[Cite as *Wiitanen v. C&S Dev. Co.*, 2005-Ohio-393.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84454

ANTOINETTE WIITANEN	:	
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
C&S DEVELOPMENT COMPANY, et al.	:	
	:	
Defendants-Appellants	:	

DATE OF ANNOUNCEMENT OF DECISION:	February 3, 2005
CHARACTER OF PROCEEDING:	Civil appeal from Common Pleas Court Case No. CV-423876
JUDGMENT:	AFFIRMED
DATE OF JOURNALIZATION:	_____

APPEARANCES:

For Plaintiff-Appellee:	RICHARD W. DUNSON DAVID R. COOK Dunson & Dunson 21851 Center Ridge Road Suite 410 Rocky River, Ohio 44116
For Defendants-Appellants:	JOHN F. CORRIGAN Climaco, Lefkowitz, Peca, Wilcox & Garofoli Co., LPA 9th Floor, The Halle Building 1228 Euclid Avenue Cleveland, Ohio 44115

ANTHONY O. CALABRESE, JR., J.:

{¶ 1} Defendants-appellants John A. Calarco ("Calarco") and C&S Development Company ("C&S") appeal the lower court's decision granting plaintiff-appellee Antoinette Wiitanen ("Wiitanen") $36,640.39 in damages. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the trial court.

I.

{¶ 2} According to the case, Wiitanen brought suit against appellants Calarco, who is her brother, and C&S, seeking recovery of monies loaned during the course of her employment. Wiitanen stated that the money was loaned to her with a promise and a personal guarantee by Calarco that he would reimburse her. This is in contrast to Calarco's allegations that Wiitanen failed to properly manage the corporate books, created improper checks and was not entitled to interest for unpaid loans.

{¶ 3} On June 12, 2002, there was a bench trial in which judgment was rendered in favor of Wiitanen in the amount of $36,640.39. Calarco then filed a motion for relief from judgment pursuant to Civ.R. 60(B) on October 9, 2002, asserting that the judgment was procured by fraud and misconduct. Wiitanen countered by stating that at no time during the trial or during the case did appellants present any evidence of fraud.

{¶ 4} The trial court denied the motion for relief from judgment on December 24, 2002. The trial court held that there was

no evidence of fraud provided at trial and the effect of granting such a motion would be to permit an untimely appeal.[1] Calarco and C&S appealed the denial of their Civ.R. 60(B) motion to this court. This court dismissed the appeal for lack of jurisdiction as a result of the absence of a final appealable order. After the appeal, on March 15, 2004, the trial court amended its judgment entry of November 2, 2003 to reflect that it had considered Calarco and C&S' counterclaims and had denied them.[2]

{¶ 5} According to the facts, Calarco is the owner, president and only shareholder of C&S, an excavating company in North Royalton.[3] Calarco hired Wiitanen with the expectation that she would perform various office duties, such as paying bills and running the office.[4] Calarco began experiencing financial difficulties and decided to clean out his office and rent it for

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[1]See December 24, 2002 journal entry stating the following: "*** The defense has not submitted sufficient evidence of fraud to indicate that he is entitled to relief under Civ.R. 60(B), where the court conducted a full trial and no evidence was produced indicating Defendant's fraud defense. In addition, it is well established that Civ.R. 60(B) motions are not an appropriate substitute for filing a timely direct appeal from the underlying judgment. *Wojenski v. Smith* (Sept. 13, 1990), Cuyahoga App. No. 57500. Therefore, a motion to vacate pursuant to Civ.R. 60(B) may not be granted where the effect would be to allow an otherwise untimely appeal. *Dedula v. Land Title Agency, Inc.* (Nov. 12, 1992), Cuyahoga App. No. 61143. Consequently, Def. Motion denied. ***"

[2]See amended journal entry of March 15, 2004, which states the following: "*** The Court further finds that C&S Development and/or John Calarco have failed to prove the counterclaim and the affirmative defenses of their case. ***"

[3]Tr. 11.

[4]Tr. 13.

