[Cite as *Natl. City Mtge. Co. v. Johnson & Assoc. Financial Servs., Inc.*, 2006-Ohio-2364.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

NATIONAL CITY MORTGAGE CO.	:	
Plaintiff-Appellee	:	C.A. CASE NO. 21164
v.	:	T.C. NO. 2003 CV 09093
JOHNSON & ASSOCIATES FINANCIAL SERVICES, INC.	:	(Civil Appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 12th day of May, 2006.

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WOLFF, J.

{¶ 1} Johnson & Associates Financial Services, Inc., appeals from a judgment of the Montgomery County Court of Common Pleas, which denied its motion to set aside a default judgment entered in favor of National City Mortgage Company.

{¶ 2} National City and Johnson & Associates, a corporation located in Georgia,

entered into an agreement whereby National City would purchase certain types of mortgages from Johnson & Associates. In the parties' agreement, the parties specified the types of mortgages that were eligible, and Johnson & Associates made general representations and warranties with respect to the mortgages that would be sold. The agreement also required Johnson & Associates to repurchase any mortgage that failed to comply with the representations and warranties.

{¶ 3} On December 16, 2003, National City filed a complaint against Johnson & Associates in which it alleged that Johnson & Associates had sold it a mortgage that did not comply with the representations and warranties set forth in the parties' agreement and had refused to repurchase the mortgage. National City alleged damages in the amount of $225,140.72, plus interest. In response to the complaint, Johnson & Associates sent a letter to National City denying that it was responsible for any inaccuracies in the mortgage, but it did not file a response in the trial court. Accordingly, on February 4, 2004, National City filed a motion for default judgment. On February 11, 2004, the trial court entered a default judgment.

{¶ 4} On September 23, 2004, Linn Johnson, the chairman of Johnson & Associates, filed a pro se motion for relief from judgment pursuant to Civ.R. 60(B). National City filed a motion to strike this filing because Ohio law precluded Johnson, who was not an attorney, from representing a corporation in a court action. While the motion to strike was pending, an Ohio attorney filed a virtually identical motion for relief from judgment on behalf of Johnson & Associates. In November 2004, the trial court struck the first motion and proceeded on the motion for relief from judgment that had been filed by Johnson & Associates' attorney. A hearing was scheduled for June 20, 2005.

{¶ 5} At the hearing, Johnson & Associates argued that its prompt response to National City by letter demonstrated that it had not shown complete disregard for the judicial system or for its opposing party and that its failure to file an answer was excusable neglect. It claimed that its delay in challenging the default judgment was caused by its difficulty in hiring an Ohio attorney to represent the company. Johnson & Associates also argued that relief from judgment was appropriate because an ambiguity in its agreement with National City rendered the contract voidable. Specifically, it alleged that it had acted as a broker, rather than as a lender, meaning that it had "reoriginated" or reviewed loan papers that it had not drafted, and that a broker should not be held to the same standard as a lender when an inaccuracy in loan documents comes to light. In essence, Johnson & Associates asserted that it was a victim of the alleged fraud, misrepresentation, or defect in the loan documents as much as National City was. It was apparently undisputed that the mortgage in question did not comply with certain federal regulations due to a problem with an appraisal, which tainted the marketability of the loan.

{¶ 6} In response, National City asserted that the plain language of the parties' agreement refuted Johnson & Associates' claim that it was not responsible under the agreement for inaccuracies or misrepresentations in the loan documents. National City also argued that Johnson & Associates had shown no excusable reason for failing to comply with the instructions on the summons, which had clearly informed Johnson & Associates of its obligation to file a response with the court. National City also challenged Johnson & Associates' assertion that it previously had been unable to obtain representation from an Ohio attorney.

{¶ 7} On June 23, 2005, the trial court overruled Johnson & Associates' motion to

set aside the default judgment. The court concluded that Johnson & Associates had not set forth "one scintilla of evidence of fraud" and had not demonstrated that it had a meritorious defense to present if relief were granted. Having identified these shortcomings in the motion, the trial court found it unnecessary to consider the timeliness of the motion.

{¶ 8} Johnson & Associates raises one assignment of error on appeal from the trial court's denial of its motion for relief from judgment.

{¶ 9} "THE APPELLANT DEMONSTRATED ALL THREE OF THE FACTORS NECESSARY TO PREVAIL ON AN OHIO CIVIL RULE 60(B) MOTION; AND THE TRIAL COURT ABUSED ITS DISCRETION BY OVERRULING SAID MOTION."

