

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Deutsche Bank National Trust Company, :
Plaintiff-Appellee, :
v. : No. 11AP-878
(C.P.C. No. 09CVE-2-2429)
Michele Oyortey et al., : (REGULAR CALENDAR)
Defendants-Appellants. :

D E C I S I O N

Rendered on April 10, 2012

*Thompson Hine LLP, Scott A King, and Terry W. Posey, Jr.,
for appellee.*

*McGookey Law Offices, LLC, Daniel L. McGookey,
Kathryn M. Eyster, and Lauren McGookey, for appellants.*

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Appellants, Michele and Benjamin Oyortey, appeal from a judgment of the Franklin County Court of Common Pleas denying their motion for relief from judgment filed pursuant to Civ.R. 60(B). For the following reasons, we affirm.

{¶ 2} Appellee, Deutsche Bank National Trust Company, filed a complaint against appellants on February 18, 2009, seeking the balance remaining on a promissory note and to foreclose on a mortgage that secured payment of the note. Appellants were served by ordinary mail on March 26, 2009. Appellants did not answer or otherwise respond, and

appellee filed a motion for default judgment on May 7, 2009, which the trial court granted on May 27, 2009.

{¶ 3} On June 6, 2011, over two years later, appellants moved for relief from judgment pursuant to Civ.R. 60(B). Appellants claimed that two meritorious defenses existed and sought relief under the "any other reason" provision in Civ.R. 60(B)(5). Specifically, appellants asserted that appellee obtained the judgment by submitting fraudulent documents to the court and by advising appellants not to defend themselves in the action. In an accompanying affidavit, Benjamin Oyortey averred that he and his wife were negotiating a loan modification with appellee both before and after the filing of the complaint. Although he acknowledged receiving the complaint, Benjamin claimed that employees of appellee advised him not to worry about the proceeding because no sale had occurred and because appellee "would withdraw the foreclosure after a loan modification had been reached." (Affidavit of Benjamin Oyortey, ¶ 4.)

{¶ 4} After appellee filed a memorandum opposing appellants' motion, the trial court overruled appellants' motion in a decision and entry filed September 19, 2011. In its entry, the trial court determined that appellants failed to satisfy any of the three requirements for relief from judgment as set forth in *GTE Automatic Elec. v. ARC Industries*, 47 Ohio St.2d 146 (1976).

{¶ 5} In a timely appeal from the trial court's judgment, appellants present the following assignment of error for our consideration:

The trial court erred in denying the Oyortey's Motion for Relief from Judgment and erred when it failed to hold an evidentiary hearing.

{¶ 6} Civ.R. 60(B) provides that a trial court may relieve a party 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 rule requires the motion to 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."

{¶ 7} "A motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion." *Griffey v. Rajan*, 33 Ohio St.3d 75, 77 (1987). "The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). When applying an abuse-of-discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Berk v. Matthews*, 53 Ohio St.3d 161, 169 (1990).

{¶ 8} To prevail under Civ.R. 60(B), the movant must show that: (1) the movant has a meritorious defense or claim to present if relief is granted, (2) the movant 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. *GTE* at paragraph two of the syllabus. The movant must satisfy all three of these requirements to obtain relief. *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151 (1996); see also *GTE* at 151 (finding that the requirements under Civ.R. 60(B) "are independent and in the conjunctive, not the disjunctive").

{¶ 9} In this case, the trial court denied appellants' motion on the grounds that appellants failed to satisfy any of the three requirements set forth in *GTE*. Specifically, the trial court found that appellants failed to (1) present a meritorious defense, (2) satisfy any of the grounds for relief in Civ.R. 60(B)(1) through (5), and (3) file the motion within a reasonable time. Because any one of these reasons would justify the denial of appellants' motion, we will address the trial court's timeliness determination, which we find to be dispositive. *Herlihy Moving & Storage, Inc. v. Nickison*, 10th Dist. No. 09AP-831, 2010-Ohio-6525, ¶ 13; *TPI Asset Mgt., LLC v. Benjamin*, 10th Dist. No. 11AP-334, 2011-Ohio-6389, ¶ 13.

