[Cite as *WM Specialty Mtge. v. Mack*, 2009-Ohio-2590.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

WM SPECIALTY MORTGAGE	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2008 CA 00125
ROBERT MACK, et al.	:	
	:	
	:	
Defendants-Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas Case No. 06CV1603
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	June 2, 2009

APPEARANCES:

For Plaintiff-Appellee:	For Defendants-Appellants:
JASON A. WITACRE 5601 Hudson Dr., Suite 400 Hudson, OH 44236	JUDITH B. GOLDSTEIN 88 E. Broad St., Suite 1590 Columbus, OH 43215

Delaney, J.

{¶1} Defendants-Appellants, Rhonda and Robert Mack, appeal the September 3, 2008 judgment entry of the Licking County Court of Common Pleas to deny their Civ.R. 60(B) motion for relief from judgment. Plaintiff-Appellee is WM Specialty Mortgage, LLC. For the reasons that follow, we affirm the judgment of the trial court.

STATEMENT OF THE FACTS AND THE CASE

{¶2} Appellants purchased their home in 2002 for approximately $144,000 through a loan secured by Washington Mutual. On July 31, 2004, Appellants refinanced their mortgage note and loan with Ameriquest Mortgage Company, securing a thirty-year loan for $164,000. The terms of the loan included an annual percentage rate of 9.624%, with an adjustable rate note adjusting every six months between 8.99% and 14.99%.

{¶3} In October 2005, Mr. Mack was hospitalized and diagnosed with a serious illness. Mr. Mack missed work and was ultimately declared disabled. As a result of Mr. Mack's medical emergency, Appellants fell behind on their mortgage payments. The parties attempted to effect a payment arrangement to remedy the arrears, but were unable to settle the terms.

{¶4} In November 2006, Appellants received a solicitation from a company named Foreclosure Assistance USA, stating that it would "save your home" by working directly with the mortgage company to ensure that Appellants would keep their property. Appellee, the owner and holder of Appellants' Note and Mortgage with Ameriquest, filed a Complaint in Foreclosure against Appellants on November 1, 2006. On November

14, 2006, Appellants entered into a Mediation Agreement, Authorization for Release of Information and Limited Power of Attorney with Foreclosure Assistance USA.

{¶5} Per the contract with Foreclosure Assistance USA, the company hired Douglas Mackinnon, an attorney based in Cincinnati, to represent Appellants in the foreclosure proceeding. Mackinnon filed a motion for extension to file a responsive pleading on December 7, 2006. On January 3, 2007, Mackinnon filed an answer for the Appellants.

{¶6} Appellee filed a motion for summary judgment on February 5, 2007. Appellee served the motion for summary judgment on Appellants' counsel. Appellants did not file a response to the motion for summary judgment and the trial court granted the motion on March 6, 2007.

{¶7} On March 12, 2007, Appellants received a letter from AMC Mortgage Services, notifying them that certain borrowers have challenged Ameriquest Mortgage Company's practices under the Truth in Lending Act. The borrowers alleged that Ameriquest did not provide proper Notice of Right to Cancel to its borrowers, and those who did not receive a legally sufficient Notice of Right to Cancel have up to three years to cancel their mortgage transaction. Pursuant to a court order in *In re Ameriquest Mortgage Company Mortgaged Lending Practices Litigation*, M.D.L. No. 1715, Lead Case No. 05-cv-07097 (N.D. Ill.), Ameriquest was required to notify those with an Ameriquest loan subject to a foreclosure sale in the near future that those homeowners may have an enforceable right to cancel their mortgage transaction.

{¶8} Appellants filed a notice of appeal of the judgment entry and decree in foreclosure on April 5, 2007. On April 16, 2007, Appellants filed an emergency motion

to stay execution of the foreclosure sale pending this Court's decision on Appellants' appeal. On that same day, Appellants also filed a motion for relief from judgment.

{¶9} Thereafter, Appellants moved this Court to remand the matter to the trial court for consideration of their Civ.R. 60(B) motion. However, on the same day Appellants filed their motion for remand in this Court, the trial court entered judgment overruling the Civ.R. 60(B) motion. The trial court stated the judgment appealed from was not a final, appealable order, but found it lacked jurisdiction to rule on the Civ.R. 60(B) motion while the appeal was pending. The trial court also denied Appellants' emergency motion to stay.

