

STATE OF OHIO)	IN THE COURT OF COMMON
)	PLEAS
) SS:	
COUNTY OF CUYAHOGA)	CASE NO. CV 01-450494
 RALPH FAULKNER)	
)	
Plaintiff,)	
)	
vs.)	
)	
INTEGRATED SERVICES)	<u>JOURNAL ENTRY AND</u>
NETWORK, INC. et al)	<u>OPINION</u>
)	
)	
Defendants.)	

Kathleen Ann Sutula, J:

IT IS SO ORDERED:

Plaintiff initiated suit against Defendants Integrated Services Network and Ms. Nadyne Turner (hereinafter “Turner”) on October 10, 2001. A Case Management Conference (“CMC”) was conducted on January 23, 2002, and the Court set a trial date of July 15, 2002. Attorney Michael Troy Watson (“Watson”) entered his appearance for Turner at the CMC.

In May 2002, the Court took notice of the Ohio Supreme Court’s ruling in *Office of Disciplinary Counsel v. Watson* (2002), 95 Ohio St.3d 364, wherein Turner’s counsel,

Watson, was suspended from the practice of law for one year. As no new counsel had yet appeared, on June 5, 2002, the Court sent a letter directly to Turner advising her that Watson had been suspended, and given that the case was set for trial on July 15, 2002, that she advise the Court immediately of her new counsel. Specifically, the Court informed Turner that her “attorney...was suspended from the practice of law for one year...” The Court then set the matter for pretrial on June 20, 2002 to resolve the issues regarding the outstanding discovery and to clarify Turner’s representation.

On June 20, 2002, G. Michael Goins (“Goins”) entered his appearance on behalf of Turner, and the court extended discovery to August 9, 2002, while simultaneously resetting trial for September 9, 2002.

On July 26, 2002, Plaintiff filed its Renewed Motion to Compel Discovery; Motion for Sanctions; Motion to Extend Discovery and to Continue Trial. The grounds for those motions, *inter alia*, were that Turner still had not produced the remaining written discovery, still had not appeared for deposition, and still had not filed her more definite statement. The Court granted in part and denied in part this motion with an order setting a Show Cause hearing on September 9, 2002 at 9:00 a.m. ordering Turner and her counsel to appear and show cause why her claims should not be dismissed and judgment entered against her, with trial to follow if necessary.

Turner appeared at the Show Cause hearing with Goins as her counsel. At that hearing, she indicated that she had spoken with Watson as recently as September 5, 2002, and before that on August 30-31, 2002. When asked, she stated that she spoke with him as an attorney.

Goins stated that Watson had lost the file for approximately eight weeks. He stated further that Watson had kept in touch with Turner even though he was suspended from the practice of law, alleging that Watson “would not allow” her to talk with Goins until he introduced them. Turner confirmed that Watson told her not to talk to Goins until they were introduced, and that September 9 was the first day that she had met Goins. When asked, she stated that she never asked to meet Goins, and claimed that she was never informed of the trial date or deposition date.

The Court, however, held that Turner did not demonstrate good cause for avoiding default judgment. The Court went on to say that Turner was fully aware that Watson could no longer represent her and that Goins had entered an appearance on her behalf. In addition, the Court found that Turner voluntarily avoided communication with Goins and, if she was truly ignorant of the dates and deadlines set by this Court, that her ignorance was willful, and her conduct was calculated with the purpose of manufacturing delay to the prejudice of the Plaintiff. The Court, therefore, entered judgment in favor of the Plaintiff in the amount of \$208,343.87.

On October 8, 2002, Turner filed a Notice of Appeal with the Cuyahoga County Court of Appeals. On May 9, 2003, Turner filed with this Court a Motion for Relief From Judgment, and the appellate court remanded the case for the limited purpose of ruling on that motion.

I. Standard for Granting a 60(B) Motion

In order to prevail on a Civ.R. 60(B) motion to vacate, a party must show that (1) it has a meritorious defense to raise if the Court does grant the motion; (2) the party is entitled to relief under one of the five grounds listed in Civ.R. 60(B); and (3) the motion

is timely filed. *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, syllabus at paragraph 2. If a party cannot establish all three of these elements, the motion should be denied. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20.

The application of this test, and the ruling on the motion, is within the Court's discretion, and can be reversed only upon a showing of abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75. As the 8th District Court of Appeals has stated, "the trial court's ruling on...[the] motion for relief from judgment will not be disturbed unless it is clear that the decision was unreasonable, arbitrary, or unconscionable." *Willis v. Peoples* (Cuyahoga 1997), No. 7535, 1997 WL 47688.

II. Turner's Newly Discovered Evidence

To satisfy the second prong of the three-prong *GTE* test, Turner relies upon the recent action of the Office of Disciplinary Counsel, which filed a Complaint against Watson on April 14, 2003.¹ Turner asserts that the Complaint against Watson constitutes newly discovered evidence, and she therefore has adequate grounds for relief under Civ.R. 60(B)(2).²

The party moving for relief from judgment pursuant to Civ.R. 60(B)(2) has the burden of establishing that (1) the newly discovered evidence was discovered after trial, (2) the moving party used due diligence, and (3) the evidence is material, not cumulative or impeaching, and a new trial would result in a different outcome. *Holden v. Ohio Bureau of Motor Vehicles* (9th Dist. 1990), 67 Ohio App.3d 531, 540.

