[Cite as *Riesbeck v. Industrial Paint & Strip*, 2009-Ohio-6250.]

STATE OF OHIO, MONROE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

TEDDY RIESBECK	)	CASE NO. 08 MO 11
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
INDUSTRIAL PAINT AND STRIP	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the County Court, Small Claims Division, of Monroe County, Ohio
Case No. 08-CV-I-80

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:
Teddy Riesbeck, Pro se
102 Wood Terrace
Woodsfield, Ohio 43793

For Defendant-Appellant:
Atty. Gary W. Smith
316 South Main Street
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JUDGES:

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

Dated: November 25, 2009

[Cite as *Riesbeck v. Industrial Paint & Strip*, 2009-Ohio-6250.]
WAITE, J.

{¶1} Appellant, Industrial Paint and Strip, appeals a decision of the County Court of Monroe County, Small Claims Division, awarding Appellee Teddy Riesbeck (hereinafter "Riesbeck") payment for two weeks of unused vacation pay. Appellant claims that the verdict is against the manifest weight of the evidence and that a new trial should have been granted. The record, including Appellant's own written vacation policy and employment records, fully supports the verdict and the trial court's judgment is affirmed.

{¶2} Riesbeck was hired on October 10, 2000. On September 5, 2008, eleven of Appellant's employees were terminated in preparation for the upcoming closure of the business. According to Appellant's vacation policy, Riesbeck had earned three weeks of vacation time on October 10, 2007, and she expected to be paid for any unused vacation time when her job was terminated. She did not receive payment for unused vacation time, and filed a small claims action on September 18, 2008. A bench trial was held on October 22, 2008. Appellant was represented by counsel. Riesbeck appeared pro se. Two joint exhibits were submitted at trial. The first was Appellant's written vacation policy. The second was Appellant's record of the eleven employees who were fired on September 5, 2008, including the amount of vacation time for each that had accrued, had been used, and had been paid at separation. Riesbeck testified at trial. Richard Libby, the president of Industrial Paint and Strip, also testified. The court filed a two-page judgment entry on October 30, 2008, and awarded Riesbeck two weeks of unused vacation time, valued at $616 plus interest.

{¶3} On October 23, 2008, Appellant filed a motion to reopen the case and supplement the record, and attached a copy of an affidavit of Richard Libby along with a one-page copy of a calendar. The court denied the motion on October 30, 2008, stating that it would not set a precedent by allowing a party in a small claims case to supplement the record.

{¶4} On November 4, 2008, Appellant filed a document titled: "DEFENDANT'S MOTION TO MODIFY OR VACATE JUDGMENT OF COURT, FOR RELIEF FROM JUDGMENT OF COURT, OR MOTION FOR NEW TRIAL." The motion refers to both Civ.R. 59 (motion for new trial) and Civ.R. 60(B) (motion for relief from judgment). The court ruled on the motion on November 7, 2008, stating in its judgment entry: "the only issue at trial was how many weeks of vacation the Plaintiff was entitled to. The parties had over four weeks notice of trial and the Defendant was unable to produce testimony or documentary evidence as to that issue." (Emphasis in original.) The court denied Appellant's motion.

{¶5} Appellant filed this appeal on December 1, 2008.

ASSIGNMENT OF ERROR NO. 1

{¶6} "The trial court erred by finding for the Plaintiff-Appellee, which was clearly against the manifest weight of the evidence."

{¶7} Appellant argues that the judgment was against the manifest weight of the evidence. "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr.*

Co. (1978), 54 Ohio St.2d 279, 280, 376 N.E.2d 578. Appellant also argues that Riesbeck's testimony was not credible. Credibility is a matter for the trier of fact to determine. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶8} According to Appellant's records, Riesbeck was hired on October 11, 2000, and reached her seventh anniversary date on October 11, 2007. The vacation policy as contained in Joint Exhibit 1 states that terminated employees shall be paid for unused vacation days, that vacation is earned on the employee's anniversary date of hire, and that employees are awarded fifteen days of vacation after seven years of service. Thus, on Riesbeck's seventh anniversary hire date, October 11, 2007, she automatically earned 15 days of vacation.

{¶9} Riesbeck's employment was terminated on September 5, 2008. On that date, according to Appellant's documents, she was due to be paid for any unused vacation time. Again, according to Appellant's own Exhibit 2 that was submitted at trial, Riesbeck had accrued three weeks of vacation prior to being fired, and as of the termination date she had used one week of vacation time. Riesbeck's testimony at trial was somewhat confusing because she apparently believed she had only accrued two weeks of vacation time on October 11, 2007, and she was not sure if she was entitled to one or two weeks of paid vacation time on the date her employment was terminated. She testified that she used one week of vacation in January of 2008, and that was all the vacation time she had used since her last date of vacation accrual. (Tr., pp. 4-5.)

{¶10} Richard Libby, President of Industrial Paint and Strip, testified that Riesbeck had earned three weeks of vacation on October 11, 2007. He testified that Riesbeck had taken one extra week of vacation in the previous year. (Tr., pp. 12-13.) Upon further reflection, he then changed his testimony to: "My assumption was she would have taken them before the end of the year because you can't carry them over. So I guess I misspoke in assuming that she took all three last year." (Tr., p. 15.)

