STATE OF OHIO	)	IN THE COURT OF COMMON PLEAS
	)	SS.
COUNTY OF CUYAHOGA	)	Civil Case No. 464721
	)	**JOURNAL ENTRY AND OPINION**
GARY M. WEBER	)	
Plaintiff,	)	
Vs.	)	
ADMINISTRATOR, et al.	)	
Defendants.	)	

Kathleen Ann Sutula, J:

IT IS SO ORDERED:

This matter comes before the Court on the Plaintiff's filing a Notice of Appeal in a workers' compensation case. The Court conducted a case management conference on May 22, 2002, and established a discovery cutoff date of October 4, 2002, at which time all videotaped depositions for use at trial had to be completed, and scheduled trial for November 4, 2002.

On September 30, 2002, the Plaintiff filed a notice of voluntary dismissal and voluntarily dismissed his claim without prejudice. Under Ohio law the Plaintiff had until September 30, 2003, to re-file his complaint. When that date passed without the complaint having been re-filed, Defendant Davey Tree Expert Company (hereinafter "Davey Tree"), filed on November 7, 2003, a Motion for Default Judgment seeking an

order from the Court that due to the Plaintiff's failure to re-file the case within a year of dismissal that the Plaintiff's workers' compensation claims be disallowed. Pursuant to Cuyahoga County Local Rule 11(C), the Plaintiff had ten days to file a brief in opposition, which would have been November 17, 2003.

As with the September 30 deadline, the time for the Plaintiff to oppose Davey Tree's motion ran, and the Court entered an order granting the motion for default judgment on November 24, 2003, which was subsequently journalized on November 26, 2003. After the order was journalized (but still on the same day), the Plaintiff filed a Motion for Leave to File Complaint Instanter, which the Court denied as moot since judgment had already been entered in Davey Tree's favor. The Plaintiff has since filed a Motion for Relief from Judgment.

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. 70535, 1997 WL 47688.

Assuming *arguendo* that the Plaintiff has a valid claim and can meet the first prong of the test, the Court must consider whether the motion is supported by any of the five grounds listed in Civ.R. 60(B). In the case before the Court, the Plaintiff argues that the re-filed Complaint was not filed prior to September 30 on account of "mistake, inadvertence, surprise, or excusable neglect." Civ.R. 60(B)(1).

The basis for this argument arises from the fact that the Plaintiff's counsel avers, in the Motion for Leave and Motion for Relief, that he planned having his office re-file the Plaintiff's Complaint. The Complaint, however, was never re-filed because of an office oversight that occurred when the Plaintiff's lawyer was away on vacation, and it was not until Davey Tree filed its Motion for Default Judgment that he learned that the Complaint had not been timely filed.

While the Complaint certainly was not re-filed on account of a mistake or neglect, the attendant circumstances do not lend themselves to relieving judgment in this case. First, Ohio courts, including the Eighth District Court of Appeals, have consistently held that attorneys have an affirmative duty to check the dockets of their cases. See *Glick v. Glick* (Cuyahoga 1999), 133 Ohio App.3d. 821; *State Farm Mut. Auto Ins. Co. v. Peller* (Cuyahoga 1989), 63 Ohio App.3d 357, 360-61 ("The Parties are responsible to be informed about their cases…the parties or their attorneys are expected to keep themselves advised of the progress of their cases.")

In this instance, if the Plaintiff or the Plaintiff's attorney had checked the docket just one time after the Complaint was believed to have been filed, the docket would have revealed that the Complaint, in fact, had not been re-filed. Instead, the inference from the Plaintiff's motions is that the docket was not checked once as it was not until

sometime around November 7 that the Plaintiff's attorney learned that the action was in default. The failure to perform this simple duty is indicative to the Court that the Plaintiff is not entitled to relief.

Second, upon becoming aware that the Complaint had not been re-filed, the Plaintiff never opposed Davey Tree's motion, or took steps to file the Complaint immediately. The default motion was filed on November 7, and the Plaintiff's counsel should have received a courtesy copy of that motion either a day or two before or after the seventh. The Local Rules governing the Common Pleas Court of Cuyahoga County then gives a party seven days, plus three for mailing, to oppose a motion.

The Court, realizing the drastic result that would occur if Davey Tree's motion was granted, waited an additional seven days before considering the motion and ruling on it. Notwithstanding the extra time involved, the Plaintiff never filed a brief in opposition to that motion. The first time that the Plaintiff re-engaged the Court in the case since the voluntary dismissal was, in fact, the Motion for Leave, filed subsequent to the Court's order entering judgment in favor of Davey Tree.

Moreover, during this time, the Plaintiff failed to re-file the Complaint. Given that the Complaint was to have been re-filed in late August/early September, it should have been relatively easy for the Plaintiff to file the necessary paperwork. Instead, nearly twenty days passed before the Plaintiff filed his Motion for Leave to File Complaint Instanter. The failure to take any action, whether it would have been opposing the default motion or filing a Motion for Leave, during the time the Davey Tree's motion was pending baffles the Court.

In making its decision, the Court is guided by the case of *Terwood v. Harrison* (1967), 10 Ohio St.2d 170. In that case, the trial court entered default judgment and then denied the defendant's motion to vacate. The motion to vacate was premised upon the fact that the default judgment resulted because of defense counsel's omission in failing to file an answer. The Ohio Supreme Court, however, affirmed the trial court, holding that "the mere statement of counsel that a default judgment resulted from his omission, standing alone as the sole ground for a motion to vacate a judgment rendered by default, is not sufficient to justify the reversal of the trial court's order denying that motion on grounds of abuse of discretion." *Id.*, 10 Ohio St.2d 172.

While the Court recognizes that this precedent is more than thirty-five years old, the Court hopes that the professional standards that Ohio courts previously held attorneys and their clients to are the same today as they were at the time of *Terwood*. In a day and age where the legal profession bears the brunt of numerous jokes and routinely is criticized for inefficiency and delay, the standards by which the bar governs itself should not be lessened, even if that means a litigant, such as the Plaintiff in this case, is subjected to what may seem to be, at first glance, a harsh result. In light of this, Davey Tree should not have to bear responsibility for the results of the omissions present in this matter and have the judgment rendered in its favor vacated.

Since the reasons set forth in the motion do not constitute any of the grounds for vacating judgment as set forth in Civ.R. 60(B)(1), the Plaintiff fails to meet at least one of the three elements as outlined in the *GTE* test.

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

For the reasons previously stated, the Plaintiff's Motion for Relief from Judgment is not well taken. The Plaintiff fails to satisfy the criteria as set forth in *GTE*. As such, the Court denies the motion.

DATE: January ____, 2004

_____

KATHLEEN ANN SUTULA, JUDGE

SERVICE

A copy of the foregoing Journal Entry has been sent via regular U.S. mail on this _____ day of January, 2004, to the following:

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