

[Cite as *Hillman v. Edwards*, 2010-Ohio-3524.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Robert L. Hillman,	:	
	:	No. 10AP-58
Plaintiff-Appellant,	:	(C.P.C. No. 07CVH-09-12491)
v.	:	No. 10AP-59
	:	(C.P.C. No. 07CVH-12-17248)
[W. Joseph Edwards],	:	
	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on July 29, 2010

Robert L. Hillman, pro se.

W. Joseph Edwards, for appellee.

APPEALS from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Plaintiff-appellant, Robert L. Hillman ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which (1) allowed defendant-appellee, W. Joseph Edwards ("appellee"), to file an untimely answer in appellant's legal malpractice lawsuit and (2) granted summary judgment in favor of appellee. For the following reasons, we affirm.

{¶2} Appellant initiated two legal malpractice actions against appellee. In common pleas case No. 07CVH-09-12491, appellant failed to perfect service of his complaint. But in common pleas case No. 07CVH-12-17248, after appellant filed a complaint on December 19, 2007, service was perfected via certified mail to appellee's office. Appellee did not file an answer by the deadline, and appellant filed a motion for default judgment on February 12, 2008. Appellee filed an answer on February 26, 2008, but he did not seek leave of court for the untimely filing. Regardless, the trial court denied the default judgment motion because appellee filed an answer.

{¶3} Although appellant attempted an interlocutory appeal from that decision, this court dismissed the appeal for lack of a final appealable order. (Aug. 8, 2008 Journal Entry of Dismissal in case No. 08AP-206.) On remand, the trial court consolidated the malpractice cases, and the parties filed cross-motions for summary judgment. The court granted summary judgment for appellee and denied appellant's motion, noting appellant's failure to present experts to support his motion and to rebut appellee's.

{¶4} Appellant appealed in *Hillman v. Edwards*, 10th Dist. No. 08AP-1063, 2009-Ohio-5087 ("*Hillman I*"). In that appeal, this court found no error in the trial court's decision to grant appellee summary judgment. *Id.* at ¶34. This court concluded, however, that the trial court abused its discretion by accepting appellee's untimely answer because there was neither a motion for leave to file it nor an attempt to show excusable neglect for his untimeliness. *Id.* at ¶16. Thus, the matter was remanded to the trial court so that it could "entertain a properly filed and supported Civ.R. 6(B) motion

for leave to file an untimely answer on the ground of excusable neglect." *Id.* The trial court was ordered to reinstate summary judgment for appellee if it concluded that he avoids a default judgment due to being allowed to file an untimely answer. *Id.* at ¶36. But the court was ordered to enter a default judgment for appellant if it found no excusable neglect for the untimely answer. *Id.* In *Hillman v. Edwards*, 124 Ohio St.3d 1443, 2010-Ohio-188 ("*Hillman II*"), the Supreme Court of Ohio dismissed appellant's appeal of *Hillman I*.

{¶5} On remand, appellee filed a motion for leave to file an answer, and he claimed the following in an affidavit to prove excusable neglect. The complaint was sent to his office via certified mail, and an attorney who rents office space from him accepted and signed for it on December 31, 2007. The complaint was "mistakenly" placed in appellant's file without appellee's knowledge that it arrived. He did not become aware of the complaint until he was reviewing appellant's file after the deadline to answer had passed. He filed the original answer within a week of discovering the complaint. He reiterated that "the answer in this case was not filed timely because of an office error in which the complaint was placed in the file before [he] realized it was served." (Case No. 07CVH-12-17248, R. 69, Affidavit at 2.) In addition, he said that, "[i]n my 25 years as a practicing attorney, I have never intentionally ignored a filing deadline imposed by a court, statute or rule." (*Id.*, Affidavit at 3.) Lastly, he explained in an argument in support of his motion that it was presumably his newly hired paralegal who placed appellant's complaint in the file without his knowledge of it arriving.

{¶6} The trial court granted appellee leave to file his untimely answer, concluding that he demonstrated excusable neglect based on his explanations and the short period of time between the date the answer was due, in late January 2008, and when he originally attempted to file it, in late February 2008. The court declined to enter a default judgment against appellee and, pursuant to *Hillman I*, reinstated summary judgment in his favor.

{¶7} Appellant appeals, raising two assignments of error:

ASSIGNMENT OF ERROR NUMBER ONE

THE APPELLANT CONTENDS THAT THE TRIAL COURT ABUSED [ITS] DISCRETION BY DELIBERATELY VIOLATING CIVIL RULE 6(B) AND 60(B)(1)(2) AND (3) BY [ACCEPTING] THE DEFENDANT'S MOTION FILED AFTER THE ONE YEAR STATUTORY TIME LIMIT FOR FILING SUCH MOTION, AND THUS THE TRIAL COURT VIOLATED THE PLAINTIFF[]-APPELLANT'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE [LAW] AND MEANINGFUL ACCESS TO THE COURT, ALSO SEE THE 1ST AND 5TH AMEND[MENTS] CONCERNING DISCRIMINATION.

ASSIGNMENT OF ERROR NUMBER TWO

APPELLANT CONTENDS THAT THE TRIAL COURT, AND APPELLATE COURT DENIED HIM DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE 1ST AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION[] WHEN BOTH COURTS (1) GRANTED AND SUSTAINED DEFENDANT'S SUMMARY JUDGMENT WHILE DEFENDANT WAS DECLARED IN DEFAULT[,] (2) FOR MISAPPLYING THE LAWS TO FACTS ALLEGED IN THE CASE[,] (3) FOR INCORRECTLY RULING UPON THE PLAINTIFF'S CLAIMS, AS PLAINTIFF NEVER FILED HIS LAW SUIT BASED UPON DEFENDANT'S FAILURE TO RAISE [ISSUES] PLAINTIFF DESIRED ON DIRECT APPEAL (BUT) ONLY FOR THE DEFENDANT'S

MISREPRESENTATION OF THE MATERIAL FACTS THAT WERE RAISED IN THE PLAINTIFF'S DIRECT APPEAL[,] AND (4) FOR GRANTING THE DEFENDANT SUMMARY JUDGMENT DESPITE DEFENDANT'S FAILURE TO ANSWER INTERROGATORIES, OR PROVIDE DISCOVERY IN VIOLATION OF CIVIL RULES.

