

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Discover Bank,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 12AP-139
	:	(M.C. No. 2011 CVF 011434)
Derek A. Farmer,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on October 25, 2012

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*Weltman, Weinberg & Reis Co., L.P.A., and Douglas N. Hattaway*, for appellee.

*Derek A. Farmer*, pro se.

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APPEAL from the Franklin County Municipal Court

CONNOR, J.

{¶ 1} Defendant-appellant, Derek A. Farmer, appeals from a decision of the Franklin County Municipal Court denying his motion for relief from judgment after the trial court had granted summary judgment in favor of plaintiff-appellee, Discover Bank, in this action upon a credit card account.

{¶ 2} Discover filed its complaint on March 25, 2011, seeking recovery of an unpaid credit card balance. Farmer filed his answer on May 17, 2011. On July 7, 2011, Discover filed its motion for summary judgment, supporting this with, inter alia, copies of the pertinent account statements. Farmer then moved for an extension of time to respond to the summary judgment motion as he sought discovery in the case. The trial court on

July 25, 2011 granted Farmer's motion, giving him 28 days to respond to the summary judgment motion after service of discovery responses.

{¶ 3} The parties held a pre-trial hearing before the judge on August 18, 2011, at which time Discover provided its discovery responses. By agreement of the parties another pre-trial was scheduled for November 14, 2011. In the interim, however, Farmer failed to file an answer to Discover's pending summary judgment motion. On September 27, 2011, the trial court granted summary judgment in favor of Discover.

{¶ 4} On November 17, 2011, Farmer filed his "Motion To Reconsider And/Or Set Aside" the trial court's judgment pursuant to Civ.R. 60(B)(1) and (5). The trial court denied his motion on January 18, 2012. Farmer has timely appealed and brings the following sole assignment of error:

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION TO RECONSIDER AND/OR SET ASIDE ITS ENTRY TO SEPTEMBER 27th, 2011 GRANTING SUMMARY JUDGMENT RELIEF.

{¶ 5} In order to prevail on a motion for relief from judgment under Civ.R. 60(B), a movant must demonstrate that (1) the movant has a meritorious defense or claim to present if relief is granted, (2) the movant 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. *Perry v. Gen. Motors Corp.*, 113 Ohio App.3d 318 (10th Dist.1996), citing *GTE Automatic Electric v. ARC Industries*, 47 Ohio St.2d 146 (1976). If Civ.R. 60(B)(1), (2) or (3) are the grounds for relief, the motion must be made within one year after the judgment, order, or proceeding was entered or taken; otherwise, the motion must be made within a reasonable time. *Id.* To warrant a hearing on the motion, a party seeking relief from judgment is not required to submit evidentiary material so long as the movant sets forth with sufficient specificity facts that, if true, would justify relief. *Waterford Tower Condominium Assn. v. TransAmerica Real Estate Group*, 10th Dist. No. 05AP-593, 2006-Ohio-508, citing *Your Financial Comm. of Ohio, Inc. v. Emerick*, 123 Ohio App.3d 601 (10th Dist.1997).

{¶ 6} The decision to grant or deny a Civ.R. 60(B) motion is left to the sound discretion of the trial court and will not be reversed on appeal unless the trial court

abused that discretion. *Moore v. Emmanuel Family Training Ctr.*, 18 Ohio St.3d 64, 66 (1985). The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude was arbitrary, unreasonable, or unconscionable. *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.*, 72 Ohio St.3d 464 (1995). Where a meritorious defense is presented and the motion is timely, doubts regarding whether excusable neglect exists should be resolved in favor of the motion so that cases can be decided on their merits. *GTE* at 151.

{¶ 7} Farmer first asserts that he has a meritorious defense on the basis that Discover did not append to the complaint a copy of the note underlying the debt, and never produced a copy of the note in response to his discovery requests. Discover points out that the current action is an action on a credit card account, not on a mortgage note or similar instrument. Under Ohio law, "[c]redit card agreements are contracts whereby the issuance and use of a credit card creates a legally binding agreement." *Bank One, Columbus, N.A. v. Palmer*, 63 Ohio App.3d 491, 493 (10th Dist.1989); *see also, Discover Bank v. Doran*, 10th Dist. No. 10AP-496, 2011-Ohio-205. Discover was not obligated to produce an underlying note to support the claim, and this argument is accordingly not well-taken.

{¶ 8} Farmer also argues that his failure to respond to the summary judgment motion was the product of excusable neglect, because he relied on verbal assurances that a copy of the note would be forthcoming from Discover. He also claims that he properly anticipated a delay in ruling on the summary judgment motion till such a note was produced. In light of the above discussion, this expectation was hardly reasonable. Moreover, the course of litigation in this case could give Farmer no reasonable grounds to believe that he could defer filing his memorandum in opposition to the motion for summary judgment. The time on Farmer's previous motion for extension had run, more than 28 days having passed after service of Discover's discovery responses. A scheduled pre-trial on November 14, 2011, of itself, could provide no basis for a litigant to believe that all other matters in the case would be held in suspense until the pre-trial took place. Absent any formal entry by the trial court altering its prior determination that a response to the motion for summary judgment was due, it was not excusable neglect for Farmer to

simply fail to undertake his burden of timely responding to the motion for summary judgment.

{¶ 9} In accordance with the foregoing, we find that the trial court did not err in denying Farmer's motion for relief from judgment because Farmer failed to establish grounds for relief under the standard set forth above. Farmer's sole assignment of error is overruled, and the judgment of the Franklin County Municipal Court is affirmed.

*Judgment affirmed.*

BROWN, P.J., and SADLER, J., concur.

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