

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

U.S. Bank National Association, as  
Trustee for the Specialty Underwriting  
and Residential Finance Trust Mortgage  
Loan Asset-backed, Certificates  
Series 2006-BC2

Court of Appeals No. L-12-1314

Trial Court No. CI0200906885

Appellee

v.

Donald E. McHugh, et al.

**DECISION AND JUDGMENT**

Appellants

Decided: December 13, 2013

\* \* \* \* \*

Bill L. Purtell, for appellee.

Gregory H. Wagoner, for appellants.

\* \* \* \* \*

**YARBROUGH, J.**

**I. Introduction**

{¶1} Appellants, Donald and Cynthia McHugh, appeal the judgment of the Lucas County Court of Common Pleas, denying their motion for relief from judgment in the

underlying foreclosure action, in which summary judgment was previously granted in favor of appellee, U.S. Bank National Association. We affirm.

### **A. Facts and Procedural Background**

{¶2} On August 23, 2005, appellants executed a note and mortgage on their home located at 2403 Lost Creek Drive, Toledo, Ohio. The note and mortgage were originally executed in the amount of \$287,959.53. Home Loan Services d/b/a Expanded Mortgage Credit was the original lender, and Mortgage Electronic Registration Systems, Inc. (MERS) received the mortgage as nominee for Home Loan Services and its successors and assigns. The mortgage was subsequently recorded on September 8, 2005. The note was indorsed in blank by Home Loan Corporation. On May 27, 2008, MERS assigned the mortgage to appellee. The assignment was recorded on August 9, 2008.

{¶3} After appellants defaulted on the note and mortgage by failing to make the required payments, appellee instituted the underlying action by filing its complaint in foreclosure on September 14, 2009. In its complaint, appellee states that it is the holder of the note and is the assignee of the mortgage, both of which are attached to the complaint, along with the assignment of the mortgage. Appellants filed a timely answer setting forth several affirmative defenses including lack of standing and failure to state a cause of action for which relief may be granted.

{¶4} On May 20, 2010, appellee filed its motion for summary judgment. In opposing appellee's motion, appellants argued that appellee was not the real party in

interest and therefore had no standing to bring the foreclosure proceeding. Specifically, appellants challenged the validity of MERS' assignment of the mortgage to appellee. Further, they argued that appellee lacked standing because it was not the holder of the note. The trial court disagreed, and on August 4, 2010, granted appellee's motion for summary judgment.

{¶5} Appellants failed to appeal the trial court's grant of summary judgment. Instead, 18 months after summary judgment was granted, appellants filed a motion for relief from judgment under Civ.R. 60(B). Once again, appellants argued that appellee lacked standing and was not the real party in interest. They alleged that they were entitled to relief pursuant to their discovery of new evidence in the form of a pooling service agreement that confirmed appellee's lack of standing. Appellee opposed appellants' motion on the basis that it was barred by res judicata, untimely, and failed to establish grounds for relief pursuant to Civ.R. 60(B)(2). After considering the parties' arguments, the trial court denied appellants' motion. In its judgment entry, the court determined that the evidence relied upon by appellants in supporting their Civ.R. 60(B) motion was available to them prior to summary judgment and, therefore, was not newly discovered evidence. Further, the court found that appellants failed to demonstrate the existence of a meritorious defense as required under the Ohio Supreme Court's holding in *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113.

Finally, the court concluded that appellants' motion was not filed within a reasonable time pursuant to Civ.R. 60(B).

### **B. Assignment of Error**

{¶6} Appellants have filed this timely appeal of the trial court's denial of their motion for relief from judgment, assigning the following error for our review: "U.S. Bank Does Not Have Standing to Bring This Action."

### **II. Analysis**

{¶7} In their sole assignment of error, appellants argue that appellee did not have standing to pursue the underlying foreclosure action. Appellee responds by arguing that appellants' argument is misplaced insofar as it fails to address the applicable standard for a motion for relief from judgment under Civ.R. 60(B). Further, appellee argues that the trial court's decision was proper in light of appellants' failure to meet the standard for Civ.R. 60(B) motions set forth in *GTE Automatic*, supra.

{¶8} 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).

{¶9} 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*, 47 Ohio St.2d at paragraph two of the syllabus, 351 N.E.2d 113. As the elements of the test are conjunctive, a failure of any single element is fatal. *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 637 N.E.2d 914 (1994).

{¶10} Upon review, we hold that the trial court did not abuse its discretion in denying appellants’ Civ.R. 60(B) motion. We agree with appellee that the motion fails to satisfy the timeliness element. Appellants’ inability to meet the timeliness element moots analysis of the other elements. *Fifth Third Mtge. Co. v. Whittington*, 6th Dist. Lucas No. L-13-1010, 2013-Ohio-2815, ¶ 11.

{¶11} In their motion for relief from judgment, appellants argued that they were entitled to relief from judgment under Civ.R. 60(B)(2), which provides for relief on the basis of “newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B).” Pursuant to Civ.R. 60(B), motions for relief from judgment that are premised upon newly discovered evidence

under (B)(2) must be made within a reasonable time, and not more than one year after the entry of judgment. “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. Lucas No. L-09-1293, 2011-Ohio-358, ¶ 19, quoting *Scotland Yard Condominium Assn. v. Spencer*, 10th Dist. Franklin 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).

{¶12} At the outset, we note that appellants’ motion was filed beyond the one-year limitation contained in the rule. Thus, on that basis alone, the trial court properly denied appellants’ motion as untimely filed. Further, appellants provided no justification for their 18-month delay in filing the Civ.R. 60(B) motion, either in their original motion or before us on appeal. Instead, appellants merely reargue the standing defense that they already raised in their answer and in opposition to appellee’s motion for summary judgment.

{¶13} Therefore, because appellants have not satisfied the timeliness element of the *GTE Automatic* test, we conclude that the trial court did not abuse its discretion in denying their Civ.R. 60(B) motion.

{¶14} Accordingly, appellants’ sole assignment of error is not well-taken.

### III. Conclusion

{¶15} For the foregoing reasons, the judgment of the Lucas 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.

Mark L. Pietrykowski, J.

Stephen A. Yarbrough, J.  
CONCUR.

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JUDGE

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JUDGE

<p>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: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
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