

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Deutsche Bank National Trust Company,	:	
as Trustee for Argent Securities, Inc.,	:	
Asset-Backed Pass-Through Certificates,	:	
Series 2006-M1 c/o American Home	:	
Mortgage Servicing, Inc.,	:	
	:	No. 12AP-536
Plaintiff-Appellee,	:	(C.P.C. No. 11CVE-02-2422)
v.	:	(REGULAR CALENDAR)
John Whiteman,	:	
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 23, 2013

Manley Deas Kochalski LLC, and Matthew J. Richardson, for appellee.

Dann, Doberdruk & Harshman LLC, Marc E. Dann, and Grace Doberdruk, for appellant.

APPEAL from the Franklin County Court of Common Pleas

McCORMAC, J.

{¶ 1} Defendant-appellant, John Whiteman ("Whiteman"), appeals the judgment of the Franklin County Court of Common Pleas, in which the court denied his motion for relief from judgment pursuant to Civ.R. 60(B)(3) and motion to dismiss pursuant to Civ.R. 12(B)(1). For the following reasons, we affirm that judgment.

{¶ 2} On April 11, 2006, Whiteman executed a promissory note in favor of Argent Mortgage Company, LLC ("Argent") for \$236,700. Also on that date, Whiteman executed a mortgage that secured the note and encumbered the property located at 1943 Drew

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Avenue, Columbus, Ohio 43235. The mortgage indicated that the lender was Argent. In February 2009, Argent assigned the mortgage to plaintiff-appellee, Deutsche Bank National Trust Company, as Trustee for Argent Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2006-M1 ("Deutsche").

{¶ 3} On February 23, 2011, Deutsche filed the present foreclosure action against Whiteman and other entities with interests in the real property, alleging that the mortgage conveys Deutsche an interest in the property, Deutsche is an entity entitled to enforce the note, Whiteman defaulted on the note, Deutsche declared the debt due, and all conditions precedent to Deutsche's ability to enforce the mortgage had been satisfied.

{¶ 4} Deutsche attached several documents to its complaint, including the promissory note and mortgage. Deutsche also attached two signed and notarized documents that purportedly assigned the mortgage to Deutsche. The first assignment-of-mortgage document assigned the mortgage from Argent to Deutsche, stated an effective date of February 11, 2009, and indicated recordation in Franklin County on February 17, 2009. This assignment referenced a "Pooling and Servicing Agreement" ("PSA") dated June 1, 2006. The second assignment-of-mortgage document assigned the mortgage from Deutsche to itself, stated an effective date of May 14, 2009, and indicated recordation in Franklin County on July 1, 2009. In addition to these documents, Deutsche attached a preliminary judicial report issued by a title insurance company in February 2011. A schedule attached to the report referenced the two above-noted assignments to Deutsche, as well as five other assignments of mortgage that were deemed invalid because the assignor in each was not the lienholder at the time the assignments were recorded.

{¶ 5} On July 14, 2011, Deutsche filed a motion for default judgment against Whiteman and other entities who had failed to file an answer or otherwise defend. Also on July 14, 2011, Deutsche filed an affidavit of Kim Martinez, a duly authorized signer of American Home Mortgage Servicing, Inc., the servicer and attorney-in-fact for Deutsche. Therein, Martinez attested that Whiteman had defaulted on the note and that Deutsche was entitled to collect on the note and enforce the mortgage.

{¶ 6} On July 18, 2011, the trial court granted Deutsche's motion for default judgment, finding that Whiteman had been served with a summons and the complaint

and had not filed an answer or any other responsive pleading. The court entered judgment for Deutsche on the note, and entered an order of foreclosure. Whiteman did not appeal the judgment or the order. A sheriff's sale was ordered for October 28, 2011.

{¶ 7} On August 15, 2011, Whiteman filed a Civ.R. 60(B) motion for relief from judgment, seeking vacation of the judgment and decree of foreclosure. Also on August 15, 2011, Whiteman filed a motion to stay the sheriff's sale. On August 22, 2011, the trial court granted Whiteman's motion to stay the sheriff's sale pending the decision on the Civ.R. 60(B) motion.

