[Cite as *Feher v. Artz*, 2015-Ohio-547.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CHAMPAIGN COUNTY

EUGEN FEHER	:	
	:	Appellate Case No. 2014-CA-24
Plaintiff-Appellant	:	
	:	Trial Court Case No. 14-CVG-239
v.	:	
	:	
ROBERT ARTZ	:	(Civil Appeal from Champaign
	:	County Municipal Court)
Defendant-Appellee	:	
	:	

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O P I N I O N

Rendered on the 13th day of February, 2015.

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FAIN, J.

{¶ 1} Plaintiff-appellant Eugen Feher appeals from an order of the Champaign County Municipal Court granting defendant-appellee Robert Artz's motion for relief from judgment pursuant to Civ. R. 60(B). Feher contends that the court erred by granting the 60(B) motion without a finding of excusable neglect and without Artz having presented a meritorious defense. We conclude that there is sufficient evidence in the record to support a finding that Artz presented the existence of a meritorious defense by his answer to the complaint, and that there was a sufficient indication in the record to justify the trial court in finding that Artz's counsel did not receive notice of the damages hearing, as a result of which Artz's failure to appear at the damages hearing was excusable neglect. Therefore, the trial court did not abuse its discretion in granting relief, and its order granting relief from judgment under Civ.R. 60(B), from which this appeal is taken, is Affirmed.

I. The Course of Proceedings

{¶ 2} A forcible entry and detainer action was commenced by Feher, pro se, on April 3, 2014. The court set the first cause of action for restitution of the premises for hearing on April 16, 2014. On the day of the hearing, a judgment entry was filed finding that Artz was served with a three day notice to vacate the premises, and that Feher was entitled to judgment as a matter of law. The entry also stated that Artz must vacate the premises on or before April 18, 2014. On April 22, 2014, Artz, through counsel, filed an answer and denied owing any damages. On the same day, Artz also filed a motion asking for additional time in which to vacate the premises. On the same day, the court filed an entry denying the request for an extension of time to vacate the premises.

{¶ 3} In a separate entry, on the same day, April 22, 2014, the court filed an entry granting Feher's request to continue the damages hearing to May 16, 2014. Attached to the continuance entry are two "certificates of mailing" from the United States Postal Service, verifying that the continuance entry was mailed, by regular mail to Feher and Artz, individually. Although the name of the defense attorney is hand-written on the continuance entry, there is no certificate of mailing to verify that he was sent a copy. The damages hearing was conducted on May 16, 2014; neither Artz nor his attorney appeared. On the day of the hearing, a judgment entry was filed rendering judgment in favor of Feher in the amount of $3,900, representing one month's rent and $3,400 for damage to the premises. Four days later, on May 20, 2014, Artz filed a motion to set aside the judgment, in which he alleged that his attorney did not appear for the hearing because his attorney never received any written notice of the hearing date, and that no one from the court called, or left a message, about the hearing.

{¶ 4} A hearing on the motion to set aside the judgment was scheduled for June 18, 2014, at which all parties appeared with counsel. The trial court did not consider the hearing on the motion to be an evidentiary hearing; the court listened to arguments of counsel and no testimony was taken. By entry dated June 26, 2014, the trial court granted Artz's motion to set aside the judgment. From the order setting aside the judgment, Feher appeals.

II. There is Evidence in the Record to Support a Finding that Defendant has Raised a Meritorious Defense.

{¶ 5} Feher's First Assignment of Error is as follows:

THE TRIAL COURT ABUSED ITS DISCRETION IN SETTING ASIDE

PLAINTIFF'S JUDGMENT WHEN THERE WAS NO EVIDENCE OF A MERITORIOUS DEFENSE IF RELIEF IS GRANTED.

{¶ 6} To prevail on a motion brought pursuant to 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." *GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, 47 Ohio St. 2d 146, 351 N.E. 2d 113 (1976), paragraph two of the syllabus. We use an abuse of discretion standard to review a court's decision granting a motion to set aside a judgment. *Render v. Belle*, 8th Dist. Cuyahoga No. 93181, 2010-Ohio-2344, ¶ 8, citing *Associated Estates Corp. v. Fellows*, 11 Ohio App.3d 112, 463 N.E.2d 417 (8th Dist. 1983); *Doddridge v. Fitzpatrick*, 53 Ohio St.2d 9, 371 N.E.2d 214 *(*1978). An abuse of discretion connotes an attitude by the court that is arbitrary, unconscionable, or unreasonable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983). It has been held that a trial court's failure to conduct an evidentiary hearing when granting a 60(B) motion is not an abuse of discretion if the motion is timely, the defendant has raised a meritorious defense, and the record reveals grounds for excusable neglect. *Doddridge* at 13.

