**[Cite as *FIA Card Servs. v. Evans*, 2015-Ohio-2395.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 101975**

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## FIA CARD SERVICES, N.A.

PLAINTIFF-APPELLANT

vs.

## JUSTIN A. EVANS

DEFENDANT-APPELLEE

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**JUDGMENT:**
REVERSED AND REMANDED

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Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-824097

**BEFORE:** E.T. Gallagher, J., Jones, P.J., and Stewart, J.

**RELEASED AND JOURNALIZED:** June 18, 2015

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EILEEN T. GALLAGHER, J.:

**{¶1}** Plaintiff-appellant, FIA Card Services, N.A. ("FIA"), appeals the judgment of the common pleas court denying its motion for relief from judgment. FIA raises the following assignments of error for review:

> 1. The trial court erred in sua sponte dismissing appellant's claim with prejudice.
>
> 2. The trial court abused its discretion when it denied appellant's motion for relief from judgment as appellant demonstrated that the trial court was mistaken in sua sponte dismissing with prejudice appellant's claim because the dismissal was contrary to the parties' agreement.

**{¶2}** After careful review of the record and relevant case law, we reverse and remand the matter for further proceedings consistent with this opinion.

## I. Procedural History

**{¶3}** On March 24, 2014, FIA filed suit against defendant-appellee, Justin A. Evans ("Evans"), to recover a balance due and owing on a credit account by Evans in the amount of $4,566.19. Attached to the complaint were monthly periodic banking statements matching the amount sought by FIA.

**{¶4}** On May 6, 2014, Evans filed an answer to FIA's complaint. At a case management conference held on July 1, 2014, the parties entered into an agreed judgment entry.

**{¶5}** The agreed judgment entry was signed by the parties and the trial court, and stated, in relevant part:

> Upon agreement of the parties, the Court hereby awards judgment in favor of [FIA] and against [Evans], in the amount of Four Thousand Five Hundred Sixty-Six and 19/100 Dollars ($4,566.19) and court costs of this action.
>
> In satisfaction of this judgment, [FIA] will accept payments as follows: $50.00 by the 15th day of July, 2014, and on the same day each month thereafter until the entire outstanding balance plus court costs is paid in full. Provided that [Evans] does not default on payment of said obligation as provided for herein, [FIA] agrees to forbear from executing on its judgment against [Evans] except for filing of a certificate of judgment with the Common Pleas Court and filing proof of claim with the Probate Court, if necessary. * * * IF ANY INSTALLMENT OR ANY PART THEREOF REMAINS UNPAID FOR FIVE (5) DAYS AFTER ITS DUE DATE, THEN WITHOUT FURTHER ACTION OF THE COURT, THE FULL AMOUNT OF THE JUDGMENT AND COURT COST THEREUPON SHALL BECOME IMMEDIATELY DUE AND PAYABLE.

**{¶6}** On the same day, the trial court issued a journal entry, which stated, "[p]ursuant to the agreement of the parties, case is settled and dismissed with prejudice." On August 18, 2014, FIA filed a motion for relief from judgment pursuant to Civ.R. 60(B). In its motion, FIA argued that the trial court's July 1, 2014 journal entry did not reflect the agreement of the parties. On September 5, 2014, the trial court denied FIA's Civ.R. 60(B) motion. FIA now appeals from the trial court's judgment.

## II. Law and Analysis

**{¶7}** For purposes of clarity, we will consider FIA's assignments of error out of order. In its second assignment of error, FIA argues the trial court abused its discretion by denying its motion for relief under Civ.R. 60(B).

**{¶8}** Civ.R. 60(B) provides:

> 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.

**{¶9}** In order to prevail on a motion for relief from judgment pursuant to Civ.R. 60(B), the movant must demonstrate the following (1) a meritorious defense or claim to present if relief is granted; (2) entitlement to relief under one of the grounds stated in Civ.R. 60(B)(1) through (B)(5); and (3) the timeliness of the motion.[1] *GTE Automatic Elec., Inc. v. ARC Indus.*, 47 Ohio St.2d 146, 150-151, 351 N.E.2d 113 (1976). The failure to establish any one of these requirements will result in the denial of the motion. *See Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988).

**{¶10}** We review a trial court's denial of a Civ.R. 60(B) motion for relief from judgment under an abuse of discretion standard. *Id.* To constitute an abuse of discretion, the trial court's ruling must be "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

**{¶11}** In the case at bar, FIA argues that it is entitled to relief from judgment pursuant to Civ.R. 60(B)(1) or (B)(5) because the trial court's journal entry dismissing the case with prejudice was based on the court's mischaracterization of the parties' agreed judgment entry. We agree.

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[1] 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. Civ.R. 60(B).

**{¶12}** Initially, we note that FIA's motion for relief was timely filed just 48 days after the dismissal was entered. Further, there is no question, given the nature of the parties' mutual agreement, that FIA would have a meritorious claim if relief was granted. Finally, we find FIA is entitled to relief under Civ.R. 60(B)(1) or, alternatively, (B)(5). Here, the trial court adopted an agreed entry that expressly awarded judgment in favor of FIA. There is nothing in the agreed judgment entry to suggest the parties intended to dismiss the case with prejudice subject to a conditional settlement agreement. FIA's claim against Evans was not terminated. Instead, FIA obtained judgment on its claim against Evans. *See Continental W. Condo. Unit Owners Assn. v. Howard E. Ferguson, Inc*., 74 Ohio St.3d 501, 502, 660 N.E.2d 431 (1996) ("A settlement agreement is a contract designed to terminate a claim by preventing or ending litigation."). Because the trial court's July 1, 2014 journal entry directly contradicts the express intent of the parties, the trial court erred in denying FIA's Civ.R. 60(B) motion.

