[Cite as *Fannie Mae Fed. Natl. Mtge. Assn. v. Nedbalski*, 2015-Ohio-2159.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102247

FANNIE MAE FEDERAL NATIONAL MORTGAGE ASSOCIATION

PLAINTIFF-APPELLEE

vs.

GARY NEDBALSKI, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-11-755693

BEFORE: Keough, P.J., McCormack, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: June 4, 2015

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} Defendant-appellant, Gary Nedbalski ("Nedbalski"), appeals from the trial court's judgment denying his Civ.R. 60(B) motion for relief from judgment. Finding no merit to the appeal, we affirm.

I. Background

{¶2} In 2005, Nedbalski executed a mortgage on his property at 24555 Barrett Road, Olmsted Falls, Ohio, to secure amounts due on a promissory note, and delivered it to First Security Mortgage Corporation, who subsequently transferred its interest to JPMorgan Chase Bank, N.A. ("Chase"). Chase subsequently transferred the mortgage to Federal National Mortgage Association ("Fannie Mae").

{¶3} In May 2011, Fannie Mae filed a foreclosure complaint in common pleas court against Nedbalski, Chase, and the city of Cleveland, Department of Port Control, division of Cleveland Hopkins International Airport. Nedbalski challenged the foreclosure action in a counterclaim against Fannie Mae and a cross-claim against Chase, arguing that they had intentionally misled him during the loan-modification process and caused his default by instructing him to miss three mortgage payments and stop paying his credit cards so he would qualify for a loan modification; incorrectly telling him that his loan had been modified, which caused him to go into arrears; and reporting him to a credit agency.

{¶4} Fannie Mae filed its motion for summary judgment on April 10, 2012. Nedbalski did not file a brief in opposition, but after a settlement conference, the trial

court granted him an extension of time through August 3, 2012 to file a brief in opposition. The trial court held another settlement conference on July 26, 2012, and granted Nedbalski another extension of time through August 10, 2012, to file his brief in opposition to Fannie Mae's motion for summary judgment. Nedbalski did not file an opposition by August 10, 2012, but on August 22, 2012, filed a motion seeking another extension of time. The trial court denied that request.

{¶5} The magistrate's decision granting summary judgment was filed on October 12, 2012. Nedbalski did not file timely objections to the magistrate's decision, and on October 30, 2012, the trial court issued an order adopting the magistrate's decision and entering an order of foreclosure and sale.

{¶6} Nedbalski appealed to this court, but voluntarily dismissed his appeal on July 10, 2013. *Fannie Mae Natl. Mort. Assoc. v. Nedbalski*, 8th Dist. Cuyahoga No. 99446. On July 25, 2013, Nedbalski filed a complaint in the United States District Court for the Northern District of Ohio. *Nedbalski v. JPMorgan Chase Bank, N.A.*, N.D.Ohio No. 1:13 CV 1609, 2014 U.S. Dist. LEXIS 7160 (Jan. 17, 2014). Nedbalski's complaint contained the same factual recitations presented in his counterclaim and cross-claim in the foreclosure action, and alleged seven causes of action against Chase, Fannie Mae, and Seterus (who serviced the mortgage on behalf of Fannie Mae), including violations of the RICO statutes, Fair Credit Reporting Act, Truth in Lending Act, and Real Estate Settlement Procedures Act, as well as "immoral, unethical, oppressive, and unscrupulous" conduct. *Id.* at *3.

{¶7} The defendants moved to dismiss the lawsuit, arguing that Nedbalski's claims were identical to those raised in the foreclosure case and thus were barred. Nedbalski responded by arguing that the state court judgment in the foreclosure action was void and could not be used to bar the federal court action. *Id.* at *7. Specifically, Nedbalski argued that his property is included in the city of Cleveland's airport layout plan, which was submitted with the city of Cleveland's federal grant applications to the Federal Aviation Administration, and through which the city of Cleveland received federal money. Nedbalski argued that federal law provides that approval of a grant application is conditioned upon the satisfaction by the city of project requirements, one of which is that the city will acquire and hold good title to all land to be used by the airport, and the property will not be encumbered by a mortgage. Thus, Nedbalski asserted that the mortgage placed on his property was void, thereby rendering the judgment in the foreclosure case also void.

{¶8} The district court found that it did not have jurisdiction over Nedbalski's lawsuit, because district courts do not have jurisdiction over cases brought by "state-court losers" that "complain[ ] of injuries caused by state-court judgments * * * and invit[e] the district court to review and reject those judgments." *Id.* at *9. Because Nedbalski's action raised a challenge to the validity of the state court's judgment in the foreclosure case, the district court found it was without jurisdiction to hear the case and dismissed it. *Id.* at *10.

{¶9} The sale of Nedbalski's property went forward in July 2013, while the

district court case was pending. The common pleas court originally stayed confirmation of the sale pending the outcome of the district court case, but on December 10, 2013, the court granted Chase's motion for reconsideration of the stay of confirmation, and the sale was confirmed. Nedbalski did not appeal the confirmation of sale.

{¶10} Instead, in February 2014, Nedbalski filed a Civ.R. 60(B) motion for relief from judgment. Subsequently, on October 6, 2014, the trial court entered an order adopting the magistrate's decision denying the motion for relief from judgment. It is from this judgment that Nedbalski now appeals.

II. Analysis

{¶11} In a single assignment of error, Nedbalski contends that the trial court erred in denying his Civ.R. 60(B) motion for relief from judgment.

{¶12} A reviewing court will not disturb a trial court's decision regarding a Civ.R. 60(B) motion absent an abuse of discretion. *State ex rel. Russo v. Deters*, 80 Ohio St.3d 152, 153, 684 N.E.2d 1237 (1997). To prevail on a Civ.R. 60(B) motion for relief from judgment, the moving party must demonstrate (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 (B)(5);[1] and (3) the motion is made within a reasonable time, and where the grounds for relief are Civ.R. 60(B)(1), (2), or (3), not

[1]Those grounds are: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial under Civ.R. 59(B); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged; and (5) any other reason justifying relief from the judgment.

more than one year after the judgment was entered. *GTE Automatic Elec. v. ARC Ind.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus. If any of these three requirements is not met, the motion should be overruled. *Svoboda v. Brunswick*, 6 Ohio St.3d 348, 351, 453 N.E.2d 648 (1983).

{¶13} In his Civ.R. 60(B) motion for relief from judgment, Nedbalski asserted that he was entitled to relief under Civ.R. 60(B)(3), (4), and (5) because the mortgage on his property is void, thereby rendering any judgment on that mortgage void, and Fannie Mae does not have standing to foreclose on the mortgage in question.

{¶14} It is well established, however, that Civ.R. 60(B) cannot be used as a substitute for an appeal. *Doe v. Trumbull Cty. Children Serv. Bd.*, 28 Ohio St.3d 128, 502 N.E.2d 605 (1986), paragraph two of the syllabus. As this court stated recently:

> Public policy favors the finality of judgments. *Rhoads v. Greater Cleveland Regional Transit Auth.*, 8th Dist. Cuyahoga No. 92024, 2009-Ohio-2483, ¶ 5. If not appealed, a trial court's judgment must remain undisturbed pursuant to the doctrine of res judicata, which bars claims that were or could have been raised on direct appeal. *La Barbera v. Batsch*, 10 Ohio St.2d 106, 113, 227 N.E.2d 55 (1967). Thus, relief from judgment under Civ.R. 60(B) should be granted only in the exceptional circumstance where justice demands relief from a prior judgment. *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 105, 316 N.E.2d 469 (8th Dist.1974). For these reasons, a Civ.R. 60(B) motion may not be used as a substitute for appeal to collaterally attack a final judgment. *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 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.

M & T Bank v. Steel, 8th Dist. Cuyahoga No. 101924, 2015-Ohio-1036, ¶ 13.

{¶15} Here, Nedbalski's remedy was to challenge the trial court's judgment by way of appeal. In fact, he had two opportunities to appeal: after the trial court entered

the order of foreclosure and sale on October 30, 2012, and after the trial court confirmed the sale on December 10, 2013.[2] Nedbalski did not take either opportunity. Although he filed a direct appeal of the trial court's foreclosure order on January 18, 2013, he voluntarily dismissed that appeal on July 9, 2013, in order to challenge the trial court's judgment in federal district court. And he did not appeal the trial court's subsequent judgment of December 10, 2013 confirming the sale. Because Nedbalski was improperly attempting to use his Civ.R. 60(B) motion as a substitute for an appeal, the trial court did not abuse its discretion in denying the motion.

