[Cite as *Mullens v. Adkins*, 2015-Ohio-3424.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

JERRY L. MULLENS, et al. ,

:

Plaintiffs-Appellees, Case No. 14CA26

:

vs.

:

DAVID A. ADKINS, et al., DECISION AND JUDGMENT ENTRY :

Defendants-Appellants.

APPEARANCES:

Brian K. Duncan and Bryan D. Thomas, Duncan Law Group L.L.C., Columbus, Ohio[1], for appellants.

Richard F. Bentley, Wolfe & Bentley, L.L.P., Ironton, Ohio, for appellees.

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALZIED: 8-11-15
ABELE, J.

{¶ 1} This is an appeal from a Lawrence County Common Pleas Court judgment that adopted a Magistrate's decision that recommended the denial of a Civ.R. 60(B) motion for relief from judgment filed by David A. Adkins and Connie R. Adkins, defendants below and appellants herein. Appellants assign the following errors for review:

FIRST ASSIGNMENT OF ERROR:

[1] Different counsel represented appellants during the trial court proceedings.

> "THE TRIAL COURT, IN ITS JULY 11, 2014 JUDGMENT ENTRY, ABUSED ITS DISCRETION BY ADOPTING THE MAY 8, 2014, MAGISTRATE'S DECISION WHICH UPHELD THE NOVEMBER 22, 2013 JUDGMENT ENTRY, AS THE TRIAL COURT NEVER CONTEMPLATED THAT APPELLANTS' REAL PROPERTY RIGHTS WOULD BE FORFEITED IN ITS JUNE 6, 2013 JUDGMENT ENTRY; AS SUCH, THE JULY 11, 2014, JUDGMENT ENTRY EFFECTIVELY DENIED APPELLANTS THEIR RIGHT TO DUE PROCESS."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "WHETHER, ASSUMING ARGUENDO THAT THIS COURT DETERMINES THAT APPELLANTS WERE NOT DEPRIVED OF THEIR DUE PROCESS RIGHTS, APPELLANTS RESPECTFULLY ASSERT THAT THE UNDERLYING JUDGMENT ENTRIES CONTRADICT THE TRIAL COURT'S POLICY AND 'LONGSTANDING PRACTICE' WITH RESPECT TO ADJUDICATING MATTERS ON THEIR MERITS AS OPPOSED TO TO PROCEDURAL DEFECTS."

{¶ 2} We provide a very brief recitation of the facts that underlie the claims in this action because the questions before us are procedural. On November 21, 2007, Jerry L. Mullens and Rita A. Mullens, plaintiffs below and appellees herein, filed the instant action and sought to quiet title against appellants who allegedly encroached upon their real estate. To the best we can determine, appellants did not file a responsive pleading.

{¶ 3} In May 2008, appellants, through counsel, filed a notice of bankruptcy, thereby taking the case off the trial court's active docket. Several months later, the automatic stay in bankruptcy court was lifted and, on November 8, 2010, the trial court ordered the matter reinstated to its active docket.

{¶ 4} On December 27, 2010, appellees filed a motion for summary judgment and argued that they are entitled to judgment as a matter of law. Again, appellants filed nothing in

opposition to appellees' motion.[2]

{¶ 5} The matter came on for a bench trial before the magistrate on May 10, 2012. The magistrate later found for the appellees as to the real estate, but set for future disposition the question of what to do with a house located on that property.

{¶ 6} After a subsequent hearing, the magistrate issued a report that awarded the house to appellants, as well as an easement for ingress and egress.[3] The court also ordered the parties to conduct an appraisal of the real estate and ordered appellants to have a survey prepared so that the appellees could prepare a quit-claim deed to transfer the house and the easement to the appellants.

{¶ 7} The parties filed no objections to the decision and, on October 10, 2012, the trial court adopted the decision and included the recommendations as its own orders. Further, at the conclusion of the entry, the Court noted that appellants are entitled to the materials "that form the barn and the garage." The court gave the appellants ninety days to remove those materials, or they would be deemed forfeited to the appellees. The entry further noted that this is a final appealable order. No appeal was taken from that judgment.

{¶ 8} After appellants failed to pay their share of the appraisal and failed to remove the

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[2] It does not appear that the trial court ruled on the motion. On November 29, 2011, counsel for appellees requested the matter be set for trial.

[3] There is no transcript from these proceeding in the record. However, from the magistrate's decisions we glean that the house is on appellees' property, but that they did not initially think it belonged to them. When appellants bought contiguous property at a sheriff's sale, they believed the house belonged to them. The magistrate invoked equity to award the house to appellants, while quieting title for appellees to the remainder of the disputed land.

materials, the appellees filed a motion that sought, inter alia, to have the materials forfeited to them. Appellants did not respond and the magistrate ultimately granted the appellees' request. The court also ordered appellants to pay their share of the appraisal costs to appellees. No objections were filed, and the trial court entered judgment on June 6, 2013. The court adopted the decision, ordered the materials forfeited to appellees, and denoted the entry as a final appealable order. Still, no appeal was taken.