¹ As Plaintiff does not address the issue of whether or not Turner has a meritorious defense to Plaintiff Faulkner's Complaint, the Court notes that Turner, in her motion before the Court, has satisfied her burden of alleging that she may have a meritorious defense. The Ohio Supreme Court has held that a party is not required to prove in its Rule 60(B) motion that the party would actually prevail on that defense. *Rose Chevrolet*, 36 Ohio St.3d at 20.

² The Complaint contains several charges, a few of which bear some resemblance to what transpired in Turner's relationship with Watson.

Initially, the Court agrees with Turner that the newly discovered evidence is not the Complaint itself, but rather it is the contents of the Complaint that may constitute the newly discovered evidence. More specifically, Watson's egregious conduct with other clients after his suspension serves as the basis upon which Turner hopes the Court will grant relief.

While the Complaint itself may have been compiled after trial, some of the facts contained therein did occur prior to the Court entering judgment against Turner. Aside from Watson's conduct towards Turner, the other factual allegations levied against Watson have been discovered as a result of the filing of the Complaint.³ Even though some of the evidence cannot be considered newly discovered, e.g., Watson's actions with respect to Turner, the other allegations made, and now disclosed, against Watson can be considered new evidence, so long as Turner "was excusably ignorant." *Prostollo v. University of South Dakota* (D.S.D. 1974), 63 F.R.D. 9, 11.

The Court, therefore, turns its attention to the issue of whether Turner exercised due diligence or whether she was inexcusably ignorant. First, the Court notes that its rationale in entering judgment against Turner rested upon more than the Court believing that she acted willfully in disobeying the Court's order. Rather, the Court, in its journal entry for the show cause hearing, stated, that it was Turner's *ignorance* that was willful. *See* Journal Entry at ¶11.

While the Court acknowledges that Watson may have acted inappropriately with respect to other clients, this evidence does not negate the fact that this Court itself put

³ The fact that Turner's motion was filed less than a month after the Office of Disciplinary Counsel filed the Complaint seemingly verifies that Turner has only recently learned of Watson's misconduct with respect to his other clients. It is also indicative that the motion, filed within the one-year period proscribed under Civ.R. 60, is timely filed.

Turner on notice that Watson was suspended from the practice of law for a year. The Court made it very clear that Watson had been suspended and that Turner needed to obtain new counsel.

This Court finds it incredulous that Turner could not, and did not, understand what the Court meant when it advised her that Watson was suspended from the practice of law. The very definition of the term, and the first definition to appear in *Merriam-Webster's Dictionary*, is “to debar temporarily from a privilege, office, or function.” *Merriam-Webster Dictionary* (visited June 12, 2003) <www.m-w.com/cgi-bin/dictionary>. The plain meaning of the term, as well as its common usage, is obvious to a reasonable person. The meaning is not so esoteric that Turner should have been mystified as to its use. Quite simply, the Court informed Turner that Watson could not practice law for a year, and a reasonable person reading the notice the Court sent to Turner would have interpreted the Court’s language in precisely this manner.

The fact that Turner continued to converse with Watson in his role as her attorney after receiving the Court’s notice is akin to an ostrich burying its head in the sand, and certainly Turner’s actions do not constitute due diligence, but rather inexcusable neglect. If anything, if Turner had acted on her knowledge that Watson was suspended from the practice of law, perhaps some of Watson’s other clients may have been spared from his unethical behavior; at the same time, Turner may have also learned at an earlier point, from sources other than the Office of Disciplinary Counsel’s Complaint, that others were being misled and misrepresented by Watson. Ultimately, Turner “offers no adequate explanation for why this information could not have been

discovered long ago with the exercise of reasonable diligence.” *Todd v. Todd* (10th Dist. 2002), 2002 WL 992389 at ¶16.

Finally, with respect to the third prong of the newly discovered evidence test, Turner fails to meet her burden of showing that the evidence would lead to a different result at trial. While the evidence in the Complaint against Watson could relieve Turner of the default judgment entered against her at the show cause hearing, the evidence is not relevant to the merits of the case. The Plaintiff’s claims against Turner are for defamation, tortious interference with an employment contract, and breach of contract, among other claims. *See* Amended Complaint, Fourth, Sixth, and Eighth Causes of Action. The evidence concerning Watson’s improprieties is not material to the original cause of action. As such, the evidence would have no bearing in a new trial on the Plaintiff’s Complaint.

While the judgment entered against Turner and the Court’s denial of her motion may seem harsh, in a situation such as this one, where perfection competes against finality, the law “place[s] finality above perfection in the hierarchy of values.” *Knapp v. Knapp* (1986), 24 Ohio St.3d 141, 145. In light of the fact that Turner received notice from the Court that her attorney was suspended from the practice of law, yet ignored that advice and made a conscious decision to continue consulting him, the Court agrees with the rationale of the United State Supreme Court, which has held, that “[t]here must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from.” *Ackerman v. United States* (1950), 340 U.S. 193, 198.

It is, therefore, ORDERED, ADJUDGED, and DECREED:

For the reasons previously stated, the Defendant's motion to vacate judgment is not well taken. The Defendant fails to satisfy the criteria as set forth in *GTE*, as well as the test for newly discovered evidence as outlined in *Holden*. As such, the Court denies the motion to vacate judgment.

There is no just cause for delay.

FINAL.

DATE: June ____, 2003

KATHLEEN ANN SUTULA, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing Journal Entry and Opinion has been sent via fax and regular U.S. mail on this _____ day of June, 2003, to the following:

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