{¶11} Neither party appeared to understand the actual written terms of Appellant's vacation policy. Both witnesses seemed to be unclear as to whether vacation accrued on the anniversary of hire date or at the beginning of the calendar year. The policy as written was simple and clear. Employees earned a lump-sum vacation on their anniversary date of employment. Vacation days could not be carried over or accrued "year to year". If an employee was fired, he or she was entitled to be paid for the unused vacation days that had been awarded at the previous anniversary of the employee's hire date. Riesbeck's testimony and Appellant's documents as submitted on the record reflect that Riesbeck was owed two weeks of vacation pay. The manifest weight of the evidence supports this verdict. Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 2

{¶12} "The trial court erred by not modifying or vacating its judgment of October 30, 2008; by not granting the Defendant-Appellant relief from its judgment of October 30, 2008; or in the alternative, by not granting Defendant-Appellant's request for a new trial."

{¶13} Appellant argues that a small claims action may be modified or vacated in the same manner as other civil actions, pursuant to R.C. 1925.14. This is correct. Appellant also argues that the court should have either granted a new trial under Civ.R. 59 or granted relief from judgment under Civ.R. 60. Appellant cites no caselaw in support of its arguments, and the appeal is basically a plea to allow him to supplement the trial record with a further affidavit from Mr. Libby and to introduce a calendar into evidence.

{¶14} Civ.R. 59 allows, rather than mandates, a trial court to grant a new trial: "This rule provides that the trial court may grant a new trial if one of the specifically enumerated grounds exists or if good cause is shown. The rule does not require that the trial court grant a new trial, but, rather, the rule allows the court discretion to grant or not to grant a new trial." *Eagle Am. Ins. Co. v. Frencho* (1996), 111 Ohio App.3d 213, 218, 675 N.E.2d 1312. The purpose of Civ.R. 59(A) is to empower the trial court to prevent a miscarriage of justice. *Malone v. Courtyard by Marriott L.P.* (1996), 74 Ohio St.3d 440, 448, 659 N.E.2d 1242.

{¶15} A trial court's decision to overrule a motion for a new trial is reviewed for abuse of discretion. *Mannion v. Sandel* (2001), 91 Ohio St.3d 318, 321, 744

N.E.2d 759. An abuse of discretion in this context connotes that the court's attitude is unreasonable, arbitrary, or unconscionable. *Baker v. Dorion*, 155 Ohio App.3d 560, 2003-Ohio-6834, 802 N.E.2d 176, ¶13.

{¶16} Appellant does not set forth any basis for its request to grant a new trial other than that one of its representatives believes the trial judge made the wrong decision and that some representative would like to present new evidence on its behalf. Although a Civ.R. 59 motion may be granted based on newly discovered evidence, there is no indication that the document Appellant, through its representative, wishes to enter into the record qualifies as newly discovered. Evidence that could or should have been discovered prior to trial cannot be treated as newly discovered evidence. *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 410-411, 629 N.E.2d 500. The purpose of Civ.R. 59 is not to simply allow a party a second opportunity to present evidence that should have been presented at the first trial. *Griffith v. Griffith*, 7th Dist. No. 07 JE 40, 2009-Ohio-1024.

{¶17} In order to prevail on a Civ.R. 60(B) motion for relief from judgment, 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, 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, 150-151, 351 N.E.2d 113. All three elements of the test must be met to prevail on the motion.

Strack v. Pelton (1994), 70 Ohio St.3d 172, 174, 637 N.E.2d 914. A trial court's ruling on a Civ.R. 60(B) motion is reviewed only for abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77, 514 N.E.2d 1122.

{¶18} Once again, Appellant's claim for relief is that it has a document that would have allowed it to prevail at trial. Relief from judgment may be granted based on newly discovered evidence, but similar to Civ.R. 59, evidence that could have been discovered prior to trial by the exercise of due diligence does not qualify as newly discovered evidence. See Civ.R. 60(B)(2).

{¶19} Appellant alleges that Riesbeck committed a fraud on the court by lying about her vacation time. As stated earlier, whether or not Riesbeck was lying, i.e., whether she was credible, was a matter for the trier of fact to decide and does not constitute a basis for relief from judgment. Although Civ.R. 60(B)(3) allows relief from judgment due to fraud on the court, this refers to, "conduct which defiles the court itself, or fraud which is perpetrated by officers of the court so as to prevent the judicial system from functioning in the customary manner of deciding the cases presented in an impartial manner. Examples of fraud on the court justifying relief from judgment would include such 'egregious misconduct' as bribery of a judge or jury, or fabrication of evidence by counsel[,] or the prevention of an opposing party from fairly presenting his case." (Citations omitted.) *Hartford v. Hartford* (1977), 53 Ohio App.2d 79, 84, 371 N.E.2d 591. "[A] subsequent discovery that a witness committed perjury at trial is not a sufficient basis for a finding of a fraud upon the court so as to justify the invocation of the court's inherent power to set aside its judgment." Id.

{¶20} Appellant has shown no abuse of discretion in the trial court's denial of its Civ.R. 59 and 60(B) motions, and the second assignment of error is overruled.

{¶21} Based on the record in this matter, Appellant has not demonstrated any error in the court's judgment, and the small claims judgment in favor of Riesbeck is affirmed in full.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.