[Cite as *Mynes v. Brooks*, 2010-Ohio-2126.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

Timothy Mynes, et al.,	:	
Plaintiffs-Appellees/ Cross-Appellants,	:	Case No. 07CA3185
v.	:	
Otis R. Brooks, et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellants/ Cross-Appellees.	:	
	:	File-stamped date: 4-28-10

APPEARANCES:

Scott L. Braum, Dayton, Ohio, for Appellants, JDG Home Inspections, Inc., d/b/a The HomeTeam Inspection Service, and Tim Gambill.

Kristin E. Rosan and Timothy G. Madison, Columbus, Ohio, for Appellees.

Kline, J.:

{¶1} JDG Home Inspection, Inc., d/b/a the HomeTeam Inspection Service, and Tim Gambill (collectively the "Inspectors") appeal the judgment of the Scioto County Court of Common Pleas, which granted Timothy and Janeen Mynes' (collectively the "Myneses") Civ.R. 60(B) motion for relief from judgment. On appeal, the Inspectors raise various arguments about the propriety of the trial court's decision. Initially, the Inspectors contend that Civ.R 60(B) relief is improper because the Myneses' motion attacked an agreed entry. We agree. Accordingly, we reverse the judgment of the trial court and remand this cause for further proceedings consistent with this opinion.

I.

{¶2} We have considered this matter before. Originally, we found that the trial court's order was not a final appealable order, and, as a result, we dismissed this appeal for lack of jurisdiction. See *Mynes v. Brooks*, Scioto App. No. 07CA3185, 2008-Ohio-5613, at ¶19. However, the Supreme Court of Ohio reversed our judgment in *Mynes v. Brooks*, 124 Ohio St.3d 13, 2009-Ohio-5946. Therefore, pursuant to the Supreme Court of Ohio's decision, we will now consider the merits of the Inspectors' appeal. See id. at ¶13.

{¶3} Additionally, we recently decided a companion case that arose from the same series of events. See *Mynes v. Brooks*, Scioto App. No. 08CA3211, 2009-Ohio-5017. Because our opinion in the companion case recounts many of the facts of this matter, we will not repeat those facts here. Instead, we will discuss only the facts pertinent to this particular appeal.

{¶4} The Myneses purchased a house in Portsmouth, Ohio. Before closing on the house, the Myneses hired the Inspectors to perform a general home inspection. The agreement between the Inspectors and the Myneses contains the following arbitration clause: "Any controversy or claim arising out of or related to this Agreement, its breach, or the Report must be settled by binding arbitration in accordance with the rules of the American Arbitration Association, and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction."

{¶5} The Inspectors noted several potential issues with the house, including the presence of mold in various places. The inspection report discusses the mold in an italic font, offsetting this discussion from the rest of the report. The section on mold also

states: “If you wish to have the mold tested, please contact our office.” However, the Myneses took no further action and closed on the house.

{¶6} After discovering that the house was full of toxic black mold, the Myneses filed a complaint against the Inspectors, the sellers, the builders, and various other defendants. As to the Inspectors, the complaint asserts claims of breach of fiduciary duties, failure to disclose, negligence, and respondeat superior.

{¶7} The Inspectors moved to stay the claims against them pending arbitration, and, eventually, the Myneses agreed to the stay. As a result, the trial court granted the stay in an AGREED ORDER GRANTING INSPECTION DEFENDANTS’ MOTION TO STAY CLAIMS PENDING ARBITRATION.

{¶8} Several months later, the Myneses sought relief from the agreed order by filing a Civ.R. 60(B) motion for relief from judgment. The trial court granted the Myneses’ motion, revoked the stay, and ordered the Inspectors to participate in the lawsuit.

{¶9} The Inspectors appeal and assert the following assignment of error: “THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT: 1) CONSIDERED AND THEN, WITHOUT A HEARING, GRANTED [THE MYNESES’] CIVIL RULE 60(B) MOTION FOR RELIEF FROM THE AGREED TRIAL COURT ORDER OF SEPTEMBER 5, 2006, AND 2) WITHOUT ANY DISCOVERY, FULL BRIEFING, OR A HEARING, *SUA SPONTE*, DENIED [THE INSPECTORS’] MOTION TO STAY CLAIMS PENDING ARBITRATION.”

