[Cite as *Van Scyoc v. Desai*, 2012-Ohio-3864.]

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

Joseph Van Scyoc	Court of Appeals No. L-11-1308
Appellant	Trial Court No. CI0201003885
v.	
Henry Desai, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: August 24, 2012

* * * * *

Joseph Jacobs, Jr., for appellant.

Mark J. Metusalem, for appellees.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals the denial of his application for relief from judgment entered in the Lucas County Court of Common Pleas. Because we conclude that the trial court properly denied the motion because appellant failed to demonstrate one of the Civ.R. 60(B)(1)-(5) grounds, we affirm.

{¶ 2} On October 14, 2007, appellant, Joseph Van Scyoc, cut his foot on the concealed sharp edge of a water jet in a Jacuzzi while a guest at a Maumee hotel. Appellant claims serious injury. Appellee Shree Shiv Corporation owns the hotel. Appellee Henry Desai is its general manager.

{¶ 3} On October 16, 2009, appellant filed a complaint against appellees alleging negligence and breach of contract. Appellant subsequently voluntarily dismissed this suit and refiled on May 10, 2010.

{¶ 4} On July 8, 2011, appellees moved for summary judgment on grounds that appellant's complaint was filed after the two-year statute of limitations had run and a denial of negligence of appellees. The second ground was supported by the affidavit of appellee Desai who averred that, even though the hotel has a system in place to find and repair defects in guest rooms, the hotel had no notice of any problem with the Jacuzzi on which appellant alleged injury. Indeed, appellee Desai stated, the hotel had never had a complaint about or injury from any Jacuzzi in its rooms.

{¶ 5} Appellant responded with documentation that suggested appellees attempted to conceal their identity or delay service, thus tolling the statute of limitations. He did not respond to appellees' assertion that they were without negligence.

{¶ 6} In a judgment entered September 14, 2011, the trial court concluded that appellant had presented evidence sufficient to create a question of fact with respect to the statute of limitations. On the issue of negligence, however, the court granted summary judgment to appellees. The court found appellant had presented no evidence in the

record to suggest that appellees failed to maintain the room or the Jacuzzi or had actual or constructive notice of a defect and failed to address it.

{¶ 7} On October 7, 2011, appellant filed a motion for relief from judgment pursuant to Civ.R. 60(B). On October 17, 2011, appellant filed a notice of appeal. On October 31, 2011, this court sua sponte dismissed appellant's appeal as having been filed beyond the 30 days within which an appeal must be perfected pursuant to App.R. 3 and 4. *Van Scyoc v. Desai*. 6th Dist. No. L-11-1261 (Oct. 31, 2011). On November 10, 2011, the trial court denied appellant's motion for relief from judgment. This appeal followed.

{¶ 8} Appellant sets forth the following three assignments of error:

1. The trial court erred in granting defendant's motion for summary judgment since it did not use the proper standard for determining the liability of a motel owner in a latent defect case.

2. The trial court erred in accepting a self-serving generalized affidavit and relying upon it to dismiss plaintiff's case.

3. The trial court erred in denying plaintiff's motion for relief from judgment.

I. Summary Judgment

{¶ 9} Appellant's first two assignments of error concern purported deficiencies in the September 14, 2011 award of summary judgment. Appellant failed to timely file a notice of appeal with respect to that judgment.

{¶ 10} "Where a notice of appeal is not filed within the time prescribed by law, the reviewing court is without jurisdiction to consider issues that should have been raised in the appeal." *State ex rel. Pendell v. Adams Cty. Bd. of Elections*, 40 Ohio St.3d 58, 60, 531 N.E.2d 713 (1988). The result is fatal to the appeal. *Piper v. Burden*, 16 Ohio App.3d 361, 388, 476 N.E.2d 386 (1984). The effect of a dismissal for want of timely submission of a notice of appeal is to foreclose all further direct consideration of the issues that might have been raised in that appeal. *See Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995).

{¶ 11} Both of appellant's first two assignments of error concern the merits of the September 14 summary judgment. Since consideration of these issues has been foreclosed, appellant's first and second assignments of error are not well-taken.

II. Relief from Judgment

{¶ 12} In his third assignment of error, appellant asserts that the trial court erred in denying his motion for relief from judgment.

{¶ 13} Civ.R. 60(B) provides that on motion a trial court may relieve a party from a final judgment 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. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.

{¶ 14} In order to prevail on a motion for relief from judgment, the moving party must show that,

(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 stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of 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 Electric, Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

{¶ 15} If any one of the *GTE* requirements is not met, the motion should not be granted. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988).

{¶ 16} The decision of a trial court to grant or deny a motion for relief from judgment rests in the court's sound discretion and will not be reversed absent an abuse of that discretion. *GTE* at 148, *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987). An abuse of discretion is more than a mistake of law or judgment, the term

connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 17} In this matter, the court found appellant had demonstrated a meritorious claim should relief be granted and that his motion was timely. Nevertheless, the court concluded that appellant had failed to show that he was entitled to relief under any of the grounds set forth in Civ.R. 60(B)(1)-(5).

{¶ 18} A review of appellant's motion for relief in the trial court confirms the trial court's conclusion. Although he argues at length about purported discovery violations and the meritorious strength of his case, he does not mention any of the Civ.R. 60(B)(1)-(5) grounds for relief or suggest how any of them applies to his circumstances. There is no assertion of any mistake or excusable neglect, no suggestion of newly discovered evidence or fraud; no allegation of prior satisfaction of the claim.

{¶ 19} Concerning applicability of the Civ.R. 60(B)(5) "other reason," as appellee points out (B)(5) is not appropriate when summary judgment is granted because the court failed to consider a party's untimely filed memorandum in opposition. *Russell v. Taylor*, 7th Dist. No. 99 C.A. 142, 2000 WL 1486756 (Sept. 28, 2000). *Chester Twp. v. Fraternal Order of Police*, 102 Ohio App.3d 404, 408, 657 N.E.2d 348 (1995). The same would hold true when, as here, a party has wholly omitted a merit argument in a brief filed while the summary judgment motion was decisional. A motion for relief from judgment, pursuant to Civ.R. 60(B), is not a substitute for appeal. *Colley v. Bazell*, 64 Ohio St.2d 243, 245, 416 N.E.2d 605 (1980).

{¶ 20} Appellant's third assignment of error is not well-taken.

{¶ 21} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court 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. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE