

[Cite as *Fifth Third Mtge. Co. v. Orebaugh*, 2011-Ohio-4472.]

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

FIFTH THIRD MORTGAGE CO.,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-03-039
	:	<u>OPINION</u>
- vs -	:	9/6/2011
	:	
REBECCA OREBAUGH, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
Case No. CV2010-08-3193

Brian R. Gutkoski, 24755 Chagrin Boulevard, Suite 200, Cleveland, Ohio 44122, for plaintiff-appellee

Worrell A. Reid, 6718 Loop Road, #2, Centerville, Ohio 45459, for defendant-appellant

**POWELL, P.J.**

{¶1} Rebecca Orebaugh asks this court to overturn the grant of summary judgment to Fifth Third Mortgage Company in a foreclosure action. The judgment is reversed because the grant of summary judgment was void as it was predicated on another void action when the trial court set aside a previously-granted default

judgment while the case was on appeal.

{¶12} According to the record, plaintiff-appellee, Fifth Third, filed a foreclosure action against multiple defendants, including defendant-appellant, Orebaugh, in August 2010. Orebaugh answered Fifth Third's complaint one day out of time. Five days after the answer was filed, Fifth Third moved for default judgment, indicating that all defendants were in default of answer.

{¶13} Nine days after it filed for default judgment, Fifth Third moved for summary judgment on September 16, 2010, acknowledging that Orebaugh answered the complaint. Orebaugh responded to Fifth Third's motion for summary judgment. The trial court granted default judgment against Orebaugh on October 6, 2010. Orebaugh moved for relief from judgment pursuant to Civ.R. 60(B) in October, and filed an appeal with this court on November 2.

{¶14} The record reveals that the trial court filed an entry November 17 in which it observed that it had no jurisdiction to consider Orebaugh's Civ.R. 60(B) motion because of the pending appeal; the trial court denied Orebaugh's motion. In the same entry, the trial court sua sponte set aside the default judgment as to Orebaugh only.

{¶15} The trial court principally relied on the Ohio Supreme Court case of *In re Estate of Gray* (1954), 162 Ohio St. 384, to support its decision to vacate the judgment. The *Gray* case was cited for the proposition that a court has the power to correct nonjudicial mistakes in its proceedings and may annul within a reasonable time, orders and judgments inadvertently or improvidently made. See *Id.* at 390.

{¶16} In the case at bar, the trial court said it would not have granted the default judgment had it known Orebaugh answered, albeit late. It mentioned that it

was also unaware of Fifth Third's motion for summary judgment. Although the case was pending on appeal, the trial court "returned [the case] to the active docket," noting that Fifth Third's summary judgment motion remained pending.

{¶7} This court dismissed Orebaugh's appeal with prejudice February 1, 2011, when she failed to file a brief. See *Fifth Third Mortgage Co. v. Orebaugh* (Feb. 1, 2011), Butler App. No. CA2010-11-300. On February 23, the trial court granted summary judgment to Fifth Third, with little or no discussion of the issues involved. Orebaugh instituted this appeal, setting forth the following single assignment of error:

{¶8} "THE TRIAL COURT'S SUPPLEMENTAL JUDGMENT ENTRY GRANTING PLAINTIFF SUMMARY JUDGMENT WAS INCORRECT AS A MATTER OF LAW IN THAT APPELLANT' AFFIDAVIT CREATE A TRIABLE ISSUE, MAKING SUMMARY DISPOSITION OF MATTER INAPPROPRIATE." [SIC]

{¶9} We need not address the merits of this summary judgment action because that judgment was void, predicated on another void order—the trial court's sua sponte decision in November 2010 to set aside the default judgment when the case was on appeal.

{¶10} When a case has been appealed, the trial court retains all jurisdiction not inconsistent with the court of appeals' jurisdiction to reverse, modify, or affirm the judgment. *Yee v. Erie County Sheriff's Dept.* (1990), 51 Ohio St.3d 43, 44; see *Howard v. Catholic Soc. Serv. of Cuyahoga County Inc.*, 70 Ohio St.3d 141, 147, 1994-Ohio-219 (trial court did not have jurisdiction to consider a motion for relief from judgment under Rule 60[B] of the Ohio Rules of Civil Procedure while an appeal from the judgment was pending in reviewing court; jurisdiction may be conferred on the trial court only through an order by the reviewing court remanding the matter for

consideration of the Civ.R. 60[B] motion).

{¶11} Where a party files a timely notice of appeal from a final order, this action divests the trial court of jurisdiction to alter the order. *Stewart v. Zone Cab of Cleveland*, Cuyahoga App. No. 79317, 2002-Ohio-335. The trial court in this case had no jurisdiction to set aside, or alter, the default judgment as that substantive decision was inconsistent with this court's jurisdiction to reverse, modify, or affirm the default judgment.

{¶12} Courts have held that an action taken by a trial court after it loses jurisdiction as a result of the filing of an appeal is null and void. See *Perfection Graphics, Inc. v. Sheehan* (June 14, 1996), Geauga App. No. 95-G-1915, 1996 WL 648979; see *Story v. Price-Story*, Cuyahoga App. No. 94085, 2010-Ohio-4675, ¶7; *T & H Transportation, Inc. v. Tatman* (December 30, 1983), Madison App. No. CA83-07-029, 1983 WL 6348.

{¶13} Where a trial court enters an order without jurisdiction, its order is void and a nullity, and a void judgment puts the parties in the same position they would be in if it had not occurred. *Stewart*. Accordingly, any action taken after the trial court lost jurisdiction through the pending appeal was a nullity and the trial court could not deny a Civ.R. 60(B) motion without an appellate court remand, could not set aside the default judgment, and could not subsequently grant summary judgment. Cf. *In re Brandon P.*, Lucas App. No. L-02-1230, 2003-Ohio-1861 (follows that any subsequent order of the lower court predicated on the void order is also a nullity); see *Howard* at 47.

{¶14} We sustain Orebaugh's assignment of error only to the extent that we find the grant of summary judgment was error. The summary judgment, the order

denying Orebaugh's Civ.R. 60(B) motion, and the order setting aside the default judgment are all vacated as null and void judgments.

{¶15} When we place the parties in the same position as if the null and void action of the trial court had not occurred, this case returns to the point where the default judgment was granted against Orebaugh and her Civ.R. 60(B) motion is pending. This cause is remanded to the trial court for further proceedings.

{¶16} Judgment reversed and remanded.

HENDRICKSON and PIPER, JJ., concur.