

TD BANKNORTH, N.A.

v.

PHILLIP A. LIBBY et al.

Submitted on Briefs June 14, 2017
Decided June 22, 2017

Panel: ALEXANDER, MEAD, GORMAN, HJELM, and HUMPHREY, JJ.

MEMORANDUM OF DECISION

Phillip A. Libby and Shawn C. Libby (“the Libbys”) appeal from a judgment of the District Court (Portland, *J. French, J.*) denying their motion, pursuant to M.R. Civ. P. 60(b), to vacate a 2007 judgment of foreclosure and order of sale. On appeal, the Libbys argue that the court abused its discretion in denying their motion to vacate because TD Banknorth N.A. has not held a public sale pursuant to 14 M.R.S. § 6323 (2006) and has accepted payments of \$66,541.53 since the entry of the judgment. We affirm the trial court’s denial of the Libbys’ motion.

We review the denial of a motion for relief from judgment pursuant to M.R. Civ. P. 60(b) for an abuse of discretion. *See Town of Wiscasset v. Mason Station, LLC*, 2015 ME 59, ¶ 6, 116 A.3d 458. A motion brought pursuant to Rule 60(b)(4)-(6) “*shall* be made within a reasonable time” from the entry of the underlying judgment.¹ M.R. Civ. P. 60(b) (emphasis added).

¹ On appeal, the Libbys do not indicate which subsection of M.R. Civ. P. 60(b) entitles them to relief. Although in their motion to vacate they argued they were entitled to relief from judgment pursuant to 60(b)(4), they do not pursue that claim on appeal. *See Holland v. Sebunya*, 2000 ME 160, ¶ 9 n.6, 759 A.2d 205 (“The failure to mention an issue in the brief . . . is construed as

Such relief is only appropriate when the moving party has diligently pursued his or her rights as "Rule 60(b) presupposes that a party has performed [his or her] duty to take legal steps to protect [his or her] own interest" *Putnam v. Albee*, 1999 ME 44, ¶ 8, 726 A.2d 217.

Here, the Libbys failed to demonstrate any steps taken, before their filing of the Rule 60(b) motion, to protect their interests in this matter. On this record, the trial court did not err in finding that the motion was not filed "within a reasonable time" and did not abuse its discretion in denying the Libbys motion to vacate pursuant to M.R. Civ. P. 60(b).²

The entry is:

Judgment affirmed.

Mark A. Kearns, Esq., and Mark L. Randall, Esq., Portland, for appellants Philip A. Libby and Shawn C. Libby

TD Banknorth, N.A., did not file a brief

Portland District Court docket number RE-2007-175
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either an abandonment or a failure to preserve that issue."). Because their 60(b) motion was filed almost nine years after the entry of the judgment of foreclosure and order of sale, the motion is properly treated as a rule 60(b)(6) motion. *See Putnam v. Albee*, 1999 ME 44, ¶ 8, 726 A.2d 217 (observing that a motion filed three years after the judgment was entered was properly termed a rule 60(b)(6) motion).

² Because the Libbys did not move for additional findings of fact, we assume that the court's finding that the motion was not filed "within a reasonable time" is supported by the record unless clearly erroneous. *See Blanchard v. Blanchard*, 2016 ME 140, ¶ 15, 148 A.3d 277. Given the passage of time between the entry of the underlying judgment and the filing of the Rule 60(b) motion, such a finding is not clearly erroneous.