[Cite as *Mun. Realty Corp. v. Ergur*, 2014-Ohio-1557.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Municipal Realty Corp.	Court of Appeals No. L-13-1241
Appellee	Trial Court No. CI0201104858
v.	
Koray Ergur, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: April 11, 2014

* * * * *

Richard M. Kerger, Marc Alan Silverstein, and Nicholas B. Wille, for appellee.

Eric J. Wittenberg, for appellants.

* * * * *

SINGER, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas denying a motion to vacate a default judgment in a case alleging, inter alia, slander of title. For the reasons that follow, we affirm.

{¶ 2} Appellee is Municipal Realty Corp., a Delaware corporation. Appellants are CP&G Investment, L.L.C. and Koray Ergur, a member of CP&G Investment, L.L.C. On June 30, 2010, appellee and appellant CP&G Investments entered into a commercial real estate agreement for appellee to sell and appellant CP&G to buy property at 505 Jefferson Avenue in Toledo. The purchase price for what is known as The Commodore Perry Condominium was to be $2.5 million. The agreement contained certain performance benchmarks which, according to appellee, appellant CP&G failed to meet. Nonetheless, the closing date was extended multiple times. In January 2011, appellee advised appellants that, as the result of their multiple breaches of the purchase agreement, appellee considered the deal off. Appellee then began to remarket the property and indeed, according to its complaint, identified a potential buyer.

{¶ 3} On April 14, 2011, appellant Ergur filed with the county recorder an affidavit, asserting an interest in the property by virtue of the 2010 sales agreement. On August 12, 2011, appellee filed the complaint that underlies this appeal. Service was obtained by process server. Appellee maintained that the Ergur affidavit improperly created a cloud on its title. Appellee sought a declaration of the rights of the parties and removal of the affidavit, as well as damages for breach of contract, slander of title, tortious interference with business relationship and contract and other relief.

{¶ 4} In the absence of a timely answer, on September 15, 2011, appellee moved for a default judgment. A month later the trial court granted judgment on the declaratory and injunctive relief appellee sought. The court set a hearing to determine the amount of

damages. Neither appellant appeared for the hearing. On January 19, 2012, the court entered judgment for appellee in the amount of $234,542.58, plus interest.

{¶ 5} On January 17, 2013, appellant Ergur filed a pro se "Motion for Order to Show Cause RE: Vacation of Judgment." Simultaneously, appellant Ergur filed an answer to the original complaint, consisting of a general denial of liability and 19 "affirmative defenses." Also submitted was an eight page "declaration" of appellant Ergur, accusing appellee, the financial institutions involved, his former lawyer, city officials and various others of fraud, misrepresentation and double dealing.

{¶ 6} On February 6, 2013, appellee filed a memorandum in opposition to what it construed as appellant Ergur's motion for relief from judgment. Appellee also moved to strike Ergur's answer as having been filed out of time and without leave of the court, because it was an improper general denial and as ineffective with respect to appellant CP&G. The trial court granted appellee's motion to strike and denied appellant Ergur's motion for relief from judgment. From this judgment, both appellants brought this appeal. Appellants set forth the following three questions for review which we shall construe as their assignments of error:

1. Whether the trial court erred in denying the Appellant's [sic] Motion to Vacate Judgment.

2. Whether the trial court erred in denying the Appellant's [sic] Motion to Vacate without holding an evidentiary hearing.

3. Whether the trial court erred in granting default judgment in favor of the Appellee without giving notice and an opportunity for a hearing when the Appellant had indicated an intention to appear and defend in this case, in violation of the provisions of Civ.R. 55(A).

{¶ 7} As a preliminary matter, we note that appellant Ergur's pleadings may only be considered as pro se filings for appellant Ergur. Appellant Ergur does not present himself to be an attorney and may not represent a corporation even if he is a member of that corporation. An Ohio corporation must be represented by an attorney and cannot be represented in court by a non-attorney officer. *Union Savings Assn. v. Home Owner's Aid*, 23 Ohio St.3d 60, 64, 262 N.E.2d 558 (1970). The corporation, as a result, must be deemed never to have appeared in the trial court. The trial court properly struck appellant Ergur's pleadings as purported representations of the corporation. The assignments of error as they apply to the corporation are found not well-taken.

I. Default Judgment

{¶ 8} In his third assignment of error, appellant Ergur maintains that he was denied his right to notice and a hearing on the default motion because he had indicated an intention to appear and defend. Appellee responds that this issue is not properly before this court as appellant Ergur did not raise the issue in the trial court. Moreover, appellee insists, there is nothing in the record to suggest that appellant Ergur made any appearance in the case or indicated in any way his intent to defend against appellee's complaint prior to the court's issuance of the default judgment.

{¶ 9} Civ.R. 55(A), in material part, provides:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefore * * *. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application.

{¶ 10} Once a default judgment has been issued, it may be vacated or set aside pursuant to Civ.R. 60(B). Civ.R. 55(B). Alternatively, if a default judgment is entered and the defendant was never properly served with process, such a judgment is void for want of jurisdiction and may be vacated by the inherent power of the court. 1970 Staff Note, Civ.R. 55(B).

