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# IN THE COURT OF COMMON PLEAS
# CUYAHOGA COUNTY, OHIO

DAVID J. HORVATH
Plaintiff

ELIE FAYEZ ABBOUD, ET AL
Defendant

Case No: CV-17-885126

Judge: JOHN P O'DONNELL

## JOURNAL ENTRY

THE DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT, FILED 09/19/2018, IS DENIED.
THE DEFENDANTS' MOTION TO STAY, FILED 09/13/2018, IS DENIED.

JUDGMENT ENTRY DENYING THE DEFENDANTS' MOTIONS FOR RELIEF FROM JUDGMENT AND FOR A STAY OF THE ORDER APPOINTING A RECEIVER. O.S.J.

O.S.J.

Judge Signature Date

FILED
2018 NOV 21 A 10: 24
CLERK OF COURTS
CUYAHOGA COUNTY

11/21/2018

**IN THE COURT OF COMMON PLEAS**
**CUYAHOGA COUNTY, OHIO**

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| **DAVID J. HORVATH** | ) | **CASE NO. CV 17 885126** |
| | ) | |
| **Plaintiff,** | ) | **JUDGE JOHN P. O'DONNELL** |
| | ) | |
| **vs.** | ) | **JUDGMENT ENTRY DENYING THE** |
| | ) | **DEFENDANTS' MOTIONS FOR** |
| **ELIE FAYEZ ABBOUD, *et al.*** | ) | **RELIEF FROM JUDGMENT** |
| | ) | **AND FOR A STAY OF THE ORDER** |
| **Defendants.** | ) | **APPOINTING A RECEIVER** |

***John P. O'Donnell, J.***:

Plaintiff David J. Horvath is an attorney who represented defendant Elie Fayez Abboud. After Abboud did not pay Horvath's bill, Horvath obtained a money judgment totaling $18,200 against Abboud in case number 862826 in the Cuyahoga County Court of Common Pleas. Abboud didn't pay the judgment and Horvath then filed the complaint in this case seeking, among other remedies, appointment of a receiver over the two defendant companies – Grossman DT, Inc. and Tamuz Management, Inc. – on the grounds that the companies are owned by Abboud and, as such, are either assets that could be used to satisfy the judgment or possess assets that can satisfy the judgment.

The defendants ignored Horvath's discovery requests and Horvath moved to compel the defendants' responses. Like the discovery requests themselves, the defendants ignored the motion to compel and it was granted. Predictably, the defendants then ignored the court order compelling them to produce answers to the discovery and Horvath then filed a motion for sanctions under Rule 37 of the Ohio Rules of Civil Procedure. The discerning reader will not be surprised to learn that the defendants never opposed the motion for sanctions and it was granted on September 7, 2018.

The sanctions imposed include an order that the factual allegations in the complaint are established as true – *i.e.*, that Abboud is a judgment creditor of Horvath and also an owner of the two companies – and thus Horvath is entitled to the appointment of a receiver over the companies to carry his money judgment into effect. Accordingly, a receiver was appointed over DT Grossman, Inc. and Tamuz Management, Inc.

On September 10, 2018, the defendants, through Michael Aten, Esq., appealed the order appointing a receiver. On September 13, the defendants, through Myron Watson, Esq., filed a motion to stay execution of the order appointing a receiver.[1] The motion to stay was supplemented on September 15. On September 19, defendant DT Grossman, Inc. only, through Jonathan M. McDonald, Esq., filed a motion for relief from the judgment appointing a receiver. Since then, the other two defendants, through Aten, have joined in the motion for relief.

A hearing on the motions for relief from judgment and to stay was held September 28, 2018, and this decision follows.

