

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NATIONAL CITY BANK C/O	:	JUDGES:
ALTERGRA CREDIT COMPANY	:	Hon: W. Scott Gwin, P.J.
	:	Hon: John W. Wise, J.
Plaintiffs-Appellees	:	Hon: John F. Boggins, J.
	:	
-vs-	:	Case No. 2003-CA-30
	:	
MICHAEL AND STEPHANIE LEE	:	
FRAZIER	:	<u>OPINION</u>
	:	
Defendants-Appellees	:	

CHARACTER OF PROCEEDING: Civil appeal from the Knox County Court of Common Pleas, Case No. 02FR070249

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: October 19, 2004

APPEARANCES:

For Plaintiffs-Appellees

For Defendants-Appellants

PAMELA S. PETAS
LERNER, SAMPSON & ROTHFUSS
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Cincinnati, OH 45202

MICHAEL AND STEPHANIE FRAZIER
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Gwin, P.J.

{¶1} Defendants Michael and Stephanie Lee Frazier appeal a judgment of the Court of Common Pleas of Knox County, Ohio, which overruled their motion to vacate the trial court's earlier judgment entered against them and in favor of plaintiff-appellee National City Bank. Appellants assign four errors to the trial court:

{¶2} "I. WHETHER DEFENDANTS/APPELLANTS WERE DENIED DUE PROCESS OF LAW AS DEFENDANT'S VERIFIED MOTION TO VACATE A VOID JUDGMENT WAS DECIDED ABSENT AN ORAL HEARING.

{¶3} "II. WHETHER DEFENDANTS/APPELLANTS WERE DENIED DUE PROCESS OF LAW AS DEFENDANT'S MOTION DID MEET THE REQUIREMENTS OF OHIO RULES OF CIVIL PROCEDURE (ORCP) RULE 60(B) AND THAT AS A RESULT THE DECISION AGAINST DEFENDANTS/APPELLANTS MAY HAVE BEEN DUE TO PREJUDICE AND BIAS BY THE PRESIDING JUDGE.

{¶4} "III. WHETHER DEFENDANTS/APPELLANTS WERE DENIED DUE PROCESS OF LAW AS DEFENDANT'S MOTIONS WERE TIMELY, VALID LAWFULLY AND PROCEDURALLY SUFFICIENT AND HAD A RIGHT TO ORAL ARGUMENT TO OPPOSE PLAINTIFF'S OPPOSITION, WHEREIN NO ORAL ARGUMENT WAS CONSIDERED NOR WAS DEFENDANTS/APPELLANTS ALLOWED A RIGHT TO A ORAL HEARING.

{¶5} "IV. WHETHER DEFENDANTS/APPELLANTS WERE DENIED DUE PROCESS OF LAW AS THE PRESIDING JUDGE WAS DECISION MAKER IN THE INSTANT CASE, TO WHICH THE DEFENDANT'S REQUESTED THE PRESIDING JUDGE'S RECUSAL BASED ON A PREVIOUS AFFIDAVIT OF DISQUALIFICATION

AND WHETHER OR NOT THE PRESIDING JUDGE COULD REMAIN FOCUSED AND NEUTRAL AND OBSTAIN FROM BEING PREJUDICIAL BASED ON THE DEFENDANTS/APPELLANTS PRIOR ALLEGATIONS OF BIAS.”

{¶6} In July of 2002, appellee filed this action for judgment on two promissory notes and foreclosure of two mortgages on property owned by appellants in Knox County, Ohio. The trial court entered summary judgment in favor of appellee on January 23, 2003.

{¶7} On April 25, 2003, appellants filed their Civ. R. 60 (B) motion. On April 29, 2003, appellants filed a notice advising the court they had filed an affidavit of disqualification with the Supreme Court, seeking to remove the trial judge from the case. After the Supreme Court denied the affidavit of disqualification on August 4, 2003, appellee filed a memorandum in opposition to the motion to vacate. On August 22, 2003, the trial court overruled the motion to vacate the judgment, and this appeal ensued.

{¶8} Civ. R. 60 (B) provides:

{¶9} (B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc

{¶10} 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.

{¶11} In *GTE Automatic Electric, Inc. v. ARC Industries* (1976), 47 Ohio St. 2d 146, the Ohio Supreme Court set forth what a movant must demonstrate in order to prevail on a motion to vacate a judgment. The movant must show first, he has a meritorious claim or defense; secondly, he is entitled to relief under one of the grounds stated in Civ. R. 60 (B)(1) through (5); and thirdly, the motion for relief is made within a reasonable period of time.

{¶12} Appellants cited Civ. R. 60 (B)(5) as the basis for their motion. Appellants urged the court's previous judgment was void because there was no evidence presented to the court in support of appellee's cause of action. Appellants also argued the trial court judge should have recused himself from the case because of bias.

{¶13} Chief Justice Moyer refused to remove the trial judge from the case. We are bound by this determination.

{¶14} Appellants also challenged the trial court's jurisdiction.

I & III

{¶15} In their first and third assignments of error, appellants urge the court erred in not granting an oral hearing on their Civ. R. 60 (B) motion.

{¶16} In *Gaines & Stern Company, L.P.A. v. Schwarzwald* (1990), 70 Ohio App. 3d 643, 591 N.E. 2d 866, the Eighth District Court of Appeals held a trial court is not required to hold a hearing on a motion made pursuant to Civ. R. 60 (B), unless the material submitted by the movant contains allegations of operative facts demonstrating relief is warranted, *Schwarzwald* at 645, citations deleted.

{¶17} Our review of the record indicates appellants did not present facts tending to show the court lacked jurisdiction, and in fact, the record demonstrates the contrary. Appellants' answer to the complaint denies they are in default, and alleges they have submitted full payment pursuant to the mortgage, although appellants question whether the mortgage they have is the same one referred to in appellee's pleadings. In so doing, they admitted the existence of the debt but challenged the amount and whether they had defaulted.

{¶18} We find appellants failed to state sufficient operative facts to warrant an evidentiary hearing.

{¶19} The first and third assignments of error are overruled.

II & IV

{¶20} Appellants also assert the overruling of their motion to vacate may be due to prejudice and bias of the trial judge. As we held *supra*, we are bound by the Supreme Court's determination in this matter.

{¶21} Appellants maintained appellee is not entitled to judgment on the second mortgage loan because it could not present a copy of the promissory note, and because the documents it did submit to the court were Xeroxed copies. As noted *supra*, appellants did not deny the existence of the mortgages. In addition, we have reviewed

the documents submitted by appellee in support of its allegations, and we find there was sufficient evidence presented to the trial court from which it could enter summary judgment in favor of appellee.

{¶22} The second and fourth assignments of errors are overruled.

{¶23} For the foregoing reasons, the judgment of the Court of Common Pleas of Knox County, Ohio, is affirmed.

By Gwin, P. J.,
Wise, J., and
Boggins, J., concur

JUDGES

