ORIGINAL

IN THE SUPREME COURT OF OHIO

10-1965

EDWARD . HARRISON, JR.	)On Appeal from
	)Court of appeals Eighth Appellate District
Appellee	)
	) Court of Appeals Case No. 94270
vs.	)
	)
JAMES J. DOERNER, JR.	)
	)
Appellant	)

MOTION FOR STAY OF PROCEEDINGS

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FILED
NOV 12 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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MOTION FOR STAY OF PROCEEDINGS

Appellant respectfully requests the Court to Stay execution of the Order of the 8th District Court of Appeals dated September 20, 2010 upholding the lower court's denial of Appellant's Civ. R. 60 (B) (5) motion. This request is made to prevent foreclosure of Appellant's property while this matter is pending before this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been served on David Ledman, Attorney for Appellee at 35000 Chardon Road, Suite 105, Willoughby Hills , OH 44094 by regular mail on October 8, 2010.

Joel A. Nash [0061081]
Counsel for Appellants,

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94270

EDWARD C. HARRISON, JR.

PLAINTIFF-APPELLEE

vs.

JAMES J. DOERNER, JR.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-521297

BEFORE: Blackmon, P.J., Boyle, J., and Cooney, J.

RELEASED AND JOURNALIZED: September 30, 2010

"Appendix A"

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FILED AND JOURNALIZED
PER APP.R. 22(C)

SEP 30 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

PATRICIA ANN BLACKMON, P.J.:

Appellant James J. Doerner, Jr. appeals the trial court's denial of his motion to set aside judgment and assigns the following errors for our review:

> **"I. The trial court erred in ruling untimely appellant's Civ.R. 60(B)(5) motion filed four (4) years and three (3) months after judgment without considering that a fraud had been perpetrated upon the court."**
>
> **"II. Whether a judgment debtor should be relieved from judgment obtained by misrepresentations and omissions of material facts pursuant to a Civ.R. 60(B)(5) filed four (4) years and three (3) months after the judgment.**

Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

On February 4, 2004, Harrison filed suit against Doerner alleging breach of contract, breach of fiduciary duty, promissory estoppel, and unjust enrichment. In the complaint, Harrison alleged that in October 2000, he and Doerner reached a verbal agreement to form a partnership to own and operate a lounge, engage in related business activities, and share in the obligations, as well as the benefits of the enterprise.

Harrison also alleged that in furtherance of the agreement, they negotiated for the purchase of a business known as "S&S Lounge," a liquor license issued by the Ohio Department of Liquor Control, and subleased the premises occupied by the lounge. In addition, Harrison alleged that pursuant

to the agreement, he and Doerner were to have equal ownership and share the profits equally.

Harrison further alleged that in furtherance of, and in reliance on, the parties' agreement, he managed the lounge between October 2000 and March 2001, performed services, expended labor, incurred expenses, and deferred compensation. Harrison alleged that in March 2001, Doerner repudiated the parties' agreement.

With leave of court, on June 15, 2004, Doerner, pro se, filed an answer and was subsequently served with written discovery requests, including interrogatories, request for admissions, and request for production of documents. Doerner failed to respond to the discovery request, and Harrison filed a motion to compel, which the trial court granted on October 19, 2004, ordering Doerner to respond by October 26, 2004. Doerner failed to comply with the trial court's order, and Harrison filed a motion for sanctions.

On November 17, 2004, Harrison filed a motion for summary judgment and requested an oral hearing, which the trial court scheduled for March 10, 2005. Doerner failed to appear for the hearing on Harrison's motion for summary judgment. On March 25, 2005, the trial court granted Harrison's motion for summary judgment and scheduled a hearing for May 9, 2005, to address the issue of damages.

On May 20, 2005, the trial court conducted an evidentiary hearing on the issue of damages, but Doerner failed to appear. The trial court entered judgment in Harrison's favor in the amount of $93,500, plus interest and costs. Thereafter, Harrison perfected a judgment lien on Doerner's property and attempted to execute on the judgment. Harrison scheduled the deposition of Doerner for October 3, 2006, but Doerner failed to appear; thereafter, Harrison filed a motion to compel.

