[Cite as *McBroom v. Bob-Boyd Lincoln Mercury, Inc.*, 2013-Ohio-1679.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Gracie McBroom,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-829 (C.P.C. No. 95CVH10-6977)
Bob-Boyd Lincoln Mercury, Inc.,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	
Carroll McBroom,	:	
Plaintiff-Appellee,	:	
(Gracie McBroom,	:	No. 12AP-830 (C.P.C. No. 95CVH09-6236)
Plaintiff-Appellant),	:	(REGULAR CALENDAR)
v.	:	
Bob-Boyd Lincoln Mercury, Inc.,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on April 25, 2013

Gracie McBroom, pro se.

Stockamp & Brown, LLC, David A. Brown, *Deanna L. Stockamp*, and *John C. Camillus*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

McCORMAC, J.

{¶ 1} Plaintiff-appellant, Gracie McBroom, pro se, appeals the judgments of the Franklin County Court of Common Pleas denying her Civ.R. 60(B) motions for relief from judgment. For the following reasons, we affirm.

{¶ 2} This case began in September 1995 when appellant and her now-deceased husband, Carroll McBroom (the "McBrooms") filed a complaint against defendant-appellee, Bob-Boyd Lincoln Mercury, alleging that repairs to their vehicle had not been performed and that their vehicle was further damaged while in appellee's custody. The trial court granted appellee's motion to dismiss for failure to prosecute. The McBrooms' timely appeal of that decision was designated as *McBroom v. Bob-Boyd Lincoln Mercury, Inc.*, 10th Dist. No. 96APE10-1305 (Jan. 30, 1997).

{¶ 3} In October 1995, the McBrooms filed a complaint alleging that repairs made to their vehicle were covered under a lifetime service guarantee provided by appellee. The trial court granted appellee's motion for summary judgment on grounds that the McBrooms had not produced any evidence of the existence of a lifetime service guarantee. The McBrooms' timely appeal of that decision was designated as *McBroom v. Bob-Boyd Lincoln Mercury, Inc.*, 10th Dist. No. 96APE06-768 (Jan. 30, 1997).

{¶ 4} The cases were consolidated for appeal. In case No. 96APE10-1305, this court determined that the trial court failed to provide the requisite notice to the McBrooms before dismissing their complaint. Accordingly, we remanded the matter to the trial court with instructions to provide them proper notice of appellee's motion to dismiss for failure to prosecute. *Id.* In case No. 96APE06-768, we determined that the trial court erred in granting summary judgment for appellee. Specifically, we found that the McBrooms had attached a copy of a lifetime service guarantee to their original complaint, which they alleged pertained to their vehicle and to certain repairs made to their vehicle and that, pursuant to Civ.R. 10(C) and 56(C), such was a part of the record that should have been considered by the trial court before rendering summary judgment in favor of appellee. Accordingly, we remanded the matter to the trial court for further proceedings. *Id.*

{¶ 5} On January 12, 1998, a bench trial on the consolidated remanded cases was held before a magistrate. Appellant appeared at the trial but failed to present any

evidence. The magistrate granted appellee's motion to dismiss the action pursuant to Civ.R. 41(B)(2). Appellant did not file objections to the magistrate's decision. The trial court adopted the magistrate's decision and dismissed the complaints with prejudice. Finding no error in the trial court's dismissal of the complaints, this court affirmed. *McBroom v. Bob-Boyd Lincoln Mercury, Inc.*, 10th Dist. No. 98AP-229 (Oct. 22, 1998) (memorandum decision).

{¶ 6} Over a decade later, on January 31, 2012, appellant filed a motion for relief from judgment pursuant to Civ.R. 60(B). Although appellant's motion is difficult to decipher, it appears that she seeks relief on grounds of newly discovered evidence under Civ.R. 60(B)(2), the newly discovered evidence being the lifetime service guarantee and certain receipts associated with appellee's repairs to her vehicle. Appellant asserts that this documentation was misappropriated by appellee's then-attorney and then-service manager during a deposition in April 1997, that a magistrate granted appellant's motion for return of the documentation, and that she was subsequently informed that the documentation could not be located. Appellant appears to contend that the misappropriation of the documentation was the reason she was unable to provide it at the January 1998 bench trial, and that she now possesses the documentation and can present it as evidence at a new trial.

