[Cite as *Hussein v. Hafner & Shugarman Ents., Inc.*, 2011-Ohio-4738.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Fadhil A. Hussein, M.D., et al.	Court of Appeals No. WD-10-083
Appellees	Trial Court No. 2006CV0540
v.	
Hafner & Shugarman Enterprises, Inc., et al.	**DECISION AND JUDGMENT**
Appellant	Decided: September 2, 2011

* * * * *

Theodore M. Rowen and Anastasia K. Hanson, for appellees.

Marvin A. Robon and Larry E. Yunker II, for appellant Jeffrey Shugarman.

* * * * *

YARBROUGH, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas denying defendant-appellant Jeffrey Shugarman's "Rule 60(B) Motion to Set Aside Judgment and Motion to Enforce Settlement Agreement." For the reasons that follow, we affirm.

{¶ 2} As this is the third time this case has come before us, we will provide a recitation of only those facts giving rise to this appeal. For a full discussion of the case history, see *Hussein v. Hafner & Shugarman Ents., Inc.*, 6th Dist. No. WD-09-020, 2010-Ohio-4205.

{¶ 3} On December 9, 2008, an arbiter entered an award finding Shugarman individually liable for damages of $524,015.56, stemming from a construction contract between Hafner & Shugarman Enterprises, Inc. and plaintiffs-appellees Fadhil Hussein, M.D. and Raya Ahmed, M.D. Neither Shugarman[1] nor his counsel appeared at or participated in the arbitration. Appellees subsequently filed an application with the trial court for an order confirming the arbitration award. The record indicates that Shugarman did not file an objection to the arbitration award despite counsel's brazen statements to the contrary in his brief and at oral argument.

{¶ 4} On February 25, 2009, the trial court entered an order modifying the arbitration award to set aside the personal liability of Shugarman. Appellees timely appealed to this court (the second appeal), arguing that the trial court's modification was in error. Shugarman did not enter an appearance nor file a brief in the appeal.

{¶ 5} While that appeal was pending, on July 12, 2010, the trial court held a status conference at which the parties discussed a settlement agreement. Following the

[1]The arbiter awarded $524,015.56 in favor of appellees and against defendants Hafner & Shugarman Ents., Inc., David Hafner, and Jeffrey Shugarman, individual and corporate. Only Shugarman is a party to the current appeal, and thus we will frame our discussion of the facts relative to him.

conference, appellees were to draft a proposed judgment entry and circulate it to all parties, who would then have until August 2, 2010, to raise any objections. The terms of that settlement agreement are now disputed. Appellees contend that the agreement involved reinstating the arbitrator's award and dismissing all remaining claims and counterclaims against all parties, thus resulting in Shugarman remaining personally liable pursuant to the arbitration award. In contrast, Shugarman contends that the agreement simply was to dismiss all unresolved claims of each party against the other, in effect dismissing the disputed issue of Shugarman's personal liability, and leaving only Hafner & Shugarman Enterprises, Inc. as the liable party. The proposed judgment entry, which appellees circulated to the parties on July 14, 2010, states in relevant part:

{¶ 6} "* * * the Court dismisses with prejudice, each party to bear its own costs, all of the remaining claims of every form and type filed in the within matter, whether they have been designated as claims, complaints, counterclaims, cross-claims or third party claims, against [appellees] and Defendants Hafner & Shugarman Enterprises, Inc. d/b/a Hafner Crafted Homes; Jeffrey Shugarman; David Hafner * * *.

{¶ 7} "Further, pursuant to the Arbitrator's Award issued on January 7, 2009 and affirmed by this Court in its Order, issued February 25, 2009, this Order shall serve as evidence of the release of certain mechanic's liens filed by Defendant Hafner & Shugarman Enterprises, Inc. and further described in Exhibits A and B, attached hereto, and it is (sic)."

{¶ 8} Appellees circulated this proposed judgment entry, and Shugarman did not raise an objection. On July 30, 2010, appellees sent the proposed judgment entry to the trial court. On August 13, 2010, appellees filed in this court a notice of voluntary dismissal of their appeal of the trial court's February 25, 2009 order. However, on that same day, and prior to this court receiving the notice of voluntary dismissal, we issued our opinion in *Hussein v. Hafner & Shugarman Ents., Inc.*, supra, in which we reversed the trial court and reinstated the personal liability of Shugarman.

{¶ 9} Subsequent to our August 13, 2010 decision, appellees revised their proposed judgment entry by inserting one line referencing this court's decision. The revised proposed judgment entry states:

{¶ 10} "* * * the Court dismisses with prejudice, each party to bear its own costs, all of the remaining claims of every form and type filed in the within matter, whether they have been designated as claims, complaints, counterclaims, cross-claims or third party claims, against [appellees] and Defendants Hafner & Shugarman Enterprises, Inc. d/b/a Hafner Crafted Homes; Jeffrey Shugarman; David Hafner * * *.