***History***

Sometime in 2009 Horvath began to represent Abboud in connection with an appellate matter. He ultimately billed for 25 hours of legal work through April 2010. Abboud would not pay the bill and Horvath sued him in case number 862826 on May 5, 2016. Aten appeared to defend Abboud but never opposed Horvath's motion for summary judgment and, on February 27, 2017, Horvath obtained a summary judgment for his legal fees in the amount of $7,375. A bench trial was held on May 10, 2017, on Horvath's remaining claim for fraudulent inducement. Abboud and Aten did not appear at trial after failing to participate in a scheduling conference set by the court for the purpose of setting a trial date. Judgment after the *ex parte* trial on the fraud claim

[1] The motion to stay refers to the order appointing a receiver as being "issued on September 9, 2018." The order was, in fact, journalized on September 7.

was given in Horvath's favor for another $7,375, plus $3,450 for attorney's fees, bringing the total judgment in case number 862826 to $18,200.

Horvath filed this case about three months later on August 28, 2017. The three defendants appeared in the case through Aten on November 6, 2017. At a pretrial case management conference that same day, the defendants' oral motion for a leave until November 20 to file a responsive pleading was granted. But the defendants did not file an answer, forcing Horvath to file a motion for default judgment on December 4, 2017, whereupon the defendants filed, through Watson, a motion for a leave to plead, which was granted until January 19, 2018. No answer was filed by that date so, on January 23 at 10:23 a.m., Horvath filed a second motion for default judgment, to include the appointment of a receiver. That same day, at 3:19 p.m., the defendants filed an answer.

In the meantime, in early November 2017, Horvath had served written discovery requests on all three defendants. Those requests were completely ignored and Horvath filed on March 20, 2018, a motion pursuant to Rule 37 of the Ohio Rules of Civil Procedure to compel the defendants to respond. The defendants did not respond to the motion, or to the discovery, and the motion to compel was granted with an order that the defendants must provide discovery answers by April 24, 2018. That deadline came and went with no answers provided. In the interim, the defendants and their counsel failed to participate in a March 26, 2018, telephone pretrial conference and failed to appear in court at an April 25, 2018, pretrial conference.

On May 2, 2018, Horvath filed a Civil Rule 37(A) motion to impose a sanction on the defendants for their failure to abide by the order compelling the production of discovery answers. The motion for sanctions was supplemented twice, first on May 22 and then on August 15, 2018. The defendants never filed a written opposition to either the May 2 motion or its supplements.

While the motion for sanctions was pending, James Alexander, Jr., Esq. entered an appearance as counsel for Grossman DT, Inc. only on May 9 and attempted to move for summary judgment on May 16 without leave of court, resulting in the motion being stricken from the record.

As noted above, the motion for sanctions was granted on September 7, 2018, resulting in the two pending motions.

***The motion for relief from judgment***

I will address the motion for relief from judgment first, since if it is granted the motion to stay is moot.

The motion for relief from judgment is made pursuant to Civil Rule 60(B). That rule provides, in pertinent part:

> **(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc.** 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; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment.

The Ohio Supreme Court has held that, in addition to showing entitlement to relief under one of the grounds set forth in Civil Rule 60(B)(1) through (5), a movant must demonstrate a meritorious defense or claim to present if relief is granted. *GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, 47 Ohio St. 2d 146, (1976) syllabus 2.

The defendants' argument appears to be that they are entitled to relief under the catchall provision of Civil Rule 60(B)(5) because a) their counsel "abandoned" them by never responding to the plaintiff's discovery requests and b) under the circumstances, default judgment was too severe of a sanction under Civil Rule 37 for their failure to provide discovery responses. As for

their meritorious defense to the lawsuit, the defendants assert that "Grossman [DT, Inc.] has, as is already a matter of record, conclusively demonstrated the falsity of the ostensible factual basis for Plaintiff's claims against it"[2] because Abboud's son, who is said to be a shareholder of Grossman DT, Inc., is not a defendant here and that Horvath has "unequivocally acknowledged that Elie [Fayez Abboud] possessed no ownership interest in Grossman [DT, Inc.]."[3]

The trouble with these arguments is that there is no evidentiary quality record evidence to support either of them. Indeed, there is no evidentiary quality record evidence at all, and the absence of that evidence is a direct result of the defendants' decision to refuse Horvath's discovery requests.

