

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

Nationstar Mortgage, LLC

Court of Appeals No. OT-14-007

Appellant

Trial Court No. 12CV641E

v.

Kimberly Miller, et al.

DECISION AND JUDGMENT

Appellee

Decided: May 1, 2015

* * * * *

Matthew J. Richardson and Andrew C. Clark, for appellant.

Daniel L. McGookey and Kathryn M. Eyster, for appellee.

* * * * *

JENSEN, J.

{¶ 1} Plaintiff-appellant, Nationstar Mortgage, LLC, appeals the January 31, 2014 judgment of the Ottawa County Court of Common Pleas granting defendant-appellee Miller’s motion for relief from judgment. For the reasons that follow, we reverse the trial court’s decision and reinstate the foreclosure judgment in favor of Nationstar.

I. Background

{¶ 2} On November 1, 2007, Kimberly Miller executed a note and mortgage in favor of Nationstar in connection with her purchase of a home located at 2841 South Amherst Road in Port Clinton, Ohio. She executed a loan modification agreement on October 20, 2010. In April of 2012, Miller defaulted on the loan. Nationstar filed a residential foreclosure action against Miller in the Ottawa County Court of Common Pleas on December 21, 2012, requesting that the property securing the note be sold and that the amount due to it—\$363,073.07—be paid from the proceeds of the sale. Miller failed to answer, and on May 22, 2013, Nationstar moved for default judgment. The trial court granted the motion and entered judgment in favor of Nationstar on June 27, 2013.

{¶ 3} On July 12, 2013, Nationstar filed a praecipe for order of sale, and on August 2, 2013, it filed a notice of sale. The property was scheduled to be sold on August 30, 2013.

{¶ 4} On August 23, 2013, Miller filed a motion to stay the judicial sale of the property, alleging that she never received a copy of the complaint. She attached to her motion an affidavit attesting that she had never been served with copies of the summons and complaint. Nationstar opposed the motion and recited its efforts at obtaining proper service. It detailed that in accordance with Civ.R. 4.1(A)(1)(a), a copy of the complaint and summons were sent to the South Amherst address on December 28, 2012, and was returned “unclaimed” with a notation that Miller’s new address was a P.O. Box in Port Clinton. Nationstar reissued service via certified mail to Miller’s P.O. Box on

February 26, 2013, but it too was returned as “unclaimed.” Nationstar then attempted to serve Miller by private process under Civ.R. 4.1(B), but it was unsuccessful. It instructed the clerk to issue service under Civ.R. 4.6(D) by ordinary mail to both the South Amherst address and the P.O. Box. The ordinary mail service to the South Amherst address was returned and marked unable to forward, however, the service to the P.O. Box was not returned.

{¶ 5} The court conducted a telephonic evidentiary hearing on Miller’s motion on August 28, 2013, on the issue of whether Miller was properly served. At the hearing, Miller testified that she never received a copy of the summons or complaint. She said that she learned that her property was being sold when the person renting the South Amherst home delivered a sealed envelope containing the sheriff’s notice of the sale to one of Miller’s friends who, in turn, gave it to Miller. Miller was residing in Columbus at the time. She also explained that she paid for the use of the P.O. Box beginning in October of 2012, but because she pre-paid for only six months’ use of the box, the post office issued it to someone else when that period expired.

{¶ 6} On the same day as the hearing, the trial court denied Miller’s motion to stay. It found that based upon “the pleadings, evidence and arguments of counsel defendant Miller was served by regular mail service on April 12, 2013 and said mail was not returned to the Clerk of Courts. Further, said service was reasonably calculated to reach defendant Miller.”

{¶ 7} The following day, Miller filed a combined motion to stay sale and motion for relief from judgment. The sheriff's sale nevertheless went forward on August 30, 2013, and Nationstar purchased the property. Miller filed a motion to stay execution of the sale on September 9, 2013, but the trial court entered an order confirming the sale on September 19, 2013. Two nunc pro tunc entries were filed on October 8 and 21, 2013, correcting the distribution of proceeds. The sheriff's deed was recorded on October 24, 2013.

{¶ 8} Miller filed a notice of appeal on November 21, 2013 with respect to the October 21, 2013 judgment. We dismissed Miller's appeal on December 13, 2013, as untimely. After we dismissed the appeal, Miller filed a request in the trial court, asking that the court rule on her motion to vacate judgment. The trial court conducted an evidentiary hearing on October 31, 2013, on Miller's motion.

{¶ 9} At the hearing, Miller called Gina Rowland to testify. Rowland was the friend who delivered to Miller the envelope containing the notice of sale that Miller's tenant received at her address. Rowland testified that Miller was shocked when she opened the envelope and discovered that judgment had been entered against her and that her house was being sold. Miller asked Rowland, an attorney, how this could happen. Rowland asked her if she ever received a complaint, and Miller responded that she had not.

