[Cite as *Johnson v. Drum*, 2009-Ohio-6147.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

RAYMOND JOHNSON, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2009-T-0038**
- vs -	:	
ALICIA DRUM, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Newton Falls Municipal Court, Case No. 07 CVG 00278.

Judgment: Affirmed.

Rhys Brendan Cartwright-Jones, 101 City Center One Building, 100 Federal Plaza East, Youngstown, OH 44503-1810 (For Plaintiffs-Appellants).

William M. Flevares, Turner, May & Shepherd, 185 High Street, N.E., Warren, OH 44481-1219 (For Defendants-Appellees).

MARY JANE TRAPP, P.J.

{¶1} Raymond Johnson appeals from a judgment of the Newton Falls Municipal Court denying his Civ.R. 60(B) motion for relief from judgment. This matter arose from an eviction action Mr. Johnson filed against his tenants. The trial court ruled in favor of the tenants and also found Mr. Johnson liable for wrongfully withholding their security deposit in violation of R.C. 5321.16. Instead of filing a direct appeal from the court's judgment, Mr. Johnson filed a Civ.R. 60(B) motion to seek relief from judgment, which the trial court denied. On appeal, Mr. Johnson claims the trial court abused its

discretion in overruling his Civ.R. 60(B) motion without a hearing. For the following reasons, we affirm.

{¶2} **Substantive Facts and Procedural History**

{¶3} On October 11, 2007, Mr. Johnson filed a forcible entry and detainer action against Alicia Drum and Cristi Wellen, seeking to evict them from a mobile home he owned in North Bloomfield, Ohio. He also sought to collect the monthly rent of $450 from October 3, 2007 to November 3, 2007, and $127 for "electrical service." The trial court held a hearing on November 7, 2007. Because the tenants had already vacated the subject property, the issue of possession was moot, and the court set the matter for a hearing regarding the issue of unpaid rent. Ms. Drum and Ms. Wellen subsequently filed a counterclaim, asserting Mr. Johnson wrongfully withheld their security deposit in violation of R.C. 5321.16, and also converted fuel oil left in the fuel oil tank on the subject property.

{¶4} Ms. Drum and Ms. Wellen filed a motion for default judgment on their counterclaim and a motion to dismiss for failing to join the real party in interest, Connie Johnson, the actual owner of the property and Mr. Johnson's wife. The court allowed Mr. Johnson to join Mrs. Johnson as a party. Mr. Johnson thereafter filed a motion for summary judgment and for a dismissal of the counterclaim. The court overruled these motions and held a bench trial on November 24, 2008.

{¶5} On December 12, 2008, the court issued a judgment, finding Mr. Johnson wrongfully withheld the security deposit in the amount of $450 in violation of R.C. 5321.16(B) and was therefore liable for that amount plus statutory damages in an equal

amount. The court also found him liable for $193 in rent overpayment and $520 for the fuel oil left at the premises, for a total amount of $1,613.

{¶6} Mr. Johnson did not appeal from the judgment. On February 2, 2009, after the time for a direct appeal had expired, Mr. Johnson filed a motion for relief from judgment pursuant to Civ.R. 60(B)(3) alleging "misrepresentation of an adverse party" and requesting a hearing. The only document he attached to his motion was his own affidavit stating that the fuel tank was empty when he checked it in January of 2008 and that Ms. Drum and Ms. Wellen never provided him with a forwarding address.

{¶7} The court denied the motion. Mr. Johnson now appeals from that judgment, raising the following assignment of error for our review:

{¶8} "The trial court abused its discretion in overruling Mr. Johnson's Motion 60(B) without a hearing."

{¶9} **Analysis**

{¶10} We review a trial court's determination of a Civ.R. 60(B) motion for an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶11} Civ.R. 60 states, in pertinent part:

{¶12} "(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc.

{¶13} "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. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation."

