[Cite as *Bank of New York Mellon v. McMasters*, 2015-Ohio-1769.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

THE BANK OF NEW YORK MELLON fka THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWABS INC., ASSET-BACKED CERTIFICATES, SERIES 2006-11,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-L-112**
- vs -	:	
JOAN MCMASTERS, et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 12 CF 001607.

Judgment: Affirmed.

Adam J. Turer, Lerner Sampson & Rothfuss, 120 East Fourth Street, Suite 800, P.O. Box 5480, Cincinnati, OH 45202 (For Plaintiff-Appellee).

David N. Patterson, 33579 Euclid Avenue, Willoughby, OH 44094-3199 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Joan McMasters, appeals from the judgment of the Lake County Court of Common Pleas, adopting the magistrate's decision that denied appellant's motion for relief from the court's judgment of foreclosure. For the reasons discussed below, the trial court's judgment is affirmed.

{¶2} On June 12, 2012, appellee, The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders of the CWABS Inc., Asset-Backed Certificates, Series 2006-11, filed a complaint in foreclosure, premised upon appellant's default upon her note and mortgage. Appellee attached a copy of the February 2, 2012 assignment of the mortgage to its complaint which purported to give appellee all rights and beneficial interest under the mortgage together with the note. Appellant filed her answer instanter, which alleged appellee lacked standing, and the case was referred to mediation. The matter, however, was ultimately returned to the trial court's active docket.

{¶3} Appellee subsequently filed its motion for summary judgment. Appellee supported its motion with the affidavit of Jodi A. Zook, a representative of appellee's servicing agent with knowledge of the relevant records relating to the mortgage. The affidavit purported to authenticate the indorsed note and mortgage, as well as the assignment of the mortgage. Zook averred that appellee was in possession of the note. Appellant did not oppose appellee's motion for summary judgment; and, on September 24, 2013, the trial court entered summary judgment in appellee's favor on its complaint in foreclosure. Appellant did not file a notice of appeal from this order. On December 2, 2013, the trial court entered an order of sale.

{¶4} On April 1, 2014, appellant filed a motion to set aside the entry of summary judgment pursuant to Civ.R. 60(B). In her motion, appellant argued genuine issues of material fact remained to be litigated based upon the application of promissory estoppel and the doctrine of "unclean hands." To wit, appellant asserted appellee's representatives allegedly encouraged appellant to fall into default, but the default would

be somehow settled, presumably through reinstatement, without the filing of a suit in foreclosure. She further argued that appellee, at the time of filing the suit, did not have standing to sue; hence, pursuant to *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, she concluded the order of summary judgment was void. Appellee opposed the motion.

{¶5} A hearing was held on appellant's motion during which appellant conceded she failed to respond to appellee's motion for summary judgment because she "gave up." And although appellant argued the underlying judgment was void due to alleged conduct on behalf of the bank relating to purported loan modification negotiations that fell through, counsel for appellant admitted the trial court possessed both subject matter jurisdiction and jurisdiction over appellant when it entered summary judgment. Finally, during the magistrate's examination, counsel for appellant acknowledged the issues he was advancing in the motion to set aside judgment should have been addressed either during the summary judgment exercise or on appeal from the same.

{¶6} After the hearing, the magistrate denied appellant's Civ.R. 60(B) motion. In his decision, the magistrate determined appellant failed to set forth any operative facts that could form the basis of a meritorious defense or counterclaim. Moreover, the magistrate found appellant was aware of all issues raised in her motion to set aside judgment prior to the court's entry of summary judgment. Hence, the magistrate concluded each of her arguments was barred by res judicata. Finally, the magistrate determined, regardless of the foregoing, that appellant's motion to set aside judgment

was untimely because the factual allegations were known to appellant at least two years prior to the entry of summary judgment.

{¶7} Appellant filed objections to the magistrate's decision. The trial court subsequently overruled appellant's objections and adopted the magistrate's decision. Appellant now appeals the trial court's judgment assigning the following error:

{¶8} "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 standing and that it was the real party in interest."

{¶9} Under her sole assignment of error, appellant asserts several arguments; she first asserts the trial court erred in adopting the magistrate's conclusion that the Civ.R. 60(B) motion was barred by res judicata. Appellant further claims the trial court erred because she set forth genuine issues that would permit relief based upon the application of promissory estoppel and the doctrine of unclean hands. These arguments, however, turn on her view that the underlying entry of summary judgment was void ab initio because appellee lacked standing to initiate the underlying foreclosure. As a result, appellant maintains, the trial court was without subject matter jurisdiction to enter judgment. We do not agree.

