

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Christiana Bank & Trust Company,
as Owner Trustee of the Security
National Funding Trust

Court of Appeals No. L-11-1075

Trial Court No. CI0200807327

Appellee

v.

Bonnie Ostrander, et al.

DECISION AND JUDGMENT

Appellant

Decided: January 11, 2013

* * * * *

Eric T. Deighton, for appellee.

Steven L. Diller, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals a judgment that confirmed a foreclosure sale in the Lucas County Court of Common Pleas. Because we conclude that appellee failed to establish a justiciable interest in the subject matter of the suit at the time it attempted to invoke the jurisdiction of the court, we dismiss the case.

{¶ 2} On January 10, 2007, appellant, Bonnie Ostrander, borrowed \$138,600 through Freedom Home Mortgage Corporation. The note for this debt was secured by a mortgage on real property on Roseanna Drive in Toledo, Ohio.¹

{¶ 3} On October 8, 2008, appellee, Christiana Bank & Trust Company, as Owner Trustee of the Security National Funding Trust, filed suit alleging that it was the holder of the note and that appellant was in default for lack of payment. Appellee sought judgment on the note, foreclosure of the mortgage and sale of the property to satisfy the debt.

{¶ 4} When appellant failed to answer the complaint, appellee moved for a default judgment. On January 28, 2009, the court granted appellee's motion, foreclosed the mortgage and ordered sale of the property. Appellee filed an order of sale on September 9, 2009.

{¶ 5} On January 25, 2010, counsel for appellant entered an appearance and moved the court to withdraw its order of sale. Appellant also asked the court to enforce a purported settlement agreement between appellant and appellee. According to appellant, appellee agreed that, if appellant would make payments to bring the loan current, appellee would modify the terms of the note to reflect a fixed interest rate, give notice to credit reporting agencies that she was not delinquent and dismiss the foreclosure suit. Appellant claimed she had made the agreed payments, but appellee had not performed its reciprocal duties. Appellee responded on March 4, 2010, denying the existence of a settlement agreement.

¹ Appellant's husband, Charles Ostrander, is on the mortgage for dower interest only.

{¶ 6} On March 31, 2010, appellant filed a Civ.R. 60(B) motion to set aside the default judgment and requested the court withdraw the order of sale. The trial court withdrew the order of sale and set an evidentiary hearing on appellant's motion for April 29, 2010.

{¶ 7} It is not clear if the April hearing occurred. The parties agree that there were discussions that led to a May 27, 2010 consent entry. This second entry appears identical to the first default judgment except the order of sale is delayed 90 days. Appellee concedes that it agreed not to seek a deficiency judgment against appellant as part of its understanding leading to the consent entry. The parties suggest the 90-day waiting period was to allow further negotiations. The order of sale was eventually set for September 15, 2010.

{¶ 8} On September 14, 2010, appellant again moved the court to withdraw the order of sale, asserting that appellee refused to negotiate in good faith. Again the court cancelled the sheriff's sale. The sale was eventually rescheduled for March 16, 2011.

{¶ 9} On February 24, 2011, at appellant's request, the court referred the matter to foreclosure mediation. On March 8, 2011, appellant moved to again vacate the sale date.

{¶ 10} The court denied appellant's motion to vacate the order for sheriff's sale. The sale proceeded as scheduled, following which further mediation was cancelled. The court confirmed the sale on April 1, 2010. Appellant appealed.

{¶ 11} Appellant sets forth the following three assignments of error:

First Assignment of Error

The trial court erred as a matter of law when it denied appellant's motion pursuant to Rule 60(B).

Second Assignment of Error

The trial court erred when it denied appellant's motion to stay the execution of judgment.

Third Assignment of Error

The trial court abused its discretion when it denied appellant's motion to vacate the sheriff's sale while the case was referred to the foreclosure magistrate.

I. Relief from Judgment

{¶ 12} Civ.R. 60(B) provides:

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.

