[Cite as *U.S. Bank, N.A. v. Metzger*, 2015-Ohio-839.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

U.S. BANK NA, TRUSTEE FOR GSAA HOME EQUITY TRUST 2006-1 PLAINTIFF-APPELLEE	)	CASE NO. 14 MA 63
VS.	)	OPINION
CHARLES METZGER, JR., et al DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 08CV1691

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: March 3, 2015

ROBB, J.

{¶1} Defendant-Appellant Charles Metzger ("Appellant") appeals the decision of the Mahoning County Common Pleas Court denying his motion to vacate a foreclosure judgment in favor of plaintiff-appellee U.S. Bank National Association as Trustee for GSAA Home Equity Trust 2006-1 ("the Bank"). Appellant initially contends that the foreclosure judgment was void because the Bank lacked standing. Yet, this court has ruled and the Supreme Court has recently confirmed in *Kuchta* that the type of "jurisdiction" at issue when standing is lacking is not that which renders a judgment void.

{¶2} In the alternative, Appellant argues that the trial court should have granted him relief from judgment under Civ.R. 60(B)(5), which deals with fraud upon the court and any other reason justifying relief from judgment. He sets forth three arguments in support: the Bank lacked standing because the note attached to the complaint was not indorsed; the assignment of mortgage to the Bank violated a pooling and servicing agreement; and the Bank may not have sent notice of acceleration as appellant did not receive such notice.

{¶3} However, we conclude that the trial court did not abuse its discretion in denying the motion for Civ.R. 60(B) relief filed 3.75 years after the foreclosure judgment. This court finds that the motion was not filed within a reasonable time under the circumstances of this case. Accordingly, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶4} On April 23, 2008, the Bank filed a complaint against Appellant seeking to collect on a note and foreclose on a mortgage due to an unpaid balance of $149,962.31 plus interest from December 1, 2007. The note, mortgage, and assignment of mortgage were attached to the complaint. The October 2005 note was payable to Countrywide Home Loans, Inc. ("Countrywide") as the lender and contained no indorsement to another party.

{¶5} The mortgage stated that Countrywide was the lender owed money under the note and that Mortgage Electronic Registration Systems, Inc. ("MERS") was the nominee for Countrywide, its successors and assigns. MERS was the mortgagee under the security instrument and had the right to exercise interests in the security instrument, including the right to foreclose. The assignment of mortgage to the Bank, executed on April 21, 2008 by MERS as nominee for Countrywide, stated that MERS was transferring all of its rights in the mortgage together with the promissory note described therein and all money due and to become due thereon and all rights accrued to the mortgagee.

{¶6} Appellant did not file an answer or appear, although he was served by a special process server on May 19, 2008. The Bank sought default judgment, which was granted on August 8, 2008. Various orders of sale were sought and withdrawn by the Bank. The first sale was withdrawn after Appellant filed for bankruptcy on October 20, 2008. The bankruptcy court thereafter granted the Bank's "Motion for Relief from Stay and Abandonment," noting that no response to the Bank's motion had been filed by Appellant, his counsel, or the trustee. In January of 2009, the Bank filed the bankruptcy order in the present case in order to reactivate the docket. A sale was set for the fall of 2009 but then withdrawn. Another sale was set in 2010 but withdrawn on September 9, 2010 in order to ascertain eligibility for loan modification.

{¶7} It was not until after the Bank's May 7, 2012 notice of sale that Appellant made his first appearance in the case. He filed a motion to vacate the foreclosure judgment on May 16, 2012. As a threshold issue, he alleged that the Bank lacked standing and thus the court lacked subject matter jurisdiction based upon his assertion that the Bank was not entitled to enforce the note. This argument was based upon his observation that the note attached to the complaint was payable to Countrywide and was not indorsed to another party.

{¶8} Appellant alternatively asked the court to vacate the judgment under Civ.R. 60(B)(5) based upon fraud upon the court or any other reason justifying relief. As to the alleged fraud upon the court, Appellant complained that the Bank's counsel

represented in the complaint that the Bank was the holder of the note and counsel had the mortgage assignment executed on April 21, 2008, when the pooling and servicing agreement for GSAA Home Equity Trust 2006-1 had a closing date of January 27, 2006. The trust agreement, printed from the government's website, was submitted as an exhibit at the 60(B) hearing.

