

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

HOUSEHOLD REALTY CORPORATION,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2014-L-003
MARTIN B. GUNTER, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 10 CF 001263.

Judgment: Affirmed.

Melissa L. Zujkowski and Warren T. McClurg, II, Ulmer & Berne, LLP, Skylight Office Tower, 1660 West Second Street, Suite 1100, Cleveland, OH 44113 (For Plaintiff-Appellee).

David N. Patterson, 33579 Euclid Avenue, Willoughby, OH 44094 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Martin B. Gunter appeals from the judgment entry of the Lake County Court of Common Pleas, adopting the decision of its magistrate, and denying Mr. Gunter's motion for relief from judgment in a foreclosure action. We affirm.

{¶2} October 7, 2008, Mr. Gunter obtained a loan from appellee, Household Realty Corporation ("Household"), in the principal amount of \$128,096.73. He executed a note. The loan was secured by a mortgage on a property at 5297 Naylor Drive, Perry

Township, Ohio 44077. The mortgage was recorded with the Lake County Recorder October 9, 2008.

{¶3} March 2, 2010, Household notified Mr. Gunter by letter that he was in default, and that Household would accelerate the balance due under the note and mortgage if he failed to cure. Evidently he did not, as Household filed its complaint in foreclosure April 28, 2010. May 17, 2010, Mr. Gunter answered the complaint, denying liability, and setting forth various affirmative defenses.

{¶4} June 15, 2010, the trial court stayed legal proceedings, and ordered the case sent to mediation.

{¶5} February 21, 2012, Mr. Gunter's counsel moved the trial court for leave to withdraw, which motion was granted February 28, 2012.

{¶6} June 8, 2012, the trial court filed a judgment entry noting the failure of mediation, and returning the case to its active docket.

{¶7} October 4, 2012, Household filed for summary judgment. October 15, the trial court denied the motion for summary judgment, on the basis that it was served not on Mr. Gunter, but on his former counsel. December 5, 2012, the trial court set the case for bench trial before its magistrate on January 16, 2013. December 6, 2013, Household moved to file an amended complaint. The trial court denied the motion December 21, 2012.

{¶8} Bench trial was had, with Mr. Gunter appearing pro se. March 6, 2013, the magistrate filed his decision, finding in favor of Household, and granting a decree of foreclosure in the amount of \$126,686.07, plus interest and court costs. The trial court adopted the magistrate's decision the same day.

{¶9} Mr. Gunter did not file objections to the magistrate's report. He did not file a transcript of the proceedings before the magistrate. He did not appeal the trial court's judgment.

{¶10} Sheriff's sale was had October 7, 2013. Household purchased the property for \$90,000.

{¶11} November 15, 2013, Mr. Gunter, now represented by counsel, moved for relief from judgment, Civ.R. 60(B). Attached to the motion was his affidavit, which provides, in pertinent part:

{¶12} "9. In fact, I and [Household] reached an agreement to resolve any disputes and preclude the filing of any foreclosure proceedings.

{¶13} "10. As much as was possible, I complied with all terms and conditions of the agreement.

{¶14} "11. [Household], however, proceeded to commence the instant litigation in breach of the promises and agreement.

{¶15} "12. I reasonably believed that [Household] breached our agreement and settlement of all issues and failed to comply with its promises relative thereto.

{¶16} "13. I reasonably and foreseeably relied upon the promises of [Household] to put the mortgage back in good standing and refrain from filing the instant foreclosure."

{¶17} November 20, 2013, the magistrate filed his decision denying the motion for relief from judgment. In pertinent part, the decision states: "the magistrate finds that the defendant *has failed to identify a potential claim or affirmative defense which was not previously addressed or waived at the bench trial.*" (Emphasis added.)

{¶18} No objections were filed to the magistrate's decision. December 10, 2013, the trial court filed its judgment entry adopting the decision. January 6, 2014, Mr. Gunter noticed this appeal, assigning three errors. The first reads:

{¶19} "The trial court erred to the prejudice of the appellant by entering judgment in favor of the appellee and denying the motion to set aside despite competent, credible evidence that the parties settled the matter prior to litigation including the appellee's promise not to commence the instant foreclosure proceedings."

{¶20} Essentially, Mr. Gunter argues that by his affidavit, he presented a meritorious defense to foreclosure – i.e., that he and Household had entered a settlement agreement.

{¶21} We review a trial court's decision to grant or deny a motion for relief from judgment for abuse of discretion. *Cefaratti v. Cefaratti*, 11th Dist. Lake No. 2004-L-091, 2005-Ohio-6895, ¶11. Regarding this standard, we recall the term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.)

{¶22} Civ.R. 60(B) provides, in relevant part:

{¶23} "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; * * * The motion shall be

made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.”

{¶24} “It is well-settled that in order to prevail on a motion for relief from judgment pursuant to Civ. R. 60(B), the movant must demonstrate the following: (1) a meritorious claim or defense if relief is granted; (2) entitlement to the relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) timeliness of the motion. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St. 2d 146, * * *, paragraph two of the syllabus. (Parallel citation omitted.) *Cefaratti, supra*, at ¶10.

{¶25} “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, Inc. v. Adams*, 36 Ohio St.3d 17, 20, * * * (1988); *GMAC Mtge., LLC. v. Herring*, 189 Ohio App.3d 200, 2010-Ohio-3650, * * * ¶32 (2d Dist). 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 v. Susa Partnership, LP.*, 10th Dist. No. 07AP-702, 2008-Ohio-1111, ¶16. 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.” (Parallel citations omitted.) *Home S. & L. of Youngstown v. Snowville Subdiv. Joint Venture Phase I*, 8th Dist. Cuyahoga No. 97985, 2012-Ohio-4594, ¶18.

{¶26} “Pursuant to Civ.R. 53(D)(3)(b)(iv), ‘(e)xcept 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, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or

conclusion as required by Civ.R. 53(D)(3)(b).’ * * * In a civil proceeding, ‘plain error involves those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material, adverse effect on the character of and public confidence in, judicial proceedings.’ *In re Moore*, 10th Dist. No. 04AP-299, 2005-Ohio-747, ¶ 8, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122, * * * (1997).” (Parallel citations omitted.) *Hamad v. Hamad*, 10th Dist. Franklin No. 12AP-617, 2013-Ohio-2212, ¶21.

{¶27} Mr. Gunter did not object to the magistrate’s decision of March 6, 2014, granting foreclosure to Household, nor did he file a transcript of the bench trial. He did not appeal the trial court’s judgment entry adopting that decision. By his affidavit attached to his motion for relief from judgment, he asserted the parties had entered a settlement of their dispute. A settlement is a contract: whether it is legally binding requires a trial court to determine whether the elements of a contract exist. See *generally Rulli v. Fan Co.*, 79 Ohio St.3d 374 (1997). If there was a legally binding settlement between Mr. Gunter and Household, that might be a meritorious defense pursuant to Civ.R. 60(B). But in his November 20, 2013 decision, the magistrate specifically found the motion for relief from judgment raised no claim or defense not addressed or waived at trial. In the absence of any objections to the prior decision regarding foreclosure, **or** transcript of trial, and any appeal from the trial court’s judgment entry adopting that decision, we must presume the existence of a settlement between the parties was either rejected or waived at trial. Further, as Mr. Gunter failed to object to the magistrate’s decision rejecting his motion for relief from judgment, we

can only review this issue for plain error, and find none. Thus, Mr. Gunter cannot meet the first prong of the *GTE* test, presentation of a meritorious defense.

{¶28} The first assignment of error lacks merit.

{¶29} The second assignment of error reads: “The trial court erred to the prejudice of the appellant by entering judgment in favor of the appellee and denying the motion to set aside as the appellee failed to proffer competent, credible evidence to properly and sufficiently establish actual damages.”

{¶30} Mr. Gunter argues Household failed to introduce evidence regarding his payment history.

{¶31} The third assignment of error reads:

{¶32} “The trial court erred to the prejudice of the appellant by entering judgment in favor of the appellee and denying the motion to set aside as the appellee failed to proffer competent, credible evidence to properly and sufficiently establish that it satisfied the condition [precedent] required by the applicable acceleration clause of the mortgage which necessitated advance notice prior to filing.”

{¶33} Mr. Gunter argues Household failed to prove it provided him the notice of acceleration required by the mortgage.

{¶34} We deal with these assignments of error together.

{¶35} First, we note a review of the record indicates neither assignment of error is factually true, as Household attached copies of the requisite documents to its motion for summary judgment, introduced by a properly framed affidavit.

{¶36} Second, we note that each goes directly to the merits of the decision granting Household foreclosure. That judgment entry was never appealed; any alleged

error was, therefore, waived; and pursuant to App.R. 4(A), we are presently without jurisdiction to consider these issues.

{¶37} The second and third assignments of error lack merit.

{¶38} The judgment of the Lake County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.