IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY

PRYMME LAND, et al.	)	CASE NO. CV-11-769490
	)	
Plaintiff,	)	JUDGE SHANNON M. GALLAGHER
	)	
vs.	)	
	)	**OPINION AND ORDER**
MARIO MARRA,	)	
	)	
Defendant	)	

***Shannon M. Gallagher, J.*:**

Defendant, Mario Marra, moves this court to vacate the judgment entered against him on January 16, 2014, pursuant to Ohio Civ. R. 60(B). Defendant filed his motion to vacate the judgment and supporting brief on November 26, 2014. Plaintiffs Prymme Land, Ltd. and Prymme Lake, LLC filed a brief in opposition to Defendant's motion on December 17, 2014. This court conducted a hearing and heard arguments on April 2, 2015. For the reasons that follow, Defendant's motion is DENIED.

I. LAW AND ANALYSIS

Civ. R. 60 (B) provides:

> 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.

To prevail on a motion to vacate under Civ. R. 60(B) 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 Ohio R. Civ. P. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and where the grounds of relief are pursuant to Ohio R. Civ. P. 60(B)(1), (2), or (3) not more than one year after the judgment, order or proceeding was entered or taken. *GTE Automatic Electric, Inc. v. ARC Ind. Inc.*, 47 Ohio St.2d 146 (1976). These required elements are independent and in the conjunctive, not the disjunctive. *Id*. The Ohio Supreme Court has stated that the movant bears the burden of demonstrating that a final judgment should be set aside. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St. 3d 17 (1988).

Defendant Marra moves to vacate this judgement pursuant to Civ. R. 60(B)(2),(3),(4) and (5) on the basis of newly discovered evidence, fraud, that it is no longer equitable that the judgment should have prospective application and for "any other reason." In his motion to vacate, Defendant has put forth what he claims to be newly discovered evidence of a letter from Plaintiff's former counsel. He also argues that his counsel did not receive notice of Plaintiff's motion for a corrected judgment, filed on January 10, 2014 and granted on January 16, 2014.

II. FACTS AND PROCEDURAL HISTORY

Plaintiffs filed the complaint in this action on November 17, 2011, alleging fraud, conversion and breach of contract arising out of a contract of sale in which Prymme Land purchased from Marra certain real property and an eatery and bar named "Treasure Island" in Andover, OH. Plaintiffs moved for a default judgment on February 21, 2012. The court granted this motion for default on February 29, 2012, finding that Plaintiff served Defendant with their summons and complaint on December 20, 2011 and that Defendant failed to timely answer, move, plead,

respond, defend this action or otherwise appear. This court entered a default judgment against Defendant in the amount of two-hundred fifty thousand dollars ($250,000.00), plus interest, attorney's fees, and court costs.

On March 8, 2012, Defendant appeared, moving for relief from default judgment. Plaintiffs opposed and filed for summary judgment. The court granted Plaintiffs' motion for summary judgment on the basis of a settlement agreement in which Marra agreed to purchase the real property and restaurant back from Plaintiffs for one-hundred twenty thousand dollars ($120,000.00). The court did not, however, award an amount of damages in the entry announcing this judgment. Defendant appealed this ruling. The Eight District Court of Appeals later dismissed his appeal finding:

> The court's March 23, 2013 judgment entry is not a final order. It grants plaintiff's motion for summary judgment without actually entering a judgment reflecting the amount of damages awarded . . . While we do not have jurisdiction to review this matter, we suggest that the trial court may wish to address its jurisdiction to enter judgment now in light of the default judgment it previously entered on February 29, 2012. The February 2012 judgment has not been vacated or reversed.
>
> *Mario Marra v. Prymme Land LTD, et al,.* 8th Dist. Cuyahoga No. 99800

Plaintiffs filed a motion for corrected judgment entry, which the court granted on January 16, 2014. In its entry the court entered judgment against Defendant Marra in the amount of one-hundred twenty thousand dollars ($120,000.00) and also vacated the prior default judgment.

In January of 2014, Attorney Michael Maloney represented Defendant Marra. Attorney Maloney served as defense counsel of record from March 8, 2012 until July 11, 2014, when the court granted his motion to withdraw. On June 13, 2014, Attorneys Edward Rausch and Diana Khouri, entered appearances on behalf of Marra in this action, filing Defendant's Motion to Vacate Judgment Pursuant to 60(B)(5).

In his most recent motion to vacate now pending before this court, Defendant presents evidence of a letter, dated June 15, 2011, from Plaintiffs' former attorney. The letter rescinds the sale and cancels the contract because of Marra's failure to make repairs to the property as contracted under the sales agreement. Marra claims that he found this letter in October 2014 while going through boxes stored at a rental property he owns. The letter was written by Robert Wynn, Prymme's former counsel, to David L. Combs, Marra's former counsel, and states in pertinent part:

> Please be advised on behalf of Mr. Marra that Mr. Bruce Goodrick [principal of Prymme], Prymme Land Ltd. And Prymme Lake, LLC hereby rescind and cancel the Asset Purchase Agreement of September 15, 2009, the Real Estate Purchase Agreement of September 15, 2009, the promissory note signed on or about June 11, 2010, and all other documents signed by Goodrick, Prymme Land Ltd., and/or Prymme Lake, LLC.