$3,500 a month to generate additional income. After cleaning out his office, Calarco moved his business records to Wiitanen's residence.[5]

{¶ 6} As previously stated, Calarco's business was experiencing significant financial problems, so he asked Wiitanen to use her personal credit cards, a bank credit line and cash advances to help keep the business afloat.[6] According to the trial testimony, Wiitanen testified that the charges were not made for her personal benefit and the business funds were not commingled with her personal accounts. Wiitanen and Calarco agreed that since Wiitanen's Discover card had a zero balance, it would be easier to track expenses and could be used to pay corporate bills with less confusion than other cards.

{¶ 7} Wiitanen kept Calarco fully informed of the business expenses and corporate bills. These business charges were made with the full knowledge, authority and consent of Calarco.[7] Despite appellant's claims, Wiitanen never intended that any of these payments be considered a gift. Indeed, there were numerous and explicit promises made by Calarco that he would repay all monies loaned by Wiitanen, including the loans to C&S.[8] In

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[5]Tr. 17.

[6]Tr. 15, 26.

[7]Tr. 41, 47.

[8]Tr. 163.

addition, Wiitanen testified that she had possession of the corporate checkbook only with the express permission of Calarco and that she wrote and signed checks only with his permission.[9] These checks were issued for both corporate obligations owed to third parties as well as for partial reimbursement to her for monies advanced.

II.

{¶ 8} Appellant's first assignment of error states the following: "Fraudulent conduct is a serious matter and the failure to learn of it through discovery or at trial should not preclude relief from judgment pursuant to Civil Rule 60."

{¶ 9} Appellant's second assignment of error states the following: "If a motion for relief from judgment contains allegations of operative facts that would warrant relief, the trial court should grant a hearing to take evidence and verify the allegations before it rules on the motion."

{¶ 10} Because of the substantial interrelation between appellant's first and second assignments of error, we shall address them together. Civ.R. 60 states the following:

{¶ 11} Rule 60 - Relief from judgment or order

"(A) Clerical mistakes. 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, *.**

[9]Tr. 20.

> **"(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. On motion and upon such terms as are just, 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.* 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. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation."**
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> **{¶ 12}** (Emphasis added.)

{¶ 13} To prevail on his motion under Civ.R. 60(B), the movant must demonstrate 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 Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146. All three requirements must be met. *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174.

{¶ 14} In the case at bar, appellants contend that Wiitanen

failed to disclose a number of corporate checks and failed to provide them with certain records; however, we do not find this to be the case. Wiitanen was unable to provide the additional records primarily because of income tax issues. Appellee Wiitanen was without the ability to provide the records to appellants as they were with the Internal Revenue Service and, therefore, not in her possession. Moreover, assuming arguendo that Wiitanen did have the records in her possession, appellants could have simply filed a motion to compel; however, appellants neglected to do so.

{¶ 15} Instead of filing a motion to compel, appellants obtained copies of the records from the bank upon which all checks were drawn. These records could have easily been obtained well before the last day of trial. This does not constitute newly discovered evidence; both the bank and the account number were known to counsel before the trial date. The appropriate procedure would have been for appellants to file requests for production of documents in order to obtain any documents which they believed Wiitanen had in her possession. Had these requests gone insufficiently answered, appellants could have sought the documents through a motion to compel. Appellants, however, did not utilize such procedures.

{¶ 16} The March 14, 2001 pretrial provided that discovery was to be completed by June 13, 2001. Eventually, on November 19, 2001, the discovery deadline was extended until January 15, 2002.

Answers were previously filed on January 11, 2001, therefore giving the parties over a year to conduct discovery. The parties in this case had more than enough time to pursue discovery in a satisfactory manner.

{¶ 17} Where there is substantial evidence upon which the trier of fact has based its verdict, a reviewing court abuses its discretion in substituting its judgment for that of the jury as to the weight and sufficiency of the evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. De Hass* (1967), 10 Ohio St.2d 230.

