

[Cite as *L & B Capital, L.L.C. v. Boyas*, 2005-Ohio-4294.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85782

K & B CAPITAL, L.L.C.	:	ACCELERATED DOCKET
	:	
Plaintiff-Appellant	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
	:	
LEA BOYAS	:	
	:	
Defendant-Appellee	:	

DATE OF ANNOUNCEMENT  
OF DECISION:

August 18, 2005

CHARACTER OF PROCEEDING:

Civil appeal from  
Common Pleas Court  
Case No. CV-505807

JUDGMENT:

AFFIRMED

DATE OF JOURNALIZATION:

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APPEARANCES:

For Plaintiff-Appellant:

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Plaintiff-appellant, K&B Capital, L.L.C. ("K&B"), appeals the trial court's decision denying its motion for relief from judgment following the trial court's sua sponte dismissal of its complaint against defendant-appellee Lea Boyas ("Boyas"). Finding no merit to the appeal, we affirm.

{¶ 2} In its complaint, K&B asserted a fraud claim relating to Boyas' alleged false representation regarding the financial assets of Republic Environmental Systems, Inc. K&B claimed that, based on Boyas' representation, it extended a line of credit to the company and subsequently lost money. The parties engaged in discovery and the court set the matter for a final pretrial and trial.

{¶ 3} On August 2, 2004, the date of the final pretrial, the court dismissed K&B's complaint with prejudice when its counsel failed to appear. On August 16, K&B moved for relief from judgment asserting that it was excusable neglect for counsel to fail to timely appear. On December 14, 2004, the trial court granted K&B's Civ.R. 60(B) motion, stating:

"Pltf's mtn for relief from judgmt or order, filed 8/16/04, is granted. Pltf has satisfied requirements of Civ R 60(B). FPT is set for 1/20/05 at 9:30 a.m. Trial is set for 3/2/05 at 9:00 a.m."

{¶ 4} However, on the same day, the trial court issued a subsequent order, stating:

"Pursuant to Civil Rule 60(A) the court sua sponte corrects an error, as follows. The entry of this date in this case purporting to grant pltf's motion for relief from judgment filed 8/16/04 is hereby vacated as said entry was entered in error. The motion for relief from judgment is denied."

{¶ 5} K&B appeals the denial of its Civ.R. 60(B) motion, raising one assignment of error.

{¶ 6} K&B argues that the trial court abused its discretion by denying its motion for relief from judgment. As part of its argument, K&B contends that it was erroneous for the trial court to dismiss its complaint with prejudice without providing any notice.

While we agree with K&B's assertion, this argument goes to the trial court's underlying decision, which K&B failed to timely appeal. See *Doe v. Trumbull Cty. Children Serv. Bd.* (1986), 28 Ohio St.3d 128; *Trebmal Const. Inc. v. Cuyahoga Cty. Bd. of Rev.* (1994), 94 Ohio App.3d 246. "Errors which could have been corrected by timely appeal cannot be the predicate for a Civ.R. 60(B) motion for relief from judgment." *Kelm v. Kelm* (1992), 73 Ohio App.3d 395. As a result, K&B has waived this argument and we are precluded from considering it.

{¶ 7} Next, in regard to the trial court's denial of K&B's motion for relief from judgment, we cannot say that the trial court abused its discretion. See *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77.

{¶ 8} In order to prevail on a Civ.R. 60(B) motion, 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 judgment. *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. The trial court need not hold an evidentiary hearing if the movant fails to demonstrate all three elements of *GTE*. *Yanky v. Yanky*, Cuyahoga App. No. 83020, 2004-Ohio-489, citing *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 1996-Ohio-430.