{¶14} "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 as entered or taken." *Len-Ran, Inc. v. Erie Insurance Group*, 11th Dist. No. 2006-P-0025, 2007-Ohio-4763, ¶19, quoting *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. "Failure to satisfy any one of the three prongs of the GTE decision is fatal to a motion for relief from judgment." *Len-Ran, Inc.* at ¶20, citing *Rose Chevrolet Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20.

{¶15} A party is not automatically entitled a hearing on a Civ.R. 60(B) motion. This court has stated that "[i]f the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under Civ.R. 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion." *Nat'l City Bank v. Rini*, 162 Ohio App.3d 662, 2005-Ohio-4041, ¶21, citing *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, paragraph two of the syllabus.

{¶16} At the outset, we note that Mr. Johnson did not file a transcript or a Rule 9(C) or (D) statement. In his notice of appeal, he stated: "No transcript or statement pursuant to either App.R. 9(C) or (D) is necessary."

{¶17} "Upon appeal of an adverse judgment, it is the duty of the appellant to ensure that the record, or whatever portions thereof are necessary for the determination of the appeal, are filed with the court in which he seeks review. App.R. 9(B) and 10(A); Section (1) of Rule IV of the Supreme Court Rules of Practice. It follows that where a transcript of any proceeding is necessary for disposition of any question on appeal, the appellant bears the burden of taking the steps required to have the transcript prepared for inclusion in the record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197. Any lack of diligence on the part of an appellant to secure a portion of the record necessary to his appeal should inure to appellant's disadvantage rather than to the disadvantage of appellee." *Rose Chevrolet, Inc. v. Adams* (1998), 36 Ohio St.3d 17, 19.

{¶18} Here, Mr. Johnson chose not to present us with either a transcript of proceedings or a Civ.R. 9(C) or (D) statement. Lacking either, we are compelled to rely on the facts as found by the trial court.

{¶19} As found by the trial court, Mr. Johnson entered into a lease agreement with Ms. Drum and Ms. Wellen in September of 2006 for a mobile home, for which they paid him a monthly rent of $450 plus utilities. Based on the receipts presented by Ms. Drum and Ms. Wellen and the testimony presented at trial, the court found that they initially paid Mr. Johnson a security deposit of $450, the first month's rent of $450, and an additional amount of $400, which Mr. Johnson required as the "last month's rent."

{¶20} Ms. Drum and Ms. Wellen moved into the premises in October of 2006. On October 1, 2006, they paid an additional $170, which represented $120 for the fuel oil in the fuel oil tank at the premises, and another $50 toward the "last month's rent." Apparently they made an extra $200 payment in February of 2007, which had never been properly credited by Mr. Johnson. In addition, the court found them to have paid $120 of the alleged $127 overdue electric bill.

{¶21} The court found Ms. Drum and Ms. Wellen did not pay the rent for October 2007 and vacated the premises on November 7, 2007. Therefore, Ms. Drum and Ms. Wellen owed one month's rent. However, after applying the security deposit, the "last month's rent," and the $200 paid in February of 2008, the court determined Mr. Johnson owed the tenants a total of $643.

{¶22} In their counterclaim, Ms. Drum and Ms. Wellen sought punitive damages under Ohio's Landlords and Tenants Act, R.C. 5321.01, et. seq., for Mr. Johnson's withholding of their security deposit.[1] "Under R.C. 5321.16(B) and (C), a landlord who

1. R.C. 5321.16 states, in pertinent part: "(B) Upon termination of the rental agreement any property or money held by the landlord as a security deposit may be applied to the payment of past due rent and to the payment of the amount of damages that the landlord has suffered by reason of the tenant's noncompliance with section 5321.05 of the Revised Code or the rental agreement. Any deduction from the security deposit shall be itemized and identified by the landlord in a written notice delivered to the tenant together with the amount due, within thirty days after termination of the rental agreement and delivery of possession. The tenant shall provide the landlord in writing with a forwarding address or new

wrongfully withholds a portion of a tenant's security deposit is liable for damages equal to twice the amount wrongfully withheld and for reasonable attorney fees." *Smith v. Padgett* (1987), 32 Ohio St.3d 344, 349. Regarding this counterclaim, the trial court found Mr. Johnson wrongfully withheld the entire security deposit, which warranted an award of the statutory damages. The court, however, did not award attorney fees because the eviction in this case did not appear to be retaliatory in nature.

