

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

CAVALRY PORTFOLIO :
SERVICES, L.L.C. :
Plaintiff-Appellee : C.A. CASE NOS. 21532
21664

vs. : T.C. CASE NO. 05-CV-6012

WILLIE A. TERRELL, JR. : (Civil Appeal from
Common Pleas Court)
Defendant-Appellant :

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O P I N I O N

Rendered on the 23rd day of March, 2007.

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1010, Cincinnati, OH 45202
Attorney for Plaintiff-Appellee

Willie A. Terrell, Jr., 1721 Radio Road B-6, Dayton, OH 45403
Defendant-Appellant, Pro Se

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GRADY, J.

{¶ 1} Defendant, Willie A. Terrell, Jr., appeals from an
order denying his Civ. R. 60(B) motion for relief from summary
judgment for Plaintiff, Cavalry Portfolio Services, L.L.C.

{¶ 2} Terrell incurred credit card debt in excess of
\$50,000 with MBNA. In 2004, MBNA assigned the debt to eCast

Settlement Corporation, which then assigned the debt to Cavalry.

{¶ 3} On August 3, 2005, Cavalry commenced the underlying action against Terrell seeking \$53,371.05, plus costs, pre-judgment interest, and post-judgment interest. Cavalry served Terrell with requests for admission, interrogatories, and requests for production of documents. Terrell did not respond to Cavalry's discovery requests. On December 19, 2005, Terrell filed an answer to Cavalry's complaint.

{¶ 4} On December 30, 2005, Cavalry moved for summary judgment based on Terrell's failure to answer Cavalry's requests for admissions. Terrell did not respond to Cavalry's motion. The trial court granted Cavalry's motion for summary judgment.

{¶ 5} On February 2, 2006, Terrell moved the trial court to reconsider its decision granting summary judgment and requested a hearing on his motion. The trial court treated Terrell's motion as a motion for relief from judgment pursuant to Civ. R. 60(B).

{¶ 6} In his motion, Terrell stated that he had requested a copy of the debt from Cavalry but had not received one. Terrell failed to present any evidence in support of his motion, and did not explain why he was entitled to relief or a

hearing under Civ. R. 60(B). On February 28, 2006, the trial court overruled Terrell's motion. Terrell filed a timely notice of appeal.

{¶ 7} On April 19, 2006, Terrell filed a motion to stay execution of the judgment. The trial court overruled the motion on June 6, 2006. Terrell filed a timely notice of appeal from the trial court's decision. Terrell's two appeals were consolidated on October 3, 2006.

ASSIGNMENT OF ERROR

{¶ 8} Terrell failed to state an assignment of error in his brief, as required by App. R. 16(A)(3). Reviewing his brief, it appears that Terrell believes that the trial court erred by not holding an evidentiary hearing before ruling on his Rule 60(B) motion. Further, Terrell argues that counsel for Cavalry made several mistakes by not providing information requested by Terrell, and by not acknowledging that Terrell had entered into a settlement agreement with MBNA.

{¶ 9} Civ. R. 60(B) provides that "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."

{¶ 10} The standard of review of a trial court's decision on a Civ. R. 60(B) motion is an abuse of discretion standard.

Tidwell v. Quaglieri, Greene App. No. 06-CA-0036, 2007-Ohio-569, _21. "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." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (citations omitted).

{¶ 11} Terrell has failed to demonstrate that he is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1)-(5). Terrell argues that counsel for Cavalry made mistakes by not providing information requested by Terrell and not acknowledging that Terrell had entered into a settlement agreement with MBNA. We note that Terrell did not file any discovery requests in this matter and did not ask the trial

court to order Cavalry to provide any information. Consequently, we do not find that Terrell is entitled to Rule 60(B) relief for Cavalry's alleged failure to provide information.

{¶ 12} Further, Terrell is not entitled to Rule 60(B) relief due to Cavalry's alleged failure to acknowledge the existence of a settlement agreement between Terrell and MBNA.

There is no evidence in the record supporting the existence of such an agreement.

{¶ 13} Terrell references two letters, which he attached to his appellate brief as Exhibits D and E. One of the letters is from a representative of MBNA and the other is from counsel for Cavalry. Both letters discuss settlement terms relating to the credit card debt. But neither letter was made a part of the record before the trial court.

{¶ 14} Terrell had ample opportunity to present these letters to the trial court in opposition to Cavalry's motion for summary judgment or in support of his Civ. R. 60(B) motion. He failed to do so. "A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail* (1978), 54 Ohio St.2d 402, 377 N.E.2d 500, paragraph one of the syllabus. We

note that if a valid, settlement agreement existed between Terrell and MBNA or Terrell and Cavalry, Terrell may be able to seek further relief by commencing an action against the party with which he settled.

{¶ 15} Finally, Terrell argues that the trial court erred by failing to hold a hearing on his 60(B) motion. The mere filing of a motion for relief from judgment under Civ. R. 60(B) does not automatically entitle the movant to a hearing on the motion. *Scotland Foods, Inc. v. Bryan* (Oct. 25, 1995), Clark App. No. 95-CA-2, citing *Admoeit v. Baltimore* (1974), 39 Ohio App.2d 97, 103, 316 N.E.2d 469. The movant has the burden of demonstrating in the motion that he is entitled to an evidentiary hearing. *Id.* "Before the trial court must schedule a hearing on a motion for relief from judgment, 'the movant must do more than make bare allegations that he or she is entitled to relief.'" *Cook Family Investments v. Billings*, Lorain App. Nos. 05CA008689, 05CA008691, 2006-Ohio-764, _12 (citations omitted).

{¶ 16} In his 60(B) motion, Terrell failed to explain why he was entitled to relief under Civ. R. 60(B) or why he needed a hearing. Therefore, on this record, we cannot find that the trial court erred in not holding a hearing on Terrell's Civ. R. 60(B) motion.

{¶ 17} The assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. and FAIN, J., concur.

Copies mailed to:

Cliff G. Linn, Esq.
Willie A. Terrell, Jr.
Hon. Gregory F. Singer