{¶ 18} The trial court is in the better position to determine whether a fraud had been committed. The trial court in the case at bar reviewed all of the evidence presented and concluded the following:

> **"*** The Court finds that the oral promise to pay does not fall within the Statute of Frauds as the debt benefitted defendant and his business. And, therefore, plaintiff is entitled to recover from defendants. *F & D Siding Services v. Angelo Commarato,* 2001 Ohio App. LEXIS 189 (4/26/01), Cuy. App. No. 78038.**
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> **"Plaintiff submitted 167 exhibits evidencing the charges to her credit cards, payments from her credit line account and her collateral loan account. *** The Court further finds that the evidence submitted is insufficient to prove that the plaintiff leased the Nissan vehicle for either defendant or that there was a promise made by defendant to pay or repay the monthly lease to plaintiff. A verdict is, therefore, entered in favor of plaintiff and against defendants in the total amount of**

$36,640.39."[10]

{¶ 19} The record demonstrates that the appellee presented extensive evidence, approximately 167 exhibits, regarding her credit line account, credit cards and her collateral loan account. In addition, extensive testimony was given at trial.

{¶ 20} The company's financial situation was dire and Wiitanen utilized her own funds with the understanding that she would be reimbursed by her brother. She relied on continued promises from him that he would reimburse her for her time and money; however, this did not occur.

{¶ 21} The significant evidence presented in the case at bar demonstrates that Wiitanen provided ample support for her position. When a motion is adequately supported by affidavits and exhibits, an oral hearing is not required. *Matson v. Marks* (1972), 32 Ohio App.2d 319. Civ.R. 60(B) does not require a hearing to be conducted. We also note that it is not an abuse of discretion by the trial court to fail to conduct an evidentiary hearing when the trial court has sufficient evidence before it is to decide whether a meritorious defense was presented. *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 14.

{¶ 22} In sum, we find that the evidence presented in the case at bar does not demonstrate fraud on the part of Wiitanen. Appellants failed to show that they were entitled to relief under

[10]Journal entry filed June 20, 2002.

Civ.R. 60(B), failed to satisfy the fundamental prerequisites of Civ.R. 60(B) and are not entitled to a hearing.

{¶ 23} Appellant's first and second assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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ANTHONY O. CALABRESE, JR.
JUDGE

JAMES J. SWEENEY, P.J., CONCURS;

DIANE KARPINSKI, J., DISSENTS WITH SEPARATE DISSENTING OPINION.

announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84454

ANTOINETTE WIITANEN Plaintiff-appellee v. C&S DEVELOPMENT COMPANY, et al. Defendants-appellants	:	DISSENTING OPINION

DATE: February 3, 2005

KARPINSKI, J., DISSENTING:

{¶ 24} I respectfully dissent from the majority because the trial court failed to conduct the evidentiary hearing required by defendant's first appeal in *Wiitanen v. C&S Dev. Co.*, Cuyahoga App. No. 82373, 2003-Ohio-5644 (*"Wiitanen I"*).

{¶ 25} In *Wiitanen I*, this court concluded that the trial court had never addressed defendants' counterclaims in its bench trial. This court therefore concluded that no final judgment was ever entered and this court lacked jurisdiction to review the matter.

Before remanding the case back to the trial court, this court stated:

> Calarco and C&S's affirmative defenses and counterclaim raised essentially the same issues raised in the motion for relief from judgment, that is, that Wiitannen removed funds from the corporation's bank account and refused to return corporate records. These claims were not addressed at trial. Although defense counsel discussed them in his opening statement, **the court requested closing arguments immediately after the plaintiff rested her case. Thus, Calarco and C&S were not given an opportunity to present evidence on these issues at trial. The court never took evidence or ruled upon the counterclaims before or after the trial.**
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> ***
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> **Until the common pleas court hears** and decides the affirmative defenses and counterclaims raised in the answer, this matter remains pending before the common pleas court, and we have no jurisdiction to consider this appeal. Appeal dismissed. (Emphasis added.)

{¶ 26} On remand in the case at bar, the trial court **did not hold a hearing** on defendants' counterclaims and/or affirmative defenses as required by this court's remand order. The trial court merely amended its original journal entry from the bench trial. In that modified entry relating back to November 2, 2003, the court simply noted that defendants had failed to prove their counterclaim and affirmative defenses.

{¶ 27} The majority errs by reaching the merits of defendants' arguments in this appeal because the trial court still needs to hold an evidentiary hearing on defendants' counterclaim and affirmative defenses. I would reverse the judgment of the trial

court and remand this matter for the hearing mandated by *Wiitanen I*.