[Cite as *Maddox v. Ward*, 2006-Ohio-4099.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 87090

LAVERA MADDOX	:	ACCELERATED
	:	JOURNAL ENTRY
Plaintiff-appellee	:	AND
	:	OPINION
-vs-	:	
	:	
VIOLETTA WARD	:	
	:	
Defendant-appellant	:	

DATE OF ANNOUNCEMENT
OF DECISION: AUGUST 10, 2006

CHARACTER OF PROCEEDING: Civil appeal from the Bedford Municipal Court Case No. 04-CVF-02791

JUDGMENT: Reversed and Remanded

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellee:
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GARSON & ASSOCIATES
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Cleveland, Ohio 44113

For Defendant-Appellant:
ANTHONY T. PARKER, ESQ.
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Cleveland, Ohio 44115

ANN DYKE, A.J.:

{¶ 1} Defendant Violetta Ward appeals from the order of the Bedford Municipal Court that denied her motion to vacate an order awarding judgment to plaintiff Lavera Maddox in the amount of $5,000 following Ward's absence from the initial pretrial. For the reasons set forth below, we reverse and remand for further proceedings consistent with this opinion.

{¶ 2} On July 22, 2004, Maddox filed this matter against Ward, alleging that the residential premises that she had leased from Ward were not habitable, in violation of R.C. 5321.04, and that Ward had improperly retained her security deposit. Ward, represented by attorney Anthony T. Parker, filed an answer denying liability. Ward also filed a counterclaim in which she asserted that Maddox breached the parties' rental agreement and did not leave the premises in a reasonable condition. Maddox denied liability under the counterclaim and served discovery upon Ward.

{¶ 3} The court set the matter for a pretrial conference on April 18, 2005 at 9:30 a.m. On that same date, Maddox filed a motion to compel discovery. Neither Ward nor her counsel appeared at the pretrial and the court journalized the following order:

{¶ 4} "* * * The Court finds Defendant has refused to Answer Plaintiff's Discovery Requests and hence these matters are admitted. Upon due consideration, Defendant's Counterclaim is hereby stricken. Judgment is hereby entered in favor of Plaintiff against

Defendant in the sum of $5,000 with costs and interest at 5% from date of judgment on Plaintiff's Oral Motion for Summary Judgment."

{¶ 5} On May 13, 2005, Ward moved for relief from judgment. In support of this motion, Parker averred that he inadvertently marked on his schedule that the pretrial commenced at 1:00 p.m. He arrived at this time with responses to Maddox's request for discovery but learned that judgment had been entered for Maddox and that Ward's counterclaim had been dismissed. He also averred that Maddox had damaged the premises and that her security deposit was retained because the damages exceeded the amount of the security deposit. Parker also argued that the court should have imposed a lesser sanction and should not have awarded Maddox judgment on the merits for failure to appear at the pretrial.

{¶ 6} The trial court denied the motion for relief from judgment and Ward now appeals, assigning the following error for our review:

{¶ 7} "The trial court erred in denying Defendant's Motion for Relief from Judgment."

{¶ 8} Within this assignment of error, Ward asserts that the failure to attend the pretrial was due to excusable neglect, that the court imposed an unduly harsh sanction, and that he did not have an opportunity to respond to Maddox's oral motion for summary judgment or the motion to compel discovery. We agree with these contentions.

{¶ 9} With regard to the motion to vacate, we note that this court reviews the award or denial of Civ.R. 60(B) motions in accordance with the abuse-of-discretion standard. *Associated Estates Corp. v. Fellows* (1983), 11 Ohio App.3d 112, 463 N.E.2d 417; *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 371 N.E.2d 214. An abuse of discretion implies more than an error of law or judgment; it suggests that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 566 N.E.2d 1181; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 10} Civ. R. 60(B) provides in relevant part:

{¶ 11} "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; * * *."

{¶ 12} To prevail on his motion under Ohio Civ.R. 60(B), the movant must demonstrate that: (1) the moving party has a meritorious defense or claim to present if relief is granted; (2) the moving party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and, (3) the motion for relief is made within a reasonable time. *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, syllabus at paragraph 2; *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 1996 Ohio 430, 665 N.E.2d 1102.

{¶ 13} In *Blasco v. Mislik* (1982), 69 Ohio St.2d 684, 433 N.E.2d 612, the Supreme Court identified the purpose of Civ. R. 60 as affording "relief in the interest of justice." The Court has also observed that any doubt should be resolved in favor of the motion to vacate so that cases may be decided on the merits. *Moore v. Emmanuel Family Training Center, Inc.* (1985), 18 Ohio St.3d 64; 479 N.E.2d 879.

