

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

EMC MORTGAGE COMPANY, INC.

C.A. No. 25067

Appellant/Cross-Appellee

v.

ROBERT W. ATKINSON

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2003 04 2401

Appellee/Cross-Appellant

DECISION AND JOURNAL ENTRY

Dated: January 12, 2011

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} EMC Mortgage Corporation brought a foreclosure action against Robert Atkinson. In October 2008, EMC and Mr. Atkinson signed an Agreed Judgment Decree, which the trial court entered as its judgment. Under the terms of the Agreed Judgment Decree, Mr. Atkinson promised to pay EMC \$18,000 by December 15, 2008. If he did not, EMC could immediately execute on the Agreed Judgment Decree. Mr. Atkinson did not pay EMC \$18,000 by December 15, 2008, but attempted to send the payment in February 2009. When EMC rejected the payment and executed on the Agreed Judgment Decree, Mr. Atkinson moved for relief from judgment under Rule 60(B) of the Ohio Rules of Civil Procedure. Following a hearing, the trial court determined that equity required it to modify the Agreed Judgment Decree to change the due date for the payment from December 15, 2008, to February 12, 2009. EMC has appealed, arguing that the trial court incorrectly modified the Agreed Judgment Decree. Mr.

Atkinson has cross-appealed, arguing that the court should have held an evidentiary hearing on his motion for relief from judgment. We reverse because the trial court did not have inherent equitable power to modify the decree and it failed to determine whether Mr. Atkinson was entitled to relief under Civil Rule 60(B).

MODIFICATION OF JUDGMENT

{¶2} “At common law, a court of general jurisdiction [had the] power to control its own orders and judgments during the term at which they [we]re made or rendered, and the power, in the exercise of a sound discretion, to vacate or modify them.” *Moherman v. Nickels*, 140 Ohio St. 450, 455 (1942). The trial court’s power to modify its judgments during the same term was “an inherent power of the court independent of any statutory authority therefor.” *Id.* at 456. Trial courts also had the authority to modify their judgments after term, but only as authorized by statute. *McCue v. Buckeye Union Ins. Co.*, 61 Ohio App. 2d 101, 103 (1979) (citing former R.C. 2325.01).

{¶3} In 1970, the Ohio Supreme Court, exercising its authority to “prescribe rules governing practice and procedure in all courts of the state” under Article IV Section 5(B) of the Ohio Constitution, adopted the Ohio Rules of Civil Procedure. Trial courts’ inherent power to modify or vacate their judgments did not survive the adoption of those rules. *Cale Prods. Inc. v. Orrville Bronze & Aluminum Inc.*, 8 Ohio App. 3d 375, 377 (1982) (“The Civil Rules provide a unified and comprehensive scheme for the granting of relief from judgment irrespective of terms of court It would be anomalous to hold that an inherent discretionary power, no longer limited in duration by the expiration of the term of court, remains viable outside of this procedural framework.”). In *Cale Products*, this Court rejected the idea that trial courts still have the inherent power to modify their judgments. *Id.* at 379. It determined, instead, that, “[w]hether

within term or without, the power of a court to alter its judgment must be consistent with the [Ohio Rules of Civil Procedure].” *Id.* at 379 (quoting *Ford Motor Credit Co. v. McMasters*, 9th Dist. 9188, 1979 WL 207763 at *2 (Aug. 15, 1979)). But see *Patton v. Diemer*, 35 Ohio St. 3d 68, 70 (1988) (recognizing that trial courts have inherent power to vacate void judgments).

{¶4} Under Rule 60(B) of the Ohio Rules of Civil Procedure, the trial court “may relieve a party . . . from a final judgment . . . for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence . . . ; (3) fraud . . . , misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged . . . ; 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 . . . was entered or taken.” Civ. R. 60(B). Interpreting Civil Rule 60(B), the Ohio Supreme Court has held that, “[t]o prevail on a motion brought under [the rule], 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” *GTE Automatic Elec. Inc. v. ARC Indus. Inc.*, 47 Ohio St. 2d 146, paragraph two of the syllabus (1976).

{¶5} The trial court scheduled a hearing on the motion to vacate, but, instead of letting Mr. Atkinson present evidence regarding his motion, it mostly just asked the lawyers about the history of the case. It then told the parties that “I’m going to do something here that I think I have the power, as far as an equitable matter, to extend [Mr. Atkinson’s] time [to pay the \$18,000].” It also told the parties, “I think the Court has to do some equity here.” It further told them that it was “not vacating the judgment entry.” In its “Final Judgment,” the court wrote that,

“[f]or good cause shown and with evidence of justifiable delay, the Court finds that equity requires the Agreed Judgment Decree . . . to be modified”

{¶6} Mr. Atkinson has conceded that, “rather than employ Civil Rule 60(B), the trial court relied on its inherent equitable powers to modify its final entry and prevent a manifest injustice.” The trial court, however, did not have inherent equitable power to modify the Agreed Judgment Entry. The court failed to analyze whether Mr. Atkinson had a meritorious claim or defense, whether he was entitled to relief under one of the grounds stated in Civil Rule 60(B)(1) to (5), or whether he moved within a reasonable time. See *GTE Automatic Elec. Inc. v. ARC Indus. Inc.*, 47 Ohio St. 2d 146, paragraph two of the syllabus (1976). We, therefore, conclude that the trial court incorrectly modified the Agreed Judgment Entry. EMC’s assignment of error is sustained.

EVIDENTIARY HEARING

{¶7} Mr. Atkinson’s cross-assignment of error is that the trial court should have held an evidentiary hearing on his motion for relief from judgment. “A party moving for relief from judgment under Civ.R. 60(B) is not automatically entitled to an evidentiary hearing.” *FirstMerit Bank, N.A. v. Reliable Auto Body Co.*, 169 Ohio App. 3d 50, 2006-Ohio-5056, at ¶10. “If, however, the material submitted by the movant contains allegations of operative facts demonstrating that relief is warranted, the trial court should grant the movant a hearing to take evidence and either verify or discredit the asserted facts.” *Id.* Mr. Atkinson has acknowledged that the reason the trial court did not afford him an evidentiary hearing on his motion was because it thought it had inherent equitable power to modify the judgment.

{¶8} At the hearing, the trial court noted that Mr. Atkinson had submitted an affidavit in support of his motion and that a copy of the \$18,000 check that he had sent EMC in February

2009 was attached to the affidavit. The trial court also asked Mr. Atkinson whether what his lawyer had said about his reason for not paying the \$18,000 by December 15, 2008, was “true to the best of [his] knowledge.” Mr. Atkinson said that it was. Mr. Atkinson has not identified what other evidence he would have offered in support of his motion for relief from judgment. On remand, however, the trial court may decide that additional evidence is necessary to decide whether Mr. Atkinson’s motion satisfies the requirements of Civil Rule 60(B). It is not appropriate for this Court to resolve at this time whether a full evidentiary hearing is necessary. Mr. Atkinson’s cross-assignment of error is overruled.

CONCLUSION

{¶9} The trial court did not have inherent equitable power to modify the parties’ Agreed Judgment Decree. The judgment of the Summit County Common Pleas Court is reversed, and the matter is remanded for consideration of Mr. Atkinson’s motion for relief from judgment under Rule 60(B) of the Ohio Rules of Civil Procedure.

Judgment reversed,
and cause remanded.

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 appellee/cross-appellant.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
MOORE, J.
CONCUR

APPEARANCES:

ERIC DEIGHTON, attorney at law, for appellant/cross-appellee.

JAMES K. REED, attorney at law, for appellee/cross-appellant.