{¶ 13} To prevail on a Civ.R. 60(B) motion for relief from judgment, “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.” *GTE Automatic Elec, Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus; *Covert Options, Inc. v. R.L. Young & Assocs., Inc.*, 2d Dist. No. 20011, 2004-Ohio-67, ¶ 7. All three elements must be established, and “the test is not fulfilled if any one of the requirements is not met.” *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 637 N.E.2d 914 (1994); *Fifth Third Bank of W. Ohio v. Shepard Grain Co., Inc.*, 2d Dist. No. 2003 CA 40, 2004-Ohio-1816, ¶ 10. On review, an appellate court may reverse a court’s ruling on a Civ.R. 60(B) motion only on a showing of an abuse of discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987). An 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, 450 N.E.2d 1140 (1983).

{¶ 14} There seems to be more than enough confusion associated with this assignment of error to taint all parties. Appellant moved for relief judgment on March 31, 2010. The trial court did not rule on this motion. Ordinarily, when a trial court does not rule on a motion it is presumed to be denied. *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, 770 N.E.2d 58, ¶ 13. Nevertheless, the court behaved as if it had partially granted the motion. It stayed the sale and was willing to ratify an amended default judgment entry by consent of the parties, albeit the only difference with the original entry being a 90-day delay of the order of sale. Thus, with respect to the March 31 motion, we cannot say that the court's decision was adverse to appellant.

{¶ 15} It is not the March 31 motion, however, which appellant appeals. Appellant maintains that her September 14, 2010 motion to withdraw the order of sale, although not denominated a Civ.R. 60(B) motion, contained arguments "in the nature of such a motion." In support of appellant's proposition that the September 14 motion should be treated as pursuant to Civ.R. 60(B), appellant points out that, in its response, appellee argued that appellant failed to satisfy the requirements of the rule.

{¶ 16} The prerequisites for a party seeking to foreclose a mortgage are execution and delivery of the note and mortgage; valid recording of the mortgage; default; and establishing an amount due. *First Natl. Bank of Am. v. Pendergrass*, 6th Dist. No. E-08-048, 2009-Ohio-3208, ¶ 21. In this matter, appellant complained and presented evidence that her dealings with appellee were punctuated with a lack of cooperation, miscommunication and any number of other irritants that engendered frustration. In

appellant's view, after the suit was filed, the bank made misrepresentations to her in order to get her to send them more money, which she sent. The bank then stalled, refused to talk to her and made promises it did not keep.

{¶ 17} Ordinarily, appellee's right to foreclose the mortgage would have been set when the suit was filed. Appellant did not contest that she executed the original note and mortgage. There is no dispute that the note and mortgage were properly recorded. There is nothing in the record to suggest that appellee's assertion that appellant was in default on her payments was not true. Neither is there any dispute as to the amount due, especially since appellee agreed to forego any deficiency judgment.

{¶ 18} Subsequent to oral argument on this matter, however, the Supreme Court of Ohio released an opinion dispositive of this matter. In *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017, ¶ 28, the court held that a party that failed to establish an interest in the mortgage or the note at the time it filed suit had no standing to invoke the jurisdiction of the court. Moreover, a litigant cannot cure a lack of standing after the commencement of the suit by later obtaining an interest in the subject of the litigation. *Id.* at ¶ 39. A lack of subject matter jurisdiction may be raised sua sponte by the court at any stage of the proceedings, including on appeal. *Miller ex rel. Lafountain v. McMichael*, 3d Dist. No. 11-03-08, 2003-Ohio-6713, ¶ 8.

{¶ 19} In examining the documents filed by appellee, we note that attached to the original complaint and the subsequent motion for default judgment is a "Note Allonge" signed by the secretary of Freedom Home Mortgage Corporation which states, "Pay

without recourse to the order of” followed by a blank line. To the motion for default judgment is attached a “Mortgage Assignment” dated October 1, 2008, from “Mortgage Asset Registration Systems, Inc., as nominee for Countrywide Mortgage Ventures, L.C.C.” to “Countrywide Home Loans, Inc.” for property owned by Brian Smith located in Miamisburg, Ohio. Nowhere in the record is there any document in support of appellee’s assertion that it is the present holder of appellant’s note and mortgage, let alone any evidence that the assignment was antecedent to filing the complaint. Absent establishment of a justiciable interest of the subject matter of the suit at the time it attempted to invoke the jurisdiction of the court, the suit must be dismissed, rendering all of appellant’s assignments of error moot.

{¶ 20} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is reversed. Pursuant App.R. 12(B) and *Schwartzwald* at ¶ 40, the underlying suit is dismissed without prejudice. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.