

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

Countrywide Home Loans, Inc.

Court of Appeals No. L-13-1070

Appellee

Trial Court No. CI0200802809

v.

Robert E. Montgomery, et al.

DECISION AND JUDGMENT

Appellant

Decided: October 25, 2013

* * * * *

Eric T. Deighton, for appellee.

Robert E. Montgomery, pro se.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals an order from the Lucas County Court of Common Pleas which denied a motion to vacate judgment on a foreclosure action. Because clear evidence indicates appellee held title to the note and mortgage at the time the suit commenced, the judgment of the trial court is affirmed.

{¶ 2} In 2004, appellant, Robert E. Montgomery, entered into a mortgage agreement with Keybank for the purchase of a home at 3420 Scarsborough Road in Toledo, Ohio. On March 19, 2008, appellee Countrywide Home Loans, Inc. filed a foreclosure action against appellant. Appellee filed a summary judgment motion which

was granted by the trial court. In his appeal, appellant alleged that appellee improperly brought the action in violation of Civ.R. 17(A), arguing that Countrywide was not the real party in interest because it did not have title to the mortgage at the time the suit was commenced. This court on appeal affirmed the grant of summary judgment and permitted the foreclosure to go forward because the evidence was clear that appellee became holder of the note before commencing with the foreclosure proceedings and appellant had failed to provide any evidence to the contrary. *See Countrywide Home Loans, Inc. v. Montgomery*, 6th Dist. Lucas No. L-09-1169, 2010-Ohio-693.

{¶ 3} In March 2012, appellant filed for bankruptcy protection and the sheriff's foreclosure sale was stayed for a short period of time. On November 1, 2012, appellee filed notice of relief from the bankruptcy stay which was eventually granted by the trial court. Appellant promptly filed another motion to vacate judgment on the same grounds previously denied by both the trial court and this court of appeals, namely, that Countrywide was not the party in interest at the time of commencement. Appellant's second and third motions to vacate judgment were both denied by the trial court and appellant subsequently filed this appeal.

{¶ 4} Appellant asserts one assignment of error:

Trial court erred in granting Countrywide's motion for Summary judgment because Countrywide was not the real party in interest at the time of judgment, due to a defect in the chain of title.

{¶ 5} In this case, the appeal concerns a motion to vacate judgment under Civ.R. 60(B). "To prevail on his motion under 60(B), 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 * * *." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 150, 351 N.E.2d 113 (1976). "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, 514 N.E.2d 1122 (1987). An abuse of discretion is more than an error in 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).

{¶ 6} This assignment of error is similar to that of the previous appeal considered by this court. It read "[t]he plaintiff was not the real party in interest in the lawsuit filed in the trial court and therefore lacked standing to bring suit at the time the suit was filed against the defendant." *Countrywide*, 6th Dist. Lucas No L-09-1169, 2010-Ohio-693 at

¶ 2. Evidence considered included a final judicial report by First American Title Insurance which stated:

1. Said Mortgage was assigned to COUNTRYWIDE HOME LOANS, INC., 7105 CORPORATE DRIVE, PTX-B-209, PLANO, TX 75024 BY SEPARATE INSTRUMENT dated March 14, 2008, filed for record April 16, 2008 at 9:10 a.m. and recorded in INSTRUMENT NO. 20080416-0018897 of Lucas County records. *Id.* at ¶ 7.

In that case, this court held that the “uncontradicted evidence * * * establish[ed] that appellee was the holder of appellant’s mortgage on March 14, 2008, the date that this foreclosure action was commenced.” *Id.* at ¶ 14. Subsequently, the judgment of the trial court was affirmed. *Id.* at ¶ 15.

{¶ 7} The only new evidence brought in this appeal is the Ohio Supreme Court’s decision in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214. In that case, a foreclosure action, the Schwartzwalds argued that appellee did not have standing to bring suit under Civ.R. 17(A). Although it was clear that the plaintiff did not have title to the note or mortgage at the time the foreclosure litigation commenced, both the trial court and court of appeals held that this lack of standing was cured by acquiring title from the previous note holder during litigation. *Id.* at ¶ 10 and 15. The Ohio Supreme Court reversed the judgment of the lower courts, holding “a litigant cannot pursuant to Civ.R. 17(A) cure their lack of standing after commencement of the action by obtaining an interest in the subject of the

litigation and substituting itself as the real party in interest.” *Id.* at ¶ 39. Therefore, “the lack of standing at the commencement of a foreclosure action requires dismissal of the complaint.” *Id.* at ¶ 40.

{¶ 8} Both Civ.R. 17(A) and *Schwartzwald* stand for the principle that any party commencing an action must have standing to sue at the time the action commences. However, the facts in that case are significantly different than the facts in the present action. Here, both the trial court and the court of appeals have repeatedly held that Countrywide has proven itself to be the holder of the note and mortgage at the time the action commenced. Such a finding defeats any claim that *Schwartzwald* ought to apply in this case because Countrywide did not attempt to substitute itself as the real party in interest after the suit had already been filed. On these facts, therefore, the trial court did not abuse its discretion in denying the motion to vacate judgment.

{¶ 9} Accordingly, appellant’s assignment of error is not well-taken. The judgment of the trial court is affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

Countrywide Home Loans, Inc.
v. Montgomery
C.A. No. L-13-1070

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

Thomas J. Osowik, 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>.