

[Cite as *Aurora Bank, F.S.B. v. Gordon*, 2016-Ohio-935.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103074

AURORA BANK, F.S.B.

PLAINTIFF-APPELLEE

vs.

DANIELLE POWER GORDON, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-12-773416

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

RELEASED AND JOURNALIZED: March 10, 2016

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Danielle Power¹ Gordon (“Gordon”), appeals the denial of her motion for relief from a judgment in foreclosure. She raises the following two assignments of error:

1. The trial court erred in finding that it had jurisdiction over Ms. Gordon authorizing it to enter judgment against her and in failing to hold an evidentiary hearing when service was challenged.
2. The trial court committed reversible error in finding that Ms. Gordon was not entitled to 60(B) relief based upon its incorrect conclusion that all of Ms. Gordon’s grounds for relief were grounded in standing.

{¶2} We find no merit to the appeal and affirm.

I. Facts and Procedural History

{¶3} Jon S. Gordon, Gordon’s deceased husband, executed a promissory note dated January 25, 2007, in favor of Lehman Brothers Bank, F.S.B. (“Lehman Brothers”). As security for the note, Gordon and her husband executed a mortgage dated January 26, 2007, on property located at 3572 Lytle Road, Shaker Heights, Ohio (“the property”), in favor of Mortgage Electronic Systems, Inc. (“MERS”), as nominee for Lehman Brothers, its successors, and assigns.

{¶4} MERS assigned the mortgage to Aurora Loan Services, L.L.C., who later assigned it to Aurora Bank, F.S.B. (“Aurora Bank” or “the bank”). Following a default

¹ The complaint and subsequently filed pleadings misspelled Ms. Gordon’s name as Danielle Power Gordon. The correct spelling of her name is Danielle Pauer Gordon.

under the terms of the note and mortgage, Aurora Bank filed a complaint seeking foreclosure on the property and attempted to serve Gordon with summons of the complaint numerous times. During one attempt to serve Gordon by special process server, the process server reported seeing a woman in the home, but the woman did not answer the door. Ultimately, Aurora Bank obtained service by publication.

{¶5} While the case was pending, Aurora Bank assigned the mortgage to Nationstar Mortgage L.L.C. (“Nationstar”), and the court substituted Nationstar as the party-plaintiff. Nationstar filed a motion for default judgment against Gordon, which was granted by a magistrate. Gordon filed timely objections to the magistrate’s decision and asserted several issues, including insufficient service of process. However, on November 12, 2014, the trial court overruled Gordon’s objections and adopted the magistrate’s decision. Gordon did not appeal the judgment.

{¶6} Gordon subsequently retained counsel, and, on December 30, 2014, she filed a motion for relief from judgment pursuant to Civ.R. 60(B). The trial court overruled the motion. In its journal entry, the court explained:

“It is well established that a Civ.R. 60(B) motion cannot be used as a substitute for an appeal and that the doctrine of res judicata applies to such a motion. [*Bank of Am., N.A. v. Kuchta*, [141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040] at ¶ 16, citing *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, 846 N.E.2d 43, ¶ 8-9. Thus, the doctrine of res judicata bars appellants’ attempted collateral attack against the judgment in foreclosure.” *Bank of Am., N.A. v. Friedman*, 2014-Ohio-5034 (Ohio Ct. App., Cuyahoga County Nov. 13, 2014). Just as in *Friedman*, Defendant * * * Gordon could have raised the issues of fraud and standing at the trial level or on direct appeal.

{¶7} Gordon now appeals from that judgment.

II. Law and Analysis

{¶8} In the first assignment of error, Gordon argues the trial court erred in finding that it had personal jurisdiction to render judgment against her. She contends the trial court lacked personal jurisdiction because she was never properly served with the complaint. In the second assignment of error, Gordon argues the trial court erred in denying her Civ.R. 60(B) motion for relief from judgment. We discuss these assigned errors together because they involve the same issues.

{¶9} Civ.R. 60(B) provides:

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, 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} 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 (B)(5), and (3) the timeliness of the motion. *GTE Automatic Elec., Inc.*, 47 Ohio St.2d 146, 150-151, 351 N.E.2d 113 (1976). These requirements are independent and written in the conjunctive; therefore, all three must be

clearly established in order to be entitled to relief. *See Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988).

{¶11} We review a trial court's denial of a Civ.R. 60(B) motion for relief from judgment for an abuse of discretion. *Id.* 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).

{¶12} Gordon argues she was entitled to relief under Civ.R. 60(B)(3) and (5) because counsel for Aurora Bank made misrepresentations to the court in order to obtain service on her. She contends the bank's lawyer made false statements in an affidavit that allowed service to be perfected by publication. Civ.R. 60(B)(3) provides relief from a judgment procured by fraud perpetrated by an adverse party. *Coulson v. Coulson*, 5 Ohio St.3d 12, 15, 448 N.E.2d 809 (1983). Civ.R. 60(B)(5), applies when an officer of the court, such as an attorney, actively participated in defrauding the court. *Id.* at paragraph two of the syllabus.

{¶13} However, "'misrepresentations to the court do not constitute a fraud on the court unless the adverse party was prevented from presenting a defense.'" *State Alarm, Inc. v. Riley Indus. Servs.*, 8th Dist. Cuyahoga No. 92760, 2010-Ohio-900, ¶ 21, quoting *Zaubi v. Caluya*, 8th Dist. Cuyahoga No. 61308, 1991 Ohio App. LEXIS 4863 (Oct. 10, 1991).

{¶14} Gordon contends that, in the affidavit for service by publication, the bank's lawyer falsely described the efforts he made to find an address where she could be served

by mail. However, she raised these arguments in the trial court before the court granted the foreclosure judgment, and thus was not prevented from presenting fraud as a defense. Moreover, these arguments could have been raised in a direct appeal of the judgment in foreclosure, but Gordon did not file an appeal.

{¶15} Civ.R. 60(B) cannot be used as a substitute for an appeal. *Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 1; *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128, 502 N.E.2d 605 (1986), paragraph two of the syllabus. *See also State ex rel. Richard v. Cuyahoga Cty. Commrs.*, 89 Ohio St.3d 205, 729 N.E.2d 755 (2000); *Levy v. Levy*, 8th Dist. Cuyahoga No. 103002, 2016-Ohio-207, ¶ 19;² *Bank of N.Y. Mellon v. Hutchins*, 8th Dist. Cuyahoga No. 100435, 2014-Ohio-2765, ¶ 10 (res judicata barred homeowner from seeking relief from foreclosure judgment because a motion for relief from judgment could not be used as a substitute for a timely filed appeal.).

{¶16} Therefore, res judicata barred Gordon from seeking relief from judgment because her arguments could have been raised in a direct appeal of the foreclosure judgement. The trial court's judgment denying Gordon's Civ.R. 60(B) was not an abuse of discretion.

{¶17} The first and second assignments of error are overruled.

² Incidentally, plaintiff's counsel filed an amended affidavit acknowledging that he erroneously indicated in the original affidavit that he "communicated with the representative of the party seeking foreclosure on March 30, 2012 when in fact the date of the communication was August 30, 2012." Counsel's amended affidavit further states: "This error on my part was inadvertent and unintentional and was not as a result of any attempt on my part to deceive the Court or any party to the case."

{¶18} 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 the common pleas 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.

EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., CONCURS;
PATRICIA ANN BLACKMON, J., CONCURS IN JUDGMENT ONLY