[Cite as *Wolinetz Law Offices, L.L.C. v. Domanick*, 2013-Ohio-1251.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Wolinetz Law Offices, L.L.C.,	:	
Plaintiff-Appellee,	:	
		No. 12AP-570
v.	:	(M.C. No. 2011 CVF 018364)
Michael Domanick,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 29, 2013

Dana & Pariser Co., L.P.A., David B. Pariser and *Alyson C. Tanenbaum*, for appellee.

Gallagher Sharp and *Kevin C. Alexandersen*, for appellant.

APPEAL from the Franklin County Municipal Court

DORRIAN, J.

{¶ 1} Defendant-appellant, Michael Domanick, appeals from a judgment of the Franklin County Municipal Court denying his motion for relief from judgment in favor of plaintiff-appellee, Wolinetz Law Offices, L.L.C. Because we conclude that the trial court did not err in denying appellant's motion for relief from judgment, we affirm.

{¶ 2} On May 18, 2011, appellee filed a complaint against appellant alleging breach of contract, failure to pay on an account, and unjust enrichment for failure to pay legal fees. Along with the complaint, appellee requested service by certified mail and also requested "waiver of notification of failure."[1] Appellee filed as well a form titled "Waiver of Notification and Instructions to Clerk," indicating that, if service of process by certified

[1] The request for service by certified mail and for waiver of notification of failure are both contained in the Franklin County Clerk of Court's "New Civil Case Filings" coversheet, which must be completed for all new case filings.

mail is returned unclaimed, appellee waives notice of the failure of service by the clerk and requests ordinary mail service in accordance with Civ.R. 4.6(C) or (D) and R.C. 1923.06.

{¶ 3} The clerk of courts made efforts to serve appellant with the complaint via certified mail at 333 Cornwall Road, Rocky River, OH 44116. The certified mail went unclaimed and was returned to the clerk. The clerk then served appellant at the same address via ordinary mail on October 27, 2011. The summons notified him that he had until November 24, 2011 to serve a copy of his answer upon appellee and three days thereafter to file a copy of the answer with the clerk and that, if he failed to appear and defend, default judgment would be rendered against him. Appellant did not file an answer or otherwise appear or defend.

{¶ 4} On December 2, 2011, appellee filed a motion for default judgment. The certificate of service attached to the motion for default judgment indicates that the motion was served via ordinary mail upon appellant's attorney, Kevin Alexanderson, Esq. Prior to this time, no appearance had been made in the case by Attorney Alexanderson and/or any other attorney on appellant's behalf. On December 13, 2011, appellant's attorney filed a brief in response to appellee's motion for default judgment and a motion to dismiss the case on December 18, 2011. Appellant moved to dismiss the complaint, arguing that appellee had failed to properly serve appellant pursuant to Civ.R. 4(E) and 12(B). Appellant argued that, although certified mail was unclaimed, the docket was void of any written request to serve him via ordinary mail as required by Civ.R. 4.6(C) or (D). Therefore, according to appellant, the motion for default judgment should be denied as there was no good service in the case, and the case should be dismissed on December 18, 2011, as six months would have expired by that time, and service would not have been effected. On December 16, 2011, appellee filed a memorandum contra appellant's motion to dismiss and reply in support of its motion for default judgment.

{¶ 5} On December 20, 2011, the trial court denied appellant's motion to dismiss and granted default judgment in favor of appellee. Subsequent to the default judgment, on December 28, 2011, appellant filed a "Reply to Plaintiff's Memorandum Contra Defendant, Michael Domanick's, Motion to Dismiss." In this reply, appellant requested leave to file an answer instanter in the event the court found that appellee was justified in

filing by ordinary mail and complied with the rules. No answer instanter was attached to the reply. Appellant did not appeal the default judgment or the denial of his motion to dismiss.

{¶ 6} On March 22, 2012, appellant filed a motion for relief from judgment. Appellee filed a memorandum contra on March 30, 2012, and appellant filed a reply on April 10, 2012. A hearing regarding the same was held May 31, 2012. On June 6, 2012, the court denied appellant's motion for relief from judgment. Appellant timely filed the instant appeal.

{¶ 7} Appellant asserts the following assignment of error:

> DEFENDANT-APPELLANT MET ALL OF THE REQUIREMENTS FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(B) AND IT WAS ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY THE GRANTING OF THIS MOTION.

