[Cite as *Aurora Loan Servs., L.L.C. v. Wilcox*, 2009-Ohio-4577.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

AURORA LOAN SERVICES, LLC :

Plaintiff-Appellee C.A. CASE NO. 2009 CA 9

v. : T.C. NO. 07-336

MICHAEL WILCOX, et al. : (Civil appeal from Common Pleas Court)

Defendants-Appellants :

:

. . . . . .

O P I N I O N

Rendered on the 4th day of September, 2009.

. . . . . .

RICK D. DeBLASIS, Atty. Reg. No. 0012992 and CHRIS MARKUS, Atty. Reg. No. 0081221, 120 E. Fourth Street, Suite 800, Cincinnati, Ohio 45202
Attorneys for Plaintiff-Appellee

ALAN J. STATMAN, Atty. Reg. No. 0012045 and JEFFREY P. HARRIS, Atty. Reg. No. 0023006, and W. KELLY LUNDRIGAN, Atty. Reg. No. 0059211, 3700 Carew Tower, 441 Vine Street, Suite 3700, Cincinnati, Ohio 45202

and

HANNAH W. HUTMAN, Atty. Reg. No. 0081022, 110 N. Main Street, Suite 1520, Dayton, Ohio 45402
Attorneys for Defendant-Appellant, Intervenor Thomas Noland

. . . . . .

FROELICH, J.

{¶ 1} Thomas Noland, bankruptcy trustee for Michael Wilcox, (hereinafter referred

to as "the Trustee"), appeals from a judgment of the Miami County Court of Common Pleas, which denied his motion to vacate a judgment of foreclosure against Wilcox.

{¶ 2} Because the trial court did not abuse its discretion in concluding that the Trustee had failed to set forth a meritorious defense in his motion to vacate, the judgment denying the motion will be affirmed.

{¶ 3} On April 26, 2007, Aurora Loan Services, LLC ("Aurora") filed a complaint in foreclosure against Wilcox. The complaint alleged that Aurora was the holder and owner of a note on which Wilcox had defaulted and that Wilcox owed over $250,000, plus interest and other costs. The note was secured by a mortgage. Aurora attached to the Complaint a copy of the mortgage, but the Complaint stated that a copy of the note was "unavailable at [that] time."

{¶ 4} On June 18, 2007, Wilcox, through counsel, filed an Answer containing general denials and asserting fourteen defenses, including failure to name the real party in interest; the Answer did not allege fraud.

{¶ 5} Aurora filed a motion for summary judgment, in which it argued that the defenses pled in Wilcox's answer were "insufficient to comply with the Civil Rules' requirement of notice pleading" in that he had failed to allege any operative facts. Aurora specifically refuted each of the affirmative defenses raised in Wilcox's answer and attached additional documentation in support of its claim. These documents, supported by affidavits, included the note, with endorsements representing the transfers of the note, the total amount owed on the note, and a file-stamped copy of the Corporate Assignment of Mortgage filed with the Miami County Recorder.

{¶ 6} Wilcox filed a Memorandum in Opposition to Plaintiff's Motion for Summary

Judgment, in which he argued that his default did not automatically entitle Aurora to foreclosure. Wilcox asserted in his Memorandum that the trial court should consider the "equity of redemption" as well. In essence, Wilcox argued that the trial court must consider "the equities of the situation in order to decide whether foreclosure is appropriate" and should give him an opportunity to sell the property at its fair market value to preserve his equity in the property, the interests of all creditors, and the rights of the property's occupants. No evidentiary material was submitted in response to the memorandum in opposition and no Civ.R 56(F) motion was filed seeking additional time.

{¶ 7} On September 10, 2007, the trial court granted Aurora's motion for summary judgment and entered a decree of foreclosure. The court found that the note was secured by a mortgage, that the mortgage had been filed with the county recorder, that the conditions of the mortgage had been broken, and that Aurora was entitled to foreclosure. Wilcox did not appeal. One month later, Wilcox filed for bankruptcy.

