**[Cite as *Bank of New York v. Shirmeyer*, 2014-Ohio-1303.]**

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

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| Bank of New York | Court of Appeals No. L-13-1078 |
| Appellee | Trial Court No. CI0200704399 |
| v. | |
| Shirley A. Shirmeyer | **DECISION AND JUDGMENT** |
| Appellant | Decided: March 28, 2014 |

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Matthew J. Richardson, for appellee.

Shirley A. Shirmeyer, pro se.

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**PIETRYKOWSKI, J.**

**{¶ 1}** Pro se appellant, Shirley Shirmeyer, appeals the March 20, 2013 judgment of the Lucas County Court of Common Pleas denying her Civ.R. 60(B) motion for relief from judgment in a foreclosure action and the denial of her Civ.R. 55(A) request for default judgment. For the reasons that follow, we affirm.

**{¶ 2}** This action commenced on June 20, 2007, with appellee Bank of New York Mellon's filing of its complaint in foreclosure. The complaint alleged that on May 19, 2004, appellant executed a note in the amount of $105,000 which was secured by a mortgage, that appellee is the owner and holder of the mortgage, that appellant was in default on the note, and that a principal balance of $103,135.78, with interest was due and owing. Appellee requested that the court foreclose on the mortgage and that the property be sold. Attached to the complaint and referenced therein, were copies of the note and mortgage and the May 16, 2006 assignment of the mortgage to appellee. Appellant's answer indicated that the parties were attempting to reach a resolution; she did not deny the averments in the complaint.

**{¶ 3}** On August 30, 2007, appellee filed its motion for summary judgment. The attached affidavit of M. Kelly Michie, first vice-president for Countrywide Home Loans, stated that Countrywide is the servicer for appellee. Michie stated that she had personal knowledge of the note and mortgage attached to the affidavit, that appellant was in default and that the balance had been accelerated, and that $103,135.78 with interest was due and owing. Appellant did not oppose the motion.

**{¶ 4}** On September 19, 2007, the trial court granted the summary judgment motion and entered a decree of foreclosure and order of sale. The property was ultimately set for judicial sale on October 31, 2012. An emergency motion to stay the sale was filed and raised issues regarding service of the original summons and standing. The motion was filed, pro se, by appellant's son. The court denied the motion finding

that the son was engaged in the unauthorized practice of law. The confirmation of the sale was journalized on March 18, 2013.

**{¶ 5}** On December 12, 2012, appellant filed a Civ.R. 60(B) motion for relief from judgment arguing that appellee failed to establish standing and that it was not the real party in interest. The motion was signed by appellant and her son as having "power of attorney." On March 7, 2013, appellee opposed the motion arguing that appellant's son was engaged in the unauthorized practice of law, that it was untimely and improperly being used as a substitute for appeal, and that appellant failed to demonstrate entitlement to relief. Also on March 7, appellant filed a "Notice and Entry of Default" because (at that point) appellee had "failed to defend or answer" her Civ.R. 60(B) motion.

**{¶ 6}** A hearing was held on the motion on March 14, 2013. Appellant was not at the hearing but her son was present. In its March 20, 2013 judgment entry, the court denied appellant's motions. This appeal followed.

**{¶ 7}** Appellant now raises two assignments of error for our review:

> I. The trial court erred by denying the 60 B [sic] motion to vacate judgment against the appellee-plaintiff.
>
> II. The trial court erred by denying the default judgment sought against the plaintiff-appellee.

**{¶ 8}** In appellant's first assignment of error, she argues that the court erroneously denied her Civ.R. 60(B) motion for relief from judgment. Specifically, appellant argues

that by failing to address each point raised in the motion, the trial court "passed the buck" by agreeing with appellee.

**{¶ 9}** It is well-settled that "[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 implies that the court's attitude is unreasonable, unconscionable or arbitrary. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

**{¶ 10}** Civ.R. 60(B) sets forth the following grounds for relief from judgment:

> (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.

**{¶ 11}** In order to obtain relief from judgment pursuant to Civ.R. 60(B), a 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 Indus., Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

**{¶ 12}** These requirements must be shown by "operative facts" presented in evidentiary material accompanying the request for relief. *East Ohio Gas Co. v. Walker*, 59 Ohio App.2d 216, 220, 394 N.E.2d 348 (8th Dist.1978). Relief pursuant to Civ.R. 60(B) will be denied if the movant fails to adequately demonstrate any one of the requirements set forth in *GTE*. *Argo Plastic Prods. Co. v. Cleveland*, 15 Ohio St.3d 389, 391, 474 N.E.2d 328 (1984). Civ.R. 60(B) relief is not available as a substitute for appeal. *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128, 131, 502 N.E.2d 605 (1986).

**{¶ 13}** We first note that appellant's motion for relief was filed more than five years after the September 2007 decree of foreclosure. In her motion, appellant failed to provide any justification or reason for the delayed filing. Further, the only Civ.R. 60(B) basis which appellant mentioned was fraud on the part of appellee, Civ.R. 60(B)(3), which is required to be brought within one year.

**{¶ 14}** Moreover, there is no evidence to suggest that the claims raised by appellant in her motion could not have been raised on direct appeal to this court. As noted above, a motion for relief from judgment may not be used as a substitute for appeal. Finally, the motion for relief was co-signed by appellant's son, a non-party to the action and not representing appellant as her attorney.

**{¶ 15}** Based on the foregoing, we find that the trial court did not abuse its discretion when it denied appellant's motion for relief from judgment. Appellant's first assignment of error is not well-taken.

**{¶ 16}** In her second assignment of error, appellant argues that the trial court erred by failing to grant her request for a default judgment. First, appellee moved for and was granted leave to file a late response to appellant's motion for relief from judgment. More importantly, default judgment under Civ.R. 55(A) was not an available remedy for appellee's failure to file a response opposing appellant's motion. Civ.R. 55(A) relief is proper where a defendant to a complaint or counterclaim fails to file an answer or otherwise contest the allegations. There was no counterclaim pending against appellee thus, the trial court did not abuse its discretion when it denied appellant's request for a default judgment. Appellant's second assignment of error is not well-taken.

**{¶ 17}** On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE