

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

U.S. BANK NATIONAL ASSOCIATION

Plaintiff-Appellee

-vs-

LISA SCHALIP

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 14 CAE 01 0003

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Delaware County Court of
Common Pleas, Case No. 13 CVE 05 0401

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

August 21, 2014

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, P.J.

{¶1} Defendant-appellant Lisa Schalip appeals the December 11, 2013 Judgment Entry entered by the Delaware County Court of Common Pleas granting foreclosure in favor of Plaintiff-appellee U.S. Bank, N.A.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 13, 2013, U.S. Bank, N.A., as Trustee for J.P. Morgan Chase Acquisition Trust 2006-ACC1, filed a complaint for foreclosure against Appellant Lisa Schalip and John Doe, the unknown spouse of Lisa Schalip, Green Valley Growers, Inc., Unifund CCR Partners, FIA Card Servicers, N.A., State of Ohio Department of Taxation, the United State of America and the Delaware County Recorder. The complaint was a refiling of a previous foreclosure action voluntarily dismissed by U.S. Bank without prejudice pursuant to Civil Rule 41(A).

{¶3} On September 11, 2013, the trial court ordered Appellee to file a Statement of Acceptance as required by Local Rule 38.02. The trial court cautioned Appellee failure to comply with the order would result in dismissal.

{¶4} On October 1, 2013, U.S. Bank filed a motion for default judgment against Lisa Schalip, John Doe, Green Valley Growers, the State of Ohio and Unifund Partners.

{¶5} On October 15, 2013, the trial court denied the motion for default judgment and dismissed the case without prejudice, pursuant to Civil Rule 41(B)(1), citing Appellee's failure to comply with Local Rule 38.2 and the trial court's previous order.

{¶6} On November 22, 2013, Appellee filed a motion to vacate dismissal, pursuant to Civil Rule 60(B)(1). On December 4, 2013, the trial court granted the motion, reinstating the case to the trial court's active docket.

{¶7} Appellee then filed a motion for summary judgment.

{¶8} On December 11, 2013, the trial court granted Appellee's motion for summary judgment and entered final judgment granting foreclosure in favor of Appellee.

{¶9} Appellant Lisa Schalip now appeals, assigning as error:

{¶10} "I. THE TRIAL COURT ERRED AND EXCEEDED ITS JURISDICTION WHEN IT RE-INSTATED A CASE PURSUANT TO CIVIL RULE 60(B)."

I.

{¶11} Ohio Civil Rule 60 (B) provides,

{¶12} "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: (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 or

taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation." (Emphasis added.)

{¶13} Appellee asserts all trial courts have inherent authority to vacate their orders of dismissal, citing *Horman v. Veverka*, 30 Ohio St.3d 41 (1987) as support. In *Horman*, the trial court dismissed the plaintiff's complaint without prejudice for failure to comply with a pretrial order governing the presentation of videotaped trial testimony. Plaintiffs refiled their complaint, but again failed to comply with the order governing videotaped trial testimony. The trial court dismissed the complaint with no indication of whether the dismissal was with or without prejudice. Plaintiff's moved the trial court to vacate the dismissal order. The trial court granted the motion to vacate, and reinstated the case to the trial court's active docket.

{¶14} Following an appeal, the Supreme Court held,

{¶15} "The issue presented is whether a court of appeals has jurisdiction to review the decision of a trial court to vacate a dismissal for want of prosecution and to reinstate a case on its docket.

{¶16} "Here it seems clear that the trial judge did not intend his dismissal of August 22, 1984 to be with prejudice. The trial judge had not, as required by Civ.R. 41(B), given notice to plaintiffs' counsel prior to issuing that order. The order of vacation came within two weeks of the dismissal and specified that the case be reinstated on the court's docket.

{¶17} "It has long been settled that, during a term of court, a trial court has inherent discretion with respect to its orders. In *Niles v. Parks* (1892), 49 Ohio St. 370, 371, 34 N.E. 735, 736, it was held: 'The court of common pleas had complete control

over its own orders during the term at which they were entered, and might set aside the sale and entry of confirmation, at its discretion.' See, also, *Huntington & McIntyre v. W.M. Finch & Co.* (1854), 3 Ohio St. 445; *Knox County Bank v. Doty* (1859), 9 Ohio St. 506; *Huber Mfg. Co. v. Sweny* (1897), 57 Ohio St. 169, 48 N.E. 879; *Wagner v. Long* (1937), 133 Ohio St. 41, 10 O.O. 11, 11 N.E.2d 247.

