[Cite as *HSBC Bank USA NA v. Beins*, 2014-Ohio-56.]

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

HSBC Bank USA NA	Court of Appeals No. L-13-1067
Appellee	Trial Court No. CI0201104590
v.	
Kelli J. Beins, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: January 10, 2014

* * * * *

Benjamin D. Carnahan, for appellee.

Kelli Beins and Kevin Beins, pro se.

* * * * *

OSOWIK, J.

{¶ 1} This is a pro se appeal from a judgment of the Lucas County Court of Common Pleas that denied appellants' motion to vacate a default judgment entered against them in this foreclosure action. For the following reasons, the judgment of the trial court is affirmed.

{¶ 2} In March 2007, appellants Kelli Beins and Kevin Beins executed a note for the original amount of $80,500 payable to Best Rate Funding Corp. The note was secured by a mortgage on a residential property in Toledo, Ohio. The mortgage eventually was assigned from Mortgage Electronic Registration Systems, Inc., acting as nominee for Best Rate Funding Corp., to appellee HSBC Bank USA NA on January 6, 2009, and recorded January 23, 2009. Although the parties had signed a loan modification agreement in February 2009, upon appellants' continued failure to make payments, appellee sent a notice of default and filed a complaint in foreclosure on July 29, 2011. The record reflects that appellants did not file an answer to the complaint despite personal service on August 6, 2011. On September 19, 2011, appellee moved for default judgment. Appellants failed to file a response to the motion.

{¶ 3} On September 26, 2011, the trial court filed a default judgment entry in which it found that appellants owed the sum of $89,879.23, plus interest, on a promissory note held by appellee, which was secured by real estate located at 3604 Queenswood Boulevard in Toledo, Ohio. The trial court also found that unpaid taxes were owed to the Lucas County treasurer. On January 10, 2012, the trial court ordered the property sold at a sheriff's sale.

{¶ 4} The record reflects that appellee twice delayed the foreclosure sale in order to allow appellants further opportunity to become current on their loan. Having failed to do that, appellants subsequently filed the following pro se motions seeking relief from the trial court's default judgment entry: a "Motion for Injunctive Relief O.R.C.P. 65(A)"

filed May 31, 2012, a "Motion for Leave to File Answer Out of Time" filed July 12, 2012, and a "Motion for Relief from Void Judgment and for Injunctive Relief O.R.C.P. 60(B)" filed July 27, 2012.

By judgment entry filed March 29, 2013, the trial court denied all of appellants' motions. As to appellants' first motion, the trial court noted that default judgment was granted because appellants had failed to file an answer or assert any defenses herein and, additionally, that appellants' motion failed to comply with the Ohio Rules of Civil Procedure for issuance of an injunction. In denying appellants' motion for leave to file an answer, the trial court noted that the motion was post-judgment and that there was no mechanism for filing an answer at that point. The trial court denied the motion for relief from void judgment based on applicable case law. Appellants filed a timely appeal from the judgment.

{¶ 5} Appellants set forth the following assignments of error:

> First Assignment of Error:
>
> The record made in Case No. CI-0201104590 in The Lucas County Court of Common Pleas verifies that the court wanted subject matter jurisdiction to rule and determine that Defendants was a judgment debtor to HSBC BANK USA N.A. However; Default judgment must be proved by evidence entered on the record through a competent witness. (sic)

Second Assignment of Error:

Where there were no depositions, admissions, answers to interrogatories, or affidavits, plaintiffs motion for Default judgment should not be considered under district court rule RULE 55. Default, (A) Entry of judgment. Appellants where not given proper notice of Judgment and has not had a hearing on any averments or affidavits Appellants have submitted. Appellants have requested to see accounting and have put Appellee's on notice of Appellants Recission due to fraud. (sic)

Third Assignment of Error:

No valid evidence on the record. Defendants, filed an Motion for injunctive relief under rule 65(A) in CI-0201104590, directly challenging subject matter jurisdiction, once challenged, named plaintiff was required to prove up subject matter jurisdiction by producing an original contract with Defendants ink signature, and a competent witness with first hand knowledge to testify to purported contract and purported debt. (sic)

