[Cite as *Collins Fin. Serv. v. Murray*, 2009-Ohio-4619.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

COLLINS FINANCIAL SERVICE,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2008-P-0095**
- vs -	:	
BRET MURRAY,	:	
Defendant-Appellee.	:	

Civil Appeal from the Portage County Municipal Court, Ravenna Division, Case No. 2008 CVF 0652 R.

Judgment: Affirmed.

Frederick Stratmann, Cheek Law Offices, L.L.C., 471 East Broad Street, 12th Floor, Columbus, OH 43215 (For Plaintiff-Appellant).

Thomas J. Sicuro, Sicuro & Simon, 213 South Chestnut Street, Ravenna, OH 44266 (For Defendant-Appellee).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Collins Financial Service, appeals from the September 23, 2008 judgment entry of the Portage County Municipal Court, Ravenna Division, approving the motion for relief from judgment of appellee, Bret Murray.

{¶2} On December 13, 2001, appellee opened an account with American Investment Bank, N.A., Dell Computer Corporation. The account balance reached the total sum of $2,420.01. The account was in default and was charged off on September

23, 2002. The obligation was purchased by Chase Manhattan Bank and subsequently assigned to appellant.

{¶3} On February 13, 2008, appellant filed a complaint against appellee, seeking the principal sum of $2,420.01, plus accrued interest of $2,456.91, for a total amount owed of $4,876.92, plus future interest at eight percent and costs. Appellee did not file an answer.

{¶4} A default hearing was held before the magistrate on August 22, 2008. Appellee did not appear. Pursuant to his August 22, 2008 decision, the magistrate indicated that default judgment should be entered for appellant in the amount of $4,876.92, plus costs and interest at eight percent from February 8, 2008. The trial court approved the magistrate's decision on August 25, 2008. No objections were filed.

{¶5} On September 19, 2008, appellee filed a motion for relief from judgment. On September 23, 2008, the trial court approved appellee's motion. It is from that judgment that appellant filed a timely notice of appeal and asserts the following assignments of error:

{¶6} "[1.] The trial court abused its discretion when it vacated the judgment, as Defendant's motion did not comply with Rule 7(B)(1) of the Ohio Rules of Civil Procedure and was therefore defective on its face.

{¶7} "[2.] The trial court erred to the prejudice of plaintiff in vacating the judgment pursuant to Civil Rule 60(B).

{¶8} "[3.] The trial court abused its discretion in granting the motion to vacate judgment without giving the non-moving party the opportunity to respond to the motion, pursuant to due process and Civil Rule 7(B)(2)."

{¶9} At the outset, we note the dissent has indicated the August 25, 2008 judgment entry is not a final, appealable order, and the instant appeal should be dismissed. An assignment of error was not raised by either party as to whether the trial court's August 25, 2008 judgment entry adopting the magistrate's decision was a final order. "Generally, when a court of appeals chooses to consider an issue not briefed by the parties, the court should notify the parties and give them an opportunity to brief the issue." *State v. Blackburn*, 11th Dist. No. 2001-T-0052, 2003-Ohio-605, at ¶45. (Citation omitted.)

{¶10} Moreover, the magistrate's recommendation at issue was appropriately addressed by the trial court. This rendered the August 25, 2008 entry a judgment upon which execution could have issued forthwith. There was nothing further for the trial court to do. The trial court issued an entry on August 25, 2008, separate from the magistrate's August 22, 2008 recommendation. See *In re Estate of Castrovince* (Aug. 16, 1996), 11th Dist. No. 96-P-0175, 1996 Ohio App. LEXIS 6226, at *2-3. Further, the August 25, 2008 entry indicated the trial court engaged in an independent review of the magistrate's report, dissimilar to *McClain v. McClain* (Feb. 12, 1999), 11th Dist. No. 98-P-0002, 1999 Ohio App. LEXIS 448, at *3-4, as cited to by the dissent. Furthermore, unlike *Girard v. Leatherworks Partnership*, 11th Dist. No. 2001-T-0138, 2002-Ohio-7276, involving a multiple-party, multiple-claim action, Civ.R. 54(B) is inapplicable to the case sub judice, and the trial court was not required to include such language to constitute a final, appealable order as stated in the holding of *Girard*. As such, this court will review the merits of the instant appeal.