{¶ 8} On September 22, 2011, the trial court filed a decision and entry which granted Whiteman's Civ.R. 60(B) motion and vacated the judgment and decree of foreclosure. Eight days later, on September 30, 2011, Whiteman notified the court that he had never served his Civ.R. 60(B) motion on Deutsche. Thereafter, on November 1, 2011, Deutsche filed a motion to set aside the September 22, 2011 order based upon Whiteman's failure of service. On November 15, 2011, the court granted Deutsch's motion, vacated the order that granted Whiteman's Civ.R. 60(B) motion, and granted Deutsch leave to file a response to Whiteman's Civ.R. 60(B) motion. On November 29, 2011, Deutsche filed a memorandum in opposition to Whiteman's motion for relief from judgment. Thereafter, on December 13, 2011, Whiteman filed a reply brief along with a Civ.R. 12(B)(1) motion to dismiss the complaint.

{¶ 9} On June 11, 2012, the trial court, without holding a hearing, issued a decision and entry denying Whiteman's motion for relief from judgment, pursuant to Civ.R. 60(B)(3), and motion to dismiss the complaint pursuant to Civ.R. 12(B)(1).

{¶ 10} In a timely appeal, Whiteman asserts the following assignments of error:

[I]. IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY APPELLANT'S 60(B) MOTION TO VACATE WITHOUT HOLDING A HEARING.

[II]. THE TRIAL COURT ERRED BY DENYING APPELLANT'S 12(B)(1) MOTION TO DISMISS BECAUSE THERE WAS NO JUSTICIABLE CONTROVERSY BETWEEN APPELLANT AND APPELLEE.

{¶ 11} Whiteman argues in his first assignment of error that the trial court erred when it denied his Civ.R. 60(B) motion without holding a hearing. In order to prevail on

a motion for relief from judgment under Civ.R. 60(B), the movant must demonstrate the three prongs of the test articulated by the Supreme Court of Ohio in *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146 (1976). The *GTE* test requires that the movant demonstrate: (1) a meritorious claim or defense, (2) entitlement to relief under one of the five grounds listed in Civ.R. 60(B), and (3) the timeliness of the motion. *Id.* at 150-51. An appellate court will not disturb a trial court's decision on a Civ.R. 60(B) motion absent an abuse of discretion. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20 (1988). An abuse of discretion connotes an attitude by the court that is arbitrary, unconscionable or unreasonable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 12} The grounds for relief under Civ.R. 60(B) are: (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 Civ.R. 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 rule further provides that the motion for relief from judgment must be made within a reasonable time and that for reasons (1), (2), and (3), it cannot be made more than one year after the judgment, order or proceeding was entered or taken. Civ.R. 60(B); *GTE* at 115-16.

{¶ 13} Whiteman argues that, because he alleged a meritorious defense, the trial court abused its discretion in denying him relief from judgment without a hearing. Whiteman's meritorious defense to the foreclosure is that Deutsche was not the owner and holder of his note and mortgage at the time it filed its complaint and, thus, had no right to foreclose. More particularly, Whiteman contends that Deutsche submitted fraudulent evidence of ownership of the note and mortgage at the time it filed the complaint. Whiteman raises two arguments in support of his contention, and claims that a hearing would have provided him the opportunity to challenge the authenticity of the documents submitted by Deutsche and to submit additional evidence.

{¶ 14} Whiteman first alleges that the assignments of the mortgage to Deutsche were invalid because they were executed by notorious "robo-signers." " 'Robo-signing'

occurs when bank employees tasked with rapidly signing large numbers of affidavits and legal documents asserting the bank's right to foreclose sign such documents without actually checking them to ensure their accuracy." *Chase Home Fin., L.L.C. v. Heft*, 3d Dist. No. 8-10-14, 2012-Ohio-876, ¶ 22, fn. 4, citing *Ohio v. GMAC Mtgg., L.L.C.*, 760 F.Supp.2d 741, 743 (N.E. Ohio 2011).