{¶9} As to "any other reason justifying relief," Appellant asserted that the Bank failed to comply with a condition precedent to foreclosure by not providing notice of acceleration. Appellant filed an affidavit stating that he did not recall receiving the required acceleration notice. At the 60(B) hearing, he testified that he did not recall receiving the notice and also that he did not receive the notice. (Tr. 19, 21). On the topic of timeliness, the motion generally stated that the request was timely filed after Appellant discovered these issues.

{¶10} The Bank responded that it was entitled to enforce the note. It urged that an assignment of mortgage was sufficient to transfer the note as the record shows the parties intended to transfer both. The Bank stated that Appellant lacked standing to challenge the mortgage assignment as he was neither a party to nor a third-party beneficiary of the pooling and servicing agreement. In addition, the Bank argued that proof of notice of acceleration is not required in order to receive default judgment and the debtor was required to raise this issue in the action to preserve it.

{¶11} The Bank emphasized that (B)(5) is for use only in extraordinary circumstances and only when one of the more specific grounds does not apply. The Bank also insisted that the motion was not timely filed, stating that the allegations were apparent at the time the foreclosure action was filed. The Bank pointed out that Appellant specified no reason for waiting 3.75 years after default judgment was entered and more than four years since the foreclosure action was filed.

{¶12} In reply, Appellant stated that language in the mortgage assignment purporting to transfer the note with the mortgage was insufficient to negotiate the note, urging that a note payable to another must be indorsed to the Bank or indorsed in blank in order for the Bank to be a holder. Appellant additionally argued that he can raise an invalid assignment to defeat the Bank's claim of ownership. He also

surmised that if a notice of acceleration existed, the Bank would have attached it to its response. As to timeliness, he replied that the Bank's complaint and attachments made it not readily apparent to him that he could construct a defense.

{¶13} On April 7, 2014, the magistrate denied Appellant's motion to vacate the foreclosure judgment. Appellant filed timely objections to the magistrate's decision, raising in relevant part the void judgment argument and the three aforementioned Civ.R. 60(B)(5) arguments. On May 15, 2014, the trial court overruled the objections, adopted the magistrate's decision, and entered judgment denying the motion to vacate the judgment decree of foreclosure. Appellant filed a timely notice of appeal from that decision. He sets forth two assignments of error on appeal.

ASSIGNMENT OF ERROR NUMBER ONE

Appellant's first assignment of error contends:

"THE TRIAL COURT ERRED BY NOT VACATING THE JUDGMENT FOR LACK OF JURISDICTION."

{¶14} A court has inherent authority to vacate a void judgment. *See Westmoreland v. Valley Homes Mut. Hsg. Corp.*, 42 Ohio St.2d 291, 294, 328 N.E.2d 406 (1975), citing Staff Note to Civ.R. 60(B) (1970) ("Any court has inherent power to vacate a void judgment without the vacation being subject to a time limitation. * * * In effect then, Civ.R. 60(B) deals with vacation of voidable judgments."). A motion for relief from a void judgment is often used by a defendant who did not timely appeal the default judgment but wishes to have that judgment declared void later without resorting to the requirements of Civ.R. 60(B). *See Hayes v. A. Bonamase Contracting, Inc.*, 7th Dist. Nos. 12MA62, 12MA161, 2013-Ohio-5383, ¶ 17.

{¶15} In *Schwartzwald*, the Bank filed the foreclosure action before it obtained "an assignment of the promissory note and mortgage." *Federal Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶2. The debtors argued to the trial court that the Bank lacked standing to sue, but the trial court and the appellate court disagreed with the debtor's position, essentially

finding that the lack of standing could be cured by transfer of the loan documents after suit was filed.

{¶16} The Ohio Supreme Court ruled, however, that standing was required in order to invoke the jurisdiction of the common pleas court. *Id.* at ¶ 24. A lack of standing is thus determined as of the time the complaint was filed and cannot be cured by a later assignment of a claim. *Id.* at ¶ 24, 39. The Court ruled that because the Bank "failed to establish an interest in the note or mortgage at the time it filed suit, it had no standing to invoke the jurisdiction of the common pleas court." *Id.* at ¶28.

{¶17} Appellant believes the *Schwartzwald* holding supports his argument that a lack of standing is the type of jurisdictional defect that can be raised at any time. He asserts that the judgment in such a case is void ab initio rather than voidable.