{¶11} Since appellant's assignments of error are interrelated, we address them in a consolidated analysis. The decision to grant or deny a Civ.R. 60(B) motion is entrusted to the sound discretion of the trial court. *In re Whitman* (1998), 81 Ohio St.3d 239, 242, citing *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. (Citations omitted.)

{¶12} Appellant first maintains that appellee's Civ.R. 60(B) motion failed to comply with Civ.R. 7(B)(1) which provides, in relevant part:

{¶13} "A motion, whether written or oral, shall state with particularity the grounds therefor, and shall set forth the relief or order sought."

{¶14} Appellee's motion indicates that he is requesting "relief from judgment" and further requests the trial court to allow an answer to be filed in the instant case. In addition, appellee indicated in his motion that he "has good and valid defenses to the complaint and allowing the judgment to stand would create an injustice to [him]." Contrary to appellee's assertion, "Civ.R. 7(B)(1) requires a particularized statement only of the grounds for the motion; it does not require the movant to provide a list of the evidence in support of those grounds." *Tosi v. Jones* (1996), 115 Ohio App.3d 396, 401. Therefore, appellant's argument is without merit.

{¶15} Additionally, to support its claim that appellee's motion was to be supported by evidentiary material, appellant cites to *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, stating:

{¶16} "In order to obtain relief under Civil Rule 60(B), the movant must file a motion as provided for in Civil Rule 7(B). He *must* also file a brief or memorandum of fact and law, and affidavits, depositions, answers to interrogatories, exhibits and any other relevant material. ***." (Emphasis added.)

{¶17} However, in employing this analysis, appellant has failed to take into account several considerations. First, the *Adomeit* Court stated the movant "*may* also file a brief or memorandum of fact and law, and affidavits, depositions, answers to interrogatories, exhibits and any other relevant material ***" with a Civ.R. 60(B) motion. Id. at 102. (Emphasis added.) In fact, a movant is not required to attach evidentiary material to his motion for relief from judgment. *Thompson v. Dodson-Thompson*, 8th Dist. No. 90814, 2008-Ohio-4710, at ¶12. (Citations omitted.) Indeed, if evidentiary material is not submitted to support a Civ.R. 60(B) motion, the movant runs the risk the trial court will not grant the motion.

{¶18} Additionally, *Adomeit* is distinguishable from the instant case, as the trial court in *Adomeit* did not grant the Civ.R. 60(B) motion. *Adomeit v. Baltimore*, 97 Ohio App.2d at 100. As previously noted, this court must recognize that under our standard of review, i.e., abuse of discretion, we are not to judge whether we would have granted or denied the motion. Instead, the test is whether the trial court, being in the best position to judge the cases on its docket, abused its broad discretion. In the instant case, the court below exercised this broad discretion by granting appellee's Civ.R. 60(B) motion.

{¶19} Appellant also claims the trial court erred in granting appellee's motion to vacate the default judgment, as he did not satisfy the requirements set forth in Civ.R. 60(B). We disagree.

{¶20} Relief from judgment may be granted pursuant to Civ.R. 60(B), which states, in part:

{¶21} "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."

{¶22} Regarding the moving party's obligations for a Civ.R. 60(B) motion, the Supreme Court of Ohio has held:

{¶23} "To prevail on a motion brought under Civ.R. 60(B), 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 Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus.

{¶24} As stated in Civ.R. 60(B)(5), relief is to be granted for "any other reason justifying relief from the judgment." Civ.R. 60(B)(5) is a catch-all provision, which reflects "the inherent power of a court to relieve a person of the unjust operation of a judgment." *Smith v. Smith*, 8th Dist. No. 83275, 2004-Ohio-5589, at ¶16.

{¶25} Here, the trial court issued a judgment entry on August 25, 2008, approving the magistrate's decision to issue a default judgment against appellee. On September 19, 2008, appellee, in his motion to vacate, stated he had valid defenses to appellee's complaint. Obviously, if a movant supplies nothing more, that party runs the risk that the motion will be summarily denied. However, on September 23, 2008, the trial court approved appellee's motion. The decision of the trial court results in the instant case being resolved on the merits through application of the substantive law, rather than being disposed of on procedural grounds. The trial court is in the best position to determine if the case is one that should proceed other than by default. As a result, our review is based on an abuse of discretion standard. We further recognize that, in paragraph three of the syllabus in *GTE Automatic Electric*, supra, the Supreme Court of Ohio stated:

{¶26} "Where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits."