{¶ 8} On September 3, 2008, the Trustee filed a Motion to Intervene and for Leave to File Motion to Vacate Judgment under Rule 60(B). In his motion to vacate, the Trustee argued that claims made by Aurora in the foreclosure action and upon which the judgment of foreclosure was based were false. Numerous documents were attached, including mortgage documents and filings from the bankruptcy proceedings. The trial court granted the motion to intervene and allowed the Trustee to file a Civ.R. 60(B) Motion to Vacate the judgment of foreclosure. Aurora filed a Response to the Motion to Intervene and a Memorandum in Opposition to the motion to vacate. On January 26, 2009, the trial court overruled the motion to vacate without a hearing.

{¶ 9} The Trustee appeals, raising an assignment of error which challenges three

aspects of the foreclosure action. The assignment of error states:

{¶ 10} "THE TRIAL COURT ERRED IN FINDING THAT: 1) IT HAD JURISDICTION SINCE AURORA HAD NO STANDING TO SUE, WAS NOT A REAL PARTY IN INTEREST, AND COULD NOT PROPERLY INVOKE THE JURISDICTION OF THE TRIAL COURT UPON COMMENCEMENT OF THE CASE; 2) AURORA'S LACK OF STANDING AND FAILURE TO BE A REAL PARTY IN INTEREST COULD BE CURED; AND 3) APPELLANT WAIVED ITS RIGHT TO CHALLENGE AURORA'S MISREPRESENTATION, FRAUD OR OTHER MISCONDUCT IN INTENTIONALLY MISREPRESENTING ITS STANDING AND STATUS AS A REAL PARTY IN INTEREST IN THE TRIAL COURT, AND THEREFORE THE TRIAL COURT SHOULD HAVE GRANTED APPELLANT TRUSTEE'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO OHIO CIVIL RULE 60(B)."

{¶ 11} The first and second arguments challenge the trial court's jurisdiction and Aurora's status as a real party in interest. The third argument alleges that Aurora committed fraud or misrepresentation when it filed its Complaint because it was not the holder of the note at that time. Each of these arguments would require us to examine the underlying judgment of foreclosure. Since the appeal is from the overruling of the motion to vacate the foreclosure judgment and not from the underlying judgment itself, these arguments beg the question of whether the trial court properly concluded that the Trustee was not entitled to Civ.R. 60(B) relief and whether the trial court properly overruled the Trustee's Motion to Vacate Judgment.

{¶ 12} "Civ. R. 60(B) represents an attempt to strike a balance between conflicting principles that litigation must be brought to an end and that justice should be done."

Chapman v. Chapman, Montgomery App. No. 21244, 2006-Ohio-2328, at ¶13. Civ.R. 60(B) permits trial courts to relieve parties from a final judgment for the following reasons: (1) "mistake, inadvertence, surprise or excusable neglect;" (2) newly discovered evidence; (3) fraud, misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged; or (5) any other reason justifying relief from the judgment. The Trustee sought relief under Civ.R. 60(B)(3) and 60(B)(5).

{¶ 13} 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), and (3) the motion is made within a reasonable time. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. All of these requirements must be satisfied, and the motion should be denied if any one of the requirements is not met. *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 1994-Ohio-107; *Cincinnati Ins. Co. v. Schaub*, Montgomery App. No. 22419, 2008-Ohio-4729, at ¶15.

{¶ 14} In order to establish a meritorious claim or defense under Civ.R. 60(B), the movant is required to allege a meritorious claim or defense, not to prove that she will prevail on such claim or defense. See *State v. Yount*, 175 Ohio App.3d 733, 2008-Ohio-1155, at ¶10. "A 'meritorious defense' means a defense 'going to the merits, substance, or essentials of the case.' *** Relief from a final judgment should not be granted unless the party seeking such relief makes at least a prima facie showing that the ends of justice will be better served by setting the judgment aside." *Wayne Mut. Ins. Co. v. Marlow* (June 5, 1998), Montgomery App. No. 16882, citing Black's Law Dictionary, abridged, (6 Ed. Rev. 1991) 290. Broad, conclusory statements do not satisfy the requirement that a Civ.R. 60(B) motion must be

supported by operative facts that would warrant relief from judgment. *Cunningham v. Ohio Dept. of Transp*., Franklin App. No. 08AP-330, 2008-Ohio-6911, at ¶37; *Bennitt v. Bennitt* (May 26, 1994), Cuyahoga App. No. 65094, 66055.