{¶18} As the Bank points out, this court has previously ruled that a lack of standing does not make a judgment void. *Bank of Am. N.A. v. Miller*, 7th Dist. No. 13CA894, 2014-Ohio-2932, ¶ 25-33 (holding post-*Schwartzwald* that a lack of standing to initiate a foreclosure action does not render the judgment void), citing *Deutsche Bank Natl. Trust Co. v. Finney*, 10th Dist. Nos. 13AP-198, 13AP373, 2013-Ohio-4884 (default judgment not void for lack of standing). *See also CitiMortgage, Inc. v. Fishel*, 7th Dist. No. 11MA97, 2012-Ohio-4117, ¶ 6 (holding pre-*Schwartzwald* that "a lack of standing to initiate a foreclosure action does not raise a question of subject matter jurisdiction and does not void an otherwise valid judgment.").

{¶19} The Supreme Court has recently confirmed these holdings in *Bank of America, N.A. v. Kuchta*, 141 Ohio St. 3d 75, 2014-Ohio-4275, 21 N.E.3d 1040. In that case, the assignment document transferring the note and mortgage was not signed until after the complaint was filed. *Id.* at ¶ 2-3. The debtor raised the issue to the trial court but did not appeal and then sought relief from judgment, arguing the judgment was a void judgment or it was voidable for fraud under Civ.R. 60(B)(3).

{¶20} In disposing of the void judgment argument, the Supreme Court reiterated that the term "jurisdiction" can be used to speak of: (1) subject matter jurisdiction, (2) personal jurisdiction, or (3) jurisdiction over a particular case. *Id.* at ¶

18, citing *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11-12. In *Pratts*, the Court had explained that the third category of jurisdiction "encompasses the trial court's authority to determine a specific case within that class of cases that is within its subject matter jurisdiction." *Pratts*, 102 Ohio St.3d 81 at ¶ 12. Moreover, "lack of jurisdiction over the particular case merely renders the judgment voidable." *Id.*

{¶21} "A court's subject-matter jurisdiction is determined without regard to the rights of the individual parties involved in a particular case." *Kuchta*, 141 Ohio St.3d 75 at ¶ 19. The *Kuchta* Court pointed out that a foreclosure action is within the common pleas court's subject matter jurisdiction and concluded that a lack of standing would not eliminate subject matter jurisdiction or cause a foreclosure judgment to be void ab initio. *Id.* at ¶ 20, 22-24. Thus, Appellant's first assignment of error is overruled.

{¶22} As Appellant cannot use a motion to vacate a void judgment to contest standing, he alternatively seeks to utilize the procedure for vacating a voidable judgment under Civ.R. 60(B). Appellant raises the three aforementioned disputes involving the unendorsed note, the assignment said to be in violation of a pooling and servicing agreement that governs the trust, and notice of acceleration.

ASSIGNMENT OF ERROR NUMBER TWO

{¶23} Appellant's second assignment of error provides:

{¶24} "THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT CHARLES METZGER'S 60(B) MOTION TO VACATE."

{¶25} Pursuant to Civ.R. 55(B), a court may set aside a default judgment in accordance with Civ.R. 60(B), which provides for a motion for relief from a final judgment. A trial court's ruling on a Civ.R. 60(B) motion is reviewed only for an abuse of discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987).

{¶26} A party may seek relief from judgment on grounds of: (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; (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. Civ.R. 60(B). The motion must be made within a reasonable time, with a maximum time limit of one year for the first three grounds. Civ.R. 60(B).

{¶27} To prevail on such a motion, the movant must demonstrate: (1) that there is a meritorious defense or claim to present if relief is granted; (2) entitlement to relief under one of the five grounds; and (3) that the motion was timely. *GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 150, 351 N.E.2d 113 (1976). Each of these three requirements is mandatory. *Id.* at 151.

{¶28} On the first element of the *GTE* test, the movant need only allege a meritorious defense and need not prove that he will prevail on that defense. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1998). Appellant's alleged merit defenses are: the Bank was not entitled to enforce the note; the assignment of mortgage was made in violation of a pooling and servicing agreement; and he was not provided notice of acceleration prior to the 2008 foreclosure action.