{¶23} In their counterclaim, Ms. Drum and Ms. Wellen also sought to recover the value of the fuel oil left at the premises. Based on the evidence presented, the court found them to have left at the premises 200 gallons of fuel oil, equivalent to three fourths of the tank. The court calculated the value of the oil to be $520 and found Mr. Johnson to be liable for that amount.

{¶24} The court concluded Mr. Johnson is liable to Ms. Drum and Ms. Wellen for a total amount of $1,613 and interest. Mr. Johnson did not seek a direct appeal from that judgment. Instead, after the appeal time had expired, he filed a Civ.R. 60(B)(3) motion seeking relief from judgment. In the brief, Mr. Johnson stated that the court's conclusion regarding his withholding of the security deposit "follows from a misrepresentation of the defendants and counterclaim plaintiffs, specifically, that they provided no [sic] forwarding address and no [sic] notice of intent to vacate the premises. Having provided no forwarding address, any communication of an accounting of the security deposit would have been futile. Further, failure to give 30-days notice of intent

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address to which the written notice and amount due from the landlord may be sent. If the tenant fails to provide the landlord with the forwarding or new address as required, the tenant shall not be entitled to damages or attorneys fees under division (C) of this section. (C) If the landlord fails to comply with division (B) of this section, the tenant may recover the property and money due him, together with damages in an amount equal to the amount wrongfully withheld, and reasonable attorneys fees."

to vacate left the defendants and counterclaim plaintiffs in breach of their lease." He also claimed Ms. Drum and Ms. Wellen left no fuel tank oil at the premises.

{¶25} To support these claims, Mr. Johnson attached an affidavit of his own to the motion. He stated (1) when he checked the fuel oil tank on the property in January of 2008, the tank was empty; (2) Ms. Drum and Ms. Wellen did not provide him with a notice of intent to vacate the premises; and (3) they did not provide him with a forwarding address.

{¶26} The trial court denied the motion, stating Mr. Johnson essentially disagreed with the court's factual findings regarding the security deposit and the amount of fuel oil remaining at the premises, and should have raised these claims on a direct appeal.

{¶27} We agree with the trial court. Mr. Johnson, in essence, claims the trial court's judgment was not supported by the evidence, a claim that he could and should have made on direct appeal. Civ.R. 60(B) cannot be used as a substitute for a timely appeal. *Key v. Mitchell* (1998), 81 Ohio St.3d 89, 90-91.

{¶28} Furthermore, the evidence he sought to introduce with the Civ.R. 60(B)(3) motion regarding the amount of fuel oil left at the premises, and whether Ms. Drum and Ms. Wellen provided him with a forwarding address as required by R.C. 5321.16, should have been presented at trial. He cannot belatedly seek a consideration of the evidence he could have but did not present at trial, through the vehicle of a Civ.R. 60(B)(3) motion.

{¶29} Mr. Johnson's Civ.R. 60(B)(3) motion claimed entitlement to relief from judgment because of "misrepresentation made by an adverse party" but failed to contain

any allegations of operative facts which would warrant relief under the rule, and therefore, the trial court was not required to hold a hearing. *Rini* at ¶17.

{¶30} Based on the foregoing reasons, we conclude the trial court did not abuse its discretion in overruling Mr. Johnson's Civ.R. 60(B)(3) motion without a hearing. The assignment of error is overruled, and the judgment of the Newton Falls Municipal Court is affirmed.

DIANE V. GRENDELL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.