{¶10} Appellants then moved this Court to dismiss their appeal without prejudice. The confusion in the trial court over the propriety of the appeal was eventually resolved, and Appellants filed a notice vacating their motion to dismiss the appeal on May 3, 2007. On May 7, 2007, we sustained the motion to dismiss the appeal and overruled the motion for remand as moot. On May 21, 2007, Appellants filed a motion with this Court to reinstate the appeal and on May 31, 2007, they filed an emergency motion to stay the foreclosure proceedings. We sustained the motion for stay and ultimately vacated our dismissal entry and reinstated Appellants' appeal.

{¶11} In analyzing Appellants' appeal of the trial court's determination that Appellee was entitled to judgment as a matter of law, we found that Appellants' Assignments of Error dealt only with their Civ.R. 60(B) motion for relief from judgment. *WM Specialty Mortgage, LLC v. Robert Mack, et al*. (Mar. 31, 2008), Licking App. No. 2007CA49, ¶ 6. We held that our review on appeal was limited to the materials the trial court had before it, i.e. the motion for summary judgment. Id. at ¶ 7. As Appellants'

made no arguments that the trial court's judgment on summary judgment was incorrect, we affirmed the decision of the trial court to grant summary judgment in favor of Appellee. Id. at ¶ 9.

{¶12} On April 9, 2008, Appellants refiled its Civ.R. 60(B) motion for relief from judgment with the trial court. Appellants' home was set for sheriff's sale on August 8, 2008 and Appellants' filed a motion for stay of execution on August 6, 2008. The trial court granted the motion for stay, pending its decision on Appellants' motion for relief from judgment.

{¶13} After an evidentiary hearing August 25, 2008, the trial court denied Appellants' motion for relief from judgment on September 3, 2008.

{¶14} Appellants filed a timely notice of appeal of the judgment on October 3, 2008. On April 7, 2009, Appellants filed a motion for stay of execution pending this Court's decision on appeal. The sheriff's sale was scheduled for May 29, 2009. The trial court denied the motion to stay on April 28, 2009.

ASSIGNMENTS OF ERROR

{¶15} Based upon the trial court's September 3, 2008 decision, Appellants raise three Assignments of Error:

{¶16} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED DEFENDANTS' CIVIL RULE 60(B) MOTION FOR RELIEF FROM JUDGMENT FOR FAILURE TO PRESENT A MERITORIOUS DEFENSE.

{¶17} "II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED DEFENDANTS' CIVIL RULE 60(B0 MOTION FOR RELIEF FROM JUDGMENT FOR FAILURE TO DEMONSTRATE THE DEFENDANTS WERE ENTITLED TO RELIEF

UNDER CIVIL RULE 60(B)(5): ANY OTHER REASON JUSTIFYING RELIEF FROM JUDGMENT.

{¶18} "III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED DEFENDANTS' CIVIL RULE 60(B) MOTION FOR RELIEF FROM JUDGMENT FOR FAILURE TO DEMONSTRATE THE DEFENDANTS WERE ENTITLED TO RELIEF UNDER CIVIL RULE 60(B)(1): EXCUSABLE NEGLECT."

CIV.R. 60(B) STANDARD

{¶19} Appellants' three Assignments of Error involve the trial court's denial of Appellants' motion for relief from judgment under Civ.R. 60(B). A motion for relief from judgment under Civ.R. 60(B) lies within the trial court's sound discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 514 N.E.2d 1122. In order to find abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶20} Civ.R. 60(B) states in pertinent part,

{¶21} On motion and upon such terms as are just, the court may relieve a party* * * from a final judgment, order or proceedings for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should

have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered to taken. * * *."

{¶22} A party seeking relief from judgment pursuant to Civ. R. 60(B) must show: "(1) a meritorious defense or claim to present if relief is granted; (2) entitlement to relief under one of the grounds set forth in Civ.R. 60(B)(1)-(5); and (3) the motion must be timely filed." *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus. A failure to establish any one of these three requirements will cause the motion to be overruled. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20, 520 N.E.2d 564; *Argo Plastic Prod. Co. v. Cleveland* (1984), 15 Ohio St.3d 389, 391, 474 N.E.2d 328.

{¶23} Further, Civ.R. 60(B) "is not available as a substitute for a timely appeal * * * nor can the rule be used to circumvent or extend the time requirements for an appeal." *Blasco v. Mislik* (1982), 69 Ohio St.2d 684, 686.

