[Cite as *CitiMortgage, Inc. v. Henning*, 2019-Ohio-3851.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CITIMORTGAGE, INC.	:	JUDGES:
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	
MICHAEL J. HENNING, ET AL.	:	Case No. 18-CA-104
	:	
Defendants-Appellants	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 17CV000863
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	September 16, 2019

APPEARANCES:

For Plaintiff-Appellee	For Defendants-Appellants
KARA CZANIK 7759 University Drive Suite A West Chester, OH 45069	BRIAN A. BROWN 700 Stonehenge Parkway Suite 2B Dublin, OH 43017

Wise, Earle, J.

{¶ 1} Defendants-Appellants, Michael and Christine Henning, appeal the October 30, 2018 judgment entry of the Court of Common Pleas of Licking County, Ohio, denying their Civ.R. 60(B) motion for relief from judgment. Plaintiff-Appellee is CitiMortgage, Inc.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On June 26, 2000, appellants executed a promissory note in the amount of $130,777.00 secured by a mortgage. Appellee is the holder of the note and mortgage. Because appellants failed to pay on the note, appellee filed a complaint in foreclosure on August 11, 2017. Appellants were granted an extension to file an answer until October 1, 2017. Instead of filing an answer, appellants, on October 3, 2017, filed a motion to dismiss the complaint or otherwise issue a standing order for foreclosure mediation.

{¶ 3} On November 22, 2017, appellee filed a motion for leave to file an amended complaint. The motion was granted and appellee filed the amended complaint on same date. Appellants never answered the amended complaint.

{¶ 4} By judgment entry filed December 5, 2017, the trial court denied appellants' motion to dismiss and granted their request for mediation. The parties engaged in mediation which did not resolve the matter.

{¶ 5} On June 8, 2018, appellee filed a motion for leave to file a motion for default judgment. The motion was granted and appellee filed the motion on June 11, 2018, claiming appellants failed to answer. A non-oral hearing was scheduled for July 11, 2018.

{¶ 6} On July 10, 2018, appellants filed a motion for extension of non-oral hearing for default judgment, stating they were busy handling other affairs and intended to submit "affidavits/paperwork." On July 12, 2018, the trial court scheduled an oral hearing for July

30, 2018. Appellant Christine Henning appeared at the hearing. By judgment entries filed July 30, 2018, the trial court denied appellants' motion for extension of the hearing date, found appellants were in default of motion or answer, and entered a judgment and decree in foreclosure in favor of appellee. Appellants did not appeal the trial court's judgment and decree in foreclosure.

{¶ 7} On August 23, 2018, appellants filed a motion for relief from judgment pursuant to Civ.R. 60(B). A hearing was held on October 8, 2018. By judgment entry filed October 30, 2018, the trial court denied the motion.

{¶ 8} Appellants filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶ 9} "THE TRIAL COURT ERRED IN DENYING THE HENNINGS' 60(B) MOTION FOR RELIEF."

I

{¶ 10} In their sole assignment of error, appellants claim the trial court erred in denying their Civ.R. 60(B) motion for relief from judgment. We disagree.

{¶ 11} A motion for relief from judgment under Civ.R. 60(B) lies in the trial court's sound discretion. *Griffey v. Rajan,* 33 Ohio St.3d 75, 514 N.E.2d 1122 (1987). In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983). Appellants based their Civ.R. 60(B) motion on "mistake, inadvertence, surprise or excusable neglect" and "any other reason justifying relief from the judgment." Civ.R. 60(B)(1) and (5). In *GTE*

Automatic Electric Inc. v. ARC Industries, Inc., 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus, the Supreme Court of Ohio held the following:

> To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (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 (5); 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.

{¶ 12} As discussed by the Supreme Court of Ohio in *Kay v. Glassman, Inc.,* 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996):

> The term "excusable neglect" is an elusive concept which has been difficult to define and to apply. Nevertheless, we have previously defined "excusable neglect" in the negative and have stated that the inaction of a defendant is not "excusable neglect" if it can be labeled as a "complete disregard for the judicial system." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 153, 1 O.O.3d 86, 90, 351 N.E.2d 113, 117; *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 21, 520 N.E.2d 564, 567, at fn. 4.

{¶ 13} In addition, "[w]hile unusual or special circumstances can justify neglect, if a party could have controlled or guarded against the happening or event he later seeks to excuse, the neglect is not excusable." *National City Bank v. Kessler,* 10th Dist. Franklin No. 03AP-312, 2003-Ohio-6938, ¶ 14. The analysis of excusable neglect turns on the facts and circumstances presented in each case. *Cannell v. Bates,* 10th Dist. Franklin No. 00AP-915, 2001 WL 224532 (Mar. 8, 2001).

{¶ 14} First, appellants argue the trial court erred in finding their failure to file an answer was not excusable neglect. They admit they never filed an answer to the complaint or amended complaint; however, they "never displayed a complete disregard for the judicial system." Appellant's Brief at 7. Appellants point out they filed a motion to dismiss or in the alternative, requested mediation, participated in mediation, and filed a motion for extension of the hearing date. Appellants argue their failure to file an answer was due to their misreading of the trial court's December 5, 2017 judgment entry wherein the trial court denied their motion to dismiss, but ordered the case to mediation. They "assumed that they had properly answered or otherwise defended their case per the Trial Court's order, and that assumption amounts to excusable neglect." Appellant's Brief at 7.