{¶ 11} Appellee is correct on this assignment of error in both respects. Reviewing courts do not ordinarily consider issues not presented to the court whose judgment is sought to be reversed, nor do we consider errors which could have been called to the attention of the trial court when such error could have been corrected or avoided. *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81, 679 N.E.2d 706 (1997). Appellant Ergur did not raise this issue in the trial court and, therefore, waived the question on appeal. Moreover, appellant Ergur does not contest valid service of process and the record is devoid of any entry of appearance or any comparable act by appellant

Ergur prior to the default judgment being awarded. Accordingly, appellant's third assignment of error is not well-taken.

II. Relief from Judgment

{¶ 12} In his first assignment of error, appellant Ergur suggests that the trial court erred in denying his motion for relief from judgment. In his second assignment of error, appellant asserts that the trial court erred by denying him a hearing on his motion for relief from judgment.

{¶ 13} A trial court may relieve a party from a final judgment if, on motion, the party shows:

> (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. Civ.R. 60(B).

{¶ 14} The rule requires that the motion for relief for judgment be made within a reasonable time and, with respect to reasons one, two and three, no more than a year after the judgment is entered.

> To prevail on a motion brought under Civ. R. 60(B), the 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 Electric, Inc. v. ARC Industries, Inc., 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

{¶ 15} The decisions as to whether to grant relief from judgment and whether to conduct a hearing on a motion for relief from judgment rest within the sound discretion of the court and will not be reversed absent an abuse of that discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987); *U.A.P. Columbus v. Plum*, 27 Ohio App.3d 293, 294, 500 N.E.2d 924 (10th Dist.1986). An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 16} In his motion to vacate, appellant Ergur states that the default judgment should be vacated on the grounds of (1) newly discovered evidence and (2) "certain frauds including misrepresentation and other misconduct of the plaintiff in procuring said

judgment[.]" In support of both grounds, appellant Ergur directs the court's attention to his eight page unsworn declaration.

{¶ 17} Stripped of superfluous material, appellant Ergur's declaration essentially reiterates and elaborates on the affidavit that is the topic of appellee's complaint. On this basis, we cannot credit appellant Ergur's assertion that this is evidence that could not by due diligence have been discovered in time to move for a new trial pursuant to Civ.R. 59(B). As a result, appellant Ergur has failed to establish the presence of a Civ.R. 60(B)(2) factor.

{¶ 18} With respect to appellant Ergur's allegations of fraud and misconduct, the acts and events he alleges relate to the behavior of appellee in the inducement to and performance of the real estate sales agreement. The fraud or misconduct referenced in Civ.R. 60(B)(3) is fraud or misconduct involved in obtaining the judgment, not fraud or misconduct that would have amounted to a claim or defense in the case itself. *U.S. Bank, N.A. v. Corley*, 6th Dist. Lucas No. L-13-1117, 2013-Ohio-4626, ¶ 13. "Civ. R. 60(B) does not permit the reopening of an adjudicated claim based solely upon the contention that the result of the adjudication is erroneous." *Fifth Third Bank v. Thorn*, 2d Dist. Miami No. 93-CA-19, 1994 WL 53833 *4 (Feb. 23, 1994). Appellant Ergur failed to raise a proper Civ.R. 60(B)(3) factor.

{¶ 19} Although appellant Ergur did not expressly move a Civ.R. 60(B)(1) rationale for relief from judgment, he does reference the provision and in his statement asserts that his failure to answer the initial complaint and respond to subsequent

pleadings was the fault of an attorney he had retained for a different transaction. The attorney, who did not enter an appearance in this case, and withdrew from representation in the other transaction, promised, but failed, to file a motion for an extension of time to answer the complaint in this case, according to appellant Ergur's unsworn statement.

{¶ 20} Assuming for the sake of argument that this attorney's alleged dereliction constituted excusable neglect pursuant to Civ.R. 60(B)(1), consideration of the timeliness of its assertion is appropriate.

{¶ 21} Civ.R. 60(B) requires that a motion for relief from judgment brought pursuant to Civ.R. (60)(B)(1)(2) or (3) must be brought within a reasonable time and no later than one year after the judgment from which relief is sought. Whether a Civ.R. 60(B) motion is brought within a reasonable time depends on the facts and circumstances of the case. The party seeking relief from judgment bears the burden of demonstrating the timeliness of the motion. *S.R. v. B.B.*, 6th Dist. Lucas No. L-09-1293, 2011-Ohio-358, ¶ 19. An unexplained or unjustified delay in making the motion after discovering a ground for relief may place the motion outside that which constitutes a reasonable time. *Id*. at ¶ 21.

{¶ 22} In this matter, the complaint was filed on August 12, 2011. Default judgment was moved on September 15, 2011, and granted on October 13, 2011. Judgment on damages was entered January 19, 2012. Appellant Ergur interposed his motion for relief from judgment on January 17, 2013. Ergur's statement constitutes an admission that he was aware of the complaint of this matter from the outset. He does not

contest appellee's assertion that he was both formally and informally advised of each pleading filed in the proceeding. While confusion with local counsel may excuse some delay in response, appellant Ergur fails to provide a reason for neglecting the matter for 15 months after the motion for default, 14 months after the initial entry of default and almost a year after the final entry of damages. Consequently the trial court acted within its discretion in concluding that appellant Ergur's motion was untimely. Similarly, in such circumstances, the court does not abuse its discretion in denying a hearing on the motion. *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151, 666 N.E.2d 1134 (1996). Accordingly, appellant Ergur's first and second assignments of error are not well-taken.

{¶ 23} On consideration, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE