[Cite as *Larney v. Vlahos*, 2016-Ohio-1371.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

VINCENT LARNEY, et al.,	:	**O P I N I O N**
Plaintiffs-Appellees,	:	
		CASE NO. 2015-T-0103
- vs -	:	
EMANUAL VLAHOS,	:	
Defendant,	:	
JOHN VLAHOS,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas.
Case No. 1997 CV 01635.

Judgment: Affirmed.

Alden B. Chevlen, 5202 Nashua Drive, Youngstown, OH 44515 (For Plaintiffs-Appellees).

Thomas M. Lyden, 8872 East Market Street, Warren, OH 44484 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, John Vlahos, appeals from a judgment entry of the Trumbull County Court of Common Pleas denying his motion to vacate two revivor orders. Appellees, Vincent and Fifi Larney, did not file an appellate brief. For the following reasons, we affirm the judgment denying appellant's motion to vacate.

Statement of Facts and Procedural History

{¶2} In 1995, defendants, Emanuel and John Vlahos, entered into a contract with appellees to purchase appellees' business. The parties executed two promissory notes, on which defendants defaulted. Appellees filed a complaint against defendants. Appellees did not obtain service of the complaint on Emanuel, and John did not file an answer or otherwise appear before the court.

{¶3} On December 22, 1997, appellees obtained a default judgment against John in the amount of $58,676.00 plus interest at the rate of 10% per annum and costs. No payments were made toward the default judgment, and it became dormant. On March 26, 2007, appellees moved to revive the dormant judgment. The trial court granted the motion on April 6, 2007. No payments were made toward the revived judgment, and it again became dormant. On July 25, 2014, appellees moved to revive the dormant judgment a second time. The trial court granted the motion one week later on August 1, 2014. John was served with a copy of the order granting the request for revivor on August 5, 2014, via certified mail. John did not appeal from either order of revivor. On July 21, 2015, John filed a motion to vacate both revivor orders, which the trial court overruled on August 19, 2015. It is from this entry John now appeals and asserts one assignment of error for our review:

{¶4} "The trial court committed prejudicial error by denying defendant-appellant's motion to vacate the orders of revivor."

{¶5} Appellant argues the motion to vacate should have been granted because he was twice denied his rights to procedural due process before the dormant judgment was twice revived.

Standard of Review and Civ.R. 60(B)

{¶6} A motion to vacate may be brought in two ways: (1) a common law motion based on an argument that the judgment is void and (2) a Civ.R. 60(B) motion for relief from a voidable judgment. *See, e.g.*, *Plummer v. Plummer*, 2d Dist. Montgomery No. 23743, 2010-Ohio-3450, ¶27 (citations omitted). "The distinction between 'void' and 'voidable' is crucial. If a judgment is deemed void, it is considered a legal nullity which can be attacked collaterally. Conversely, if a judgment is deemed voidable, it will have the effect of a proper legal order unless its propriety is successfully challenged through a direct attack on the merits." *Clark v. Wilson*, 11th Dist. Trumbull No. 2000-T-0063, 2000 Ohio App. LEXIS 3400, *4-5 (July 28, 2000). "This principle applies even if the trial court committed a nonjurisdictional error in issuing the judgment. The sole exception to the principle is when a party can establish entitlement to relief from judgment under the limited circumstances delineated in Civ.R. 60(B)." *Gaul v. Gaul*, 11th Dist. Ashtabula No. 2013-A-0034, 2015-Ohio-3824, ¶40 (citations omitted).

{¶7} Here, appellant neither framed his motion to vacate in terms of Civ.R. 60(B) nor argued that the judgment was void. In his brief on appeal, however, appellant recites the Civ.R. 60(B) standard of review and, again, does not argue the judgment is void. We therefore proceed with a Civ.R. 60(B) analysis and review the trial court's judgment for an abuse of discretion. *See, e.g.*, *Am. Express Bank, FSB v. Waller*, 11th Dist. Lake No. 2011-L-047, 2012-Ohio-3117, ¶11.

