[Cite as *Bank of Am., N.A. v. Pandey*, 2013-Ohio-3830.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Bank of America, N.A.,	:	
Plaintiff-Appellee,	:	
		No. 12AP-950
v.	:	(C.P.C. No. 11CVE09-11655)
Linda L. Pandey et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on September 5, 2013

Lerner, Sampson & Rothfuss, LPA, and *Adam R. Fogelman*, for appellee.

Linda L. Pandey and *Nawal K. Pandey*, pro se.

APPEAL from the Franklin County Court of Common Pleas

KLATT, P.J.

{¶ 1} Defendants-appellants, Linda L. and Nawal K. Pandey, appeal from a judgment entered by the Franklin County Court of Common Pleas denying their motion for relief from judgment and for stay. For the following reasons, we affirm that judgment.

I. Factual and Procedural Background

{¶ 2} On September 19, 2011, plaintiff-appellee, Bank of America, N.A., filed a complaint in the trial court alleging that the appellants were in default on a promissory note secured by a mortgage on property located at 2441 Bradenton Court, Columbus, Ohio, and seeking foreclosure on such mortgage. In response, appellants requested mediation. Accordingly, the trial court referred the matter for mediation, which was not successful. After the failed mediation, appellants filed an answer to the complaint. They

asserted a number of defenses, including a claim of "unclean hands" and claims of res judicata and the "Two Dismissal Rule," both based on appellee's two previous foreclosure filings against them that had both been dismissed without prejudice.

{¶ 3} Appellee filed a motion for summary judgment, arguing that it was entitled to judgment as a matter of law on its claim and that appellants' defenses all failed because appellants did not allege facts to support those defenses. In response, appellants attempted to provide more facts in support of their defenses. Specifically, they filed documents from the two previous foreclosure actions appellee filed against them. The trial court ultimately granted appellee summary judgment and ordered the sale of appellants' house.

{¶ 4} On August 23, 2012, appellants filed a motion for relief from judgment pursuant to Civ.R. 60(B) and for a stay of the proceedings pursuant to Civ.R. 62. They alleged that appellee's complaint was barred by the "Two Dismissal Rule" but did not argue their unclean hands defense. The trial court denied appellants' requests, concluding that the double-dismissal rule did not apply to bar this action because both of the previous actions had been dismissed by court order.[1]

II. The Appeal

{¶ 5} Appellants appeal the denial of their motion for relief from judgment and assign the following errors:

> [1.] It was an abuse of discretion for the Trial Court to deny Appellants' 60(B) motion without holding [a] hearing.
>
> [2.] The Trial Court erred when it summarily rejected or did not consider Defendants' allegation of Plaintiff's unclean hands.

A. Did the Trial Court Properly Deny Appellants' Motion for Relief from Judgment?

{¶ 6} Because appellants' two assignments of error both concern the trial court's denial of their motion for relief from judgment, we will address them together.

[1] We agree with the trial court that the appellants were, although inartfully, arguing that the double-dismissal rule applied to these facts.

1. Standard of Review

{¶ 7} 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, 150-51 (1976); *Wells Fargo Bank, N.A. v. Perkins*, 10th Dist. No. 10AP-1022, 2011-Ohio-3790, ¶ 8. All three of the elements must be established, and the test is not met if any one of the requirements is not met. *Strack v. Pelton*, 70 Ohio St.3d 172, 174 (1994). The decision to grant or deny a Civ.R. 60(B) motion rests in the trial court's sound discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75, 77 (1987). An appellate court will not reverse such a decision absent an abuse of that discretion. *Id.*

2. Appellants' Substantive Arguments

{¶ 8} Substantively, appellants argue that the trial court abused its discretion by denying their motion for two reasons. First, they again argue that the double-dismissal rule should bar this action. We disagree.

{¶ 9} Civ.R. 41(A)(1) allows for a plaintiff to unilaterally file a notice of dismissal of its claims against a defendant. Such a dismissal under the rule is generally without prejudice, but the rule provides an exception—"a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court." *Olynyk v. Scoles*, 114 Ohio St.3d 56, 2007-Ohio-2878, ¶ 8. Thus, when a plaintiff files two unilateral notices of dismissal under Civ.R. 41(A)(1)(a) regarding the same claim, the second notice of dismissal functions as an adjudication of the merits of that claim, regardless of any contrary language in the second notice stating that the dismissal is meant to be without prejudice. *Id.* at ¶ 10. In that situation, the second dismissal is with prejudice under the double-dismissal rule, and res judicata applies if the plaintiff files a third complaint asserting the same cause of action. This is the double-dismissal rule appellants seek to apply to bar appellee's instant complaint.

{¶ 10} In *Olynyk*, the Supreme Court of Ohio clarified that the double-dismissal rule applies only when both previous dismissals were "notice dismissals" under Civ.R.

41(A)(1)(a). *Id.* at ¶ 31; *Sipes v. Sipes*, 5th Dist. No. 2011-CA-00101, 2012-Ohio-3215, ¶ 20. Here, the two previous foreclosure actions against appellants were both dismissed by order of the court pursuant to Civ.R. 41(A)(2). Appellee did not file notice of dismissals pursuant to Civ.R. 41(A)(1)(a) in either case. Accordingly, the double-dismissal rule in Civ.R. 41(A)(1) does not apply to this matter. *Olynyk*; *HSBC Bank USA, N.A. v. Wanda*, 8th Dist. No. 98775, 2013-Ohio-1556, ¶ 12 (double-dismissal rule did not apply because two previous actions were dismissed for failure to prosecute, not by notice); *Sipes* at ¶ 21 (rejecting application of double-dismissal rule where first dismissal was pursuant to court order).

{¶ 11} Appellants next argue that the trial court did not consider its allegation of appellee's "unclean hands." Appellants did not assert this issue in their motion for relief from judgment, and their failure to raise the issue as grounds for relief forfeits it on appeal. *Scotland Yard Condominium Assoc. v. Spencer*, 10th Dist. No. 05AP-1046, 2007-Ohio-1239, ¶ 16, citing *Natl. City Mtge. Co. v. Johnson & Assoc. Fin. Servs., Inc.*, 2d Dist. No. 21164, 2006-Ohio-2364, ¶ 16 (failure to raise issue in Civ.R. 60(B) motion precludes party from raising that issue on appeal); *Mahlerwein v. Lakhi*, 5th Dist. No. 07 CA 2, 2007-Ohio-6616, ¶ 14.

3. Did the Trial Court have to Hold a Hearing on the Motion?

{¶ 12} Finally, appellants allege that the trial court erred in failing to hold an evidentiary hearing before ruling on their motion. We disagree. A trial court is not required to hold an evidentiary hearing when the motion and attached evidentiary materials do not allege operative facts which would warrant relief under Civ.R. 60(B). *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151 (1996); *Todd v. Todd*, 10th Dist. No. 01AP-1095, 2002-Ohio-2394, ¶ 11. Because appellants' double-dismissal rule did not warrant relief as a matter of law, the trial court did not err by not holding a hearing on appellants' motion.

III. Conclusion

{¶ 13} For the foregoing reasons, the trial court did not abuse its discretion by denying appellants motion for relief from judgment without a hearing. Accordingly, we

overrule appellants' two assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.