

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

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| TOMI WESTOVER, | : | O P I N I O N |
| Plaintiff-Appellee, | : | |
| - VS - | : | CASE NO. 2012-T-0019 |
| DOMINIC HUMPHRIES, | : | |
| Defendant-Appellant. | : | |

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2010 CV 01844.

Judgment: Affirmed.

Scott C. Essad, 721 Boardman-Poland Road, Suite 201, Youngstown, OH 44512 (For Plaintiff-Appellee).

James S. Gentile, The Liberty Building, 42 North Phelps Street, Youngstown, OH 44503-1635 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Dominic Humphries appeals from a judgment of the Trumbull County Court of Common Pleas, which denied his Civ.R. 60(B) motion for relief from judgment against him in a forcible entry and detainer action filed by Tomi Westover. For the following reasons, we affirm the trial court's judgment.

Substantive Facts and Procedural History

{¶2} Mr. Humphries and Ms. Westover had been in a long-term relationship and have a child together. They resided together at a house in Newton Falls owned by Ms. Westover's family. When their relationship turned sour in 2007, Ms. Westover began collecting rent from Mr. Humphries in 2008 and 2009, and, when Mr. Humphries stopped paying rent in 2010, she sought to evict him. After serving the statutory three-day notice, she filed a forcible entry and detainer action in the Newton Falls Municipal Court, seeking a writ of restitution and back rent.

{¶3} Mr. Humphries, through counsel, filed an answer and counterclaim, alleging that he had performed valuable home services over the years and paid substantial home expenses for the residence. He also alleged Ms. Westover had agreed to allow him to reside at the residence for life in exchange for his services and the expenses he paid. Because the counterclaim was in excess of the municipal court's monetary limit, the case was transferred to the common pleas court.

{¶4} Ms. Westover moved for summary judgment. She alleged that Mr. Humphries had been paid for the work he performed on the residence and she herself had paid other contractors for home repair work. Attached to her motion was her affidavit and copies of 46 checks written to Mr. Humphries and various contractors. The trial court denied her motion for summary judgment.

{¶5} During the course of the litigation, Mr. Humphries changed counsel several times. In February, 2011, his original attorney moved the court for leave to withdraw as counsel. The court held a hearing on April 1, 2011, at which Mr. Humphries failed to appear, and the attorney was allowed to withdraw.

{¶6} New counsel entered an appearance, and, on June 14, 2011, the court issued a judgment entry indicating a status conference was held and a final pretrial and a jury trial were scheduled for October 20, 2011 and October 26, 2011, respectively. Mr. Humphries' attorney apparently attended the conference. A docket entry dated June 20, 2011 reflects that a notice regarding the dates of the final pretrial and the jury trial was sent, but it is unclear whether the notice was sent to both the attorney and Mr. Humphries.

{¶7} Attorney number two's representation of Mr. Humphries was short-lived, however. He moved to withdraw in July 2011, citing "a breakdown of communication between attorney and client." On August 3, 2011, the court set a hearing on the motion to withdraw for August 17, 2011, ordering Mr. Humphries to appear with old and new counsel. The notice of the hearing date was sent to Mr. Humphries. In a judgment entry dated August 17, 2011, the court indicated that Mr. Humphries failed to appear at the hearing and it granted Attorney number two's motion to withdraw. In that judgment entry, the court reiterated the final pretrial and jury trial dates. That judgment entry was sent to both Mr. Humphries and Attorney number two.

{¶8} Mr. Humphries failed to appear for trial, in person or through counsel. The court issued a judgment entry stating that the defendant failed to appear and a default judgment on Ms. Westover's forcible entry action was granted. In a separate judgment entry addressing the second cause of action for rent, the court stated that "[a]fter hearing evidence on the matter," it found Mr. Humphries owes Ms. Westover \$800 per month from May 2010 to the present, for a total of \$13,600, plus interest. In a third judgment entry, the court granted judgment in Ms. Westover's favor upon Mr.

Humphries' counterclaim, because of Mr. Humphries' failure to prosecute. All three judgments were sent to Mr. Humphries, and he did not appeal from these judgments.

{¶9} On January 26, 2012, Mr. Humphries, through newly retained counsel, filed a Civ.60(B) motion for relief from judgment, claiming he was not informed of the October 20, 2011 final pretrial or the October 26, 2011 trial date. He attached his own affidavit, which stated that he did not appear on the trial date "due to excusable neglect in the [sic] he was not properly notified of the final pretrial date of October 20, 2011, and trial date and [sic] October 26, 2011."

{¶10} On February 8, 2012, the trial court denied the motion without a hearing. Mr. Humphries timely appealed from that judgment. His sole assignment of error states:

{¶11} "The court erred and abused its discretion in rendering judgment for plaintiff by default and granting default against defendant on his counterclaim for an alleged failure on the part of the defendant to appear for trial."

