

[Cite as *Wachovia Bank, N.A. v. Perez*, 2010-Ohio-4011.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93806

WACHOVIA BANK, N.A., ET AL.

PLAINTIFFS-APPELLEES

vs.

MIRIAM PEREZ

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-599457

BEFORE: Jones, J., McMonagle, P.J., and Dyke, J.

RELEASED AND JOURNALIZED: August 26, 2010

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Miriam Perez (“Perez”), appeals the trial court’s denial of her motion for relief from judgment. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

STATEMENT OF THE CASE

{¶ 2} Plaintiff-appellee Wachovia Bank, N.A. (“Wachovia”), filed a complaint against Perez on August 22, 2006. Wachovia filed to foreclose on the property located at 23804 Edgehill Drive, Beachwood, Ohio. The court entered a default judgment on February 16, 2007, and placed the premises for sale on June 8, 2007.

However, the sale was stayed by Perez’s Chapter 13 Bankruptcy filing (Case No. 07-14012).

{¶ 3} On January 7, 2009, Wachovia Bank filed a notice of termination of automatic stay as Perez could not complete her Chapter 13 plan. On March 23, 2009, Perez filed a motion for relief from judgment pursuant to Civ.R. 60(B). On

July 21, 2009, the court denied Perez's motion. On July 31, 2009, Perez filed a motion for findings of fact and conclusions of law. On August 6, 2009, the court denied Perez's motion as untimely filed. On August 20, 2009, Perez filed her notice of appeal.

STATEMENT OF THE FACTS

{¶ 4} Perez and her then husband, Amram Perez, entered into a HELOC (Home Equity Line of Credit) loan on April 8, 1996 with First Union Home Equity Bank ("First Union Bank"), that was subsequently purchased by Wachovia.

{¶ 5} In consideration of the credit line, First Union Home Equity Bank executed a loan agreement with a maximum credit limit of \$128,600. First Union Bank also granted an open-ended mortgage on the property located at 23804 Edgehill Drive, Beachwood, Ohio. This mortgage was titled in the name of Miriam Perez, as Trustee of the Miriam Perez Trust Agreement. The mortgage was recorded on April 9, 1996. The loan agreement and the mortgage were transferred to Wachovia through the merger of First Union Bank into Wachovia Bank of Delaware, N.A. The Wachovia mortgage constituted the first lien on the property, after the statutory lien for real estate taxes.

{¶ 6} The property was also encumbered by a second mortgage. Amram Perez obtained an additional line of credit from Huntington National Bank, with a maximum credit limit of \$75,000. The Huntington credit line was secured by the second mortgage, which was also executed by Perez, as Trustee of the Miriam Perez Trust Agreement. The borrowers defaulted on both credit lines and

Wachovia instituted this foreclosure action to recover the balance due under the loan agreement.

ASSIGNMENTS OF ERROR

{¶ 7} Perez assigns two assignments of error on appeal:

{¶ 8} “[1.] The trial court abused its discretion in denying defendant’s Motion for Findings of Fact and Conclusions of Law.

{¶ 9} “[2.] The trial court abused its discretion in denying defendant’s Motion for Relief from Judgment pursuant to Rule 60(B).”

LEGAL ANALYSIS

{¶ 10} Perez argues in her first assignment of error that the lower court erred when it did not issue findings of fact and conclusions of law. Review of the record demonstrates no error on the part of the lower court.

{¶ 11} Civ.R. 52, Findings by the court, provides the following:

“When questions of fact are tried by the court without a jury, *judgment may be general for the prevailing party* unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ.R. 58, or not later than seven days after the party filing the request has been given notice of the court’s announcement of its decision, whichever is later, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law.

“When a request for findings of fact and conclusions of law is made, *the court, in its discretion, may* require any or all of the parties to submit proposed findings of fact and conclusions of law; however, only those findings of fact and conclusions of law made by the court shall form part of the record.

“Findings of fact and conclusions of law required by this rule and by Rule 41(B)(2) are *unnecessary upon all other motions including those pursuant to Rule 12, Rule 55 and Rule 56.*” (Emphasis added.)

{¶ 12} In the case at bar, the magistrate conducted a hearing on Wachovia's motion for default judgment. The magistrate granted Wachovia's motion for default judgment on February 16, 2007. The magistrate's decision contained six pages of specific findings concerning the amount of the indebtedness due to Wachovia and the validity and priority of Wachovia's mortgage.¹ Significant detail behind the court's findings and conclusions were provided in the magistrate's decision. The trial court then adopted the decision in its entirety, without objection from Perez.

