[Cite as *Landmark Am., Inc. v. Jeries*, 2009-Ohio-6709.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

LANDMARK AMERICA, INC.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-009**
- vs -	:	
RAYMOND G. JERIES,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 CV 000110.

Judgment: Affirmed.

John J. Frank, Craig W. Relman Co., L.P.A., 26851 Miles Road, Suite 204, Cleveland, OH 44128 (For Plaintiff-Appellee).

David J. Gornik, 7103 Brightwood Drive, Concord, OH 44077 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Raymond G. Jeries, appeals the judgment entered by the Lake County Court of Common Pleas. The trial court granted a motion for summary judgment filed by appellee, Landmark America, Inc. ("Landmark"). Thereafter, the trial court denied Jeries' motion for relief from judgment.

{¶2} In 1997, D.J.M. Enterprises, Inc. obtained a "Continuing Guaranty Unlimited" from the Huntington National Bank in the amount of $15,000. Jeries signed the agreement in his capacity as president of D.J.M. Enterprises, Inc. In addition, Jeries

signed as a “guarantor” in his personal capacity. In 2000, Huntington assigned the debt to Landmark.

{¶3} Landmark filed a complaint against Jeries, alleging Jeries was in default of the continuing unlimited guaranty. The complaint sought damages in the amount of $15,000, plus interest. Landmark attached copies of the guaranty as well as the assignment to its complaint.

{¶4} Jeries filed a pro se answer. This answer provided, in its entirety, “I do not believe that I owe Landmark America anything, never having heard of them before this. I hope this is a sufficient answer as I am not a lawyer.”

{¶5} In March 2008, Jeries filed a motion to continue the status conference scheduled for April 18, 2008. As a basis for the motion, Jeries asserted he was unable to travel from Florida to Ohio due to recent cardiac surgery. The trial court denied the motion; however, it permitted the parties to conduct the status conference by telephone.

{¶6} In April 2008, Jeries filed a motion to dismiss. He argued that the trial court did not have jurisdiction over him because he is a Florida resident. Landmark filed a brief in opposition to Jeries’ motion to dismiss.

{¶7} Landmark filed a motion for summary judgment. Landmark attached several exhibits to its motion, including: an affidavit from Shawn Kerin, the Account Officer of Landmark, which states that Jeries owes Landmark $15,000, plus interest; a copy of the business credit line agreement between Huntington and D.J.M. Enterprises; a copy of the security agreement between Huntington and D.J.M. Enterprises; a copy of the continuing guaranty unlimited between Huntington and D.J.M. Enterprises, which contains Jeries’ signature as “guarantor”; a copy of the assignment of the loan from

Huntington to Landmark; and a copy of a letter from Huntington to D.J.M. Enterprises regarding the assignment.

{¶8} Landmark America filed a supplement to its motion for summary judgment. Landmark attached a second affidavit from Shawn Kerin to the supplement. In this affidavit, Kerin states that on December 5, 2007, a "notice of partial pay-off/partial release" was sent to Jeries at his Florida residence. A copy of this document was also attached to the supplement to the motion for summary judgment, and it provides that the total pay-off amount was $24,526.69, which included a principal pay-off amount of $15,039.09. Kerin identified this document in his second affidavit. In addition, Kerin again asserted that Jeries owes landmark $15,000, plus interest. We note the complaint in this matter was filed in January 2008, slightly more than one month after Kerin stated the pay-off letter was sent to Jeries.

{¶9} On June 26, 2008, Landmark filed a brief in opposition to Jeries' notice of statute of limitations. In its response, Landmark stated, "[o]n or about June 13, 2008 [Jeries] presumably filed a Notice of Statute of Limitations." A review of the record indicates Jeries' notice of statute of limitations was not actually filed with the clerk of courts until August 14, 2008.

{¶10} Landmark filed a second motion for summary judgment. Then, it filed an additional supplement to its motion for summary judgment. Jeries did not file a brief in opposition to either of Landmark's motions for summary judgment. The trial court granted Landmark's motion for summary judgment.

{¶11} On August 14, 2008, Jeries filed a document captioned "desire to appeal." Therein, he asked the trial court to revisit its decision to enter summary judgment in

favor of Landmark. The trial court construed Jeries' pleading as a motion to vacate the summary judgment entry. The trial court denied Jeries' motion. Jeries did not file a notice of appeal of the trial court's judgment entry denying his Civ.R. 60(B) motion.

{¶12} In September 2008, the trial court issued a nunc pro tunc judgment entry. This entry corrected the amount of the judgment in favor of Landmark to $15,000, plus interest and costs. Jeries did not file a notice of appeal from the nunc pro tunc judgment entry.

{¶13} On November 26, 2008, Jeries filed a motion for relief from judgment pursuant to Civ.R. 60(B). Jeries sought relief from the trial court's September 2008 nunc pro tunc judgment entry. Landmark filed a brief in opposition to Jeries' motion for relief from judgment. Jeries' filed a reply to Landmark's brief in opposition. The trial court denied Jeries' motion for relief from judgment.