{¶ 10} Johnson & Associates claims that the trial court abused its discretion in overruling its motion for relief from judgment. It also argues, for the first time, that it did not receive proper notice of the default judgment pursuant to Civ.R. 55(A).

{¶ 11} To prevail upon a motion brought under Civ. R. 60(B), the moving party must demonstrate that: (1) it has a meritorious defense or claim to present if relief is granted; (2) it 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. *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 150-151, 351 N.E.2d 113. Johnson & Associates relied on Civ. R. 60(B)(1), which permits the court to relieve a party from a final judgment for mistake, inadvertence, or excusable neglect. We review a trial court's denial of a motion for relief from judgment under an abuse of discretion standard. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77, 514 N.E.2d 1122.

{¶ 12} In its motion, Johnson & Associates asserted that it was not bound under the parties' agreement to repurchase the mortgage in question from National City because it

did not act as a "Seller," as that term is used in the agreement, but rather as a broker. It reasoned that a broker does not prepare loan documents, and therefore cannot be held responsible for their accuracy, as a seller or preparer of loan documents would be. Therefore, Johnson & Associates concluded that it was not liable for any inaccuracies in the loan documents.

{¶ 13} The mortgage loan purchase agreement executed by the parties does not support Johnson & Associates' interpretation of its responsibilities under that agreement. Johnson & Associates is clearly identified in the agreement as the "Seller," and the seller "represents and warrants that *** each loan is current at delivery and complies fully with all applicable federal, state and local statutes." The agreement further states that, if a loan is tainted in any way by fraud, misrepresentation, or defects, or fails to meet the seller's representations, warranties or covenants, the seller shall repurchase it within ten days of written notice from National City at a price equal to the purchase price paid by National City, plus interest. Thus, Johnson & Associates' assertion that the agreement did not accurately reflect its limited role as a "broker" was specious. In fact, it had expressly assumed responsibilities far beyond those of a "broker," as it defined that term. The trial court reasonably concluded that Johnson & Associates had not demonstrated that it had a meritorious defense to present if relief was granted.

{¶ 14} The trial court also appears to have concluded that Johnson & Associates had failed to establish mistake, inadvertence, or excusable neglect, as required for relief pursuant to Civ.R. 60(B)(1). Although its judgment is somewhat cryptic in this respect, the court seems to have concluded that, given the sophisticated nature of the mortgage sale and servicing business and the amount of money at issue, Johnson & Associates should

have been wise enough to seek counsel for the handling of the response to National City's complaint. We find no fault with this conclusion. Furthermore, although the trial court does not comment upon this point specifically, the court could have reasonably concluded that Johnson & Associates' claim that it was unable to hire an Ohio attorney over the course of several months lacked credibility.

{¶ 15} Having found that Johnson & Associates failed to establish two of the required elements for relief from judgment, the trial court did not abuse its discretion in overruling the motion.

{¶ 16} Johnson & Associates also asserts on appeal that it did not receive seven days prior written notice of the hearing on the motion for default judgment, as required by Civ.R. 55(A). This rule applies to a party who "has appeared in the action." Because Johnson & Associates failed to file an answer in the trial court before National City moved for default judgment, it is debatable whether it was entitled to such notice. See, e.g., *Miamisburg Motel v. Huntington Natl. Bank* (1993), 88 Ohio App.3d 118, 623 N.E.2d 123; *Allstate Ins. Co. v. Hunt*, Montgomery App. No. 20991, 2006-Ohio-238. Assuming, for the sake of argument, that Johnson & Associates had made an appearance entitling it to notice, its failure to receive such notice of the hearing on the motion for default judgment made the judgment voidable, but not void. See *Miamisburg Motel*, 88 Ohio App.3d 118 (affirming the trial court's refusal to vacate judgment because the motion to vacate was untimely, notwithstanding lack of notice of the application for default judgment). But, see, *Plant Equip., Inc. v. Nationwide Control Serv. Inc.* (2003), 155 Ohio App.3d 46, 798 N.E.2d 1202. As such, Johnson & Associates' failure to raise this issue in the trial court when it filed its Civ.R. 60(B) motion waived it for purposes of appeal. *Gentile v. Ristas*, 160 Ohio

App.3d 765, 2005-Ohio-2197, 828 N.E.2d 1021, ¶74.

{¶ 17} The assignment of error is overruled.

{¶ 18} The judgment of the trial court will be affirmed.

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GRADY, P.J. and FAIN, J., concur.

Copies mailed to:

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