[Cite as *Lawson v. Levering*, 2009-Ohio-4491.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kristen M. Lawson,	:	
Plaintiff-Appellee,	:	No. 09AP-179 (C.P.C. No. 03CVC01-677)
v.	:	(REGULAR CALENDAR)
Andrew A. Levering,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 1, 2009

Andrew Cooke & Associates, LLC, Andrew P. Cooke, and *Kylie Keitch*, for appellee.

Andrew A. Levering, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Andrew A. Levering, from a judgment of the Franklin County Court of Common Pleas, denying appellant's motion for relief from judgment under Civ.R. 60(B).

{¶2} On January 17, 2003, plaintiff-appellee, Kristen M. Lawson, filed a complaint against appellant, asserting a cause of action for negligence. The complaint alleged that appellant was operating a motor vehicle on January 23, 2001, and that he failed to stop at a red light at the intersection of Lane and Neil Avenues, striking appellee,

a pedestrian, who was crossing Lane Avenue, and causing her to suffer severe emotional distress and physical injury, including a dislocated shoulder and fractured hip.

{¶3} A copy of the complaint was sent by certified mail to appellant's address on Findley Avenue in Columbus, but was returned as unclaimed. On March 25, 2003, the clerk of courts sent a copy of the complaint by ordinary mail to the same Findley Avenue address. On May 1, 2003, appellant filed a pro se answer, which contained appellant's signature and listed his address on Findley Avenue in Columbus.

{¶4} The trial court's case schedule set a trial date for March 4, 2004. Appellee and her counsel appeared for trial on that date, but appellant failed to appear. The trial court, by notice filed March 4, 2004, set a new trial date for March 10, 2004. Appellee and her counsel appeared for trial on March 10, 2004, at which time appellee's "case was presented to the Court," but appellant "again failed to appear for trial."

{¶5} By entry filed March 30, 2004, the trial court granted judgment in favor of appellee in the amount of $90,000 for injuries sustained as a result of being struck by the automobile driven by appellant, and the court made a determination that appellee had not been negligent in the accident. The damage award included $9,775.59 for medical bills, $1,000 for lost wages, and $79,224.41 for pain and suffering.

{¶6} On September 8, 2008, appellant filed a motion for relief from judgment pursuant to Civ.R. 60(B)(5). In the accompanying memorandum in support, appellant argued he had a meritorious defense, and that he was entitled to relief because he never received notice of the second trial date. Appellant further argued that he was entitled to relief under Civ.R. 60(B)(5) because the default judgment in the amount of $90,000 was excessive. Appellant submitted an affidavit with his motion for relief from judgment, in

which he stated that his address had changed by the time of the second trial date on March 10, 2004, as he had moved from his residence on Findley Avenue in August 2003. Appellant averred he had not received notice of the second trial date, and that he was unaware of the default judgment entered against him until attempting to renew his driver's license at the Bureau of Motor Vehicles in June 2008. Appellant further averred he was "unaware of any duty to inform the court of my change of address."

{¶7} On October 6, 2008, appellee filed a memorandum contra appellant's motion for relief from judgment. On January 27, 2009, the trial court filed its decision and entry denying appellant's motion for relief from judgment, finding that the Civ.R. 60(B) motion was untimely.

{¶8} On appeal, appellant sets forth the following two assignments of error for this court's review:

> I. The trial court erred in analyzing Appellant's 60(B)(5) Motion for Relief From Judgment under 60(B)(1) timeliness standards.
>
> II. The trial court erred in denying Appellant Andrew Levering's 60(B)(5) Motion For Relief From Judgment.

{¶9} Appellant's assignments of error are interrelated and will be considered together. Under these assignments of error, appellant argues that the trial court erred in analyzing his motion for relief from judgment under the timeliness standard of Civ.R. 60(B)(1), and that the court erred in denying relief under Civ.R. 60(B)(5).

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

> 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 * * *; (3) fraud * * *; (4) the judgment has been satisfied, released or discharged * * *; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.

{¶11} In *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus, the Supreme Court of Ohio held:

> To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (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.

{¶12} The Supreme Court of Ohio has noted that "Civ.R. 60(B)(5) is intended as a catch-all provision reflecting the inherent power of a court to relieve a person from the unjust operation of a judgment." *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, 66. The grounds for invoking that provision, however, should be "substantial," and Civ.R. 60(B)(5) should not be used as a substitute for any of the other more specific provisions of Civ.R. 60(B). Id., citing *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 105.

{¶13} Appellant first contends the trial court erred in addressing the issue of timeliness under the one-year limitation imposed by Civ.R. 60(B)(1), rather than the "reasonable time" requirement of Civ.R. 60(B)(5). In its decision, the trial court construed appellant's argument that he was unaware of a duty to notify the court of his change of address as falling under Civ.R. 60(B)(1), rather than (B)(5), because appellant "is asking this Court to 'excuse' his 'neglect' of this action since he is not a lawyer."

{¶14} We note, however, that despite the above language in the trial court's decision, the court went on to analyze appellant's motion under Civ.R. 60(B)(5), and concluded that the motion was also untimely under that provision. Specifically, in addressing appellant's claim that the award was excessive under Civ.R. 60(B)(5), the trial court found that appellant failed to explain why he did "little or nothing after filing an Answer to defend against Plaintiff's claims prior to entry of judgment," nor did appellant explain "why, for more than three years after judgment was entered, he failed to ascertain whether a judgment had been entered against him" despite the fact that such information "would have been available from the Clerk of Courts." The trial court thus concluded: "In the absence of an adequate explanation * * * Defendant has failed to demonstrate that his motion was timely filed."

