[Cite as *Louden v. Cooper*, 2004-Ohio-5127.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

ALBERT LOUDEN,	)	
	)	CASE NO. 04 MA 9
PLAINTIFF-APPELLANT,	)	
	)	
- VS -	)	O P I N I O N
	)	
CEPHUSE COOPER,	)	
	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Youngstown Municipal Court, Case No. 02CVI4191.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant:

Attorney Wayne Sarna
Community Legal Aid Services, Inc.
First National Bank Building, 7th Floor
11 Federal Plaza Central
Youngstown, Ohio 44503

For Defendant-Appellee:

Attorney Joseph Rafidi
3627 South Avenue
Youngstown, Ohio 44502

JUDGES:

Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: September 23, 2004

VUKOVICH, J.

{¶1} Plaintiff-appellant Albert Louden appeals the decision of the Youngstown Municipal Court which upheld a magistrate's decision refusing to vacate a settlement entry. The issue presented is whether appellant's motion satisfied the requirements for granting relief from judgment under Civ.R. 60(B)(5). For the following reasons, the decision of the trial court is affirmed as appellant failed to meet the requirements for relief from judgment required by Civ.R. 60(B)(5).

STATEMENT OF THE CASE

{¶2} Appellant filed a small claims complaint against defendant-appellee Cephuse Cooper. Appellant alleged that appellee sold him realty with an outstanding water bill constituting a lien on the property. When appellee failed to appear at the hearing, the magistrate entered default judgment for appellant in the amount of $2,040.42 plus costs. On October 25, 2002, the trial court approved the magistrate's decision pending objections.

{¶3} Appellee sent a letter to the court, which was construed as objections. The trial court overruled the objections, upheld the magistrate's decision, and entered judgment for appellant for $2,040.42. Appellee filed a Civ.R. 60(B) motion to vacate default judgment. On June 23, 2003, however, the court overruled his motion.

{¶4} A debtor's examination was then scheduled for June 24, 2003. On that day, but before the hearing, the parties' attorneys signed a settlement agreement stating that appellee would pay appellant $1,000 in ten $100 monthly increments. The magistrate approved the settlement agreement that day. On July 15, 2003, the court signed the settlement entry.

{¶5} On July 25, 2003, appellant filed a Civ.R. 60(B)(5) motion to vacate the court's July 15, 2003 settlement entry and to thus reinstate the October 25, 2002 judgment. The motion claimed that the agreement was entered without appellant's consent and that it lacked consideration.

{¶6} Appellant attached the affidavits of his attorneys. Apparently, appellant's counsel, Attorney Howard, had to attend a deposition on the day of the debtor's examination so she asked her coworker, Attorney Sarna, to represent appellant that

day. When court was running late and Attorney Sarna had to appear in bankruptcy court, he approached appellee's counsel to discuss the issue of payment. Attorney Sarna stated that he thought the $1,000 stated in the settlement entry represented the full amount of the judgment and that he did not know that the full amount of judgment was $2,040.42.

{¶7} Appellant also attached a letter that Attorney Sarna wrote to appellee's counsel on June 27, three days after signing the settlement entry, opining that the entry should read $2,040.42 as the total amount rather than $1,000. Finally, appellant attached a second letter written to appellee's counsel on July 2, 2003, returning appellee's first $100 installment payment due to the alleged lack of consideration to support the settlement agreement.

{¶8} A hearing before the magistrate was held on appellant's motion to vacate. On September 5, 2003, the magistrate denied relief from judgment stating that appellant failed to satisfy the requirements of Civ.R. 60(B). Appellant filed objections on September 18, 2003, restating the arguments in his Civ.R. 60(B) motion. On December 3, 2003, the trial court adopted the magistrate's decision and denied appellant's motion to vacate. Appellant filed timely notice of appeal.

GENERAL LAW ON CIV.R. 60(B)

{¶9} Civ.R. 60(B) provides:

{¶10} "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. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules."

{¶11} In order to prevail on a Civ.R. 60(B) motion for relief from judgment, the movant must demonstrate: (1) the existence of a meritorious claim or defense to present if relief is granted; (2) entitlement to relief under one of the five grounds set forth in the rule; and (3) a timely motion, not more than one year after judgment if one of the first three grounds are alleged. *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, at ¶2 of syllabus. The trial court's decision on a motion for relief from judgment shall not be reversed absent an abuse of discretion, i.e. if the decision is arbitrary, unconscionable, or unreasonable. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77.

{¶12} Since the motion to vacate in this case was made a mere ten days after the judgment was entered and since appellant already had judgment entered in his favor in the amount of $2,040.42, the *GTE* elements of a timely motion and a meritorious claim are undeniably satisfied. Thus, the only remaining issue on appeal is whether operative facts were presented to support the final *GTE* element of entitlement to relief under one of the five grounds for relief.

