

[Cite as *Wells Fargo Bank v. Herbert*, 2007-Ohio-6204.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89946

WELLS FARGO BANK

PLAINTIFF-APPELLANT

VS.

BRIAN HERBERT, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-564255

BEFORE: Kilbane, J., Celebrezze, A.J., and Rocco, J.

RELEASED: November 21, 2007

JOURNALIZED:

[Cite as *Wells Fargo Bank v. Herbert*, 2007-Ohio-6204.]

ATTORNEYS FOR APPELLANT

Michael E. Finucane
Daniel A. Cox
Reisenfeld & Associates
2035 Reading Road
Cincinnati, Ohio 45202

PRO SE APPELLEES

Brian Herbert
Paula Herbert, aka Doksa
191 Maplelawn
Berea, Ohio 44017

[Cite as *Wells Fargo Bank v. Herbert*, 2007-Ohio-6204.]

MARY EILEEN KILBANE, J.:

{¶ 1} On June 2, 2005, plaintiff-appellant Wells Fargo Bank, N.A. (“Wells Fargo”) filed a complaint in foreclosure against defendants-appellees Brian and Paula Herbert (“the Herberts”). The Herberts defaulted on their mortgage payments to Wells Fargo in the amount of \$39,151. The property is located at 191 Maplelawn Drive, Berea, Ohio. The Herberts failed to answer or appear.

{¶ 2} Wells Fargo filed a motion for default judgment, which was granted by the magistrate. On April 6, 2006, the trial court adopted the magistrate’s decision granting judgment in favor of Wells Fargo and against the Herberts in the amount of \$39,151.77, with interest at the rate of 8.74% beginning January 1, 2005, and also granting a decree of foreclosure for Wells Fargo.

{¶ 3} On January 8, 2007, the property was purchased by Wells Fargo at sheriff’s sale for \$110,000, based upon erroneous instructions from a paralegal involved in the case. The paralegal was supposed to provide to counsel bidding instructions reading “No Bid,” but instead informed local counsel to bid \$110,000 for the property.

{¶ 4} On January 23, 2007, the trial court issued a decree of confirmation. Wells Fargo did not file a motion to stay confirmation.

{¶ 5} On April 26, 2007, Wells Fargo filed a motion to vacate the sheriff’s sale, which was denied by the trial court on May 2, 2007. Wells Fargo argued that based upon the erroneous instructions provided by the paralegal to counsel

regarding the sheriff's sale, the sale would result in a financial windfall for the Herberts.

{¶ 6} On June 1, 2007, Wells Fargo filed the instant appeal, asserting one assignment of error:

“The trial court erred and abused its discretion in denying plaintiff-appellant's unopposed motion to vacate sheriff's sale.”

{¶ 7} Wells Fargo argues that the trial court abused its discretion in denying its motion to vacate the sheriff's sale. We disagree.

{¶ 8} We review a trial court's ruling on a Civ.R. 60(B) motion to vacate upon an abuse of discretion standard. *Adomeit v. Baltimore*, Cuyahoga App. No. 32625, 39 Ohio App.2d 97. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶ 9} In order to prevail on a Civ.R. 60(B) motion for relief from judgment, the movant must demonstrate the following: first, the movant has a meritorious defense or claim to present if relief is granted; second, the party is entitled to relief on grounds set forth in Civ.R. 60(B)(1) through (5); and third, the motion is made within a reasonable time, and where the grounds for relief are based upon Civ.R. 60(B)(1), (2) or (3), not more than one year after judgment, order, or proceeding was entered or taken. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146. Civ.R. 60(B)(1) through (5) consist of the following:

“(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. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. ***.”

{¶ 10} Thus, we must determine whether Wells Fargo is entitled to relief pursuant to the factors delineated in Civ.R. 60(B). Wells Fargo argues that it is entitled to relief via Civ.R. 60(B)(1), (2), (4) and (5).

{¶ 11} In the instant case, Wells Fargo’s argument fails except for the time requirements. Each of Wells Fargo’s assertions for mistake, newly discovered evidence, judgment no longer being equitable, and lastly, the catch all “any other reason justifying relief” are terse in explanation.

{¶ 12} Essentially, Wells Fargo is asking this court to surmise the future value of the Herberts’ home and also to assume that the Herberts will gain a financial windfall as a result. Home buyers, on a daily basis, take financial risks when purchasing homes: they risk that the market value of their home will decrease, they risk spending more than market value on the purchase of a home, etc., and later claim that the purchase was made by mistake, inadvertence, surprise, excusable neglect, or, based upon newly discovered evidence and that they never should have

purchased the home. To grant relief to Wells Fargo Bank based upon Civ.R. 60(B) essentially grants relief to a bank, who, like all other home buyers, risks a future loss from their purchase.

{¶ 13} Thus, the trial court did not abuse its discretion in denying Wells Fargo's motion to vacate the sheriff's sale.

{¶ 14} Wells Fargo's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
KENNETH A. ROCCO, J., CONCUR