{¶ 10} Although motions for relief under Civ.R. 60(B)(5) are not governed by a fixed time limit, they must still be brought within a reasonable time after entry of judgment. Civ.R. 60(B). Whether a Civ.R. 60(B) motion is filed within a reasonable time depends on the facts and circumstances of the particular case. *Herlihy* at ¶ 14, citing *Scotland Yard Condominium Assn. v. Spencer*, 10th Dist. No. 05AP-1046, 2007-Ohio-1239, ¶ 33. The movant bears the burden of submitting factual material that demonstrates the timeliness of the motion. *Herlihy* at ¶ 14, citing *State ex rel. Minnis v. Lewis*, 10th Dist. No. 93AP-812 (Dec. 30, 1993), citing *Youssefi v. Youssefi*, 81 Ohio App.3d 49, 53 (9th Dist.1991).

{¶ 11} A motion to vacate a default judgment filed nearly seven months after actual notice of the action and more than four months after default judgment was entered does not, on its face, satisfy the reasonable time requirement. *Mt. Olive Baptist Church v. Pipkins Paints & Home Improvement Ctr., Inc.*, 64 Ohio App.2d 285 (8th Dist.1979), paragraph two of the syllabus. "[A]n unexplained or unjustified delay in making the motion after discovering a ground for relief may put the motion beyond the pale of a reasonable time." *Herlihy* at ¶ 15 (citations omitted). This court has held that a motion filed over 20 months after service of the complaint and 16 months after entry of judgment did not satisfy the reasonable time requirement where the movant was aware of the action and actively participated in a related suit at least four months prior to filing of motion. *Benjamin* at ¶ 16-17.

{¶ 12} Here, appellants filed their motion for relief from judgment over two years after the entry of judgment and over 26 months after service of the complaint. It is undisputed that appellants were aware of the filing of the complaint and the entry of default judgment but chose not to participate in the proceedings for over two years. Appellants' only explanation for this delay is their claim that appellee instructed them to disregard the foreclosure action while they attempted to negotiate two loan modifications. However, even if this were so, appellants admit that those negotiations fell through over one year before they filed their motion for relief from judgment, yet they do not explain why they did not seek relief from judgment during that time. Under these circumstances, we find that the trial court did not abuse its discretion in finding that appellants failed to prove that their motion was filed within a reasonable time. Because the timeliness

requirement is dispositive, we need not address whether appellants presented a meritorious defense or established relief under the "any other reason" provision in Civ.R. 60(B)(5). See *Herlihy* at ¶ 19; *Benjamin* at ¶ 18.

{¶ 13} We also disagree with appellants' argument that the trial court erred by not holding an evidentiary hearing on their motion. A movant is not automatically entitled to a hearing on a motion for relief from judgment under Civ.R. 60(B). *Cunningham v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-330, 2008-Ohio-6911, ¶ 35, citing *Cuervo v. Snell*, 131 Ohio App.3d 560, 569 (10th Dist.1998). Instead, to warrant a hearing, "the movant must allege operative facts that, if true, would be sufficient to establish each of the elements of the *GTE* test." *Id.* "A trial court may * * * deny a Civ.R. 60(B) motion without granting an evidentiary hearing when the motion is untimely." *GMAC Mtge., LLC v. Lee*, 10th Dist. No. 11AP-796, 2012-Ohio-1157, ¶ 25, citing *Bednar v. Bednar*, 20 Ohio App.3d 176 (9th Dist.1984); *Busselle v. Redden's Auto Body & Garage*, 8th Dist. NO. 85824, 2005-Ohio-4011, ¶ 12. As explained above, appellants failed to allege operative facts establishing the timeliness of their motion for relief from judgment. Therefore, the trial court did not abuse its discretion by denying appellants' motion without conducting a hearing.

{¶ 14} Accordingly, appellants' assignment of error is overruled.

{¶ 15} Having overruled appellants' sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