{¶ 14} With regard to the issue of whether there is a meritorious defense in this matter we note that Ward was not provided with the opportunity to demonstrate whether there were genuine issues of material fact prior to the court's grant of the oral motion for summary judgment. In addition, the court gave her no opportunity to explain why she missed the pretrial.

1. Summary Judgment

{¶ 15} As an initial matter we note that, although the trial court proceeded to consider Maddox's "oral motion for summary judgment" in Ward's absence, Civ.R. 56 obviously requires that the non-moving party be given an opportunity to demonstrate whether there are genuine issues of material fact. No such opportunity was provided in this matter.

2. Dismissal with Prejudice

{¶ 16} Pursuant to Civ.R. 41(B)(1):

{¶ 17} "Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant

or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." (Emphasis added.)

{¶ 18} The notice requirement exists to insure that, to the extent possible, cases are decided on the merits and that a party facing dismissal is given the opportunity to obey the court order of which he or she stands in violation by either curing the defect, proceeding with the matter or dismissing his or her action voluntarily and, thus, without prejudice. *Rucker v. Cvelbar Body & Paint Co.*, supra. The notice contemplated by Civ.R. 41(B)(1) includes notice prior to dismissal and an opportunity to explain or correct a party's nonappearance. *Ford Motor Credit Co. v. Potts* (1986), 28 Ohio App. 3d 93, 502 N.E.2d 255. As the Court explained therein:

{¶ 19} "It seems to us preferable that the party be given notice and an opportunity to bring such circumstances to the court's attention prior to the rendering of a judgment against her on the merits, rather than requiring the court and the parties to untangle the situation later through a motion for relief from judgment or an appeal. Giving this defendant notice will afford her only an opportunity to explain the circumstances of her nonappearance -- there is no requirement that the court relieve her of the consequences of her nonappearance, if it was inexcusable. The burden will be upon her to explain why her case should not be dismissed for failure of prosecution, or at least why any dismissal

should be without prejudice. And, should the trial court accept her explanation that her nonappearance did not amount to failure of prosecution, it may still deem a lesser sanction than dismissal warranted -- for example, ordering defendant to pay the expenses of the other parties, incurred as the result of her nonappearance."

{¶ 20} Accord *Carr v. Green* (1992), 78 Ohio App.3d 487, 605 N.E.2d 431 ("[T]his court reaffirms its position that Civ.R. 41(B) requires the prior issuance by the trial court of a separate and additional notice to the plaintiff or his counsel of the pendency of a motion to dismiss for failure to prosecute, whether the dismissal is with or without prejudice, so that the plaintiff has an opportunity to either comply with the court order or explain the circumstances of his nonappearance").

{¶ 21} In this matter, the court issued the judgment for Maddox hours after the missed pretrial, and gave Ward no opportunity to defend against the dismissal. See *Noles v. Bennett* (September 30, 1998), Lorain App. No. 97CA006988 ("The order dismissing the case was issued just four hours after the missed pre-trial conference. There is no indication in the record that the judge or Bennett's counsel made any effort to contact Noles' counsel when he did not appear at the pre-trial conference. * * * . The record is devoid of any indication that Noles' counsel was provided with an opportunity, reasonable or otherwise, to defend against dismissal

with prejudice.). See, also, *Rucker v. Cvelbar Body & Paint Co.*, (Dec. 7, 1995), Cuyahoga App. No. 68573.

3. Motion to Vacate

{¶ 22} Similarly, with regard to whether a party has established excusable neglect, the Court stated in *Svoboda v. Brunswick* (1983), 6 Ohio St.3d 348, 351, 453 N.E.2d 648 as follows:

{¶ 23} "* * * [T]he concept of 'excusable neglect' must be construed in keeping with the proposition that Civ. R. 60(B)(1), is a remedial rule to be liberally construed, while bearing in mind that Civ.R. 60(B) constitutes an attempt to 'strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done.'" Id., quoting 11 Wright & Miller, Federal Practice & Procedure 140, Section 2851.

{¶ 24} In *Kay v. Marc Glassman, Inc.*, supra, the Ohio Supreme Court defined "excusable neglect" in the negative by stating "the inaction of a defendant is not 'excusable neglect' if it can be labeled as a 'complete disregard for the judicial system.'" Id.