{¶ 7} On August 23, 2012, the trial court journalized its decision and entry denying appellant's motion for relief from judgment. The trial court found that appellant's motion was untimely, having been filed well after the one-year filing deadline under Civ.R. 60(B)(2).

{¶ 8} In a timely appeal, appellant raises a single assignment of error for our review:

> THE TRIAL COURT ERRED IN THE DECISION AND ENTRY DENYING APPELLANT'S MOTION TO RE-OPEN THE CONSOLIDATED CASES BECAUSE OF APPELLANT'S NEWLY FOUND DISCOVERED EVIDENCE.

{¶ 9} Civ.R. 60(B) provides:

> 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.

{¶ 10} Civ.R. 60(B) attempts to balance the public's interest in protecting the finality of judgments with its interest in achieving justice. *See, e.g., Knapp v. Knapp,* 24 Ohio St.3d 141, 144-45 (1986). Thus, in order to prevail upon a motion, pursuant to Civ.R. 60(B), a movant must demonstrate the following: "(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. "If any of these requirements are not met, the trial court must overrule the Civ.R. 60(B) motion." *Jones v. Gayhart,* 2d Dist. No. 21838, 2007-Ohio-3584, ¶ 9. "The decision to grant or deny a Civ.R. 60(B) motion is left to the sound discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion." *Richardson v. Richardson,* 10th Dist. No. 07AP-287, 2007-Ohio-6642, ¶ 7. "An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable." *Classic Bar & Billiards, Inc. v. Samaan,* 10th Dist. No. 08AP-210, 2008-Ohio-5759, ¶ 10, citing *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219 (1983).

{¶ 11} Upon review, we find no abuse of discretion by the trial court. In order to be granted relief under Civ.R. 60(B)(2), a moving party must demonstrate that: " '(1) the evidence was actually "newly discovered," that is, it must have been discovered subsequent to trial; (2) the movant exercised due diligence; and (3) the evidence is material, not merely impeaching or cumulative, and that a new trial would probably

produce a different result.' " *Dickson v. Ball,* 10th Dist. No. 04AP-748, 2006-Ohio-3436, ¶ 11, quoting *Cominsky v. Malner*, 11th Dist. No. 2002-L-103, 2004-Ohio-2202, ¶ 20.

{¶ 12} As noted above, appellant avers in her motion that because appellee's former attorney and service manager misappropriated her copies of the lifetime service guarantee and repair receipts, she could not present that evidence at the January 1998 trial. Appellant further avers that she now possesses that documentation and is prepared to present it as evidence at a new trial. However, appellant offers no evidence, by affidavit or otherwise, in support of her bare allegations that appellee's former counsel and service manager misappropriated the documentation. Further, appellant does not explain why it took her over a decade to locate the documentation she now claims to possess. Finally, as we noted in our 1997 opinion, appellant attached a copy of the lifetime service guarantee to the complaint she filed in October 1995. Our review of that complaint reveals that copies of the lifetime service guarantee and the repair receipts appellant claims to have been misappropriated were attached to the complaint. Under these circumstances, appellant has not demonstrated either that the evidence was actually "newly discovered" or that she exercised "due diligence" in obtaining it. Accordingly, the trial court did not abuse its discretion in denying appellant's Civ.R. 60(B)(2) motion on grounds that it was untimely filed.

{¶ 13} For the foregoing reasons, appellant's sole assignment of error is overruled, and the judgments of the Franklin County Court of Common Pleas are hereby affirmed.

Judgments affirmed.

BRYANT and CONNOR, JJ., concur.

McCORMAC, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Ohio Constitution, Article IV, Section 3(C).