

[Cite as *Speer v. Speer*, 2010-Ohio-4662.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

LARRY SPEER

Appellant

v.

SCOTT A. SPEER, et al.

Appellees

C. A. No. 25234

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2008 01 0157

DECISION AND JOURNAL ENTRY

Dated: September 30, 2010

MOORE, Judge.

{¶1} Appellant, Larry Speer, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On January 8, 2008, Larry Speer filed a complaint on behalf of himself and R.I. International, Inc. dba Repair Products Unlimited seeking injunctive and other relief against his son, Scott Speer, Scott’s wife, Melissa Thompson Speer, Amber Foster and Repair Products Unlimited (collectively, “Repair Products Unlimited participants”). Larry Speer alleged that he was the sole shareholder of R.I. International. In the answer to the amended complaint, Scott Speer claimed to be the sole shareholder of R.I. International. The Repair Products Unlimited participants filed several counterclaims.

{¶3} After a period of motion practice, the parties reached a settlement agreement. On July 22, 2008, Speer signed the settlement agreement. On July 31, 2008, the Repair Products

Unlimited participants signed the settlement agreement. Melissa Thompson Speer had a durable power of attorney for Scott Speer and signed on his behalf. On August 5, 2008, Scott Speer, who was incarcerated at the time, personally signed the settlement. On August 11, 2008, the magistrate held a hearing regarding the settlement. Speer was not present. His attorney, however, represented to the magistrate that Speer had revoked his assent to the settlement agreement prior to the endorsement of the Repair Products Unlimited participants. On August 25, 2008, the magistrate issued a decision recommending that the trial court accept and enforce the settlement agreement. In his decision, the magistrate noted that Speer's attorney did not have an affidavit from Speer alleging revocation of his assent. The magistrate found that Speer's contention lacked credibility. Initially, Speer filed an objection to the magistrate's decision; he later rescinded his objection. On November 10, 2008, the trial court adopted the magistrate's decision, ordered that the case was settled and retained jurisdiction to enforce the agreement. On December 22, 2008, the trial court entered a second order, specifically dismissed the complaint and counterclaim with prejudice and stated that the parties acknowledged that Scott Speer solely owned R.I. International and Repair Products Unlimited.

{¶4} On November 9, 2010, Speer filed a motion to vacate the judgment pursuant to Civ.R. 60(B). The trial court denied the motion without a hearing.

{¶5} Speer timely filed a notice of appeal. He raises two assignments of error for our review. We combine the assignments of error in order to facilitate our discussion.

II.

ASSIGNMENT OF ERROR I

“WHETHER THE LOWER COURT ERRED IN DENYING [SPEER’S] REQUEST FOR AN EVIDENTIARY HEARING ON HIS MOTION TO VACATE THE JUDGMENT ENTRY.”

ASSIGNMENT OF ERROR II

“WHETHER THE LOWER COURT ERRED IN DENYING [SPEER’S] MOTION TO VACATE THE JUDGMENT ENTRY.”

{¶6} In his first assignment of error, Speer contends that the trial court erred in denying his request for an evidentiary hearing on his motion to vacate the judgment entry. In his second assignment of error, Speer contends that the trial court erred in denying his motion to vacate the judgment entry. We do not agree.

{¶7} Civ.R. 60(B) states:

“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. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

“The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.”

{¶8} Here, the Repair Products Unlimited participants contend that a motion pursuant to Civ.R. 60(B) is not the appropriate method to challenge a settlement agreement citing, among others, this Court’s decision in *Colvin v. Abbey’s Restaurant*, 131 Ohio App.3d 439. We need not determine whether a motion to vacate the judgment under Civ.R. 60(B) was appropriate in this instance because, even assuming the motion was procedurally appropriate, it was insufficient to require that the trial court hold a hearing or vacate the judgment.

{¶9} In order to prevail on a motion for relief from judgment pursuant to Civ.R. 60(B), the movant must demonstrate: (1) 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) timeliness of the motion. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. If any of these three requirements is not met, the motion is properly overruled. *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174. When a motion, however, asserts grounds for relief from judgment that are sufficiently alleged and are supported with evidence which would warrant relief from judgment the trial court abuses its discretion in denying a hearing. *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 19, citing *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 105. Under this standard, we must determine whether the trial court's decision was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶10} On November 9, 2009, Speer filed his motion for relief from judgment in the trial court. In that motion, he alleged that he was entitled to relief under Civ.R. 60(B)(1), (2), (3), and (5). His arguments, however, centered around his previous contention that he revoked his approval of the settlement prior to the approval of the Repair Products Unlimited participants, a contention that was unsupported by evidence, and a contention that the underlying contract of sale of R.I. International, Inc. from Speer to his son in 2000 contained a forgery of Speer's signature. Accordingly, his first argument centered around Civ.R. 60(B)(3), involving fraud, misrepresentation or other misconduct of an adverse party and his second argument centered around Civ.R. 60(B)(2), involving newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B).

{¶11} The forgery contention was supported by an affidavit and report from a handwriting expert. The report is dated October 2, 2009. On November 18, 2009, Repair Products Unlimited responded in opposition. On November 24, 2009, Speer sought leave to file a reply brief. On December 7, 2009, Speer filed a reply brief, which cited testimony from the unsigned, unverified deposition of Amber Foster, who was a participant in Repair Products Unlimited. On December 14, 2009, the trial court granted Speer leave to file the reply brief by December 7, 2009.

{¶12} Addressing his claim regarding the discovery that his signature was forged on the sales contract signed in 2000, the trial court did not err in finding that Speer failed to properly support his motion and demonstrate that he was entitled to a hearing. Under Civ.R. 60(B)(2), Speer was required to demonstrate that he had newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Civ. R. 59(B). The trial court noted in overruling Speer's motion to vacate that the forgery argument was not new. Speer's attorney presented an argument at the August 11, 2008 hearing before the magistrate that the signature was a forgery. Speer did not attend that hearing, nor did his counsel present any evidence in support of the argument. Speer objected to the magistrate's decision that was filed two weeks later and which addressed this argument, but subsequently withdrew his objection. Speer did not appeal from the judgment entry issued November 10, 2008, adopting the magistrate's decision. Moreover, as observed by the magistrate, it is incredible and implausible that Speer failed to remember that he never signed the underlying sales contract regarding a company whose ownership was in dispute until just before the participants in Repair Products Unlimited signed the settlement agreement in this case. Indeed, Speer's 60(B) motion states "[h]ad he known, *as he always suspected*, that [the 2000 sales contract] was a forgery he

would have never entered into the Settlement Agreement concluding this case.” (Emphasis added.) This Court’s decision in *Holden v. Ohio Bur. of Motor Vehicles* (1990), 67 Ohio App.3d 531, makes clear that when presenting newly discovered evidence the moving party must demonstrate:

“***(1) that the evidence was actually ‘newly discovered’; that is, it must have been discovered subsequent to the trial; (2) that the movant exercised due diligence; and (3) that the evidence is material, not merely impeaching or cumulative, and that a new trial would probably produce a different result.” (Citations and quotations omitted.) *Id.* at 540.

{¶13} Further, the trial court stated in its judgment entry that Speer’s motion was timely under Civ.R. 60(B) because it was made within one year after judgment was entered. Although Civ.R. 60(B) mandates that a motion be made within one year from judgment under subsections (1), (2) and (3), merely filing such a motion within one year of judgment does not automatically qualify the motion as timely. The complaint in this matter was filed on January 8, 2008, and on, January 15, 2008, Repair Products Unlimited filed an answer to the amended complaint. The answer put Speer on notice that ownership of R.I. International, Inc. was disputed and alleged that Speer had been interfering with ownership since 2002. For these reasons, Speer is unable to demonstrate that he acted with due diligence in failing to discover evidence, which he apparently had in his possession, of the allegedly forged signature until nearly one year after the approval of the settlement agreement and nearly nine years after the contract was allegedly forged. Further, Speer’s motion admitted that he always suspected the underlying contract was forged. Accordingly, the trial court did not err in denying a hearing or relief from judgment with regard to Speer’s allegation of “newly discovered” evidence. *Strack*, 70 Ohio St.3d at 174; *Blakemore*, 5 Ohio St.3d at 219; Civ.R. 60(B).

{¶14} Speer's second contention involved alleged fraud on the part of the Repair Products Unlimited participants in that Speer contended that they backdated their signatures by nearly two weeks to convince the trial court that they approved the settlement before Speer revoked his assent. Speer, however, only provided evidence of the backdating in his reply brief. Generally, new matters may not be raised and addressed in a reply brief. The trial court's journal entry does not indicate that it considered the deposition. Further, the copy of the deposition to which Speer cites was filed in an unsigned, unverified form. Accordingly, we do not consider this evidence. See *Gibson v. Xerxes Corp.* (Apr. 17, 1991), 9th Dist. No. 90CA004885, at *2.

{¶15} As a result, Speer's contention that he revoked his assent to the settlement agreement fails to raise any issue or present any evidence not addressed by the magistrate or the trial court at the time the settlement was entered. The motion and reply brief do not, therefore, demonstrate that Speer was entitled to a hearing or relief from judgment and the trial court did not abuse its discretion in overruling the motion. *Kay*, 76 Ohio St.3d at 19; *Blakemore*, 5 Ohio St.3d at 219; Civ.R. 60(B).

{¶16} Accordingly, Speer's first and second assignments of error are overruled.

III.

{¶17} Speer's first and second assignments of error are 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 Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS

DICKINSON, P. J.
CONCURS, SAYING:

{¶18} I concur in the majority’s judgment and most of its opinion. While I acknowledge that the Ohio Supreme Court has written that an abuse of discretion standard applies to the review of a ruling on a motion for relief from judgment, in practice, both the Supreme Court and this Court have applied a de novo standard: “In order for a party to prevail on a motion for relief from judgment under Civ.R. 60(B), the movant must demonstrate the following These requirements are independent and in the conjunctive; thus the test is not fulfilled if any one of the requirements is not met.” *Strack v. Pelton*, 70 Ohio St. 3d 172, 174 (1994); see *Buckingham, Doolittle & Burroughs LLP v. Healthcare Imaging Solutions LLC*, 9th Dist. No. 24699, 2010-Ohio-418, at ¶10. In this case, Mr. Speer failed to satisfy the three-part *GTE Automatic* test and,

therefore, as a matter of law, was not entitled to relief under Rule 60(B) of the Ohio Rules of Civil Procedure.

APPEARANCES:

DAVID S. NICHOL, Attorney at Law, or Appellant.

JAMES REED, Attorney at Law, for Appellees.

R. DAVID BRIGGS, Attorney at Law, for Appellees.