{¶ 25} Excusable neglect has been established where a party fails to appear at a pretrial due to a scheduling error. *Rucker v. Cvelbar Body & Paint Co.*(Dec. 7, 1995), Cuyahoga App. No. 68573; *Best Ins. Agency, Inc. v. House on Hill, Inc.* (June 18, 1987), Cuyahoga App. No. 53392; *Noce v. Wible* (Dec. 16, 1983), Lake App. No. 9-245.

{¶ 26} In this matter, the oversight of Ward's counsel in noting an incorrect time for the pretrial conference did not exhibit a deliberate act of ignoring a judicial directive such as would constitute inexcusable neglect.

{¶ 27} Counsel also asserted a meritorious defense in relation to the alleged damages caused by Maddox at the dwelling. *Vardeman v. Llewellyn* (1985), 17 Ohio St.3d 24, 27, 476 N.E.2d 1038; *Prawdzik v. II Enters.*, Franklin App. No. 03AP-1044, 2004-Ohio-3318. In addition, the motion was filed within one month of the court's dismissal and was therefore timely. *Morgan v. Bateson* (May 17, 1996), Montgomery App. No. 15164.

{¶ 28} In accordance with all of the foregoing, we hold that the trial court abused its discretion by denying Ward's motion for relief from judgement.

{¶ 29} Ward's sole assignment of error is well-taken.

Reversed and remanded.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellants recover of said appellees their costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. MCMONAGLE, J., CONCURS

(SEE ATTACHED CONCURRING OPINION)

DIANE KARPINSKI, J., CONCURS IN JUDGMENT

ONLY (SEE ATTACHED CONCURRING OPINION)

ANN DYKE
ADMINISTRATIVE JUDGE

N.B. This entry is an announcement of the court's decision. See App.R.22(B), 22(D) and 26(A); Loc.App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App. R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 87090

LAVERA MADDOX,	:	
	:	
Plaintiff-Appellee	:	C O N C U R R I N G
	:	
v.	:	O P I N I O N
	:	

VIOLETTA WARD, :
:
Defendant-Appellant :

DATE: AUGUST 10, 2006

CHRISTINE T. McMONAGLE, J., CONCURRING:

{¶ 30} I concur specifically with the lead opinion in this matter and write separately in regard to the separate concurring opinion which I find to be in error.

{¶ 31} Plaintiff sued defendant on July 22, 2004. Service of the complaint was perfected on August 4, 2004. Two leaves to plead were taken, and an answer and counterclaim were filed by defendant on September 16, 2004. On November 5, 2004, plaintiff filed a reply to defendant's counterclaim. Notice of pretrial was sent to plaintiff and defendant on March 8, 2005 at the office of their attorneys. The notice provided that the pretrial was set for April 18, 2005 at 9:30 a.m. The notice further stated:

{¶ 32} "NOTE: COUNSEL AND LITIGANTS FOR BOTH SIDES ARE REQUIRED TO BE PRESENT AT THE ABOVE HEARING. FAILURE OF EITHER PARTY TO APPEAR MAY RESULT IN IMMEDIATE DISPOSAL OF THE ACTION."

{¶ 33} A motion to compel discovery was filed by the plaintiff on April 18, 2005.

{¶ 34} On April 19, 2005 the court issued the following entry:

{¶ 35} "This matter came on for pretrial April 18, 2005. Case called. Plaintiff present in Court. Defendant did not appear. The Court finds Defendant has refused to answer Plaintiff's discovery

requests and hence these matter [sic] are admitted. Upon due consideration, Defendant's counterclaim is hereby stricken. Judgment is hereby entered in favor of Plaintiff against Defendant in the sum of $5,000 with costs and interest at 5% from date of Judgment upon Plaintiff's oral motion for Summary Judgment."

{¶ 36} On May 13, 2005, defendant filed a motion for reconsideration and relief from judgment pursuant to Civ.R. 60(B). In that motion, defendant sought to set aside the court's April 19, 2005 judgment on the ground of excusable neglect. In particular, counsel for defendant stated that he had the time for the pretrial scheduled wrong on his calendar and, hence, he appeared for the pretrial at 1:00 p.m. instead of 9:30 a.m. on April 18th. Counsel further stated in his motion that when he appeared for the pretrial he had the responses to plaintiff's discovery requests with him. Plaintiff did not oppose defendant's motion. On August 18, 2005, the Court denied same, and defendant appeals herein from that ruling.