{¶18} "The trial court's inherent power with respect to its docket has been modified by statute. R.C. 2505.02 defines a final order as ' * * * an order vacating or setting aside a judgment and ordering a new trial.' [footnote omitted]

{¶19} "The order of the trial judge on September 4, 1984 is not equivalent to 'ordering a new trial' since no trial in the case *sub judice* was ever held. Accordingly, the order of September 4, 1984 vacating the dismissal and reinstating the case to the trial court's docket remains within the trial court's inherent power and was not a final appealable order."

{¶20} The Ninth District followed the holding in *Horman* with its decision in *Shoup v. Holman*, 81 Ohio App.3d 127, 610 N.E.2d 502. In *Shoup*, the plaintiff filed a motion for default judgment based upon Holman's failure to file a responsive pleading. The motion for default judgment did not contain a proof of service. The trial court dismissed the cause without prejudice, after being informed an agreement had been reached between the parties. Shoup filed a motion to vacate the dismissal as the agreement between the parties had fallen through. The trial court granted Shoup's motion to vacate and entered a default judgment in his favor.

{¶21} Garnishment proceedings were commenced against Holman. Holman then filed a motion to vacate judgment, contending he did not have notice of the motions

for default judgment and to vacate judgment. The trial court denied Holman's motion, holding the delay in filing the motion was unreasonable. The Ninth District held,

{¶22} "A review of the record discloses that the appellant's motion to vacate asserted that the trial court was without jurisdiction to vacate the dismissal and enter default judgment. The motion made no mention of Civ.R. 60(B), nor did it provide authority for the proposition that the court was without jurisdiction to grant the appellee's motion to vacate and enter default judgment.

{¶23} "As the motion addressed the trial court's jurisdiction rather than request relief under Civ.R. 60(B), the trial court erred in relying upon the timeliness requirement of Civ.R. 60(B). This fact, however, is not dispositive of the issues in the case at bar, as a trial court has the inherent power to vacate a dismissal and reinstate a cause to the trial court's docket. See *Horman v. Veverka* (1987), 30 Ohio St.3d 41, 42–43, 30 OBR 83, 84, 506 N.E.2d 218, 219–220.

{¶24} "As the trial court had the inherent power to vacate the dismissal in 1984, there is no basis for concluding that the default judgment was rendered without jurisdiction, and it was therefore not error for the trial court to deny the appellant's jurisdictional motion."

{¶25} See also, *Minnillo v. Friedland*, 8th Dist. No. 100359, 2014-Ohio-33.

{¶26} In *Kelly v. Freudman* (July 9, 2001), Stark App. No. 2000CA00369, this Court held,

{¶27} "In its judgment entry of November 9, 2000, the trial court stated that it ' * * * considers the Brief in Opposition by Plaintiff as a request to the Court to exercise its inherent corrective authority over its previous entries.' Judgment Entry, Nov. 9, 2000, at

1. In the case of *Horman v. Veverka* (1987), 30 Ohio St.3d 41, the Ohio Supreme Court recognized a trial court's inherent power with respect to its orders.

{¶28} "The *Horman* case involved the dismissal of a complaint for want of prosecution. *Id.* at 41. The trial court's judgment entry did not contain the words 'without prejudice.' *Id.* Plaintiffs subsequently filed a motion to vacate the trial court's order. *Id.* The trial court granted plaintiffs' motion and reinstated the case on its docket. *Id.* The court of appeals concluded that the trial court improperly vacated its order of dismissal because plaintiffs failed to meet the requirements of Civ.R. 60(B). *Id.*

{¶29} "On appeal to the Ohio Supreme Court, the Court concluded that the trial court did not intend the dismissal to be 'with prejudice' since the trial judge did not give notice to plaintiffs' counsel as required by Civ.R. 41(B). *Id.* at 42. The Court reversed the decision of the court of appeals and held that it was within the trial court's inherent power to reinstate the case to its docket as it was not a final appealable order. *Id.* at 42-43. In reaching this conclusion, the Court recognized that '[i]t has long been settled that, during a term of court, a trial court has inherent discretion with respect to its orders.' *Id.* at 42.

{¶30} "We find the *Horman* case distinguishable from the case *sub judice* since it involved a dismissal without prejudice, which did not operate as an adjudication on the merits. Therefore, in the *Horman* case, the trial court had inherent power to vacate the dismissal and reinstate the case. However, in the matter currently before the court, the trial court dismissed the case with prejudice and therefore, did not have the inherent power to vacate the dismissal as it pertained to Ramona Cicchetti."

{¶31} Based upon the case law set forth above, we find the trial court had the inherent power to vacate its previous dismissal without prejudice and reintstate the case. The trial court did not lack jurisdiction to enter summary judgment herein.

{¶32} The sole assignment of error is overruled.

{¶33} The December 11, 2013 Judgment Entry entered by the Delaware County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Wise, J. concur