{¶8} In his first assignment of error, appellant argues that the trial court erred by granting appellee's motion for leave to file an untimely answer. We disagree.

{¶9} Appellant contends that Civ.R. 60(B) governs appellee's motion and that appellee missed the deadline set forth in that rule. Civ.R. 60(B), which applies to a party seeking relief from judgment, and its deadline are inapplicable, however, because the trial court entered no judgment against appellee. Instead, as this court previously recognized, appellee's motion is governed by Civ.R. 6(B), which permits the trial court to grant a party leave to file an untimely answer upon a showing of excusable neglect. *Hillman I* at ¶16. Civ.R. 6(B) specifies no deadline for seeking leave to file an untimely answer due to excusable neglect.

{¶10} Next, appellant challenges the trial court's decision that appellee demonstrated excusable neglect for his untimely answer. A trial court's ruling on a Civ.R. 6(B) motion will not be disturbed absent an abuse of discretion. *Davis v. Immediate Med. Servs., Inc.*, 80 Ohio St.3d 10, 14, 1997-Ohio-363. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In determining whether an untimely answer is due to excusable neglect, a court must consider all of the surrounding facts and circumstances. *Davis* at

14. Neglect is inexcusable if a party's conduct falls substantially below what is reasonable. *Scarefactory, Inc. v. D&B Imports, Ltd.*, 10th Dist. No. 01AP-607, 2002-Ohio-200. Neglect is inexcusable if it reflects a complete disregard for the judicial system. *Accu-Check Instrument Serv., Inc. v. Sunbelt Business Advisors of Cent. Ohio*, 10th Dist. No. 09AP-505, 2009-Ohio-6849, ¶14. Furthermore, excusable neglect does not exist if the party or his attorney could have controlled or guarded against the event that led to the untimely answer. *Scarefactory, Inc.*

{¶11} Civ.R. 6(B) "mitigate[s] against the harshness of a default judgment," and, therefore, this court previously recognized that appellee avoids a default judgment if permitted to file an untimely answer. *Hillman I* at ¶7, 36. In fact, when deciding whether to allow an untimely answer under Civ.R. 6(B), courts must be mindful of the admonition that cases should be decided on their merits, where possible, rather than on procedural grounds, as in through a default judgment. *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.*, 72 Ohio St.3d 464, 466, 1995-Ohio-49. Consequently, the excusable neglect standard under Civ.R. 6(B) is "notably forgiving." *Hillman I* at ¶14, citing *Columbus v. Kahrl* (Mar. 12, 1996), 10th Dist. No. 95APG09-1204.

{¶12} We now turn to whether appellee demonstrated that his untimely answer was due to excusable neglect. *Beck-Durell Creative Dept., Inc. v. Imaging Power, Inc.*, 10th Dist. No. 02AP-281, 2002-Ohio-5908, is an analogous case involving a business that missed a deadline to file an answer. *Id.* at ¶2. This court concluded that the business demonstrated excusable neglect under Civ.R. 6(B) by submitting evidence showing that the complaint was not promptly forwarded to the attention of the person

responsible for filing the answer, due to office personnel inadvertently mishandling the complaint instead of following set procedure. *Imaging Power, Inc.* at ¶9-18. Similarly, here, appellee established in his affidavit that he missed the deadline to timely answer appellant's complaint because of an inadvertent mishandling of the complaint that occurred in contravention of the norms of his office. In particular, appellee said that after the attorney who rents office space from him accepted appellant's complaint via certified mail, "office error" occurred because the complaint was "mistakenly" placed in appellant's file without his knowledge of it having arrived. Accordingly, pursuant to *Imaging Power, Inc.*, appellee demonstrated excusable neglect for his untimely answer.

{¶13} In addition, appellee has not shown disregard for the judicial system. See *Accu-Check Instrument Serv., Inc.* at ¶14. He noted that, in his 25 years of practice, he had never "intentionally ignored a filing deadline imposed by a court, statute or rule." Moreover, when he discovered appellant's complaint, and that the deadline to answer had passed, he attempted, albeit unsuccessfully, to rectify the problem by filing an answer in a week, and this occurred not too long after the answer was due.

{¶14} Therefore, we conclude that appellee demonstrated excusable neglect for his untimely answer. Thus, the trial court did not abuse its discretion by granting him leave to file the untimely answer, and we overrule appellant's first assignment of error.

{¶15} In his second assignment of error, appellant challenges the trial court reinstating its previous decision to grant summary judgment in favor of appellee, as well as this court's review of that judgment in *Hillman I*. Appellant may not relitigate that

issue, however, because the doctrine of res judicata bars relitigation of final judgments. *Holzemer v. Urbanski*, 86 Ohio St.3d 129, 132, 1999-Ohio-91.

{¶16} Here, in *Hillman I*, this court affirmed the trial court's decision to grant summary judgment for appellee, and in *Hillman II* the Supreme Court of Ohio dismissed appellant's appeal of *Hillman I*. Given this procedural history, summary judgment for appellee is a final decision, and res judicata bars appellant from challenging that decision again here. Therefore, we overrule his second assignment of error.

{¶17} In summary, we overrule appellant's two assignments of error. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.
