[Cite as *Residential Funding Co., L.L.C. v. Thorne*, 2012-Ohio-2552.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Residential Funding Company, LLC	Court of Appeals No. L-11-1131
Appellee	Trial Court No. CI0200808576
v.	
Gary T. Thorne, et al.	**DECISION AND JUDGMENT**
Appellant	Decided: June 8, 2012

* * * * *

Jeffrey A. Lipps, David A. Wallace, Barton R. Keyes and Joel E. Sechler, for appellee.

George R. Smith, Jr., for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} This is an appeal from the judgment of the Lucas County Court of Common Pleas, denying appellant Gary T. Thorne's various post-judgment motions in the foreclosure action against him. Upon consideration of the assignments of error, we affirm, in part, and reverse, in part.

I. Background

{¶ 2} This is Thorne's second appeal in this foreclosure case. In *Residential Funding Co., LLC v. Thorne*, 6th Dist. No. L-09-1324, 2010-Ohio-4271 ("*Thorne I*"), Thorne challenged the trial court's award of summary judgment in favor of appellee Residential Funding Company, LLC ("Residential") on its complaint for foreclosure and on Thorne's counterclaim for an alleged violation of the Truth in Lending Act ("TILA"). Residential's motion for summary judgment was supported by affidavits from Kenneth Ugwuadu and Jeffrey Stephan that (1) authenticated the attached note and mortgage documents, including the document assigning the mortgage to Residential,[1] (2) stated that Residential was the possessor and owner of the note, and (3) averred that appellant defaulted on the note, and that the accelerated amount due was $181,786.83 plus interest.

{¶ 3} In his first appeal, Thorne argued that Residential was not the holder and party entitled to enforce the note and mortgage at the time it filed its complaint. *Id.* at ¶ 26. We rejected Thorne's argument on the grounds that the assignment of the mortgage occurred prior to the filing of the complaint.

{¶ 4} We next rejected Thorne's arguments relating to his TILA counterclaim, holding that based on the contents of the mortgage documents attached to the affidavits, Thorne received sufficient disclosure under TILA. Based on those same facts, we also held that Thorne's affirmative defense of fraud was without merit because it was barred

[1] The original complaint for foreclosure contained the mortgage and assignment of mortgage, but did not contain the note.

by the statute of limitations since he should have discovered the purported fraud at the time he signed the documents in 2003.

{¶ 5} As a separate assignment of error, Thorne challenged the validity of the Ugwuadu affidavit, arguing that it did not comport with Civ.R. 56(E). Specifically, Thorne claimed that Ugwuadu's assertion that Residential had custody of the note and mortgage was not based on personal knowledge. Finding no merit to this argument, we held that Ugwuadu's statement that he had personal knowledge, combined with his employment at GMAC Mortgage, LLC ("GMAC")[2] and the nature of the facts asserted in his affidavit, "created a reasonable inference that Ugwuadu did in fact have personal knowledge that GMAC was currently holding the note and the mortgage on behalf of Residential." Noting that Thorne "presented no evidence to refute this claim," we concluded that his assignment of error was not well-taken. *Id.* at ¶ 71.

{¶ 6} Finally, Thorne challenged the trial court's dismissal, pursuant to Civ.R. 12(B)(6), of his third-party complaint against Cardinal Mortgage Services of Ohio, Inc. ("Cardinal"). The third-party complaint alleged counts of fraud, civil conspiracy, and violation of the Ohio Mortgage Broker's Act based on purported non-disclosure of documents relating to the mortgage transaction and to the payment of a yield spread premium. For the same reasons as in our rejection of Thorne's affirmative defense of fraud, we held that these claims were barred by the statute of limitations. Accordingly,

[2] GMAC is the loan servicing agent for Residential.

finding this and the other assignments of error not well-taken, we affirmed the judgment of the trial court.

