[Cite as *Davis v. Barton*, 2021-Ohio-2359.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

LAWRENCE DANIEL DAVIS,

Plaintiff-Appellant,

v.

DANIEL P. BARTON/SHELLY BARTON,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0064

Civil Appeal from the
Struthers Municipal Court of Mahoning County, Ohio
Case No. CVF 1600469

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Anthony Meranto, 4822 Market Street, Suite 301, Youngstown, Ohio 44512 for Plaintiff-Appellant and

Atty. James Gentile, DeGenova & Yarwood, Ltd., The Liberty Building, 42 North Phelps Street, Youngstown, Ohio 44503 for Defendants-Appellees.

Dated: June 22, 2021

Robb, J.

{¶1} Plaintiff-Appellant Lawrence Daniel Davis appeals the May 4, 2020 judgment of the Struthers Municipal Court, which denied his motion for findings of fact and conclusions of law on a dismissal judgment and his motion to vacate the dismissal judgment. The March 11, 2020 dismissal was granted on the motion of Defendant-Appellees Daniel and Shelly Barton.

{¶2} Appellant claims the trial court erred in denying his motion for findings of facts and conclusions of law. However, Civ.R. 52 was inapplicable as no questions of facts were "tried by the court" and the rule specifically says it does not apply to a ruling on a motion filed under Civ.R. 12. Appellant also contends the trial court erred in denying his motion for relief from the dismissal judgment without a hearing. However, Appellant's motion lacked operative facts alleging a meritorious claim or defense and failed to name or provide operative facts in support of one of the grounds for relief in Civ.R. 60(B). Accordingly, the trial court's May 4, 2020 judgment is affirmed.

{¶3} Appellant further argues the trial court erred in granting the motion to dismiss. Because Appellant's notice of appeal did not designate the March 11, 2020 dismissal judgment entry in violation of App.R. 3(D), the assignment of error relating to the March 11, 2020 judgment is dismissed.

STATEMENT OF THE CASE

{¶4} On October 26, 2016, Appellant filed a complaint against Appellees for breach of contract and unjust enrichment. He alleged he furnished material or performed labor, between April 4, 2014 and February 18, 2015, at Appellees' property in Poland, Ohio "in pursuance of a certain contract with Defendants, the owners, part owners, lessees, original contractors, subcontractors, or other persons, as the case may be." The complaint said the agreement entitled Appellant to $23,867 and he was still owed $8,263.

{¶5} Rather than attach a contract, invoice, or account to the complaint, Appellant attached a March 18, 2015 email he received from the bank's mortgage loan vice president. The email referenced Appellant's invoice to FJP Contracting LLC in the amount of $23,867 and dated January 1, 2014. The bank officer said he received the

invoice from Frank Popovich on February 20, 2015 for Appellees' home construction at their Poland address. The email said the bank would inspect the property and seek payment authorization in the next week.

{¶6} Appellees' answer denied they had a contract with Appellant and denied any money remained due from them for the project mentioned in the complaint. The allegations under the breach of contract and unjust enrichment claims were likewise denied. The answer claimed Appellant failed to state a claim and raised the defense of accord and satisfaction.

{¶7} On January 4, 2017, the judge recused himself from the case. Nothing occurred of record on the case for nearly three years.

{¶8} On September 17, 2019, a notice was issued by the clerk of the municipal court under a local rule, asking Appellant to advise the court of the case status within 30 days or suffer dismissal under Civ.R. 41(B)(1). A week later, the clerk scheduled a pretrial. On October 17, 2019, the court issued an entry stating a pretrial was held and discovery was complete. A bench trial was scheduled for January 2020 but later reset for March 12, 2020.

{¶9} On February 7, 2020, Appellees filed a "Motion to Dismiss" under Civ.R. 19, asking the court to order Appellant to join Popovich Custom Builders Inc. (the contractor) in the action or to find the absent party indispensable and dismiss the action. The motion said Appellees solely contracted with the contractor, who ceased doing business during the course of construction and apparently failed to pay Appellant after the draw from Appellees' construction loan paid the contractor for the excavation work. Appellees quoted from Civ.R. 19(A), which discusses "Persons to Be Joined if Feasible." For instance, "A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties * * *." They also pointed out they were at risk of incurring double obligations in the contractor's absence.

{¶10} Appellant did not respond to the motion. On March 4, 2020, Appellant filed a motion to continue the March 12 trial date, stating he would be at a convention. On March 11, 2020, the court denied the motion to continue the trial.

{¶11} In another March 11, 2020 judgment entry, the trial court dismissed the case. The court said Appellees' February 7, 2020 motion to dismiss was granted for good cause and for the reasons set forth in the motion.

{¶12} On April 13, 2020, Appellant filed a motion for findings of fact and conclusions of law, citing Civ.R. 52. On the same day, Appellant filed a motion to vacate the judgment under Civ.R. 60(B), stating: "Plaintiff was not afforded a hearing on Defendants' Motion to dismiss, made pursuant to Ohio Civ.R. 19, which Plaintiff deemed meritless."

{¶13} On April 20, 2020, Appellees filed a memorandum in opposition to the motions. They asserted that Appellant was not entitled to findings of fact and conclusions of law under Civ.R. 52, which only applies "[w]hen questions of fact are tried by the court without a jury" and there was no trial.