**{¶13}** Moreover, even if we accepted the trial court's interpretation that the parties' agreed judgment entry was a "settlement," our holding would not change. In *Infinite Sec. Solutions, L.L.C. v. Karam Props. II*, Slip Opinion No. 2015-Ohio-1101, the Ohio Supreme Court recently held that "a trial court has jurisdiction to enforce a settlement agreement after a case has been dismissed only if the dismissal entry incorporated the terms of the agreement or expressly stated that the court retained jurisdiction to enforce the agreement." *Id*. at ¶ 34. Because the trial court's July 1, 2014 dismissal entry did not incorporate the terms of the "settlement" or expressly state

that the court was retaining jurisdiction to enforce the settlement agreement, the entry would divest the trial court of jurisdiction to enforce the settlement in the future. Thus, even if we interpreted the agreement as a "settlement," as the trial court did, FIA would be entitled to relief in order to avoid future jurisdictional issues created by the insufficient journal entry.

**{¶14}** Based on the foregoing, we find the trial court abused its discretion in denying FIA's motion for relief from judgment.

**{¶15}** FIA's second assignment of error is overruled. Based on our disposition of FIA's second assignment of error, its first assignment of error is rendered moot and we decline to address it. App.R. 12(A)(1)(c).

## III. Conclusion

**{¶16}** The trial court abused its discretion in denying FIA's motion for relief from judgment pursuant to Civ.R. 60(B).

**{¶17}** Judgment reversed and remanded.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas 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.

EILEEN T. GALLAGHER, JUDGE

LARRY A. JONES, SR., P.J., CONCURS;
MELODY J. STEWART, J., CONCURS IN JUDGMENT ONLY (WITH SEPARATE OPINION ATTACHED)

MELODY J. STEWART, J., CONCURRING IN JUDGMENT ONLY:

**{¶18}** I concur with the majority's disposition of this case, and the majority's analysis of Civ.R. 60(B)'s application is sound. However, like the dissenting opinion in *Infinite Sec. Solutions, L.L.C.,* Slip Opinion No. 2015-Ohio-1101, I believe that the trial court should be reversed based on a different analysis.

**{¶19}** The dissent notes in pertinent part:

> In cases in which a trial court sua sponte issues a dismissal entry after notification of settlement, our analysis should begin with a determination [of] whether the trial court had authority to dismiss the case. * * * In this case, because the trial court lacked the authority to issue the dismissal entry, the trial court committed reversible error.
>
> Civ.R. 41 provides for two types of dismissals, voluntary, Civ.R. 41(A), and involuntary, Civ.R. 41(B). The trial court did not proceed under either Civ.R. 41(A) or (B).
>
> Civ.R. 41(A) provides two methods for voluntary dismissal: by a plaintiff under Civ.R. 41(A)(1) and by order of the court under Civ.R. 41(A)(2). Dismissals pursuant to Civ.R. 41(A)(1) may be effected by the plaintiff, under certain circumstances, without an order from the court. As * * * a notice of dismissal [was not filed] in this case, Civ.R. 41(A)(1) does not apply.
>
> Civ.R. 41(A)(2) permits a plaintiff who cannot voluntarily dismiss pursuant to Civ.R. 41(A)(1) to move the court for an order dismissing the action without prejudice. A plaintiff must file a motion for an action to be dismissed pursuant to Civ.R. 41(A)(2). Accordingly, the dismisal order in this case was not based on the authority of Civ.R. 41(A)(2), as neither [party] moved the court to dismiss the action.

> Furthermore, the dismissal entry was not pursuant to Civ.R. 41(B). Civ.R. 41(B)(1) permits a trial court, after notice to the plaintiff, to dismiss sua sponte an action when "the plaintiff fails to prosecute, or comply with [the civil] rules or any court order." A trial court enters a dismissal under Civ.R. 41(B)(1) to penalize the plaintiff. 2 James M. Klein and Stanton G. Darling II, *Civil Practice*, Section 41:30, 244 (2d Ed.2004). In this matter, there was no reason to penalize either [party], as neither had failed to prosecute or comply with the rules or any order of the court. Furthermore, Civ.R. 41(B)(2), permitting a trial court to dismiss a plaintiff's action after the plaintiff, in a nonjury trial, has completed presentation of its evidence, is inapplicable under the current facts.
>
> Accordingly, by dismissing the action, the trial court committed reversible error.

*Id*. at ¶ 37-42 (Kennedy, J. dissenting).

**{¶20}** The majority opinion clearly establishes how the trial court abused its discretion by not granting the appellant's motion for relief from judgment — if indeed a Civ.R. 60(B) abuse-of-discretion standard of review applies to this case. I believe it does not. The trial court's dismissal of the case was error as a matter of law. I would reverse accordingly.