{¶ 7} *Thorne I* was issued on September 10, 2010. On November 10, 2010, Thorne filed a Civ.R. 60(B) motion for relief from judgment and a Civ.R. 56(G) motion for an award of attorney's fees and costs. In support of these motions, Thorne alleged the affidavits submitted by Residential in support of its motion for summary judgment were fraudulently signed by "robo-signers."[3] Thorne attached to his motion a copy of an October 6, 2010 press release from the Ohio Attorney General's office regarding the filing of a lawsuit against GMAC. The lawsuit accuses GMAC of "filing fraudulent affidavits to mislead courts in hundreds of Ohio foreclosures." The press release detailed that "[t]he fraud came to light after a GMAC employee, Jefferey [sic] Stephan of Sellersville, Pa., testified in a foreclosure case out of Maine that from 2006 to 2010, he signed thousands of affidavits without verifying the content." Thorne also attached uncertified copies from the referenced Maine foreclosure case, *Fed. Natl. Mtge. Assn. v. Bradbury*,[4] of (1) an unpublished September 24, 2010 order that imposed sanctions under Maine's equivalent of Civ.R. 56(G) based on GMAC's document signing practice, and (2) the defendant-mortgagor's memorandum in support of her motion for sanctions.

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[3] A "robo-signer" refers to an individual who rapidly signs a large number of affidavits and legal documents asserting a bank's right to foreclose, without verifying the accuracy and correctness of such documents. *U.S. Bank Natl. Assn. v. Spicer*, 3d Dist. No. 9-11-01, 2011-Ohio-3128.

[4] *Fed. Natl. Mtge. Assn. v. Bradbury*, Me. Dist. Ct. No. BRI-RE-09-65 (Sept. 24, 2010).

{¶ 8} Subsequently, and without a hearing, the trial court denied both of Thorne's motions. As it relates to the Civ.R. 60(B) motion, the trial court found that Thorne failed to demonstrate a meritorious defense because he did not suggest or establish that he was not in default of the mortgage, and because his claims of fraud were barred by the doctrine of issue preclusion. Further, the trial court found that Thorne presented no evidence in the form of operative facts to establish that the affidavits were fraudulent *in this case*.

{¶ 9} Thorne now appeals from this judgment, raising the following four assignments of error:

> 1. THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING THORNE'S MOTION FOR RELIEF FROM JUDGMENT WITHOUT CONDUCTING AN EVIDENTIARY HEARING.
>
> 2. THE TRIAL COURT ERRED IN OVERRULING THORNE'S MOTION FOR RELIEF FROM JUDGMENT AS TO BOTH RESIDENTIAL AND CARDINAL MORTGAGE AS THERE WAS AMPLE EVIDENCE THE AFFIDAVITS OF ROBO-SIGNERS UGWUADU AND STEPHAN SUBMITTED BY RESIDENTIAL IN SUPPORT OF SUMMARY JUDGMENT WERE FRAUDULENT, THORNE'S MOTION WAS TIMELY AND HE HAD A MERITORIOUS CLAIM OR DEFENSE.

3. THE TRAIL [sic] COURT ERRED IN APPLYING RES JUDICATA AND COLLATERAL ESTOPPEL AS A BAR TO THORNE'S MOTION TO VACATE JUDGMENT.

4. THE TRAIL [sic] COURT ERRED IN FINDING THAT THORNE HAD FAILED TO SUBMIT COMPETENT EVIDENCE THAT THE AFFIDAVITS OF ROBO-SIGNERS UGWUADU AND STEPHAN WERE SUBMITTED IN BAD FAITH AND IN OVERRULING THORNE'S MOTION FOR SANCTIONS UNDER OHIO R. CIV. P. RULE 56(G).

II. Analysis

A. Motion for Relief from Judgment

{¶ 10} Thorne's first three assignments of error pertain to his motion for relief from judgment. For ease of discussion, they will be addressed out of order.

1. Collateral Estoppel does not Apply

{¶ 11} In his third assignment, Thorne argues that the trial court erred in applying res judicata and collateral estoppel as a bar to his motion to vacate judgment.

In Ohio, "[t]he doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." "Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject

matter of a previous action," whereas issue preclusion, or collateral estoppel, "precludes the relitigation, in a second action, of an issue that had been actually and necessarily litigated and determined in a prior action that was based on a different cause of action." (Internal citations omitted.) *State ex rel. Nickoli v. Erie Metroparks*, 124 Ohio St.3d 449, 2010-Ohio-606, 923 N.E.2d 588, ¶ 21.