{¶14} In opposing the motion to vacate, Appellees pointed out that Appellant failed to explain the lack of response to their motion to dismiss but merely said he deemed the motion to dismiss under Civ.R. 19 meritless. Appellees noted a party should not ignore a motion if it is considered meritless, pointing out Appellant had 14 days to respond to their motion to dismiss and the court waited over a month before ruling. They said Appellant could have requested an extension of time to respond to the motion or for leave to amend the complaint to add the indispensable party. Appellees theorized Appellant did not wish to sue his business partner and was essentially attempting to force Appellees to pay for the work twice.

{¶15} Appellees argued that Appellant failed to demonstrate entitlement to relief under one of the grounds in Civ.R. 60(B)(1) through (5) and did not even disclose which ground for relief he was claiming. Noting Appellant had the burden to allege a meritorious claim or defense if relief was granted, Appellees pointed out Appellant's motion to vacate did not explain why he believed their Civ.R. 19 argument lacked merit. Appellees said the court was not required to hold a hearing on their motion under Civ.R. 19, especially where Appellant did not respond, and the court was not required to hold a hearing on Appellant's Civ.R. 60(B) motion due to the insufficiency of the motion.

{¶16} On May 4, 2020, the trial court denied the motion for findings of fact and conclusions law because no hearing was conducted. In the same judgment entry, the

court denied the motion to vacate, noting Appellant did not cite a valid reason to set aside the judgment.

APPELLATE PROCEEDINGS

{¶17} On June 3, 2020, Appellant filed a timely notice of appeal. The notice of appeal designated only the May 4, 2020 judgment as the order being appealed.

{¶18} On June 24, 2020, Appellees filed a motion to dismiss the appeal claiming Appellant should have appealed the March 11, 2020 judgment dismissing the case, rather than file an inapplicable Civ.R. 52 motion for findings of fact and conclusions of law and an unsupported motion to vacate. Appellees were concerned Appellant was attempting to use the appeal of the Civ.R. 60(B) denial as a substitute for an appeal of the dismissal judgment. The motion disclosed their concern arose because of a statement Appellant made under an inapplicable question on the praecipe. Where a partial transcript is ordered, the praecipe form asks what assignments of error will be presented on appeal. Although there was no transcript, Appellant answered this question by mentioning the Civ.R. 19 motion and the motion for findings and conclusions, without mentioning the denial of the Civ.R. 60(B) motion.[1]

{¶19} Appellees said Appellant was barred from raising whether the trial court erred in dismissing the case because he failed to appeal the March 11, 2020 judgment.[2] Appellees also argued the time for appealing the March 11, 2020 order had passed. However, there was the Supreme Court's pandemic tolling order to consider. *See* Ohio Supreme Court, 3/27/2020 Administrative Actions, 2020-Ohio-1166 (tolling effective Mar. 9. 2020 through July 30, 2020).

[1] We also note in the docketing statement under "Probable issues for review," Appellant alleged errors in granting the motion to dismiss without a hearing, failing to issue findings of fact and conclusions of law, and refusing to vacate the dismissal judgment.

[2] Appellee's motion said the trial court's March 11, 2020 judgment was a dismissal on the merits. We note Civ.R. 41(B)(4)(b) states: "A dismissal for either of the following reasons shall operate as a failure otherwise than on the merits * * * failure to join a party under Civ. R. 19 or Civ. R. 19.1." The action could thus be refiled (if there was not a savings statute/statute of limitations issue).

This does not affect the dismissal's status as a final appealable order as the rule also says a dismissal for lack of subject matter or personal jurisdiction is a failure otherwise than upon the merits, and those orders are appealable. *See, e.g., National City Commercial Capital Corp. v. AAAA at Your Service Inc.*, 114 Ohio St.3d 82, 2007-Ohio-2942, 868 N.E.2d 663, ¶ 8. And, our September 30, 2020 judgment said the dismissal and the denial of Civ.R. 60 relief were both final appealable orders.

{¶20} Appellant never responded to Appellees' motion to dismiss the appeal, even though he had until 10 days after the pandemic tolling order expired to do so. *See id.*; App.R. 15(A). He also did not amend the notice of appeal to add a designation of the March 11, 2020 judgment within 30 days after the pandemic tolling expired or seek leave to amend it thereafter. *See* App.R. 3(F).

{¶21} On September 30, 2020, this court denied Appellees' motion to dismiss the appeal. We agreed a motion to vacate is not a substitute for an appeal of the judgment sought to be vacated. However, we pointed out the March 11, 2020 judgment was not the only final appealable order: the May 4, 2020 denial of Civ.R. 60(B) relief "is itself a final appealable order." We pointed out the June 3, 2020 appeal from the May 4, 2020 judgment was timely, even without the pandemic tolling order.

{¶22} Appellees' motion to dismiss the appeal was predicting what assignments of error would be raised by Appellant in the future based on non-binding filings. The motion did not account for Appellant's right to appeal from the denial of Civ.R. 60(B) relief (where the appellate court would thereafter decide upon briefing whether the motion warranted a hearing in the trial court or whether certain arguments within the motion seemed to be used as a substitute for appeal). Appellees' motion also did not account for the appeal of the denial of a motion for findings of fact and conclusions of law in order to obtain an appellate ruling on whether Civ.R. 52 applied.

{¶23} Our September 30, 2020 judgment ordered Appellant to file his brief within 20 days. After two extensions, Appellant filed his brief on December 22, 2020.

{¶24} Appellant's first assignment of error claims the March 11, 2020 dismissal was erroneous, but this judgment was never designated in the notice of appeal. Appellant's second assignment of error is divided into two arguments about the court's May 4, 2020 judgment, which was the only judgment designated in the notice of appeal: part one claims the court erred by denying the motion for findings of fact and conclusions of law, and part two claims the court erred by denying the Civ.R. 60(B) motion to vacate the dismissal entry.

