[Cite as *Ohio Cas. Ins. Co. v. Valaitis,* 2012-Ohio-2561.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

THE OHIO CASUALTY INSURANCE CO.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
- vs -	:	**CASE NO. 2011-L-062**
ANTHONY V. VALAITIS,	:	
Defendant-Appellee,	:	
C-ENTERPRISES, INC., et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 07CV002430.

Judgment: Reversed and remanded.

Melanie R. Shaerban, Shawn W. Maestle, and *John G. Farnan*, Weston Hurd, LLP, 1301 East 9th Street, Suite 1900, Cleveland, OH 44114-1862 (For Plaintiff-Appellee).

Kenneth B. Baker and *James Y. Oh,* Javitch, Block & Rathbone, L.L.P., 1100 Superior Avenue, 19th Floor, Cleveland, OH 44114 (For Defendant-Appellee).

Joseph R. Klammer, The Klammer Law Office, Ltd., Lindsay II Professional Center, 6990 Lindsay Drive, #7, Mentor, OH 44060 (For Defendants-Appellants).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, C-Enterprises, Inc., et al., appeal from the judgment of the Lake County Court of Common Pleas denying their motion for relief from a judgment dismissing the underlying cause of action with prejudice. We reverse the judgment of the trial court and remand the matter for further proceedings.

{¶2} In 2006, Appellee-Anthony V. Valaitis filed a lawsuit against Appellants ("construction action"). In his first amended complaint, Valaitis alleged appellants were hired to construct a house under a written construction contract. Valaitis alleged, inter alia, that appellants failed to construct the home in a workmanlike manner.

{¶3} Appellant-C-Enterprises, Inc., was the named insured on a commercial general liability policy issued by Appellee-Ohio Casualty Insurance Company ("Ohio Casualty") at the time relevant to the occurrences that prompted the filing of the construction action. Appellants-Matthew and Edward Sullivan claimed to be insureds under the policy as principals of the named insured. Appellants sought coverage under the policy for defense against the construction action. Ohio Casualty, however, maintained it had no duty to defend or indemnify appellants against Valaitis' claims. As a result, in August 2007, Ohio Casualty filed a declaratory judgment action requesting the trial court to issue an order establishing its obligations under the policy. Appellants were represented by the same counsel in both actions.

{¶4} The record reflects that settlement negotiations in the construction action took place on September 15, 2008. After settlement discussions, the parties reached an oral agreement to settle the case on September 15, 2008. The terms of the agreement were read into the record in the construction action during an in-chambers conference with the trial judge. Appellants' counsel made the following statements on record regarding the details of the agreement:

> **{¶5}** In exchange for full, final release, mutual releases of all parties involved in this litigation, C-Enterprises and Ed Sullivan will pay $187,500.00 to Dr. Valaitis as follows: $50,000.00 of that will come from settlement in the case of C-Enterprises versus - - or I should say, Ohio

> Casualty versus C-Enterprises, I believe, which is a case that is being settled separately from this.

{¶6} A draft settlement agreement was circulated to the parties reflecting the specifics of the oral agreement. Despite the foregoing statement on record, the agreement provided that a settlement had been reached in the construction action for $187,500.00, of which Ohio Casualty would pay $50,000.00 to settle the declaratory judgment action.

{¶7} On September 30, 2008, the trial court entered judgment dismissing the declaratory judgment action with prejudice. The court's order reads:

> **{¶8}** Having been advised that the above-mentioned case has been settled, that a dismissal entry was to be filed, and having received no entry to that effect to date, the Court hereby journalizes the within case as dismissed, and hereby dismisses the same, with prejudice. Either party may present a journal entry changing these terms within thirty (30) days.

{¶9} The only information in the record indicating the declaratory judgment action was settled was counsel's statement that it was "being settled separately" from the construction action.

{¶10} After issuing the judgment, the court ordered the clerk to serve the order on the parties via counsel. There was no notation of service of the order on the appearance docket, however, in violation of Civ.R. 58(B). No party formally submitted any proposed changes to the terms of the trial court's dismissal order.

