

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

NATIONAL CITY BANK,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2010-L-047
PEARL M. GRAHAM,	:	5/27/11
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 09 CV 002827.

Judgment: Affirmed.

Rosemary Taft Milby, Matthew G. Burg, and Kevin C. Susman, Weltman, Weinberg & Reis Co., L.P.A., Lakeside Place, #200, 323 West Lakeside Avenue, Cleveland, OH 44113-1099 (For Plaintiff-Appellee).

James Alexander, Jr., 2490 Lee Boulevard, Suite 115, Cleveland Heights, OH 44118-1255 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This is an accelerated-calendar appeal, taken from a final judgment of the Lake County Court of Common Pleas. Appellant, Pearl M. Graham, seeks reversal of the trial court's decision overruling her motion to vacate under Civ.R. 60(B). As the primary basis for the appeal, appellant maintains that the trial court abused its discretion in concluding that she had not stated a justifiable reason for failing to submit a response to a prior motion for summary judgment.

{¶2} In August 2009, appellee, National City Bank, filed the underlying “debt collection” proceeding against appellant. In its complaint, appellee asserted that, upon submitting an application for a VISA card account, appellant became bound by the terms of a “credit” agreement through her subsequent use of the card. The complaint also alleged that, once appellant failed to make the necessary payments, the entire balance in the account became immediately due under the agreement’s acceleration clause. Finally, appellee asserted that, since appellant did not pay the entire amount upon demand, she now was liable for the sum of \$11,192.96, plus interest.

{¶3} In response to the complaint, appellant sent a handwritten letter to the clerk of the trial court. In this correspondence, she indicated that, in replying to the previous demands for payment, she had informed appellant that some of the charges on her account were fraudulent. Appellant further indicated that appellee took no steps to act upon the supplied information and make the needed corrections to her account.

{¶4} When appellant did not submit any other type of answer to the complaint, appellee moved for a default judgment regarding the issue of liability. However, before appellant could respond to the motion, the trial court rendered a judgment denying the default request on the basis that her letter to the clerk of courts would be deemed her answer for purposes of the action.

{¶5} Once the trial court disposed of the “default” motion, appellee served appellant with requests for admissions and interrogatories. When appellant did not respond in a timely manner, appellee moved for summary judgment as to its entire claim for relief. As the ground for this new motion, appellee maintained that, by failing to provide answers to the requests for admissions and interrogatories, she had admitted

all of the factual allegations contained in its complaint.

{¶6} In response to the summary judgment motion, appellant again sent a letter to the clerk of the trial court and appellee's counsel. In this correspondence, she objected to the forty-seven interrogatories and again denied that she could be found liable for all of the outstanding debt. After conducting an oral hearing on the matter, the trial court held that the summary judgment was not warranted. As one basis for this determination, the court noted in a separate judgment that appellant had stated during the hearing that she would be able to produce evidence showing that the debt was not chargeable to her.

{¶7} Within fourteen days of the oral hearing, appellee filed a second motion for summary judgment on its entire claim. Although the second motion again referred to the fact that appellant had still not properly answered the request for admissions and interrogatories, appellee also attached new evidentiary materials to this submission. The new materials primarily consisted of various statements appellee had sent to appellant over a seven-year period concerning her account. According to appellee, the statements demonstrated that appellant had failed to make the necessary minimum payment over a substantial period.

{¶8} Appellant never filed a letter or any other type of response to the second Civ.R. 56(C) motion. Thus, approximately twenty-five days following the submission of appellee's second motion, the trial court issued a written decision in which it granted the motion and entered final judgment against appellant for the amount requested in the complaint. As the grounds for its ruling, the trial court stated that it had not relied upon the majority of appellee's evidentiary materials because appellee had not employed the

proper procedure for presenting the items. Instead, the court's ruling was based upon the following analysis: (1) appellee had been able to demonstrate that appellant was in default on the "credit card" account; and (2) appellant had failed to oppose the second motion within the time period set during the prior oral hearing.

{¶9} After appellee commenced garnishment proceedings, appellant filed a one-page Civ.R. 60(B) motion for relief from the foregoing final judgment. In the text of the motion, she simply indicated that she had not responded to the second Civ.R. 56 motion because she had been "very ill" and was still under a doctor's care. As to the merits of the sole claim against her, appellant attached a copy of the interrogatories and request for admissions which she had now completed. As part of her written answers to some of the interrogatories, she asserted that she was not responsible for a charge stating that she had transferred a separate debt of \$9,784.50 to the account.

{¶10} In its judgment entry of April 7, 2010, the trial court began its legal analysis by concluding that appellant had failed to set forth any justifiable reason for granting her relief from the "summary judgment" decision. Specifically, the trial court held that she had not shown the existence of any unusual circumstances explaining why she had not been able to timely respond to appellee's second motion. In addition, the trial court held that appellant had not set forth a meritorious defense because she still had failed to refute appellee's basic evidence that she owed the debt. In light of these two points, the court denied appellant relief under Civ.R. 60(B).

{¶11} In now appealing the 60(B) ruling, appellant has raised two assignments of error for review:

{¶12} "[1.] The trial court abused its discretion in denying appellant's motion for

relief from judgment.

{¶13} “[2.] The trial court abused its discretion when it failed to provide a hearing on appellant’s motion for relief from judgment.”

{¶14} Appellant’s first assignment relates to the actual merits of her Civ.R. 60(B) motion. In asserting that she was entitled to relief from the money judgment rendered in favor of appellee, appellant submits that the assertions in her motion were sufficient to state a viable reason for relief. First, she maintains that the fact that she had been sick sufficed to show excusable neglect in failing to respond to appellee’s second motion for summary judgment. Second, appellant argues that relief under the “catchall” provision of 60(B)(5) was warranted because the trial court’s decision to grant summary judgment was erroneous, and it would simply be unjust to allow it to remain in effect.