{¶25} We begin with the two-part second assignment of error as it involves the judgment that was designated in the notice of appeal. Additionally, if a trial court errs in failing to issue findings of fact and conclusions of law, a case can be remanded for their

issuance, which would provide a new opportunity to thereafter appeal the dismissal entry. Moreover, a timely and appropriate motion for findings of fact and conclusions of law would be linked to the applicable judgment and may be a consideration by the appellate court when determining whether to exercise discretion to review an assignment of error based on a judgment which was not designated in the notice of appeal; an inapplicable (or untimely) motion would not be similarly linked to the judgment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶26} As to the trial court's May 4, 2020 judgment, which was the subject of the notice of appeal, Appellant first contends:

"THE TRIAL COURT ERRED BY NOT PROVIDING APPELLANT FINDINGS OF FACT AND CONCLUSIONS OF LAW, AS ITS JUDGMENT ENTRY OF DISMISSAL INDICATED NO FACTUAL OR LEGAL BASIS FOR SAME AND APPELLEES' MOTION WAS NOT SUPPORTED BY ANY AFFIDAVIT."

{¶27} On this topic, Appellant says: the trial court did not hold a hearing on the motion to dismiss; the motion was not supported by an affidavit; and the trial court granted the dismissal motion for the reasons set forth in the motion. Appellant claims the court should have issued findings of fact and conclusions of law because Civ.R. 52 allows a request for findings of fact and conclusions of law when questions of fact are tried by the court without a jury. He says a court abandons its obligation by merely relying on its reference to the reasons in a party's motion to support its decision.

{¶28} Appellant relies on Civ.R. 52, as did his motion in the trial court. This rule provides in pertinent part:

> When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ. R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the findings of fact found separately from the conclusions of law.
>
> * * *

> Findings of fact and conclusions of law required by this rule and by Civ.R. 41(B)(2) and Civ.R. 23(G)(3) are unnecessary upon all other motions including those pursuant to Civ.R. 12, Civ.R. 55 and Civ.R. 56.

Civ.R. 52. The cited rules requiring findings and conclusions are inapplicable. *See* Civ.R. 41(B)(2) (granting a defendant's motion to dismiss in a bench trial after the plaintiff's presentation of evidence); Civ.R. 23(G)(3) (class action attorney's fees).

{¶29} A request for findings of fact and conclusions of law under Civ.R. 52 will not be granted unless it was timely and the rule applies to the judgment. *See Werden v. Crawford*, 70 Ohio St.2d 122, 124, 435 N.E.2d 424 (1982). We note that certain post-judgment motions, including "timely and appropriate" requests for findings of fact and conclusions of law, are linked to the judgment and can toll the time for filing an appeal. *See* App.R. 4(B)(2) (also including a motion for new trial but not a motion for relief from judgment). *Compare* Civ.R. 60(B) (stating the motion "does not affect the finality of a judgment or suspend its operation").

{¶30} Therefore, where an appellant files a post-judgment motion listed in App.R. 4(B)(2) but where the motion is inapplicable to the type of judgment issued by the trial court, the motion is a nullity for purposes of the Appellate Rule. *L.A. & D. Inc. v. Board of Lake Cty. Commrs.*, 67 Ohio St.2d 384, 386-387, 423 N.E.2d 1109 (1981) (motion for new trial from summary judgment was improper and thus did not toll the time to appeal). Hence, if Civ.R. 52 does not require the court to issue findings of fact and conclusions of law, then the court has no duty to issue them (and the time for filing a notice of appeal is not tolled). *Ohio Edison Co. v. Cubick*, 7th Dist. Mahoning No. 20 MA 0029, 2020-Ohio-7027, ¶ 48.

{¶31} On the issue of whether Appellant's request for findings and conclusions under Civ.R. 52 was timely, we note: the judgment was filed on March 11, 2020; the court directed the clerk to serve the parties; the clerk issued notice of the judgment on March 12, 2020; and the motion for findings of fact and conclusions of law was not filed until April 13, 2020, long after the 7-day time limit in Civ.R. 52. However, the time for filing the motion was tolled as the Supreme Court's pandemic tolling order was retroactive to March 9, 2020. *See* Ohio Supreme Court, 3/27/2020 Administrative Actions, 2020-Ohio-1166 (tolling effective Mar. 9. 2020 through July 30, 2020).

{¶32} On the issue of whether Appellant's request for findings of fact and conclusions of law was appropriate and permissible, the rule only applies "[w]hen questions of fact are tried by the court without a jury * * *." Civ.R. 52. A request for findings and conclusions under Civ.R. 52 "is not authorized where no fact-finding hearing occurred." *Schenley Props. LLC v. Youngstown Bd. of Zoning Apps.*, 7th Dist. Mahoning No. 09 MA 31, 2009-Ohio-1527, ¶ 6.

{¶33} Therefore, an appellant is not entitled to findings of fact and conclusions of law on a Civ.R. 12 motion to dismiss for lack of subject matter jurisdiction or a Civ.R. 12 motion to dismiss for lack of personal jurisdiction. *In re Wells*, 7th Dist. No. 03BE76, 2004-Ohio-1572. Likewise, an appellant is not entitled to findings and conclusions when a court dismisses a complaint pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. *State ex rel. Drake v. Athens Cty. Bd. of Elections*, 39 Ohio St.3d 40, 41, 528 N.E.2d 1253 (1988); *Mehno v. Dattilio*, 7th Dist. Columbiana No. 15 CO 0023, 2016-Ohio-4659, ¶ 8. On such a motion, the court makes a legal conclusion without assuming the role of a fact-finder and has no duty to issue findings of fact and conclusions of law. *Drake*, 39 Ohio St.3d at 41.