{¶ 9} In the instant case, K&B fails to satisfy the second element by demonstrating that it was entitled to relief under one of the grounds stated in Civ.R.60(B)(1) through (5). Although K&B argues that it was excusable neglect for its counsel to fail to timely appear for the final pretrial, it offered no explanation demonstrating excusable neglect. Rather, K&B merely argued that it arranged for another associate of its Michigan co-counsel to appear, who was not admitted pro hac vice to practice in Ohio but was very familiar with the case. Thus, its own argument reveals that it intentionally disregarded the court's order and Loc.R. 10(A), which requires all counsel to file a written entry of appearance before being permitted to appear at any proceeding. K&B further argued that, when the trial court refused to acknowledge

the nonadmitted counsel at the final pretrial, such counsel proposed to contact another local attorney to appear. Again, although the trial court took a harsh position, we cannot say that K&B satisfied the criterion for demonstrating excusable neglect under Civ.R. 60(B)(1).<sup>1</sup>

{¶ 10} Furthermore, we find no reason to invoke Civ.R. 60(B)(5) under the instant circumstances. As this court stated in *Smith v. Smith*, Cuyahoga App. No. 83275, 2004-Ohio-5589, "Civ.R. 60(B)(5) is intended as a catch-all provision reflecting the inherent power of a court to relieve a person of the unjust operation of a judgment."

*Smith*, at ¶16, citing *Housden v. Housden* (May 6, 1991), Butler App. No. CA90-08-160. The grounds for invoking Civ.R. 60(B)(5) must be substantial, however, and it is not to be used as a substitute for any of the more specific provisions of Civ.R. 60(B).

*Id.*, citing *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, paragraphs one and two of the syllabus.

{¶ 11} K&B argues that Civ.R.60(B)(5) applies but K&B offers no support for its argument other than the fact that the trial court's actions were severe. The real issue, however, is that K&B should have appealed the trial court's dismissal along with filing its motion for relief from judgment. Moreover, the only argument it raises in the instant appeal relates solely to Civ.R. 60(B)(1), thereby precluding the application of the catch-all provision.

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<sup>1</sup>K&B acknowledges that two local counsel were available in their offices located near the court.

{¶ 12} As a result, this court is constrained to affirm the decision of the trial court.

It is ordered that appellee recover of appellant the 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.

ANN DYKE, P.J. CONCURS;

MARY EILEEN KILBANE, J. DISSENTS  
(SEE SEPARATE OPINION)

JUDGE  
COLLEEN CONWAY COONEY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per

App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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COUNTY OF CUYAHOGA

NO. 85782

K & B CAPITAL, L.L.C.,	:	
	:	
Plaintiff-Appellant	:	
	:	
	:	
-vs-	:	D I S S E N T I N G
	:	
LEE BOYAS,	:	O P I N I O N
	:	
	:	
Defendant-Appellee	:	

DATE: August 18, 2005

MARY EILEEN KILBANE, J.:

{¶ 13} I respectfully dissent from the majority's opinion, as I believe there are two alternate remedies.

{¶ 14} The docket reflects that in August 2004, the court dismissed the instant action for the failure of counsel to appear at a pretrial. Shortly thereafter, K & B filed a motion for relief from judgment.

{¶ 15} In December 2004, the court entered two journal entries on the docket. The first order denied the motion for relief from

judgment. This order, however, was specifically dated December 13, 2004, but not docketed until the following day. The second order, journalized December 14, 2004, acknowledged K & B's motion for relief from judgment, granted the motion, and found that the motion satisfied the requirements of Civ.R. 60(B). The court then proceeded to set the matter for trial. Since this second order acknowledges that relief is being granted under Civ.R. 60(B) and sets the case for trial, I would find that this order is not a final appealable order because the case was technically still pending. Absent a final order, this Court is without jurisdiction to affirm, reverse, or modify an order from which an appeal is taken. *General Acc. Ins. Co. v. Insurance Co. of North America* (1989), 44 Ohio St.3d 17, 20.

{¶ 16} In the alternative, and because of the confusing nature of the docket, under Civ.R. 60(A) and App.R. 9(E), this appeal could have been remanded to the trial court for clarification of the journal entries, both journalized on December 14, 2004, to set forth the trial court's ultimate determination in this matter. The trial court could then issue a journal entry indicating whether it granted relief from the earlier judgment of dismissal because of its failure to notify counsel of the potential for dismissal or if the court, in fact, vacated its grant of relief from judgment.

{¶ 17} For these reasons, I would dismiss this case for lack of a final appealable order or, in the alternative, remand for clarification from the trial court.