{¶15} Under Ohio law, it is well-settled that relief from a prior final judgment can only be granted when the moving party has shown that she is entitled to relief under one of the five possible grounds stated in Civ.R. 60(B), that she has a meritorious claim or defense, and that the motion was filed in a timely manner. See, e.g., *Fouts v. Weiss-Carson* (1991), 77 Ohio App.3d 563, 565. It is equally well-settled that the disposition of a 60(B) motion lies within the sound discretion of the trial court; accordingly, the ruling on such a motion will not be reversed on appeal unless an abuse of that discretion can be shown. *Meslat v. Amster-Kirtz Co.*, 5th Dist. Nos. 2007 CA 00189 & 2007 CA 00190, 2008-Ohio-4058, at ¶26, quoting *Griffey v. Rajan* (1987), 33 Ohio St.3d 75. 77. Under a 60(B) analysis, an abuse of discretion occurs when the trial court exhibits an attitude that is unreasonable, arbitrary or unconscionable. *Cannell v. Robert L. Bates Co.* (Mar. 8, 2001), 10th Dist. Nos. 00AP-915, 00AP-916, & 00AP-917, 2001 Ohio App. LEXIS

835, at *4.

{¶16} In attempting to satisfy the first prong of the foregoing standard, appellant essentially asserted that her recent illness constituted excusable neglect under Civ.R. 60(B)(1). However, in considering this possible justification for relief, this court has held that a party's sickness must be extremely serious before it will be deemed a legitimate reason for not going forward in a civil proceeding. In *Fouts*, 77 Ohio App.3d at 566, the defendant maintained that her failure to answer the complaint was justified because she had been emotionally distraught over a pending divorce. After noting that the defendant had taken a medical leave and was receiving psychiatric counseling, we still concluded that excusable neglect had not been established: "[W]e have no operative facts as to the severity of her mental condition or whether her condition would have rendered her *incompetent* for purposes of receiving service or comprehending her legal obligations." (Emphasis sic.) *Id.*

{¶17} In the years since the issuance of the *Fouts* opinion, other appellate courts have continued to apply a similar analysis. For example, in *Meslat*, 2008-Ohio-4058, the Fifth Appellate District held that a finding of excusable neglect could not be based upon the fact that the party was taking medication for back pain and was not permitted to drive a motor vehicle. Like the *Fouts* court, the *Meslat* court emphasized that there had been nothing before the trial court to indicate that the moving party was rendered incompetent by the pain or medication. *Id.* at ¶30. See, also, *Cannel*, 2001 Ohio App. LEXIS 835 (the fact that the moving party had suffered a serious stroke did not suffice to satisfy Civ.R. 60(B)(1)); *Columbus v. Triplett* (Nov. 16, 2000), 10th Dist. No. 00AP-339, 2000 Ohio App. LEXIS 5301 (a finding of excusable neglect could not be based

solely on the fact that the moving party had been recently diagnosed as a diabetic.).

{¶18} In the instant matter, appellant only stated in her pro se 60(B) motion that she had been “very ill” and was still being treated by a doctor. In making this statement, she never indicated the nature of her illness. More importantly, she did not give any indication that her illness had been so severe that she had become totally incapable of responding to appellee’s second summary judgment motion, or that her illness prevented her from moving the trial court for an extension of time in which to respond to appellee’s dispositive motion.

{¶19} Like the defendant in *Fouts*, appellant simply failed to state in her motion sufficient operative facts to warrant a finding of excusable neglect. Therefore, the trial court did not err in overruling her motion for relief from the “money” judgment under Civ.R. 60(B)(1).

{¶20} As was noted above, appellant also maintains before this court that she was entitled to relief under the “catchall” provision of Civ.R. 60(B)(5) on the grounds that the trial court had committed a significant legal error in granting summary judgment in favor of appellee. As to this point, our review of the trial record readily shows that she never asserted this argument at the trial level; as a result, she has waived the right to raise it for review on appeal. *Brewer v. Brewer*, 10th Dist. No. 09AP-146, 2010-Ohio-1319, at ¶24. Moreover, this court would emphasize that, even if appellant had properly preserved this argument, it still could not form the basis for any relief because a Civ.R. 60(B) motion cannot be employed as a means of contesting the merits of the underlying judgment: “[A] movant may not use the arguments lost in the underlying judgment to justify relief from that judgment.” *Streetsboro v. Encore Homes*, 11th Dist. No. 2002-P-

0018, 2003-Ohio-2109, at ¶10.

{¶21} In order to be entitled to relief under Civ.R. 60(B), the moving party must be able to satisfy all three prongs of the governing standard. *Fouts*. Hence, even though the trial court also found that appellant had failed to assert a meritorious defense in relation to the second summary judgment motion, the fact that she could not establish any of the five stated grounds for relief was a sufficient reason to warrant the denial of her 60(B) request. That is, since appellant did not refer to sufficient operative facts to warrant a finding of excusable neglect, the trial court did not abuse its discretion in overruling her motion. Accordingly, the first assignment in this appeal lacks merit.

{¶22} Under her second assignment, appellant submits that the trial court erred in disposing of her Civ.R. 60(B) motion without first conducting an oral hearing on the matter. However, when the moving party fails to initially allege sufficient operative facts to justify relief under the rule, a trial court is not obligated to hold a hearing before ruling upon the motion. *Fouts*, 77 Ohio App.3d at 567. Thus, in light of our ultimate holding under the first assignment, it follows that the trial court in the present matter did not abuse its discretion in going forward without any form of hearing.

{¶23} As neither assignment in this appeal has merit, it is the order of this court that the judgment of the trial court is affirmed.

DIANE V. GRENDALL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.