{¶34} Appellant is essentially stating the trial court should have held a factual hearing rather than grant the motion to dismiss and thus should be required to file findings and conclusions because a factual hearing should have been held. However, this is contrary to the plain language of the rule, which applies when "questions of fact are tried by the court." Civ.R. 52. It does not apply when a court grants a dismissal motion without a hearing, even if erroneously.

{¶35} Appellant suggests a motion on joinder requires the consideration of facts and thus Civ.R. 52 should apply. Not only is Appellant's argument contrary to the plain language of the rule regarding questions of fact that are "tried" by the court, but Appellant is interpreting the first paragraph of Civ.R. 52 without acknowledging the remainder of the rule. Specifically, the third paragraph in Civ.R. 52 says the findings of fact and conclusions of law required by the rule "are unnecessary upon all other motions including those pursuant to Civ.R. 12" (or Civ.R. 56). *Mehno*, 7th Dist. No. 15 CO 0023 at ¶ 8 ("Civ.R. 52 indicates findings are not required when ruling on Civ.R. 12 motions.").

{¶36} Appellees filed a motion to dismiss for failure to join a necessary party under Civ.R. 19. This type of motion is specifically listed in Civ.R. 12. *See* Civ.R. 12(B)(7) (motion raising "failure to join a party under Rule 19"); (H) ("failure to join a party indispensable under Rule 19" can also be made in a motion for judgment on pleadings in division (C) or at trial). As such, Appellees' motion to dismiss for failure to join an indispensable party under Civ.R. 19 was a Civ.R. 12 motion.

{¶37} Lastly, we note even though various types of evidence like affidavits are considered in ruling on a Civ.R. 56 summary judgment motion, a court is not required to issue findings of fact and conclusions of law on such a motion as it is specifically excluded from Civ.R. 52. *Mosley v. Gen. Motors Corp.*, 7th Dist. Mahoning No. 01-CA-85, 2002-Ohio-6000, ¶ 45-47 (where an appellant similarly argued "questions of facts are tried by the court" when the court rules on summary judgment evidence, this district emphasized he "failed to consider the remainder of the rule" and quoted the rule's third paragraph). *See also State ex rel. Parker Bey v. Byrd,* 160 Ohio St.3d 141, 2020-Ohio-2766, 154 N.E.3d 57, ¶ 19, citing *Maddox v. East Cleveland*, 8th Dist. Cuyahoga No. 96390, 2012-Ohio-9, ¶ 23 (summarily overruling an assignment of error which complained about the court's refusal to issue findings of fact and conclusions of law on the type of motion specifically excluded from Civ.R. 52's application).

{¶38} In conclusion, questions of fact were not "tried by the court without a jury" and the trial court granted a Civ.R. 12 motion which is specifically excluded from the scope of Civ.R. 52. Accordingly, Appellant was not entitled to findings of fact and conclusions of law under Civ.R. 52, and the trial court did not err in denying his Civ.R. 52 motion.

MOTION FOR RELIEF FROM JUDGMENT

{¶39} Appellant's other contention challenging the trial court's May 4, 2020 judgment argues:

"THE TRIAL COURT ERRED BY NOT VACATING ITS JUDGMENT, PURSUANT TO APPELLANT'S 60(B) MOTION, AND/OR CONDUCTING A HEARING, AS ITS JUDGMENT ENTRY OF DISMISSAL INDICATED NO FACTUAL OR LEGAL BASIS FOR SAME AND APPELLEES' MOTION WAS NOT SUPPORTED BY ANY AFFIDAVIT."

{¶40} We review the denial of a Civ.R. 60(B) motion under an abuse of discretion standard of review. *State ex rel. Russo v. Deters*, 80 Ohio St.3d 152, 1997-Ohio-351,

684 N.E.2d 1237 (1997). An abuse of discretion exists where the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Id.*, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶41} To prevail on a Civ.R. 60(B) motion, the movant must demonstrate each of the following three elements: (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 listed in the five subdivisions of the rule; and (3) the motion is made within a reasonable time (and not more than one year after judgment if the motion is based on one of the first three subdivisions). *GTE Automatic Elec. Inc. v. ARC Industries Inc.*, 47 Ohio St.2d 146, 150-151, 351 N.E.2d 113 (1976). "If any of these three requirements is not met, the motion should be overruled." *Rose Chevrolet Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988).

{¶42} Appellant states the trial court should have granted relief from judgment or scheduled a hearing on the Civ.R. 60(B) motion rather than summarily denying it. As for the motion's timeliness, it was filed 33 days after the dismissal entry, and Appellees did not contest the timeliness in the opposition to the motion before the trial court.

{¶43} In alleging a meritorious claim or defense under this assignment of error, Appellant's brief says his meritorious claim in the action was clear as he performed the work and the contractor was not the only person liable. He also construes this as a defense to the dismissal motion, while complaining Appellees' motion to dismiss for failure to join a party was not supported by an affidavit and no hearing was held. We note in a different assignment of error contesting the dismissal of the case, Appellant suggested a homeowner is liable to a subcontractor for breach of contract even if the homeowner only contracted with the contractor; he also said his unjust enrichment claim could proceed regardless of privity of contract principles and regardless of whether the contractor was a party to the litigation.

