

**IN THE COURT OF APPEALS**  
**FIRST APPELLATE DISTRICT OF OHIO**  
**HAMILTON COUNTY, OHIO**

IMA FUND I, LLC,	:	
Plaintiff-Appellee,	:	APPEAL NO. C-1600277
	:	TRIAL NO. A-1304041
vs.	:	
	:	<i>JUDGMENT ENTRY.</i>
ROBERT CARR,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R.11.1(E); 1st Dist. Loc.R. 11.1.1.

In June 2013, plaintiff-appellee, IMA Fund I, LLC ("IMA"), filed a complaint for foreclosure in rem of real property located at 970 Harkin Drive in Cincinnati, Ohio (the "Property") due to default upon the note and mortgage after the decease of Shirley M. Carr, the mortgagor and original borrower. The complaint listed unknown heirs and next of kin as defendants to the action. IMA perfected service by publication on the unknown heirs and next of kin, and proof of publication was filed with the trial court on September 20, 2013. Thereafter, upon motion by IMA, the trial court rendered default judgment against the unknown heirs and next of kin. A foreclosure decree was entered by the trial court on November 4, 2013. An order for sale of the Property was issued on December 12, 2013, and the order was returned and filed February 6, 2014. The sale of the Property was confirmed on April 14, 2014, and the proceeds distributed on June 18, 2014.

On October 16, 2015, defendant-appellant, Robert Carr, the son of Shirley M. Carr, filed a motion to vacate a void judgment with an accompanying memorandum. Appellant argued, in relevant part, that the default judgment and judgment of foreclosure were void as (1) the court did not have jurisdiction over him due to insufficient service of process, (2) IMA lacked capacity to invoke the court's jurisdiction pursuant to R.C. 1705.58(A), (3) IMA misrepresented the chain of title for the Property, and (4) IMA had perpetrated a fraud against the court by representing itself as a real party in interest. A hearing on appellant's motion was held before a magistrate. On December 3, 2015, the magistrate issued a decision denying appellant's motion to vacate, which the magistrate treated as a Civ.R. 60(B) motion. Appellant filed objections to the magistrate's decision and a request for findings of fact and conclusions of law. On February 23, 2016, the trial court issued an opinion overruling appellant's objections, denying his request for findings of fact and conclusions of law, and adopting the magistrate's decision.

Appellant appealed, raising six assignments of error relating to the denial of his motion.<sup>1</sup> Having reviewed the record, we find no merit to appellant's assigned errors and affirm the trial court's judgment.

To prevail on a Civ.R. 60(B) motion for relief from judgment, the moving party must demonstrate (1) a meritorious defense, (2) entitlement to relief under one of the grounds stated in the rule, and (3) that the motion was 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). The movant must meet all three prongs before relief may be granted. *Id.* at 151. A trial court's decision on a Civ.R. 60(B) motion is reviewed under an abuse-of-discretion standard. *Jee v. Absolute Fire Protection, Inc.*, 1st Dist.

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1. In its appellate brief and in a motion dated August 16, 2016, IMA argues that appellant's appeal should be dismissed as moot "because the property was sold, deed transferred, and proceeds distributed." We overrule IMA's arguments, deny its motion, and address the merits of appellant's assigned errors.

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Hamilton No C-150374, 2016-Ohio-365, ¶ 7.

In his first assignment of error, appellant argues the judgment of foreclosure was void as he was not served with a copy of the summons or complaint. A judgment rendered in the absence of personal jurisdiction over a defendant is void. *See Maryhew v. Yova*, 11 Ohio St.3d 154, 156, 464 N.E.2d 538 (1984). Because a trial court has inherent power to vacate a void judgment, a party who asserts that the court lacked personal jurisdiction because of improper service of process need not meet the requirements of Civ.R. 60(B). *See Patton v. Diemer*, 35 Ohio St.3d 68, 70, 518 N.E.2d 941 (1988); *Cincinnati Ins. Co. v. Emge*, 124 Ohio App.3d 61, 63, 705 N.E.2d 408 (1st Dist.1997). Where service by publication occurs, strict compliance with Civ.R. 4.4 is required. *Dowers v. Krause*, 1st Dist. Hamilton No. C-030644, 2004-Ohio-1487, ¶ 8.

