

[Cite as *Kassouf v. Pierce*, 2005-Ohio-6487.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85994

RICHARD R. KASSOUF, INC.	:	JOURNAL ENTRY
	:	AND
Plaintiff-appellee	:	OPINION
	:	
-vs-	:	
	:	
CHARLES PIERCE, ET AL.	:	
	:	
Defendants-appellants	:	

DATE OF ANNOUNCEMENT
OF DECISION:

DECEMBER 8, 2005

CHARACTER OF PROCEEDING:

Civil appeal from the
Cleveland Municipal Court
Case No. 2002 CVG 7475

JUDGMENT:

Affirmed.

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:

STANLEY E. STEIN, ESQ.
75 Public Square, Suite 714
Cleveland, Ohio 44113-2078

For Defendants-Appellants:

LEONARD W. YELSKY, ESQ.
YELSKY & LONARDO
75 Public Square, Suite 800
Cleveland, Ohio 44114

ANN DYKE, P.J.:

{¶ 1} Defendant-Appellant Janet Pierce ("Appellant") appeals from the order of the trial court which denied Appellant's Motion

to Vacate Judgment. For the reasons set forth below, we affirm the trial court's denial of the Appellant's motion.

{¶ 2} On April 4, 2002, Appellee Richard Kassouf, Inc. ("Appellee") filed a complaint against Defendants Charles A. Pierce and Janet Pierce, the Appellant, for unlawful detainer and damages. Appellant was personally served with the complaint on April 11, 2002 and by certified mail on April 13, 2002 and failed to answer.

{¶ 3} On May 1, 2002, the court entered judgment on behalf of the Appellee in the form of an eviction and damages, determined on June 2, 2002 to be \$56,107.68.

{¶ 4} On October 15, 2004, the Appellant filed a Motion to Vacate Judgment. In the motion, she asserted that the court has an inherent power to vacate the judgment as void because the judgment against her was predicated on a document signed on her behalf by someone else without her authorization. The trial court denied Appellant's motion and stated the following:

{¶ 5} "Defendant argues that this Court should vacate its earlier judgment as void. But Defendant offers no reason why this Court should treat its earlier judgment as void. Defendant does not question the court's subject matter jurisdiction. Defendant does not attack the court's personal jurisdiction over her. She thus utterly fails to show that this Court should vacate its earlier decision as void. The cases Defendant cites do not support her own motion.

{¶ 6} What Defendant argues is that this Court's judgment in favor of Plaintiff and against her was predicated on a document signed on her behalf by someone else without her authorization. This goes to the merits of the case, not the validity of the court's judgment under Civ.R. 60(B). Defendant is at pains to distinguish her motion from a motion under Civ.R. 60(B) because, under Civ.R. 60(B), her motion is made too late. Civ.R. 60(B) requires that a motion for relief based on Civ.R. 60(B)(3) for "fraud . . . misrepresentation or other misconduct of an adverse party" be brought within one year of the judgment. Defendant's motion is brought more than two years after the Court's May 2002 judgment."

{¶ 7} Appellant now appeals and submits a single assignment of error for our review.

{¶ 8} Appellant's sole assignment of error states:

{¶ 9} "It was error for the court to overrule Appellant's Motion to Vacate Judgment."

{¶ 10} Within this assignment of error, Appellant presents three issues for our review. First, Appellant maintains that it was proper to file a motion to vacate two and a half years after the judgment was rendered because the judgment was void and not governed by Civ.R. 60(B) as the judgment was based upon a document which contained a forged signature of the Appellant. Second, Appellant maintains that because it was a void judgment, it is

proper for the court to vacate the judgment two and a half years after the judgment was rendered. Finally, Appellant maintains that the court may vacate a void judgment even after the purported judgment debtor has been served with process and has failed to answer. Because we find that the court's judgment was not void ab initio, we find Appellant's first issue without merit and the following two issues moot.

{¶ 11} In her first issue, Appellant asserts that her motion to vacate is void and not subject to the requirement of Civ.R. 60(B) that a motion to vacate must be filed within one year when asserting that relief from judgment is necessary on the basis of fraud. In maintaining this proposition, Appellant relies on *Demianczuk v. Demianczuk* (1984), 20 Ohio App.3d 244, 455 N.E.2d 785. Although *Demianczuk* states that a court has inherent power to vacate a void judgment, Appellant's reliance on *Demianczuk* is misplaced. In *Demianczuk* the court found the judgment void because the court lacked the jurisdiction to hear the case. The *Demianczuk* court, however, did not address whether a court may vacate its own judgment upon the merits of the case, as Appellant asserts here.

{¶ 12} Appellant further relies on *Morton v. Pettitt* (1931), 124 Ohio St. 241, 124 Ohio St. 241, 10 Ohio L.Abs. 547, in asserting her proposition that the court's judgment in this action is void. In *Morton*, however, the fraud was committed upon the court. In the instant action, Appellant's contention that the signature of her

name on the Advance Occupancy Agreement was not her signature and was a forge goes directly to the merits of the case and not the validity of the judgment of the court. The alleged fraud would not have been committed upon the court, it would have been committed upon the parties to the transaction. Accordingly, the judgment is not void ab initio. As we have determined that the judgment is not void, the other two issues dealing with the court's power to vacate a void judgment are moot. Additionally, because the court's judgment in favor of Appellee was not void, Appellant's motion to vacate is subject to the requirements of Civ.R. 60(B).

{¶ 13} Appellant's relief could be actionable, if at all, only as fraud under Civ.R. 60(B)(3), making the motion subject to the one-year limitation under 60(B), which provides in pertinent part:

{¶ 14} "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 proceedings 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; *** (5) any other reason justifying relief from 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."

{¶ 15} A motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77, 514 N.E.2d 1122. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 16} The court entered a judgment on behalf of Plaintiff on May 1, 2002. Appellant did not file her motion to vacate until October 15, 2004, nearly two and a half years from the judgment entry. In her motion to vacate, Appellant asserts a claim of fraud. As stated above, a motion for relief based upon Civ.R. 60(B) for fraud must be made within one year after judgment. As Appellant's motion was made more than two years from judgment, the trial court properly denied Appellant's motion. Accordingly, Appellant's sole assignment of error is without merit.

Judgment affirmed.

It is ordered that appellee recover of appellants its 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 Cleveland Municipal Court 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.

DIANE KARPINSKI, J., AND

ANTHONY O. CALABRESE, JR., J., CONCUR.

ANN DYKE
PRESIDING JUDGE

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).