{¶ 13} The trial court does not abuse its discretion when it fails to make separate findings of fact and conclusions of law pursuant to a Rule 52 motion, but instead issues an order adopting findings and conclusions of the court's referee. *Dunson v. Aldrich* (1988), 54 Ohio App.3d 137, 561 N.E.2d 972.

{¶ 14} "The third paragraph of Rule 52 has also been amended. The third paragraph has stated that the findings required by Rule 52 and Rule 41(B)(2) '*are unnecessary upon all other motions* including those pursuant to Rule 12 (pleading motions) and Rule 56 (summary judgment).' *The amendment adds Rule 55 (default) to those motions not requiring findings.* Hence, *after a default hearing the court need not prepare findings even if requested to do so.* There had been some uncertainty among attorneys as to whether findings might be requested at a

¹ See Magistrate's Decision, filed February 16, 2007, pages 1-6.

default hearing.” (Emphasis added.) See Civ.R. 52, Commentary, Staff Notes, 1971, _8.

{¶ 15} The trial court has discretion to issue findings of fact and conclusions of law from orders granting motion for relief from default judgment. *Eads v. Spring* (Sept. 11, 1987), Erie App. No. E-86-64.

{¶ 16} Accordingly, Perez’s first assignment of error is without merit.

{¶ 17} Perez argues in her second assignment of error that the lower court erred in denying her motion for relief from judgment pursuant to Civ.R. 60(B).

{¶ 18} Civ.R. 60(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc, provides the following:

“On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (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. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.”

{¶ 19} The requirements for Civ.R. 60(B) are set forth in *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 146, 351 N.E.2d 113, which provides at paragraph two of the syllabus that:

“To prevail on a motion brought 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) 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.”

{¶ 20} Here, Perez argues that she met the three-prong *GTE* test. However, contrary to Perez’s argument, her claims are without merit. Perez argues that she is a victim of fraud on the part of her husband. However, a review of the evidence demonstrates that Perez’s signature is on the required documentation. Perez does not contend that her signature or that of her ex-husband, were forged. Perez and her husband at the time, jointly applied for, and jointly received, a line of credit from Wachovia Bank. The line of credit was issued to both Perez, and her then husband, in consideration of a jointly signed mortgage on the residence. Unfortunately for Perez, the actions of her spouse do not exonerate her of her liability on the debt.

{¶ 21} Review of the first paragraph of the Prime Equity Line Agreement and Disclosure Statement (“loan agreement”) demonstrates that both parties were signing the document. “The words ‘I,’ ‘me,’ and ‘my,’ which also mean ‘we,’ ‘us,’ and ‘our,’ if more than one customer, mean the person or persons signing this Agreement. The words ‘you,’ ‘your,’ and ‘yours’ mean First Union Home Equity Bank, N.A.”² The loan agreement also provides under the “Other Provisions” paragraph that “Each of us who signed this Agreement or are issued Drafts or are

²See Wachovia Bank’s complaint, filed August 22, 2006, Exhibit A, paragraph 1.

allowed to use this Account, are both individually and jointly obligated for all payments due under this Agreement.”

{¶ 22} In this case, Perez signed the loan agreement and agreed to the terms listed in the agreement. Perez is jointly and severally liable for the debts incurred by the other “customer” (her former husband Amram Perez) who signed the document with her. The claims Perez put forth do not justify forfeiture of Wachovia’s collateral.

{¶ 23} Perez further argues that her attorney “mistook the proper venue for raising her defenses to the claims as the bankruptcy court” and she “did not intentionally ignore the action brought in this Court.”³ While these claims may or may not be accurate, they are not legally relevant to the alleged errors in Perez’s brief. These arguments encompass malpractice allegations, rather than legal defenses to Perez’s liability for the debt at issue.

{¶ 24} Accordingly, we find that the lower court acted properly in its denial of Perez’s motion for relief from judgment. Perez’s second assignment of error is overruled.

It is ordered that appellees recover of appellant their 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 Cuyahoga County Court of Common Pleas to carry this judgment into execution.

³See Appellant’s brief, p. 6.

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

LARRY A. JONES, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
ANN DYKE, J., CONCUR