{¶ 12} Here, the trial court found that Thorne's fraud claims, both those arising from the submission of the allegedly fraudulent affidavits, and those arising from the activities of Residential and Cardinal (i.e., allegedly failing to provide the appropriate disclosures and inform appellant of the yield spread premium) were barred by the doctrine of collateral estoppel since those issues had been actually and necessarily decided.

{¶ 13} As an initial matter, we must clarify the multiple claims and assertions of fraud in these proceedings. As an affirmative defense to the foreclosure action, Thorne asserted fraud on the part of Residential in the form of concealing material terms and costs of the loan, which he claimed rendered the loan unenforceable. Similarly, Thorne initiated a third-party complaint against Cardinal based on fraud in the form of failing to disclose the true costs of the loan, in particular the yield spread premium. In response to these claims, Residential and Cardinal argued that the assertion of fraud was barred by the applicable four-year statute of limitations. Based on the mortgage documents attached to the Ugwuadu and Stephan affidavits, the trial court found that Thorne should

have been aware of the alleged fraud as of 2003. Thus, because the foreclosure proceedings did not commence until 2008, the trial court found, and this court affirmed, that the fraud claims were outside of the statute of limitations.

{¶ 14} In contrast, as grounds for Civ.R. 60(B) relief, Thorne now asserts fraud in the submission of the Ugwuadu and Stephan affidavits based on the revelation that GMAC's policy and practice was to have employees sign thousands of affidavits without knowledge or verification of their contents. It is this assertion of fraud, and not the assertion relating to his affirmative defense and third-party complaint, that we must analyze for application of res judicata principles. The question we must answer is whether collateral estoppel prevents Thorne from arguing in his Civ.R. 60(B) motion that the Ugwuadu and Stephan affidavits are fraudulent. We hold that it does not.

{¶ 15} The trial court found that in our decision in *Thorne I* we "determined that no evidence supported fraud claims based on the activities of Mr. Ugwuadu and Mr. Stephan." This is a mischaracterization of our holding. In *Thorne I*, we considered only Ugwuadu's affidavit, and addressed the issue whether the contents of the affidavit were sufficient to establish personal knowledge on the part of the affiant.[5] In contrast, the issue Thorne now presents is whether both the Stephan and Ugwuadu affidavits were fraudulently signed where extrinsic evidence exists showing that GMAC had a policy and

[5] We note that in *Thorne I*, Thorne assigned as error "The trial court erred in considering documents on summary judgment the delivery of which was 'attested' to by affiants who had no personal knowledge of delivery and were not competent to testify with regard thereto."

practice of having employees sign affidavits without knowledge or verification of their contents. Therefore, because the issue before us has not been litigated and decided previously, collateral estoppel does not apply.

{¶ 16} Accordingly, Thorne's third assignment of error is well-taken.

2. Thorne's Civ.R. 60(B) Motion

{¶ 17} Thorne's first and second assignments of error are interrelated and will be addressed together. Thorne argues that based on the evidence he presented, the trial court erred by denying his Civ.R. 60(B) motion. Alternatively, Thorne argues that, at the least, the trial court should have ordered a hearing before ruling on his motion.

a. Relief not Warranted Based on Attached Documents

{¶ 18} In reviewing the denial of a Civ.R. 60(B) motion, an appellate court applies an abuse of discretion standard. *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987). A ruling will be reversed for an abuse of discretion only where it appears that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

> It is well established that to prevail on a motion 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. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 150-151, 351 N.E.2d 113 (1976).

{¶ 19} Examining the third prong first, we note that the trial court did not make any finding as to whether Thorne's Civ.R. 60(B) motion was timely, only stating generally, "In this case, the Court finds that Mr. Thorne has failed to satisfy the first two *GTE* elements." Residential argues that Thorne has failed to satisfy his burden of showing that the Civ.R. 60(B) motion was made within a reasonable time. It also contends that Thorne did not even address the timeliness element in his motion, and thus the motion properly should be denied on that basis alone. As to the latter, Thorne's motion expressly states, "[it] is filed within one year of the judgment sought to be vacated." As to the former, we agree with Residential that complying with the one-year limitation in Civ.R. 60(B) does not automatically determine that the motion was filed within a reasonable time. However, under the circumstances of this case, we conclude that it was timely filed.

