

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COUNTRYWIDE HOME LOANS
SERVICING, L. P., et al.

C.A. No. 25297

Appellees

v.

DEBRA J. MURPHY-KESLING, et al.

Appellants

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2009 02 1220

DECISION AND JOURNAL ENTRY

Dated: December 8, 2010

MOORE, Judge.

{¶1} Appellant, Debra J. Murphy-Kesling, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On February 11, 2009, appellee, Countrywide Home Loans Servicing, L.P., filed a complaint for foreclosure due to Murphy-Kesling's failure to remain current on her mortgage. On May 28, 2009, the trial court referred the matter to foreclosure mediation. Mediation was unsuccessful. On June 12, 2009, Murphy-Kesling filed her answer to the complaint. On August 19, 2009, Countrywide filed a motion for summary judgment. On September 25, 2009, the trial court granted Countrywide's motion for summary judgment. On October 21, 2009, the trial court granted Countrywide a decree of foreclosure. On January 15, 2010, Murphy-Kesling filed a purported counter-complaint. On January 26, 2010, she filed a motion to set aside the judgment. On January 28, 2010, Countrywide filed a motion to strike the counter-complaint. On

February 26, 2010, the trial court struck Murphy-Kesling's counter-complaint and denied her motion to vacate the judgment.

{¶3} Murphy-Kesling timely filed a notice of appeal. She has raised six unnumbered assignments of error for our review. We have numbered the assignments of error and rearranged some of them to facilitate our review.

II.

{¶4} We note that Murphy-Kesling has presented her arguments before the trial court and this Court pro se. With respect to pro se litigants, this Court has observed:

“[P]ro se litigants should be granted reasonable leeway such that their motions and pleadings should be liberally construed so as to decide the issues on the merits, as opposed to technicalities. However, a pro se litigant is presumed to have knowledge of the law and correct legal procedures so that [she] remains subject to the same rules and procedures to which represented litigants are bound. [She] is not given greater rights than represented parties, and must bear the consequences of [her] mistakes. This Court, therefore, must hold [pro se appellants] to the same standard as any represented party.” (Internal citations omitted.) *Sherlock v. Myers*, 9th Dist. No. 22071, 2004-Ohio-5178, at ¶3.

Accordingly, while we have made every effort to address the merits of Murphy-Kesling's contentions, it is not our duty to create an argument where none is made. *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, at *8.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED BY NOT FULLY AND ACTIVELY UTILIZING JUDICIAL POWER AND INFLUENCE THROUGH THE CONSTITUTION AND CSPA DURING MEDIATION TO NEGOTIATE A REASONABLE MUTUAL AGREEMENT THAT WAS EQUITABLE AND BENEFICIAL TO ALL PARTIES AND IN THE BEST INTEREST OF SOCIETY AS A WHOLE THERE BY [SIC] AVOIDING FORECLOSURE.”

ASSIGNMENT OF ERROR III

“THE TRIAL COURT ERRED BY DENYING [MURPHY-KESLING'S] CONSTITUTIONAL RIGHTS OF EQUAL PROTECTION OF PROPERTY

AND CONSUMER RIGHTS THROUGH GRANTING SUMMARY JUDGMENT (R21)[.]”

ASSIGNMENT OF ERROR IV

“THE TRIAL COURT ERRED BY DENYING [MURPHY-KESLING’S] CONSTITUTIONAL RIGHTS OF EQUAL PROTECTION OF PROPERTY AND CONSUMER RIGHTS THROUGH GRANTING DECREE OF FORECLOSURE (R26).”

{¶5} In Murphy-Kesling’s first, third and fourth assignments of error, she contends that the trial court erred by failing to actively use its judicial power to negotiate a reasonable agreement to avoid foreclosure, granting summary judgment in favor of Countrywide and granting a decree of foreclosure. We do not agree.

{¶6} Any failure by the trial court to use any judicial power to negotiate an agreement to avoid foreclosure necessarily would have taken place prior to the grant of summary judgment and the decree of foreclosure. The trial court granted summary judgment on September 25, 2009 and granted the decree of foreclosure on October 21, 2009. Murphy-Kesling did not file a notice of appeal until March 12, 2010, well outside the time provided by the appellate rules for appealing the decree of foreclosure. App.R. 4(A); *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 245 (stating that “a motion for relief from judgment is not a substitute for a direct appeal from the judgment challenged.”) Accordingly, Murphy-Kesling’s attempt to appeal on these assignments of error is untimely. Her first, third and fourth assignments of error are overruled.