Doerner again failed to appear for his deposition, and Harrison filed a motion to show cause. At a hearing on May 2, 2007, the trial court ordered Doerner to appear for the deposition scheduled for May 24, 2007, and to produce all requested documents. Doerner complied with the trial court's order.

On September 11, 2009, Doerner filed a motion for relief from the trial court's May 24, 2005 judgment in favor of Harrison. In the motion, Doerner asserted that Harrison obtained the judgment through fraud upon himself and the court. Harrison opposed the motion on the grounds that there was no evidence of fraud and that the motion was untimely.

On October 23, 2009, the trial court denied Doerner's motion for relief from judgment on the grounds that it was untimely.

Motion to Vacate Judgment

In the first assigned error, Doerner argues the trial court erred in denying his Civ.R. 60(B)(5) motion as untimely.

We review appeals from the award or denial of Civ.R. 60(B) motions under an abuse of discretion standard. *Render v. Belle*, Cuyahoga App. No. 93181, 2010-Ohio-2344, citing *Associated Estates Corp. v. Fellows* (1983), 11 Ohio App.3d 112, 463 N.E.2d 417. See, also, *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 371 N.E.2d 214. An abuse of discretion connotes an attitude by the court that is arbitrary, unconscionable, or unreasonable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

Civ.R. 60(B) states in pertinent part:

> **"On motion and upon such terms as are just, the court may relieve a party * * * 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; (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 to taken. * * *."**

In order to prevail on a motion for relief from judgment under Civ.R. 60(B), the movant must demonstrate: "(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 for 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, 351 N.E.2d 113, paragraph two of the syllabus. A failure to establish any one of these three requirements will cause the motion to be overruled. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20, 520 N.E.2d 564; *Argo Plastic Prod. Co. v. Cleveland* (1984), 15 Ohio St.3d 389, 391, 474 N.E.2d 328.

A movant is not entitled to a hearing on a motion for relief from judgment if the motion or supportive affidavits do not contain allegations of operative facts that would warrant relief under Civ.R. 60(B). *Hrabak v. Collins* (1995), 108 Ohio App.3d 117, 121, 670 N.E.2d 281; *Boster v. C & M Serv., Inc.* (1994), 93 Ohio App.3d 523, 526, 639 N.E.2d 136.

In the instant matter, Doerner filed his motion to vacate pursuant to Civ.R. 60(B)(5), claiming that Harrison had perpetrated a fraud upon him and the court. Doerner specifically claimed that Harrison, a convicted felon, could not have been a part owner of a liquor license or bar under Ohio law.

Initially, we note Civ.R. 60(B)(5) is a catch-all provision that reflects the inherent power of a court to relieve a person from the unjust operation of a judgment. *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, 448 N.E.2d

1365, paragraph one of the syllabus. The grounds for relief must be substantial. Id. It is to be used only in extraordinary and unusual cases when the interests of justice warrant it. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 316 N.E.2d 469. The provision is not to be used as a substitute for any of the more specific provisions of Civ.R. 60(B). *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 637 N.E.2d 914. See, also, *Savage v. Goda* (Oct. 26, 2000), 8th Dist. Nos. 77473 and 77486.

The record reveals that Doerner filed his motion four years and three months after the entry of the challenged judgment. With regard to the requirement that the motion must be timely filed, we note that all five grounds for relief require the motion to be made within a reasonable time; the first three grounds for entitlement to relief have a maximum time limit of one year from the entry of judgment, while the last two grounds have no maximum limit if the time can otherwise be characterized as reasonable under the circumstances of the case. *In re Monogudis*, Cuyahoga App. No. 92988, 2010-Ohio-2087, citing *Yancey v. Yancey*, 7th Dist. No. 07 MA 33, 2007-Ohio-5045.

We conclude under the facts of this case that a motion filed more than four years after the final judgment is not a reasonable time under Civ.R. 60(B)(5). Id., citing *Marchel v. Marchel*, 160 Ohio App.3d 240, 2005-Ohio-1499, 826 N.E.2d 887. A three-year delay in filing a Civ.R. 60(B) motion was untimely. Thus,

the trial court acted well within its discretion in concluding that the motion was untimely.

