

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

National City Bank successor by
merger National City Mortgage Co.

Appellant

v.

Dimitries Jenkins, et al.

Appellee

Court of Appeals No. E-12-018

Trial Court No. 2008 CV 1051

DECISION AND JUDGMENT

Decided: July 12, 2013

* * * * *

Marcel C. Duhamel, Heather M. Lutz, David Y. Park,
Erin Laurito, and Barbara Borgmann, for appellant.

Daniel L. McGookey, Kathryn M. Eyster,
and Lauren McGookey, for appellee.

* * * * *

SINGER, P.J.

{¶1} Appellant bank appeals the order of the Erie County Court of Common Pleas granting relief from a judgment of foreclosure. Because we conclude that the trial court abused its discretion in granting the motion, we reverse.

{¶2} In March, 2004, appellee, Dimitries Jenkins, and his now former wife, Gina, purchased a home on Sherman Street in Sandusky. The purchase was financed with a loan from appellant, National City Bank n/k/a PNC Bank N.A., in the amount of \$77,850. The promissory note for the loan was secured by a mortgage on the property. In 2005 National City Bank assigned the mortgage to National City Mortgage Co.

{¶3} According to appellee, in 2007, when he and his wife separated, she stopped contributing toward the mortgage payment and he was ordered to pay what he terms a “substantial child support payment.” Appellee maintains that his attempt to modify the loan at that point was unavailing because National City Bank was unwilling to cooperate. In 2008, appellee missed a payment and was unable to catch up because of late fees, bank charges and the bank’s unwillingness to work with him, he says.

{¶4} On November 18, 2008, National City Bank filed a complaint seeking to foreclose appellee’s mortgage. Appellee did not answer the complaint, but moved for and was granted an extension of time within which to answer. During this extension, appellee obtained counsel, who entered an appearance and moved for a second extension of time. The court extended the answer date until May 1, 2009.

{¶5} On May 1, 2009, rather than file an answer, appellee’s counsel moved to withdraw, citing an inability to contact her client. Appellee disputes this account, claiming that it was he who was unable to contact his attorney. Moreover, appellant

maintains, counsel never informed him that an answer had not been filed or that one was due.

{¶6} Appellant moved for a default judgment on August 13, 2009. On March 8, 2010, the court entered a default judgment on the note, foreclosed the mortgage and ordered a sheriff's sale of the subject property. On July 20, 2010, appellant purchased the property at the sheriff's sale, assigning its bid to PNC Mortgage, a division of PNC Bank N.A. Appellant moved for an order confirming the sale on June 1, 2011. On June 6, 2011, the court entered a judgment confirming the sale. The court issued a writ of possession on October 27, 2011.

{¶7} On December 2, 2011, appellant moved for a stay of the writ, followed by a motion for relief from judgment. The court granted the stay. Appellant filed a memorandum in opposition to the relief from judgment motion. Extensive briefing followed. On March 30, 2012, the court granted appellee's Civ.R. 60(B) motion. This appeal followed.

{¶8} Appellant sets forth the following two assignments of error:

1. The trial court erred and abused its discretion by vacating PNC Bank, National Association's ("PNC") default judgment and decree of foreclosure against Dimitries Jenkins ("Jenkins") because Jenkins failed to file his motion for relief within a reasonable time.

2. The trial court erred and abused its discretion by vacating the order confirming the sheriff's sale because Jenkins failed to show a meritorious defense with respect to the confirmation of the sale and also failed to file his motion for relief within a reasonable time.

Relief from Judgment

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. Civ.R. 60(B).

{¶9} 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.

{¶10} 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 CA40, 2004-Ohio-1816, ¶ 10. With respect to the meritorious defense or claim element, however, a party need only allege a meritorious claim or defense; the party need not prove that he or she will prevail. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988).

{¶11} 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).

Timeliness

{¶12} In its first assignment of error, appellant contests that appellee’s motion for relief from judgment was filed within a reasonable time. Appellant notes that the motion was not filed until nearly 21 months after the entry of the default judgment. This amount of time, without sufficient excuse, is inherently unreasonable, appellant asserts. In support appellant cites numerous cases in which substantially shorter periods were deemed to be untimely. *Ross v. Olsavsky*, 7th Dist.No. 09 MA 95, 2010-Ohio-1310, ¶ 36 (17 months); *Broadvox, LLC v. Oreste*, 8th Dist. No. 92064, 2009-Ohio-3466, ¶ 19 (six months); *State Farm Mut. Auto. v. Garreffa*, 4th Dist. No. 04CA3, 2004-Ohio-3394, ¶ 20 (nine months); *Fed. Natl. Mtge. Assn. v. Goldstein*, 8th Dist. No. 97743, 2006-Ohio-6769, ¶ 7 (five months).

{¶13} Decrees of foreclosure and orders of sale are final appealable orders. *Ohio Dept. of Taxation v. Plickert*, 128 Ohio App.3d 445, 446, 715 N.E.2d 239 (8th Dist.1998), citing *Third Natl. Bank of Circleville v. Speakman*, 18 Ohio St.3d 119, 480 N.E.2d 411 (1985). Subsequent proceedings are “administrative matters finalizing the result of the sheriff’s sale and giving the mortgagors the opportunity to exercise their equitable right of redemption. These actions can be classified as proceedings to aid in execution of the judgment.” *Countywide Home Loans Servicing, L.P. v. Nichpor*, Slip Opinion No. 2013-Ohio-2083, ¶ 6. This means appellee waited nearly two years from the final order to interpose his motion.

{¶14} While appellant maintains that the sudden departure of his counsel on answer day left him without knowledge that an answer was due, this event cannot excuse what must have been his knowledge or deliberate avoidance of knowledge that the foreclosure was proceeding. In such circumstances, such an extended delay is inherently unreasonable and the trial court abused its discretion in concluding otherwise. Accordingly, appellant's first assignment of error is well-taken. Appellant's second assignment of error is moot.

{¶15} On consideration whereof, the judgment of the Erie County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings. Appellee is ordered to pay the 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.

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.

JUDGE

James D. Jensen, 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:
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