

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

AMERICAN EXPRESS BANK, FSB,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-L-047
KEITH WALLER,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 09 CV 003064.

Judgment: Affirmed.

Anne M. Smith and Derek W. Scranton, Zwicker & Associates, PC, 2300 Litton Lane, Suite 200, Hebron, KY 41048-0597 (For Plaintiff-Appellee).

James V. Loiacono and John S. Salem, Denman & Lerner Co., L.P.A., 8039 Broadmoor Road, #21, Mentor, OH 44060 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Keith Waller, appeals from the judgment of the Lake County Court of Common Pleas denying his motion for relief from judgment filed pursuant to Civ.R. 60(B). For the reasons discussed in this opinion, we affirm.

{¶2} On September 21, 2009, appellee, American Express Bank, FSB, filed a complaint against appellant alleging he was in default on a credit card account in the amount of \$52,252.37. Appellee attached an account statement and a copy of the credit agreement to the complaint. Appellant filed an answer, denying the allegations.

{¶3} Appellee filed a motion for summary judgment, which was entered on the docket on March 1, 2010. Attached to the motion was an affidavit signed by the Custodian of Records of American Express attesting to, inter alia, appellant's default. Appellee additionally attached a voluminous packet of bank statements and other similar materials relating to the underlying account that was incorporated into the affidavit by reference. Subsequently, on March 2, 2010, the trial court, apparently unaware that the motion was filed a day earlier, issued an entry ordering appellee to "file a motion for summary judgment with documentary evidence." The order stated that if appellee failed to comply by March 10, 2010, the matter would be dismissed for want of prosecution. Appellee responded to the order by a pleading captioned "motion to withhold dismissal." In the motion, appellee apprised the court that its motion for summary judgment had been sent to the court and served on appellant's counsel on February 23, 2010. Although appellant was duly served with all motions, he did not respond to the "motion to withhold dismissal" and never filed a memorandum in opposition to appellee's motion for summary judgment. The case proceeded and, on March 29, 2010, the trial court granted appellee's motion for summary judgment.

{¶4} Appellant, via new counsel, filed a timely appeal of the trial court's entry of summary judgment. Appellant was provided notice that his appellate brief was due on or before June 22, 2010. Appellant, however, failed to file a brief and, on June 30, 2010, this court dismissed the appeal for failure to prosecute.

{¶5} On February 23, 2011, appellant filed a motion for relief from the trial court's March 29, 2010 entry of summary judgment pursuant to Civ.R. 60(B). Appellant's motion first asserted that the judgment was premised upon a mistake and

thus he was entitled to relief under Civ.R. 60(B)(1). Appellant specifically claimed appellee had erroneously informed the court that appellant was personally liable on the debt and, as a result, the court improperly entered summary judgment based upon a mistake of fact; appellant further asserted the court mistakenly entered judgment without compelling appellee to adhere to its March 2, 2010 order to file a motion supported by proper documentary evidence. Appellant additionally asserted, pursuant to Civ.R. 60(B)(4), that because the underlying debt was not a personal debt, it would be inequitable for the judgment to have prospective application against him. Finally, appellant claimed that, viewed in their entirety, the foregoing reasons justify relief under Civ.R. 60(B)(5), the “catch-all” provision of the rule.

{¶6} After considering the motion, the trial court denied appellant relief from judgment. In support, the trial court first observed that appellant was inappropriately using the motion to vacate as a substitute for an appeal. The court underscored that the alleged errors could have been corrected through a direct appeal, which was dismissed for failure to prosecute. Thus, these errors could not be used as a basis for a Civ.R. 60(B) motion to vacate. Regardless of this point, the court further determined that appellant failed to adequately identify a mistake upon which relief could be granted under Civ.R. 60(B)(1). Finally, the court concluded that the judgment was not inequitable as appellant failed to identify any specific post-judgment events that would render the prospective application of the order against him unjust.

{¶7} Appellant filed a timely appeal and has assigned the following two errors for this court’s consideration:

{¶8} “[1.] The trial court erred in denying defendant’s motion to vacate.

{¶9} “[2.] It was error for the trial court to not adhere to the court’s docket when considering defendant’s motion to vacate.”

{¶10} To prevail on a Civ.R. 60(B) motion, the movant must show that (1) he or she has a meritorious claim or defense to present if relief is granted; (2) the party is entitled to relief under one of the grounds set forth under Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where relief is sought under Civ.R. 60(B)(1), (2), or (3), not more than one year after the judgment, order, or proceeding was entered. *GTE Automatic Elec. Inc. v. ARC Indus., Inc.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus.

