[Cite as *Deutsche Bank Natl. Trust Co. v. Forgues*, 2016-Ohio-4702.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103613

DEUTSCHE BANK NATIONAL TRUST CO.

PLAINTIFF-APPELLEE

vs.

CHRISTINE J. FORGUES A.K.A. DOUBRAVA A.K.A. ANDRES, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-12-779307

BEFORE: S. Gallagher, J., E.A. Gallagher, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: June 30, 2016

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SEAN C. GALLAGHER, J.:

{¶1} Christine Forgues appeals the denial of her motion for relief from judgment filed under Civ.R. 60(B), in which Forgues presented a recent change in law as a basis to invalidate the foreclosure judgment entered against her in early 2013. We affirm.

{¶2} In March 2007, Forgues received a $144,440 mortgage loan for her primary residence in Cleveland, Ohio. She defaulted in December 2009 and admits she has not paid any monthly installments since that time. Forgues resides in the home and has spent the last seven years challenging the foreclosure in one form or another in various courts. *See, e.g., Forgues v. Select Portfolio Servicing, Inc.*, N.D.Ohio No. 1:15-CV-1670, 2016 U.S. Dist. LEXIS 52918, *9 (Apr. 20, 2016). As is pertinent to the current appeal, Forgues claims she sent a notice of intent to rescind the mortgage according to the Truth in Lending Act, 15 U.S.C. 1635(a), in January 2010. Under that consumer protection legislation, borrowers have three days within which to exercise an unfettered right to rescind a mortgage loan transaction. *Id.* If, however, the lender fails to provide the necessary notices of that right, the borrower has up to three years to rescind the transaction. *Id.* Sometime in 2012, the lender, or the successor in interest to the lender, initiated foreclosure proceedings against Forgues. For unexplained reasons, although Forgues participated in the action, she failed to answer or assert the affirmative defense of rescission. The trial court entered default judgment in favor of the lender.

{¶3} In June 2015, Forgues filed a motion for relief from judgment, claiming that a change in the law provided her a new defense to the foreclosure action. It suffices to

know that at the time of Forgues's foreclosure proceedings, the federal circuit courts were split on the issue of whether a homeowner had to file suit within three years to invoke the right to rescind the contract, or whether mailing notice to the bank was sufficient. The Supreme Court settled that issue and held that mailing notice was good enough. *Jesinoski v. Countrywide Home Loans, Inc.*, 574 U.S. ___, 135 S.Ct. 790, 190 L.Ed.2d 650 (2015). Forgues now claims that because she mailed a notice of intent to rescind the transaction within the three-year period, her mortgage was void ab initio pursuant to *Jesinoski* and, therefore, the trial court erred by denying Forgues's motion for relief from judgment. We disagree for two simple reasons.

{¶4} As a preliminary matter, Forgues cannot rely on *Jesinoski* as a basis to collaterally attack the final foreclosure judgment entered against her. It is well settled that "a subsequent change in the controlling case law in an unrelated proceeding does not constitute grounds for obtaining relief from final judgment under Civ.R. 60(B)." *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128, 129, 502 N.E.2d 605 (1986). If the law were otherwise, any unsuccessful litigant could attempt to reopen and relitigate a final judgment simply because there has been a change in the controlling case law. *Id.* "Such a result would undermine the stability of final judgments and, in effect, render their enforceability conditional upon there being 'no change in the law.'" *Id.*, quoting *Parks v. U.S. Life & Credit Corp.*, 677 F.2d 838 (11th Cir.1982). Forgues's reliance on the alleged change in controlling precedent in an unrelated proceeding is misplaced.

