

COURT OF APPEALS  
MORROW COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

ABN AMRO MORTGAGE GROUP, INC.

Plaintiff-Appellee

-vs-

RONALD E. WERT, et al.

Defendant-Appellant

JUDGES:

Hon. John W. Wise, P. J.

Hon. William B. Hoffman, J.

Hon. Julie A. Edwards, J.

Case No. 05 CA 1

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common  
Pleas, Case No. 03 CV 164

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

April 11, 2006

APPEARANCES:

For Plaintiff-Appellee

PHILLIP C. BARRAGATE  
SHAPIRO & FELTY, LLP  
1500 West Third Street  
Suite 400  
Cleveland, Ohio 44113

For Defendant-Appellant

KEVIN P. COLLINS  
COLLINS & LOWTHER, LPA  
125 South Main Street  
Marion, Ohio 43302

For Defendant-Appellee Treasurer

TOM C. ELKIN  
19 East High Street  
Mt. Gilead, Ohio 43338

*Wise, P. J.*

{¶1} Appellant Ronald Wert (“appellant”) appeals the decision of the Morrow County Court of Common Pleas that denied his motion for relief from judgment pursuant to Civ.R. 60(B). The following facts give rise to this appeal.

{¶2} On September 9, 2003, pursuant to the trial court’s order of foreclosure, ABN AMRO Mortgage Group, Inc. (“ABN”) notified appellant about the details of the sale of his residence. ABN foreclosed on appellant’s property due to appellant’s failure to make mortgage payments in a timely manner. On October 2, 2003, ABN notified appellant, by letter, that the mortgage could be reinstated if he paid \$10,371.01 by noon on October 15, 2003. Appellant sent a check to ABN on October 6, 2003, in the amount of \$8,695.76. Thereafter, on October 10, 2003, appellant’s residence was sold at a sheriff’s sale, to ABN, for the sum of \$120,000. The trial court filed a judgment entry confirming the sale and ordering deed on November 7, 2003.

{¶3} On February 6, 2004, appellant filed a motion for relief from judgment pursuant to Civ.R. 60(B) seeking to set aside the sale of the real estate. In his motion, appellant claimed misrepresentation and other misconduct by ABN. On January 6, 2005, the trial court denied appellant’s motion for relief from judgment. Appellant timely filed a notice of appeal from the trial court’s denial of his 60(B) motion and sets forth the following assignment of error for our consideration:

{¶4} “I. THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY DENYING HIS MOTION FOR RELIEF FROM JUDGMENT.”

## I

{¶5} In his sole assignment of error, appellant maintains the trial court erred when it denied his motion for relief from judgment. We disagree.

{¶6} The record in this matter establishes that the trial court filed a judgment entry confirming the sale and ordering deed on November 7, 2003. Appellant did not appeal the trial court's judgment entry. Instead, on February 6, 2004, appellant filed a motion for relief from judgment pursuant to Civ.R. 60(B). In this motion, appellant claims misrepresentation and other misconduct by ABN. A party may not use a Civ.R. 60(B) motion as a substitute for a timely appeal. *Doe v. Trumbull Cty. Children Services Bd.* (1986), 28 Ohio St.3d 128, paragraph two of the syllabus.

{¶7} The issues raised in appellant's Civ.R. 60(B) motion were cognizable on direct appeal from the November 7, 2003, judgment entry confirming the sale and ordering deed, and constituted a challenge to the correctness of the trial court's original decision confirming the sale of appellant's real estate. After the expiration of the time period for filing a timely notice of appeal, appellant may not use a Civ.R. 60(B) motion as a substitute for a timely direct appeal.

{¶8} Appellant's sole assignment of error is overruled.

{¶9} For the foregoing reasons, the judgment of the court of Common Pleas, Morrow County, Ohio, is hereby affirmed.

By: Wise, P. J.

Hoffman, J., concurs in judgment only.

Edwards, J., concurs separately.

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JUDGES

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*EDWARDS, J., CONCURRING OPINION*

{¶10} While I concur with Judge Wise as to the disposition of appellant's sole assignment of error, I disagree with Judge Wise as to the analysis of that assignment.

{¶11} Judge Wise, in his decision, holds that the issues raised in appellant's Civ. R. 60(B) motion were cognizable on direct appeal from the trial court's November 7, 2003, entry confirming sale and that appellant could not use a Civ. R. 60(B) motion as a substitute for a timely appeal from such entry.

{¶12} In the case sub judice, pursuant to a Judgment Entry filed on August 7, 2003, appellee was granted judgment against appellant. A Sheriff's Sale was then scheduled for October 10, 2003. After the sale, an entry confirming sale and ordering distribution was filed on November 7, 2003.

{¶13} Thereafter, on February 6, 2004, appellant filed a Motion for Relief from Judgment pursuant to Civ. R. 60(B). Appellant, in his motion, alleged that appellee had acted in such a way as to prevent appellant from exercising his rights under Ohio law. Appellant specifically alleged that appellee "offered [appellant] an opportunity to reinstate this mortgage and during the time that the payments were sent to the Plaintiff the Plaintiff went forward with the sale and confirmation of sale."

{¶14} Appellant, in support of his motion, attached a copy of a letter from appellee to appellant dated October 2, 2003, stating that appellant's mortgage could be reinstated if a total of \$10,327.01 was received by appellee by October 15, 2003. Such letter previously had not been filed with the trial court. Thus, the letter, which appellant claims supports his allegations that appellee engaged in misrepresentation and misconduct, was not part of the trial court record at the time the November 7, 2003,

Judgment Entry confirming sale was filed. Thus, I disagree with Judge Wise's conclusion that the issues raised in appellant's Civ. R. 60(B) motion were cognizable on direct appeal from the trial court's November 7, 2003, Judgment Entry confirming sale.

{¶15} However, I agree that the trial court did not err in denying appellant's Civ. R. 60(B) motion. In order to prevail on a Civ.R. 60(B) motion for relief from judgment, the movant must establish that he has a meritorious defense or claim to present if relief is granted; that he is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and that the motion is made within a reasonable time. *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus.

{¶16} In the case sub judice, I would find that appellant has failed to demonstrate that he has a meritorious defense or claim to present. The October 2, 2003, letter that appellee sent to appellant stated that appellant's loan could be reinstated if appellee received a certified check from appellant in the amount of \$10,327.01 by noon on October 15, 2003. Thereafter, appellant sent appellee a check in the amount of \$8,695.76 on October 4, 2003, which was less than the amount required for reinstatement. No further checks were sent by appellant to appellee. Since appellant did not comply with the requirements for reinstatement of his loan, I would find that appellant had failed to establish a meritorious claim or defense.

{¶17} On such basis, I concur with Jude Wise as to the conclusion that the trial court did not err in denying appellant's Civ. R. 60(B) motion for relief from the trial court's November 7, 2003, Judgment Entry ordering confirmation of sale.

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Judge Julie A. Edwards

IN THE COURT OF APPEALS FOR MORROW COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

ABN AMRO MORTGAGE GROUP, INC.	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
RONALD E. WERT, et al.	:	
	:	
Defendant-Appellant	:	Case No. 05 CA 1

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Morrow County, Ohio, is affirmed.

Costs assessed to Appellant.

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JUDGES