{¶11} An appellate court reviews a judgment entered on a Civ.R. 60(B) motion for an abuse of discretion. *Strack v. Pelton*, 70 Ohio St.3d 172, 174, (1994). An abuse of discretion is a phrase connoting the court’s judgment that fails to comport with either reason or the record. *Janecek v. Marshall*, 11th Dist. No. 2010-L-059, 2011-Ohio-2994, ¶7.

{¶12} Appellant essentially restates the same arguments on appeal as those alleged in his motion for relief from judgment. In particular, he claims the trial court’s entry of summary judgment was premised upon the mistaken conclusion that he was responsible for the debt. He further asserts the trial court mistakenly proceeded to judgment without requiring appellee to follow its March 2, 2010 order. Further, by allegedly failing to enforce that order, appellant claims he was somehow prevented a meaningful opportunity to respond to oppose appellee’s motion. Finally, appellant asserts that, because he is purportedly not liable for the debt, it would be inequitable to enforce the entry against him. For the reasons discussed below, we do not agree.

{¶13} In its judgment, the trial court correctly observed that a motion filed pursuant to Civ.R. 60(B) may not be used as a substitute for a direct appeal. See e.g. *Elkins v. Elkins*, 11th Dist. No. 2011-T-0033, 2012-Ohio-1461, ¶17. And, furthermore, the trial court rightly concluded that the arguments advanced in appellant's motion, particularly any challenge to perceived irregularities in the manner in which the summary judgment exercise was managed, could have been asserted on direct appeal from the original entry of summary judgment. Appellant filed a timely appeal, but, either intentionally or by oversight, failed to prosecute the matter and the direct appeal was dismissed.

{¶14} Due to his inaction, appellant was turned away at the front door of the appellate process; he cannot, however, after the opportunity for direct appellate review has passed, use Civ.R. 60(B) as a means of indirect entry into appellate review. Because it would be both unjust and contrary to established policy to permit appellant to do indirectly what he was previously barred, by his own failure to act, from doing directly, we hold the trial court did not abuse its discretion in denying appellant relief from judgment. See *Bosco v. Euclid*, 38 Ohio App.2d 40, 43 (8th Dist.1974), see also *Demers v. Brown* 343 F.2d 427, 428 (1st Cir.1965). Thus, for this reason alone, appellant's arguments lack merit.

{¶15} Assuming, however, arguendo, appellant was not precluded from advancing his arguments pursuant to Civ.R. 60(B), his challenges would still lack merit. With respect to appellant's argument asserting he is not responsible for the debt, appellee's motion for summary judgment included documentary evidence supporting its claim that appellant was the account holder. Bank statements, incorporated into the

affidavit of appellee's custodian of records, list appellant's name on the account and include the amount in default. Such evidence was sufficient to shift the burden to appellant to establish a genuine issue of material fact regarding his responsibility on the debt. Because appellant failed to file a response memorandum in opposition to appellee's motion, he failed to create an issue regarding his personal liability on the debt. We discern no mistake in the trial court's entry of summary judgment. Therefore, even if available, appellant was not entitled to relief from that judgment on his theory he was not personally responsible for the debt.

{¶16} Furthermore, we see no mistake in the manner in which the trial court handled appellee's filing of its motion for summary judgment. Although the trial court issued an order directing appellee to file a motion with supporting documentary evidence a day after the motion was actually filed, appellee, by a "motion to withhold dismissal," notified the court and opposing counsel that it had already complied with the order. The court did not enter an additional order indicating the March 1, 2010 filing was insufficient nor did it dismiss appellee's cause of action on March 10, 2010 for failure to prosecute. It is therefore reasonable to conclude appellee's motion for summary judgment, filed on March 1, 2010, was sufficient to meet the requirements set forth in the court's March 2, 2010 order. Appellee's March 1, 2010 filing, therefore, rendered the court's March 2, 2010 order moot.

{¶17} Appellant had an opportunity to respond to both the "motion to withhold dismissal" and the motion for summary judgment, but failed to do so. Given the circumstances of the case, we therefore hold that, even if Civ.R. 60(B) was an available

remedial tool in this case, there is simply no legal or equitable basis justifying relief from the trial court's March 29, 2010 entry of summary judgment.

{¶18} Appellant's assignments of error are without merit.

{¶19} For the reasons discussed in this appeal, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

DIANE V. GRENDALL, J.,

THOMAS R. WRIGHT, J.,

concur.