{¶ 20} The trial court entered its judgment on November 23, 2009. Thorne appealed, and we issued our decision on September 10, 2010. It was not until September 24, 2010, that the order in *Fed. Natl. Mtge. Assn. v. Bradbury* was entered, detailing Stephan's deposition testimony regarding his affidavit signing practices. Then, on October 6, 2010, the Ohio Attorney General issued its press release announcing a lawsuit against GMAC for fraudulent affidavit signing practices based in part on Stephan's testimony in the Maine case. By the time Thorne became aware of the alleged

robo-signing scandal, his only recourse was to file a motion for relief from judgment, which he did within two months of the order in the Maine case, and within one year of the trial court's original judgment. Therefore, the third prong is satisfied. *See Rettig v. Rettig*, 6th Dist. No. WD-09-040, 2010-Ohio-2122, ¶ 23 (wife's motion for relief from judgment timely where it was filed within one year of the decree of dissolution and only shortly after she became aware of husband's possible fraud with regard to his stock appreciation rights).

{¶ 21} Turning to the first prong, "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*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988). The trial court found that Thorne had not demonstrated a meritorious defense because he has "not suggested or established that he is not in default on the note and the mortgage at issue here." However, this specific defense is not required since it is also a valid defense to a foreclosure action that the party seeking to foreclose is not the real party in interest. Civ.R. 17(A); *OneWest Bank, FSB v. Stoner*, 2d Dist. No. 2011 CA 13, 2011-Ohio-4672, ¶ 36. Here, to establish itself as the real party in interest, Residential bore the initial burden of proving that it was the current holder of the note and mortgage. *Countrywide Home Loans, Inc. v. Montgomery*, 6th Dist. No. L-09-1169, 2010-Ohio-693, ¶ 12. To prove this in its motion for summary judgment, Residential relied on the affidavits of Ugwuadu and Stephan, including the attached documents. It follows that if the affidavits

were made without personal knowledge, and thus do not comport with Civ.R. 56(E),[6] then no basis exists on which summary judgment could have been granted. Thus, the first prong is satisfied.

{¶ 22} Under the second prong, we must determine whether the trial court abused its discretion in finding that Thorne's motion and attachments did not provide operative facts that demonstrate he is entitled to relief under Civ.R. 60(B). We recognize that "[t]he movant bears the burden of proving his allegations in support of his motion. It is not too heavy a burden to require that the factual information presented be of sufficient quality to sustain a vacation of the judgment by meeting evidentiary standards." (Internal citations omitted.) *East Ohio Gas Co. v. Walker*, 59 Ohio App.2d 216, 221, 394 N.E.2d 348 (8th Dist.1978). In his motion, Thorne alleges that he is entitled to relief under Civ.R. 60(B)(3) because the Ugwuadu and Stephan affidavits were "robo-signed." We note that no evidentiary hearing was held on Thorne's Civ.R. 60(B) motion. Nevertheless, Thorne argues that the material he attached to his motion provides sufficient evidence to prove he is entitled to relief from judgment, and thus the trial court abused its discretion in denying his motion. We disagree.

{¶ 23} The issue of demonstrating grounds for relief under Civ.R. 60(B) based on "robo-signing" has been discussed in detail in Ohio on two occasions, both arising out of

[6] "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit."

the Third District.[7] In *U.S. Bank Natl. Assn. v. Spicer*, 3d Dist. No. 9-11-01, 2011-Ohio-3128, the Third District Court of Appeals held that Spicer failed to demonstrate he was entitled to relief under Civ.R. 60(B)(5) for alleged fraud upon the court. In that case, 21 months after a default judgment was entered against him, Spicer filed his Civ.R. 60(B) motion, arguing that the individual who signed the assignment of the mortgage was a robo-signer. To support his claim, Spicer provided "unauthenticated internet articles discussing the alleged misconduct of mortgage lenders in the industry." In affirming the lower court, the Third District stated, "There is nothing in these articles or Spicer's unsupported allegations that can be construed as a 'fraud upon the court.' Spicer simply failed to provide any relevant evidence to demonstrate misconduct on the part of U.S. Bank or its servicing agent." *Id.* at ¶ 41.