{¶ 9} Subsequently, appellees filed a motion to hold appellants in contempt for failing to comply with the previous order. Again, appellees did not respond. The magistrate then issued a decision on November 5, 2013 and found that appellants should be deemed to have forfeited their claim to the house. No objections were filed and, on November 22, 2013, the trial court adopted the decision and entered its own order that forfeited appellants their right to the house, but further ordered appellees to pay appellants the fair market value of the house after the deduction for costs and attorney fees. The trial court also denoted this entry as a final appealable order. Again, no appeal was taken.

{¶ 10} On January 22, 2014, appellants filed a Civ.R. 60(B)(1)&(5) motion for relief from that judgment. Later, appellees filed their memorandum contra. The magistrate recommended that the motion be denied. This time, the appellants objected to the decision, but trial court overruled those objections. The trial court entered final judgment for the appellees on July 11, 2014. This appealed followed.

I

{¶ 11} Appellants' first assignment of error appears to make the compound argument that (1) the trial court erred by denying their Civ.R. 60(B) motion, and (2) throughout the entire

proceeding they have been deprived of their Constitutional Due Process rights.

{¶ 12} A Civ.R. 60(B) motion is committed to a trial court's sound discretion, and its ruling should not be disturbed absent an abuse of that discretion. *State ex rel. Russo v. Deters*, 80 Ohio St.3d 152, 153, 684 N.E.2d 1237 (1997); *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987); *Moore v. Emmanuel Family Training Ctr.*, 18 Ohio St.3d 64, 66, 479 N.E.2d 879 (1985). Generally, an abuse of discretion implies that a trial court's attitude was unreasonable, arbitrary or unconscionable. *Landis v. Grange Mut. Ins. Co.*, 82 Ohio St.3d 339, 342, 695 N.E.2d 1140 (1998); *Malone v. Courtyard by Marriott L.P.*, 74 Ohio St.3d 440, 448, 659 N.E.2d 1242 (1996). In applying the abuse of discretion standard, appellate courts must not substitute their judgment for that of the trial court. *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 732, 654 N.E.2d 1254 (1995); *In re Jane Doe 1*, 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181 (1991).

{¶ 13} To prevail on a Civ.R. 60(B) motion, a movant must demonstrate: (1) a meritorious defense or claim to present if relief is granted; (2) entitlement 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, 351 N.E.2d 113 (1976), paragraph two of the syllabus; also see *Griffey v. Rajan*, 33 Ohio St.3d 75, 76, 514 N.E.2d 1122, at fn. 1 (1987). In the case sub judice, appellants may have satisfied the last requirement, but failed to meet the first two.

{¶ 14} In the case sub judice, the appellants' motion argues that they “have both meritorious claims and defenses to the underlying matter, which were set forth in great detail

throughout the pendency of this matter and at trial." However, neither the docket of journal entries nor the original papers show that appellant answered the complaint or filed a memorandum contra to appellees' motion for summary judgment. As for the trial, we find no copy of the transcript of that proceeding as part of the record on appeal. See App.R. 9.

{¶ 15} Furthermore, appellants had the burden to establish a legitimate defense if their Civ.R. 60(B) is to be granted. Appellants' motion asserted that they are entitled to Civ.R. 60(B)(1) relief as their "failure to respond was a result of mistake, inadvertence, surprise or excusable neglect." However, appellants both testified at the April 23, 2014 hearing that they did not receive any of the materials sent to them by counsel or the Lawrence County Clerk of Courts. Thus, Civ.R. 60(B)(1) does not appear to apply in this context.

{¶ 16} Appellant's also claimed that they were entitled to relief under Civ.R. 60(B)(5), which permits a court to vacate the judgment for any other reason justifying relief. At this point, we will assume, for the sake of argument, that a failure to receive notice and materials from the opposing counsel or the clerk of courts is sufficient reason to justify relief under Civ.R. 60(B)(5), provided such failure can be demonstrated. When a Civ.R. 60(B) motion hearing is held and witness testimony is given, the trial court assumes the role of trier of fact and may assess the weight and credibility of that testimony. See *In re Dankworth Trust*, 7th Dist. Belmont No. 14BE9, 2014-Ohio-5825, at ¶¶46-47; *Good Knight Properties, L.L.C. v. Adam*, 6th Dist. Lucas No. L–13–1231, 2014-Ohio-4109, at ¶¶16-17. Here, even before they testified at the April 2014 hearing, appellants had damaged their credibility. Affidavits they filed in support of their Civ.R. 60(B) motion stated that they were unaware of any proceedings in the trial court after the automatic stay in bankruptcy court had been lifted. We point out that the stay was lifted in

December 2009, and the matter returned to the trial court's active docket by entry dated November 8, 2010. In 2012, appellants and their counsel at that time were present at trial.

{¶ 17} Thus, the attestations in the appellants' affidavits should be viewed with caution. Moreover, during the April 23, 2014 hearing, Appellant David Adkins, during cross-examination, disrespectfully referred to opposing counsel as "bub," and also answered affirmatively when counsel (clearly exasperated by this point) asked if all of the things mailed to him by the clerk of courts had "just mysteriously disappeared." The trial court apparently determined that appellants' excuses were not credible, and we will not second-guess that determination.

