

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DEUTSCHE BANK NATIONAL
TRUST COMPANY, AS TRUSTEE
FOR SOUNDVIEW HOME LOAN
TRUST 2006-WF2 ASSET-BACKED
CERTIFICATES, SERIES 2006-WF2

Plaintiff-Appellee

-VS-

MICHAEL W. FREEMAN, ET AL.

Defendants-Appellants

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 14-CA-00019

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common
Pleas, Case No. 14-CV-00017

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

March 2, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendants-Appellants

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Farmer, J.

{¶1} On January 23, 2014, appellee, Deutsche Bank National Trust Company, as Trustee for Soundview Home Loan Trust 2006-WF2 Asset-Backed Certificates, Series 2006-WF2, filed a complaint in foreclosure against appellants, Michael and Crystal Mae Freeman, for failure to pay on a note secured by a mortgage. Appellants failed to file an answer.

{¶2} On March 17, 2014, appellee filed a motion for default judgment. By judgment entry and decree in foreclosure filed March 31, 2014, the trial court granted the motion and ordered the property sold. No appeal was filed.

{¶3} On May 6, 2014, appellants filed a motion for relief from judgment pursuant to Civ.R. 60(B), claiming excusable neglect and a meritorious defense. By entry filed June 27, 2014, the trial court denied the motion.

{¶4} Appellants filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶5} "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR RELIEF FROM JUDGMENT."

I

{¶6} Appellants claim the trial court erred in denying their motion for relief from judgment. We disagree.

{¶7} A motion for relief from judgment under Civ.R. 60(B) lies in the trial court's sound discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75 (1987). In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable,

arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983). In *GTE Automatic Electric Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus, the Supreme Court of Ohio held the following:

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)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken.

{¶8} "The above three requirements are independent and in the conjunctive. Unless each of the three is satisfied, relief must be denied." *Volodkevich v. Volodkevich*, 35 Ohio St.3d 152, 153 (1988).

{¶9} Appellants argued they had a meritorious defense, they were entitled to relief under Civ.R. 60(B)(1), "excusable neglect," and their motion was filed within a reasonable period of time.

{¶10} In its entry filed June 27, 2014, the trial court agreed appellants may have a meritorious defense and the motion was filed within a reasonable time, but concluded appellants did not establish excusable neglect:

However, the Defendant does not satisfy Civil Rule 60(B)(1), excusable neglect. The Defendant alleges he did not know he should do anything besides call the attorney for the Plaintiff. He did not understand he needed to file a document with the Court. Finally, he did not have time to educate himself on the need to hire an attorney because he was working. However, the Summons, which was served upon him with the Complaint, clearly states he is required to serve on the Plaintiff's attorney a copy of his Answer to the Complaint within 28 days after service. Further, the Answer must be filed with the Court within three days after service on the Plaintiff's attorney. Finally, the Summons indicates if he fails to appear and defend, judgment by default will be taken against him for the relief demanded in the Complaint.

{¶11} Based upon a review of the summons and appellant Michael Freeman's affidavit, we agree with the trial court's conclusion.

{¶12} As discussed by the Supreme Court of Ohio in *Kay v. Glassman, Inc.*, 76 Ohio St.3d 18, 20 (1996):

The term "excusable neglect" is an elusive concept which has been difficult to define and to apply. Nevertheless, we have previously defined "excusable neglect" in the negative and have stated that the inaction of a defendant is not "excusable neglect" if it can be labeled as a "complete disregard for the judicial system." *GTE Automatic Elec., Inc. v. ARC*

Industries, Inc. (1976), 47 Ohio St.2d 146, 153, 1 O.O.3d 86, 90, 351 N.E.2d 113, 117; *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 21, 520 N.E.2d 564, 567, at fn. 4.

{¶13} In addition, "[w]hile unusual or special circumstances can justify neglect, if a party could have controlled or guarded against the happening or event he later seeks to excuse, the neglect is not excusable." *National City Bank v. Kessler*, 10th Dist. Franklin No. 03AP-312, 2003-Ohio-6938, ¶ 14. The analysis of excusable neglect turns on the facts and circumstances presented in each case. *Cannell v. Bates*, 10th Dist. Franklin App. No. 00AP-915, 2001 WL 224532 (March 8, 2001).

{¶14} In his affidavit filed May 6, 2014, appellant Michael Freeman averred he was served with a copy of the complaint, he did not understand he needed to file a document with the court, and he and his wife were unable to spend time educating themselves on the need to hire an attorney based on their work schedules. This court has previously found that such reasons do not amount to excusable neglect under Civ.R. 60(B)(1). See, *PNC Mortgage v. Oyortey*, 5th Dist. Delaware No. 11 CAE00093, 2012-Ohio-3237; *Bank of N.Y. Mellon v. Flack*, 5th Dist. Stark No. 2010CA153, 2011-Ohio-890.

{¶15} Upon review, we find the trial court did not abuse its discretion in finding no excusable neglect and in denying appellants' motion for relief from judgment.

{¶16} The sole assignment of error is denied.

{¶17} The judgment of the Court of Common Pleas of Perry County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Wise, J. concur.

SGF/sg 219