

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

JAMES MITCHELL,	:	APPEAL NO. C-050546
Plaintiff-Appellee,	:	TRIAL NO. 04CV-32878
vs.	:	<i>JUDGMENT ENTRY.</i>
ANNETTE WALKER,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Plaintiff-appellee James Mitchell filed a forcible-entry-and-detainer action for nonpayment of rent against his tenant, defendant-appellant Annette Walker, on November 15, 2004. A hearing date of December 3, 2004, was set. The parties did not appear, and the case was continued to December 10, 2004. Walker failed to appear at the December 10 hearing. The magistrate issued a writ of restitution. Walker was physically evicted from the premises on December 22, 2004.

On May 27, 2005, Walker filed a Civ.R. 60(B) motion for relief from judgment. Along with her motion, Walker filed an affidavit in which she stated that she had paid, and Mitchell's agent had accepted, all rent and late fees prior to the December 10, 2004, hearing. Walker stated that she did not attend the December 10

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<sup>1</sup> See S.Ct.RRep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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hearing because she had paid, and Mitchell had accepted, "all of the rent owed for November and December, 2004." Walker alleged that at the December 10 hearing Mitchell had misrepresented to the trial court that her rent was in arrears. Walker further stated that she did not know that Mitchell had obtained a writ of restitution until she and her daughter were physically evicted from the premises on December 22, 2004.

Mitchell did not respond to Walker's motion. The trial court overruled Walker's motion without holding a hearing. Walker has appealed.

Walker's sole assignment of error alleges that the trial court erred in overruling her Civ.R. 60(B) motion without holding a hearing, because she had set forth sufficient operative facts to warrant relief.

"To prevail on a motion brought 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 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."

"Civ.R. 60(B) is a remedial rule to be liberally construed so that the ends of justice may be served."<sup>3</sup> Any doubt as to whether the movant has a meritorious defense should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits.<sup>4</sup> "If the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief

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<sup>2</sup> See *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113.

<sup>3</sup> See *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 1996-Ohio-430, 665 N.E.2d 1102.

<sup>4</sup> See *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 371 N.E.2d 214; *GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, supra.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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under Civ.R. 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion."<sup>5</sup> A trial court abuses its discretion by failing to hold a hearing where grounds warranting relief from judgment are sufficiently alleged and supported with evidence.<sup>6</sup>

By accepting future rent payments after serving a notice to vacate, a landlord waives the notice as a matter of law, because the acceptance of future rent payments is inconsistent with the intent to evict.<sup>7</sup> Whether the landlord has waived the notice requirement is generally a question of fact.<sup>8</sup>

Mitchell filed the complaint for forcible entry and detainer on November 15, 2004. The complaint stated that Mitchell had served Walker on November 4, 2004, with a written notice to vacate the premises on or before November 12, 2004, for "nonpayment of November rent." In Walker's affidavit filed in support of her Civ.R. 60(B) motion, she stated that she had paid, and Mitchell had accepted, rent and fees for November and December 2004. Walker also stated that, at the December 10 hearing, Mitchell had misrepresented to the court that her rent was in arrears. Mitchell did not refute Walker's affidavit.

Based upon the statements made in her affidavit, Walker had a meritorious defense to present. Further, if Mitchell obtained the judgment through misrepresentations to the court, Walker was entitled to relief under Civ.R. 60(B)(3) and Civ.R. 60(B)(5). Mitchell did not challenge the timeliness of Walker's motion in the trial court, but we note that it was made well within a year after the judgment.

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<sup>5</sup> See *Coulson v. Coulson* (1983), 5 Ohio St.3d 12, 448 N.E.2d 809, citing *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97,316 N.E.2d 469.

<sup>6</sup> See *Kay v. Marc Glassman, Inc.*, supra.

<sup>7</sup> See *Mularcik v. Adams*, 7th Dist. No. 03 JE 17, 2004-Ohio-1383; *King v. Dolton*, 9th Dist. No. 02CA0041, 2003-Ohio-2423; *Classic A Properties v. Brown*, 4th Dist. No. 02CA2868, 2003-Ohio-5850; *Associated Estates Corp. v. Bartell* (1985), 24 Ohio App.3d 6,492 N.E.2d 841.

<sup>8</sup> See *Classic A Properties v. Brown*, supra; *Associated Estates Corp. v. Bartell*, supra.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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We hold that the trial court abused its discretion in failing to hold a hearing to resolve the factual issues before ruling on Walker's Civ.R. 60(B) motion.

The assignment of error is sustained. The judgment of the trial court is reversed, and this cause is remanded for a hearing on Walker's Civ.R. 60(B) motion for relief from judgment, and for further proceedings consistent with law and this judgment entry.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HILDEBRANDT, P.J., and PAINTER, J.**

JUDGE RUPERT A. DOAN was a member of the panel, but died before the release of this judgment entry.

*To the Clerk:*

Enter upon the Journal of the Court on December 6, 2006

per order of the Court \_\_\_\_\_  
Presiding Judge