{¶10} In *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, the Supreme Court of Ohio addressed the propriety of raising the issue of standing in a Civ.R. 60(B)(3) motion. In *Kuchta,* the bank filed a complaint in foreclosure against the defendants. The defendants initially answered the foreclosure complaint and asserted lack of standing. The bank filed a motion for summary judgment to which the

defendants did not respond. The trial court entered judgment in the bank's favor, and the defendants did not appeal the judgment. Later, however, the defendants filed a motion for relief from judgment pursuant to Civ.R. 60(B)(3). After the trial court denied the motion, the Ninth Appellate District reversed the trial court's judgment concluding that, because standing was jurisdictional, the defendants would be entitled to relief if they could establish the bank lacked standing. *Bank of Am. v. Kuchta*, 9th Dist. Medina No. 12CA0025-M, 2012-Ohio-5562. The Ninth District certified its decision as in conflict with a decision of the Tenth District, and the matter was accepted by the Supreme Court. *Kuchta*, 2014-Ohio-4275.

{¶11} After initially drawing the conclusion that a lack of jurisdiction does not constitute fraud for purposes of establishing a viable basis for relief under Civ.R. 60(B)(3), the Court observed:

> [B]ecause the issue of standing could have been and in fact was raised during the foreclosure proceedings, res judicata prevents the Kuchtas from using the issue to establish entitlement to relief. Ohio's Civ.R. 60(B) is substantially equivalent to Fed.R.Civ.P. 60(b), which codified the centuries-old "rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments" regardless of their finality. Civ.R. 60(B) exists to resolve injustices that are so great that they demand a departure from the strict constraints of res judicata. However, the rule does not exist to allow a party to obtain relief from his or her own choice to forgo an appeal from an adverse decision.

Id. at ¶15, quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944).

{¶12} It is well established that a Civ.R. 60(B) motion cannot be used as a substitute for an appeal and that the doctrine of res judicata applies to such a motion. *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, ¶ 8-9. In this case, the

Kuchtas filed a Civ.R. 60(B) motion in order to relitigate an issue that they had raised at the start of litigation, which they failed to appeal. Thus, the doctrine of res judicata barred their attempted collateral attack against the judgment in foreclosure. *Kuchta*, 2014-Ohio-4275, at ¶15-16.

{¶13} The Court further considered whether a challenge to standing can be asserted in a common-law motion to vacate a judgment for lack of subject matter jurisdiction. The Court recognized that the court of common pleas possesses subject matter jurisdiction over all foreclosure actions. It determined, however, that while standing is a jurisdictional requirement, "lack of standing does not affect the subject-matter jurisdiction of the court." *Id.* at paragraph three of the syllabus.

{¶14} Even assuming arguendo appellee lacked standing, such a defect would not affect the trial court's subject matter jurisdiction. Thus, the trial court's judgment was not void ab initio, and appellant's argument to the contrary is unavailing. *See id.* at paragraph one of the syllabus. *See also Bank of Am. v. Gibson*, 11th Dist. Geauga No. 2014-G-3204, 2015-Ohio-209 (addressing substantially similar facts to those in the matter sub judice and affirming the trial court's denial of the defendant's Civ.R. 60(B) motion).

{¶15} Appellant's Civ.R. 60(B) motion was filed pursuant to subsections (B)(3), (B)(4), and (B)(5). Nevertheless, the *Kuchta* analysis still applies. Because appellant had an opportunity to challenge, inter alia, appellee's standing during the pendency of the summary judgment phase, the provisions allowing equitable relief pursuant to Civ.R. 60(B)(4) and (B)(5) do not affect our decision. Appellant did not establish an injustice so great as to warrant a departure from the application of res judicata. *See Kuchta*,

2014-Ohio-4275, at ¶15. Instead, the record simply reveals that appellant failed to oppose appellee's motion for summary judgment because she "gave up" and never took advantage of an opportunity to appeal the adverse judgment. 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." *Id.*

{¶16} Here, even though appellant challenged appellee's standing in her answer, she did not respond to appellee's motion for summary judgment. Appellant did not pursue a direct appeal from the entry of summary judgment. Because appellant had a full opportunity to litigate an issue unrelated to the court's subject matter jurisdiction, she is barred from collaterally challenging appellee's standing in the underlying motion to set aside judgment. *See generally Gibson*, *supra*.

{¶17} Appellant's assignment of error is without merit.

{¶18} For the reasons discussed above, the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs,

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