

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

Fifth Third Mortgage Company

Court of Appeals No. L-13-1010

Appellee

Trial Court No. CI0201006802

v.

Emory G. Whittington, III, et al.

DECISION AND JUDGMENT

Appellant

Decided: June 28, 2013

* * * * *

David M. Gauntner, for appellee.

Emory G. Whittington, III, pro se.

* * * * *

SINGER, P.J.

{¶ 1} Appellant, Emory G. Whittington, III, appeals the December 27, 2012 denial of his motion to vacate judgment issued by the Lucas County Court of Common Pleas. Due to the motion being filed well outside the time permitted under Civ.R. 60(B), we affirm the trial court's ruling.

{¶ 2} In February 2002, appellant executed a promissory note to appellee, Fifth Third Mortgage Company, which was secured via a mortgage lien in appellant's property located at 521 Nebraska Avenue in Toledo. Afterwards, appellant defaulted on the loan via nonpayment leading appellee to initiate foreclosure action on September 29, 2010.

{¶ 3} The foreclosure action proceeded through the Lucas County Court of Common Pleas. Appellant failed to file an answer, leading to the trial court entering a default judgment for appellee on March 2, 2011. The foreclosure sale was delayed for nearly two years. Appellant instigated multiple failed mediations and filed for Chapter 7 Bankruptcy. He was also denied a loan modification due to a disqualifying debt-to-income ratio.

{¶ 4} Appellant filed a motion to vacate judgment with the trial court on October 9, 2012. The motion was denied by the trial court as untimely and a failure to state or support a legal basis for vacating the judgment. From this order, appellant now brings this accelerated appeal.

{¶ 5} Appellant sets forth as his assignment of error that the trial court erred in denying his motion to vacate judgment. New exhibits attached to appellant's brief claim to prove appellee's purported fraudulent operation in the state of Ohio, showing that "Appellee is not authorized to conduct or transact business in the State of Ohio." The error arises where appellant claims that, due to an inactive registration with the Secretary of State, "[o]perating under court impunity, these mobs are allowed to high jack [sic] real property unimpeded."

{¶ 6} In his brief, appellant frames the trial court’s March 2, 2011 judgment entry as an order for summary judgment as opposed to a default judgment. Despite appellant’s characterization of the issue as summary judgment, the issue in the instant case is an appeal of a motion to vacate judgment under Civ.R. 60(B). Civ.R. 60 allows for relief from a final judgment upon a showing of:

(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.

{¶ 7} “The standard by which we review a decision on a Civ.R. 60(B) motion is abuse of discretion.” *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 637 N.E.2d 914 (1994), citing *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988). An abuse of discretion constitutes more than an error of law or judgment; it implies an attitude that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*,

5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1984). “When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court.” *In re Jane Doe I*, 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181 (1991).

{¶ 8} The standard used to determine if a motion to vacate judgment should be granted was set forth in *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), which states that:

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.

{¶ 9} These elements are independent and conjunctive. *Id.* at 151. Therefore, all three elements must be met for appellant to successfully seek relief from judgment under Civ.R. 60(B). *Mt. Olive Baptist Church v. Pipkins Paints & Home Imp. Ctr., Inc.*, 64 Ohio App.2d 285, 286, 413 N.E.2d 850 (8th Dist.1979). Thus, the proper test used by the trial court is:

(1) Did appellee timely file its motion to vacate the default judgment?

(2) Did appellee demonstrate that it had a meritorious defense or claim to the action?

(3) Did appellee, in accordance with Civ.R. 60(B), set forth a valid ground for relief? *Burger dba A.A. Zinc Co. v. Higginson Capital Mgt., Inc., dba Great Lakes Warehouse Co.*, 6th Dist. No. 80-261, 1981 WL 5667 (June 26, 1981).

{¶ 10} Appellant alleges he is entitled to relief from the default judgment entered against him because of fraud perpetrated by appellee. However, appellant's motion fails to meet the timeliness requirement of element one. The default judgment was entered by the trial court on March 2, 2011, while the motion was filed on October 9, 2012—a difference of 19 months. Civ.R. 60(B) requires that, for an assertion of fraud, the motion cannot be filed more than 12 months after the judgment was entered.

{¶ 11} As the elements of the test are conjunctive, a failure of any single element is fatal. *Strack*, 70 Ohio St.3d at 174, 674 N.E.2d 914. Thus, appellant's inability to meet the timely filing condition moots analysis of the other elements.

{¶ 12} Upon a review of the record, we find that appellant failed to establish grounds for relief as set forth in Civ.R. 60(B). Accordingly, appellant's assignment of error is found not well-taken.

{¶ 13} On consideration whereof, the court finds substantial justice has been done the party complaining and the judgment of the Lucas County Court of Common Pleas is

affirmed. Appellant is ordered to pay the court 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.