ASSIGNMENT OF ERROR II

“[MURPHY-KESLING’S] CONSTITUTIONAL RIGHTS TO EQUITY AND OPEN COURT IN SECTION 16, ARTICLE I; TRIAL BY JURY, SECTION 5, ARTICLE I; DUE PROCESS OF LAW, SECTION 16, ARTICLE 5; EQUAL PROTECTION, SECTION 2, ARTICLE I; HAVE BEEN VIOLATED BY THE TRIAL COURT STRIKING THE COMPLAINT, *** WITH JURY DEMAND (R38) AND CONFIRMING THE 9/25/2009 JUDGMENT ENTRY (R21) AND 10/21/2009 DECREE OF FORECLOSURE (R26)[.]”

{¶7} In her second assignment of error, Murphy-Kesling contends that the trial court erred in striking her complaint and jury demand, as well as confirming the grant of summary judgment and the decree of foreclosure. We do not agree.

{¶8} We have previously addressed Murphy-Kesling's attempt to appeal the trial court's grant of summary judgment and decree of foreclosure. On January 15, 2010, Murphy-Kesling filed a document captioned "Counter Complaint, Request for Declaratory and Injunctive Relief, Consumer Damages, Civil Penalties, Punitive Damages, and other Appropriate Relief" including a jury demand based on Countrywide's alleged violations of the Consumer Sales Practices Act. On January 28, 2010, Countrywide filed a motion to strike her counterclaims because they were filed out of time and without leave of court, in addition to the fact that the original complaint had already been reduced to judgment. The trial court correctly noted that her motions were filed out of time, approximately three months after a judgment was issued. She did not seek leave of court. Murphy-Kesling failed to comply with Civ.R. 13 through 15. Accordingly, her second assignment of error is overruled.

ASSIGNMENT OF ERROR V

"THE TRIAL COURT ERRED BY DENYING [MURPHY-KESLING'S] CONSTITUTIONAL RIGHTS OF EQUAL PROTECTION OF PROPERTY AND CONSUMER RIGHTS BY DENYING 60B MOTION TO SET ASIDE JUDGMENT, RESCISSION OF MORTGAGE AND NOTE*** (R35)[.]"

ASSIGNMENT OF ERROR VI

"...AND PERMITTING A LENDER TO COMMIT FRAUD, DECEIT, UNREASONABLE AND UNCONSCIONABLE ACTS AND PRACTICES BEFORE, DURING AND AFTER A RESIDENTIAL MORTGAGE FORECLOSURE."

{¶9} In her fifth and sixth assignments of error, Murphy-Kesling contends that the trial court erred in denying her motion to vacate the judgment pursuant to Civ.R. 60(B)(3). We do not agree.

{¶10} Civ.R. 60(B) states:

“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.

“The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.”

{¶11} In order to prevail on a motion for relief from judgment pursuant to Civ.R. 60(B), the movant must demonstrate: (1) a meritorious claim or defense; (2) entitlement to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) timeliness of the motion. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. If any of these three requirements is not met, the motion is properly overruled. *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174. When a motion, however, asserts grounds for relief from judgment that are sufficiently alleged and are supported with evidence which would warrant relief from judgment, the trial court abuses its discretion in denying a hearing. *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 19, citing *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 105. Under this standard, we must determine whether the trial court’s decision was

arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶12} On January 26, 2010, Murphy-Kesling filed a one-page document captioned “MOTION To Set Aside Default Judgment Rescission of Mortgage and Note, Declaratory Judgment, Injunction, Damages, Penalties or other appropriate relief.” Although the trial court entered summary judgment against her rather than a default judgment, she sought relief from default judgment under Civ.R. 55 and Civ.R. 60(B)(3). The trial court denied the motion because default judgment had not been granted and because her motion did not contain specific allegations of fraud.

{¶13} The motion to vacate the judgment was timely made and identified the section of Civ.R. 60(B) upon which it was based. As the trial court noted, however, it did not contain allegations beyond the bare statement that Countrywide “knowingly committed deceitful, unconscionable acts with this residential mortgage before[,] during and after this foreclosure to liquidate[] Consumer’s collateral in violation of consumer rights through [R.C.] 1345.031.” While we are sensitive to the plight of many homeowners facing foreclosure, the trial court did not abuse its discretion in overruling Murphy-Kesling’s motion to vacate pursuant to Civ.R. 60(B). Her fifth and sixth assignments of error are overruled.

III.

{¶14} Murphy-Kesling’s first, second, third, fourth, fifth and sixth assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

DEBRA J. MURPHY-KESLING, pro se, Appellant.

C. SCOTT CASTERLINE, Attorney at Law, for Appellee.