[Cite as *Spencer v. Lair*, 2009-Ohio-3450.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TIMOTHY LEE SPENCER

Plaintiff-Appellant

-vs-

RONALD K. LAIR, ET AL.

Defendants-Appellees

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. W. Scott Gwin, J.
Hon. William B. Hoffman, J.

Case No. 2008CA00175

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2005CV00046
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	July 6, 2009

APPEARANCES:

For Plaintiff-Appellant

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For Defendants-Appellees

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Farmer, P.J.

{¶1} On January 5, 2005, appellant, Timothy Spencer, filed a complaint against appellees, Advantage Inspections, Inc., its employee, William Brandyberry, Ronald and Cynthia Lair, Elaine Croxton, and Croxton Realty Company, claiming negligence, breach of contract, breach of warranty, negligent supervision, failure to disclose, fraud, and violations of the consumer sales practices act regarding a real estate sale.

{¶2} On March 28, 2005, appellees Brandyberry and Advantage filed a motion to dismiss and compel arbitration, or in the alternative, stay the proceedings until after arbitration as provided for in the contract between appellant and Advantage. By judgment entry filed April 20, 2005, the trial court stayed the trial of the action until the arbitration was completed per the contract.

{¶3} On June 28, 2006, a notice of dismissal with prejudice was filed, stating "[t]he parties" agree the matter is settled and dismissed with prejudice.

{¶4} On March 3, 2008, appellant filed a Civ.R. 60(A) motion for relief from judgment, claiming a clerical error as only Mr. Brandyberry and Advantage were to be dismissed and instead all of the parties were inadvertently dismissed. By judgment entry filed July 1, 2008, the trial court denied the motion, finding Civ.R. 60(A) permits the correction of clerical mistakes and does not permit any substantive changes in judgment and the relief requested was a substantive change.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE TRIAL COURT SHOULD HAVE GRANTED THE PLAINTIFF-APPELLANT'S MOTION FOR RULE 60(A) RELIEF FROM JUDGMENT."

II

{¶7} "THE TRIAL COURT JUDGE SHOULD HAVE RECUSED HIMSELF BASED UPON HIS PAST AND PRESENT RELATIONSHIP WITH ONE OF THE DEFENDANT-APPELLEES. THIS RELATIONSHIP WAS NOT REVEALED UNTIL THE FINAL HEARING."

I

{¶8} Appellant claims the trial court erred in failing to grant his motion for relief from judgment pursuant to Civ.R. 60(A). We disagree.

{¶9} Civ.R. 60(A) governs clerical mistakes and states the following:

{¶10} "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court."

{¶11} "A 'clerical mistake' has been defined as follows:

{¶12} "***The term "clerical mistake" does not mean that it must be made by a clerk. The phrase merely describes the type of error identified with mistakes in transcription, alteration or omission of any papers and documents which are traditionally or customarily handled or controlled by clerks but which papers or documents may be

handled by others. *It is a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney.****" (Emphasis added.) *In re Merry Queen Transfer Corp.,* (E.D.N.Y.1967) 266 F.Supp. 605, 607." *Dentsply v. International, Inc. v. Kostas* (1985), 26 Ohio App.3d 116, 118.

{¶13} "Civ.R. 60(A) does not authorize substantive changes in orders, judgments on decrees. *Musca v. Chagrin Falls* (1981), 3 Ohio App.3d 192, paragraph one of the syllabus. Civ.R. 60(A) is not to be used as a vehicle for relitigating matters that have already been litigated and decided, to correct adjudicatory errors that were subject to appeal, or for changing that which was deliberately done. *Hiles v. Hiles* (December 8, 1983), Cuyahoga App. No. 46253, unreported 7." *Walker v. Reno Hotel, Inc.* (June 16, 1988), Cuyahoga App. No. 54077.

{¶14} In his motion filed March 3, 2008, appellant argued the grounds for relief were based on the mistaken filing of a general dismissal:

{¶15} "Plaintiff grounds this motion that the Court inadvertently dismissed the entire action when, pursuant to the Release attached as Exhibit 'A', only Defendants William E. Brandyberry and Advantage Home Inspections, Inc. were to be dismissed."

{¶16} In support of his motion, appellant attached the general release of his claims against Mr. Brandyberry and Advantage, although the release was not companied by any affidavit.

{¶17} The June 28, 2006 notice of dismissal states, "The parties do hereby agree that the captioned matter is settled and dismissed with prejudice at Defendants'

costs." It is signed by the attorney for Mr. Brandyberry and Advantage, and notes "per phone consent" of appellant's attorney.