{¶8} Civ.R. 60(B) provides:

> 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.

{¶9} The Ohio Supreme Court has set forth a three-prong test a movant must meet to prevail on a Civ.R. 60(B) motion. First, the motion must be filed within a reasonable time after the judgment or order was entered. Second, the party must be entitled to relief based on one of the reasons set forth in Civ.R. 60(B)(1)-(5). Third, the party must establish it has a meritorious defense or claim to present in the event relief is granted. *GTE Automatic Elec.*, *Inc. v. ARC Indus.*, *Inc.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. A party must satisfy each prong of the *GTE* Test to be entitled to relief; if one prong is not satisfied, the entire motion must be overruled. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20 (1988).

{¶10} Additionally, "[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 Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, ¶16, citing *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, ¶8-9. "Under the doctrine of res judicata, any 'issue that could have been raised on direct appeal and was not is res judicata and not subject to review in subsequent proceedings.'" *Evanich v. Bridge*, 170 Ohio App.3d 653, 2007-Ohio-1349, ¶26 (9th Dist.), quoting *State v. Saxon,* 109 Ohio St.3d 176, 2006-Ohio-1245, ¶16 (citation omitted).

Equitable Relief

{¶11} We first address whether appellant is entitled to relief under one of the reasons set forth in Civ.R. 60(B)(1)-(5). Appellant argues he is entitled to relief because the dormant judgment was revived twice without giving him notice and an opportunity to show cause as to why the judgment should not be revived. Under certain circumstances, a procedural due process violation might entitle a party to relief from judgment under Civ.R. 60(B)(5), the "any other reason" provision. *See, e.g.*, *Bletsch v. Bletsch*, 11th Dist. Trumbull No. 90-T-4376, 1990 Ohio App. LEXIS 5229, *6-7 (Nov. 30, 1990).

{¶12} R.C. 2325.15 and R.C. 2325.17 currently provide:

> **§ 2325.15 Revivor of dormant judgment or finding.**
>
> *When a judgment*, including judgments rendered by a judge of a county court or mayor, a transcript of which has been filed in the court of common pleas for execution, *is dormant*, or when a finding for money in equitable proceedings remains unpaid in whole or in part, under the order of the court therein made, *such judgment may be revived*, or such finding made subject to execution as judgments at law are, in the manner prescribed for reviving actions before judgment, or *by action in the court in which such judgment was rendered or finding made*, or in which transcript of judgment was filed. [Emphasis added.]
>
> **§ 2325.17 Time a lien attaches when a dormant judgment is revived.**
>
> *If sufficient cause is not shown to the contrary, the judgment* or finding mentioned in section 2325.15 of the Revised Code *shall stand revived*, and thereafter may be made to operate as a lien upon the lands and tenements of each judgment debtor for the amount which the court finds to be due and unsatisfied thereon to the same extent and in the same manner as judgments or findings rendered in any other action. [Emphasis added.]

{¶13} We have adopted the well-settled law that these statutes require "a judgment debtor receive notice and be afforded a hearing before a dormant judgment is revived." *State v. Magruder*, 11th Dist. Geauga No. 2007-G-2799, 2008-Ohio-2137, ¶16. *See also, e.g.*, *Omni Credit Servs. v. Leston*, 2d Dist. Montgomery No. 25287, 2013-Ohio-304; *Mansfield Truck Sales & Serv. v. Fortney*, 5th Dist. Ashland No. 2008-COA-040, 2009-Ohio-2686; *State v. Graewe*, 8th Dist. Cuyahoga No. 77545, 2000 Ohio App. LEXIS 3511 (Aug. 3, 2000); *State v. Jones*, 12th Dist. Warren No. CA2000-02-015, 2000 Ohio App. LEXIS 4802 (Oct. 16, 2000).