{¶ 6} In their brief, appellants assert the assignments of error set forth above followed by one section on "Law and Argument." The law and argument section is essentially a general discussion as to the default judgment without reference to any of the specific assignments of error. Appellants also assert that because they are laypersons they should not be required to have "intricate knowledge of the civil rules." As to that argument, we note that pro se litigants are bound by the same rules and procedures as

litigants who retain counsel. *Meyers v. First Natl. Bank of Cincinnati*, 3 Ohio App.3d 209, 210, 444 N.E.2d 412 (1st Dist.1981); *Kenwood Gardens Ass'n, LLC v. Shorter*, 6th Dist. Lucas No. L-10-1315, 2011-Ohio-4135. This court has made some allowances for pro se litigants, within limits, but it is not required to craft well-articulated claims from poorly drafted arguments. *Shorter*, *supra*, citing *Karmasu v. Tate*, 83 Ohio App.3d 199, 206, 614 N.E.2d 827 (4th Dist.1992). We have carefully reviewed and considered appellants' pro se brief and find it to be to a large extent undecipherable, containing random legal conclusions and references to inapplicable case law. Nevertheless, we choose not to dispose of appellants' appeal on that basis. Instead, we will address the trial court's decision as it relates to appellants' basic argument, which appears to be that the trial court should not have granted the default judgment against them and, further, erred by not granting their motion to vacate.

{¶ 7} As to their primary argument, we have reviewed the record in this matter and find that the trial court did not err by granting default judgment. While a pro se litigant may be afforded reasonable leeway to the extent that his or her motions and pleadings should be liberally construed, such a litigant may not be given any greater rights than a represented party and must bear the consequences of his or her mistakes. *Sherlock v. Myers*, 9th Dist. Summit No. 22071, 2004-Ohio-5178, ¶ 3. Creating exceptions to the rules for pro se litigants would lead to the demise of the civil rules altogether. *Miller v. Lint*, 62 Ohio St.2d 209, 214, 404 N.E.2d 752 (1980). The record reflects that appellants did not file an answer to the complaint in foreclosure filed by

appellee, despite timely and undisputed personal service on August 6, 2011. Appellants failed to make any appearance in the foreclosure case before the default motion was filed and granted.

{¶ 8} Appellee moved for default judgment pursuant to Civ.R. 55 on September 19, 2011. Among other documents, the motion for default judgment contained an affidavit from a contract management coordinator for appellee's loan servicer who attested, among other things, that he was in possession of the original note and its accompanying mortgage, copies of which had been filed with the complaint. He further swore that appellants were in default and their debt had been accelerated as permitted in the note and mortgage. We note that appellants did not file a response to the motion for default judgment and it was granted on September 23, 2011. The record further reflects that appellants did not file a direct appeal from that judgment. Appellants' arguments as to the granting of the default judgment are without merit.

{¶ 9} Appellants further assert that the trial court erred by denying their motion to vacate the default judgment. Civ.R. 55(B) provides that a default judgment, like any other judgment, may be vacated or set aside under the provisions of Civ.R. 60(B). We find, however, based on our review of the record, that the trial court correctly denied appellants' motion.

{¶ 10} In order to prevail on a motion 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)-(5); and the motion is made within a reasonable time. *GTE Automatic Elec. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976). If any of the three requirements 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), citing *Svoboda v. Brunswick*, 6 Ohio St.3d 348, 351, 453 N.E.2d 648 (1983).

{¶ 11} Appellants argue that they have submitted several meritorious defenses. First, they argue that there is "no evidence that Defendants was (sic) a judgment debtor to HSBC BANK USA N.A." However, the record indicates that at the time of the filing of the complaint, July 29, 2011, appellee submitted evidence that the original loan had been assigned to HSBC on September 8, 2008. Thus, appellee presented evidence that it was the proper party to bring the complaint. The court acquired jurisdiction since the mortgage lender established an interest in the mortgage and note prior to the filing of the complaint. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 28.

{¶ 12} Secondly, appellants argue that appellee submitted "sham affidavits in bad faith." The record establishes that an affidavit of James English was submitted. Mr. English was the contract coordinator for HSBC's loan servicer, Ocwen Loan Servicing, LLC, and his affidavit was taken under oath and with personal knowledge that HSBC was in possession of the original note. A characterization that the affidavit was a "sham" is not a presentation of a meritorious defense.

{¶ 13} Thirdly, appellants place great emphasis on R.C. 2329.191 in arguing that the court failed to acquire jurisdiction in this case. Specifically, they note that the preliminary judicial report that was filed with the complaint was "effective June 16, 2011" and the complaint was filed July 29, 2011. Hence, they argue, since the complaint was filed beyond 30 days, the court cannot acquire jurisdiction. However, R.C. 2329.191(B) simply requires that the preliminary report "be effective within thirty days prior to the filing of the complaint or other pleading requesting a judicial sale." Thus, the effective date of the preliminary report is not confined to the filing of the complaint but rather to any pleading requesting judicial sale. Appellants fail to articulate how compliance or non-compliance with R.C. 2329.191(B) denies the court jurisdiction over the complaint.

{¶ 14} Finally, appellants argue that they "were not given notification of Default Judgment prior to entry of 9/19/11." However, the record reflects that they were served notice of the complaint on August 6, 2011, and failed to respond to the complaint.

{¶ 15} Thus, appellants have failed to plead any operative facts that would present a meritorious defense to the complaint.

{¶ 16} An appeal from the denial of a 60(B) motion is reviewed pursuant to an abuse of discretion standard. *Fifth Third Mtge. Co. v. Whittington*, 6th Dist. Lucas No. L-13-1010, 2013-Ohio-2815, ¶ 7-8. 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.

Pursuant to Civ.R. 60(B)(1), appellants would have to show mistake, inadvertence, surprise or excusable neglect, with excusable neglect being the one basis they could argue, although such a claim is not clearly set forth in their brief. If a movant claims excusable neglect, he or she bears the burden of proof. Neglect is not excusable "if the party could have prevented the circumstances from occurring." *Vanest v. Pillsbury Co.*, 124 Ohio App.3d 525, 536, 706 N.E.2d 825 (4th Dist.1997).

{¶ 17} As we emphasized above, litigants who choose to proceed pro se are presumed to know the law and correct procedure, held to the same standard as other litigants, and bound to the same rules as those litigants who retain counsel. Accordingly, Ohio courts have consistently held that "the failure to forward a complaint to an attorney or retain legal assistance after being served with a complaint does not constitute excusable neglect." *Mid Ohio Sec. v. Wolfe*, 9th Dist. Summit No. 21511, 2003-Ohio-5787, ¶ 11. Pursuant to Civ.R. 8, 12(A) and 13, appellants were required to file an answer to appellee's complaint within 28 days after service of the summons and complaint upon them, asserting any claims or defenses related to this matter at that time. Instead, appellants failed to file an answer, failed to respond to the motion for default judgment, and filed their Civ.R. 60(B) motion nine months later. It is "only where the failure to respond is coupled with a complete lack of notice of the original motion * * * that excusable neglect [may] lie." *Zimmerman v. Rourke*, 9th Dist. Lorain No. 04CA008472, 2004-Ohio-6075, ¶ 9.

{¶ 18} Appellants offer no explanation or justification for failing to file an answer, retain counsel, enter an appearance or assert any claims or defenses. Further, appellants failed to file a motion for extension of time to answer or plead prior to judgment. Finally, appellants do not assert that they did not receive the complaint or that they lacked notice of its filing. Accordingly, appellants have not proven the defense of excusable neglect.

{¶ 19} As to the remaining provisions of Civ.R. 60(B), appellants have not shown that they uncovered newly discovered evidence under Civ.R. 60(B)(2), or the existence of fraud, misrepresentation or other misconduct on the part of appellee under Civ.R. 60(B)(3). Additionally, it is clear that the judgment was not satisfied, thereby eliminating an argument based on Civ.R. 60(B)(4). Finally, appellants have not set forth "any other reason justifying relief from judgment" pursuant to Civ.R. 60(B)(5). Therefore, the trial court did not err by denying appellants' Civ.R. 60(B) motion and this argument is without merit.

{¶ 20} After careful review of the record and evidence presented before the trial court, we find substantial justice has been done. Appellants failed to answer the complaint. The record contains no evidence that the trial court erred by granting default judgment or denying appellants' motion for injunctive relief and motion to vacate. Accordingly, appellants' first, second and third assignments of error are found not well-taken.

{¶ 21} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellants 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, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE