

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

COLLEGE HILLS ASSOCIATION,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2014-L-016
TT GROUP, LLC, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 12 CF 003104.

Judgment: Affirmed.

Robert E. Kmiecik, Kevin M. Fields, and Vincent P. Zuccaro, Kaman & Cusimano LLC, 50 Public Square, Suite 2000, Cleveland, OH 44113 (For Plaintiff-Appellee).

Timothy J. Fitzgerald, Koehler Neal LLC, Erieview Tower, Suite 3330, 1301 East Ninth Street, Cleveland, OH 44114 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} On May 22, 2013, the trial court entered a default judgment and foreclosure against appellant TT Group, LLC. Appellant now appeals the trial court’s judgment entry denying its Civ.R. 60(B) motion to vacate the default judgment and foreclosure entry. For the reasons that follow, we affirm.

{¶2} Appellee, College Hills Association (“the Association”), is an Ohio nonprofit corporation operating 104 residences located in Painesville, Lake County, Ohio. On March 9, 2011, TT Group acquired title to 985 Marietta Drive, Painesville,

Ohio 44077, a unit operated by the Association. As a unit owner, TT Group is obligated to pay maintenance fees and assessments for its share of common property expenses. Beginning January 2012, TT Group did not pay fees and assessments. As a result, on July 5, 2012, the Association filed a certificate of lien in the amount of \$706.13 plus interest and costs, Instrument No. 2012R017880.

{¶3} Thereafter, on November 28, 2012, the Association filed a complaint for foreclosure against TT Group and others.¹ The Association sought a monetary judgment in the amount of \$2,730.13, a decree of foreclosure on the lien, costs incurred in bringing the action, costs of collection (including attorney fees), and any future unpaid assessments. TT Group did not file an answer.

{¶4} On May 13, 2013, the Association filed a motion for default judgment. The motion was accompanied by an affidavit of the Association's managing agent and an itemized accounting. By that point, TT Group's delinquency had grown to \$3,438.43. Also, the Association had incurred numerous costs and attorney fees as a result of collecting and bringing suit. TT Group did not file a response.

{¶5} On May 22, 2013, the trial court granted the Association's motion for default judgment and issued a decree of foreclosure. The Association was awarded, inter alia, \$3,438.43 plus six percent interest and costs. TT Group did not appeal that judgment.

{¶6} An order of sale was filed on July 23, 2013. The unit at issue was later appraised at \$39,000. Notice of a sheriff's sale, scheduled for December 16, 2013,

1. The complaint named two other defendants, Geraldine Jackson and Lake County Treasurer. However, neither defendant is a named party to this appeal.

was published in the News Herald, a local newspaper, on November 8, 15, and 22, 2013.

{¶7} Three days before the scheduled sale, TT Group filed two motions: (1) “Emergency Motion To Vacate Void Default Judgment/Decree Of Foreclosure And Order Of Sale And For Relief From Same Pursuant To Civ.R. 60(B)”;² and (2) “Emergency Motion To Stay Execution On Judgment Granting Default And Decree Of Foreclosure And Order Of Sale Pursuant To Civ.R. 62(A)”. The Association filed a combined brief in opposition to both motions.

{¶8} On January 9, 2014, the trial court denied TT Group’s motion to vacate.² The court found that TT Group failed to demonstrate that it was entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5). TT Group appealed that judgment and asserts the following two assignments of error:³

{¶9} “[1.] The Trial Court Erred by Overruling the Motion For Relief From Default Judgment/Decree of Foreclosure and Order Of Sale Pursuant to Civ.R. 60(B)(5) Where the Default Judgment Did Not Comply with Civ.R. 55(C) and Civ.R. 54(C).

{¶10} “[2.] The Trial Court Abused Its Discretion by Overruling the Motion For Relief From Default Judgment/Decree of Foreclosure and Order Of Sale Pursuant to Civ.R. 60(B)(5) Where the Default Judgment Was Not Signed by the Judge.”

2. The court did not rule on the motion to stay. As a result, the sheriff’s sale was conducted as scheduled. However, no bid was received for the property and no sale occurred.

3. TT Group filed a motion to stay the trial court’s judgment of default and decree of foreclosure entered on May 22, 2013 and the order of sale entered on July 23, 2013. The trial court denied the motion. Thereafter, TT Group filed a motion for stay with this court. The Association filed a brief in opposition. On April 14, 2014, this court granted the motion to stay conditioned upon the posting of a \$7,000 cash bond.

{¶11} TT Group's two assignments of error concern the denial of its Civ.R. 60(B) motion to vacate judgment.

{¶12} The disposition of a Civ.R. 60(B) motion lies within the sound discretion of the trial court and the ruling will not be reversed on appeal unless an abuse of that discretion can be shown. *Denittis v. Aaron Constr., Inc.*, 11th Dist. Geauga No. 2011-G-3031, 2012-Ohio-6213, ¶25. 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). The Second Appellate District also recently adopted a similar definition of the abuse-of-discretion standard: an abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004). When an appellate court is reviewing a pure issue of law, "the mere fact that the reviewing court would decide the issue differently is enough to find error[.] * * * By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error." *Id.*, ¶67.

{¶13} Relief from judgment may be granted pursuant to Civ.R. 60(B), which states, in part:

{¶14} "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: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a

new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reason (1), (2), and (3) not more than one year after the judgment * * *.”

{¶15} Regarding the moving party’s obligations under Civ.R. 60(B):

{¶16} “To prevail on a motion brought under Civ.R. 60(B), the movant 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, paragraph two of the syllabus (1976).

{¶17} “If any one of the aforementioned requirements is not satisfied, the motion is properly overruled.” *Sokol v. HMDG, LLC*, 11th Dist. Geauga No. 2012-G-3117, 2013-Ohio-3476, ¶13.

{¶18} In its first assignment of error, TT Group argues that the default judgment/decree of foreclosure should have been vacated pursuant to Civ.R. 60(B)(5) because it is contrary to the restriction in Civ.R. 54(C) that a default judgment cannot “exceed in amount that prayed for in the demand for judgment.” TT Group stresses that the Association prayed for \$2,730.13 in its complaint but the court awarded default

judgment for \$3,438.43. TT Group further contends that it had a meritorious defense; however, no explanation of that defense was provided.

{¶19} In its second assignment of error, TT Group contends the trial court abused its discretion by overruling its Civ.R. 60(B) motion because the default judgment was not signed by the judge.

{¶20} TT Group's arguments are barred by res judicata. As the Ohio Supreme Court enunciated in *Bank of America N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, ¶15, Civ.R. 60(B) "does not exist to allow a party to obtain relief from his or her own choice to forgo an appeal from an adverse decision." When a party seeks Civ.R. 60(B) relief in lieu of filing a direct appeal, res judicata bars relief. *Id.* ¶16. As TT Group elected not to appeal the underlying foreclosure judgment and all arguments raised now could have been raised in a timely appeal, res judicata bars Civ.R. 60(B) relief.

{¶21} For the foregoing reasons, TT Group's assignments of error are not well-taken. The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDALL, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.