{¶ 15} "[A] movant has no automatic right to a hearing on a motion for relief from judgment." *Hrabak v. Collins* (1995), 108 Ohio App.3d 117, 121. It is an abuse of discretion for a trial court to overrule a Civ.R. 60(B) motion for relief from judgment without holding an evidentiary hearing only if the motion or supportive affidavits contain allegations of operative facts which would warrant relief under Civ.R. 60(B). *Boster v. C & M Serv., Inc.* (1994), 93 Ohio App.3d 523, 526; *In re Estate of Kirkland*, Clark App. No. 2008-CA-57, 2009-Ohio-3765, at ¶17.

{¶ 16} We review the trial court's determination of a Civ. R. 60(B) motion for an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion is "'more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 17} The trial court found that the Trustee's motion did not contain operative facts justifying relief under Civ.R. 60(B). Specifically, the court found that the Trustee had failed to allege a meritorious defense because the defenses the Trustee sought to assert in the motion to vacate – Aurora's alleged lack of standing and not being a real party in interest – had been waived by Wilcox's failure to raise them in opposition to the motion for summary judgment, and because any question about whether Aurora was the holder of the note when it filed its Complaint had been cured by the time Aurora filed for and was granted summary judgment.

{¶ 18} Upon review, we find no abuse of discretion in the trial court's denial of the Trustee's motion to vacate. Aurora alleged in its Complaint that it was the "holder and owner" of the note. Wilcox set forth numerous defenses in its Answer, including a statement that the Complaint failed to name the real party in interest. Subsequently, Aurora attached the note to its Motion for Summary Judgment, which documented the terms of the loan and the series of transfers leading to the blank endorsement; Aurora presented evidence that the note contained a blank endorsement, making the note a bearer instrument, and that it was in possession of the document. In his Memorandum in Opposition to Summary Judgment, Wilcox did not present evidentiary material or refute that Aurora was the holder of the note at the time the Complaint was filed or at any time; rather, he argued that a foreclosure would not be equitable.

{¶ 19} A movant for summary judgment bears the initial burden of demonstrating, with Civ.R. 56(C) evidentiary materials, that there are no genuine issues of material fact. *State ex rel. Leigh v. State Emp. Relations Bd.* (1996), 76 Ohio St.3d 143, 146, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293. If the moving party satisfies its initial burden, "the nonmoving party then has a reciprocal burden *** to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Dresher*, 75 Ohio St.3d at 292-293; see Civ.R. 56(E).

{¶ 20} Aurora supported its motion for summary judgment with documentary evidence that it was the holder of the note, which was a bearer instrument. In

response, Wilcox failed to introduce evidence setting forth specific facts showing that any genuine issue of material fact remained. The evidentiary material before the court did not demonstrate a genuine issue of material fact as to Aurora's interest in and authority to collect on the note and, thus, the trial court granted summary judgment.

{¶ 21} The Trustee, in his Civ.R. 60(B) motion, did not submit operative facts that would support his conclusory allegations that Aurora was not the holder of the note and not entitled to collect on it when Wilcox breached its terms, and thus the movant failed to establish a meritorious defense that would warrant relief from judgment.

{¶ 22} The Trustee alleged that Aurora committed fraud and misrepresentation in the filing of its Complaint and that such conduct justified vacating the judgment. However, even assuming, for the sake of argument, that Aurora did engage in fraud by filing a Complaint to collect on a note that it did not then hold, the Trustee was still required to establish a meritorious defense to the claim to be entitled to relief under Civ.R. 60(B). *First National Bank of Southwestern Ohio v. Individual Business Services, Inc*,. Montgomery App. No. 22435, 2008-Ohio-3857, at ¶21, citing *Marlow*, supra. In these facts – when the defendant was represented by counsel at the underlying judgment, raised "real party in interest" in his Answer, responded to a motion for summary judgment that was supported with evidentiary material including the note, and did not submit any operative facts in his Civ.R. 60(B) motion – "the ends of justice [would not] be better served by setting the judgment aside," *Marlow*, supra.

{¶ 23} The trial court did not abuse its discretion in denying the Trustee's motion to vacate. The assignment of error is overruled.

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

. . . . . .

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

Copies mailed to:

Rick D. DeBlasis
Chris Markus
Alan J. Statman
Jeffrey P. Harris
W. Kelly Lundrigan
Hannah W. Hutman
Hon. Jeffrey M. Welbaum