{¶14} Regarding notice, the Civil Rules mandate that "[u]pon the filing of a motion to revive a dormant judgment the clerk shall forthwith issue a summons for service upon each judgment debtor. The summons, with a copy of the motion attached, shall be in the same form and served in the same manner as provided in these rules for service of summons with complaint attached[.]" Civ.R. 4(F). Thus, service of summons with the motion attached "shall be signed by the clerk, contain the name and address of the court and the names and addresses of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address[.]" Civ.R. 4(B). Further, the summons "shall command the judgment debtor to serve and file a response to the motion within the same time as provided by these rules for service and filing of an answer to a complaint, and shall notify the judgment debtor that in case of failure to respond the judgment will be revived." Civ.R. 4(F). Thus, the summons shall command the judgment debtor to serve his answer within 28 days after service of the summons and motion upon him or within 28 days after the completion of service by publication. *See* Civ.R. 12(A)(1).

{¶15} Regarding an opportunity to be heard, "'R.C. 2325.17 requires the judgment debtor be granted an opportunity to show cause why the judgment should not be revived, which could only be done at a hearing before the court. * * * [S]uch an opportunity must be granted to meet fundamental requirements of due process.'" *Magruder*, *supra*, at ¶17, quoting *Leroy Jenkins Evangelistic Assoc. v. Equities Diversified, Inc.*, 64 Ohio App.3d 82, 88 (10th Dist.1989). "The show cause hearing may be summary in nature and may amount to a non-oral hearing to allow the judgment debtor to submit evidentiary materials." *Rindfleisch v. AFT, Inc.*, 8th Dist. Cuyahoga Nos. 84551, etc., 2005-Ohio-191, ¶12 (citation omitted).

{¶16} With these principles in mind, we first analyze the 2014 order of revivor. On July 25, 2014, appellees filed a "Motion to Revive Judgment." There was no certificate of service attached. Appellees also filed a "Revivor Praecipe" with a request that the clerk "mail a copy of the attached MOTION and ORDER FOR REVIVOR" to appellant by certified mail. There is a hand-written notation on the bottom of this praecipe, which indicates it was "issued 8-5-14." Four days prior, however, on August 1, 2014, the trial court prematurely issued its order for revivor in favor of appellees. The clerk issued the order to appellant, via successful certified mail, but had not served appellant with a summons and a copy of the motion. Also, the trial court's order was issued well before expiration of the 28 days in which appellant was permitted to file a response. *See* Civ.R. 4(F) and Civ.R. 12(A)(1).

{¶17} Based on the foregoing, it appears from the record that appellant did not receive notice of the 2014 motion to revive and was not afforded an opportunity to show cause why the dormant judgment should not be revived. The trial court's August 1,

2014 order of revivor was thus not issued in accordance with the relevant statutes and rules of civil procedure. Although the order itself was served upon appellant, no appeal was taken from that order. Because his due process argument could have been raised on a direct appeal, appellant is therefore not entitled to equitable relief under the doctrine of res judicata.

{¶18} We now turn to the issue of equitable relief as it pertains to the 2007 order of revivor. On March 26, 2007, Equity Management filed a "Motion to Revive Dormant Judgment." Equity Management was apparently acting on behalf of appellees in their attempt to collect the dormant judgment. The motion includes a request that the clerk "issue a copy of the within Motion to Revive Dormant Judgment and Notice of Hearing to: JOHN N. VLAHOS, by certified mail" to his address; no certificate of service was attached. The next entry on the docket is the trial court's April 6, 2007 order granting the motion to revive in favor of Equity Management. In the entry, the trial court stated that appellant had not appeared or showed cause as to why the judgment should not be revived. The Notice of Hearing included in the motion, however, was a pre-printed field form that was never filled in and was crossed out in pen. The docket reflects that the clerk never served the summons and motion on appellant by certified mail, or by any other method, nor did the clerk mail to appellant a copy of the trial court's final order of revivor. A subsequent Order on Debtor Exam was sent by certified mail to appellant on December 6, 2007, which was returned due to unsuccessful service on December 26, 2007. The docket does not reflect any other attempts to serve appellant with either order.

