

[Cite as *Maguire v. Natl. City Bank*, 2011-Ohio-387.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

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| JOHN MAGUIRE | : | |
| Plaintiff-Appellant | : | C.A. CASE NO. 24146 |
| v. | : | T.C. NO. 07CV2017 |
| NATIONAL CITY BANK, et al. | : | (Civil appeal from Common Pleas Court) |
| Defendant-Appellee | : | |

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OPINION

Rendered on the 28th day of January, 2011.

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JOHN MAGUIRE, 215 McDaniel Street, Apt. 410, Dayton, Ohio 45405
Plaintiff-Appellant

ADAM C. SHERMAN, Atty. Reg. No. 0076850, Suite 2000, Atrium Two, 221 East Fourth
Street, Cincinnati, Ohio 45202
Attorney for Defendant-Appellee

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DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of John Maguire, filed July 16, 2010. On March 8, 2007, Maguire filed a complaint against National City Bank (“NCB”), alleging that the bank had breached a contract for the purchase of real property located at 2243 Titus Avenue. Maguire also alleged wrongful eviction and theft of

property. According to Maguire's complaint, Maguire resided at the Titus Avenue property, which was owned by Lyle Wheeler. In 2003, NCB, the holder of the mortgage deed, foreclosed on the property and Maguire entered into a contract with Wheeler to purchase it. Because the contract price did not satisfy the mortgage loan, Maguire also alleged that he negotiated the purchase with NCB's loss mitigation unit. In October, 2003, Maguire was arrested and incarcerated on charges unrelated to the property. In November, 2003, the property was sold to another party. The trial court sustained NCB's motion to dismiss, and we affirmed the trial court's judgment to the extent that it dismissed the claims for wrongful eviction and theft of property, and we reversed the trial court's judgment to the extent that it dismissed the breach of contract claim, remanding the matter for further proceedings. *Maguire v. National City Bank*, Montgomery App. No. 22168, 2007-Ohio-4570.

{¶ 2} On remand, Maguire amended his complaint, adding a claim for fraud. NCB moved for summary judgment, and attached to the motion was the affidavit of Patricia Herman, an employee of Altegra Credit Company Loan Services ("Altegra"), in the Loss Mitigation Department. Altegra is a subsidiary of NCB. Herman averred in part that she was responsible for the collection of a mortgage loan to Wheeler, secured by the Titus Avenue property, and that Altegra did not own the property. The trial court granted summary judgment in favor of NCB. We affirmed the decision of the trial court, finding that "there is no evidence to indicate that [NCB] held itself out as being capable of agreeing to the sale of the property, which it did not own." *Maguire v. National City Bank*, Montgomery App. No. 23140, 2009-Ohio-4405, ¶ 35. The Ohio Supreme Court declined jurisdiction and the Sixth Circuit Court of Appeals dismissed Maguire's appeal for lack of

jurisdiction.

{¶ 3} On March 15, 2010, Maguire filed a “Motion to Reopen Case and Request for Hearing,” along with his own affidavit and the affidavit of Lyle Wheeler. Maguire asserted that he had discovered new evidence to refute Herman’s affidavit, in the form of Wheeler’s testimony, and that Maguire was unable to locate Wheeler until February 18, 2010. According to Maguire, summary judgment would not have been granted had this new evidence been timely discovered.

{¶ 4} On June 17, 2010, the trial court issued a Decision denying Maguire’s request to reopen his case. The trial court treated Maguire’s motion as a motion for relief from judgment. Pursuant to Civ.R. 60(B), regarding the breach of contract claim, the trial court determined, “Maguire has not produced operative facts to support that a contract existed between Maguire and NCB that would satisfy the Statute of Frauds, [and] the breach of contract claim does not survive as a meritorious claim.” Regarding the fraud claim, the trial court determined, “Wheeler recalls conversations he had with Maguire concerning the status of 2243 Titus Avenue and reasons why the short sale had not been completed. However, the testimony in Wheeler’s affidavit does not rise to the level of newly discovered evidence and thus does not allege any operative facts to support the fraud claim. According to Wheeler’s testimony, Maguire was a party to the conversations; as such, Maguire would have had the same information available to him at the time of the original summary judgment ruling. Thus, the evidence presented by Maguire does not provide a meritorious claim based on newly discovered evidence.”

