[Cite as *Clague Towers Condominium Owner's Assn., Inc. v. Heyduk*, 2009-Ohio-6649.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93283

CLAGUE TOWERS CONDOMINIUM OWNER'S ASSOCIATION, INC.

PLAINTIFF-APPELLEE

vs.

MARK S. HEYDUK, ET AL.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-611184

BEFORE: Sweeney, J., Cooney, A.J., and Boyle, J.

RELEASED: December 17, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Wilson A. Leece, II
9840 Lorain Avenue
Cleveland, Ohio 44102

ATTORNEYS FOR APPELLEE

James C. Wrentmore
Singerman, Mills, Desberg & Kauntz Co., L.P.A.
3401 Enterprise Parkway
Suite 200
Beachwood, Ohio 44122

M. Katherine Bushey
Kevin M. Fields
Robert E. Kmiecik
Kaman & Cusimano, L.L.C.
50 Public Square
Suite 2000
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Mark S. Heyduk ("defendant"), appeals the trial court's denial of his motion for relief from judgment. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On December 28, 2006, plaintiff-appellee, Clague Towers Condominium Owner's Association, Inc. ("Clague Towers"), filed a foreclosure complaint against defendant alleging failure to pay $3,506.17 in condominium maintenance fees and assessments for the condominium defendant owned at 3675 Clague Road, #408, North Olmsted, Ohio 44070 ("the condo"). On January 9, 2007, the complaint was sent to defendant at the condo via certified mail; however, on January 31, 2007, the receipt was returned unclaimed. On February 23, 2007, the complaint was sent to defendant at the condo via regular mail.

{¶ 3} On April 1, 2007, defendant mailed a check for $1,000 to Clague Towers as partial payment for the fees owed. On May 15, 2007, Clague Towers mailed the uncashed check back to defendant at the condo. In June 2007, the check was returned to Clague Towers as undeliverable. Clague Towers sent the check, along with a letter stating that the amount was insufficient, to defendant at 3010 Dover Center Road, Westlake, Ohio 44145, which was the address listed on the check.

{¶ 4} On July 9, 2007, Clague Towers moved for default judgment as defendant failed to answer the foreclosure complaint or make any other appearance in the case. On March 17, 2008, the court granted Clague Towers' default judgment motion, and on April 22, 2008, the court entered judgment against defendant for

$5,177.81 and granted the foreclosure decree. On October 16, 2008, the condo was sold at a sheriff's sale and Clague Towers' judgment was satisfied.

{¶ 5} On March 27, 2009, defendant filed a motion for relief from judgment, which the court denied on April 17, 2009. Defendant appeals and raises two assignments of error for our review, which we will address together:

{¶ 6} "I. The trial court abused its [discretion] by denying appellant's motion in the lower court for relief from judgment or order under Civil Rule 60 B (3) and O.R.C. 2325.03 entered against the appellant/defendant supported by [an incontrovertible] affidavit of appellant/defendant that he in fact did not receive a copy of the complaint.

{¶ 7} "II. The trial court abused its discretion by denying appellant's motion for relief from judgment or order under Civil Rule 60 B (3) and O.R.C. 2325.03 with evidence presented that appellee's attorneys actually knew appellant's true address, 3010 Dover Center Road, Westlake, Ohio 44145, by returning his check for [condominium] fees, the foundation of this foreclosure action and not the address used in the caption of defendant in the lower court."

{¶ 8} Specifically, defendant argues that he was never properly served with the foreclosure complaint and requests relief from judgment pursuant to Civ.R. 60(B)(3),[1] alleging fraud, misrepresentation, or other misconduct in that Clague Towers knew of, but failed to properly serve him, at the Westlake address.

---

[1]Defendant fails to argue error under R.C. 2325.03 on appeal, beyond listing the statute in his assignments of error. Therefore, we disregard this statute. App.R. 12(A)(2) and 16(A).

{¶ 9} We review a ruling on a Civ.R. 60(B) motion for relief from judgment under an abuse of discretion standard. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17. An abuse of discretion is "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, 219 (internal citations omitted).