{¶ 37} Civ.R 56, governing summary judgment, provides in pertinent part that "*** if the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court." Civ.R. 56(A). The rule further provides that "*** the motion shall be served at least fourteen days before the time fixed for hearing." Civ.R. 56(C). By the very terms of Civ.R. 56, there is no such thing as an oral motion for summary judgment heard the same day that

it is made. The motion and the ruling thereon in this case are therefore nullities.

{¶ 38} Further, the court appears to have responded to plaintiff's motion to compel discovery by deeming "matters admitted." The motion to compel was filed the day before the court ruled upon it. The motion had not been served upon defendant and there was no hearing. Due process requires at a minimum, service and an opportunity to be heard before sanctions may be imposed. *Hillabrand v. Drypers Corp.* 87 Ohio St.3d 517, 2000-Ohio-468, 721 N.E.2d 1029; *Zeidlerr v. D'Agostino*, Cuyahoga App. No. 85161, 2005-Ohio-2738.

{¶ 39} The court's dismissal of defendant's counterclaim "upon due consideration" was apparently a sanction for appearing late at the pretrial. This court, in reversing the dismissal of a claim for counsel's failure to appear at a pretrial, has stated the following:

{¶ 40} "It is an abuse of discretion for the court to impose the harsh and extreme remedy of dismissal for a single, accidentally missed pretrial.

{¶ 41} "In *Moore v. Emmanuel Family Training Center* (1985), 18 Ohio St.3d 64, the Supreme Court stated:

{¶ 42} "'The interests of justice are better served when Ohio's courts address the merits of claims and defenses at issue. The extremely harsh sanction of dismissal should be reserved for cases when an attorney's conduct falls substantially below what is

reasonable under the circumstances evidencing a complete disregard for the judicial system or the rights of the other party.'

{¶ 43} "The court, in taking the action it did, denied the appellant his right to reach the merits of his case. The court's action in this instance, where an extreme abuse did not occur, amounted to an abuse of discretion." *Mongello v. Kilbane* (Apr. 13, 1989), Cuyahoga App. No. 55231, citing *Moore*, supra at 70.

{¶ 44} Here, counsel's action in appearing late for the pretrial was not "a complete disregard for the judicial system or the rights of the other party." Counsel made a mistake; he thought the pretrial was at 1:00 p.m. and appeared at that time rather than 9:30 a.m. The court abused its discretion in dismissing defendant's counterclaim.

{¶ 45} The separate concurring opinion in this matter claims that appellant had a burden under *GTE Automatic Elec. Inc. v. Arc Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, to prove that there was a meritorious defense to the landlord/tenant claim (fortuitously, there was a stipulation of meritorious defense in that regard). However, to hold that the meritorious claim burden went to the underlying landlord/tenant claim in a case such as this would place an impossible-to-be-met burden upon an appellant. Plaintiff never filed a written motion for summary judgment. There are no exhibits or documents; defendant was never given an opportunity to respond. There is absolutely no evidence before the court to shed even the smallest amount of light upon the underlying claim. To

place a burden on appeal to "prove" the meritorious nature of the underlying claim when due to the action of the court, there is no record whatsoever, creates a wholly impossible situation. I would hold that the *GTE* "meritorious defense burden" in a case such as this requires proof of a meritorious defense to the **procedure** used to reach the summary judgment itself. And that, as previously discussed, cannot be denied; the judgment and order of dismissal obtained by the plaintiff in this matter were obtained without a scintilla of due process, are constitutionally infirm, void ab initio, or resulting from an abuse of discretion. Civ.R. 60(B) is the appropriate vehicle and this court is correct in reversing the trial court's refusal to vacate those orders.

{¶ 46} This matter should be remanded to the trial court with orders to vacate the judgments of April 19, 2005, and permit the parties to proceed upon appropriately filed, served and noticed motions.

COURT OF APPEALS OF OHIO EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 87090

LAVERA MADDOX :
:
:
Plaintiff-appellee :

	:	CONCURRING
v.	:	
	:	OPINION
VIOLETTA WARD	:	
	:	
	:	
Defendant-appellant	:	

DATE: AUGUST 10, 2006

KARPINSKI, J., CONCURRING IN JUDGMENT ONLY

{¶ 47} I concur in judgment only because I disagree with part of the lead opinion's analysis.

{¶ 48} The lead opinion correctly states the criteria for a movant to prevail on a Civ.R.60(B) motion: "(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 Electric Inc. v. Arc Industries, Inc.* (1976), 47 Ohio St.2d 146, syllabus at paragraph two.