{¶ 24} The Third District again addressed the issue in *Chase Home Fin., L.L.C. v. Heft*, 3d Dist. Nos. 8-10-14, 8-11-16, 2012-Ohio-876. There, Heft moved under Civ.R. 60(B) for relief from judgment, arguing that he had a meritorious defense because robo-signing "may well have been utilized," and thus a question of fact existed concerning Chase's standing to bring the foreclosure action. However, the Third District held that the trial court did not abuse its discretion in denying Heft's Civ.R. 60(B) motion because,

[7] Other Ohio decisions have dealt with the issue of robo-signing in relation to Civ.R. 60(B) motions, but have either affirmed the dismissal of the motion on the grounds of timeliness, *GMAC Mtge., LLC v. Lee*, 10th Dist. No. 11AP-796, 2012-Ohio-1157; *Bank of New York v. Roether*, 3d Dist. No. 1-11-56, 2012-Ohio-1465, or held that the issues were not first raised in the trial court, *Wells Fargo Bank, N.A. v. Perkins*, 10th Dist. No. 10AP-1022, 2011-Ohio-3790.

> Heft never actually alleged that *his* mortgage documents were robo-signed, only that they *might have* been robo-signed, and the only "evidence" Heft submitted in support of this allegation was three newspaper articles concerning [the affiant's] admission that she robo-signed some mortgage foreclosure documents while working for Chase. However, "[a] newspaper article alone is not evidence of operative facts which might support a Civ.R. 60(B) motion." *Salem v. Salem*, 61 Ohio App.3d 243, 246, 572 N.E.2d 726 (9th Dist.1988). (Emphasis sic.) *Heft* at ¶ 37.

{¶ 25} Here, Thorne has similarly failed to provide any evidentiary quality materials proving that the affidavits were fraudulently signed in this case. Thorne attached three documents to his Civ.R. 60(B) motion: (1) an uncertified copy of the Maine court order, (2) an uncertified copy of the defendant's memorandum in support of her motion for sanctions in the Maine case, and (3) an uncertified copy of an Ohio Attorney General Press release. None of these documents are admissible as evidence.

{¶ 26} It is a condition precedent to admissibility that evidence is authenticated. Evid.R. 901(A) provides that the authentication requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Here, no evidence was presented, in the form of an affidavit or otherwise, that the documents are what Thorne claims them to be. However, certain evidence may be self-authenticating, and thus "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required." Evid.R. 902. Examples of self-authenticating evidence

relevant to the current situation are "certified copies of public records" under Evid.R. 902(4) and "official publications" under Evid.R. 902(5).

{¶ 27} As to the documents from the Maine case, Thorne contends that the court order "is a public record bearing indicia of authenticity under [Evid.R] 901(B)(7) and would appear to be self-authenticating under [Evid.R.] 902(5)." This is incorrect. Evid.R. 901(B) provides illustrations of extrinsic evidence that may be used to authenticate the matter in question. For example, Evid.R. 901(B)(7) provides that public records or reports may be authenticated by extrinsic evidence that the record or report "is from the public office where items of this nature are kept." Here, as alluded to in the previous paragraph, Thorne has provided no extrinsic evidence that the documents he provided are physically from the court where they are kept. Thus, the documents are not authenticated under Evid.R. 901.