{¶44} However, in reviewing the trial court's decision for an abuse of discretion, it is the arguments Appellant disclosed to the trial court that govern. *J.P. Morgan Chase Bank v. Macejko*, 7th Dist. Mahoning No. 07-MA-148, 2010-Ohio-3152, ¶ 37 ("We cannot find that the trial court abused its discretion in denying Civ.R. 60(B) relief based upon arguments that were never presented to it."). Appellant's motion to vacate filed in the trial

court merely said, “Plaintiff was not afforded a hearing on Defendant’s motion to dismiss, made pursuant to Ohio Civ.R. 19, which Plaintiff deemed meritless.”

{¶45} As Appellees’ response pointed out, Appellant did not indicate to the trial court why Appellant believed Appellees’ Civ.R. 19 motion was meritless. Appellant also did not explain why a hearing should have been held on the dismissal motion in the absence of a response requesting a hearing or what Appellant wished to demonstrate at a hearing or thereafter.

{¶46} “Under Civ.R. 60(B), a movant's burden is only to allege a meritorious defense, not to prove that he will prevail on that defense.” *Rose Chevrolet*, 36 Ohio St.3d at 20. However, the meritorious claim or defense must be specified:

> A general conclusory allegation is insufficient to meet the burden. A motion to vacate can be denied without a hearing where operative facts are not outlined to demonstrate the defense. Thus, a hearing is only required to verify or discredit facts where sufficient operative facts in support of the alleged defense are initially set forth.

Second Natl. Bank of Warren v. Sorice, 7th Dist. Mahoning No. 01 CA 63, 2002-Ohio-3204, ¶ 10. *See also Carkido v. Hasler*, 129 Ohio App.3d 539, 550, 718 N.E.2d 496 (7th Dist.1998) (“Appellant presented absolutely no operative facts to show that he would have a meritorious defense if the trial court agreed to vacate the judgment that granted a default judgment against appellant. Therefore, we cannot hold that the trial court abused its discretion by overruling the motion for relief from judgment without first holding an evidentiary hearing”).

{¶47} Appellant’s motion merely contained a general conclusory statement that he believed there was no merit to the dismissal motion (which was granted without a hearing). As Appellees’ point out, the motion had no operative facts related to the underlying claim in the lawsuit or related to a defense to the dismissal motion.

{¶48} Furthermore, Appellant failed to allege entitlement to relief under one of the grounds set forth in Civ.R. 60(B), which is one of the mandatory requirements of the GTE test. Civ.R. 60(B) states in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (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 Rule 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.

Civ.R. 60(B)(1)-(5). The fifth ground is a catch-all provision reflecting the inherent power of a court to relieve a person from the unjust operation of a judgment, but it is not a substitute for a more specific ground and the reason presented by the movant must be substantial. *Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64, 66, 448 N.E.2d 1365 (1983) (abuse of discretion to grant relief where the movant sets forth operative facts alleging a meritorious defense but not the grounds for relief). *See also Coulson v. Coulson*, 5 Ohio St.3d 12, 15, 448 N.E.2d 809 (1983) (such as active participation in a "fraud upon the court" by an attorney or other officer of the court).

{¶49} As aforementioned, the movant must demonstrate he "is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5)." *GTE Automatic Elec.*, 47 Ohio St.2d at 151. Appellant's brief gives no indication which of the five grounds the motion was utilizing, mentioning only two of the *GTE* elements (timeliness and meritorious claim). Likewise, Appellant's motion for relief from judgment filed in the trial court did not cite to one of the five subdivisions. And, the language of the motion did not hint at which ground was being argued where Appellant's motion merely alleged: "Plaintiff was not afforded a hearing on Defendant's motion to dismiss, made pursuant to Ohio Civ.R. 19, which Plaintiff deemed meritless."

{¶50} "[I]t is well established that a Civ.R. 60(B) motion cannot be used as a substitute for an appeal and that the doctrine of res judicata applies to such a motion." *Bank of America, N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶

16. *See also Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128, 131, 502 N.E.2d 605 (1986). "As Civ.R. 60(B) is not a substitute for an appeal, it cannot be utilized merely to raise mistakes allegedly committed by the trial court." *State v. Brown*, 7th Dist. Mahoning No. 13 MA 172, 2014-Ohio-5824, ¶ 50). *See also Genhart v. David*, 7th Dist. Mahoning No. 10 MA 144, 2011-Ohio-6732, ¶ 17 ("the mistake contemplated by Civ.R. 60(B)(1) is some mistake on the part of the parties, not a mistake of fact or law by the court"); *Gron v. Gron*, 7th Dist. Jefferson No. 07 JE 49, 2008-Ohio-5054, ¶ 27-29. Otherwise, the movant would be essentially moving for reconsideration of a final judgment, which motion is a nullity. *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 379, 423 N.E.2d 1105 (1981).

