[Cite as *Fairbanks Capital Corp. v. Unknown Heirs at Law, Devisees, Legatees, Exr., or Admr. of Douglas*, 2005-Ohio-6459.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

FAIRBANKS CAPITAL CORP. aka AAMES CAPITAL

Appellee

v.

THE UNKNOWN HEIRS AT LAW, DEVISEES, LEGATEES, EXECUTORS OR ADMINISTRATORS OF CLEO A. DOUGLAS, et al.

Appellants

C. A. No. 22733

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2000 10 4427

DECISION AND JOURNAL ENTRY

Dated: December 7, 2005

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

{¶1} Appellant, Tracy Douglas, appeals from a judgment of the Summit County Court of Common Pleas that denied his motion for relief from judgment. This Court affirms.

{¶2} On October 4, 2000, appellee, Fairbanks Capital Corporation ("Fairbanks"), formerly known as Aames Capital Corporation, brought this action against Douglas and others, seeking to foreclose on a mortgage note that Douglas

had signed as attorney in fact for his mother, who had since passed away. Fairbanks later moved for summary judgment. On June 29, 2001, the trial court granted summary judgment and entered a decree of foreclosure.

{¶3} On January 18, 2005, Douglas moved for relief from judgment pursuant to Civ.R. 60(B). He asserted that, after judgment was entered against him, he had hired new counsel who sought the opinion of a handwriting expert and he was prepared to assert a meritorious defense that the document that formed the basis of this action was a forgery. Douglas further maintained that, although he had told his former counsel that he never signed such a mortgage document, his former counsel did not pursue that defense. The record reveals, however, that the prior counsel did dispute the validity of the debt in Douglas's responsive pleading, but never offered any evidence in opposition to Fairbanks' motion for summary judgment.

{¶4} The trial court denied Douglas's Civ.R. 60(B) motion without a hearing. Douglas appeals and raises two assignments of error.

FIRST ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(B) OF THE OHIO RULES OF CIVIL PROCEDURE."

{¶5} Through his first assignment of error, Douglas contends that the trial court erred in denying his motion for relief from judgment. The decision whether to grant relief from judgment is within the sound discretion of the trial court. *Rose*

Chevrolet, Inc. v. Adams (1988), 36 Ohio St.3d 17, 20. An abuse of discretion amounts to more than an error of judgment, but instead equates to "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. Id.

{¶6} Civ.R. 60(B) authorizes the trial court to grant relief from a final judgment as follows:

> "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." (Emphasis added.)

{¶7} In order to prevail on a motion brought pursuant to Civ.R. 60(B), the moving party 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, paragraph two of the syllabus.

{¶8} Because Douglas waited more than three and a half years after the trial court's judgment to file his Civ.R. 60(B) motion, this Court will focus on the third prong of the *GTE* test, which requires that the motion be made within a reasonable time. See id.

{¶9} Douglas asserted in his Civ.R. 60(B) motion that he was entitled to relief from the judgment against him because Fairbanks had obtained that judgment with a forged document. Douglas asserted that he was entitled to relief under either Civ.R. 60(B)(1), Civ.R. 60(B)(2), Civ.R. 60(B)(3), or Civ.R. 60(B)(5). As the trial court correctly noted, however, any claims for relief from judgment under Civ.R. 60(B)(1), (2), or (3) were untimely because Douglas had failed to file his Civ.R. 60(B) motion within one year of the judgment entered against him. See Civ.R. 60(B).

{¶10} Although Douglas also claimed that he was entitled to relief under Civ.R. 60(B)(5), which does not have a one-year time limit, the trial court found that Douglas had failed to allege a meritorious claim under Civ.R. 60(B)(5). The so-called "catch-all" provision of Civ.R. 60(B)(5) cannot be used as a substitute for one of the more specific provisions of Civ.R. 60(B). *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, 66. Because the essence of Douglas's claim was one of fraud, it fell under the fraud provision of Civ.R. 60(B)(3). See *Cuyahoga*

Supply & Tool, Inc. v. Kilbane (Mar. 12, 1998), 8th Dist. No. 71672. Douglas could not use Civ.R. 60(B)(5) to bypass the one-year time limit for claims for relief from judgment under Civ.R. 60(B)(3).

{¶11} Moreover, even if Douglas had a viable basis for relief under Civ.R. 60(B)(5), he was still required to demonstrate that his motion was made within a reasonable time. Although the issue of "what constitutes 'reasonable time' for filing the motion under Civ.R. 60(B) depends upon the facts of the case[,]" *Stickler v. Ed Breuer Co.* (Feb. 24, 2000), 8th Dist. Nos. 75176, 75192, and 75206, "[a] movant must offer some operative facts or evidential material demonstrating the timeliness of his or her motion." *In re Guardianship of Brunstetter*, 11th Dist. No. 2002-T-0008, 2002-Ohio-6940, at ¶14, citing *Shell v. Cryer*, 11th Dist. No. 2001- L-083, 2002-Ohio-848.

{¶12} Douglas offered no legitimate reason why it had taken him three and one-half years to seek relief from the judgment against him. He merely indicated that he had hired new counsel and sought the opinion of a handwriting expert. He suggested that he could not have raised this defense earlier because Fairbanks had failed to provide him with the document for analysis, although he recounts no specific facts or dates to explain his long delay. Douglas set forth no facts to explain why he could not have raised the same defense in a timely manner or why it had taken him more than three years to assert it. The record reveals that Douglas disputed his obligation on the mortgage note from the beginning and

indicated in his answer that Fairbanks had failed to make the original document available to him.

{¶13} Because Douglas failed to allege operative facts to demonstrate that his motion was made within a reasonable time, the trial court did not abuse its discretion in denying his motion for relief from judgment. The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

> "THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN EVIDENTIARY HEARING PRIOR TO OVERRULING APPELLANT'S MOTION FOR RELIEF FROM DEFAULT JUDGMENT PREVIOUSLY ENTERED AGAINST APPELLANT."

{¶14} Next, Douglas asserts that the trial court erred by denying his Civ.R. 60(B) motion without first holding an evidentiary hearing on the motion. A party moving for relief from judgment pursuant to Civ.R. 60(B) is entitled to a hearing only if sufficient operative facts are alleged. "If the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under Civil Rule 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion." *Coulson v. Coulson* (1983), 5 Ohio St.3d 12, 16, quoting *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 105. A trial court need not hold a hearing, however, where the facts alleged are undisputed and, on their face, support a claim for relief. See *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 14.

{¶15} As explained above, Douglas's motion failed to allege sufficient facts to demonstrate that he was entitled to relief under Civ.R. 60(B). Consequently, the trial court did not err in denying his motion without an evidentiary hearing. The second assignment of error is overruled.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant Tracy Douglas.

Exceptions.

DONNA J. CARR
FOR THE COURT

SLABY, P. J.
MOORE, J.
CONCUR

APPEARANCES:

ALEXANDER R. FOLK, Attorney at Law, 113 Portgage Trail, P. O. Box 67128, Cuyahoga Falls, Ohio 44222, for appellant Tracy Douglas.

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