{¶ 8} Appellant moved for relief from the default judgment pursuant to Civ.R. 60(B), which provides that, under certain circumstances, a court may relieve a party from a final judgment. We review a trial court's decision to grant or deny a motion for relief from judgment under Civ.R. 60(B) for abuse of discretion. *Winona Holdings, Inc. v. Duffey,* 10th Dist. No. 10AP-1006, 2011-Ohio-3163, ¶ 12. An abuse of discretion occurs where a trial court's decision is "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219 (1983).

{¶ 9} A party seeking relief from judgment under Civ.R. 60(B) "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." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.,* 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. The movant must establish all three of the requirements to obtain relief from judgment. *Duffey* at ¶ 13.

{¶ 10} The trial court denied appellant's motion for relief from judgment on the grounds that appellant failed to satisfy the second prong of the *GTE* test, which requires appellant to establish that he is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5). Appellant asserts that he is entitled to relief under Civ.R. 60(B)(1)

due to "excusable neglect." In determining whether neglect is "excusable," we must consider all of the surrounding facts and circumstances. *Duffey* at ¶ 14. "The term 'excusable neglect' is an elusive concept which has been difficult to define and to apply." *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18 (1996). The Supreme Court of Ohio has stated that "the inaction of a defendant is not 'excusable neglect' if it can be labeled as a 'complete disregard for the judicial system.' " *Id.*, quoting *GTE Automatic Elec.* at 153. We have previously held that excusable neglect is not present if the party could have prevented the circumstances from occurring. *Porter, Wright, Morris & Arthur, LLP v. Frutta Del Mondo, Ltd.*, 10th Dist. No. 08AP-69, 2008-Ohio-3567, ¶ 22. The Supreme Court has also stated that "the concept of 'excusable neglect' must be construed in keeping with the proposition that Civ.R. 60(B)(1) is a remedial rule to be liberally construed, while bearing in mind that Civ.R. 60(B) constitutes an attempt to 'strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done.' " *Colley v. Bazell*, 64 Ohio St.2d 243, 248 (1980), quoting *Doddridge v. Fitzpatrick*, 53 Ohio St.2d 9, 12 (1978). *Bank of Am., N.A. v. Malone*, 10th Dist. No. 11AP-860, 2012-Ohio-3585, quoting *Miller v. Susa Partnership, L.P.*, 10th Dist. No. 07AP-702, 2008-Ohio-1111.

{¶ 11} The trial court found that appellant had failed to prove that he was not served with the complaint. We agree, and we reject appellant's argument that the docket was void of any written request to serve him via ordinary mail. The record does contain such a written request, as well as a certificate of mailing by ordinary mail. Furthermore, there is nothing in the record to indicate ordinary mail was not successful. "Service shall be deemed complete when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery." Civ.R. 4.6(D).

{¶ 12} The trial court also found appellant failed to demonstrate excusable neglect in failing to file an answer. We agree as well. Appellant asserts that he was not at home at the time the complaint was served by mail, as he was caring for his terminally ill father. In his affidavit attached to his motion for relief, he avers, "I have no recollection of being served or receiving the lawsuit which is the subject matter of this litigation." However, the appellee's certificate of service contained in the record indicates that appellee served its

motion for default judgment on appellant's attorney, Attorney Alexanderson, Esq. Appellant does not dispute that Attorney Alexanderson was served, nor does he suggest that such service was improper, even though Attorney Alexanderson had not formally appeared in the case by that time. Appellee's service of the motion upon appellant's attorney on December 2, 2011, indicates appellant was aware of the complaint and had consulted an attorney prior to this time.

{¶ 13} Finally, even assuming, arguendo, he was not properly served with the complaint, appellant provides no explanation regarding why he failed to request leave to file an answer when he filed his motion in response to the motion for default judgment and motion to dismiss the case. He also does not explain why he failed to file an answer along with his request for leave to file an answer instanter in his reply to appellee's memorandum contra appellant's motion to dismiss. In this case, default judgment could have been prevented had appellant requested leave to file an answer, which he did not. With all this in mind, we cannot find that the trial court erred in finding no excusable neglect and in denying appellant's motion for relief from judgment.

{¶ 14} For the foregoing reasons, appellant's assignment of error is overruled, and the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.

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