{¶15} In *Investors Reit One v. Fortman* (2001), 10th Dist. No. 00AP-195, the appellant raised arguments similar to the arguments in this case. Under the facts of that case, the appellant filed a Civ.R. 60(B)(5) motion for relief from judgment on August 16, 1999, and submitted an affidavit stating he did not receive notice of the trial court's November 15, 1988 judgment against him until August 5, 1999. The trial court denied the motion, finding that the appellant's lack of notice was due to his own lack of diligence, and that he could not be excused for failing to inquire of the status of his case for nearly 11 years. The trial court concluded that the appellant "cannot use this 'late notice' as a basis for relief from the 1988 judgment." Id.

{¶16} On appeal, the appellant asserted that the trial court erred in finding that his failure to receive notice of the 1988 judgment was caused by his own actions. This court rejected appellant's argument, holding in part:

> [T]he record supports the trial court's finding that defendant's failure to receive notice of the 1988 judgment was attributable to his own neglect and that his Civ.R. 60(B) motion was untimely. The record indicates that notice of the 1988 judgment entry was sent to all of the parties in the case. The clerk of the trial court, in mailing notice of the judgment to defendant's last known address, and entering a notation in the case docket indicating that service was made, complied with due process requirements addressed by the Ohio Supreme Court in *Atkinson v. Grumman Ohio Corp*. (1988), 37 Ohio St.3d 80, 523 N.E.2d 851. Here, the trial court did not err in determining that it was incumbent upon defendant to keep the court apprised of his current address and to inquire about the status of the case, and that defendants' failure to receive notice of the judgment was caused by his own neglect or lack of due diligence. Further, Civ.R. 60(B)(5) "is not to be used as a substitute for any of the more specific provisions of Civ.R. 60(B)." * * * Although defendant's failure to file a notice of change of address with the trial court, contrary to court rule, may have resulted from mistake, inadvertence or neglect, the facts presented are not the type of "extraordinary" circumstances that would provide a basis for relief under Civ.R. 60(B)(5).

Fortman (citations omitted).

{¶17} In *Fortman,* this court also found unpersuasive the appellant's contention that he should be held to a lesser standard than an attorney because he was acting pro se. Specifically, this court observed that, under Ohio law, " 'a pro se civil litigant is bound by the same rules and procedures as those who retain counsel.' " Id., quoting *Holman v. Keegan* (2000), 139 Ohio App.3d 911, 918. See also *Marshall v. Staudt*, 5th Dist. No. 1998CA00177 ("a *pro se* litigant has an obligation to keep the trial court informed of any change of address"); *State Farm Mut. Auto. Ins. Co. v. Peller* (1989), 63 Ohio App.3d 357, 361 (it is the duty of a party, once he has been made a party to an action, to stay apprised of the progress of the case).

{¶18} In the present case, appellant received notice of the original trial date, but failed to appear for trial. Although appellant contends he did not receive notice of the second trial date, he acknowledges not having provided the trial court notice of his change of address. Similar to the circumstances in *Fortman,* the trial court in the instant case deemed it incumbent upon appellant to keep the court apprised of his current address, and to stay informed about the status of the case.

{¶19} Whether a Civ.R. 60(B) motion is filed within a reasonable time "depends on the facts and circumstances of the particular case." *Scotland Yard Condo. Assn. v. Spencer,* 10th Dist. No. 05AP-1046, 2007-Ohio-1239, ¶33. See also *Walker v. Walker* (Oct. 17, 1991), 2d Dist. No. 2772 ("Whether a delay between a final order and a Civ.R. 60(B)(5) motion was made within a 'reasonable' time depends on the facts and circumstances of the case"). Moreover, a determination as to whether the time concerned is reasonable is "committed to the sound discretion of the trial court." *Warman v. Dunwoodie* (June 28, 1996), 2d Dist. No. 15581.

{¶20} In the present case, the record supports the trial court's finding that, after filing his answer, appellant essentially took no further action in the case. Specifically, in addition to not appearing at the first scheduled trial date (despite notice), appellant failed to notify the trial court of his change of address, and he made no effort to check the status of the case for more than three years following the judgment. Further, the motion for relief from judgment was filed more than four years after the judgment was entered.

{¶21} Upon review, we find the trial court was justified in holding that appellant failed to adequately explain his lack of diligence in attempting to determine whether a judgment had been entered against him. As previously noted, while the trial court

deemed the motion to be more accurately a request for relief under Civ.R. 60(B)(1) (i.e., excusable neglect), the court further analyzed the motion under Civ.R. 60(B)(5) and still found the motion to be untimely. Here, regardless of whether appellant's motion for relief from judgment is more properly characterized as falling under the more liberal time provisions of Civ.R. 60(B)(5), rather than the one-year requirement of Civ.R. 60(B)(1), we conclude that the trial court did not abuse its discretion in denying appellant's motion as untimely. *Fortman*; *Maumee Equip. Inc. v. Smith* (Nov. 22, 1985), 6th Dist. No. L-85-168 (even if Civ.R. 60(B)(5), rather than 60(B)(1), was the appropriate provision for relief, appellants failed to adequately explain why they waited almost two and one-half years to vacate judgment, and "it would have been error for the trial court to grant appellants' motion where they had not shown that they had acted within a reasonable time"); *Plant v. Plant*, 5th Dist. No. 02CA01, 2002-Ohio-3684 (trial court did not abuse its discretion in denying appellant's Civ.R. 60(B)(5) motion for relief from judgment as appellant had a duty to advise court of change of address, and failure to do so precluded him from justifying relief for alleged lack of notice).

{¶22} Based upon the foregoing, appellant's first and second assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

FRENCH, P.J., and KLATT, J., concur.

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