{¶11} On October 15, 2008, Valaitis filed a motion to enforce the terms of the agreement settling the construction action. Although the record in this case contains no information regarding the details of what occurred after the motion was filed, various

pleadings in this matter indicate the settlement was finalized in February of 2009. The terms of the ultimate agreement were not entered into the record of the case sub judice.

{¶12} On January 15, 2010, nearly 15 months after the trial court dismissed, with prejudice, the underlying declaratory judgment action, appellants, via new counsel, filed a motion for relief from that judgment. In support, appellants asserted they were entitled to relief pursuant to Civ.R. 60(B)(5), the so-called "catch-all" provision. Appellants initially noted their motion was filed within a reasonable time and, referring to the arguments asserted in their counterclaim in the declaratory judgment action, maintained they had a meritorious defense to the underlying matter.

{¶13} Appellants further asserted relief was necessary to meet the demands of justice. In support, appellants argued they did not authorize their counsel to settle the declaratory judgment action and thus did not authorize counsel to alert the court that a dismissal of that matter was imminent. Appellants also alleged they had only recently learned that the declaratory judgment action had been dismissed in September 2008. Appellants claimed their then-counsel left them with the impression that Ohio Casualty would ultimately provide coverage and they were therefore misled into believing the declaratory judgment action was still pending. Attached to the motion, appellants appended an undated copy of the proposed settlement agreement, circulated to the parties subsequent to the oral agreement to settle the construction action. The document had the settlement language relating to the declaratory judgment action crossed out. Appellants maintained this demonstrated they did not agree to settling the declaratory judgment action contemporaneously with the construction action and, as a result, they concluded, they were entitled to relief from the September 30, 2008 order.

{¶14} Ohio Casualty filed a brief in opposition to appellants' motion for relief from judgment. Ohio Casualty asserted appellants were not entitled to relief because any argument in support of their position that they were entitled to coverage and a defense was not meritorious. Moreover, Ohio Casualty asserted that even if appellants had a meritorious defense to its declaratory judgment action, challenges to a lawyer's acts or omissions that occur in the course of his or her representation are not a basis for relief under Civ.R. 60(B)(5). Citing various cases from multiple appellate jurisdictions, Ohio Casualty observed that a litigant who voluntarily hires purportedly ineffective counsel cannot require an adversary to bear the loss for the potentially negligent acts of that attorney. According to Ohio Casualty, rather than relief from judgment, appellants' proper remedy is a cause of action for legal malpractice.

{¶15} Valaitis also filed a brief in opposition to appellants' motion. Valaitis argued that, regardless of their counsel's purported ineffectiveness, appellants are bound by the actions of their freely retained counsel. Valaitis therefore argued appellants may not seek relief from a judgment that resulted from such actions. Similar to Ohio Casualty, Valaitis argued appellants' remedy for their counsel's alleged ineffectiveness must come from a source separate from a Civ.R. 60(B) motion for relief from judgment.

{¶16} Appellants subsequently filed a reply brief and a supplement to their motion. And, in turn, Ohio Casualty filed a sur-reply brief with leave of court. Valaitis later filed a motion to strike appellants' reply brief for failing to comply with local procedural rules.

{¶17} On April 25, 2011, the trial court issued its judgment relating to the multiple pleadings filed by the parties. The trial court initially acknowledged that

appellants' reply brief was filed out of rule; the court nevertheless denied Valaitis' motion to strike in favor of considering all points raised in support of the motion for relief.

{¶18} Upon consideration of the parties' relative positions, the trial court determined that appellants were not entitled to relief from judgment pursuant to Civ.R. 60(B)(5). In arriving at this conclusion, the court found appellants' arguments in support of their motion "*** are more specifically characterized as mistake, inadvertence, surprise or excusable neglect, all of which fall under Civ.R. 60(B)(1). Inasmuch as Civ.R. 60(B)(5) cannot be substituted for a more specific ground for relief, [appellants] are not entitled to relief under Civ.R. 60(B)(5)." Because a Civ.R. 60(B)(1) motion must be filed within one year of the judgment, the court concluded the motion was untimely.