{¶29} On the second element of the *GTE* test, Appellant proceeds under Civ.R. 60(B)(5), any other reason justifying relief from judgment. This is a catch-all provision providing the court with the ability to relieve a person from the unjust operation of a judgment. *Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64, 448 N.E.2d 1365 (1983), ¶ 1 of syllabus. However, it is not to be used as a substitute for any of the other more specific provisions of the rule. *Id.* Moreover, the grounds for invoking Civ.R. 60(B)(5) should be substantial. *Id.* at ¶ 2 of syllabus. Fraud upon the court has been placed into this category and may exist when an officer of the court, such as an attorney, actively participates in defrauding the court. *See Coulson v. Coulson*, 5 Ohio St.3d 12, 15, 448 N.E.2d 809 (1983).

{¶30} Notably, the grounds for relief asserted by Appellant are the same as his merit defenses. He urges that the Bank failed to provide notice of acceleration justifying relief from judgment under (B)(5). He also raises fraud upon the court,

claiming that the Bank's attorney called the Bank a "holder" in the complaint even though it appeared the Bank did not meet the statutory definition of a "holder" and the Bank's attorney drafted the assignment of mortgage just prior to filing the complaint knowing it was (allegedly) too late under the trust.

{¶31} Essentially, Appellant is claiming that if a debtor later becomes informed that he may have been able to assert certain defenses in the foreclosure action that should have been apparent but were unknown to the debtor at the time it was filed, he can ask to have the foreclosure judgment vacated after someone educates him on the popular prevailing foreclosure defenses. But, all of the issues he raises were in existence at the time the complaint was filed. Importantly, the claim as to the unendorsed note was apparent on the face of the complaint. The alleged 2008 violation of the pooling and servicing agreement occurred by the assignment of mortgage after a 2006 trust closing date, which assignment was attached to the complaint. This assignment incorporated into the complaint purported to transfer both the mortgage *and the note*, making that issue evident. And, at the time the action was filed, a defense as to any failure to send notice of acceleration would have been apparent as well.

{¶32} In *Kuchta*, after arguing that a lack of standing rendered a judgment void, the debtors alternatively proceeded under Civ.R. 60(B)(3), which deals with fraud, misrepresentation, or other misconduct. The debtors urged that the bank fraudulently claimed to be the holder of the note and owner of the mortgage at the time the complaint was filed. The Supreme Court found that this was not a proper ground for relief because the bank's alleged lack of standing did not prevent the Kuchtas from appearing and presenting a full defense, including the defense of lack of standing. *Kuchta*, 141 Ohio St. 3d 75 at ¶ 14.

{¶33} The Court explained: "the fraud, misrepresentation, or other misconduct contemplated by Civ.R. 60(B)(3) refers to deceit or other unconscionable conduct committed by a party to obtain a judgment and does not refer to conduct that would have been a defense to or claim in the case itself." *Id.* at ¶ 13, adopting the position in *PNC Bank, N.A. v. Botts*, 10th Dist. No. 12AP-256, 2012-Ohio-5383

(which was the case certified to be in conflict with the Ninth District's *Kuchta* case) and *GMAC Mtge., L.L.C. v. Herring*, 189 Ohio App.3d 200, 2010-Ohio-3650, 937 N.E.2d 1077 (2d Dist.). The Court added that the matter was res judicata as the debtors raised standing in an answer but did not participate in the summary judgment process and did not appeal from the foreclosure judgment. *Kuchta*, 141 Ohio St. 3d 75 at ¶ 15.

{¶34} We need not address whether this portion of the *Kuchta* holding extends to the Civ.R. 60(B)(5) situation presented by Appellant. The timeliness of the Civ.R. 60(B) motion was not at issue in *Kuchta*.

{¶35} As to timeliness, Appellant's motion merely stated that a motion filed under Civ.R. 60(B)(5) is not subject to the one-year time period and that he moved to vacate after he discovered the fraud upon the court. His affidavit mentioned nothing as to timeliness. His reply below stated that the bank's complaint and attachments made it not readily-apparent that he could construct a defense. On this subject, his merit brief on appeal states only that the Civ.R. 60(B)(5) motion was not subject to the one-year time period and was timely filed.

{¶36} His reply brief, which is not the place for raising new arguments, claims that the motion was made within a reasonable time after faulty securitization became public, without specifying how this made his May of 2012 motion timely. His reply also points to his testimony at the Civ.R. 60(B) hearing that he sought loan modification in March of 2012. It is then suggested that he did not file the motion at that time because he hoped he could get his house out of foreclosure, concluding that the motion was filed soon after the Bank sought the latest sale (which prompted him to realize that the modification was not going to work). Even if he had argued this to the trial court (or on appeal prior to the reply brief), a hope of post-judgment settlement in 2012 does not stay a 60(B) clock that started running in mid-2008; nor does it erase the prior delay.

