[Cite as *Harris v. Lucic Gen. Contrs., Inc.*, 2012-Ohio-2004.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

JOHN HARRIS, JR. d.b.a. ST. CLAIR CAR CENTER AND TRUCK REPAIR,	:	**MEMORANDUM OPINION**
Plaintiff-Appellant,	:	**CASE NO. 2011-L-112**
- vs -	:	
LUCIC GENERAL CONTRACTORS, INC., et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 09CV003973.

Judgment: Appeal dismissed.

John W. Bosco, John W. Bosco Co., L.P.A., Paramount Building, 31805 Vine Street, Willowick, OH 44095 (For Plaintiff-Appellant).

Charles P. Royer and *Daniel M. Singerman*, McCarthy, Lebit, Crystal & Liffman Co., L.P.A., 1800 Midland Building, 101 Prospect Avenue, West, Cleveland, OH 44115 (For Defendants-Appellees).

TIMOTHY P. CANNON, P.J.

{¶1} Plaintiff-Appellant, John Harris, Jr., d.b.a. St. Clair Car Center and Truck Repair, appeals from the Lake County Court of Common Pleas order granting a motion to vacate the default judgment entered against Defendants-Appellees, Lucic General Contractors and Velimir Lucic. Appellees filed a motion to dismiss the appeal, asserting that the order was not final and appealable. Appellant filed a brief in opposition. Shortly

thereafter, the parties briefed the underlying issue. For the reasons stated herein, we find that the subject order is not final and appealable.

{¶2} On December 9, 2009, appellant filed a multi-count complaint against several defendants: the city of East Cleveland, Norman and Susan Kirchner, d.b.a. St. Clair Auto Body, George Neff, St. Clair Auto Body, and appellees. An amended complaint followed. Appellees never filed any answer to the complaint. The remaining defendants each filed an answer generally denying the allegations.

{¶3} On September 22, 2010, the trial court entered default judgment against appellees. It was subsequently stipulated that Mr. and Mrs. Kirchner, George Neff, and St. Clair Auto Body were dismissed with prejudice.

{¶4} On July 6, 2011, appellees surfaced and filed a Civ.R. 60(B) motion to vacate the default judgment. In their motion, appellees argued that relief was warranted through Civ.R. 60(B)(1) and (5), alleging excusable neglect in that service was perfected upon Lucic's mother who did not speak English and who consequently did not forward the summons or complaint onto her son or his business. The motion was sharply opposed and a hearing on the matter was held.

{¶5} On August 19, 2011, the trial court granted appellees' Civ.R. 60(B) motion to vacate its prior judgment. The court did not make a determination as to whether there was just reason for delay, pursuant to Civ.R. 54(B). The remaining party, the city of East Cleveland, was voluntarily dismissed and appellant timely filed a notice of appeal.

{¶6} Appellees filed a motion to dismiss the appeal before this court, arguing that the original September 22, 2010 default judgment entry was interlocutory because

other claims and parties existed; thus, they contend the subsequent August 19, 2011 entry vacating the underlying interlocutory judgment is not a final, appealable order. Conversely, appellant argues the August 19, 2011 order is final and appealable because the notice of appeal was filed *after* the disposition of all parties and claims.

{¶7} Notwithstanding the motion to dismiss, the parties briefed the underlying claims. In his merit brief, appellant argued Civ.R. 60(B) relief was not appropriate, correctly citing the 60(B) standard set forth by the Ohio Supreme Court in *GTE Automatic Elec. v. ARC Industries*, 47 Ohio St.2d 146 (1976). Appellees, in their response brief, again asserted the appeal should be dismissed but exhausted the bulk of their argument guarding against appellant's Civ.R. 60(B) assertions.

{¶8} Civ.R. 54(B) explains:

{¶9} "In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudication all the claims and the rights and liabilities of the parties."

{¶10} Here, the trial court's September 22, 2010 default judgment was interlocutory because all other defendants named and claims set forth in the complaint remained. Thus, appellees' Civ.R. 60(B) motion to vacate that judgment was essentially a motion for reconsideration of an interlocutory order. Indeed, the very language of Civ.R. 60(B) states "the court may relieve a party or his legal representative from a *final* judgment, order or proceeding." (Emphasis added.) The trial court's August 19, 2011

judgment entry vacating its prior interlocutory judgment was itself also interlocutory because the city of Cleveland had not yet been voluntarily dismissed.

{¶11} The Eighth Appellate District, in *Yeckley v. Yeckley*, 8th Dist. No. 94358, 2010-Ohio-4252, ¶12, addressed a similar situation, stating:

{¶12} "The proceedings in the underlying action were not completed before KeyBank filed its motion to vacate the default judgment entered against it. * * * [T]he order granting default judgment against KeyBank was an interlocutory order, subject to modification at any time. * * * KeyBank did not have to comply with Civ.R. 60(B) when it asked the court to vacate that order; its motion was simply a motion for reconsideration."

{¶13} The Eighth District ultimately dismissed the appeal, relying on the well-founded principle that "'[a]n order vacating a judgment that was entered against less than all parties and in which the trial court did not make an express determination that there was "no just reason for delay" is not a final, appealable order.'" *Id.* at ¶13, quoting *Jarrett v. Dayton Osteopathic Hosp., Inc.*, 20 Ohio St.3d 77 (1985). Such is squarely the case here.

{¶14} We note that, even if there were a remand to the trial court to certify there is no just reason for delay pursuant to Civ.R. 54(B), this appeal would still be problematic. Appellant's assigned errors are all premised on the trial court granting a Civ.R. 60(B) motion, *not* a motion for reconsideration. A remand would serve only to delay this case further. If the merits of the claim were to be addressed as it pertains to granting a motion for reconsideration, we would be faced with the question of whether the court abused its discretion in reconsidering its own interlocutory judgment after new

facts came to the court's attention. This is certainly a lower standard than whether the court abused its discretion in finding that the conduct of appellees constituted excusable neglect and whether there would be a meritorious defense if relief were granted. The Sixth Appellate District has held "when presented with additional evidence on a motion for reconsideration, a trial court does *not* abuse its discretion in reconsidering its interlocutory decision on a motion for summary judgment." (Emphasis sic.) *Hundsrucker v. Perlman*, 6th Dist. No. L-03-1293, 2004-Ohio-4851, ¶29, citing *D'Agastino v. The Uniroyal-Goodrich Tire Co.*, 129 Ohio App.3d 281 (6th Dist.1988). Here, new facts surfaced such that the trial court chose to reconsider its previous interlocutory judgment. We would be unlikely to conclude this was an abuse of the court's discretion.

{¶15} Regardless, we have no jurisdiction to consider the matter. Though appellees labeled their motion as a motion for relief pursuant to Civ.R. 60(B), their motion was actually merely a motion for reconsideration of a non-final order that, pursuant to Civ.R 54, could be modified at anytime because claims remained pending. The appeal is therefore dismissed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.