{¶19} The court further determined that even if the motion was timely filed, the allegations relating to counsel's purported lack of authority to settle the case and/or counsel's alleged failure to communicate the settlement essentially challenged counsel's effectiveness. The court therefore concluded, pursuant to the Supreme Court of Ohio's decision in *Argo Plastics Products, Co. v. Cleveland*, 15 Ohio St.3d 389 (1984) that a Civ.R. 60(B) motion was not an appropriate vehicle to obtain relief for counsel's ineffectiveness in a civil case.

{¶20} The judgment was filed and appellants now appeal. They assert the following as their sole assignment of error:

{¶21} "The trial court erred in denying Appellants' motion for relief from judgment."

{¶22} Appellants' assigned error contends the trial court's judgment denying their Civ.R. 60(B) motion for relief from judgment was an abuse of discretion. In particular, appellants argue the trial court's dismissal of the underlying case was

entered in error because the settlement of the construction action did not include language indicating the declaratory judgment action would be settled via the terms of the agreement. For the reasons that follow, we hold appellants are entitled to relief from judgment.

{¶23} To prevail on a Civ.R. 60(B) motion, the movant must show that (1) he or she has a meritorious claim or defense to present if relief is granted; (2) the party is entitled to relief under one of the grounds set forth under Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where relief is sought under Civ.R. 60(B)(1), (2), or (3), not more than one year after the judgment, order, or proceeding was entered. *GTE Automatic Elec. Inc. v. ARC Indus., Inc.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus.

{¶24} An appellate court reviews a judgment entered on a Civ.R. 60(B) motion for an abuse of discretion. *Strack v. Pelton,* 70 Ohio St.3d 172, 174 (1994). An abuse of discretion is a phrase connoting the court's judgment that fails to comport with either reason or the record. *Janecek v. Marshall*, 11th Dist. No. 2010-L-059, 2011-Ohio-2994, ¶7.

{¶25} We initially point out that, even though the court sua sponte dismissed the declaratory judgment action after being purportedly "advised" the matter would settle, the record is devoid of any information indicating the declaratory judgment action was settled by appellants' then-counsel with, or as a condition to, the settlement of the construction action. Counsel merely indicated, on record, that the declaratory judgment action would be settled *separately from* the construction action, a case counsel was apparently vested with authority to negotiate and settle. With nothing in the record to indicate the declaratory judgment action was settled, it is unclear what prompted the

court's entry of dismissal. As the record before us fails to demonstrate appellants' former counsel actually settled the declaratory judgment action, it would appear that the judgment at issue was premised upon erroneous information.

{¶26} That said, after the underlying judgment of dismissal was entered, the clerk failed to note on the docket that the parties were served with the underlying judgment. Civ.R. 58(B), the civil rule governing the procedures for notifying parties of a judgment entry, provides, in relevant part:

> **{¶27}** When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties * * * notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, *the service is complete*. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided by App.R. 4(A). (Emphasis added.)[1]

{¶28} The trial court directed the clerk to serve the judgment involuntarily dismissing the declaratory judgment action on the parties' respective attorneys. There is no specific evidence in the record, however, demonstrating that the judgment of dismissal was actually served on appellants' former counsel. And, the docket does not show that service was noted after the judgment was filed. Pursuant to Civ.R. 58(B),

1. App.R. 4(A) provides: "A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure."

consequently, service of the judgment of dismissal was never completed and appellants were deprived of notice of the judgment under the rule. *See Palmer v. O'Brien*, 2d Dist. No. 24258, 2011-Ohio-5208, ¶18 (where service is incomplete due to clerk's failure to note the same on the docket, plaintiff-appellant was deprived of notice of the judgment at issue.)

