

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

BAC Home Loans Servicing, L.P.

Court of Appeals No. S-12-030

Appellee

Trial Court No. 09CV000371

v.

Tina L. Shackelford, et al.

DECISION AND JUDGMENT

Appellants

Decided: June 7, 2013

* * * * *

Bill L. Purtell, for appellee.

Tina L. Shackelford and Tom R. Chong, pro se.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellants, Tina Shackelford and Tom Chong, appeal the judgment of the Sandusky County Court of Common Pleas, denying their Civ.R. 60(B) motion for relief from the judgment of foreclosure entered against them. We affirm.

A. Facts and Procedural Background

{¶ 2} On March 26, 2009, appellee, BAC Home Loans Servicing, L.P. (“BAC”)¹, initiated its complaint in foreclosure against appellants. Appellants filed their answer, asserting as one of their affirmative defenses that BAC is not the real party in interest. Shortly thereafter, BAC moved for summary judgment. Appellants requested an extension to file their opposition to the motion for summary judgment. However, instead of filing an opposition, they moved to have the case referred to mediation. Two mediation sessions were held, but no agreement was reached. Subsequently, the case was returned to the trial court’s active docket. On May 11, 2010, the trial court granted BAC’s motion for summary judgment. Appellants did not appeal. The property was then sold at a sheriff’s sale.

{¶ 3} Before the sale was confirmed, appellants filed their initial Civ.R. 60(B) motion for relief from judgment on November 15, 2010. BAC filed its opposition to the motion on June 30, 2011. The matter was then stayed twice as Shackelford and Chong went through bankruptcy. In between the stays, appellants moved to supplement their Civ.R. 60(B) motion. The trial court never ruled on the motion to supplement. Upon the lifting of the second stay, the trial court denied appellants’ initial Civ.R. 60(B) motion in a judgment entered on August 8, 2012.

¹ The complaint was initially filed by Countrywide Home Loans Servicing, L.P. Countrywide subsequently changed its name to BAC, and BAC was substituted as the party plaintiff.

B. Assignment of Error

{¶ 4} Appellants have timely appealed, raising a single assignment of error:

The trial court erred in denying Shackelford/Chong's Motion for Relief from Judgment and erred when it failed to hold an evidentiary hearing.

II. Analysis

{¶ 5} Civ.R. 60(B) "attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." *Doddridge v. Fitzpatrick*, 53 Ohio St.2d 9, 12, 371 N.E.2d 214 (1978). Thus, "[a] motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion." *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987). An abuse of discretion connotes that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 6} Generally, to prevail on a Civ.R. 60(B) motion, a movant must satisfy three elements: "(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, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

{¶ 7} In their initial motion, appellants devoted considerable effort to demonstrating that they have a meritorious defense. In particular, they asserted that BAC is not the proper party in interest because it is not the *owner* of the note and mortgage. Appellants next argued that they were entitled to relief under Civ.R. 60(B)(3), which denominates fraud on the part of BAC, because the affidavit filed in support of BAC’s motion for summary judgment was signed by a known “robo-signer.” In support of their allegation, appellants attached an unauthenticated copy of portions of a deposition of the affiant taken in an unrelated case on February 19, 2010, in which the affiant detailed her signing practices. Finally, as to the timeliness element, appellants simply stated that the motion was filed within the one-year time limit provided by Civ.R. 60(B). BAC opposed the motion, arguing first that it indeed was the real party in interest entitled to enforce the note and mortgage, and second that the motion was untimely since appellants gave no justification for the six-month delay in filing it.

{¶ 8} In their brief on appeal, appellants have largely reprised their proposed supplemental brief in support of the Civ.R. 60(B) motion. In addition to the initial alleged meritorious defenses, appellants now raise the defenses that foreclosure is not an appropriate equitable remedy, that BAC has failed to meet all conditions precedent to foreclosure, that BAC is not the real party in interest because it is not the holder of the note, and that the affidavit filed in support of BAC’s motion for summary judgment is

deficient. Next, appellants again assert Civ.R. 60(B)(3) as a ground for relief, this time arguing it applies in that BAC perpetrated a fraud on the court by foreclosing on appellants' home while knowing that it was not the holder of the note and mortgage. Appellants also add Civ.R. 60(B)(5)—"any other reason justifying relief from the judgment"—as a separate ground for relief. Appellants argue that Civ.R. 60(B)(5) applies because BAC has not acted equitably to appellants and thus should not be entitled to equitable relief in foreclosure. Finally, like their initial motion for relief from judgment, appellants make no argument to support their conclusion that the motion is timely except for their statement that the motion was made six months after the judgment of foreclosure was entered.

{¶ 9} Upon review, we hold that the trial court did not abuse its discretion in denying appellants' Civ.R. 60(B) motion. We agree with BAC that the motion fails to satisfy the timeliness element. "Whether a Civ.R. 60(B) motion is filed within a reasonable time depends on the facts and circumstances of the particular case." *S.R. v. B.B.*, 6th Dist. No. L-09-1293, 2011-Ohio-358, ¶ 19, quoting *Scotland Yard Condominium Assn. v. Spencer*, 10th Dist. No. 05AP-1046, 2007-Ohio-1239, ¶ 33. "In the absence of any explanation for the delay in filing the Civ.R. 60(B) motion, the movant has failed to meet his burden of establishing the timeliness of his motion." *Youssefi v. Youssefi*, 81 Ohio App.3d 49, 53, 610 N.E.2d 455 (9th Dist.1991).

{¶ 10} Here, appellants have offered no justification for the delay in filing their motion, which largely contains allegedly meritorious defenses that were known to them

throughout the litigation. Moreover, as to the allegations of “robo-signing,” the circumstances of the case do not indicate that they could only have recently become aware of the purported robo-signer since the affiant’s deposition took place in February 2010, summary judgment was awarded in May 2010, and the Civ.R. 60(B) motion was not filed until November 2010. *Compare Residential Funding Co., L.L.C. v. Thorne*, 6th Dist. No. L-11-1131, 2012-Ohio-2552, 973 N.E.2d 294, ¶ 20 (Civ.R. 60(B) motion timely where it was filed within two months of when the facts detailing the alleged robo-signing came to light, and within one year of the underlying judgment), *with Bank of America, N.A. v. McLaughlin*, 6th Dist. No. E-11-057, 2012-Ohio-2341, ¶ 17 (Civ.R. 60(B) motion untimely where at the time of filing appellant had known of the robo-signing practice for five months). Therefore, because appellants have not satisfied the third prong of the *GTE Automatic* test, the trial court’s denial of their Civ.R. 60(B) motion was not an abuse of discretion.

{¶ 11} Furthermore, appellants’ argument that the trial court abused its discretion when it denied the motion without a hearing is without merit. A trial court abuses its discretion when it denies a Civ.R. 60(B) motion without a hearing where the movant has alleged operative facts that would warrant relief. *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 105, 316 N.E.2d 469 (8th Dist.1974). However, “[t]he trial court has the authority to dismiss a Civ.R. 60(B) motion without first granting an evidentiary hearing when such motion is untimely filed.” *Bednar v. Bednar*, 20 Ohio App.3d 176, 178, 485 N.E.2d 834 (9th Dist.1984), citing *Adomeit*. Therefore, we hold that the trial court’s failure to hold a

hearing before denying appellants' Civ.R. 60(B) motion did not constitute an abuse of discretion.

{¶ 12} Accordingly, appellants' assignment of error is not well-taken.

III. Conclusion

{¶ 13} For the foregoing reasons, the judgment of the Sandusky County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

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