{¶13} Appellant sought relief under Civ.R. 60(B)(5), "any other reason justifying relief from the judgment" on the grounds that he did not consent to the settlement agreement signed by the attorneys. The grounds for invoking Civ.R. 60(B)(5) relief must be substantial. Staff Note 1970. See, also, *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, 66. Furthermore, this "catch all" provision of the rule only applies when a more specific provision does not apply. Id.; *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174.

ASSIGNMENT OF ERROR

{¶14} Appellant assigns the following error on appeal:

{¶15} "THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION IN OVERRULING APPELLANT'S MOTION TO VACATE [IN] THE JUDGMENT ENTRIES OF THE MAGISTRATE JUDGE FILED SEPTEMBER 5, 2003 AND THE TRIAL JUDGE FILED DECEMBER 3, 2003."

{¶16} Appellant contends that the trial court abused its discretion in determining that he failed to meet the requirements for Civ.R. 60(B) relief. He states that his attorneys had no authority to compromise his judgment from $2,040.42 to $1,000. Appellant also claims that there was no meeting of the minds because Attorney Sarna did not intend to agree to a decreased judgment, rather he was merely agreeing to a method of payment on the full judgment, the amount of which he was mistaken. He alleges that there was no acceptance because the first attempted payment was returned. He also argues that the settlement agreement was made without consideration since he gave up $1,040.42 but received nothing in return.

{¶17} Appellant urges that the Eighth District has held that where a party properly demonstrates that his attorney was without authority to settle or compromise a claim or defense, then the party may seek to vacate that judgment pursuant to Civ.R. 60(B)(5). *Sperry v. Hlutke* (1984), 19 Ohio App.3d 156, 159, citing *Fanta v. Minerd* (Apr. 3, 1980), 8th Dist. No. 39491, unreported. Appellant also cites to this court *Brotherton v. Bules* (Jan. 31, 1981), 2d Dist. No. 1440, where the Second District held that an attorney has no power to bind a client by compromise absent express authority. Id., citing *Morr v. Crouch* (1969), 19 Ohio St.2d 24. The *Brotherton* court concluded that if a client never agreed to the settlement in the presence of the court nor in the discussions with her lawyer, the court could not properly sign a journal entry reflecting a settlement agreement and the entry should be vacated upon motion. Id.

{¶18} Here, appellant alleges that he did not know a settlement was being entered. He had already obtained full judgment against appellee. He claims he was leaving a debtor's examination to his attorneys who ended up agreeing to a payment schedule that represented less than half of the original judgment. Appellee seems to concede the application of the above case law stating that Civ.R. 60(B)(5) can be utilized where there are allegations that the attorney did not have prior authorization to settle. Yet, he then argues that the attorney had implied authority to settle. He also states that consideration existed in that the settlement caused the legal proceedings to end with voluntary and regular payments. Despite appellee's concession as to the application of the law, it appears the decision of the trial court should be affirmed because the law relied upon by appellant is invalid.

LAW AND ANALYSIS

{¶19} Although it is true that some courts have held or stated in dicta that Civ.R. 60(B)(5) can be used to vacate a judgment when an attorney settles a claim without authority of the client, the Ohio Supreme Court case law provides otherwise. For instance, in *Argo Plastic Prod. Co. v. City of Cleveland* (1984), 15 Ohio St.3d 389, the attorney for the city had authority to settle for only $2,500; however, he entered into an agreement obligating the city to settle for over half a million dollars. The trial court denied the city's motion for relief from judgment. The Eighth District Court of Appeals reversed and held that the trial court abused its discretion in denying the city's motion for relief from judgment. The court of appeals thus vacated the settlement entry.

{¶20} The Supreme Court disagreed, stating that the neglect of an attorney in settling a claim is imputed to the client. Id. at 392, citing *GTE*. The Court concluded that the city could not obtain relief from judgment solely on the misconduct of its own attorney in settling for more than was allegedly authorized. Id. at 392-393. "That being the case, the city's contention that Civ.R. 60(B) relief is warranted where its attorney exceeds his settlement authority is without merit. The city's remedy, if any, lies elsewhere." Id. at 393.

{¶21} Accordingly, the Supreme Court has held that a trial court properly denies relief from judgment where the claim revolves around the misconduct, neglect, or mistake of counsel in settling a claim without authority. Id. Although *Argo* dealt with Civ.R. 60(B) in general and focused mainly on Civ.R. 60(B)(1), the Supreme Court has held multiple times that Civ.R. 60(B)(5) cannot be used merely to avoid an adverse conclusion under one of the more specific grounds for relief. *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174; *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, 66. Thus, where the basis of the motion revolves around allegations of neglect or mistake of counsel, one cannot rely on Civ.R. 60(B)(5). Id. See, also, *Maumee Equip., Inc. v. Smith* (Nov. 22, 1985), 6th Dist. No. l85-168.

