

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

OHIO RECEIVABLES, LLC,

Plaintiff-Appellee,

v.

BRIAN S. MILLIKIN AKA BRIAN J. MILLIKIN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 17 CO 0038

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2006-CV-937

BEFORE:

Carol Ann Robb, Cheryl L. Waite, Kathleen Bartlett, Judges.

JUDGMENT:

Affirmed.

Atty. Jackson T. Moyer, Atty. Nicholas J. Cheek, Lyons, Doughty & Veldhuis, P.C., 471 E. Broad St., 12th Floor, Columbus, Ohio 43215 for Plaintiff-Appellee and

Atty. James S. Gentile, Atty Edward A. Czopur, The Liberty Bldg., 42 N. Phelps St., Youngstown, Ohio 44503 for Defendant-Appellant.

Dated: September 4, 2018

Robb, P.J.

{¶1} Defendant-Appellant Brian S. Millikin appeals the decision of the Columbiana County Common Pleas Court denying his Motion to Revise Judgment. Appellant contends the trial court abused its discretion when it failed to hold a hearing on the motion. For the reasons expressed below, this court concludes the trial court did not abuse its discretion and affirms the trial court's decision.

Statement of the Case

{¶2} In 2006, Plaintiff-Appellee Ohio Receivables LLC filed a complaint against Appellant claiming to be the holder of a promissory note executed by Appellant. Appellee demanded judgment for the principal amount plus accrued interest plus interest at the interest rate provided in the note, 23.70 %, since the last interest date of October 2006, and costs of the action. 10/25/06 Complaint. Attached to the complaint is the "Disclosure Statement, Note and Security Agreement." The original lender was CitiFinancial, Inc.

{¶3} Appellee filed a motion for default judgment after Appellant did not respond to the complaint. 1/12/07 Motion for Default Judgment. The trial court granted the default judgment. 1/16/07 J.E. It ordered Appellant to pay "the principal sum of \$9,137.09 plus accrued interest in the amount of \$4,769.97 through January 4, 2007, plus interest at the contract rate of 23.70% per annum from the last interest date of January 4, 2007, pursuant to Section 1343.03(A) of the Revised Code, and the costs of this action." 1/16/07 J.E.

{¶4} Appellant did not appeal that decision.

{¶5} The judgment became dormant and Appellee filed a Motion to Revive Dormant Judgment. 5/23/14 Motion. The trial court issued a conditional order of revival but gave Appellant time to file an answer setting forth an argument as to why the judgment should not be revived. 5/27/14 J.E.

{¶6} Appellant filed an answer to the revival motion claiming he was in the military at the time of the original judgment and he believed it was a different "Brian Millikin" who owed on this account. 6/25/14 Answer. Appellee responded to the answer

asserting Appellant was not on active duty in the military at the time the judgment was awarded. Attached to the response was a print off from the Department of Defense database indicating Appellant's active duty did not start until six months after the judgment was entered. 7/10/14 Response. Appellee also indicated it had received Appellant's social security number from defense counsel and the last four digits of the social security number for the individual who opened the account matched the last four digits of Appellant's social security number. 7/10/14 Response.

{¶7} After reviewing the motions, the trial court granted the revivor motion. 9/11/14 J.E. It stated, "It is therefore ordered that the said judgment for the amount of \$30,383.06 plus costs and interest at 23.70% as granted in the original judgment, be and the same is hereby revived against the Defendant(s), BRIAN S MILLIKIN." 9/11/14 J.E.

{¶8} Appellant did not file an appeal from that decision.

{¶9} Three years later, Appellant filed a "Motion to Revise Judgment Amount Request for Hearing." 9/11/17 Motion. Appellant stated he was not challenging the underlying judgment for the principal and instead argued he had been charged an unlawful interest rate. 9/11/17 Motion. He contended the underlying judgment has increased to an exorbitant figure. 9/11/17 Motion. He claimed the interest charged was in violation of R.C. Chapter 1343 and R.C. 1343.031. 9/11/17 Motion. Appellant requested a hearing to revise the judgment to have only lawful interest rates. 9/11/17 Motion. He later filed a supplemental motion asserting R.C. 1343.031 limited the interest rate to 6% for veterans and he has paid approximately \$18,000 on a \$9,137.09 obligation. 10/2/17 Supplement to Motion to Revise.

{¶10} Appellee filed an opposition motion claiming the calculation and balance was correct and should not be revised. 10/6/17 Motion. Attached was a balance sheet indicating the accumulation of interest. 10/6/17 Motion.

{¶11} Without holding a hearing, the trial court overruled the motion to revise. 10/18/17 J.E.

{¶12} Appellant timely appeals that decision raising one assignment of error.

Assignment of Error

“The court erred in failing to hold a hearing on the Appellant’s motion and request for a hearing.”

{¶13} Appellant asserts the sole issue in this case is whether the trial court should have held a hearing on the motion. Appellant acknowledges the decision to hold a hearing is within the trial court’s discretion. He asserts although his motion was not a Civ.R. 60(B) motion to vacate a judgment nor was it a Civ.R. 56 summary judgment motion the law associated with those motions is relevant to determine if a hearing was warranted on the motion to revise.

{¶14} Appellee counters asserting there are only certain types of motions that may be filed following a trial court’s final appealable order. Those motions are a motion for a new trial, a motion for judgment notwithstanding the verdict, and a motion for relief from judgment. Appellee contends none of those motions were filed. It asserts, at most, the motion to revise could be considered a non-compliant motion for relief from judgment pursuant to Civ.R. 60. Appellee argues a movant is not automatically entitled to a hearing under Civ.R. 60, especially when no evidentiary material supports the motion. It also asserts this motion, the trial court’s denial of it, and the appeal from that decision is being used as a substitute for the failure to appeal the earlier final decisions by the trial court.