{¶ 10} Miller also testified. She too described that she opened the letter in front of Rowland and that it was the first she had heard of the pending action. She also provided

additional testimony about the P.O. Box she had been using. She said that she rented the box for six months and paid with her debit card. After six months, she believed that the post office would automatically charge her account for continued use of the box, but this was not what happened. Instead, after her rental expired—on March 11, 2013—the post office issued the P.O. Box to someone else. Miller maintained that she never received the summons and complaint, however, she conceded that she went a period of months without ever checking the box. She explained that she was too busy with work in Columbus to return to Port Clinton to retrieve her mail.

{¶ 11} The trial court granted Miller’s motion for relief from judgment on January 31, 2014. It found that Miller’s affidavit and testimony at the hearing established that she never received a copy of the summons and complaint. Nationstar appealed the January 31, 2014 judgment, and assigns the following errors for our review:

A. The trial court committed reversible error by permitting Miller to relitigate an issue that the trial court had previously adjudicated against her, after the prior adjudication of the issue had become final and appealable, and after Miller failed to appeal the issue.

B. The trial court committed reversible error by vacating judgment based on Rafalski v. Oats because Rafalski is not the law Ohio [sic], nor of this district, and Miller did not rebut the presumption of proper service.

C. The trial court abused its discretion by granting relief from judgment under Civ.R. 60(B) where Miller failed to satisfy the three GTE requirements and improperly used her motion as a substitute for timely appeal.

II. Law and Analysis

{¶ 12} In its first assignment of error, Nationstar claims that following the court’s denial of Miller’s motion to stay, she was barred by the doctrine of res judicata from further litigating the issue of service. It argues that the deadline to appeal the trial court’s prior decision finding effective service passed and Miller’s Civ.R. 60(B) motion was merely an improper attempt to circumvent that issue. Miller does not address this argument in her brief.

{¶ 13} “Under the doctrine of res judicata, a party cannot litigate an issue that was previously fully litigated between the parties and determined in a final judgment on the merits by a court of competent jurisdiction.” *Sharp v. Brennan*, 6th Dist. Erie No. E-00-008, 2000 WL 1232394, *4 (Sept. 1, 2000), citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382, 653 N.E.2d 226 (1995). We employ a de novo standard of review when determining whether the doctrine of res judicata is applicable. *Id.*

{¶ 14} Here, Miller filed a motion, styled as a motion to stay, raising the issue of failure of service and the trial court conducted a hearing at which Miller testified. It denied Miller’s motion. Nevertheless, Miller filed a Civ.R. 60(B) motion the following day. Instead of ruling on this motion, the trial court entered three orders—one

confirming the sale and two correcting the distribution of proceeds. The last of those orders was entered on October 21, 2014, however, Miller filed her notice of appeal on November 21, 2013—after the App.R. 4 deadline for doing so. Upon our dismissal of Miller’s untimely appeal, Miller requested that the trial court rule on the motion to vacate.

{¶ 15} “It is well established that a Civ.R. 60(B) motion cannot be used as a substitute for an appeal and that the doctrine of res judicata applies to such a motion.” *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 16, citing *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, 846 N.E.2d 43, ¶ 8–9. Moreover, the movant may not rely on arguments he or she lost under the judgment to justify relief from that judgment; he or she must allege new grounds for Civ.R. 60(B) relief. *Elyria Twp. Bd. of Trustees v. Kerstetter*, 91 Ohio App.3d 599, 602, 632 N.E.2d 1376 (9th Dist.1993), citing *State ex rel. Elyria v. Trubey*, 24 Ohio App.3d 44, 48, 493 N.E.2d 254 (9th Dist.1983). In *Kuchta*, for instance, the Supreme Court of Ohio held that res judicata prevented the appellants from arguing lack of standing as entitlement to relief under Civ.R. 60(B) where they could have, and did in fact, raise the issue earlier in the litigation. *Id.* at ¶ 15-16.

{¶ 16} Here, too, Miller’s motion to vacate was simply a reiteration of her previous motion to stay,¹ which the trial court denied. We find that Miller’s sole remedy in this case was to file a direct appeal following entry of the final judgment. Miller failed to file a timely appeal leading to the dismissal of her appeal. She cannot circumvent this outcome through a Civ.R. 60(B) motion.

{¶ 17} We find Nationstar’s first assignment of error well-taken. In light of this conclusion, we need not reach its remaining assignments of error.

IV. Conclusion

{¶ 18} We find Nationstar’s first assignment of error well-taken. We reverse the January 31, 2014 judgment of the Ottawa County Court of Common Pleas granting Miller’s motion for relief from judgment, and the June 27, 2013 judgment of foreclosure is reinstated. Appellee Miller is ordered to pay the costs of this appeal under App.R. 24.

Judgment reversed.

¹ We acknowledge that Miller offered additional testimony and exhibits to bolster her previous testimony. This evidence could have been presented in support of her initial motion to stay.

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

Thomas J. Osowik, J.

JUDGE

James D. Jensen, 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:
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