{¶14} Jeries raises three assignments of error. His first assignment of error is:

{¶15} "The trial court erred in denying defendant's motion for relief from judgment when it granted summary judgment to plaintiff without considering documents and motions sent by defendant in response to plaintiff's motion for summary judgment, which inadvertently were not filed with the court."

{¶16} "A reviewing court reviews a trial court's decision on a motion for relief from judgment to determine if the trial court abused its discretion." (Citations omitted.) *Bank One, NA v. SKRL Tool and Die, Inc.*, 11th Dist. No. 2003-L-048, 2004-Ohio-2602, at ¶15. See, also, *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 150. "'The term "abuse of discretion" connotes more than an error of law or judgment; it

implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" (Citations omitted.) *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶17} Relief from judgment may be granted pursuant to Civ.R. 60(B), which states, in part:

{¶18} "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 Civ.R. 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."

{¶19} Regarding the moving party's obligations for a Civ.R. 60(B) motion, the Supreme Court of Ohio has held:

{¶20} "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 v. ARC Industries*, 47 Ohio St.2d 146, paragraph two of the syllabus.

{¶21} The trial court stated the motion for relief from judgment was filed only "four months after the final judgment." Thus, the trial court found the motion was timely filed. We note the motion was filed less than three months after the trial court's nunc pro tunc judgment entry. Accordingly, we will not disturb the trial court's finding that the motion for relief from judgment was timely.

{¶22} Next, we address whether Jeries set forth a meritorious defense should relief be granted. The trial court found "[Jeries'] arguments regarding the Statute of Limitations, [lack of] receipt of the $15,000.00, and the adequacy of the affidavit supplied by Plaintiff are merely defenses which [he] might present if relief is granted." In his affidavit, Jeries states, "[a]t no time was $15,000.00 ever advanced to the primary obligor, D.J.M. Enterprises." Thus, we agree that Jeries advanced a meritorious defense.

{¶23} The trial court denied Jeries' motion for relief from judgment because it found that Jeries did not demonstrate he was entitled to relief based on one of the factors in Civ.R. 60(B). Jeries contends the trial court failed to consider his notice of statute of limitations. While Jeries argues on appeal that the *GTE* test does not apply, it appears that his argument is most appropriately categorized as an "excusable neglect" argument under Civ.R. 60(B)(1).

{¶24} The Supreme Court of Ohio has "defined 'excusable neglect' in the negative and [has] stated that the inaction of a defendant is not 'excusable neglect' if it can be labeled as a 'complete disregard for the judicial system.'" *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20, quoting *GTE Automatic Electric v. ARC Industries*, 47 Ohio St.2d at 153. (Secondary citation omitted.)

{¶25} Jeries argues the trial court should have contacted him to determine the status of his notice of statute of limitations. It appears that Jeries placed this filing in the mail and directed it to the clerk of court's office. This document contains a certificate of service indicating a copy was mailed to Landmark on June 13, 2008. Landmark apparently received its copy, because it filed a response on June 26, 2008. However, the original document was not filed with the clerk of court's office until August 14, 2008.

{¶26} The trial court responded that it will not consider anything that is not in the record. Since the notice of statute of limitations was not filed in the record at the time the trial court issued its original judgment entry granting Landmark's motion for summary judgment, we find the trial court did not err by not considering it.

{¶27} Next, we address whether the apparent postal error constitutes excusable neglect.

{¶28} We note, "[a] party has a general duty to check the docket and to keep himself current regarding the status of the case." *Landspan Corp. v. Curtis*, 8th Dist. No. 91664, 2008-Ohio-6292, at ¶14, citing *State v. Vernon*, 11th Dist. No. 2006-L-146, 2007-Ohio-3376. Thus, the best practice would have been for Jeries to check the docket to ensure his mailed submission was actually filed with the clerk of court's office. Jeries was acting in a pro se capacity. However, as the Tenth Appellate District has stated:

{¶29} "'While one has the right to represent himself or herself and one may proceed into litigation as a pro se litigant, the pro se litigant is to be treated the same as one trained in the law as far as the requirement to follow procedural law and the adherence to court rules. If the courts treat pro se litigants differently, the court begins

to depart from its duty of impartiality and prejudices the handling of the case as it relates to other litigants represented by counsel.'" *State v. Pryor*, 10th Dist. No. 07-AP-90, 2007-Ohio-4275, at ¶9. (Citations omitted.)

{¶30} Despite Jeries' failure to check the docket, the delay in filing the notice of statute of limitations, by itself, could be considered excusable neglect. This is bolstered by the fact that a copy was sent to Landmark, which responded to the pleading. However, this does not end our inquiry. For the following reason, we must consider the effect of the trial court's ruling on Landmark's motion for summary judgment without the benefit of considering Jeries' notice of statute of limitations.

{¶31} In his notice of statute of limitations, Jeries made the argument that "[t]his questionable contract is an offer to extend credit to a corporate entity, with no proof provided by the plaintiff that any moneys were ever loaned or that it was ever used." Also, Jeries argued, "[t]his is an apparent attempt to collect a phony debt from a person who does not have the money to hire an attorney nor travel to defend himself." However, even if this submission was considered by the trial court as a response to Landmark's motion for summary judgment, it did not contain any attached affidavits or other evidentiary material. The pleading itself, while signed by Jeries, was unsworn and "does not qualify as an affidavit." See *Diakakis v. W. Res. Veterinary Hosp.*, 11th Dist. No. 2004-T-0151, 2006-Ohio-201, at ¶22.

{¶32} Moreover, Jeries' assertion that Landmark did not offer any proof that he owed the debt is contradicted by the record. Landmark attached Shawn Kerin's second affidavit to its initial supplement to its motion for summary judgment. Therein, Kerin states that Jeries owes Landmark $15,000, plus interest. Also, Kerin identifies a pay-off

letter, which provides that the total pay-off amount is in excess of $24,000 – with a principal pay-off amount of approximately $15,000 – and states that the letter was sent to Jeries in December 2007. Finally, we note Landmark attached the original documents creating the line of credit to its motion for summary judgment. Taken together, this evidence supports the trial court's nunc pro tunc judgment entry granting summary judgment in favor of Landmark.

{¶33} Accordingly, we find that Jeries has not set forth a successful showing of excusable neglect, because even if the pleading in question was considered by the trial court at the time it considered Landmark's motion for summary judgment, it would not have affected the outcome, as the pleading did not contain any evidence of the type listed in Civ.R. 56(C) to demonstrate a genuine issue of material fact for trial. Thus, the trial court did not abuse its discretion by finding that Jeries did not advance a successful claim under one of the prongs of Civ.R. 60(B) and denying his motion for relief from judgment.

{¶34} Jeries' first assignment of error is without merit.

{¶35} Jeries' second assignment of error is:

{¶36} "The trial court erred in denying defendant's motion for relief from judgment when it granted summary judgment to plaintiff based upon motions for summary judgment and affidavits filed by an unknown entity not a party to the litigation."

{¶37} Jeries argues he is entitled to relief from judgment because certain documents filed by Landmark refer to itself as "Landmark National II, Corp.," rather than its correct name of "Landmark America, Inc." We disagree. While Landmark referred to itself by an incorrect name, Jeries could have advanced this argument in a response to

Landmark's motion for summary judgment or other pleading to the court. See *Scotlad Foods, Inc. v. Bryant* (Oct. 25, 1995), 2d Dist. No. 95-CA-2, 1995 Ohio App. LEXIS 4758, at *12. However, his failure to do so was "*inexcusable* neglect." Id. (Emphasis added.)

{¶38} Jeries' second assignment of error is without merit.

{¶39} Jeries' third assignment of error is:

{¶40} "The trial court erred in treating defendant's Notice of Appeal as a motion to vacate."

{¶41} The failure to raise an argument at the trial court level bars a party from raising that argument for the first time at the appellate court level. *Harvard Mtge. Corp. v. Phillips*, 11th Dist. No. 2007-G-2783, 2008-Ohio-1132, at ¶37, citing *Discover Bank v. Poling*, 10th Dist. No. 04AP-1117, 2005-Ohio-1543, at ¶8. In this matter, Jeries argues that he did not raise this issue below because "it was unknown at that time that the trial court would construe its conversion of a Notice of Appeal to a Motion to vacate as the basis for denying [his] Motion for Relief from Judgment, finding it a 'second bite at the apple.'" However, the trial court issued a judgment entry on August 19, 2008, wherein it construed Jeries' "desire to appeal" as a Civ.R. 60 motion and denied it as such. Thus, Jeries' argument that he was unaware of the trial court's decision to construe the "desire to appeal" as a Civ.R. 60 motion is contrary to the record. Accordingly, this argument is barred because Jeries did not raise it at the trial court level.

{¶42} Moreover, Jeries' argument fails on its merits. The requirements for a notice of appeal are set forth in App.R. 3(D), which provides, in part:

{¶43} "The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. *** Form 1 in the Appendix of Forms is a suggested form of a notice of appeal."

{¶44} Jeries' "desire to appeal" did not designate the judgment appealed from nor name the court to which the appeal is taken. In addition, the document was not in the format of the suggested notice of appeal form. Finally, the first sentence of the document stated: "I am requesting you please revisit the above captioned case ***." This language clearly suggests that Jeries sought the trial court's reconsideration of its decision. Thus, the trial court did not err by construing the document as a motion for relief from judgment pursuant to Civ.R. 60.

{¶45} Jeries' third assignment of error is without merit.

{¶46} The judgment of the Lake County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.