{¶27} Under the facts of the instant case, we cannot conclude that the trial court abused its discretion in granting appellee's motion to vacate the default judgment.

{¶28} Appellant also argues the trial court abused its discretion in granting appellee's motion to vacate without first holding a hearing or giving appellant an opportunity to respond. Again, we disagree.

{¶29} The trial court's failure to hold a hearing or failure to allow appellant an opportunity to respond to appellee's Civ.R. 60(B) motion does not rise to the level of an abuse of discretion. To require such a hearing or a response by appellant "would not further the interests of justice, implement speedy litigation or encourage the decision of cases on the merits." *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 14. Additionally, the Civil Rules do not require the trial court to hold a hearing before its granting or dismissing of a Civ.R. 60(B) motion. *Adomeit v. Baltimore*, 39 Ohio App.2d at 103. As such, this argument is without merit.

{¶30} For the foregoing reasons, we find that the trial court did not abuse its discretion in granting appellee's motion to vacate. Therefore, appellant's assignments of error are without merit, and the judgment of the Portage County Municipal Court, Ravenna Division, is hereby affirmed.

DIANE V. GRENDELL, J., concurs in judgment only,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

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{¶31} I respectfully dissent.

{¶32} Pursuant to *In re Castrovince* (Aug. 16, 1996), 11th Dist. No. 96-P-0175, 1996 Ohio App. LEXIS 6226, at 4, the magistrate's decision and the trial court's judgment must be "separate and distinct instruments which are complete and independent of each other." The mere adoption of a magistrate's decision does not constitute a final appealable order. Id. In *Castrovince*, this court further stated that based on Civ.R. 54(A), it is not sufficient for a final appealable order that a trial court merely incorporate by reference the recommendations of a magistrate's decision. Id. at 3-4.

{¶33} In the instant case, pursuant to his August 22, 2008 decision, the magistrate indicated that default judgment should be granted for appellant in the amount of $4,876.92, plus costs and interest at eight percent from February 8, 2008. The trial court merely approved the magistrate's decision on August 25, 2008. However, the trial court did not issue its own "separate and distinct" order setting forth the court's ruling on the matter. Specifically, the trial court merely stated, in its entirety, the following in its judgment entry:

{¶34} "THE COURT, HAVING REVIEWED THE DECISION OF THE MAGISTRATE, APPROVES AND HEREBY ORDERS, ADJUDGES, AND DECREES THAT THE SAME BE ENTERED OF RECORD AND MADE AN ORDER OF THIS COURT. EITHER PARTY MAY FILE OBJECTIONS TO THE MAGISTRATE'S DECISION WITHIN 14 DAYS OF THE FILING OF THE MAGISTRATE'S DECISION.

{¶35} "IT IS SO ORDERED."

{¶36} This court dismissed a similar appeal in *Portage Housing II v. Channel*, 11th Dist. No. 2004-P-0081, 2004-Ohio-7245. In that case, the trial court indicated the

following in its judgment entry: "'The court, having reviewed the findings and recommendations of the magistrate, approves and hereby orders, ad judges, and decrees that the same be entered of record and made an order of this court.'" Id. at ¶1. The appellee filed a motion to dismiss "on the basis that an entry of a court merely approving a magistrate's report is not a final judgment." Id. at ¶2. This court concurred and dismissed the appeal. Id. at ¶2-3. See, also, *Girard v. Leatherworks Partnership*, 11th Dist. No. 2001-T-0138, 2002-Ohio-7276, at ¶31 (holding that a trial court's judgment entry merely approving a magistrate's decision does not constitute a final order); *McClain v. McClain* (Feb. 12, 1999), 11th Dist. No. 98-P-0002, 1999 Ohio App. LEXIS 448, at 3-4 (holding that a trial court's judgment entry which fails to make any order directing the parties is not a final appealable order.)

{¶37} Again, after the trial court filed the foregoing judgment entry, appellee filed a motion for relief from judgment on September 19, 2008. On September 23, 2008, the trial court "approved" appellee's motion. Because the underlying August 25, 2008 judgment entry does not comply with the requirements of *Castrovince*, supra, I do not believe the September 23, 2008 judgment entry is final and appealable. See *Wolford v. Newark City School Dist. Bd. of Edn.* (1991), 73 Ohio App.3d 218, 220.

{¶38} Based on the foregoing, I would dismiss the appeal.