{¶ 15} Whiteman also claims that the assignment of the note and mortgage to Deutsche was invalid because it violated the PSA. We note initially that Whiteman did not offer the PSA as evidence. However, the website he references does contain a copy of the PSA. The PSA is publicly available. *Pooling and Servicing Agreement for Asset-Backed Pass-Through Certificates, Series 2006-M1* (June 1, 2006), available at http://www.sec.gov/Archives/edgar/data/1365194/000088237706002559/d525486_ex4-1.htm. The PSA identifies Argent as depositor and Deutsche as trustee. Whiteman first argues that the note was not properly endorsed pursuant to Article II, Section 2.01(i) of the PSA. That section requires, in relevant part, that Argent deliver "the original Mortgage Note, endorsed in blank, without recourse, or in the following form: 'Pay to the order of Deutsche Bank National Trust Company, as Trustee under the applicable agreement, without recourse,' with all prior and intervening endorsements showing a complete chain of endorsement from the originator to the Person so endorsing to the Trustee." Whiteman contends that Argent's endorsement of the note in blank, without recourse, does not satisfy Section 2.01(i), as that section requires a complete chain from the originator to the depositor to the trust. In addition, Whiteman argues that the PSA reveals a specific "closing date" of June 28, 2006, which is the date by which promissory notes and mortgages must have been transferred into the trust. Whiteman contends that any assignments of the mortgage after this date, such as the assignment of the mortgage in February 2009, contravenes the terms of the PSA and renders the assignment "void" under New York law.

{¶ 16} Whiteman's challenges to the validity of the assignments of the note and mortgage, including whether they were executed by "robo-signers" or were in violation of the PSA, are unavailing. After the trial court entered judgment and the parties filed their briefs in the present case, this court decided *LSF6 Mercury REO Invests. Trust Series 2008-1 c/o Vericrest Fin., Inc. v. Locke*, 10th Dist. No. 11AP-757, 2012-Ohio-4499,

wherein we held that because a debtor is not a party to the assignment of a note and mortgage, the debtor lacks standing to challenge their validity. *Id.* at ¶ 28-29. In so holding, this court relied primarily on *Bank of New York Mellon Trust Co. v. Unger*, 8th Dist. No. 97315, 2012-Ohio-1950, which, in turn, relied upon *Bridge v. Aames Capital Corp.*, Case No. 1:09 CV 2947 (N.D. Ohio 2010).

{¶ 17} As we noted in *Locke*, the court in *Bridge* considered a homeowner's claim that, because the originating lender and assignor, Aames Capital Corporation ("Aames") improperly executed an assignment of her mortgage, Deutsche Bank, the assignee, could not foreclose on her property. In granting Deutsche Bank's motion to dismiss based upon the homeowner's lack of standing to challenge the assignment of the mortgage, the court noted that there was no dispute between Deutsche Bank and Aames as to whether the mortgage was properly assigned, and that the homeowner was the only party who challenged the validity of the assignment. The court found that there was no dispute that the homeowner had ceased making payments on the loan, that she was in default on the loan, and that she was subject to foreclosure proceedings by the holder of the mortgage note. The court further found that the fact that Deutsche Bank, rather than Aames, would be permitted to proceed with the foreclosure was legally immaterial to the homeowner's contractual obligations. In concluding that the homeowner lacked standing to challenge the validity of the mortgage assignment, the *Bridge* court reasoned that, regardless of the outcome of the litigation, the homeowner was still in default on her mortgage and subject to foreclosure, and she had suffered no injury as a result of the assignment of her mortgage.

{¶ 18} We further noted in *Locke* that the *Unger* court relied on *Bridge* in determining that allegedly invalid mortgage assignments did not alter the homeowners' obligations under the note and mortgage. As in *Bridge*, the assignee bank in *Unger* filed the foreclosure complaint based upon the homeowners' default under the note and mortgage, not because of the mortgage assignments, and the homeowners' default exposed them to foreclosure regardless of which party actually proceeded with foreclosure. The *Unger* court concluded the homeowners lacked standing to challenge the mortgage assignments. We applied the reasoning of *Bridge* and *Unger* to conclude in

Locke that the homeowners lacked standing to challenge an assignment of a note and mortgage from the originating lender to an assignee.