{¶19} We again find appellant did not receive notice of the 2007 motion to revive and was not afforded an opportunity to show cause as to why the dormant judgment should not be revived. Further, because appellant was not served with the trial court's April 6, 2007 order of revivor, appellant was unable to timely appeal the order. We therefore find that appellant would be entitled to equitable relief from the 2007 order of revivor, under Civ.R. 60(B)(5), if he also established timeliness and a meritorious defense.

Meritorious Defense

{¶20} We next address whether appellant established sufficient operative facts to constitute a meritorious defense. A moving party need only allege sufficient operative facts to constitute a meritorious defense; it need not prove that it will prevail on that defense. *See Rose Chevrolet, supra*, at 20.

{¶21} "To avoid revival of the judgment, the debtor must prove that 'the judgment has been paid, settled or barred by the statute of limitations.'" *Cadles of Grassy Meadows, II, LLC v. Kistner*, 6th Dist. Lucas No. L-09-1267, 2010-Ohio-2251, ¶10, quoting *Dillon v. Four Dev. Co*., 6th Dist. Lucas No. L-04-1384, 2005-Ohio-5253, ¶17.

{¶22} In his motion to vacate, appellant did not allege that the judgment had been paid or settled or that the motions to revive were barred by the statute of limitations. Appellant, therefore, did not establish a meritorious defense.

{¶23} In his brief on appeal, appellant argues the delay between 1998, when he was served with notice of a debtor's exam, and 2014, the next time he received notice of any matter relating to the judgment, "is longer than the 15-year timeframe during

which the legislature permits revivor actions." Appellant did not raise this issue below and has thus forfeited the argument on appeal. *See Ray v. Petersen*, 11th Dist. Geauga No. 2001-G-2387, 2002-Ohio-6575, ¶9 (citations omitted) ("It is axiomatic that a party cannot raise issues for the first time on appeal that were not raised below."). Nevertheless, we consider the issue briefly in order to address a misconception regarding the applicable statute of limitations.

{¶24} It appears appellant arrived at the "15-year timeframe" by adding together the five years it takes for a judgment to become dormant and the ten years a creditor has to revive a dormant judgment. *See* R.C. 2329.07(A)(1) and R.C. 2325.18(A) ("[a]n action to revive a judgment can only be brought within ten years from the time it became dormant"). We note, however, that the prior version of R.C. 2325.18 provided for a 21-year statute of limitations. "[T]he current version of R.C. 2325.18, effective June 2, 2004, did not clearly provide for retroactive application of the statute * * * [and] was not intended to apply to dormant judgments that existed as of June 2, 2004." *Kistner*, *supra*, at ¶17; *see also Franks v. Meyers*, 6th Dist. Wood No. WD-14-035, 2015-Ohio-703, ¶8; *Selwyn v. Grimes*, 8th Dist. Cuyahoga No. 101252, 2014-Ohio-5147, *appeal not accepted*, 142 Ohio St.3d 1477, 2015-Ohio-2104.

{¶25} Here, "neither execution on [the] judgment * * * nor a certificate of judgment for obtaining a lien upon lands and tenements [was] issued and filed" within five years from the December 22, 1997 judgment. *See* R.C. 2329.07(A)(1). The judgment against appellant thus became dormant on December 22, 2002, and the 21-year statute of limitations applies. Both the 2007 and the 2014 motions for revivor were

filed within 21 years of the judgment becoming dormant. Thus, appellant's statute of limitations argument lacks merit.

{¶26} Because appellant is unable to establish the meritorious defense prong, it is not necessary for us to reach the issue of timeliness.

Conclusion

{¶27} Although both orders of revivor were issued without proper notice, appellant failed to directly appeal the 2014 order and did not establish a meritorious defense to either order. Thus, the trial court did not abuse its discretion in denying appellant's motion to vacate.

{¶28} Appellant's assignment of error is without merit.

{¶29} The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.