{¶ 10} In *GTE Automatic Elec., Inc. v. ARC Industries, Inc*. (1976), 47 Ohio St.2d 146, 150, the Ohio Supreme Court held that to prevail on a Civ.R. 60(B) motion, "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) 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."

{¶ 11} In the instant case, defendant requests relief under Civ.R. 60(B)(3), which states that "the court may relieve a party * * * from a final judgment * * * for * * * fraud * * *, misrepresentation or other misconduct of an adverse party * * *."

{¶ 12} In reviewing defendant's motion, we find that he fails to meet the first prong of the *GTE* test. Defendant does not allege any defense, let alone a meritorious one, to the foreclosure action should relief be granted. See *Colley v. Bazell* (1980), 64 Ohio St.2d 243, at fn. 3 (stating that the "movant's burden is to allege a meritorious defense, not to prevail with respect to the truth of the meritorious defense"); *Fouts v. Weiss-Carson* (1991), 77 Ohio App.3d 563, 565 (holding that "the

burden on the moving party is only to *allege* operative facts which would constitute a meritorious defense if found to be true") (emphasis in original).

{¶ 13} Defendant does not dispute that he owed Clague Towers unpaid condominium fees. Defendant's sole argument in his motion for relief from judgment is that he was not properly served with the complaint and that Clague Towers "knew as early as June 1, 2007, that the correct mailing address of Defendant was" the Westlake address. As evidence of Clague Towers' knowledge, defendant points to the June 1, 2007 return of his $1,000 check to the Westlake address. However, defendant does not raise "rejected partial payment" as a defense to the foreclosure action, and while improper service may entitle a party to relief from judgment under certain circumstances, it is not a defense to the underlying action.

{¶ 14} As to the second prong of the *GTE* test, defendant alleges that because of Clague Towers' fraud, misrepresentation, or other misconduct, he was never served with the foreclosure complaint. Clague Towers, on the other hand, argues that it did not engage in fraud, misrepresentation, or other misconduct as service on defendant was complete under Civ.R. 4.6(D) on February 23, 2007, when "the ordinary mail envelope [was] not returned by the postal authorities with an endorsement showing failure of delivery."

{¶ 15} In *Rafalski v. Oates* (1984), 17 Ohio App.3d 65, 66, this Court held that "there is a presumption of proper service in cases where the Civil Rules on service are followed. However, this presumption is rebuttable by sufficient evidence." In the

instant case, defendant rebuts this presumption with a sworn affidavit that he "was never served with Summons or received notice of the within foreclosure action."

{¶ 16} Clague Towers contradicts the affidavit evidence with the following: (1) defendant owned the condo, which is the subject of this foreclosure; (2) defendant owed condo fees dating back to July 2005; (3) defendant was served with the complaint at the condo, which is the only address Clague Towers had on file for him; (4) is it reasonable to anticipate that defendant would receive mail sent to the condo; and (5) in June 2007, defendant's uncashed check was returned to him "with a letter [from plaintiff's counsel] explaining why his partial payment was being returned." Clague Towers asserts these facts do not show fraud, misrepresentation, or other misconduct. Clague Towers further argues that a failed attempt at partial payment, accompanied by a letter from an attorney, would put a reasonable person on notice that litigation was pending regarding the condo.

{¶ 17} After reviewing the record, we cannot find that the court abused its discretion in denying defendant's motion for relief from judgment. We conclude that defendant failed the second prong of the *GTE* test, in that he did not show he is entitled to relief under the grounds of fraud, misrepresentation, or other misconduct. Additionally, defendant failed to demonstrate that he had a meritorious defense to the foreclosure action should his Civ.R. 60(B) motion be granted.

{¶ 18} Defendant's two assignments of error are overruled.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas 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.

_____

JAMES J. SWEENEY, JUDGE

COLLEEN CONWAY COONEY, A.J., and
MARY J. BOYLE, J., CONCUR