

[Cite as *BB&T Equip. Fin. v. Sturts Excavating, L.L.C.*, 2010-Ohio-6514.]

COURT OF APPEALS  
RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

BB&T EQUIPMENT FINANCE	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellant	:	Hon. W. Scott Gwin, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2010-CA-0059
STURTS EXCAVATING, LLC, ET AL	:	
	:	
Defendants-Appellees	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Richland County Court of Common Pleas, Case No. 09CV1112

JUDGMENT: Reversed

DATE OF JUDGMENT ENTRY: December 29, 2010

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

MATTHEW G. BURG  
WELTMAN, WEINBERG & REIS CO.  
Lakeside Place, Suite 200  
323 W. Lakeside Avenue  
Cleveland, OH 44113

CHARLES ROBINSON  
3 North Main Street  
Mansfield, OH 44902

*Gwin, J.*

{¶1} Plaintiff-appellant BB&T Equipment Finance appeals a judgment of the Court of Common Pleas of Richland County, Ohio, which granted the motion for relief from judgment brought by defendant Jeremy Sturts and vacated its prior judgment as to both Sturts and defendant-appellee Sturts Excavating, LLC. Jeremy Sturts is not a party to this appeal. Appellant assigns two errors to the trial court:

{¶2} “I. THE TRIAL COURT LACKED AUTHORITY TO SUA SPONTE VACATE ITS FINAL JUDGMENT RENDERED AGAINST STURTS EXCAVATING, LLC, AND IN FAVOR OF PLAINTIFF-APPELLANT, BB&T EQUIPMENT FINANCE.

{¶3} “II. EVEN IF THE COURT CONSTRUED THE 60(B) MOTION FILED BELOW AS BEING MADE ON BEHALF OF THE COMPANY, THE COURT’S DECISION MUST STILL BE REVERSED BECAUSE A CIV. R. 60(B) MOTION FOR RELIEF FROM JUDGMENT IS NOT A SUBSTITUTE FOR A DIRECT APPEAL.

{¶4} Appellant brought the action to recover unpaid installments on a lease contract with appellee company. Appellant’s claim included an allegation defendant Jeremy Sturts was the guarantor on the lease on behalf of the company. Appellant attached a copy of the lease agreement and the guarantee as exhibits to its complaint.

{¶5} The trial court granted summary judgment on behalf of appellant and against both defendants on November 25, 2009. No appeal was taken from the court’s judgment. Instead, defendant Jeremy Sturts filed post-judgment motions including a motion for reconsideration, a motion for judgment notwithstanding the verdict/ motion for new trial, and a motion for relief from judgment pursuant to Civ. R. 60 (B).

{¶6} The motion for relief from judgment challenged the authenticity of the signature on the guarantee. Sturts requested a hearing to require appellant to prove the signature on the personal guarantee was in fact that of Jeremy Sturts. Over appellant's opposition, the trial court sustained the motion for relief from judgment and vacated the judgment as to both Sturts personally and in favor of defendant-appellee Sturts Excavating, LLC.

#### I & II

{¶7} Appellant's first assignment of error urges the trial court lacked authority to sua sponte vacate its final judgment against Sturts Excavating, LLC, because the motion for relief from judgment addressed only an issue pertaining to Jeremy Sturts' liability. In its second assignment of error, appellant argues that even if the court could permissibly construe the motion for relief from judgment on behalf of both Sturts and appellee company, a motion for relief from judgment is not a substitute for direct appeal.

{¶8} Civ. R. 60(B) states:

{¶9} "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. \*\*\*”

{¶10} Sturts cited sections (1) and (5) in his motion for relief.

{¶11} Sturts’ challenge to the guarantee was raised in the original action. In his motion opposing the original summary judgment, Sturts alleged he did not sign the personal guarantee attached to the complaint and had in fact refused to sign as guarantor.

{¶12} We agree with appellant the motion for relief from judgment addressed only issues pertaining to Jeremy Sturts. Jeremy Sturts’ liability on the lease is predicated on a theory different from the liability of appellee company, and the judgment could be re-opened as to Sturts without disturbing the final judgment against the appellee company.

{¶13} Further, we agree with appellant the motion for relief from judgment is not a substitute for a direct appeal. *Doe v. Trumbull County Children’s Services Board* (1986), 28 Ohio St. 3d 128, 502 N.E. 2d 605, syllabus by the court, paragraph two.

{¶14} It does not appear from the record there was any mistake, inadvertence, surprise or excusable neglect, and there is no other reason justifying relief from judgment. Sturts raised the issue of the validity of his signature and his opposition to the motion for summary judgment, and the court’s judgment adjudicated the issue. If Sturts believed the trial court erred in finding there was no material fact in genuine dispute regarding the signature, his remedy was to file a notice of appeal and bring the matter before us.

{¶15} Both assignments of error are sustained.

{¶16} For the foregoing reasons, the judgment of the Court of Common Pleas of Richland County, Ohio, is reversed, and the prior decision of November 25, 2009, is reinstated as to appellee Sturts Excavating, LLC.

By Gwin, J.,

Edwards, P.J., and

Delaney, J., concur

---

HON. W. SCOTT GWIN

---

HON. JULIE A. EDWARDS

---

HON. PATRICIA A. DELANEY

WSG:clw 1117

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

BB&T EQUIPMENT FINANCE	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
STURTS EXCAVATING, LLC, ET AL	:	
	:	
Defendants-Appellees	:	CASE NO. 2010-CA-0059

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio, is reversed, and the prior judgment of November 25, 2009, is reinstated as to appellee Sturts Excavating, LLC. Costs to appellees.

\_\_\_\_\_  
HON. W. SCOTT GWIN

\_\_\_\_\_  
HON. JULIE A. EDWARDS

\_\_\_\_\_  
HON. PATRICIA A. DELANEY