{¶51} In a case where a Civ.R. 60(B) motion said it was "based upon inadvertence and excusable neglect" and claimed the movant's attorney "previously prepared an answer" (without explaining further), the Supreme Court observed, "the least that can be required of the movant is to enlighten the court as to why relief should be granted." *Rose Chevrolet*, 36 Ohio St.3d at 20-21 (noting the submission of affidavits with the motion was advisable). "[W]here the movant alleges inadvertence and excusable neglect as grounds for relief from judgment under Civ.R. 60(B)(1), but does not set forth any operative facts to assist the trial court in determining whether such grounds exist, the court does not abuse its discretion in denying the motion for relief from judgment." *Id.* The burden is on the movant, and a "mere allegation" of a named ground for relief exists "without any elucidation, cannot be expected to warrant relief." *Id.*

{¶52} Here, Appellant's motion did not even name a ground for relief in Civ.R. 60(B)(1) through (5), let alone elucidate the allegation by disclosing operative facts constituting the ground alleged. Appellant did not mention the lack of response to the dismissal motion or say why there was no response (or what the response would have stated). Even if Appellant had sufficiently alleged the meritorious defense prong of *GTE*, the entitlement to relief prong was wholly absent from the motion. *See Caruso-Ciresi*, 5 Ohio St.3d at 66 ("appellant could not contend it should be relieved of the default judgment pursuant to Civ.R. 60(B)(5) simply because it had a meritorious defense").

{¶53} As to the need for a hearing on a Civ.R. 60(B) motion: "If the movant files a motion for relief from judgment and it contains allegations of operative facts which would

warrant relief under Civil Rule 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion." *Kay v. Marc Glassman Inc.*, 76 Ohio St.3d 18, 19, 665 N.E.2d 1102 (1996). "Thus, the trial court abuses its discretion in denying a hearing where grounds for relief from judgment are sufficiently alleged and are supported with evidence which would warrant relief from judgment." *Id.*

{¶54} "Conversely, an evidentiary hearing is not required where the motion and attached evidentiary material do not contain allegations of operative facts which would warrant relief under Civ.R. 60(B)." *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151, 666 N.E.2d 1134 (1996). As we have explained:

> There is no automatic right to a hearing on a motion to vacate. A court is required to conduct an evidentiary hearing only if the motion contains allegations of operative facts which would warrant relief under Civ.R. 60(B). *Kay v. Marc Glassman, Inc*. (1996), 76 Ohio St.3d 18, 19, 665 N.E.2d 1102. The court's decision in this regard is within its discretion. *Id.* Even a cursory reading of appellant's motion reveals that it in no way complies with Civ.R. 60. He does not set forth grounds for relief nor operative facts to establish any of the grounds found in Civ.R. 60(B).

Vos v. Village of Washingtonville, 7th Dist. Columbiana No. 03-CO-20, 2004-Ohio-1388, ¶ 31. "Neither a responding party nor a trial court can be expected to divine the specific grounds under which a movant seeks relief." *Mattingly v. Deveaux*, 10th Dist. Franklin No. 03AP-793, 2004-Ohio-2506, ¶ 9 (overruling the appellant's argument on the failure to hold a hearing on a motion to vacate which lacked operative facts).

{¶55} In conclusion, Appellant's motion did not allege grounds for relief under Civ.R. 60(B)(1) through (5), let alone explain the grounds by providing operative facts. Additionally, the allegation of meritorious claim or defense was conclusory with no specifics or supporting facts. Accordingly, the trial court did not abuse its discretion in denying the motion to vacate without a hearing.

DISMISSAL JUDGMENT NOT DESIGNATED IN NOTICE OF APPEAL

{¶56} Appellant sets forth an assignment of error contesting the March 11, 2020 dismissal judgment, arguing:

"THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CASE, PURSUANT TO CIV.R. 19, AS APPELLEES' CONTRACTOR WAS NOT AN INDISPENSABLE PARTY."

{¶57} Appellant's notice of appeal explicitly said Appellant was "appealing the Motion For Findings of Facts and Motion to Vacate decision entered by said trial court on the 4th of May, 2020 to the Seventh District Court of Appeals. A copy of this decision is attached." (6/3/20 Notice of Appeal). Consistent with this language, Appellant attached only the May 4, 2020 judgment (denying the motion for findings of fact and conclusions of law and the motion to vacate).

{¶58} Typically, a party files a notice of appeal from a final judgment separately from the notice of appeal filed from a subsequent final judgment denying Civ.R. 60(B) relief from the antecedent judgment.[3] Occasionally, when the Civ.R. 60(B) motion is ruled on so soon after a dismissal judgment that an appeal of the original judgment would still be timely, the appealing party files one notice of appeal listing and attaching both judgments. Due to the pandemic tolling order, this is one of those cases where the Civ.R. 60(B) motion was ruled on soon enough after the original judgment that time still remained to appeal the original judgment at the time of the Civ.R. 60(B) judgment. Yet, Appellant did not designate the first judgment (the dismissal judgment) in the notice of appeal. As pointed out in our September 30, 2020 judgment, the dismissal judgment was a final appealable order.

{¶59} "Subject to the provisions of App.R. 4(A)(3), a party who wishes to appeal from an order that is final upon its entry shall file the notice of appeal required by App.R. 3 within 30 days of that entry." App.R. 4(A)(1). (Division (A)(3) deals with delay in the clerk's service, which is not at issue here as the clerk docketed service the day after the March 11, 2020 judgment.) It is well-established the failure to file a timely notice of appeal is a jurisdictional defect. *State ex rel. Boardwalk Shopping Ctr. Inc. v. Court of Appeals for Cuyahoga Cty.*, 56 Ohio St.3d 33, 36, 564 N.E.2d 86 (1990).

[3] As earlier noted, a Civ.R. 60(B) motion does not extend the time for appeal of the judgment sought to be vacated. The time for appealing can be extended where certain listed timely and appropriate post-judgment motions are filed, such as a request for findings of fact and conclusions of law under Civ.R. 52. See App.R. 4(B)(2)(d) (or a new trial motion). But, an untimely or inapplicable post-judgment motion does not extend the time for appealing the original judgment. *L.A. & D. Inc.*, 67 Ohio St.2d at 386-387. As discussed above, Civ.R. 52 was inapplicable and thus does not link to the dismissal entry.

