

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOHN SANDIFER, ET AL.,

Plaintiffs - Appellees

-VS-

RAY YODER, ET AL.,

Defendant - Appellant

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JUDGES:

Hon. John W. Wise, P.J.

Hon. Patricia A. Delaney, J.

Hon. Craig R. Baldwin, J.

Case No. 2015 AP 02 0008

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Tuscarawas County
Court of Common Pleas, Case No.
2013CV110802

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

October 9, 2015

APPEARANCES:

For Plaintiffs-Appellees

TARA WRIGHT-TIMBERLAKE
122 South Wooster Avenue
Strasburg, Ohio 44680

For Defendants-Appellants

ROBERT E. SOLES, JR.
KARA DODSON
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Washington Square Office Park
6545 Market Avenue North
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Baldwin, J.

{¶1} Defendant-appellant Ray Yoder appeals from the January 28, 2015 Judgment Entry of the Tuscarawas County Court of Common Pleas denying his Motion to Vacate Default Judgment.

STATEMENT OF THE FACTS AND CASE

{¶2} On November 1, 2013, appellees John and Susan Sandifer filed a complaint for breach of contract and unjust enrichment against appellant Ray Yoder and Custom Buildings, Ltd. c/o Statutory Agent Ray Yoder. Appellees, in their complaint, alleged that they had entered into a contract with appellant Ray Yoder, individually and on behalf of Custom Buildings, Ltd., and that the contract had been breached. The docket indicates that appellant was served with a copy of the summons and complaint via certified mail on November 6, 2013 at his residence.

{¶3} Appellees filed a Motion for Default Judgment against appellant and Custom Buildings, Ltd. on May 9, 2014 and an Amended Motion for Default Judgment on May 21, 2014. A copy of both motions was mailed to appellant at his residence via regular mail. Pursuant to a Judgment Entry filed on July 7, 2014, the motion was granted and the trial court granted appellees judgment against appellant and Custom Buildings in the amount of \$26,275.00 plus interest. A copy of the Judgment Entry was sent by regular mail to all parties.

{¶4} On August 6, 2014, a Certificate of Judgment Lien was filed and on August 28, 2014, a Motion for Debtor's Exam was filed. As memorialized by an Order filed on September 3, 2014, appellant was ordered to appear before the court on September 29, 2014 for a Debtor's Examination. A copy of the Order was served on appellant via certified mail on September 5, 2014.

{¶5} After appellant did not appear on September 29, 2014, appellees, on November 3, 2014, filed a motion asking that appellant be found in contempt. An Order to Appear and Show Cause was filed on November 3, 2014. The Order required appellant to appear on November 17, 2014 and show cause why he should not be punished for his failure to comply with the former court order. Appellant was personally served with the order to appear on November 10, 2014.

{¶6} Appellant, on November 12, 2014, filed a Motion to Vacate Default Judgment. Appellees filed a response and appellant filed a reply. The trial court, pursuant to a Judgment Entry filed on January 28, 2015, denied appellant's motion.

{¶7} Appellant now raises the following assignments of error on appeal:

{¶8} I. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED BY DENYING APPELLANT'S MOTION TO VACATE WHEN APPELLANT DEMONSTRATED EXCUSABLE NEGLIGENCE IN NOT FILING AN ANSWER WHEN HE HAD NO KNOWLEDGE OF THE FILING OF THE COMPLAINT.

{¶9} II. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED BY NOT HOLDING AN EVIDENTIARY HEARING PRIOR TO DENYING APPELLANT'S MOTION TO VACATE.

I

{¶10} Appellant, in his first assignment of error, argues that the trial court erred in denying his Motion to Vacate.

{¶11} Civ.R. 60(B) reads as follows: "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:

{¶12} "(1) mistake, inadvertence, surprise or excusable neglect;

{¶13} “(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);

{¶14} “(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;

{¶15} “(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

{¶16} “(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. * * *.”

{¶17} In order 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, 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 proceedings was entered or taken.” *Argo Plastic Products Co. v. Cleveland* , 15 Ohio St.3d 389, 391, 474 N.E.2d 328 (1984), citing *GTE Automatic Electric v. ARC Industries*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus. If any prong of this requirement is not satisfied, relief shall be denied. *Argo* at 391.

{¶18} A motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court and a ruling will not be disturbed absent an abuse of discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987). An abuse of discretion connotes more than an error of law or judgment, it implies the court's attitude

is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶19} Appellant, in his motion, alleged that his failure to respond to the complaint was due to excusable neglect. As discussed by the Supreme Court of Ohio in *Kay v. Glassman, Inc.*, 76 Ohio St.3d 18, 20, 1996-Ohio-430, 665 N.E.2d 1102:

The term “excusable neglect” is an elusive concept which has been difficult to define and to apply. Nevertheless, we have previously defined “excusable neglect” in the negative and have stated that the inaction of a defendant is not “excusable neglect” if it can be labeled as a “complete disregard for the judicial system.” *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 153, 1 O.O.3d 86, 90, 351 N.E.2d 113, 117; *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 21, 520 N.E.2d 564, 567, at fn. 4.

{¶20} In addition, “[w]hile unusual or special circumstances can justify neglect, if a party could have controlled or guarded against the happening or event he later seeks to excuse, the neglect is not excusable.” *National City Bank v. Kessler*, 10th Dist. No. 03AP-312, 2003-Ohio-6938, ¶ 14. The analysis of excusable neglect turns on the facts and circumstances presented in each case. *Cannell v. Bates*, 10th Dist. App. No. 00AP-915, 00AP-916, 00AP-917, 2001 WL 224532 (March 8, 2001).