I

{¶24} Appellants argue in their first Assignment of Error the trial court abused its discretion in finding the Appellants failed to assert a meritorious defense. We disagree.

{¶25} In presenting a meritorious defense under Civ.R. 60(B), a movant's burden is only to allege a meritorious defense, not to prove that he will prevail on that defense. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 520 N.E.2d 564. In their motion for relief from judgment, Appellants raised the meritorious defense of rescission to the foreclosure action. Based upon the March 12, 2007 letter sent by

Ameriquest Mortgage Company, Appellants stated Ameriquest Mortgage Company violated the Truth in Lending Act by failing to provide adequate notices of the right to cancel the mortgage loan. This violation, therefore, entitles Appellants to rescind their loan. (Appellants' Motion for Relief from Judgment, Apr. 9, 2008).

{¶26} The trial court determined that Appellants failed to meet their burden to present a meritorious defense for two reasons. First, Appellants were not aware of the defense of rescission until they were notified by Ameriquest Mortgage Company of the possibility on March 12, 2007, six days after the trial court granted summary judgment in favor of Appellee. Second, the trial court found that Appellants failed to allege operative facts that they were in fact entitled to rescission based upon the Notice of Right to Cancel within their loan documentation.

{¶27} Appellee agrees with Appellants that rescission is an affirmative defense to a foreclosure action, but argued before the trial court that the defense of rescission is no longer available to Appellants as the limitations period for the Truth in Lending Act violation has expired. Under 15 U.S.C. § 1635(f), the right of rescission expires three years after the loan closes or upon the sale of the secured property, whichever is earlier. *Beach v. Ocwen Fed. Bank,* 523 U.S. 410 (1998). The U.S. Supreme Court in *Beach*, supra, held that "the right to rescind was extinguished after the three-year period. It did not hold that the three-year period was a statute of limitations. Since there is no right to rescission after the three-year period, equitable tolling is not applicable." See also, *Dye v. Ameriquest Mort. Co*., 2007 WL 4418195 (E.D. Wis., Dec. 17, 2007). Appellants entered into the loan with Ameriquest Mortgage Company on

July 31, 2004. Appellants' right to rescind their mortgage transaction based on a violation of the Truth in Lending Act expired on July 31, 2007.

{¶28} We find that the affirmative defense of rescission has been extinguished by the applicable limitation period and is no longer available to Appellants. Accordingly, Appellants' first Assignment of Error is overruled.

II, III

{¶29} Appellants' argue in their second and third Assignments of Error the trial court abused its discretion in failing to grant Appellants' motion for relief from judgment under Civ.R. 60(B)(5) or 60(B)(1). Appellants state that the inaction of their trial attorney in failing to raise the affirmative defense of rescission, failing to respond to the motion for summary judgment and failing to communicate with his clients evidences gross neglect and abandonment. In the alternative, Appellants argue their failure to respond to the motion for summary judgment should be considered "excusable neglect" under Civ.R. 60(B)(1).

{¶30} Appellants' argument under Civ.R. 60(B)(5) is that they, like the appellants in *Whitt v. Bennett* (1992), 82 Ohio App.3d 792, 613 N.E.2d 667, were the victims of the gross neglect of an attorney who abandoned his representation and, for that reason, their attorney's negligence should not be imputed to them. Id. at 796. Appellants testified at the Civ.R. 60(B) evidentiary hearing that their only communication with their attorney was an introductory letter from Mr. Mackinnon stating that pursuant to arrangement with Foreclosure Assistance USA, Mr. Mackinnon entered an appearance to represent them in the foreclosure action and had filed a motion for extension of time to respond to the complaint. T. 26-27. Appellants telephoned Mr. Mackinnon, but he

never returned their phone calls. Id. Mr. Mackinnon stated in his introductory letter that he would keep Appellants "fully informed of the future proceedings in this case," but it was not until a Decree of Foreclosure had been entered against Appellants that they were fully aware of the status of their case. Mr. Mackinnon did not respond to the summary judgment motion, resulting in judgment against Appellants. On August 22, 2007, Appellants obtained their current counsel.

{¶31} In *Whitt v. Bennett*, supra, the Second District Court of Appeals held that neglect by an attorney which is extraordinary may be grounds for relief under Civ.R. 60(B)(5). The attorney in that case failed to attend a hearing on a motion to dismiss for failure to comply with a discovery order. The court found that this was potentially a matter of extraordinary nature, and that, in such circumstances, relief from judgment may be appropriate under Civ.R. 60(B)(5). Id. at 797.

