[Cite as *TCC Mgt., Inc. v. Carson*, 2010-Ohio-1229.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

TCC Management, Inc.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-941 (M.C. No. 2006 CVF 022726)
Wendy Carson et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
(R. Dorsey & Company,	:	
Defendant-Appellant).	:	

D E C I S I O N

Rendered on March 25, 2010

Aaron J. Wilson; *Cheek Law Office*, and *Jackson T. Moyer*, for appellee TCC Management, Inc.

Arthur G. Wesner and *Jeffrey W. Sharp*, for appellant R. Dorsey & Company.

APPEAL from the Franklin County Municipal Court

TYACK, P.J.

{¶1} This case concerns contempt sanctions against an employer who allegedly failed to respond to an order of garnishment. Appellant, R. Dorsey & Company, Inc. ("Dorsey"), appeals from the September 4, 2009 judgment of the Franklin County

Municipal Court denying Dorsey's Civ.R. 60(B) motion for relief from judgment. For the reasons that follow, we reverse the judgment of the trial court and remand for a hearing.

{¶2} In March 1997, Clifford and Wendy Carson purchased a used 1992 Chevy pickup truck from Bill Swad Chevrolet, Inc. and financed approximately $8,000. As part of their divorce, Clifford took possession of the truck and assumed all payments. When the account became delinquent, Wendy cooperated with the bank holding the note by disclosing her ex-husband's address. The bank assured her she would not be held personally liable if she cooperated with them on the repossession.

{¶3} On June 1, 2006, appellee, TCC Management, Inc. ("TCC") filed a complaint for nonpayment of the contract that originated with Bill Swad Chevrolet, Inc. and purchased by TCC. TCC sought the balance due, $7,557.60 plus accrued interest of $5,067.70 through November 16, 2006, plus interest at 25 percent per annum from the last interest date, plus the cost of the action.

{¶4} Wendy answered the complaint on October 24, 2006. TCC was granted leave to file a motion for summary judgment. Wendy obtained an extension of time to retain counsel, but eventually responded to the motion pro se.

{¶5} The trial court entered judgment in favor of TCC on February 14, 2007. An order of garnishment was filed on April 12, 2007 and, on April 18, Dorsey, as garnishee, filed an answer. It is not clear from the record what transpired with respect to the April 12, 2007 order. The docket sheet accompanying this court's record shows payments were made and certain documents were filed, but they were not made part of the official record we have before us.

{¶6} On July 14, 2008, the trial court issued another garnishment order to Dorsey via certified mail. There is a return of service in the file, but the signature is illegible and undated. The parties dispute whether there was a failure to serve Dorsey with the July 14, 2008 order.

{¶7} Eventually, on January 28, 2009, TCC filed a "Motion to Show Cause for Contempt" against Dorsey but failed to forward the proper fee to the clerk. After this error was corrected some time in April or May, the court set a hearing date on the motion for July 8, 2009. Dorsey was personally served with notice of the hearing on June 18, 2009. According to the trial court, Wendy filed a Chapter 7 Bankruptcy petition sometime between July 14, 2008 and July 8, 2009, but it is not known exactly when she filed.

{¶8} Prior to the hearing, Dorsey and TCC entered into negotiations. Counsel for Dorsey believed the issue of service had been settled. On June 22, 2009, counsel for Dorsey faxed a memo to counsel for TCC stating that withholding would begin the next week and asking for verification that the July 8, 2009 hearing was cancelled. Dorsey then received a letter from counsel for TCC dated June 24, 2009 entitled "STOP GARNISHMENT NOTICE," along with a copy of a release of garnishment. On June 26, 2009, counsel for TCC filed a "Release of Affidavit and Order of Garnishment" with the court. The release stated in pertinent part:

> TO CLERK:
>
> Please issue a Release to Defendant, WENDY CARSON, addressed to his/her employer, R DORSEY & COMPANY INC, * * * releasing all garnishments of personal earnings filed by the undersigned in this case only. * * *

> * * * I certify that said employer is authorized to stop all Personal Earnings Garnishments filed previously * * * and that said employer is authorized to release to Defendant, WENDY CARSON, any sums still in said employer's possession which have previously been withheld by employer but not yet sent to the Court. * * *

{¶9} The actual release of garnishment is not included in the record filed with this court, but is attached as an exhibit to Dorsey's motion for relief from judgment. Additionally, counsel for TCC acknowledged in his response to the motion for relief from judgment that he filed the release on June 26, 2009. (See exhibit L to TCC's memorandum contra to the Civ.R. 60(B) motion.)

{¶10} The hearing went forward on July 8, 2009, with counsel for TCC present and counsel for Dorsey absent. The same day, the trial court found Dorsey in indirect civil contempt. Dorsey was ordered to pay a fine of $250, and to turn over to TCC all funds subject to the garnishment order filed July 14, 2008, up to 90 days from the date of Wendy's bankruptcy petition filing. Failure to comply could be punished by up to 30-days imprisonment of Dorsey's statutory agent.

{¶11} On August 5, 2009, Dorsey filed a "Motion for Relief from Judgment and Court Order of July 8, 2009, Pursuant to Rule 60(B)." In his motion, Dorsey laid out his understanding of the agreement between counsel to settle the issue of service. He also noted the release of garnishment and that there was no order revoking the release of garnishment or reinstating the garnishment.

{¶12} On August 25, 2009, TCC filed its memorandum contra to the motion arguing that Dorsey failed to show excusable neglect when he did not appear at the motion to show cause hearing.

{¶13} On September 4, 2009, the trial court entered judgment denying the motion without an oral hearing. This appeal followed, with Dorsey assigning the following as error:

> I. The trial court erred in overruling employer-appellant's motion to vacate a contempt citation threatening an employer with civil and criminal sanctions without holding an oral hearing, when the facts were disputed by the parties.
>
> II. The trial court erred as a matter of law in overruling a motion to vacate a contempt citation against an employer when the undisputed facts contained in the court's file clearly showed that the court order of garnishment which the employer allegedly disobeyed had in fact been released before the citation in contempt was issued.

{¶14} Our standard of review for a trial court's granting or denying a Civ.R. 60(B) motion is whether the trial court abused its discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. Civ.R. 60(B) provides, in pertinent part:

> 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; * * * 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. * * *

{¶15} 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 0must 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.

{¶16} Where a meritorious defense is presented and the motion is timely, doubts regarding whether excusable neglect exists should be resolved in favor of the motion so that cases can be decided on their merits. Id.

{¶17} An oral hearing is unnecessary if the Civ.R. 60(B) motion fails to allege sufficient operative facts. However, "[t]he court must hold a hearing where sufficient operative facts are alleged but are not believed by the court or are disputed by the other party." *WFMJ Television, Inc. v. AT&T Federal Systems CSC*, 7th Dist. No. 01-CA-69, 2002-Ohio-3013, ¶26.

{¶18} In this case, Dorsey asserts that it had a meritorious defense to its failure to comply with the July 14, 2008 order of garnishment because it was never served. Dorsey contends that the issue of proper service was negotiated prior to the contempt hearing, and it believed the issue of contempt and compliance with the order of garnishment had been resolved with the result that Dorsey would begin withholding the following week. TCC claims service was complete when the certified mail receipt was received by the office of the clerk. However, there is no date on the receipt, and the signature is illegible as noted by the clerk on the docket sheet.

{¶19} A movant need not prove it will prevail on the defense, but it must allege a defense that, if proved, would defeat the opposing party's claims. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. It is noteworthy that when Dorsey received a prior order of garnishment from TCC, he complied with the order and withheld wages. Here, it is a disputed issue of fact and law whether Dorsey received proper service. Therefore, Dorsey sufficiently alleged operative facts to demonstrate a meritorious defense.

{¶20} The next issue is whether Dorsey's failure to attend the show cause hearing on the motion for contempt constitutes excusable neglect. Excusable neglect is an elusive concept which has been difficult to define and apply. *Bowling v. Grange Mut. Cas. Co.*, 10th Dist. No. 05AP-51, 2005-Ohio-5924, ¶36. This court has previously defined excusable neglect in the negative stating that inaction of a party is not excusable neglect if it can be labeled as a "complete disregard for the judicial system." Id., quoting *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 1996-Ohio-430.

{¶21} Counsel for Dorsey asserts that he believed the issue of contempt had been settled as evidenced by his faxed memorandum of June 22, 2009. TCC argues that it never provided the requested verification that the hearing was cancelled, and therefore Dorsey had no excuse for his nonappearance. While true, Dorsey had further reason to believe the hearing was unnecessary when it received a release of garnishment signed by a judge. Why TCC filed the release and whether Dorsey was entitled to rely on this order of the court as grounds for not attending the hearing is another point disputed by the parties. The issue involves both disputed facts and disputed law, and therefore we conclude that Dorsey should have a hearing on his motion.

{¶22} Timeliness is not an issue as the motion was timely filed after the court found Dorsey in contempt.

{¶23} We recognize that the trial court may not have had all the facts before it at the time of the hearing. In particular, the release of garnishment may not have made it into the file at the time of the contempt hearing especially since this court lacks the

original in our record of proceedings. We note that at least five judges had a hand in this case, and that the record of proceedings appears incomplete at this time.

{¶24} Based on the foregoing, we sustain Dorsey's first assignment of error and overrule the second assignment of error because the facts are disputed. The judgment of the Franklin County Municipal Court is reversed and remanded for further proceedings in accordance with this decision.

Judgment reversed and remanded for further proceedings.

SADLER and McGRATH, JJ., concur.

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