

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1509

JEFFREY TURNER

vs.

U.S. BANK NATIONAL ASSOCIATION, successor trustee.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Jeffrey Turner, appeals from an order of a Land Court judge declining to vacate sua sponte a judgment entered in favor of the defendant, U.S. Bank National Association (bank), dismissing the plaintiff's complaint for a declaratory judgment that the bank does not have the right to foreclose a mortgage on the plaintiff's home. Assuming, without deciding, that the plaintiff may appeal a judge's decision not to vacate a judgment sua sponte, we discern no abuse of discretion. Accordingly, we affirm.

1. Background. On the date that the response to the bank's motion to dismiss was due, the plaintiff filed a motion

¹ Of Wilmington Trust Company and Bank of America National Association; as successor by merger of LaSalle Bank National Association; as trustee of Lehman XS Trust, mortgage pass-through certificates, series 2007-1.

to submit a second amended complaint and a motion to extend the response deadline for the motion to dismiss. On March 12, 2018, a Land Court judge (first judge) dismissed two of the plaintiff's counts for failure to name an indispensable party, and the third for failure to state a claim (March 12 order). The first judge erroneously stated in the March 12 order that the plaintiff had failed to make a timely response to the motion to dismiss.

Instead of filing a notice of appeal or a motion to vacate or reconsider, the plaintiff sent an e-mail to the clerk's office notifying the Land Court that the statement that the plaintiff had failed to make a timely response was in error and asking the first judge to "reinstate the case on its own." On June 27, 2018, the first judge issued an order acknowledging the error, indicating a preliminary intent to vacate the judgment pursuant to Mass. R. Civ. P. 60 (a), 365 Mass. 828 (1974), and offering the bank an opportunity to file an opposition. The bank did so, arguing that the dismissal was correct on the merits. On September 4, 2018, a different Land Court judge (second judge) issued an order declining to vacate the judgment on the ground that "the March 12 order . . . gave valid grounds for allowing the motion to dismiss."

2. Discussion. We review an order declining to vacate a judgment under rule 60 (a) of the Massachusetts Rules of Civil

Procedure for an abuse of discretion. See R.W. Granger & Sons, Inc. v. J & S Insulation, Inc., 435 Mass. 66, 79 (2001) (denial of motion under rule 60 [a] reviewed for abuse of discretion). "We recognize that, pursuant to Mass.R.Civ.P. 60(a), it is permissible for a judge to correct sua sponte '[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission'" Jones v. Boykan, 74 Mass. App. Ct. 213, 217 (2009), quoting Mass. R. Civ. P. 60 (a). "The two interrelated analyses in determining whether rule 60(a) relief appropriately may be granted are 'whether the judgment reflects the intent of the court at the time it was entered; and . . . whether the relief requested is essentially "clerical" in nature rather than "substantive" in nature.'" Haffey v. Rock, 75 Mass. App. Ct. 686, 689 (2009), quoting Gagnon v. Fontaine, 36 Mass. App. Ct. 393, 396 (1994).

Here, the March 12 order reflected the intent of the judge at the time it was entered. The first judge considered and ruled on the merits of dismissing each count of the amended complaint. The first judge dismissed counts one and two for failure to name an indispensable party, and count three for failure to state a claim upon which relief may be granted. In declining to vacate the judgment sua sponte, the second judge also considered the merits of dismissing the plaintiff's claims

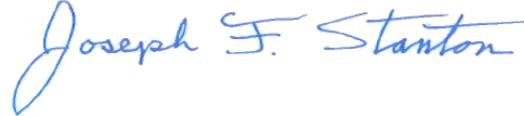
and came to the same conclusion as the first judge. The second judge acted within his discretion in declining to vacate the judgment sua sponte where both judges concluded on the merits that the plaintiff's claims should be dismissed.

Furthermore, the relief sought by the plaintiff is substantive, not clerical, in nature. Where the relief sought would alter the parties' substantive rights under the original judgment, the request is for the correction of substantive, not clerical, error. See Franchi Mgt. Co. v. Flaherty, 93 Mass. App. Ct. 418, 422 (2018) (where court corrects clerical error, time for appeal runs from original judgment so as not to alter substantive rights of parties). Although the misstatement concerning the timeliness of the plaintiff's filing could be a clerical error, reversing the first judge's decision on the merits that the plaintiff's amended complaint should be dismissed would be substantive relief. Accordingly, the second judge acted within his discretion in declining to order sua

sponte relief.

Order dated September 4,
2018, declining to vacate
judgment, affirmed.

By the Court (Vuono,
Desmond & Ditkoff, JJ.²),



Clerk

Entered: February 11, 2020.

² The panelists are listed in order of seniority.