[Cite as *U.S. Bank, Natl. Assn. v. Corley*, 2013-Ohio-4626.]

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

U.S. Bank, National Association, Trustee

Appellee

v.

Thomas F. Corley, II, et al.

Appellant

Court of Appeals No. L-13-1117

Trial Court No. CI0201202203

DECISION AND JUDGMENT

Decided: October 18, 2013

* * * * *

Anne Marie Sferra, Nelson M. Reid and Luke D. Overmeyer, for appellee.

Peter A. Dewhirst, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} In this foreclosure action, appellant, Thomas Corley, II, appeals the Lucas County Court of Common Pleas' denial of his Civ.R. 60(B) motion for relief from judgment. For the following reasons, we affirm.

A. Factual and Procedural Background

{¶ 2} On October 13, 2004, appellant refinanced his home. In 2012, appellant defaulted on the terms of his note and mortgage, and on March 12, 2012, Bank of America filed a complaint in foreclosure. Appellee, U.S. Bank, is the successor in interest to the note and mortgage and has been substituted as plaintiff in these proceedings. U.S. Bank subsequently moved for summary judgment. Appellant requested an extension of time to respond to the motion for summary judgment, and moved to have the case referred to mediation, which the trial court granted. However, mediation proved to be unsuccessful as appellant failed to provide the necessary financial information for U.S. Bank's "loss mitigation packet." Thereafter, on August 31, 2012, the trial court granted U.S. Bank's motion for summary judgment, and ordered the sale of the residence.

{¶ 3} Approximately five months later, appellant filed a Civ.R. 60(B) motion for relief from judgment. In his motion, appellant for the first time argued that the loan agreement was "the product of fraud, misrepresentation or other actionable misconduct," or, at the least, there was no meeting of the minds between the parties as to the terms of the agreement.

{¶ 4} In an attached affidavit, appellant specifically stated that when he refinanced in 2004, he desired a 15-year term at 7.5 percent. He was told by the loan officer that he could not get 7.5 percent approved, but that the loan officer could get appellant a lower payment. Appellant testified that neither the loan officer nor any other representative

informed him that in order to get the lower payment they structured the deal as a 30-year mortgage instead of a 15-year mortgage. The day of the closing, the loan officer arrived at appellant's house. According to appellant, the loan officer was very aggressive, indicating that it was imperative that appellant sign the loan documents right away. Appellant felt like there was considerable pressure to sign, and that if he did not, he would risk losing the refinancing deal on the terms as he understood them to be. Because of this pressure, appellant believed there was not even time for him to fully review the documents, so he just signed them. Appellant testified that it was only "long after the fact" that he discovered he had been duped into signing a 30-year mortgage.

{¶ 5} In his Civ.R. 60(B) motion, appellant clarified that he did not realize he had signed a 30-year mortgage until December 2012, after the trial court had already granted summary judgment against him. Appellant averred that he never would have signed the mortgage documents if he had realized it was for a 30-year term.

{¶ 6} Based on these facts, appellant concluded that he was entitled to relief under Civ.R. 60(B)(1), (3), and/or (5). The trial court, however, disagreed, and denied appellant's Civ.R. 60(B) motion, finding that appellant had failed to allege a meritorious defense to the foreclosure action.

B. Assignment of Error

{¶ 7} Appellant has timely appealed the judgment denying his Civ.R. 60(B) motion, asserting one assignment of error for our review:

> [T]he trial court abused its discretion in denying Defendant/ Appellant Thomas F. Corley, II's ("Corley") Motion to Vacate Judgment and Foreclosure Decree and Sale Order and for Leave to File Amended Answer and Counterclaim (the "Motion to Vacate").

II. Analysis

{¶ 8} "A motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court." *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987). Thus, we will not disturb that ruling on appeal absent an abuse of discretion. *Id.* 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).

{¶ 9} In order 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.

If any one of the three *GTE* elements are not met, the motion should be overruled. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988).