II.

{¶10} Under their sole assignment of error, the Inspectors raise various arguments about the propriety of the trial court's ruling on the Myneses' Civ.R. 60(B) motion. We will address only the Inspectors' initial argument because it is dispositive.

{¶11} "A trial court's ruling on a motion for relief from judgment lies within the sound discretion of the trial court and will not be overturned absent a showing of an abuse of that discretion." *Natl. City Home Loan Servs., Inc. v. Gillette*, Scioto App. No. 05CA3027, 2006-Ohio-2881, at ¶12, citing *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77; *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. An abuse of discretion connotes more than a mere error of judgment; it implies that the court's attitude is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶12} "A reviewing court will not find an abuse of discretion merely because it could maintain a different opinion if it were deciding the case *de novo*." *Dunkle v. Dunkle* (1999), 135 Ohio App.3d 669, 675, citing *Lewis v. Alfa Laval Separation, Inc.* (1998), 128 Ohio App.3d 200, 207. Nevertheless, "[t]he discretion exercised by the trial court in considering a Civ.R. 60(B) motion is not unbridled." *Dunkle* at 675.

{¶13} "In order to prevail on a motion for relief from judgment under Civ.R. 60(B), the movant must demonstrate (1) the existence of a meritorious claim or defense, (2) entitlement to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5), and (3) the timeliness of the motion." *Newman v. Farmacy Natural & Specialty Foods*, 168 Ohio App.3d 630, 2006-Ohio-4633, at ¶17, citing *Buckeye Fed. S. & L. Assn. v. Guirlinger* (1991), 62 Ohio St.3d 312, 314; *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, at paragraph two of the syllabus. Before granting a

motion for relief from judgment, the trial court must consider whether the movant has satisfied all three prongs of this test. See *Dunkle* at 675.

{¶14} Initially, the Inspectors argue that the Myneses' Civ.R. 60(B) motion "was barred by res judicata." Brief of Defendants-Appellants at 8. The Inspectors claim that res judicata applies because the Myneses sought relief from an agreed entry. See, generally, JUDGMENT, Black's Law Dictionary (8th ed.2004) (stating that "agreed judgment" may also be termed "consent judgment").

{¶15} We recognize that "res judicata" can have different meanings. And because of those different meanings, we understand that the term res judicata "causes confusion in discussions." *Dickens v. Bethlehem Baptist Church* (Sept. 15, 1994), Cuyahoga App. No. 65740, at fn. 1. Here, the Inspectors do not base their argument on either issue preclusion or claim preclusion. See, generally, *State ex rel. Nickoli v. Erie MetroParks*, ---- Ohio St.3d ----, 2010-Ohio-606, at ¶21 (explaining the doctrines of issue preclusion and claim preclusion). Thus, the Inspectors have not advanced a res judicata argument in the traditional sense. Rather, the Inspectors use the term res judicata because they believe "[a]n issue * * * has been definitively settled by judicial decision." Black's Law Dictionary (8th ed.2004). Essentially, the Inspectors argue that the agreed entry definitively settled the arbitration issue.

{¶16} "This court has held that a party may not directly or collaterally attack a consent judgment in the absence of allegations of irregularity or fraud in the procurement of the judgment." *Shanks v. Shanks* (Mar. 10, 1997), Ross App. No. 96CA2252. We applied this holding in *Shanks* and found that a trial court abused its discretion by granting a Civ.R. 60(B) motion for relief from an agreed judgment.