Service by publication was permitted by R.C. 2703.14(C) and (I) as appellant's residence could not be ascertained. IMA complied with Civ.R. 4.4(A) in perfecting service by publication. IMA's counsel provided an affidavit in which counsel averred that the names and residences of Shirley M. Carr's heirs and next of kin were unknown, efforts undertaken by IMA to ascertain the names and addresses of the unknown heirs and next of kin had been unsuccessful, and the names and addresses of the unknown heirs and next of kin could not be ascertained with reasonable diligence. The trial court approved service by publication, notice of the foreclosure suit was printed in a newspaper for three consecutive weeks as contemplated by R.C. 2703.141 and Civ.R. 4.4(A)(1), and the publisher of the newspaper filed with the court an affidavit showing the fact of publication along with a copy of the notification. As Civ.R. 4.4 was strictly followed, service by publication was perfected and the trial court had personal jurisdiction over appellant. Appellant's first assignment of error is, therefore, overruled.

In his second assignment of error appellant argues default judgment and foreclosure in favor of

IMA should not have been granted because the court lacked authority under R.C. 2117.06 to entertain a foreclosure proceeding "beyond one year after \* \* \* the death of the decedent." However, IMA filed an in rem foreclosure proceeding, not a claim against the decedent's estate. "[F]oreclosure is a remedy independent of those provided for in the probate court. \* \* \* [A] foreclosure claim is not characterized as a claim against an estate, but rather as a claim in the nature of an in rem proceeding to reach the mortgaged property to satisfy a debt." *Weaver v. Bank of N.Y. Mellon*, 10th Dist. Franklin No. 11AP-1065, 2012-Ohio-4373, ¶ 22. As no deficiency judgment was sought against Shirley M. Carr's estate, R.C. 2117.06 is inapplicable and cannot serve as a meritorious defense to the judgment entered against appellant. Appellant's second assignment of error is, therefore, overruled.

In his third assignment of error, appellant argues IMA lacked capacity to bring the foreclosure action because it is purportedly not licensed in Ohio as required by R.C. 1705.53 through 1705.58. However, as IMA was not "transacting business," but merely attempting to collect a debt, it was not required to register with the Ohio Secretary of State before filing the foreclosure suit. *See Premier Capital, LLC v. Baker*, 11th Dist. Portage No. 2011-P-0041, 2012-Ohio-2834, ¶ 29; *Bosl v. First Fin. Invest. Fund I*, 8th Dist. Cuyahoga No. 95464, 2011-Ohio-1938, ¶ 23. This argument, therefore, cannot serve as a meritorious defense to the action. Appellant's third assignment of error is overruled.

In his fourth and fifth assignments of error, appellant argues judgment in favor of IMA should not have been rendered as IMA failed to comply with Civ.R. 56 by failing to "demonstrate[e] it had the original blue-inked signed [promissory] note" or show the "validity of assignments" of the note and mortgage. Appellant is mistaken in his belief that the requirements set forth in Civ.R. 56 are applicable to default judgments. Civ.R. 55 governs default judgment. Here, the trial court, upon motion by IMA, properly entered default judgment against appellant in accordance with Civ.R. 55(A) as appellant failed to plead or otherwise defend against the action. *See Mueller v. Hammann*, 1st Dist. Hamilton Nos.

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C-120799 and C-130231, 2013-Ohio-5098; *Burdge v. On Guard Sec. Servs., Inc.*, 1st Dist. Hamilton No. C-050522, 2006-Ohio-2092. Appellant's fourth and fifth assignments are, therefore, overruled.

In his sixth assignment of error, appellant argues judgment in favor of IMA is void "for want of jurisdiction" because IMA is not a "natural person." Relying on the dissenting opinion in *Rundle v. Del. & Raritan Canal Co.*, 55 U.S. 80, 98-99, 14 L.Ed. 335 (1853), appellant contends that a corporation cannot sue or be sued as it is not a "natural person." However, R.C. 1701.13(A) and 1705.03(A) specifically provide that corporations and limited liability companies "may sue and be sued." Appellant's argument is therefore without merit and his sixth assignment of error is overruled.

The trial court's judgment denying appellant's motion to vacate is affirmed.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HENDRICKSON, P.J., S. POWELL AND M. POWELL, JJ.**

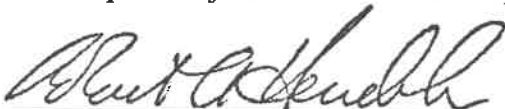
Hendrickson, J., of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), Article IV of the Ohio Constitution.

S. Powell, J., of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), Article IV of the Ohio Constitution.

M. Powell, J., of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 5(A)(3), Article IV of the Ohio Constitution.

To the clerk:

Enter upon the journal of the court on AUG 09 2017 per order of the court.

  
Presiding Judge