{¶37} The Bank urges us to recast Appellant's claims as grounds for relief only under Civ.R. 60(B)(3) (fraud, misrepresentation, or misconduct by and adverse party), which would be subject to the one-year maximum time limit). Appellant

accuses the Bank's attorney of participating in that fraud in an attempt to remove the allegation from the one-year time limit of Civ.R. 60(B)(3) (fraud, misrepresentation, or misconduct by an adverse party). *See Coulson*, 5 Ohio St.3d at 15 (fraud upon the court occurs when an officer of the court such as an attorney actively participates in defrauding the court). *See also See LaSalle National Bank Assn. v. Smith*, 7th Dist. No. 11MA85, 2012-Ohio-4040, ¶ 37 (applying (B)(5) due to the allegation that the attorney participated in the fraud upon the court by stating the bank was the note holder and by violating a pooling and servicing agreement).

{¶38} On this topic, the notice of acceleration defense did not involve an allegation of fraud upon the court, and Appellant did not establish that this defense constituted a substantial reason as required when using Civ.R. 60(B)(5). *See Caruso-Ciresi*, 5 Ohio St.3d 64 at ¶ 2 of syllabus. The mere failure to realize that one had this defense to a foreclosure action would, at most, appear to be neglect of one's own affairs. Excusable neglect falls under Civ.R. 60(B)(1), which is subject to the one-year time limit. When a more specific ground applies, the (B)(5) catch-all cannot be used to avoid that time limit. *Caruso-Ciresi*, 5 Ohio St.3d 64 at ¶ 1 of syllabus. In any event, the motion was untimely under Civ.R. 60(B)(5).

{¶39} Assuming arguendo Appellant was permitted to proceed under Civ.R. 60(B)(5) for the two claims of fraud upon the court (and even the additional claim of lacking notice), the trial court used its discretion to rationally conclude that the motion was not filed within a reasonable time as required by the rule. The motion was filed 3.75 years after the foreclosure judgment. Appellant admitted that he received the complaint and summons and other court filings in the case. He waited four years after being served with the foreclosure complaint to voice his defenses.

{¶40} As aforestated, the defenses were evident at the time the complaint was filed. Some were evident on the face of the complaint. In addition, Appellant filed for bankruptcy in the fall of 2008 and did not object to the Bank being released from the bankruptcy stay in 2009 in order to proceed on its judgment in this case. Merely because the property had not yet been sold did not make his motion timely.

See LaSalle, 7th Dist. No. 11MA85 at ¶ 39 (stays of the sale in a foreclosure action did not prevent the filing of a motion to vacate).

{¶41} In our *LaSalle* case, a debtor filed a Civ.R. 60(B)(5) motion for relief from judgment 4.25 years after the foreclosure judgment. The debtor claimed the bank and its attorney fraudulently stated that the bank was the holder of the note. An argument on the pooling and servicing trust agreement was raised as well. That debtor argued that he was unaware of the trust issue until a 2010 report of Congress was released; Appellant cites that document as well (although not really on the matter of timeliness). That debtor filed his motion a year closer in time to the release of that report than Appellant's motion. This court concluded that the delay in filing the motion to vacate was unreasonable and that the trial court did not abuse its discretion in denying the debtor's motion. *LaSalle*, 7th Dist. No. 11MA85 at ¶ 39, 43.

{¶42} In another case, the debtor alleged the bank lacked standing and asserted fraud upon the court due to the bank's claim that it was entitled to enforce in the complaint. *CitiMortgage, Inc. v. Fishel*, 7th Dist. No. 11MA97, 2012-Ohio-4117. This court ruled that a motion to vacate filed eighteen months after the entry of default judgment was unreasonable in that case. *Id.* at ¶ 14 (even if the matter could proceed under (B)(5) as opposed to (B)(3), which we believed would have been the more appropriate division).

{¶43} Similarly, the trial court was within its discretion to find the 3.75 year delay unreasonable under the facts of this case. In accordance, Appellant's second assignment of error is overruled. The trial court's judgment denying Appellant's motion to vacate the foreclosure judgment is hereby affirmed.

Donofrio, P.J., concurs.

Waite, J., concurs.