{¶15} Considering the procedural history of this case, Appellee’s arguments are correct; the trial court could not revise the judgment unless the motion to revise the judgment is construed as a Civ.R. 60 motion for relief from judgment. The Fourth Appellate District has succinctly explained, “Once a final judgment existed, the trial court no longer had authority to revise or vacate its prior orders absent some recognized form of relief such as Civ.R. 60(B).” *Wheeler v. Ohio State Univ. Med. Ctr.*, 4th Dist. No. 03CA2922, 2004-Ohio-2769, ¶ 20.

{¶16} The only recognized form of relief that the motion to revise could potentially fall under would be a motion to vacate. Motions to vacate final appealable orders are governed by Civ.R. 60 as well as the court’s inherent authority to vacate void judgments.

{¶17} Civ.R. 60(A) would be inapplicable because it governs clerical mistakes and there is no suggestion the rate of interest was a clerical mistake.

{¶18} Likewise, the court's inherent authority to vacate a void judgment is also inapplicable in this instance. While trial courts do have inherent authority to vacate void judgments, there is no claim in this instance that the earlier judgment was void. The two primary grounds upon which judgments are deemed void are when there is no personal jurisdiction over the defendant or when there is no subject matter jurisdiction. *Dilley v. Dilley*, 11th Dist. No. 2017-G-0115, 2017-Ohio-8439, ¶ 19 (Two primary grounds upon which a judgment can be found void are the trial court did not have subject matter jurisdiction or personal jurisdiction.); *See also Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶ 11. The claim that the trial court used the wrong statute in computing interest does not render the judgment void. The argument that the interest rate is illegal is not a void judgment argument.

{¶19} The other means to vacate a judgment is under Civ.R. 60(B). In order to prevail on a Civ.R. 60(B) motion, "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, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus. Courts are not required to hold a hearing on a Civ.R. 60(B) motion unless the motion and accompanying materials contain operative facts to support relief under Civ.R. 60(B). *E.g., Summers v. Lancia Nursing Homes, Inc.*, 2016-Ohio-7935, 76 N.E.3d 653, ¶ 40 (7th Dist.).

{¶20} Although Appellant claims the judgment is not a Civ.R. 60(B) motion, the only means the trial court would have had authority to do what Appellant wanted was to interpret the motion as a Civ.R. 60(B) motion to vacate and find enough evidence was submitted to, at minimum, warrant a hearing on whether the elements for vacation under Civ.R. 60(B) were met. A review of the motion to revise indicates Appellant did not specify any of the elements of the *GTE* test. Furthermore, the motion does not

contain operative facts and accompanying materials warranting a hearing. Therefore, the trial court did not abuse its discretion in failing to hold a hearing on the motion.

{¶21} It is apparent why Appellant takes the stance that the motion is not a Civ.R. 60(B) motion. It is axiomatic in Ohio law that Civ.R. 60(B) motions cannot be used as a substitute for appeal. Civ.R. 60(B) was intended to provide relief from a final judgment in specific, enumerated situations and cannot be used as a substitute for a direct, timely appeal. *Doe v. Trumbull County Children Services Bd.*, 28 Ohio St.3d 128, 502 N.E.2d 605 (1986), paragraph two of the syllabus. Any claims or arguments that were not raised in a timely appeal, but could have been raised are precluded from being raised in a subsequent Civ.R. 60(B) motion. *Key v. Mitchell*, 81 Ohio St.3d 89, 91, 689 N.E.2d 548 (1998). The Ohio Supreme Court has explained:

Such procedural devices cannot be used in order to obtain review of a judgment where a timely appeal was not filed. If we were to hold differently, judgments would never be final because a party could indirectly gain review of a judgment from which no timely appeal was taken by filing a motion for reconsideration or a motion to vacate judgment.

State ex rel. Durkin v. Ungaro, 39 Ohio St.3d 191, 193, 529 N.E.2d 1268 (1988).

{¶22} Appellant did not appeal the default judgment setting forth the interest rate at 23.70%. When Appellee filed the motion for revivor, in response to the motion, Appellant did not argue the interest rate was incorrect. Appellant did, however, argue he was on active military service when the default judgment was granted. The trial court found no merit with that argument and revived the judgment stating the interest rate was 23.70%. Appellant did not appeal the trial court's decision to revive the judgment. Instead, Appellant waited three years to file the motion to revise the judgment. Therefore, in this instance, a Civ.R. 60(B) motion is a substitute for an appeal. See *Ohio Neighborhood Fin. v. Brown*, 4th Dist. No. 10CA41, 2011-Ohio-2758, ¶ 18 (Trial court ordered interest at 5%, not contract rate of 25%. Lender did not appeal judgment. Rather, it improperly used a Civ.R 60(B) motion as a substitute for direct appeal.); *Ohio Neighborhood Fin., Inc. v. Massey*, 10th Dist. Nos. 10AP-1020, 10AP-1121, 2011-Ohio-2165, ¶ 8 (Trial court ordered interest at a lower rate than the contract

rate. Lender did not appeal the judgment. Instead, it filed a Civ.R. 60(B) motion after the appeal time. Appellate court held Civ.R. 60(B) motion was substitute for appeal.).

{¶23} However, even if the motion is not construed as a Civ.R. 60(B) motion and there is some other basis for the trial court to consider this motion, the motion does not set forth operative facts and accompanying material that would warrant a hearing. Thus, the trial court's decision to decide the matter without a hearing was not an abuse of discretion.

{¶24} In conclusion, for those reasons the sole assignment of error is meritless, and the trial court's decision to deny the motion to revise the judgment without holding a hearing is affirmed.

Waite, J., concurs.

Bartlett, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.