{¶ 11} "Further, pursuant to the Arbitrator's Award issued on January 7, 2009 and affirmed by this Court in its Order, issued February 25, 2009, *and the Court of Appeals decision of August 13, 2010, reinstating the individual personal liability of David Hafner and Jeffrey Shugarman*, this Order shall serve as evidence of the release of certain mechanic's liens filed by Defendant Hafner & Shugarman Enterprises, Inc. and further

described in Exhibits A and B, attached hereto, and it is (sic)." (Changes represented by italics.)

{¶ 12} On August 16, 2010, appellees sent a copy of this revised proposed judgment entry to the court and to all parties. Shugarman again did not raise an objection. The amended proposed judgment entry as written was then entered as the order of the trial court on September 7, 2010. On September 20, 2010, the trial court entered an order amending the September 7, 2010 order to include Exhibits A and B. However, the language of the order remained unchanged.

{¶ 13} In October 2010, appellees then sought a certificate of judgment against Shugarman from the clerk of courts. The clerk issued the requested certificate, but the certificate listed Hafner & Shugarman Enterprises, Inc. among the plaintiffs. In response to this, appellees filed a motion to clarify the court's September 20, 2010 order to reflect the fact that any claims of Hafner & Shugarman Enterprises, Inc. were dismissed, and that judgment was granted only in appellees' favor. Apparently, as alluded to in other filings in the record, Shugarman filed a response to this motion, however, he filed the response under the wrong case number and it was not considered by the trial court nor made part of the record on appeal. On October 25, 2010, the trial court granted appellees' motion to clarify, and issued the following order:

{¶ 14} "* * * the Court's Amended Judgment Entry entered on September 20, 2010 is clarified to reflect that Plaintiff Hafner & Shugarman Enterprises, Inc. is dismissed as a party; all of its claims are dismissed; and it is not entitled to judgment.

{¶ 15} "Further, judgment is entered in this matter in favor of [appellees] in the amount of $332,254.55 as compensatory damages and $191,761.01 for attorney's fees and costs, a total judgment of $524,015.56, against Defendant Jeffrey M. Shugarman a/k/a Jeffrey M. Shuggarman a/k/a Jeff Sugarman and against Defendant Hafner & Shugarman Enterprises, Inc."

{¶ 16} Shortly thereafter, on November 17, 2010, Shugarman filed a Civ.R. 60(B) motion to set aside the judgment and a motion to enforce the terms of the settlement agreement. In support of his motions, Shugarman argued that the parties had agreed in the July 12, 2010 conference to release him from any personal liability, and consequently it would be unjust to impose liability on him now, even in light of this court's August 13, 2010 decision. On December 6, 2010, the trial court denied these motions stating that "[t]he Judgment Entry of September 20, 2010, reinstating the personal liability of Defendant Shugarman was required by the appellate decision. * * * Now that [the arbitration and the appeal from the Arbitrator's Decision] have been decided, his objections are moot * * *." Shugarman timely appealed and now raises the following four assignments of error:

{¶ 17} "1. The Trial Court Erred when it entered judgment in favor of Plaintiffs on a non-justiciable issue. (See Sept. 20, 2010 J.E. reinstating personal liability of Defendant Shugarman after Settlement).

{¶ 18} "2. The Trial Court Erred when it permitted Plaintiffs to modify the Judgment Entry memorializing the terms of Settlement between the parties. (See Oct. 21, 2010 J.E.).

{¶ 19} "3. The Trial Court Abused its Discretion when it failed to consider Defendant/Appellant's 60(b) (sic) motion. (See Dec. 3rd, 2010 J.E., p. 1, ¶2).

{¶ 20} "4. The Trial Court Erred when it refused to exercise its jurisdiction upon motion to enforce the terms of settlement. (See Dec. 3rd, 2010 J.E., p. 1, ¶2)."

{¶ 21} We start initially by identifying that this is an appeal from a denial of a Civ.R. 60(B) motion. Addressing Shugarman's third assignment of error first, we hold that the trial court did not abuse its discretion when it denied Shugarman's Civ.R. 60(B) motion for relief from judgment. An appellate court applies an abuse of discretion standard in reviewing the trial court's ruling on a motion for relief from judgment under Civ.R. 60(B). *Moore v. Emmanuel Family Training Ctr., Inc.* (1985), 18 Ohio St.3d 64, 66. An abuse of discretion "connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying this standard of review, we may not substitute our judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶ 22} To prevail on a motion under Civ.R. 60(B), the moving party must demonstrate "(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 enumerated in Civ.R.