Defendant argues that this letter rescinded all contracts between the parties including the settlement agreement, and therefore the underlying suit to enforce the agreement constitutes fraud. Plaintiff maintains that this correspondence does not rescind the Settlement Agreement of April 27, 2010. Plaintiff argues that "Marra's claim of fraud misstates or misinterprets the facts. The underlying transaction may have been rescinded by Prymme (via the June 2011 letter), but the Settlement Agreement was never rescinded. The Settlement Agreement was (and is) valid and enforceable by Prymme against Marra, as the court determined in its summary judgment ruling." Plaintiffs' Brief in Opposition, filed 12/17/2014, at 6.

III. CONCLUSION

Defendant Marra has failed to satisfy the required elements of a Civ. R. 60(B) motion to vacate judgment. Defendant has not met his burden to demonstrate that he has a meritorious defense, nor has he satisfied his burden that he is entitled to relief based on a reason stated in Civ. R. 60(B)(1) through (5). Defendant further fails to sufficiently address the timeliness of this

motion. As a movant must demonstrate all required elements in order to prevail in a motion to vacate judgment pursuant to Civ. R. 60(B), this motion must therefore be denied. *GTE Automatic Electric, Inc. v. ARC Ind. Inc*., 47 Ohio St.2d 146, 151-152 (1976).

A. The letter presented into evidence by Defendant Marra is not "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B)"

The letter presented by Defendant in support of this motion to vacate is not newly discovered evidence. This letter was in his control and custody during the pendency of this matter and has only now been presented to the court. Evidence that could have been discovered at the time of judgment through the exercise of due diligence does not constitute "newly discovered evidence" for the purpose of vacating the prior judgment. *Cuyahoga Support Enforcement Agency v. Guthrie*, 84 Ohio St.3d 437, 442, 705 N.E.2d 318 (8th Dist. 1999). The letter was stored at a property owned by Marra to which he had access. He failed to exercise due diligence in presenting it to the court nearly two years since he appeared to defend this action. Marra was arguably aware of and on notice of the existence of this letter when this suit was filed and throughout litigation. He failed to bring this letter to the attention of the court in filing his objection to Plaintiffs' motion for summary judgment and in his second motion to vacate, which was later withdrawn. This letter does not constitute "newly discovered evidence" as described in 60(B)(3), and this argument, therefore, fails to satisfy Marra's burden that he entitled to relief based on a reason stated in Civ. R. 60(B)(1) through (5).

B. The Motion for Corrected Entry, filed January 10, 2014, was properly served on Marra's counsel of record at the time of filing

Defendant further argues that he had no knowledge of the judgment entered against him as his counsel, Attorneys Edward Rausch and Diana Khouri, did not receive service of the motion for a corrected entry. Plaintiffs note in their opposition to Defendant's motion to vacate that the

motion for corrected journal entry and the court's entry granting the motion were served on Marra's counsel of record at the time, Michael Maloney, by operation of the court's electronic filing system. The certificate of service certified that the motion was served via e-mail upon Attorney Maloney. E-mail service of motions is permitted under the Ohio Rules of Civil Procedure. Civ. R. 5(B)(2)(f).

Attorneys Rausch and Khouri did not receive e-mail notice of the motion and the court's entry via the court's electronic filing system because they had not yet appeared as counsel of record for Marra. E-mail notice of the corrected judgment entry to Attorney Maloney alone was sufficient and imputed to Defendant Marra. "Notice to an agent is notice to his principal, and this doctrine applies to the relation of attorney and client, and an attorney's notice or knowledge of facts affecting the rights of his client will be considered notice to the client." *Estate of Winans v. Lobvitz*, 12th Dist. No. CA91-12-206, 1992 Ohio App. LEXIS 762, *5 (citing *The American Export & Inland Coal Corp. v. The Matthew Addy Co.*, 112 Ohio St. 186, 194 (1925)). Moreover, a party has a general duty to check the court's docket. An entry on the trial court's docket constitutes notice of a decision. See *Bank of N.Y. v. Jordan*, 8th Dist. Cuyahoga No. CA-07-88619, 2007-Ohio-4293, P28. Therefore, Defendant's argument that he did not have notice of the second judgment fails to satisfy his burden that he entitled to relief based on a reason stated in Civ. R. 60(B)(1) through (5).

Based on the foregoing, Defendant Mario Marra's Motion to vacate judgment pursuant to Ohio Civil Rule 60(B) is hereby denied.

IT IS SO ORDERED.

Date: April ___, 2015

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SHANNON M. GALLAGHER, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing Judgment Entry was sent by regular U.S. Mail this ____ day of April, 2015, to the following:

Scott Kahn, Esq.
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Attorney for Plaintiff

Edward Rausch, Esq.
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