{¶ 15} Appellants attached their affidavits to their August 23, 2018 motion for relief from judgment. Appellant Michael Henning stated he was undergoing medical procedures from September 2017 through April 2018. He did not attend the mediations because he was recovering from his medical procedures and caring for the children. Appellant Christine Henning stated she underwent medical procedures in February, April, and May 2018, and afterwards was busy recovering and attending to other affairs. She

stated she attended a couple of the scheduled mediation conferences. She explained when she filed the motion for extension of the hearing date, she "meant to" ask for an extension of time to answer the amended complaint and the motion for default judgment. They both averred they did not "know the legal requirements required to succeed on a Civ.R. 60(B) Motion for Relief from Judgment" and they were not attorneys and had not undergone any formal legal training.

{¶ 16} This court has previously found that such reasons do not amount to excusable neglect under Civ.R. 60(B)(1). *See PNC Mortgage v. Oyortey,* 5th Dist. Delaware No. 11 CAE00093, 2012-Ohio-3237; *Bank of N.Y. Mellon v. Flack,* 5th Dist. Stark No. 2010CA153, 2011-Ohio-890. Appellants do not deny that they were properly served and as evidenced by their mediation attempts with appellee, they were aware of the foreclosure action. They argued they were busy with medical procedures and other affairs, and were not attorneys. However, they knew enough to file a motion for extension of time to answer the complaint. The original complaint was filed on August 11, 2017. On September 6, 2017, appellants filed their motion for extension. By judgment entry filed same date, the trial court granted the motion and gave appellants until October 1, 2017, to answer. Appellants never filed an answer by said date or any date.

{¶ 17} As noted by the trial court in its October 30, 2018 judgment entry denying appellants' Civ.R. 60(B) motion, although appellants alleged their medical procedures and other affairs were the reason for their neglect, the docket "indicates that defendants were able to make several filings, participate in mediation, and attend the court hearing." The trial court also noted appellants were quick to hire an attorney after default judgment had been granted, and the case had been pending "for nearly a year before judgment was

entered." The trial court did not find appellants' failure to answer "to be excusable neglect in light of the fact that they otherwise participated and made several filings in the case."

{¶ 18} We concur with the trial court's conclusion that appellants did not establish excusable neglect.

{¶ 19} Secondly, appellants claim the trial court erred in finding they did not have a meritorious defense to present. As explained by our colleagues from the Seventh District in *Wells Fargo Bank, N.A. v. Stevens,* 7th Dist. Mahoning No. 12 MA 219, 2014-Ohio-1399, ¶ 14:

> A meritorious defense is one which "[goes] to the merits, substance, or essentials of the case." *USB Real Estate Secs., Inc. v. Teague,* 191 Ohio App.3d 189, 196, 2010-Ohio-5634, N.E.2d 5733, ¶ 23 (2d Dist.2010). Although a party does not need to prove that the alleged defense will prevail at trial, enough operative facts must be alleged to show that the defense can be proven. *Rose Chevrolet, Inc. v. Adams,* 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988).

{¶ 20} Appellants argued appellee failed to comply with the requirements of the Fair Housing Act by failing to arrange a face-to-face meeting before three full monthly mortgage payments went unpaid [24 C.F.R. 203.604(b)]. As noted by appellants in their appellate brief at 10, citing 24 C.F.R. 203.604(d), appellee was required to arrange a face-to-face meeting "at a minimum of one letter sent to the mortgagor certified by the Postal

Service as having been dispatched * * * [and] at least one trip to see the mortgagor at the mortgaged property."

{¶ 21} In their respective affidavits, appellants averred they were never contacted for a face-to-face meeting and never received a letter regarding a face-to-face meeting. Appellee rebutted these assertions with the affidavits of Cathleen Ahlquist, a Senior Recovery Analyst for appellee. Ms. Ahlquist averred she sent a letter via certified mail to appellants requesting a face-to-face meeting, and a field agent had visited the property and left a copy of a letter offering a face-to-face meeting with appellants. Attached as exhibits were copies of the mailed letter and evidence of its certified mailing and a field call log and the hand delivered letter. Appellants never responded to the letters.

{¶ 22} Appellants also argue appellee had a duty to mitigate its damages which it failed to do because appellee locked appellants out of their account preventing them from making mortgage payments, and appellee had unclean hands because of its reprehensible conduct. Ms. Ahlquist averred in her affidavit that appellants were able to electronically access and make payments to their account until after their default. Appellee consistently shuts off online account access when a loan is ninety days past due. In its judgment entry denying relief, the trial court found no grounds to support these two claims. Upon our review of the record, we agree.

{¶ 23} We concur with the trial court's conclusion that appellants did not present a meritorious defense.

{¶ 24} Upon review, we find the trial court did not abuse its discretion in denying appellants' Civ.R. 60(B) motion for relief from judgment.

{¶ 25} The sole assignment of error is denied.

{¶ 26} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed.

By Wise, Earle, J.

Delaney, P.J. and

Baldwin, J. concur.

EEW/db