{¶ 18} Appellants further testified at the hearing that following the trial, their previous counsel terminated his relationship with them. In *Plant v. Plant*, 5th Dist. Fairfield No. 02CA01, 2002-Ohio-3684, the appellant's attorney terminated her representation of the husband when she could not reach him. A divorce decree was entered against the husband which he sought to vacate pursuant to Civ.R. 60(B)(5) and claimed that he did not receive any notice of the proceedings. The trial court denied his motion, and that denial was affirmed on appeal with the following observation:

> "The record is devoid of any evidence establishing husband did not receive the notice of hearing, the entry allowing his attorney to withdraw, or the April 20, 2000 Decree of Divorce other than husband's allegation in his affidavit. As was the case with the notice of hearing, the record fails to reveal a failure of service of the divorce decree. Husband had an affirmative duty to advise his trial counsel, and/or the trial court, of any change of address or otherwise be available for contact by his trial counsel. Husband's failure to do so precludes him from justifying relief for alleged lack of notice as a matter of law. To allow husband a second bite of the apple because he failed to keep in contact with his counsel and/or the court, would serve to encourage parties to play hide and seek and delay court proceedings." (Citations omitted.) (Emphasis added.)

{¶ 19} After their counsel "terminated" them in 2012, appellants had an obligation to either retain new counsel or to themselves stay in contact with the trial court. As in *Plant*, nothing in the record in the case at bar, (other than their own testimony and affidavits) proves that they did not receive the many notices. Indeed, the evidence of unclaimed certified mails suggests they simply did not sign or retrieve notices from post office that were sent to them. Appellants also could have traveled to the courthouse to determine the status of these proceedings. Thus, appellants failed to show that they have a meritorious defense even if they were entitled to relief under Civ.R. 60(B)(5).

{¶ 20} As for appellants' claim that they were denied Due Process, it is well settled that federal and state constitutional due process requirements are met if a party is provided with (1) notice, and (2) the opportunity to be heard. See *Century Natl. Bank v. Hines*, 4th Dist. Athens No. 13CA35, 2014-Ohio-3901, at ¶26; *Fifth Third Mtge., Co. v. Rankin*, 4th Dist. No. 11CA8, 2012–Ohio–2806, at ¶14; *Columbia Gas Transm., L.L.C. v. Ogle*, 4th Dist. Hocking App. No. 10CA11, 2012–Ohio–1483, at ¶12. After our review of this matter, we believe that the trial court provided the appellants with the required notice and the opportunity to be heard.

{¶ 21} In its July 11, 2014 judgment, the trial court noted that insofar as the contempt citation is concerned, "the docket sheet indicates [appellants] were served on September 25, 2013 by leaving a copy of the summons at the Defendants' residence." We further point out the bankruptcy attorney for appellant, David A. Adkins, filed an appearance during the proceedings to alert the court that his client filed for bankruptcy. A different attorney represented them at trial. Obviously, appellants had notice and an opportunity to respond, but for some reason

simply chose not to do so.

{¶ 22} For all these reasons, we conclude that appellants' first assignment of error is without merit and is hereby overruled.

II

{¶ 23} In their second assignment of error, appellants argue that if the judgments are allowed to stand, it would violate "the trial court's policy and 'longstanding practice' with respect to adjudicating matters on their merits as opposed to procedural defects." (Emphasis added.)

{¶ 24} At the outset, we note that if appellants are referring to a policy and "longstanding practice" of the Lawrence County Court of Common Pleas, it is the business of that Court to set its own policies and practices, rather than this Court. If, however, appellants refer to the policies and practices of this Court, or to the public policy of the State of Ohio, we agree that the cases should be decided on their merits when possible, rather than on procedural technicalities. See e.g. *Dolan v. Glouster*, 4th Dist. Athens Nos. 11CA18, 12CA1, 11CA19, 12CA6 & 11CA33, 2014-Ohio-2017, at ¶57. However, to say that this appeal is the result of mere procedural technicalities is not entirely accurate.

{¶ 25} This case was commenced seven years ago. Despite having had counsel at different points during these proceedings, no responsive pleading was filed to the complaint, and no opposition was filed to appellees' motion for summary judgment. Certified mail sent to the appellants was returned unclaimed, and they did not respond to mailings sent by opposing counsel or the Lawrence County Clerk of Courts. Although appellants claim that they did not receive any materials, nothing in the record supports such a claim, other than their affidavits

(which are demonstrably false simply on the basis of the chronology of this case) and their trial testimony.

{¶ 26} Consequently, we believe that the judgments in the case sub judice are not the result of procedural technicalities, but rather the result of appellants' disregard of these proceedings. No indication existed that appellants intended to comply with any of the trial court's orders, and to bring finality to these proceedings the court had to take the action that it did. As in *Plant*, supra, appellants should not be allowed a second bite at the apple after they ignored the judicial system for several years.

{¶ 27} For all these reasons, we find no merit to appellants' second assignment of error and it is hereby overruled. Having considered all of the errors appellants assigned and argued in their brief, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellees recover of appellants costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, P.J. & Harsha, J.: Concur in Judgment & Opinion
For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.