{¶21} Appellant, in the affidavit attached in support of motion, stated as follows:

{¶22} 1. I am a member and the statutory agent of Custom Building, Ltd. and a Defendant in this action and have personal knowledge of the facts contained herein.

{¶23} 2. I am an Ohio resident with my principal place of residence at 1573 CR 160, Dundee, Ohio 44624.

{¶24} 3. Custom Building, Ltd. is an Ohio limited liability company and I am the sole member, I attached a copy of the Custom Building, Ltd. Articles of Incorporation filed with the Ohio Secretary of State to my Motion to Vacate Default Judgment as Exhibit B.

{¶25} 4. In or around the fall of 2014, I discovered a default judgment rendered against me in this matter on Plaintiffs' claims for breach of contract and unjust enrichment; I attached a copy of the contract entered into by and between Plaintiffs and Custom Building, Ltd. to my Motion to Vacate Default Judgment as Exhibit A.

{¶26} 5. Subsequent to the discovery of the judgment, I asked my wife if she was aware of any mail from the Court that had been addressed to me and delivered in the prior months.

{¶27} 6. My wife then notified me of the mail from the Court delivered to our residence several months prior.

{¶28} 7. The mail contained the Summons and Complaint for this case.

{¶29} 8. Upon discovery of the existence of the judgment and the service of the Summons and Complaint, I contacted counsel to proceed this case.

{¶30} 9. In no way did I purposefully or intentionally ignore or disregard this matter.

{¶31} We find that the trial court did not abuse its discretion in denying appellant's motion on the basis that appellant failed to demonstrate excusable neglect. The trial court's decision was not arbitrary, unconscionable or unreasonable. The trial court, in its January 2, 2015 Judgment Entry, noted that appellant alleged that he did

not file a timely answer because he was unaware of the filing of the complaint. In denying the motion, she further emphasized that appellant acknowledged that service was addressed to his principal place of residence and that service was completed by certified mail. While, in his affidavit, he alleged that his wife did not inform him of the complaint, as noted by appellees, “[t]here has been no allegation that his wife maliciously or purposefully withheld information from him.” Moreover, in their response to appellant’s motion, appellees produced a September 4, 2013 letter sent to appellant via certified mail at the same address as in the complaint. Appellees, in the letter, advised appellant that if the matter was not resolved, they might pursue legal action against appellant. Appellant, therefore, was on notice that a complaint against him might be filed. Furthermore, as noted by appellees in their response to appellant’s Motion to Vacate, the trial court’s June 6, 2014 and July 7, 2014 Judgment Entries, the August 28, 2014 Motion for Debtor’s Exam, and the September 3, 2014 Order requiring appellant to appear before the court on September 29, 2014 for a Debtor’s Examination were all mailed successfully to appellant at his residence.

{¶32} Appellant, in his brief, cites to this Court’s decision in *McFredericks, Inc. v. Strouse*, 5th Dist Ashland No. 09COA014, 2009 -Ohio- 6253 in support of his argument that his failure to respond to the complaint was due to excusable neglect. In such case, this Court found that the defendant had sufficiently alleged excusable neglect. The defendant, in his affidavit, had alleged that he had been out of the state for two months performing software implementation, that due to personal reasons he and his wife had not communicated effectively for several months, and that mail sent to his home was processed by his wife. The defendant further alleged that mail addressed to him and sent to his home was withheld from his attention, and that he sought legal counsel as

soon as he became aware of the lawsuit. However, the facts in the case sub judice are very different. As is stated above, there is no allegation that appellant's wife acted maliciously or purposefully or that appellant was out of state for any period of time.

{¶33} Appellant's first assignment of error is, therefore, overruled.

II

{¶34} Appellant, in his second assignment of error, argues that the court abused its discretion in not holding an evidentiary hearing before it ruled on his Civ. R. 60(B) motion.

{¶35} In *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 1996–Ohio–430, 665 N.E.2d 1102, the Ohio Supreme Court found when a movant files a motion for relief from judgment, the trial court should grant a hearing to take evidence only if the motion contains operative facts which would warrant relief under Civ.R. 60(B). *Id.* at 19, citing *Coulson v. Coulson*, 5 Ohio St.3d 12, 16, 448 N.E.2d 809 (1983).

{¶36} “[A] movant has no automatic right to a hearing on a motion for relief from judgment.” *Hrabak v. Collins*, 108 Ohio App.3d 117, 121, 670 N.E.2d 281 (8th Dist.1995). Generally, “[i]t is an abuse of discretion for a trial court to overrule a Civ. R. 60(B) motion for relief from judgment without first holding an evidentiary hearing *only if* the motion or supportive affidavits contain allegations of operative facts which would warrant relief under Civ.R. 60(B).” *In re Estate of Kirkland*, 2nd Dist. Clark No.2008–CA–57, 2009–Ohio–3765, ¶ 17, citing *Boster v. C & M Serv., Inc.*, 93 Ohio App.3d 523, 526, 639 N.E.2d 136 (10th Dist.1994) (emphasis in original).

{¶37} In light of our previous analysis herein, we find no merit in appellant's claim that the lack of an evidentiary hearing on his 60(B) motion constituted reversible

error under the facts and circumstances of this case. We find, therefore, that the trial court did not abuse its discretion in declining to conduct a hearing on the matter.

{¶38} Appellant's second assignment of error is, therefore, overruled.

{¶39} Accordingly, the judgment of the Tuscarawas County Court of Common Pleas is affirmed.

By: Baldwin, J.

Wise, P.J. and

Delaney, J. concur.