60(B)(1) through (5); and (3) that the motion is made within a reasonable time, and, where the grounds for 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 Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150-151. "These requirements are independent and in the conjunctive; thus the test is not fulfilled if any one of the requirements is not met." *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174. Further, these three requirements must be shown by "operative facts" demonstrating that the moving party is entitled to relief. *Black v. Pheils*, 6th Dist. No. WD-03-045, 2004-Ohio-4270, ¶ 68 (citing *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 21). Such operative facts should be supported by evidence in the form of "affidavits, depositions, written admissions, written stipulations, answers to interrogatories, or other sworn testimony." *East Ohio Gas Co. v. Walker* (1978), 59 Ohio App.2d 216, 221.

{¶ 23} Shugarman's Civ.R. 60(B) motion and the supporting affidavit of his attorney focus solely on Shugarman's argument that a settlement agreement existed between the parties, dismissing Shugarman from all personal liability, and therefore, it would be "a tragedy of justice" to enforce the judgment of $524,015.56 against him. Although not characterized as such, presumably this is Shugarman's demonstration of a meritorious defense. However, we need not determine whether this defense is indeed meritorious because Shugarman has not demonstrated that he is entitled to relief under any of the grounds listed in Civ.R. 60(B)(1)-(5).

{¶ 24} Civ.R. 60(B) allows a court to relieve a party from final judgment for: "(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence * * *; (3) fraud * * *, 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."

{¶ 25} Although Shugarman's motion and his attorney's supporting affidavit do not identify any of the grounds for relief under Civ.R. 60(B), Shugarman's appellate brief intimates that he is entitled to relief under Civ.R. 60(B)(4). Specifically, Shugarman argues that "[t]he Trial Court had an obligation to consider events that occurred that impacted the equity of the judgment entry," and that it was no longer equitable for the judgment to have prospective application.

{¶ 26} Shugarman asserts that following the July 14, 2010 settlement agreement, he began performance of the settlement by releasing certain security interests and foregoing all counterclaims. After the beginning of his performance, this court's August 13, 2010 decision was released and appellees revised the proposed judgment entry to reflect Shugarman's personal liability, contrary to the settlement agreement. Therefore, Shugarman concludes that "the intervening circumstance of a partially performed settlement agreement and the prejudice to [Shugarman] that would result from

the late imposition of liability was grounds to disregard [this court's August 13, 2010 decision]," thereby resulting in Shugarman having no personal liability. We disagree.

{¶ 27} The intervening circumstances that Shugarman complains of actually occurred prior to the trial court's judgment entry imposing personal liability on him on September 7, 2010. In fact, following this court's August 13, 2010 decision, appellees revised the proposed judgment entry and circulated it to all parties, including Shugarman. Shugarman contends in his appellate brief that "[t]he Trial Court was well aware that the Judgment Entry as proffered no longer reflected the material terms of the Settlement Agreement." However, Shugarman did not object to the proposed judgment entry, a fact that is not inconsistent with his failure to participate in arbitration, failure to object to the arbitration award, or his failure to enter an appearance or file a brief in the appeal directly relating to his personal liability. As such, we do not think that it was inequitable for the trial court to enforce the proposed judgment entry. Thus, Shugarman has failed to demonstrate that he is entitled to relief under Civ.R. 60(B)(4).

{¶ 28} Because Shugarman has failed to satisfy all three requirements of *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, supra, we therefore hold that the trial court did not abuse its discretion in denying Shugarman's Civ.R. 60(B) motion. Accordingly, Shugarman's third assignment of error is not well-taken.

{¶ 29} As to the remaining assignments of error, it is well established that Civ.R. 60(B) relief is not a substitute for an appeal. *Blasco v. Mislik* (1982), 69 Ohio St.2d 684, 686. Consequently, our analysis is limited to whether the trial court abused its discretion

in denying Shugarman's Civ.R. 60(B) motion, not whether the trial court's underlying decision on the merits is correct. Id. Here, Shugarman's first and second assignments of error unambiguously attack the merits of the trial court's underlying decision—that is, the terms of the settlement agreement—and not the denial of the Civ.R. 60(B) motion itself. Similarly, Shugarman's fourth assignment of error also attacks the merits of the trial court's underlying decision because it essentially argues that the trial court's September 7, September 20, and October 25, 2010 judgments do not reflect the true settlement agreement between the parties, and that the trial court abused its discretion in not enforcing Shugarman's view of the settlement agreement. Accordingly, Shugarman's first, second, and fourth assignments of error are not well-taken.

{¶ 30} For the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed. Shugarman is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, P.J.

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JUDGE

Stephen A. Yarbrough, J.
CONCUR.

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JUDGE