{¶22} In *Maumee Equipment*, the Sixth District held that Civ.R. 60(B)(5) relief was properly denied even though the movant alleged that counsel had no authority to settle because relief should have been sought under Civ.R. 60(B)(1) and because

Argo allows relief to be denied under Civ.R. 60(B)(1) even where counsel had no authority to settle. The Eighth District has also changed its position since the *Sperry* case cited by appellant. See, e.g., *Hicks v. Washington* (July 16, 1987), 8th Dist. No. 52915 (citing *Argo* for the proposition that a claim that an attorney exceeded his settlement authority is not grounds for vacation of judgment). Many other districts have also followed *Argo* in situations similar to the one at bar. See, e.g., *Brinkr, Inc. v. United Riggers, Inc.* (Feb. 22, 2000), 5th Dist. No. 1999CA00300; *Mollis v. Rox Constr. Co., Inc.* (Dec. 4, 1992), 11th Dist. No. 92-T-4688; *Charles v. Anthony* (Sept. 15, 1992), 10th Dist. No. 92AP-5; *Weir v. Needham* (1985), 26 Ohio App.3d 36, 38 (9th Dist.).

{¶23} Here, appellant sought relief under Civ.R. 60(B)(5); yet, he sets forth allegations of mistake of his attorney in reading the settlement entry or in his belief that $1,000 was the full judgment amount. Appellant also alleges neglect in that his attorney failed to determine the facts of the case before endeavoring to represent his co-worker's client and in entering a settlement. Thus, Civ.R. 60(B)(5) relief was properly denied.

{¶24} Appellant did not move for relief under Civ.R. 60(B)(1). Even if he had, the trial court could have properly denied relief based upon the general principles of *GTE* and upon the more specific holding of *Argo* discussed above. For instance, *GTE* provides that excusable neglect is a complete disregard for the judicial system based upon an evaluation of the facts and circumstances in each case. *GTE* at 153. A trial court can reasonably find that an attorney who signs a settlement entry where he later claims that he was unaware of the full judgment amount and that he did not intend to compromise the judgment amount has not established neglect that is excusable. Likewise, a trial court can reasonably find that an attorney who settles a claim without authority has not established excusable neglect. An attorney should not endeavor to represent a client especially in a settlement situation where he has failed to ascertain the amount of judgment or the client's wishes for settlement or even for payment. Such a scenario could be described as "fall[ing] substantially below what is reasonable under the circumstances." *GTE* at 152.

{¶25} As for allegations of mistake, one cannot attempt to fit their inexcusable neglect into the mold of mistake in order to avoid the parameters of the definition of excusable neglect. Regardless, as aforementioned, *Argo* specifically held that a trial court properly denies relief from judgment where the claim revolves around the *misconduct, neglect, or mistake* of counsel in settling a claim without authority. Hence, even if appellant had moved for Civ.R. 60(B)(1) relief, the trial court would not have abused its discretion in refusing to vacate the settlement entry on grounds of lack of authority to settle.

{¶26} Finally, appellant's allegations of a lack of consideration are unfounded. Appellee frames consideration as being so that appellant's counsel did not have to wait for the debtor's examination. However, the key aspect of consideration is the fact that appellee could have appealed the denial of his motion to vacate default judgment. (A default judgment where a party misses a small claims court date for some valid reason is more easily vacated than a settlement agreement.) Instead, he let his appeal time lapse in reliance on this settlement entry. Moreover, other types of consideration may have existed regarding the payment schedule depending upon appellee's financial solvency and income sources.

{¶27} Finally, we note that a hearing was held on appellant's motion for relief from judgment, but no transcript was submitted to this court as per App.R. 9(B) (or to the trial court when the objections were filed). Nor was any timely App.R. 9(C) statement of the evidence or App.R. 9(D) agreed statement of the record submitted to this court. We also note that appellant did not provide his own affidavit with his motion for relief, which could have helped establish, for instance, his claim that he did not give authority to settle and that he was not involved in the discussions that day.

CONCLUSION

{¶28} The trial court can properly deny relief from judgment where the movant alleges that Civ.R. 60(B)(5) relief should be granted because his attorney entered a settlement without authority after mistakenly believing that the entry was for the full amount of judgment and mistakenly believing that he was only settling the method of payment. Civ.R. 60(B)(5) cannot be used when a more specific ground applies. In this case, the more specific ground would be Civ.R. 60(B)(1), which entails mistake,

inadvertence, surprise, or excusable neglect. Appellant failed to move for relief under Civ.R. 60(B)(1). Regardless, the Supreme Court has concluded that Civ.R. 60(B)(1) relief can be properly denied where the movant alleges an attorney settled a claim without authority. Further, excusable neglect is not apparent in this case. Finally, the trial court could properly find consideration for the agreement.

{¶29} For the foregoing reasons, the trial court's decision, refusing to vacate the settlement entry, is hereby affirmed.

Waite, P.J., concurs.
DeGenaro, J., concurs.