Although we did not use the term res judicata, we held that the consent judgment in *Shanks* precluded relief under Civ.R. 60(B). Other courts have reached similar results in cases where a party attacked a consent judgment. See, e.g., *Sponseller v. Sponseller* (1924), 110 Ohio St. 395, 399 ("The decree having been made by the agreement of the parties was an adjudication as effective as if the merits had been tried, and was not subject to collateral attack."); *Mack v. Mack* (Sept. 28, 1987), Richland App. No. CA-2479 ("The final judgment in a divorce decree is a consent judgment and therefore not voidable and therefore not subject to collateral attack by motion under Civ.R. 60(B)."); *Schenk v. Mohre* (Oct. 28, 1983), Wood App. No. WD-83-33 ("[I]t is well settled that a judgment of a court of competent jurisdiction, entered by consent of the parties, will not be reversed on error and is binding and conclusive between the parties in the absence of fraud."); *S. Ohio Coal Co. v. Kidney* (1995), 100 Ohio App.3d 661, 676 (Harsha, J., and Abele, J., concurring in judgment only). But, see, *Women's Fed. Sav. Bank v. Cuyahoga Cleaning Services, Inc.* (Dec. 23, 1993), Cuyahoga App. No. 64544 ("Any judgment of a court is subject to the provisions of Civ.R. 60(B) allowing vacation of judgments under the enumerated circumstances.").

{¶17} Here, the Myneses have not alleged any irregularities or fraud in the procurement of the agreed entry. Similarly, the Myneses have not alleged that the agreed entry differs from their actual agreement with the Inspectors. See, generally, *C.B.H., Inc. v. Joseph Skilken & Co.* (Dec. 17, 1993), Lake App. No. 93-L-038 (stating that Civ.R. 60(B) relief may be proper if the agreed judgment entry is materially and substantially different from the parties' actual agreement). Thus, pursuant to *Shanks*,

Civ.R. 60(B) relief is not available to the Myneses. Accordingly, we agree that the trial court should not have granted the Myneses' Civ.R. 60(B) motion.

{¶18} In response to the Inspectors' argument, the Myneses erroneously cite this court's decision in *S. Ohio Coal Co.*, supra. In *S. Ohio Coal Co.*, we upheld the trial court's decision to grant a Civ.R. 60(B) motion for relief from a consent judgment. The *S. Ohio Coal Co.* opinion states that "a consent judgment would be open to Civ.R. 60(B) relief as much as any other judgment." Id. at 668. However, neither Judge Harsha nor Judge Abele concurred in the *S. Ohio Coal Co.* opinion. Further, writing separately, Judge Harsha stated that, "[g]enerally, a consent judgment may not be directly or collaterally attacked in the absence of allegations of irregularity or fraud in the procurement of the judgment." Id. at 676. Judge Harsha found an exception to this general rule "where the ultimate issue involves a governmental agency which is called upon to administer a statutory duty dealing with health and safety issues affecting a significant number of people." Id. Based on this exception, Judge Harsha concurred in judgment only. Because Judge Abele concurred in Judge Harsha's separate opinion, two-of-the three judges in *S. Ohio Coal Co.* expressly rejected the broad application of Civ.R. 60(B) to consent judgments. Thus, as *Shanks* makes clear, this court follows the general rule described in Judge Harsha's separate opinion. See *Shanks* (explaining the effect of *S. Ohio Coal Co.*). And because the Myneses are not a governmental agency, the general rule applies in this case.

{¶19} Finally, the Myneses argue that res judicata does not apply because the agreed entry was not "rendered on the merits." This argument relates to the doctrine of claim preclusion, see, e.g., *State ex rel. Lowery v. McArver*, Franklin App. No. 09AP-

313, 2009-Ohio-6844, at ¶9, which, as we noted above, does not apply to the present case. Nevertheless, the Myneses' argument would not persuade us even if it did apply. First, R.C. 2711.02(B) provides that a trial court must be "satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration[.]" Thus, in our view, the agreed entry constitutes a judgment on the merits as to the enforceability of the arbitration clause. See, generally, *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, at ¶32-38 (discussing R.C. 2711.02(B) and the enforceability of arbitration clauses). Furthermore, R.C. 2711.02(C) provides that an entry granting or denying a stay pending arbitration is a final appealable order. Indeed, the Supreme Court of Ohio declared that the agreed entry *in this case* is final and appealable. And we believe that res judicata should apply to final appealable orders.

{¶20} Accordingly, for the foregoing reasons, we sustain the Inspectors' sole assignment of error. Because the Myneses' Civ.R. 60(B) motion attacked an agreed entry, granting that motion constituted an abuse of discretion. As a result, we reverse the trial court's judgment and remand this cause for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED and this cause BE REMANDED to the trial court for further proceedings consistent with this opinion. Appellees shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.