{¶ 28} Nor are the Maine court documents self-authenticating under Evid.R. 902. Thorne contends that the Maine court order falls within Evid.R. 902(5), which states, "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to * * * **(5) Official Publications.** Books, pamphlets, or other publications purporting to be issued by public authority." However, of the Ohio cases that have cited to Evid.R. 902(5), none involved a court order. *See State v. Frakes*, 5th Dist. No. 07CA0013, 2008-Ohio-4204 (NHTSA manual); *Tippie v. Patnik*, 11th Dist. No. 2007-G-2787, 2008-Ohio-1653 (O'Toole, J., dissenting) (Secretary of State website); *State v. Hyslop*, 6th Dist. No. L-03-1298, 2005-Ohio-1556 (state identification card);

Dayton Invest. Group v. Holden, 2d Dist. No. 18309, 2000 WL 1513917 (Oct. 13, 2000) (HUD pamphlet); *Wofter v. Wofter*, 5th Dist. No. 98 CA 28, 1999 WL 436829 (June 16, 1999) (school handbook); *State Acker*, 6th Dist. No. L-89-238, 1990 WL 152141 (Oct. 12, 1990) (high school yearbook); *Florer v. Queen City Grain Co., Inc.*, 1st Dist. No. C-800907, 1981 WL 10072 (Oct. 28, 1981) (county zoning resolution). Thus, we do not find that Evid.R. 902(5) applies to a domestic judgment. Further, because the copies of the Maine court documents submitted by Thorne were not certified by that court's clerk, they are not self-authenticating under Evid.R. 902(4). *See State v. Lewis*, 4th Dist. No. 10CA24, 2011-Ohio-911, ¶ 13-14; *State v. Lautenslager*, 112 Ohio App.3d 108, 111-112, 677 N.E.2d 1263 (3d Dist.1996). Consequently, as Thorne has not satisfied the condition precedent of authenticity, the Maine court documents are inadmissible as evidence.

{¶ 29} Turning to the press release, it should be mentioned that Thorne makes no argument regarding its admissibility. Our own research has not uncovered any Ohio cases that have addressed the issue whether a press release is self-authenticating under Evid.R. 902. However, some federal courts have held that a press release is a self-authenticating official publication under the equivalent Fed.R.Evid. 902(5).[8] The press releases in those cases, though, are distinguishable from the one at issue here. In *Sannes v. Jeff Wyler Chevrolet, Inc.*, S.D.Ohio No. C-1-97-930, 1999 WL 33313134 (Mar. 31,

[8] Fed.R.Evid. 902(5) defines "official publication" as "A book, pamphlet, or other publication purporting to be issued by a public authority."

1999), the court stated in a footnote that "[Federal Trade Commission] press releases, *printed from the FTC's government world wide web page*, are self-authenticating official publications under Rule 902(5)." (Emphasis added.) In *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.Supp.2d 389, 397 (D.Conn.2008), the court cited to *Sannes*, and found,

> Although nothing on the page of the exhibit submitted by Petitioner demonstrates that it was an official document issued by Representative Shays' office, [Petitioner] included the web address for Representative Shays' press releases in its Local Rule 56(a)(1) statement, thereby allowing the Court to verify that the press release in the record was a copy of an official document issued by a public authority. *See* 2 McCormick On Evid. § 227 (6th ed.2006) (noting that information "retrieved from government websites * * * has been treated as self-authenticating, subject only to proof that the webpage does exist at the governmental web location."). (Internal citations omitted.)

{¶ 30} Unlike the press releases in *Sannes* and *Kempthorne*, the attached press release here did not contain a web address to its location on the Ohio Attorney General's website.[9] Moreover, a search of that website did not locate the press release. Therefore,

[9] We note that the press release provided by Thorne did include several web addresses at the Ohio Attorney General's website for topics related to the lawsuit against GMAC. However, at the time of this opinion, those web addresses were not accessible without a username and password.

we hold that the attached press release does not satisfy the condition precedent of authenticity, and as a result is inadmissible as evidence.

{¶ 31} Further, even if the press release were authenticated, it would be inadmissible hearsay. The press release stated that Stephan testified he signed thousands of affidavits without verifying the content. Because the press release is being offered to prove the truth of this matter, there are two potential layers of hearsay that must be addressed: that of the press release, and that of Stephan's testimony. *See* Evid.R. 801(C); Evid.R. 805. Even assuming that Stephan's deposition testimony regarding the affidavit signing practice is non-hearsay as an admission by a party opponent under Evid.R. 801(D)(2)(d),[10] the press release itself fails to fall within any of the hearsay exceptions. The only exception potentially relevant is Evid.R. 803(8), which excludes from hearsay,

