

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

NATIONAL CHECK BUREAU, INC.	:	
	:	
<i>Plaintiff-Appellant</i>	:	Appellate Case No. 21557
	:	
v.	:	Trial Court Case No. 05-CVF-905
	:	
CARL E. JOHNSON	:	(Civil Appeal from
	:	Dayton Municipal Court)
<i>Defendant-Appellee</i>	:	

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O P I N I O N

Rendered on the 9th day of March, 2007.

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STACIE E. BARHORST, Atty. Reg. #0072711, BARHORST & ASSOCIATES, P.C.,
2000 W. Haddon Avenue, Suite 210, Chicago, Illinois 60622.
Attorney for Plaintiff-Appellant

JEFFREY D. SLYMAN, Atty. Reg. #0010098, 575 South Dixie Drive, Vandalia, Ohio
45377
Attorney for Defendant-Appellee Security National Bank & Trust Company

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BROGAN, J.

{¶ 1} National Check Bureau, Inc. (hereinafter “NCB”) appeals from the judgment of the Dayton Municipal Court vacating a judgment it recovered against Appellee, Carl Johnson.

{¶ 2} This matter began on January 26, 2005, when NCB filed a complaint against Johnson seeking a judgment against Johnson in the amount of Fourteen-Thousand, Six Hundred Forty-Two Dollars and Fifteen Cents (\$14,642.15) due upon a credit card obligation. On February 24, 2005, Attorney Jeffrey Slyman filed an answer on Johnson's behalf denying the allegations of the complaint. On March 3, 2005, NCB's counsel served Johnson through Slyman with a set of interrogatories and a request for admissions. On April 5, 2005, Slyman submitted a set of interrogatories to NCB through its counsel. On June 10, 2005, NCB's counsel filed credit card statements reflecting the balance due on Johnson's account. On July 8, 2005, the court set a trial date for October 21, 2005, and then on July 15, 2005, re-set the trial for November 22, 2005.

{¶ 3} NCB moved for summary judgment on July 18, 2005. Counsel, Susan Appel, attached a certificate of service stating that she served Johnson's counsel by ordinary mail a copy of the motion. Attached to the motion was the affidavit of Pamela Harbaugh, the keeper of the records concerning Johnson's account. The trial court granted NCB's summary judgment motion and entered judgment in its favor on November 18, 2005. On November 22, 2005, the day previously set for trial, the trial court entered an order permitting Johnson to move for Civ.R. 60(B) relief by December 13, 2005. On December 13, 2005, counsel for Johnson moved for Civ.R. 60(B) relief and, in an accompanying memorandum, stated he first became aware that a judgment had been rendered against Johnson when he appeared for trial on November 22, 2005. He asserted that he did not receive a copy of NCB's summary judgment motion. Counsel requested that the judgment be vacated and the matter set for trial. In the

alternative, counsel requested that he be given two weeks to respond to the summary judgment motion of which he now had a copy. NCB's counsel requested that the court deny Johnson's motion. Counsel attached the affidavit of Pamela Harbaugh who stated, "NCB's internal records state NCB 'mailed the motion for summary judgment to court with copy to defendant's attorney.'" This notation was made July 14, 2005 at 11:41 a.m.

{¶ 4} On March 6, 2006, visiting judge Susan Anderson conducted a hearing on Johnson's motion. Counsel for the plaintiff represented to the court that the motion for summary judgment was mailed to counsel for Johnson and it was not returned to her. Counsel for Johnson stood on his previous representation in the Civ.R. 60(B) motion that he did not receive a copy of the plaintiff's summary judgment motion. He also stated that his client applied for the credit card corporately rather than individually. (T. 4). The court then found that the defendant's attorney did not receive the summary judgment motion and accepted "the possibility there may be a meritorious defense to the case." (T. 5). The court then granted Johnson's motion to vacate the summary judgment previously entered.

{¶ 5} In three related assignments of error, NCB argues that the trial court abused its discretion in vacating the judgment previously awarded to it. In its first assignment, NCB argues that Johnson failed to present a meritorious defense as required by Civ.R. 60(B). In its second assignment, NCB argues that Johnson did not demonstrate excusable neglect for not responding to its motion for summary judgment. Lastly, NCB argues that Johnson's motion was not timely made. Johnson's counsel argues the motion was properly granted because he did not receive a copy of the

summary judgment motion and his motion for relief from the judgment was filed as soon as he learned the summary judgment was entered or within the time granted by the court for filing the motion.

{¶ 6} In this matter, the trial court found that Johnson’s counsel did not receive a copy of NCB’s motion for summary judgment. That finding is entitled to deference by us. Although counsel did not provide an affidavit, he made a professional representation to the court in his memorandum in support of his motion that he did not receive the motion. NCB did not present an affidavit of the person who mailed the motion to Slyman. If Johnson’s counsel was unaware of the pending matter, the court denied his client due process when it entered the summary judgment. We have held “the demonstration of the existence of a meritorious defense requires a proffer of evidentiary materials upon which the movant would rely in responding” to the summary judgment motion. *Dysert v. State Auto Mut. Ins. Co.* (Apr. 23, 1999), Miami App. No. 98-CA-46, 1999 WL 234779, at * 2. We believe the court could infer from counsel’s representation regarding a defense to the complaint that Johnson would provide an affidavit that he applied for the credit card in a corporate capacity, not an individual one. See *Id.* Lastly, the motion for relief under the rule was timely made.

{¶ 7} We find no abuse of discretion present in the trial court’s granting Johnson relief pursuant to Civ.R. 60(B). See *Rogers v. United Presidential Life Ins. Co.* (1987), 36 Ohio App.3d 126, 521 N.E.2d 845.

{¶ 8} The judgment of the trial court is Affirmed.

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FAIN and GRADY, JJ., concur.

Copies mailed to:

Stacie Barhorst
Jeffrey D. Slyman
Hon. Bill C. Littlejohn