{¶ 10} In its judgment entry, the trial court determined that appellant failed to satisfy the first *GTE* element, and thus denied his motion without further examining the remaining two elements. Appellant alleged as his defense that he entered into the note and mortgage as a product of fraud or misrepresentation. We agree with the trial court that under the facts provided by appellant, he is unlikely to prevail on this defense.

{¶ 11} "Ordinarily, one of full age in the possession of his faculties and able to read and write, who signs an instrument and remains acquiescent to its operative effect for some time, may not thereafter escape the consequences by urging that he did not read it or that he relied upon the representations of another as to its contents or significance." *Kroeger v. Brody*, 130 Ohio St. 559, 566, 200 N.E. 836 (1936). Here, assuming appellant was pressured to sign and initial each page of the note and mortgage without the opportunity to read it, and assuming in his haste he failed to notice that the front page of the note specified that the expected payoff date was October 20, 2034, he nonetheless acquiesced to its terms for the next seven years. Furthermore, he did not raise this issue in his answer to the complaint or in a response to the motion for summary judgment, despite having been served with a copy of the note and mortgage with the complaint. Thus, he cannot now escape the consequences by alleging that he did not read the terms seven years ago.

{¶ 12} Nevertheless, under Civ.R. 60(B), the "movant's burden is only to allege a meritorious defense, not to prove that he will prevail on that defense." *Rose Chevrolet* at 20, citing *Moore v. Emmanuel Family Training Ctr., Inc.*, 18 Ohio St.3d 64, 67, 479 N.E.2d 879, 882 (1985). While unlikely to be successful, appellant's alleged defense of fraud, misrepresentation, or other actionable misconduct in the creation of the note and mortgage is still a meritorious defense in a foreclosure action. *See Baker Motors, Inc. v. Baker Motors Towing, Inc.*, 183 Ohio App.3d 223, 2009-Ohio-3294, 916 N.E.2d 853, ¶ 12 (8th Dist.), quoting *First Natl. Bank of Pandora v. Freed*, 3d Dist. Hancock No. 5-03-36, 2004-Ohio-3554, ¶ 9 ("Other asserted defenses found meritorious include improper conduct in obtaining the debtor's signature on the note."). Therefore, appellant has satisfied the first *GTE* element.

{¶ 13} Although appellant has satisfied the first element, we do not find that the trial court abused its discretion in denying appellant's Civ.R. 60(B) motion for relief from judgment because appellant has failed to demonstrate that he is entitled to relief under any of the enumerated grounds in Civ.R. 60(B)(1) through (5). In his motion, appellant relies on Civ.R. 60(B)(1), (3), and (5). As support, though, he only argues that he is entitled to relief based on the conduct of the loan officer at the time of the agreement. This would appear to invoke Civ.R. 60(B)(3)—"fraud * * *, misrepresentation or other misconduct of an adverse party." However, "[t]he fraud or misconduct contemplated by [Civ.R.] 60(B)(3) is fraud or misconduct involved in obtaining the judgment, not fraud or misconduct that would have amounted to a claim or defense in the case itself." *First*

Merit Bank, NA v. Crouse, 9th Dist. Lorain No. 06CA008946, 2007-Ohio-2440, ¶ 32. Thus, since appellant relies only on the conduct which could amount to a defense, and has not provided any operative facts demonstrating that U.S. Bank committed fraud or misconduct in pursuing the foreclosure action, Civ.R. 60(B)(3) is inapplicable. Furthermore, appellant has not demonstrated or argued that he should be relieved from judgment because of his own mistake, inadvertence, surprise, or excusable neglect as provided in Civ.R. 60(B)(1), nor has he demonstrated or argued any other reason justifying relief from the judgment as provided in Civ.R. 60(B)(5). Having failed to satisfy the second *GTE* element, appellant's Civ.R. 60(B) motion must be denied.

III. Conclusion

{¶ 14} Based on the foregoing, we find appellant's assignment of error not well-taken. Accordingly, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is 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