{¶ 49} An analysis of a 60(B) motion, thus, must begin with the threshold question of the meritorious defense. In the case at bar, I disagree with the lead opinion's analysis of that defense. In her complaint tenant-appellee sought a return of her security deposit, in addition to attorney fees and damages caused as a result of her

eviction. She further alleges that the eviction resulted from the landlord's failure to repair or correct numerous housing violations and from landlord's failure to have a tenancy occupancy permit.

{¶ 50} In her answer, landlord-appellant denied these allegations and alleged, in part, that the tenant and others damaged the property.[1]

{¶ 51} Further, in her motion for relief from judgment, landlord asserts that she has provided evidence of the cost of the repairs of the damages allegedly caused by tenant. The landlord-appellant's defense to the underlying claim in the case is what must provide a basis for a meritorious defense or claim, not the procedural problems surrounding the motion for summary judgment. Those procedural problems are relevant to the second stage of the *GTE* criteria.

{¶ 52} Furthermore, tenant-appellee has expressly conceded that movant has satisfied the first prong of the *GTE* test. Specifically, appellee says: "Appellant correctly asserts that she has a meritorious claim or defense of relief if granted ***." Appellee's Brief, p. 4. Thus the threshold criterion of the *GTE* test has been satisfied, but not, I believe, for the reasons the lead opinion presents.

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[1]The complaint and answer include many more allegations than I have listed here.

{¶ 53} Nor do I agree with the analysis of the separately concurring opinion. I believe it crucial to distinguish between an appeal from a decision granting a motion for summary judgment and an appeal from a denial of a Civ.R.60(B) motion.

{¶ 54} Here, defendant failed to appeal the first decision, that is, the granting of a motion for summary judgment. The case law is emphatic that a Civ.R.60(b) cannot be used as a substitute for a direct appeal. *Manigault v. Ford Motor Corp.* (1999), 134 Ohio App.3d 402, citing *Doe v. Trumbull Cty. Children Svcs. Bd.* (1986), 28 Ohio St.3d 128; *National Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 63; *Justice v. Lutheran Social Services of Central Ohio* (1992), 79 Ohio App.3d 439, 442. In other words, a Civ.R.60(B) motion is not the appropriate method to attack a trial court's legal errors. *Kay v. Marc Glassman Inc.* (Feb. 1, 1995), Summit App. No. 16726, 1995 Ohio App. LEXIS 389, *12, rev. on other grounds (1996) 76 Ohio St.3d 18.

{¶ 55} In the case at bar, there would be no "wholly impossible situation" if the defendant had timely filed her appeal from the decision granting the motion for summary judgment. It is her late filing that causes any extra burden and rightfully so. But the burden is not that onerous.

{¶ 56} The Ohio Supreme Court has specified that to prevail on a 60(B) motion, the movant must have "a meritorious defense or claim to present if relief is granted." *GTE Automatic Elec. v. ARC*

Industries (1976), 47 Ohio St.2d, paragraph two of the syllabus. Showing a meritorious defense does not require proof, however, that movants will prevail. The requirement under Rule 60(B) requires that moving parties show merely "allegations" that, "if established at trial," would constitute a valid claim or complete defense. *Tozer v. Charles A. Krause Milling Co.* (3rd Cir. 1951), 189 F.2d 242, 244.

{¶ 57} Such allegations, moreover, are "meritorious if they contain 'even a hint of a suggestion' which, if proven at trial, would constitute a [valid claim] or a complete defense." *Keegel v. Key West & Caribbean Trading Co., Inc.* (D.C. Cir. 1980), 627 F.2d 372, 374, quoting *Moldwood Corp. v. Stutts* (5th Cir. 1969), 410 F.2d 351, 352. However, movants must recite specific facts to support their claims or defenses. *Pease v. Pakhoed Corp.* (5th Cir. 1993), 980 F.2d 995, 998-1000.

{¶ 58} The purpose of requiring a movant to show a meritorious claim is to convince the court that granting "relief will not *** have been a futile gesture ***." *Boyd v. Bulala* (4th Cir. 1990), 905 F.2d 764, 769. As one court stated: a meritorious claim or defense requirement "guards the gateway to Rule 60(b) relief." *Teamsters, Local 59 v. Superline Transp. Co.* (1st Cir. 1992), 953 F.2d 17, 20.

{¶ 59} In any event, plaintiff has conceded that defendant has a meritorious claim, and I agree with the lead opinion's analysis of

the other 60(B) criteria. I thus concur with the majority but only in judgment.