

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Michael P. Domanick,	:	
Plaintiff-Appellant,	:	
v.	:	No. 14AP-865
Wolinetz Law Offices, LLC et al.,	:	(C.P.C. No. 13CVH-09-10841)
Defendants-Appellees.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on June 16, 2015

Frank A. Raso, for appellant.

John C. Stamatakos, for appellees.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Plaintiff-appellant, Michael P. Domanick, appeals from the October 27, 2014 order and decision denying his request for relief from judgment. Because we conclude the trial court did not err in denying relief from that judgment, we affirm.

{¶ 2} Domanick filed a complaint on September 30, 2013 against defendants-appellees, Barry Wolinetz and Wolinetz Law Offices, LLC ("Wolinetz"), alleging Wolinetz fraudulently billed for work that was not done and for work provided to other clients.

{¶ 3} Wolinetz filed an answer on November 4, 2013. The certificate of service on the answer stated that the answer was served on Domanick's attorney by means of the court's e-filing system. Domanick asserts that he was not served, yet on some unknown date, he contacted Wolinetz's counsel requesting that he be served at his address or by facsimile. According to Domanick, that never happened.

{¶ 4} Wolinetz filed a motion for judgment on the pleadings on November 20, 2013, indicating on the certificate of service that the motion was served by means of the court's e-filing system on that day. Again, Domanick asserted that he was never served despite being registered for electronic filing with the Franklin County Clerk of Courts.

{¶ 5} On December 11, 2013, having received no memo in opposition, the court granted the motion for judgment on the pleadings on the grounds that Domanick failed to plead the fraud claims with particularity. Notice from the clerk's office mailed to Domanick's attorney in Beachwood, Ohio was returned on December 19, 2013, as "Return to Sender, Attempted – Not Known, Unable to Forward."

{¶ 6} Eight months later, on August 26, 2014, Domanick filed a request for relief from judgment pursuant to Civ.R. 60(B)(1) for mistake, inadvertence, surprise or excusable neglect, under Civ.R. 60(B)(3) for fraud, and under Civ.R. 60(B)(5) for any other reason justifying relief from the judgment. He indicated exhibits A, B, and C were to follow under separate cover that showed the answer was never served "as evidenced by the return of the Court's electronic docket." (R. 28.) However, there is no record of any exhibits being filed with the trial court.

{¶ 7} Domanick also stated that he was never served with Wolinetz's motion for judgment on the pleadings, erroneously identifying it as a motion to dismiss. He asserted that, had he been served, he would have responded to the motion and likely prevailed. Domanick did not contend that he had not been served with the trial court's final judgment.

{¶ 8} The trial court overruled the Civ.R. 60(B) motion on October 27, 2014, without a hearing. The trial court noted that Domanick was registered with the clerk for electronic filing, and that he had offered no proof that the clerk failed to electronically e-mail him the pleadings. The trial court also noted that Domanick failed to make any specific allegations or provide any specific facts that he would have likely prevailed on the motion for judgment on the pleadings. Finally, the trial court noted that Domanick waited nine months to file his motion without explaining the reasons for the delay. The trial court further indicated that "[i]f the Plaintiff could produce proof from an affidavit from the clerk's office establishing that somehow he was not electronically served via e-mail,

then the Court would reconsider and set this matter for hearing." (Emphasis sic.) (Sept. 25, 2014 Order and Decision.)

{¶ 9} Domanick appealed from the trial court's decision assigning the following as error:

The Trial Court abused its discretion by overruling Appellant's Motion for Relief from Judgment pursuant to Civ.R. 60(B).

{¶ 10} Domanick argues on appeal that because he was never served with the motion for judgment on the pleadings, he was never given an opportunity to respond, and therefore the trial court abused its discretion in overruling his motion for relief from judgment under Civ.R. 60(B)(5). He further argues that the trial court indicated in its ruling that it was incumbent upon Domanick's counsel to prove a negative: that he was not served with the motion by the clerk of courts.

{¶ 11} Wolinetz responds that there was no abuse of discretion because Domanick failed to advance any operative facts to support his claim of non-service of the motion for judgment on the pleadings.

{¶ 12} Civ.R. 60(B) provides as follows:

(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. 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. 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. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

{¶ 13} For a party to prevail on a Civ.R. 60(B) motion, the litigant 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 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 or the motion will be denied. *Id.* at 151; *Winona Holdings, Inc. v. Duffey*, 10th Dist. No. 10AP-1006, 2011-Ohio-3163, ¶ 13.

{¶ 14} Our standard of review of a trial court's decision to grant or deny a Civ.R. 60(B) motion for relief from judgment is whether or not the trial court abused its discretion. *Flagstar Bank, FSB v. Hairston*, 10th Dist. No. 12AP-679, 2013-Ohio-1151, ¶ 6.

{¶ 15} Domanick argues that service is the key and deciding factor in the ability of a party to litigate a case. Here, there is evidence that Domanick was served by means of the trial court's e-filing system. Domanick has not brought forth any evidence, by affidavit or otherwise, to contradict the presumption that the documents that were e-filed, specifically the answer and the motion for judgment on the pleadings, were sent to the e-mail address Domanick's attorney had on file with the clerk of courts. Aside from the bare assertion that he was not served, Domanick has not advanced any operative facts to support his contention that he was not served electronically.

{¶ 16} The trial court docket does show that two notices that were mailed from the clerk's office were returned as not served: a hearing notice that was filed and mailed on October 10, 2013; and the notice of a final appealable order that was filed and mailed on December 19, 2013. However, Domanick's Civ.R. 60(B) motion makes no mention of these documents or what, if any effect they had.

{¶ 17} Domanick failed to allege any operative facts to support his claim that he was not served with the answer or the motion for judgment on the pleadings. Although he claimed that he would produce three exhibits under separate cover to support his motion, he never filed those documents. Thus, the trial court had only his bare claim for relief. This is insufficient to establish grounds for relief from judgment. The burden is on the

parties to follow the progress of their own case and to keep abreast of the progress of the case on the docket. *Griesmer v. Allstate Ins. Co.*, 8th Dist. No. 91194, 2009-Ohio-725, ¶ 20-21.

{¶ 18} Additionally, in the absence of any evidence explaining the eight-month delay, Domanick has failed to demonstrate the timeliness of the motion. *Herlihy Moving and Storage, Inc. v. Nickison*, 10th Dist. No. 09AP-831, 2010-Ohio-6525, ¶ 15, 19.

{¶ 19} Finally, the trial court indicated that it was willing to reconsider the matter if Domanick could produce an affidavit from the clerk's office showing that he was not electronically served via e-mail. This is similar to the case of *DeFini v. Broadview Hts.*, 76 Ohio App.3d 209, 214 (8th Dist.1991) in which the court held that an appellant should be afforded additional time to appeal when the appellant submitted an affidavit from a deputy clerk that, after checking the clerk's mail records, the deputy clerk determined that no mail service had been issued.

{¶ 20} We find no abuse of discretion in the trial court's denial of Domanick's motion for relief from judgment because all three prongs of the *GTE* test were not met. Accordingly, the sole assignment of error is overruled.

{¶ 21} The decision and judgment order denying the request for relief from judgment is affirmed.

Judgment affirmed.

DORRIAN and BRUNNER, JJ., concur.