{¶32} We find the facts in the present case do not demonstrate that the action, or rather inaction, of Appellants' trial counsel in failing to respond to the motion for summary judgment or raising the defense of rescission were extraordinary circumstances to which Civ.R. 60(B)(5) may apply. It is undisputed that Appellants were in default on their mortgage loan, triggering the foreclosure proceedings. The motion for summary judgment filed by Appellee asserted there was no genuine issue of material fact that Appellants were in default of the loan and entitled to judgment as a matter of law. The trial court, and this Court, agreed Appellee was entitled to judgment as a matter of law. The client's remedy is against the attorney in a suit for malpractice; or in this case, an action against Foreclosure Assistance USA. *Pool Man, Inc. v. Rea* (Oct. 17, 1995), Franklin App. No. 95APG04-438.

{¶33} Appellants next argue that Civ.R. 60(B)(1) is applicable because of "excusable neglect." As a general rule, the neglect of a party's attorney will be imputed to the party for purposes of Civ.R. 60(B)(1). *GTE*, supra. This general rule is founded on the view that the party, having "'voluntarily chos[en] this attorney as his representative in the action, * * * cannot * * * avoid the consequences of the acts or omissions of this freely selected agent.'" *Whitt ,* supra citing *GTE*, supra. However, pursuant to Civ.R. 60(B)(1), a party may be granted relief from judgment if their trial counsel's actions represent "excusable neglect." The Ohio Supreme Court has defined "excusable neglect" in the negative by stating that, " * * * the inaction of a defendant is not 'excusable neglect' if it can be labeled as a 'complete disregard for the judicial system.'" *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20, citing *GTE,* supra, at 153.

{¶34} In this case, Appellants argue that their personal actions in this foreclosure process did not demonstrate a complete disregard for the judicial system and their failure to respond to the motion for summary judgment was excusable neglect. We find the facts presented are similar to those raised in *Brown v. Akron Beacon Journal Publishing Co*. (1991), 81 Ohio App.3d 135, 610 N.E.2d 507. In that case, the appellant's attorney failed to respond to the appellee's motion for summary judgment, resulting in a judgment in favor of the appellee. On appeal, the appellant argued the attorney's neglect should not be imputed to him since he himself was not directly at fault. Id. at 139. The Ninth District Court of Appeals declined to adopt the appellant's position, relying instead upon *Link v. Wabash R. R. Co.* (1962), 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (cited by *GTE*, supra) to hold that the appellant voluntarily chose

this attorney as his representative in the action and could not later avoid the consequences of the acts and omissions of his freely selected agent. Id. at 140. The court affirmed the trial court's decision to find the attorney's neglect to be inexcusable and therefore imputable to the appellant.

{¶35} The failure to file a response to a motion for summary judgment does not, by itself, amount to excusable neglect. *Blair v. Boye-Doe*, 157 Ohio App.3d 17, 2004-Ohio-1876, ¶ 16. Based on the facts of this case, we find the trial court did not abuse its discretion in finding Appellants did not establish excusable neglect pursuant to Civ.R. 60(B)(1).

{¶36} Accordingly, we overrule Appellants' second and third Assignments of Error.

{¶37} We find the trial court did not abuse its discretion in denying Appellants' motion for relief from judgment. The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J. and
Wise, J. concur; and
Hoffman, P. J. concurs separately

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

PAD:kgb

Hoffman, P.J., concurring

{¶38} I concur in the majority's analysis and disposition of Appellant's three assignments of error. I write separately only to make two points.

{¶39} First, the Appellate Rules do not provide for a dismissal of an appeal without prejudice. Any dismissal of an appeal this Court orders is with prejudice. To that extent, I believe this Court may not have had the right to reinstate Appellant's appeal.

{¶40} Second, I question whether the trial court has jurisdiction to even consider granting a Civil Rule 60(B) motion after this Court has affirmed the grant of summary judgment to Appellee based upon the rationale set forth by the Ohio Supreme Court in *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94.

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HON. WILLIAM B. HOFFMAN

[Cite as *WM Specialty Mtge. v. Mack*, 2009-Ohio-2590.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

WM SPECIALTY MORTGAGE	:	
	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ROBERT MACK, et al.	:	
	:	Case No. 2008 CA 00125
Defendants-Appellants	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to appellants.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE