

[Cite as *Dover W. Condominium Unit Owners' Assn. v. Carandang*, 2017-Ohio-9168.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105490

DOVER WEST CONDOMINIUM UNIT OWNERS' ASSOCIATION

PLAINTIFF-APPELLEE

VS.

JOCELYN T. CARANDANG, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-861887

BEFORE: Blackmon, J., Kilbane, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: December 21, 2017

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PATRICIA ANN BLACKMON, J.:

{¶1} Defendant-appellant Jocelyn T. Carandang (“Carandang”) appeals the trial court’s order denying her motion for relief from the judgment in the foreclosure action filed by Dover West Condominium Unit Owners’ Association (“Dover West”). Carandang assigns the following error for our review:

The trial court erred in granting default judgment to the appellee and in denying the [Carandang’s] motion for relief from judgment /motion to vacate judgment.

{¶2} Having reviewed the record and relevant law, we affirm the decision of the trial court. The apposite facts follow.

{¶3} The record indicates that in February 2015, Dover West filed Case No. CV-15-840434 against Carandang alleging that her behavior was disruptive and created a nuisance at the condominium complex. In February 2016, Dover West was eventually granted injunctive relief that ordered Carandang to abate the nuisance, and was also awarded attorneys fees and costs. This matter is the subject of a separate appeal in *Dover W. v. Carandang*, 8th Dist. Cuyahoga No. 105730, 2017-Ohio-9023.

{¶4} Several months later, Dover West filed this action against Carandang to foreclose upon a lien from the 2016 judgment, alleging that \$11,347 remained unpaid, and that it also has a condominium lien on the property in the amount of \$6,881.18, plus interest and fees, for unpaid maintenance fees, and common expenses and assessments.

{¶5} By August 2016, Carandang had not filed an answer. A default hearing was held on September 2, 2016. Carandang appeared pro se at the default hearing. Carandang did not submit an answer and on September 6, 2016, the magistrate granted Dover West a default judgment. The court concluded that the \$11,347 judgment lien is a valid lien upon the premises, and that Dover West is also entitled to \$7,487 on its condominium lien (including legal fees and costs). On October 4, 2016, the trial court adopted the magistrate's decision.

{¶6} The premises were sold on November 28, 2016. On December 20, 2016, the trial court approved and confirmed the sale and ordered the sheriff to deliver a deed to the purchaser. On January 6, 2017, Carandang sent handwritten correspondence to the court indicating that she had been sick during the earlier proceedings. Three weeks later, on January 31, 2017, Carandang, through counsel, filed a motion for relief from judgment and a motion for restraining order and injunction. In relevant part, she asserted that she had failed to answer through inadvertence as a pro se litigant, and that the default judgment was not equitable because she is entitled to protect up to \$135,000 in equity under the homestead exemption, R.C. 2319.66. In opposition, Dover West asserted that the motion was untimely because the unit had been sold. Dover West also maintained that under R.C. 2329.661, the homestead exemption does not extend to a "judgment rendered on a mortgage extended or security interest given on real or personal property by the debtor," and that Carandang consented to the lien under the terms of her mortgage and condominium association agreement.

{¶7} On February 17, 2017, the trial court denied Carandang’s motion for relief from judgment, concluding:

[The] order confirming sale “bars the filing of any further motions to set aside the sale of the lands and tenements.” R.C. 2329.27(B)(3)(b). Thus, this court lacks jurisdiction to grant Defendant Carandang the relief she seeks. Assuming that the court had jurisdiction, Defendant Carandang fails to assert the elements necessary to allow the court to grant relief from judgment. * * *

In this instance the defendant has failed to demonstrate the existence of a meritorious defense to the judgment and foreclosure if the judgment is vacated. *GMAC Mortgage, L.L.C. v. Coleff*, [8th Dist. Cuyahoga No. 98917] 2013-Ohio-2462 (8th Dist.). Defendant argues that the homestead exemption, R.C. 2329.66 demonstrates a defense that has a substantial likelihood of success on the merits. The proper time to bring the homestead exemption claim is before the foreclosure sale. It is a set-off in recovery; it is not a defense to foreclosure of a lien. The appellate court explained, “a homestead exemption is not effective until there is an involuntary execution that subjects the property to judicial sale. (Citation omitted.) In other words, the debtor’s right to exercise the homestead exemption is determined as of the date of execution, garnishment, attachment, or sale of the subject property.” *Gale v. Ficke*, 148 Ohio App.3d 657, 2002-Ohio-4030 ¶ 7, fn. 2 (8th Dist.); see *Adkins v. Massie*, [4th Dist Lawrence No. 99CA18,] 2001-Ohio-2448 * * *. Lack of counsel and ignorance of the legal system does not constitute “excusable neglect.” *Dayton Power & Light v. Holdren*, [4th Dist. Highland No. 07CA21,] 2008-Ohio-5121, ¶12.