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement

[10] Evid.R. 801(D)(2)(d) provides that a statement is not hearsay if it "is offered against a party and is * * * (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Here, no evidence was presented to prove that Stephan was an agent of Residential at the time he gave his deposition testimony in the Maine case.

personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

{¶ 32} Again, Ohio case law has not addressed whether a press release falls within the public records and reports exception under Evid.R. 803(8). Notably, several federal courts have held that a press release is admissible under the hearsay exception for public records and reports. *See, e.g., Patterson v. Central Mills, Inc.*, 6th Cir. No. 01-3551, 2003 WL 2007941 (Apr. 30, 2003); *Byrd v. ABC Professional Tree Serv., Inc.*, M.D.Tenn. No. 1:10-cv-0047, 2011 WL 2194137 (June 6, 2011); *Zeigler v. Fisher-Price, Inc.*, 302 F.Supp.2d 999, 1021, fn. 10 (N.D.Iowa 2004). The press releases in those cases were admitted under former Fed.Evid.R. 803(8)(C),[11] which excluded from the hearsay rule,

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth * * * in civil actions and proceedings and against the Government in criminal cases, *factual findings resulting from an investigation made pursuant to authority granted by law*, unless the sources of information or other circumstances indicate lack of trustworthiness. (Emphasis added.)

However, as explained in *Cincinnati Ins. Co. v. Volkswagen of Am., Inc.*, 41 Ohio App.3d 239, 241-242, 535 N.E.2d 702 (10th Dist.1987),

[11] Fed.Evid.R. 803(8) was amended in 2011. The amendments were meant to be stylistic only.

> While the Ohio rule was based on Fed.Evid.R. 803(8), the federal version contains one provision clearly omitted from the Ohio rule: " * * * factual findings resulting from an investigation made pursuant to authority granted by law * * *." Fed.Evid.R. 803(8)(C).
>
> As a result, unlike the federal rule which contemplates the admission under subdivision (C) of evaluative and investigative reports and matters of disputed evidence, the Ohio rule is generally not perceived so broadly. (Internal citations omitted.)

{¶ 33} With this in mind, we find that the press release does not fall within the hearsay exception for "public records and reports" under Evid.R. 803(8). Instead, we believe that the press release is more akin to a newspaper article, and is therefore inadmissible hearsay. *See State v. Self*, 112 Ohio App.3d 688, 694, 679 N.E.2d 1173 (12th Dist.1996) ("Newspaper articles are generally inadmissible as evidence of the facts stated within the article because they are hearsay not within any exception").

{¶ 34} In sum, Thorne has failed to submit any evidentiary quality material to support his motion for relief from judgment.[12] Consequently, the trial court did not abuse

[12] We find it ironic and frustrating that Thorne has gone to such great lengths to challenge the technical deficiencies in the evidence Residential provided in support of its motion for summary judgment, yet in doing so has similarly failed to comply with the requirements of authenticity, instead stating in his appellate brief, "There is no real question as to the authenticity of the documents Thorne submitted in support of his motion to vacate."

its discretion in denying his Civ.R. 60(B) motion based on the materials presented. Accordingly, Thorne's second assignment of error is not well-taken.

b. Trial Court Abused its Discretion by not Holding a Hearing

{¶ 35} However, we do hold that the trial court abused its discretion by not first holding a hearing to verify the facts alleged by Thorne. Unlike the award of relief from judgment, which requires the movant to *demonstrate* through operative facts that he or she is entitled to relief, the requirements to obtain a hearing on that motion are less strenuous.

{¶ 36} In this case, we are presented with the question whether a trial court abuses its discretion if it denies a hearing where a motion for relief from judgment alleges operative facts, but does not present any evidentiary support.

{¶ 37} The settled rule is that "[a] person filing a motion for relief from judgment under [Civ.R. 60(B)] is not automatically entitled to such relief nor to a hearing on the motion." *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 103, 316 N.E.2d 469 (8th Dist.1974). But, in *Coulson v. Coulson*, 5 Ohio St.3d 12, 16, 448 N.E.2d 809 (1983), the Ohio Supreme Court adopted the rule from *Adomeit* that "[i]f the movant files a motion for relief from judgment and it contains *allegations* of operative facts which would warrant relief under Civil Rule 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion." (Emphasis added.) The larger section from which the above rule was taken states,

A question arises as to when the trial court should grant a hearing before ruling on the motion for relief from judgment.