Moreover, the record indicates that in the motion for summary judgment, Harrison presented sufficient evidence to establish that he was in fact Doerner's business partner. Although Harrison did not sign the purchase agreement for the lounge and liquor license, Harrison jointly executed both the promissory note and the sublease agreement along with Doerner. If Harrison was an at-will employee as Doerner suggests, the average person would not have expected Harrison to execute the promissory note and the sublease agreement.

Further, the evidence indicates, after the trial court granted summary judgment, the trial court scheduled an evidentiary hearing on the issue of damages. However, Doerner failed to appear. The trial court's journal entry states in pertinent part as follows: "* * * After hearing the evidence and reviewing the submitted pleadings and evidence, this court finds plaintiff's motion well taken. * * *" Journal Entry March 24, 2005.

Here, given that Doerner failed to appear at the evidentiary hearing and has provided no transcript of the proceedings, we assume regularity on the part of the trial court as to the nature of the hearing held on damages. *Oliver v. C.M.H.A.*, Cuyahoga App. Nos. 80138 and 80347, 2002-Ohio-5830.

Nonetheless, Doerner insists the motion should have been granted because Harrison perpetrated a fraud upon him and the court. As discussed above, Harrison presented sufficient evidence that he was in fact Doerner's business partner in the enterprise. In addition, and directly pertinent to this issue, Civ.R. 60(B)(3) permits a court to vacate a final judgment for fraud, but only if the motion to vacate is filed within one year after the judgment was entered. Doerner's petition to vacate was filed more than four years after the challenged judgment was entered, and was therefore untimely for purposes of Civ.R. 60(B)(3).

Doerner's reliance on Civ.R. 60(B)(5), which is not subject to the one-year limitation, and instead allows relief for "any other reason justifying relief from judgment," is misplaced. Civ.R. 60(B)(5) is not applicable when one of the other more specific Civ.R. 60(B) grounds applies. *In re Estate of Kirkland*, 2nd Dist. No. 2008-CA-57, 2009-Ohio-3765, citing *Strack*, supra, 70 Ohio St.3d 172, 1994-Ohio-107, 637 N.E.2d 914. As such, the trial court did not err when it ruled the motion untimely filed. Accordingly, we overrule the first assigned error.

Relief from Judgment and Fraud

In the second assigned error, Doerner argues that his motion for relief from judgment, filed pursuant to Civ.R. 60(B)(5), should have been granted

because Harrison obtained said judgment through fraud. In our resolution of the first assigned error, we addressed Doerner's misplaced reliance on Civ.R. 60(B)(5) as a means of obtaining relief when alleging fraud and also concluded that Harrison presented sufficient evidence to establish that he was a partner in the enterprise.

As previously stated, Civ.R. 60(B)(5) is not applicable when one of the other more specific Civ.R. 60(B) grounds applies. Given that Doerner filed his motion more than four years after the challenged judgment, it was untimely because Civ.R. 60(B)(3), which governs relief based on the allegation of fraud, requires the motion to be filed within one year. Therefore, the trial court did not abuse its discretion in denying the requested relief. Accordingly, we overrule the second assigned error.

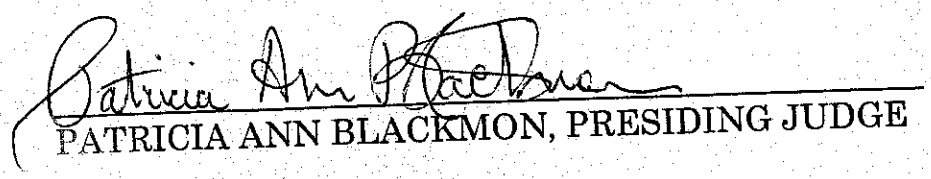
Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.



PATRICIA ANN BLACKMON, PRESIDING JUDGE

MARY J. BOYLE, J., and
COLLEEN CONWAY COONEY, J., CONCUR