{¶29} Civ.R. 60(B)(5) may be invoked only in extraordinary and unusual circumstances when the needs of justice demand. *Rock Creek v. Shinkle*, 11th Dist. No. 2006-A-0053, 2007-Ohio-4769, ¶28. Here, as discussed above, the record before this court fails to demonstrate the declaratory judgment action was *actually* settled pursuant to the agreement to settle the construction action. In this respect, the judgment of dismissal from which appellants now seek relief was premature and premised upon an inaccurate "advisement."

{¶30} Further, although the judgment ordered the clerk to serve, inter alia, appellants' former counsel, there is no evidence in the record confirming service was perfected. And, the docket in this case reveals that service, as defined by Civ.R. 58(B), was never actually completed. As the record fails to disclose that the matter was actually settled by former counsel and there is no specific evidence indicating that former counsel had notice of the dismissal entry, we maintain it would be inequitable to preclude relief by construing appellants' motion as a Civ.R. 60(B)(1) request. We therefore hold, given the unusual circumstances of this case, that the ends of justice entitle appellants relief from the September 30, 2008 judgment, pursuant to Civ.R 60(B)(5).

{¶31} As a final matter, we recognize that a dismissal with prejudice operates as an adjudication on the merits and constitutes a final order from which an appeal may be

taken. *Tower City Properties v. Cuyahoga Cty. Bd. of Revision*, 49 Ohio St.3d 67, 69 (1990); *see also Genesis Outdoor Adver. Inc. v. Troy Twp. Bd. of Zoning Appeals*, 11th Dist. No. 2001-G-2399, 2003-Ohio-3692, ¶10 (a judgment that dismisses an action with prejudice is a final, appealable order). We further acknowledge that appellants did not file a notice of appeal from the September 30, 2008 entry of dismissal. Moreover, it is well-settled that relief from judgment pursuant to Civ.R. 60(B) may not be used as a substitute for an appeal or an attempt to extend the time for appeal of a final adjudication on the merits of an action. *Key v. Mitchell*, 81 Ohio St.3d 89, 90-91 (1998), *see also In re Marriage of Henson*, 11th Dist. No. 2009-T-0028, 2010-Ohio-704, ¶29.

{¶32} Building upon these details, it might appear that appellants' motion for relief was an invalid attempt to appeal the original final order via Civ.R. 60(B). Given the unique facts of this case, we hold it is not. Under Civ.R. 58(B), the failure of a clerk to make a notation of service on the appearance docket, despite the court's inclusion of language in its order to serve the parties, has the effect of tolling the time for filing an appeal until the notation is properly entered. *In re A.A.*, 8th Dist. No. 85002, 2005-Ohio-2618, ¶17. In other words, the 30 days prescribed by App.R. 4(A) does not begin to run until service is completed as prescribed by Civ.R. 58(B). *Murdock v. Hyde*, 12th Dist. No. CA2007-11-289, 2008-Ohio-4313, ¶13; *see also Palmer, supra.*; *In re Aldridge*, 4th Dist. No. 02CA2661, 2002-Ohio-5988, ¶14; *In re Grace*, 5th Dist. No. 01CA85, 2002 Ohio App. LEXIS 1474, *6 (Mar. 20, 2002).

{¶33} Because the 30 days to file an appeal of the September 2008 judgment never commenced running, the Civ.R. 60(B) motion, on the record before this court, *is not* an indirect attempt to circumvent firmly established time limitations applicable to final, appealable orders. The Civ.R. 60(B)(5) motion was, consequently, a proper

vehicle for relief. And, given the reasons discussed in this opinion, we therefore hold the trial court erred in failing to vacate the September 30, 2008 judgment.

{¶34} Appellants' sole assignment of error has merit.

{¶35} For the reasons discussed in this opinion, the judgment of the Lake County Court of Common Pleas denying appellants' Civ.R. 60(B) motion for relief from judgment is hereby reversed and the matter remanded. On remand, the trial court is directed to vacate its September 30, 2008 judgment dismissing the declaratory judgment action with prejudice. The matter shall be therefore reinstated and proceed accordingly.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.