{¶ 19} Application of *Bridge*, *Unger*, and *Locke* compels the same conclusion in the present case. Here, Whiteman is not a party to the assignment nor is he a party to the PSA. There is no dispute between Argent and Deutsche as to whether the note and mortgage were properly assigned. Whiteman is the only party challenging the assignment's validity. It is undisputed that Whiteman defaulted on his loan and was subject to foreclosure. The mortgage assignments do not alter Whiteman's obligations under the note or mortgage. Deutsche filed the foreclosure complaint based upon Whiteman's default under the note and mortgage, not because of the mortgage assignments. Whiteman's default exposed him to foreclosure regardless of the party who actually proceeds with the foreclosure. Accordingly, because Whiteman lacked standing to challenge the mortgage assignments, the trial court properly denied Whiteman's Civ.R. 60(B) motion.

{¶ 20} Even aside from the standing issue, the trial court's judgment denying Whiteman's Civ.R. 60(B) motion should be affirmed on procedural grounds. As already noted, Whiteman contended that Deutsche committed fraud under Civ.R. 60(B)(3) when it commenced the foreclosure action, even though it did not own the note and mortgage (due to the alleged invalidity of the assignments). After the trial court entered judgment and after the parties filed their briefs in this case, this court decided *PNC Bank, Natl. Assoc. v. Botts*, 10th Dist. No. 12AP-256, 2012-Ohio-5383, wherein we explained that "[t]he fraud or misconduct contemplated by Civ.R. 60(B)(3) is fraud or misconduct on the part of the adverse party in obtaining the judgment by preventing the losing party from fully and fairly presenting his defense, not fraud or misconduct which in itself would have amounted to a claim or defense in the case." *Id.* at ¶ 15.

{¶ 21} We concluded that an allegation of fraud such as that made by Whiteman "is a matter that should have been presented as a claim or defense * * * in the underlying foreclosure action." *Id.* at ¶ 16. In so concluding, we relied on two cases from the Second District Court of Appeals, *Wells Fargo Bank, N.A. v. Brandle*, 2d Dist. No. 2012CA0002, 2012-Ohio-3492, and *GMAC Mtge., L.L.C. v. Herring*, 189 Ohio App.3d 200, 2010-Ohio-3650 (2d Dist.), both of which considered the application of Civ.R. 60(B)(3) to

circumstances where, as here, a homeowner failed to file a responsive pleading to a foreclosure complaint until after default judgment had been rendered. Both courts concluded that claims of fraud in a foreclosure action pertaining to ownership of the note and mortgage should be presented as a claim or defense in the underlying foreclosure action, not in a Civ.R. 60(B) motion.

{¶ 22} Relying on *Brandle* and *Herring*, we stated in *Botts* at ¶ 18-19:

As these cases make clear, the fraud alleged by Botts in the present case is not the type of fraud contemplated by Civ.R. 60(B)(3). Botts could have presented his claims that PNC was not the holder of the note and mortgage before the trial court but chose to not appear in the action. It is clear Botts was not prevented from fully and fairly presenting his defense due to any fraud by PNC. *See, e.g., U.S. Bank Natl. Assn. v. Marino*, 5th Dist. No. 2011CAE11 0108, 2012-Ohio-1487, ¶ 16 (appellant's argument that bank had no standing because it was not the holder of the note at the time the foreclosure complaint was filed was not viable under Civ.R. 60(B)(3), as the adverse party must have prevented the complaining party from fully and fairly presenting its case or defense, and the appellant had the opportunity to participate in the litigation, to file an answer, and to participate in discovery, but chose to not file an answer or any other response).

In essence, what Botts seeks to do in the present case is contest the underlying default judgment and decree in foreclosure based upon his claim that PNC committed fraud by asserting they were the real party in interest. A decree and judgment of foreclosure is a final appealable order. (Citations omitted.) It is well-settled law in Ohio that a motion for relief from judgment cannot be a substitute for an appeal. (Citations omitted.) * * * Thus, Botts could have filed an appeal from the decree of foreclosure contesting PNC's standing instead of raising it in a belated Civ.R. 60(B) motion. For all of the foregoing reasons, we find the trial court did not err when it denied the motion to vacate pursuant to Civ.R. 60(B) without holding a hearing and determined that the judgment was not procured by fraud.

