[Cite as *Jizco Ents. v. Hehmeyer*, 2010-Ohio-349.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
JIZCO ENTERPRISES, INC. Appellee v. IRMTRAUD HEGMEYER, et al. Appellants	C.A. No. 24803 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2008-10-7269

DECISION AND JOURNAL ENTRY

Dated: February 3, 2010

WHITMORE, Judge.

{¶1} Defendants-Appellants, Irmtraud and Kenneth Hehmeyer (collectively "the Hehmeyers"), appeal from the judgment of the Summit County Court of Common Pleas, denying their motion to vacate and motion for relief from judgment in favor of Plaintiff-Appellee, Jizco Enterprises ("Jizco"). This Court affirms.

I

{¶2} On September 12, 2008, Jizco filed an eviction proceeding against the Hehmeyers in Barberton Municipal Court. Based on a counterclaim filed by the Hehmeyers, the case was transferred to the Summit County Court of Common Pleas. Jizco later prevailed on its motion for summary judgment, and the matter was set for a hearing on damages. That hearing was held on March 20, 2009, at which Jizco and the Hehmeyers entered into an agreement on the record as to the calculation of damages. At the direction of the court, Jizco's counsel prepared the order memorializing the parties' agreement. On March 25, 2009, the trial court entered judgment

against the Hehmeyers in favor of Jizco in the amount of $44,975.62, representing rents owed and taxes due.

{¶3} On April 21, 2009, the Hehmeyers filed a motion to vacate the judgment arguing that: (1) their attorney did not review or sign the judgment order; (2) judgment was improperly entered against Kenneth as he does not have a legal interest in the property; and (3) new evidence demonstrated that Irmtraud's former spouse, Paul Zetts, was required to make the rental payments under the terms of the parties' divorce. On May 1, 2009, the Hehmeyers filed a motion for relief from judgment under Civ. R. 60(B), asserting essentially the same grounds for relief. On May 7, 2009, the Hehmeyers filed a supplement to their previously filed Civ.R. 60(B) motion further explaining how the calculation used to arrive at the amount of Jizco's judgment award failed to account for payments made by Zetts. On May 13, 2009, the trial court denied all of the foregoing motions filed by the Hehmeyers. The Hehmeyers have timely appealed the denial of their motions, asserting one assignment of error for our review.

II

Assignment of Error

> "DID THE TRIAL COURT ERR BY ACCEPTING AN 'AGREED ORDER' THAT HAD NOT BEEN ENDORSED BY COUNSEL FOR THE APPELLANTS BECAUSE THE AMOUNT OF DAMAGES WAS TO BE CALCULATED AND HAD NOT BEEN TO THE SATISFACTION OF THE APPELLANTS; AND THEN BY DENYING A MOTION FOR RECONSIDERATION FILED BY THE APPELLANTS."

{¶4} In the Hehmeyers' sole assignment of error, they argue that the trial court erred in entering an agreed order as to the amount of damages when their counsel had not reviewed or signed the order. They allege that the amount of damages was never agreed to, arguing that only the "parameters" had been discussed. They further assert that they did not waive their approval

to the amount of damages, arguing that a portion of the award was "to be calculated." We disagree.

{¶5} This Court reviews the grant or denial of a Civ.R. 60(B) motion for relief from judgment under an abuse of discretion standard. *Turowski v. Apple Vacations, Inc.*, 9th Dist. No. 21074, 2002-Ohio-6988, at ¶6. An abuse of discretion is more than a mere error of law or judgment, but "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Appellate courts may not substitute their judgment for that of the trial court when an abuse of discretion standard is applied. *Pons v. Ohio St. Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶6} Civ.R. 60(B) allows for the trial court to relieve parties from a final judgment 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."

In order to prevail on a Civ.R. 60(B) motion:

> "[T]he 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 was entered or taken." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus.

If any of the above requirements are not met, the Civ.R. 60(B) motion should be denied by the trial court. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20.

{¶7} As a preliminary matter, we note that the Hehmeyers do not argue that judgment was entered against them in error. Furthermore, they have failed to assert on appeal several of the bases for relief from judgment which were originally argued in their motions to the trial court. Rather, they challenge on appeal only the amount of the damage award and the propriety of the trial court entering an agreed order without the signature of their counsel.

{¶8} The Supreme Court has held that a party cannot employ a Civ.R. 60(B) motion as a substitute for a timely appeal, nor does such a motion extend the time in which a party may perfect an appeal from a final judgment. *Key v. Mitchell* (1998), 81 Ohio St.3d 89, 90-91. "If we were to hold differently, judgments would never be final because a party could indirectly gain review of a judgment from which no timely appeal was taken by filing a *** motion to vacate judgment." *State ex rel. Durkin v. Ungaro* (1988), 39 Ohio St.3d 191, 193.

{¶9} This Court has similarly concluded that it is within the trial court's discretion to deny a motion for relief from judgment that is based entirely upon issues that could have been raised on direct appeal. *Rock v. Inn at Medina Mgt. Co., Inc.*, 9th Dist. No. 07CA0072-M, 2008-Ohio-1992, at ¶7. Likewise, where a party's grounds for relief do not fall under the terms of Civ.R. 60(B), the argument should have been properly framed as a direct appeal, not a motion to vacate. *McClintock v. Glick*, 9th Dist. No. 05CA0009, 2005-Ohio-5187, at ¶8.

{¶10} Aside from the fact that the Hehmeyers have not related their request for relief to any of the specifically enumerated grounds for relief under Civ.R. 60(B) and have omitted any argument or legal citations to demonstrate a meritorious defense, it is evident to this Court that they are challenging the merits of the damage calculation and the trial court's ability to enter an agreed order in the absence of their counsel's signature. See *GTE Automatic Elec., Inc.*, 47 Ohio St.2d at paragraph two of the syllabus. These arguments could have been raised on direct appeal

and therefore are not the proper subject for a Civ.R. 60(B) motion. *Rock* at ¶7-8; *McClintock* at ¶8-9.

{¶11} Based on the foregoing, the trial court did not err in denying the Hehmeyers' motions. Accordingly, their sole assignment of error is overruled.

III

{¶12} The Hehmeyers' sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

CHRIS G. MANOS, Attorney at Law for Appellants.

WILLIAM LOVE, II, Attorney at Law, for Appellee.