{¶18} Appellant argues the only settlement, release, and dismissal was in favor of Mr. Brandyberry and Advantage; however, the dismissal notice generally states "[t]he parties," thereby including the Lairs, Elaine Croxton, and Croxton Realty Company.

{¶19} In its July 1, 2008 judgment entry denying the Civ.R. 60(A) motion, the trial court found the relief requested was a substantial change and not a correction of a clerical error à la *Dentsply,* supra. Appellant's argument is that unbeknownst to the Lairs, Elaine Croxton, and Croxton Realty Company, they were beneficiaries of an obvious error by the attorney for Mr. Brandyberry and Advantage.

{¶20} As noted, a Civ.R. 60(A) clerical correction applies to inadvertent clerical errors and cannot be employed to change something that was deliberately done. A review of the record reveals because of an arbitration clause between appellant and Advantage, "the trial of the action" against all the parties, including the Lairs, Elaine Croxton, and Croxton Realty Company, was stayed by the trial court on April 20, 2005. This stay may justify the fact that the attorney for Mr. Brandyberry and Advantage considered them to be "the parties" as the notice of dismissal reflects.

{¶21} Upon review, we concur with the trial court that Civ.R. 60(A) was not the proper vehicle, but Civ.R. 60(B)(5) could have been utilized. The trial court did not err in denying appellant's Civ.R. 60(A) motion for relief from judgment.

{¶22} Assignment of Error I is denied.

II

{¶23} Appellant claims the trial court should have recused itself from hearing the issue. We disagree.

{¶24} On the day of the Civ.R. 60(A) motion hearing, the trial court stated the following:

{¶25} "THE COURT: ***Before we begin, I advised Mr. Giua, I have advised Mr. Holland and I am advising Mr. Murphy, that I know Mr. and Mrs. Lair. They are friends of mine, have been friends for a long time. They are friends of mine, have been friends for a long time. They are friends of my niece and nephew and so I have on a couple of occasions socialized with them. I have also referred them to Mr. Giua." T. at 3.

{¶26} We find this disclosure fulfilled the trial court's obligation under Canon 3 of the Code of Judicial Conduct. The trial court continued the discussion and invited a response from appellant:

{¶27} "THE COURT: Might have been. Anyway, there is a relationship there. I will -- I don't think I paid attention to this until this morning, is there -- I am going to make a decision, but if there's any objection to that, I will hear it now. Mr. Holland?

{¶28} "MR. HOLLAND: I trust the Court's ability to rule based upon the law.

{¶29} "THE COURT: Mr. Murphy?

{¶30} "MR. MURPHY: No objection.

{¶31} "THE COURT: Mr. Giua?

{¶32} "MR. GIUA: No." T. at 4.

{¶33} Appellant's counsel did not object to the trial court making a decision. Under the doctrine of "invited error," it is well-settled that "a party will not be permitted to

take advantage of an error which he himself invited or induced the trial court to make." *State ex rel. Smith v. O'Connor* (1995), 71 Ohio St.3d 660, 663, citing *State ex rel. Fowler v. Smith* (1994), 68 Ohio St.3d 357, 359. See, also, *Lester v. Leuck* (1943), 142 Ohio St. 91, paragraph one of the syllabus. As the Supreme Court of Ohio has stated:

{¶34} "The law imposes upon every litigant the duty of vigilance in the trial of a case, and even where the trial court commits an error to his prejudice, he is required then and there to challenge the attention of the court to that error, by excepting thereto, and upon failure of the court to correct the same to cause his exceptions to be noted. It follows, therefore, that, for much graver reasons, a litigant cannot be permitted, either intentionally or unintentionally, to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible." *Lester* at 92-93, quoting *State v. Kollar* (1915), 142 Ohio St. 89, 91.

{¶35} The proper procedure would have been to invoke R.C. 2701.03 which states the following:

{¶36} "(A) If a judge of the court of common pleas allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the supreme court in accordance with division (B) of this section."

{¶37} Because of the trial court's late disclosure of its relationship with the Lairs, a motion for a continuance would have been an available remedy.

{¶38} Upon review, we find the record demonstrates that appellant waived any claim and argument for recusal.

{¶39} Assignment of Error II is denied.

{¶40} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, P.J.

Gwin, J. and

Hoffman, J. concur.

s/Sheila G. Farmer

s/W. Scott Gwin

s/William B. Hoffman

JUDGES

SGF/jbp 0624

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

TIMOTHY LEE SPENCER	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
RONALD K. LAIR, ET AL.	:	
Defendants-Appellees	:	CASE NO. 2008CA00175

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed. Costs to appellant.

s/Sheila G. Farmer

s/W. Scott Gwin

s/William B. Hoffman

JUDGES