{¶60} However, as reviewed infra, the contents of the notice of appeal in App.R. 3(D) are considered non-jurisdictional, even though App.R. 4 refers to the notice of appeal required by App.R. 3, which in turn provides in part: "(D) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; *shall designate the judgment*, order or part thereof *appealed from*; and shall name the court to which the appeal is taken." (Emphasis added.) This is because the rule also provides:

> Filing the Notice of Appeal. An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. *Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal*, *but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.*

(Emphases added.) App.R. 3(A). *See also* App.R. 3 (F) (after the time to appeal the order that was the subject of the notice of appeal has lapsed, "the court of appeals within its discretion and upon such terms as are just may allow the amendment of a notice of appeal, so long as the amendment does not seek to appeal from a trial court order beyond the time requirements of App.R. 4").

{¶61} In one Supreme Court case, a "notice of appeal mistakenly specified that the appeal was taken from the order denying the motion for new trial rather than from the final judgment entered on the merits." *Maritime Manufacturers Inc. v. Hi-Skipper Marina*, 70 Ohio St.2d 257, 258, 436 N.E.2d 1034 (1982). The appellate court dismissed the appeal as all arguments in the brief pertained to the decision entered after the trial rather than the decision on the new trial motion which was designated in the notice of appeal.

{¶62} However, the Supreme Court ruled the appellate court did not lack jurisdiction to hear the appeal and reversed the dismissal, opining the issue was a mere technicality under the circumstances of the case, including the clear intent behind the appeal combined with assignments of error which probed the same issues as the new trial motion. *Id.* at 258-260. We note the motion for new trial was linked to the final judgment in that case as it was timely and properly filed after a trial.

{¶63} In a subsequent case, the Court explained how defects as to the content of the notice of appeal required under App.R. 3(D) were matters subject to the appellate court's discretion and not jurisdictional. *Transamerica Ins. Co. v. Nolan*, 72 Ohio St.3d 320, 649 N.E.2d 1229 (1995). In *Transamerica*, the notice of appeal specified the party taking the appeal as "Dennis Wallace et al." The appellate court refused to rule on the appeal related to Linda Wallace as the notice of appeal failed to comply with App.R. 3(D) by specifying the party or parties taking the appeal; the court said the defect was jurisdictional, relying on a United States Supreme Court holding with regard to the similar federal rule.

{¶64} However, the Ohio Supreme Court refused to "interpret the Ohio rule so strictly." *Transamerica*, 72 Ohio St.3d at 322. The Court ruled:

> Pursuant to App.R. 3(A), the only jurisdictional requirement for a valid appeal is the timely filing of a notice of appeal. When presented with other defects in the notice of appeal, a court of appeals is vested with discretion to determine whether sanctions, including dismissal, are warranted, and its decision will not be overturned absent an abuse of discretion.

Id. at syllabus. Therefore, although the "Content of the Notice of Appeal" provision in App.R. 3(D) lists items which "shall" be included, the Supreme Court broadly opined the contents of a notice of appeal are not jurisdictional, relying on the statement in App.R. 3(A) that the failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal.

{¶65} The Court then found the appellate court abused its discretion in not considering the appeal of Linda Wallace. *Transamerica Ins.*, 72 Ohio St.3d at 322. The Court discussed some relevant considerations: good faith mistake and who made it, lack of prejudice to other party by the designation, and proportionality of the sanction considering the overriding objective of deciding cases on the merits. *Id.* at 322-323. Notable considerations in that case would have included: the judgment appealed by "Dennis Wallace et al." only related to the claims of Dennis and Linda Wallace; the Wallaces were both the parents of a decedent whose death prompted their similar claims; the addition of et al. after specifying Dennis Wallace as the appellant in the notice of

appeal allowed one to glean there was more than one appellant, who could only be Linda; and the appellees proceeded as if she was a party to the appeal.

{¶66} Citing *Transamerica*, appellate courts recognize the timely filing of a notice of appeal in a trial court case is the sole jurisdictional requirement (which can be satisfied even if the notice fails to designate one of the judgments) and the court then exercises discretion to decide whether to refuse to address certain assignments of error where the appellant violated App.R. 3(D). *See, e.g., Midland Funding LLC v. Hottenroth*, 2014-Ohio-5680, 26 N.E.3d 269 (8th Dist.), ¶ 1-4; *Bank of America, N.A. v. Robledo*, 10th Dist. Franklin No. 13AP-278, 2014-Ohio-1185, ¶ 10-15; *Grenga v. Bank One, N.A*., 7th Dist. Mahoning No. 04 MA 94, 2005-Ohio-4474, ¶ 8-9. *See also Jochum v. State ex rel. Mentor*, 11th Dist. Lake No. 2020-L-032, 2020-Ohio-4191, ¶ 43 (declining to address an assignment of error related to a decision not designated in the notice of appeal).

{¶67} In a unanimous eleven-judge en banc decision on reconsideration, the Eighth District exercised its discretion to refuse to consider two assignments of error challenging interlocutory orders that were not designated in or attached to the notice of appeal. *Midland Funding*, 2014-Ohio-5680 at ¶ 3-4 (after confirming the lacking designation was not jurisdictional). The court noted the local appellate rule was violated in addition to App.R. 3(D). *Id.* at ¶ 4.