{¶ 7} In the case before us, there is no question that the motion was timely. It was filed just four days after the judgment entry was filed.

{¶ 8} The record supports a finding that Artz presented a meritorious defense when he filed a timely answer. The record reflects that the written answer was filed three weeks prior to the hearing on damages. Although not artfully drawn, the answer denies owing any monetary

damages to the plaintiff, from which the court can infer a defense of "payment" and compliance with the contractual agreement. Payment is included in Civ. R. 8(C) as a valid affirmative defense. Civ. R. 8(E) provides that no technical form of pleading is required and averments shall be simple, concise and complete. Accordingly, the trial court did not abuse its discretion by finding that Artz's answer sufficiently presented a defense to the second count of the forcible entry and detainer action.

{¶ 9} Since the record supports a finding that a meritorious defense was presented, Feher's First Assignment of Error is overruled.

III. **There is Evidence in the Record to Support a Finding of Excusable Neglect**

{¶ 10} Feher's Second Assignment of Error is as follows:

> THE TRIAL COURT ABUSED ITS DISCRETION IN SETTING ASIDE PLAINTIFF'S JUDGMENT WHEN THERE WAS NO EVIDENCE OF EXCUSABLE NEGLECT.

{¶ 11} The record reveals that the entry continuing the date of the damages hearing was sent by regular mail to both parties, as evidenced by a USPS certificate of mailing to each individual. However, there is no certificate of mailing to defense counsel, even though he had made an appearance prior to the date of the continuance entry. At the motion hearing, the court listened to arguments of counsel, and accepted the representation made by defense counsel that he had not received notification of the date of the damages hearing.

{¶ 12} As a general rule, the neglect of a party's attorney will be imputed to the party for the purposes of Civ. R. 60(B)(1). *GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, 47

Ohio St. 2d 146, 351 N.E. 2d 113 (1976). However, counsel's "neglect" in failing to attend a hearing for which he did not have notice, if "neglect" at all, could, at a minimum, constitute "excusable neglect" under the facts and circumstances here. For example, a court does not abuse its discretion in concluding that an attorney's failure to timely respond to a court order constitutes "excusable neglect" if the record fails to indicate that proper notice of proceedings was received by counsel. *See Miller v. Miller-Dobbs, Inc.*, 10th Dist. Franklin No. 80AP-785, 1981 WL 3036 (Mar. 5, 1981). Furthermore, when balancing the interests of the parties in resetting the damages hearing, the prejudice to Artz outweighs any prejudice to Feher, since Artz lost the opportunity to present evidence at the hearing. Any doubt should be resolved in favor of granting a motion to set aside a judgment, so that the case will be decided on its merits. *GTE Automatic Electric* at 151. *See also Wilson v. Lee*, 172 Ohio App. 3d 791, 2007-Ohio-4542, 876 N.E.2d 1312, ¶ 15 (2d Dist). We have also found that Civ. R. 60(B) is a remedial rule that should be liberally construed "so that the ends of justice may be served." *Id.*, quoting *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996).

{¶ 13} There is no support in the record to conclude that Feher will be prejudiced in his ability to present his evidence again at a new damage hearing. However, prejudice to Artz is apparent from the lack of any opportunity to respond to the evidence of damages to the premises. Both the complaint and the writ of restitution stated that Feher was seeking a judgment in the amount of $1,500, based on unpaid rent, and no specific amount for damage to the premises was alleged. Even if Artz had appeared for the hearing, it would have been a surprise to learn that Feher was seeking an additional $3,400 for damage to the premises. In accordance with R.C. 1923.081, Artz should have been given the opportunity to seek discovery on the additional

claims.

{¶ 14} The trial court did not abuse its discretion in vacating its prior judgment under circumstances that created doubt whether defense counsel was served with notice of the hearing, exacerbated by the fact that claims not identified in the complaint were presented at the damages hearing. Accordingly, Feher's Second Assignment of Error is overruled.

IV. Conclusion

{¶ 15} Both assignments of error having been overruled, the order of the trial court from which this appeal is taken is Affirmed.

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DONOVAN, J., and HALL, J., concur.

Copies mailed to:

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