{¶5} Furthermore, this court has already addressed this issue in the foreclosure milieu. In *Fannie Mae v. Nedbalski*, 8th Dist. Cuyahoga No. 102247, 2015-Ohio-2159, ¶ 19, the plaintiff attempted to reopen a foreclosure judgment, claiming that a recent Ohio Supreme Court decision, *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, which dealt with a bank's standing to initiate the foreclosure action, rendered his two-year-old judgment void ab initio. As the panel recognized, after *Schwartzwald*, the Ohio Supreme Court also held that when a defendant fails to directly appeal the standing issue, the defendant is foreclosed from relying on a Civ.R. 60(B) motion to obtain relief from the final judgment based on the newly decided case law. *Fannie Mae* at ¶ 20, citing *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 25. As a result, this court concluded that failing to appeal the foreclosure judgment to preserve the issue precluded the defendant from collaterally attacking the foreclosure judgment by asserting the claim in a Civ.R. 60(B) motion.

{¶6} The same result must follow in this case. Forgues never appealed the foreclosure judgment entered against her. As a result, she cannot collaterally attack that judgment, based on changes in the controlling law in unrelated proceedings, through a Civ.R. 60(B) motion. Forgues has also failed to demonstrate any need for us to revisit our *Fannie Mae* decision or to contravene the Ohio Supreme Court's decision in *Kuchta*, which we find controlling.

{¶7} Moreover, even if we were to discuss the merits of her motion, in order to prevail on a motion for relief from judgment pursuant to Civ.R. 60(B), the movant must demonstrate the following: (1) a meritorious defense or claim to present if relief is granted; (2) entitlement to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the timeliness of the motion. *GTE Automatic Elec., Inc. v. ARC Industries*, 47 Ohio St.2d 146, 150-151, 351 N.E.2d 113 (1976). We review a trial court's denial of a Civ.R. 60(B) motion for relief from judgment under an abuse-of-discretion standard. *See Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988). To constitute an abuse of discretion, the trial court's ruling must be "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶8} Forgues has failed to demonstrate a meritorious defense to the foreclosure action. In her appeal, Forgues is arguing against a straw man — that mailing the notice of intent to rescind the mortgage within three years voided the transaction by operation of 15 U.S.C. 1635(a). The issue in her case is not whether she mailed a notice of intent to rescind the mortgage within three years, but instead is whether she was even entitled to the three-year period rather than the three-day one. Not all borrowers are entitled to the three-year period. The right to rescind the mortgage loan under the Truth in Lending Act does not extend beyond three days unless the lender fails to deliver the necessary information and forms required under the act. *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 52 (1st Cir.2002). Even if we take Forgues at her word, Forgues has failed

to allege, much less demonstrate, that the bank failed to provide her with the necessary notifications to entitle her to the three-year period. *GMAC Mtge., LLC v. McKeever*, E.D.Ky. No. 08-459-JBC, 2010 U.S. Dist. LEXIS 64640, *8 (June 29, 2010) (notice of intent to rescind mailed within three years does not void the transaction where the lender contests the basis of the rescission; it merely renders the transaction voidable). Her allegation was limited to the fact that she sent a letter within three years.

{¶9} As a result and based on the allegations advanced by Forgues, she only had three days within which to unilaterally rescind her mortgage under the Truth in Lending Act. *Forgues v. Select Portfolio Servicing*, N.D.Ohio No. 1:15-CV-1670, 2015 U.S. Dist. LEXIS 164297, at *10 (finding that Forgues failed to demonstrate that the *Jesinoski* decision had any controlling effect on her case because she failed to allege facts supporting her right to the three-year extended rescission period). Forgues admits she mailed the letter in January 2010, well outside the three-day limitation period. Forgues bore the burden of demonstrating the basis of her motion, and without allegations supporting her right to even rescind when she claims to have done so, her motion for relief from judgment was properly denied because Forgues failed to demonstrate a meritorious defense to the foreclosure action.

{¶10} The change in controlling law in an unrelated proceeding cannot be the basis of a Civ.R. 60(B) motion for relief from judgment, and even if it could be, the trial court did not abuse its discretion in denying the motion because Forgues failed to demonstrate a meritorious defense to the underlying judgment. We affirm.

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.

SEAN C. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., and
EILEEN T. GALLAGHER, J., CONCUR