No Stay of Foreclosure Proceedings

{¶8} The record reflects that Carandang failed to move to stay the confirmation of the sale, and the property has been sold with proceeds distributed. Accordingly, the trial court properly denied the motion for relief from judgment. See *Provident Funding Assocs., L.P. v. Turner*, 8th Dist. Cuyahoga No. 100153, 2014-Ohio-2529, ¶ 6; *U.S. Bank, N.A. v. Sanders*, 8th Dist. Cuyahoga No. 104607, 2017-Ohio-1160, ¶ 21. The *Sanders* court explained:

R.C. 2329.45 provides a remedy for appellants in foreclosure cases after the property has been sold and the proceeds have been distributed. However, R.C. 2329.45 only applies when the appealing party sought and obtained a stay of the distribution of the proceeds. [*Turner*] at ¶ 6, citing *Wells Fargo Bank N.A. v. Cuevas*, 8th Dist. Cuyahoga No. 99921, 2014-Ohio-498; *see also Midfirst Bank v. Samad*, 8th Dist. Cuyahoga No. 101976, 2015-Ohio-2270.

Furthermore, when a sale is confirmed, “all irregularities are cured after the sale is made and confirmed,” including “all such irregularities, misconduct, and unfairness in the making of the sale, departures from the provisions of the decree of sale, and errors in the decree and the proceedings under it.” [*Third Fed. S. & L. Assn. of Cleveland v. Rains*, 8th Dist. Cuyahoga No. 98592, 2012-Ohio-5708, at ¶ 11. At best, a party appealing a sale confirmation who did not raise objections to it in the trial court could obtain only “plain error” review of the sale confirmation. *Wells Fargo Home Mtge. v. Hee Sook Chun*, 8th Dist. Cuyahoga No. 101722, 2015-Ohio-1827, ¶ 8. The plain error doctrine is not favored and only applies in extremely rare cases. *Id.*

Id. at ¶ 21-22. *Accord Cuevas; Samad.*

{¶9} We review a trial court’s decision to grant or deny a Civ.R. 60(B) motion for an abuse of discretion. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988). An abuse of discretion standard requires a showing that the trial court’s attitude was unreasonable, arbitrary, or unconscionable. *In re Jane Doe I*, 57 Ohio St.3d 135, 137, 566 N.E.2d 1181 (1991). When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993).

{¶10} In order to prevail on a Civ.R. 60(B) motion to vacate judgment, the moving party must demonstrate the following: (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) that include, *inter alia*, “mistake, inadvertence, surprise or excusable neglect,” and “any other reason justifying relief from the judgment”; 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. *GTE Automatic Electric v. ARC Industries*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

{¶11} With regard to the issue of timeliness, Carandang’s motion to vacate the default judgment of foreclosure was filed four months after the default, and approximately five weeks after the trial court confirmed the sale. Therefore, it was not timely.

{¶12} As to the issue of meritorious defense involving the homestead exemption, we note that Carandang consented to having the condominium association place a lien on her unit for unpaid assessments. Under R.C. 2329.661, the homestead exemption does not “[e]xtend to a judgment rendered on a * * * security interest given on real property by a debtor[.]” Therefore, consensual liens on real property have been deemed to take priority over the homestead exemption. *See In re Bland*, 91 B.R. 421, 423 (Bankr. N.D. Ohio 1988) (condominium lien is consensual in nature and could not be avoided under bankruptcy homestead exemption); *Markle v. Wayne S. & L. Co.*, 5th Dist. Ashland No. 98-COA-01274, 1999 Ohio App. LEXIS 3182 (June 29, 1999)(mortgage lien is consensual and has priority over homestead exemption; mortgage lien had to be paid in full before the homeowner was entitled to \$5,000 homestead exemption). Further, in

Gale, 148 Ohio App.3d 657 at fn. 2, this court held that the debtor's right to exercise the homestead exemption is determined as of the date of execution, garnishment, attachment, or sale of the subject property; strictly speaking, it is not a defense to the foreclosure. Accordingly, the trial court was within its discretion in denying the motion for relief from judgment.

{¶13} Judgment affirmed.

It is ordered that appellee recover of appellants 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.

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J. and
SEAN C. GALLAGHER, J., CONCUR