{¶ 5} Finally, the trial court determined that Maguire’s motion was untimely in that

the judgment from which Maguire sought relief was entered on November 13, 2008, and Civ.R. 60(B) provides a maximum of one year to file a motion pursuant to the rule. According to the trial court, Maguire's motion was due no later than November 13, 2009.

{¶ 6} Maguire asserts three assignments of error. His first assignment of error is as follows:

{¶ 7} "TIME ALLOWED TO FILE MOTION TO REOPEN CASE."

{¶ 8} Maguire asserts that "the 1 year time limitation to file a motion to reopen case is stayed while the case is on appeal." Civ.R. 60(B) provides, in relevant part, "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: * * * (2) newly discovered evidence which by means of due diligence could not have been discovered in time to move for a new trial under Rule 59(B) * * * . The motion shall be made within a reasonable time, and for reason[] * * * (2) * * * , not more than one year after the judgment, order or proceeding was entered or taken. * * * ."

{¶ 9} As the trial court correctly noted, "the discrete event that triggers the time for filing a Civ.R. 60(B) motion is the trial court's act of journalizing an order or judgment which is final, not an appellate court's subsequent resolution of any error assigned in an appeal that was taken from that final judgment or order." *Chapman v. Chapman*, Montgomery App. No. 21244, 2006-Ohio-2328, ¶ 32, Grady, P.J. concurring, citing *Cotterman v. Cleveland Elective Illuminating Co.* (1987), 34 Ohio St.3d 48, 49, ("the one year provided [in Civ.R. 60(B)] begins to run, not from the date of the last appeal, but from the date on which the 'judgment, order, or proceeding was entered or taken.' ") The trial

court correctly denied Maguire's motion as untimely, and Maguire's first assigned error is overruled.

{¶ 10} Maguire's second assigned error is as follows:

{¶ 11} "THE MOTION TO REOPEN CASE AND SUPPORTING AFFIDAVITS WERE SUFFICIENT TO REQUIRE REOPENING THE CASE OR AN EVIDENTIARY HEARING."

{¶ 12} Even if Maguire's motion were timely filed, which it was not, we agree with the trial court that Wheeler's affidavit is not "newly discovered evidence" as contemplated by Civ.R. 60(B)(2), and it cannot form the basis for relief from judgment. According to Wheeler, he "did not see or hear from" Maguire from the time of his arrest in 2003 until February, 2010, and the "evidence" within Wheeler's affidavit predates Maguire's 2007 complaint. In other words, Maguire was aware of the evidence when he filed his complaint. Maguire's second assigned error is overruled.

{¶ 13} Maguire's third assigned error is as follows:

{¶ 14} "THE APPELLANT WAS NOT AFFORDED CONSIDERATION IN HIS WRITTEN PLEADINGS AS PER *HAINES V. KERNER*, 404 U.S. 519 (1972)."

{¶ 15} According to Maguire, his motion to reopen was entitled to deferential analysis since he is a pro se litigant. Maguire relies upon *Haines*, which held that the pro se prisoner's allegations under the Civil Rights Act of 1871 were to be held "to less stringent standards than formal pleadings drafted by lawyers." We have repeatedly determined, "Litigants who choose to proceed pro se are presumed to know the law and correct procedure, and are held to the same standard as other litigants." *Yocum v. Means*, Darke

App. No. 1576, 2002-Ohio-3803. A litigant proceeding pro se “cannot expect or demand special treatment from the judge, who is to sit as an impartial arbiter.” *Id.* (Internal citations omitted). *Haines* has no application to Maguire’s motion to reopen, and Maguire’s third assigned error is overruled.

{¶ 16} The judgment of the trial court is affirmed.

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FAIN, J. and FROELICH, J., concur.

Copies mailed to:

John Maguire
Adam C. Sherman
Hon. Mary L. Wiseman