{¶68} The Tenth District exercised its discretion to address assignments of error where the notice of appeal designated a repetitive judgment entered the day after the final summary judgment order was addressed in the brief. *Bank of America*, 10th Dist. No. 13AP-278 at ¶ 4, 12-15. The court emphasized the case *had only one final appealable order* and the notice of appeal contained sufficient information to show it was the order being appealed, resulting in a lack of prejudice to the opposing party. *Id.* at ¶ 15.

{¶69} In *Grenga*, this district exercised our discretion to review assignments of error addressing interlocutory orders after the notice of appeal designated only the final order. However, we also observed: "We routinely allow parties to address errors relating to prior orders not specifically designated in the notice of appeal *as long as none of those prior orders were final appealable orders*, and if the remaining parties are not prejudiced

by the failure to follow App.R. 3(D)." (Emphasis added.) *Grenga*, 7th Dist. No. 04 MA 94 at ¶ 9.

{¶70} Our local appellate rule provides: "A notice of appeal * * * shall designate the judgment or order appealed from, including the date of the judgment of order * * *. Failure to follow this rule may result in dismissal of the appeal." 7th Dist. Loc.R. 3A.

{¶71} Here, Appellant's notice of appeal named only one final appealable order, even though there existed more than one final appealable order (unlike in *Grenga* and *Bank of America*). *See Grenga*, 7th Dist. No. 04 MA 94 at ¶ 9 (one final order, plus interlocutory orders merge); *Bank of America*, 10th Dist. No. 13AP-278 at ¶ 4, 15 (only one final order, plus the order appealed was a repeat of the summary judgment entered the day before). It is also notable the two final judgments were separated in time by almost two months.

{¶72} The designation issue here is not akin to a notice of appeal designating a judgment denying a new trial motion instead of the original judgment where the appeal was only timely because the new trial was timely and proper (as in *Maritime*). Here, the denial of findings and conclusions was improper and thus not linked to the final judgment of dismissal.

{¶73} Moreover, the designation defect in this case is more serious than a designation of a final order with a failure to designate interlocutory orders (as in *Grenga*, where our district exercised its discretion to address the assignments related to the interlocutory orders, or as in *Midland Funding*, where the Eighth District used its discretion to strike the assignments of error related to the interlocutory orders, even though they merged into and only became final as a result of the judgment named in the notice of appeal and merged into the final judgment).

{¶74} The failure of Appellant's notice of appeal to designate the final judgment of dismissal in conjunction with the notice of appeal's specific designation of a subsequent final judgment denying a motion to vacate (which also denied an improper Civ.R. 52 motion) is also a more serious content defect than an appellant adding "et al." after one appellant's name without specifying the appellant's similarly-situated ex-wife was also appealing (as in *Transamerica*). The defect in the notice of appeal as related to the failure

to designate the March 11, 2020 judgment was not a mere technicality; it was a prior and separate final judgment entered in the case.

{¶75} Notably, Appellees' June 24, 2020 motion to dismiss the appeal reminded Appellant that he never designated the March 11, 2020 judgment in his June 3, 2020 notice of appeal. Upon learning of this issue, Appellant could have then acted to designate the earlier judgment if he intended to directly contest it on appeal (in case his argument on findings of fact and conclusions of law failed). At that point, there was still time remaining for Appellant to file a notice of appeal from the March 11, 2020 judgment. The pandemic tolling order was retroactive to March 9, 2020 and lasted through July 30, 2020, giving an appellant until Monday, August 31, 2020 to file a notice of appeal where a final judgment was rendered during the tolling period. Ohio Supreme Court, 3/27/2020 Administrative Actions, 2020-Ohio-1166. However, Appellant: did not designate the March 11, 2020 judgment in the June 3, 2020 notice of appeal; never responded to Appellees' motion to dismiss the appeal; did not attempt to amend the notice of appeal during the pandemic tolling order; and did not thereafter seek leave to amend the notice of appeal during the extensions he received within which to file his brief.

{¶76} Lastly, we note as to our September 30, 2020 judgment denying Appellees' motion to dismiss the entire appeal: Appellees' motion was denied because they were incorrect as to the effect of Appellant's failure to designate the antecedent dismissal judgment on his ability to appeal the *subsequent* final judgment (refusing to grant relief from the dismissal judgment and refusing to issue findings and conclusions on the dismissal). As outlined in our Appellate Proceedings section supra, our ruling was confined to the issue of whether the entire appeal had to be dismissed. Because the May 4, 2020 decision denying the motion to vacate was "itself a final appealable order," we refused to dismiss Appellant's timely appeal designating that judgment. We did not sua sponte grant Appellant leave to assign any error from any judgment entry filed in the case as we do not prejudge an appeal based on a predicted assignment of error set forth in a praecipe or docketing statement. Nor do we address a jurisdictional motion by making peremptory conclusions on which assignments of error are allowable and which are not by attempting to interpret a handwritten outline of ideas in those pre-briefing documents.

{¶77} In sum, we decline review of the assignment of error directly contesting the trial court's March 11, 2020 decision as it is beyond the bounds of the judgment designated in the notice of appeal.

CONCLUSION

{¶78} For the foregoing reasons, we dismiss Appellant's first assignment of error contesting the trial court's March 11, 2020 dismissal judgment. Appellant's two-part second assignment of error is overruled. The trial court properly denied Appellant's request for findings of fact and conclusions of law on the dismissal entry and Appellant's Civ.R. 60(B) motion for relief from the dismissal judgment. Accordingly, the trial court's May 4, 2020 judgment is affirmed.

Donofrio, P J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Struthers Municipal Court of Mahoning 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.