{¶ 23} As in *Botts*, Whiteman essentially challenges the underlying default judgment and foreclosure based upon a claim that Deutsche falsely maintained that it was the owner and holder of the mortgage when it filed the foreclosure complaint. Whiteman

does not claim that his failure to respond to the foreclosure complaint was the product of any fraud by Deutsche. Further, any irregularities in the assignment of mortgage could have been identified and raised in a responsive pleading, and Whiteman cannot blame Deutsche for its inaction in failing to challenge its status as a real party in interest sooner. *See Herring*. As we determined in *Botts*, Whiteman could have filed an appeal from the decree of foreclosure contesting Deutsche's standing instead of raising it in a belated Civ.R. 60(B) motion.

{¶ 24} For all the foregoing reasons, Whiteman's first assignment of error is overruled.

{¶ 25} In his second assignment of error, Whiteman contends the trial court erred in denying his Civ.R. 12(B)(1) motion to dismiss the complaint. Whiteman argues that Deutsche failed to establish it is the real party in interest, so it lacked standing to file the foreclosure action. Whiteman further contends that because Deutsche does not own his note and mortgage, there is no justiciable controversy between them; thus, the trial court lacked subject-matter jurisdiction.

{¶ 26} Civ.R. 12(B)(1) provides for dismissal of a complaint where the trial court lacks jurisdiction over the subject matter of the litigation. *Botts* at ¶ 21. The applicable standard of review for dismissal under Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint. *Id.*, citing *Milhoan v. E. Local School Dist. Bd. of Edn.*, 157 Ohio App.3d 716, 2004-Ohio-3243, ¶ 10 (4th Dist.). Our review of a motion to dismiss predicated on Civ.R. 12(B)(1) is de novo; thus, we must review the issues independently of the trial court's decision. *Botts* at ¶ 21, citing *Moore v. Franklin Cty. Children Servs.*, 10th Dist. No. 06AP-951, 2007-Ohio-4128, ¶ 15.

{¶ 27} "The 'subject matter jurisdiction of a court is a court's power to hear and decide a case upon its merits.' " *JP Morgan Chase Bank, N.A. v. Brown*, 2d Dist. No. 21853, 2008-Ohio-200, ¶ 42, quoting *Morrison v. Steiner*, 32 Ohio St.2d 86 (1972), paragraph one of the syllabus. "To be justiciable, a controversy must be grounded on a present dispute." *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, ¶ 17. And "[t]o have standing, a party must have a personal stake in the outcome of a legal controversy with an adversary." *Id.* at ¶ 9. "[A] lack of standing does not deprive a court of subject matter jurisdiction." *Brandle* at ¶ 20.

{¶ 28} In *Botts*, this court addressed a Civ.R. 12(B)(1) motion to dismiss in the context of a foreclosure action, and determined that a plaintiff's lack of standing is not a matter subject to dismissal pursuant to Civ.R. 12(B)(1). Because lack of standing may not be challenged under a Civ.R. 12(B)(1) motion to dismiss, the trial court did not err when it denied Whiteman's motion.

{¶ 29} Finally, we note that Whiteman has submitted the Supreme Court of Ohio's decision in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, as supplemental authority in this case. In *Schwartzwald*, the court determined that a plaintiff receiving an assignment of a note and mortgage from the real party in interest subsequent to the filing of the action, but prior to the entry of judgment, does not cure a lack to of standing to file a foreclosure action. *Schwartzwald* is inapplicable because, in the present case, the assignment of the note and mortgage occurred in February 2009 and Deutsche filed its complaint in foreclosure in February 2011. Moreover, even if *Schwartzwald* were applicable, we have already determined that lack of standing may not be challenged in a Civ.R. 12(B)(1) motion to dismiss.

{¶ 30} For the foregoing reasons, Whiteman's second assignment of error is overruled.

{¶ 31} Having overruled Whiteman's two assignments of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT, P.J. and BROWN, J., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under the Ohio Constitution, Article IV, Section 6(C).