{¶16} Moreover, although Nedbalski asserted that he was entitled to relief under Civ.R. 60(B)(3), (4), and (5), he offered no facts that would support relief under any of these sections. Civ.R. 60(B)(3) allows a judgment to be set aside if it has been obtained by "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." The fraud, misrepresentation, or other misconduct contemplated by Civ.R. 60(B)(3) involves deceit or misconduct where "the party seeking relief was taken by surprise when false testimony was given and was unable to meet it or did not know of its falsity until after trial." *Caron v. Caron*, 10th Dist. Franklin No. 98AP-369, 1998 Ohio App. LEXIS 5653, *7 (Dec. 3, 1998). In other

[2]The Ohio Supreme Court has recognized that "two judgments are appealable in foreclosure actions: the order of foreclosure and sale and the order of confirmation of sale." *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, ¶ 35. On appeal from the order of foreclosure, the parties may challenge the court's decision to grant the decree of foreclosure. An appeal from the confirmation of sale is limited to issues arising from the confirmation proceedings. *Id.* at ¶ 39-40.

words, the movant must show more than misrepresentation or false testimony; he must show misconduct that prevented him from fully and fairly presenting his defense. *Kuchta* at ¶ 13. Nedbalski offered no evidence indicating that Fannie Mae engaged in any fraud or misconduct in obtaining the foreclosure judgment so as to be entitled to relief from judgment under Civ.R. 60(B)(3).[3]

{¶17} Under Civ.R. 60(B)(4), a judgment may be vacated on grounds that "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." Under Civ.R. 60(B)(5), a judgment may be vacated for "any other reason justifying relief from judgment." Nedbalski offered no argument in his motion for relief from judgment, and none on appeal, regarding how these sections support granting him relief from judgment. Presumably, Nedbalski's argument is that it is not "equitable" to enforce the foreclosure judgment, and he is entitled to relief from judgment because the foreclosure judgment is void due to his property's inclusion in the city of Cleveland's airport layout plan. But, as the trial court properly found, there is nothing in the airport layout plan that limits a homeowner whose property is included in that plan from transferring the property, changing title, or altering ownership in any way. Thus, Fannie Mae was entitled to foreclose on Nedbalski's property based on his failure to make timely payments under the note.

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[3] Nedbalski's request for relief under Civ.R. 60(B)(3) was also untimely because the rule requires that requests for relief under Civ.R. 60(B)(3) be filed no more than one year after the entry of judgment.

{¶18} Nedbalski also argued that he was entitled to relief from judgment because Fannie Mae did not have standing to enforce the mortgage. This argument is likewise without merit because it too could have been raised on direct appeal.

{¶19} In *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, the Ohio Supreme Court explained that standing is a jurisdictional requirement that must exist at the time a suit is filed in order the invoke the jurisdiction of the trial court. *Id.* at ¶ 22. The Supreme Court also explained that if a plaintiff does not have an interest in a note or mortgage at the time it files suit, it lacks standing to commence a foreclosure action. *Id.* at ¶ 28. In such cases, "[t]he lack of standing * * * requires dismissal of the complaint * * *." *Id.* at ¶ 40.

{¶20} Following *Schwartzwald*, the Ohio Supreme Court considered a party's ability to collaterally attack a judgment in a foreclosure action by asserting the issue of standing in a Civ.R. 60(B) motion for relief from judgment. In *Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, at ¶ 25, the Supreme Court held that when a defendant fails to appeal from a trial court's judgment in a foreclosure action, the defendant is prevented from using the standing issue to obtain relief in a Civ.R. 60(B) motion. The Supreme Court found that although standing is required in order to invoke the jurisdiction of the court over a foreclosure action, a party's lack of standing does not affect the subject-matter jurisdiction of the common pleas court. *Id.* Thus, a bank's alleged lack of standing in a foreclosure matter does not preclude a defendant from appearing and presenting a full defense, including lack of standing. *Id.* at ¶ 14.

Accordingly, because the issue of standing can be raised on appeal, a Civ.R. 60(B) motion cannot be used as a substitute for a timely appeal from the judgment in foreclosure on the issue of standing. *Id.* at ¶ 16. When a defendant fails to appeal from a trial court's judgment in a foreclosure action, the doctrine of res judicata applies to bar a party from asserting lack of standing in a motion for relief from judgment. *Bank of Am. v. Friedman*, 8th Dist. Cuyahoga No. 100625, 2014-Ohio-5034, ¶ 9, citing *Kuchta* at ¶ 8.

{¶21} Here, Nedbalski could have raised the issue of standing on direct appeal of the trial court's judgment granting foreclosure. Because he did not do so, he is now precluded from collaterally attacking the foreclosure judgment by asserting lack of standing in a Civ.R. 60(B) motion.

{¶22} The trial court did not abuse its discretion in denying Nedbalski's motion for relief from judgment. The assignment of error is overruled, and the judgment is 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.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

TIM McCORMACK, J., and
SEAN C. GALLAGHER, J., CONCUR