 243, 249 (1980). The trial court's discretion to determine whether excusable neglect exists " 'necessarily connotes a wide latitude of freedom of action * * * and a broad range of more or less tangible or quantifiable factors may enter into the trial court's determination. Simply put, two trial courts could reach opposite results on roughly similar facts and neither be guilty of an abuse of discretion.' " *Peter M. Klein Co.* at ¶ 11, quoting *McGee v. C & S Lounge*, 108 Ohio App.3d 656, 661 (10th Dist.1996).

{¶ 24} In the case at bar, Richard Lancianese, assistant general counsel and vice president of BB&T, testified via affidavit regarding why BB&T failed to answer or otherwise defend in the instant action. According to Lancianese, BB&T has adopted a firm policy for handling the receipt of summons related to residential mortgage loans. That policy requires: (1) the entry of the summons into a case management system and (2) the identification of the appropriate servicing contractor/foreclosure analyst to handle the summons. Although BB&T followed its policy in this case, it did not locate a loan to Sylvia in its computer database because of an error in the entry of Sylvia's information into the database. This error led BB&T to conclude that it did not have a loan customer by the name "Sylvia H. Douglas," and thus, that it did not have an interest in the subject loan or property. Given these facts, we conclude that the trial court did not abuse its discretion in finding excusable neglect on BB&T's part.

{¶ 25} We recognize, as Harris asserts, that a significant period of time elapsed between BB&T's receipt of the summons and its motion for relief from judgment. Nevertheless, we cannot find that the trial court ruled unreasonably, arbitrarily, or unconscionably when it determined that BB&T's inaction did not amount to a complete disregard of the judicial system. Moreover, we join the trial court in rejecting Harris's argument that Lancianese was untruthful in his affidavit testimony.

{¶ 26} With regard to the third element of the *GTE* test, a party relying on the Civ.R. 60(B)(1) ground for relief must file its motion within one year after the entry of the judgment. Harris does not contend that BB&T failed to satisfy this requirement.

{¶ 27} Having reviewed Harris's arguments with regard to each *GTE* element, we find that the trial court did not abuse its discretion in granting BB&T relief from the June 23, 2010 judgment. Accordingly, we overrule Harris's first assignment of error.

{¶ 28} By its second assignment of error, Harris challenges the trial court's decision to grant the Douglasses' Civ.R. 60(B)(5) motion for relief from the June 23, 2010 judgment. The Douglasses' and BB&T's interests are aligned in this case. Thus, for the reason we articulated above, we conclude that the trial court did not abuse its discretion in finding that the Douglasses possessed a meritorious defense to Harris's claims.

{¶ 29} On appeal, Harris does not argue that the Douglasses failed to establish that they were entitled to relief on the basis of the Civ.R. 60(B)(5) ground or that their motion was untimely. We, therefore, will not address the second or third elements of the *GTE* test with regard to the Douglasses.

{¶ 30} In sum, Harris has not shown the trial court abused its discretion in granting the Douglasses' Civ.R. 60(B)(5) motion. Accordingly, we overrule the second assignment of error.

{¶ 31} For the foregoing reasons, we overrule Harris's assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and FRENCH, J., concurs.