{¶12} A review of Mr. Humphries's notice of appeal shows that the appeal is taken from the trial court's denial of his Civ.R.60(B) motion. In his notice of appeal, he stated: "Court overruled Appellant's Motion to Vacate Judgment, even though he was not notified of the trial date. The Court acted without hearing." However, no error is assigned and no argument presented in his appellant's brief relating to the 60(B) motion. In his sole assignment of error, Mr. Humphries asks us, instead, to review the issue of whether the trial court should have entered default judgment against him based on his failure to appear at the trial.

{¶13} Because Mr. Humphries does not assign any error on appeal regarding the trial court's denial of his Civ.R.60(B) motion, he waives the claim, and we need not

address it. We note, however, even if he had challenged the trial court's denial of that motion, his claim would be without merit.

{¶14} “To prevail on a motion brought under Civ.R. 60(B), the movant 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 as entered or taken.” *GTE Automatic Electric v. ARC Industries*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. Failure to satisfy any one of the three prongs of the *GTE* decision is fatal to a motion for relief from judgment. *Rose Chevrolet Inc. v. Adams*, 36 Ohio St.3d 17, 20 (1988).

{¶15} Furthermore, a party is not automatically entitled a hearing on a Civ.R. 60(B) motion. This court has stated that “[i]f the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under Civ.R. 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion.” *Natl City Bank v. Rini*, 162 Ohio App.3d 662, 2005-Ohio-4041, ¶21 (11th Dist.), citing *Adomeit v. Baltimore*, 39 Ohio App.2d 97 (1974), paragraph two of the syllabus. We review a trial court's decision on a Civ.R.60(B) motion for abuse of discretion. *Rose Chevrolet* at 20.

{¶16} Mr. Humphries fails to demonstrate that he has a meritorious defense or claim to present if relief is granted, or that he is entitled to relief due to excusable neglect, as required under *GTE*. The record clearly reflects he was sent notice of the August 17, 2011 judgment entry, which notified him of the court's permission of his

counsel's withdrawal and the dates for the final pretrial and jury trial. We recognize he was without counsel after August 17, 2011; however, “[w]hile one has the right to represent himself or herself and one may proceed into litigation as a pro se litigant, the pro se litigant is to be treated the same as one trained in the law as far as the requirement to follow procedural law and the adherence to court rules. If the courts treat pro se litigants differently, the court begins to depart from its duty of impartiality and prejudices the handling of the case as it relates to other litigants represented by counsel.” *Justice v. Lutheran Soc. Servs.*, 10th Dist. No. 92AP-1153, 1993 Ohio App. LEXIS 2029, *6 (Apr. 8, 1993). Mr. Humphries was sent notice by the court regarding his trial date; furthermore, even if he had not received the notice, “an entry of the date of trial on the court's docket constitutes reasonable, constructive notice of that fact.” *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.*, 28 Ohio St.3d 118 (1986). Therefore, his failure to appear does not constitute excusable neglect.

{¶17} Moreover, Mr. Humphries fails to demonstrate that he has a meritorious defense or claim to present if relief is granted, as required by *GTE*. Therefore, we conclude the trial court did not abuse its discretion in denying his motion without a hearing, even if he had properly challenged the court's judgment on appeal.

{¶18} The real underlying issue in this case is whether the trial court properly issued a default judgment when the defendant, having answered, failed to appear at trial. The Supreme Court of Ohio has determined that when a defendant, after answering the complaint, fails to appear at trial, no default within the meaning of Civ.R. 55(A) occurs, and the plaintiff still must prove his or her case, even in the absence of the opposing party. *Ohio Valley Radiology Assoc., supra*.

{¶19} “The proper action for a court to take when a defending party who has pleaded fails to show for trial is to require the party seeking relief to proceed ex parte in the opponent’s absence.” *Id.* at 122. See also *Dept. of Pub. Utils. v. Beaucage*, 6th Dist. No. L-11-1158, 2012-Ohio-3108, ¶11. Thus, while one might argue that the trial court erred in granting default judgment under the circumstances of this case, and indeed, Mr. Humphries raises the issue in his assignment of error, Mr. Humphries did not appeal from the underlying default judgment. It appears that he is now attempting to remedy his failure to file a timely direct appeal by using his appeal from 60(B) motion to challenge the underlying judgment. It is well established that a Civ. R. 60(B) motion may not be used as a substitute for a timely appeal. *Steadley v. Montanya*, 67 Ohio St.2d 297, 299 (1981). After failing to timely appeal the trial court’s default judgment, Mr. Humphries cannot come through the back door to pursue an appeal from it. The assignment of error is overruled.

{¶20} The judgment of the Trumbull County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.