Moreover, there is no evidence that the defendants were "abandoned" by their attorney. First, the defendants, as already noted here, had at least three attorneys of record before a fourth lawyer filed the motion for relief from judgment, and it is not clear which lawyer the current counsel is claiming abandoned Grossman DT, Inc. Second, while the docket certainly reflects a lack of diligence by all counsel for the defendants, there is no reason to conclude that the utter failure to participate in pretrial conferences, motion practice and discovery was because of a lawyer's neglect. To the contrary, the defendants' conduct in the case carries the distinct odor of strategic neglect since literally nothing was done until the judgment was finally granted and a receiver was about to take control of the two companies. Such a strategy was previously employed – albeit to no obvious beneficial effect – by Abboud and Aten in the lawsuit that resulted in Horvath's judgment when they decided not to oppose the motion for summary judgment and then not appear for trial. This pattern of neglect implies that the defendants were trying not just to

[2] Motion for relief from judgment, page 7.
[3] *Id.*

delay, but to put off forever, the day they would have to unmask the ownership of assets that could be used to satisfy Horvath's judgment.

But even if I'm wrong about the defendants' motivation, the simple fact is they failed to participate in any meaningful way in this lawsuit until after the motion for sanctions was granted and the receiver was appointed. That remedy having been ordered, the defendants have still not demonstrated to Horvath (and Abboud's other judgment creditors, who have sought to intervene here) through sworn answers to interrogatories, sworn deposition testimony and document production the truth of their claim that Abboud has no part in Grossman DT, Inc.'s business. That continued resistance to cooperation serves only as corroboration that the receiver's appointment was necessary to the just resolution of the parties' disputes.

It is worth keeping in mind that the receiver's job is to preserve the receivership estate. In connection with that duty, the receiver will have control over all of the companies' books, records and other documents, allowing him to make an independent assessment of whether Abboud has any involvement in the business sufficient to justify execution against the business to satisfy the personal judgment against Abboud. Moreover, the receiver, while authorized to conduct the day-to-day operation of the business, cannot make a disposition of any significant assets of the business without the specific permission of the court. This means that nothing will be done without the defendants being aware of what is proposed and having the opportunity to be heard on the matter – the same kind of opportunity they were given throughout this case, but declined, until there was no choice other than to grant the motion for sanctions.

Civil Rule 60(B) requires a trial court to, in effect, answer the question of what has happened since a judgment to render it unjust. The defendants consciously chose not to participate in the lawsuit through the point when the Civil Rule 37 sanction was imposed. They can't now

benefit from that choice by obtaining relief from a judgment that is a direct result of their decision to ignore the case. So here, the answer to the question of what has changed since the judgment on September 7 that renders it unjust is "nothing." As a result, the defendants have failed to demonstrate any reason justifying relief from the September 7, 2018, judgment.

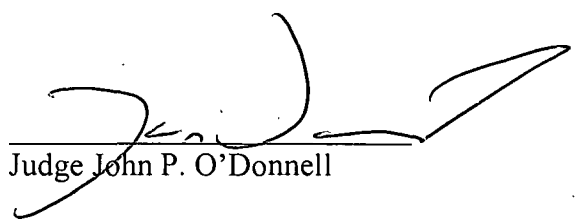
In light of that failure, the motion for relief may be denied without considering whether the defendants have a meritorious defense, since both a reason justifying relief and a meritorious defense must be shown. I will therefore not address whether the defendants have established a meritorious defense. But I will note again, in passing, that the defendants still haven't properly answered the discovery.

The defendants' motion for relief from judgment is denied.

The defendants' motion to stay execution of the September 7, 2018, judgment also lacks merit. Given the demonstrated unwillingness of the defendants to take part in a lawsuit according to the rules of procedure and their propensity to evade their obligations under those rules, any stay of execution will only serve as a further opportunity to defeat the ability of Abboud's judgment creditors to be made whole.

For these reasons, the September 19, 2018, motion for relief from judgment, the September 13, 2018, motion to stay the judgment appointing a receiver, and the supplemental motion to stay filed on September 15, are denied.

**IT IS SO ORDERED**:



Judge John P. O'Donnell

November 21, 2018