If the material submitted by the movant in support of its motion contains no operative facts or meager and limited facts and conclusions of law, it will not be an abuse of discretion for the trial court to refuse to grant a hearing and overrule the motion.

If the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under Civil Rule 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion. This is proper and is not an abuse of discretion. If under the foregoing circumstances, the trial court does not grant a hearing and overrules the motion without first affording an opportunity to the movant to present evidence in support of the motion its failure to grant a hearing is an abuse of discretion. *Adomeit* at 105.

{¶ 38} Here, Thorne's motion for relief from judgment contained allegations of operative facts pertaining to the purported fraud in the form of the Stephan and Ugwuadu affidavits. Specifically, Thorne alleges that the affidavits in this case were signed by Stephan and Ugwuadu without personal knowledge of the facts therein in accordance with the policy and procedures of GMAC. In addition, although not evidentiary material themselves, the attached documents further support the allegations with specific descriptions of the misconduct. Thus, because Thorne has satisfied the meritorious

defense and timeliness prongs, and because he has alleged operative facts, which if proven true, would entitle him to relief, we hold that the trial court abused its discretion by denying his motion without first holding a hearing.

{¶ 39} Accordingly, Thorne's first assignment of error is well-taken.

{¶ 40} As a final matter, we must address Thorne's contention that the allegedly fraudulent affidavits of Stephan and Ugwuadu warrant relief from the judgment dismissing his third-party complaint against Cardinal as well. We find this contention to be without merit. The third-party complaint was dismissed pursuant to Civ.R. 12(B)(6), which tests the sufficiency of the complaint only. Thus, the dismissal, which we affirmed in *Thorne I*, could not have relied upon the affidavits themselves. Therefore, because the verity of the Stephan and Ugwuadu affidavits is irrelevant to his claim against Cardinal, and because Thorne has alleged no other grounds for relief, Thorne is not entitled to relief from that portion of the judgment.

B. Motion for Sanctions

{¶ 41} In his fourth assignment of error, Thorne argues that the trial court erred in overruling his motion for sanctions under Civ.R. 56(G). In reviewing the denial of a Civ.R. 56(G) motion, we once again apply an abuse of discretion standard. *See Ivancic v. Cleveland Elec. Illuminating Co.*, 8th Dist. No. 63372, 1993 WL 367092 (Sept. 16, 1993); *Cincinnati Bd. of Edn. v. Armstrong World Industries, Inc.*, 1st Dist. No. C-910803, 1992 WL 314206 (Oct. 28, 1992).

{¶ 42} Civ. R. 56(G) provides:

> Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purposes of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

{¶ 43} In support, Thorne again relies on the order from the Maine court case as evidence of bad faith. However, as discussed earlier, the documents from the Maine court case do not satisfy evidentiary standards. For this reason, we cannot hold the trial court abused its discretion in denying his motion. Moreover, his argument rests on the fact that since the affidavits at issue in the Maine case were found to be fraudulent, the same must be true for the case at hand because the same individuals signed the affidavits in both situations. We disagree. The finding in the Maine court case alone does not sufficiently prove that Ugwuadu and Stephan signed the affidavits *in this case* in bad faith. Therefore, Thorne's fourth assignment of error is not well-taken.

III. Conclusion

{¶ 44} We are aware that Thorne has never seriously argued that he is not in default on his note, and we are aware that our decision to afford Thorne a hearing on the robo-signing allegations could be criticized as elevating technical details over practical

realities. However, we strongly believe there is value in protecting the integrity of court proceedings, and we cannot in good conscience rubber stamp judgments that may be based solely on materials not meeting evidentiary standards.

{¶ 45} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is reversed, in part, and affirmed, in part. This cause is remanded to the Lucas County Court of Common Pleas for a hearing on Thorne's Civ.R. 60(B) motion. Costs are to be shared equally between the parties pursuant to App.R. 24.

Judgment reversed, in part,
and affirmed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE