[Cite as *Tejeda v. Toledo Heart Surgeons, Inc.*, 2009-Ohio-3494.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

John Tejeda — Court of Appeals No. L-08-1306

Appellee — Trial Court No. CI-0200403492

v.

Toledo Heart Surgeons, Inc., et al. — **DECISION AND JUDGMENT**

Appellants — Decided: July 17, 2009

* * * * *

Eugene F. Canestraro, for appellee.

Karen A. Novak and Judith A. Meyers, for appellants.

* * * * *

HANDWORK, J.

{¶ 1} This appeal arises from a decision of the Lucas County Common Pleas Court denying the Civ.R. 60(B) motion for relief from judgment filed by appellants, Xavier R. Mousset, M.D. and Toledo Heart Surgeons, Inc. In its decision, the court below also granted the motion of appellee, John Tejeda, P.A., to strike. The trial court decided the Civ.R. 60(B) motion without holding an evidentiary hearing. Appellants raise the following assignments of error:

{¶ 2} "First Assignment of Error:

{¶ 3} "The trial court abused its discretion when it denied appellants' 60(B) motion because said motion satisfied the three-prong test entitling appellants to relief.

{¶ 4} "Second Assignment of Error:

{¶ 5} "The trial court abused its discretion when it failed to hold an evidentiary hearing when appellants' motion contained operative facts which could support a meritorious defense.

{¶ 6} "Third Assignment of Error:

{¶ 7} "The trial court abused its discretion in denying appellants relief from judgment because its judgment was based upon evidence contra to Evidence R. 1002."

{¶ 8} The facts of this case are set out in our decision *Tejeda v. Toledo Heart Surgeons, Inc.*, 6th Dist. No. L-07-1242. Additional facts pertinent to this appeal are as follows.

{¶ 9} On April 5, 2008, Dr. Mousset found what he alleges is the original employment contract between himself and appellee. This contract contains the signatures of both parties and, as opposed to the version of the contract used at trial, has no handwritten alterations. The major difference between the two documents is in the compensation section. The version which both parties relied upon at trial states:

{¶ 10} "Section 4. Compensation:

{¶ 11} "* * *

{¶ 12} "If Employer terminates Employee without cause, or Guarantor dies, Employee shall receive payment of his salary in a lump sum within 90 days of the termination, cessation or death."

{¶ 13} The document Dr. Mousset purportedly discovered after trial states:

{¶ 14} "Section 4. Compensation:

{¶ 15} "* * *

{¶ 16} "If Employer terminates Employee without cause, or Guarantor dies, Employee shall receive payment of his salary throughout the employment term guaranteed."

{¶ 17} In their first assignment of error, appellants contend that the trial court abused its discretion in denying their Civ.R. 60(B) motion for relief from judgment. In reviewing a trial court's decision on a motion for relief from judgment, we must apply an abuse of discretion standard. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. Therefore, a lower court's ruling on a such a motion will not be disturbed on appeal absent a showing that the trial court's attitude in reaching its judgment was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 18} In order "[t]o 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 was entered or taken." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus ("*GTE*"). If any one of these three requirements is not met, the motion should be overruled. *Argo Plastic Products Co. v. Cleveland* (1984), 15 Ohio St.3d 389, 391.

{¶ 19} It is clear that appellants met the reasonable time portion of the three-prong *GTE* test. Therefore, the question is whether the trial court abused its discretion by deciding that appellants did not meet one of the first two prongs of the test set forth in GTE. Appellants set forth three bases for their motion. These were excusable neglect under Civ.R. 60(B)(1), fraud pursuant to Civ.R. 60(B)(3), and "any other reason justifying relief" under Civ.R. 60(B)(5).

{¶ 20} In determining whether a party's neglect is excusable or inexcusable we must take into consideration all of the surrounding facts and circumstances. *Arnold & Caruso, Ltd. v. Nyktas*, 6th Dist. No. L-05-1011, 2005-Ohio-5566, ¶ 9. In the present case, the bare allegation that Dr. Mousset searched for but could not locate the "original" employment contract because he moved two times is simply not enough to constitute excusable neglect. Specifically, the photocopy of the employment contract was attested to by Dr. Mousset as being the authentic contract at trial, entered into evidence at trial, and relied upon by the parties without any complaint made by appellants throughout the remainder of this case in the court below. It was only after the parties filed their briefs on appeal, and one week before oral argument, that Dr. Mousset "discovered" the allegedly original employment contract. We therefore conclude that appellants failed to establish excusable neglect under Civ.R. 60(B)(1).

{¶ 21} Appellants next argue that they satisfy the second prong of the test for relief from judgment because the recently discovered document establishes fraud within the meaning of Civ.R. 60(B)(3). Appellee claims there was no fraud and, even if there were, it was not material to the claim of breach or the counterclaims.

{¶ 22} "The elements of fraud are: (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance." *Burr v. Bd. of Stark Cty. Commrs* (1986), 23 Ohio St.3d 69, paragraph two of the syllabus. "In order to set aside a final judgment for fraud, misrepresentation or other misconduct of the adverse party, the conduct complained of must be such as prevented the losing party from fully and fairly presenting his case or defense." *Tower Mgt. Co. v. Barnes* (Aug. 7, 1986), 8th Dist. No. 51030.

{¶ 23} While, under Civ.R. 60(B), the movant must only allege operative facts in order to satisfy the meritorious claim or defense prong, he or she must submit materials of an evidentiary quality relating to the second prong of the *GTE* test. *LaRosa v. LaRosa*, 11th Dist. No. 2001-G-2339, 2002-Ohio-1170. There was no such evidence presented in relation to appellants' fraud claim. Even though there was an affidavit from Dr. Mousset attesting to his recent discovery of the contract, this affidavit contained no evidence of fraud on the part of appellee. Since there was no evidentiary showing of fraud, we find the trial court did not abuse its discretion in ruling appellants did not satisfy Civ.R. 60(B)(3).

{¶ 24} Finally, appellants claim satisfaction of the second prong of the *GTE* test under Civ.R. 60(B)(5). They argue that awarding the current prejudgment interest would

act as punitive damages and, therefore, justice requires they be relieved from judgment. Civ.R. 60(B)(5) is a "catch-all" provision which provides for relief from judgment when justice so requires, but it is not to be used as a substitute for any of the other more specific provisions of Civ.R. 60(B)." *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, paragraph one of the syllabus. This rule is "only to be used in an extraordinary and unusual case when the interests of justice warrants it." *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 105.

{¶ 25} We find appellants' arguments unpersuasive in determining whether the trial court abused its discretion by not allowing relief from judgment based upon Civ.R. 60(B)(5). This was not an "extraordinary and unusual" situation. In other words, appellants' claims could be, and were, better argued within the confines of specific sections of Civ.R. 60(B). Therefore, we again find that appellants did not satisfy the second prong of the test.

{¶ 26} Because appellants failed to establish any valid ground for the granting of a Civ.R. 60(B) motion, we need not address the issue of whether they have a meritorious claim or defense to present if relief is granted. *Argo Plastic Products Co. v. Cleveland*, supra. Accordingly, the trial court's attitude in denying appellants' motion for relief from judgment was not unreasonable, arbitrary, or unconscionable. Appellants' first assignment of error is found not well-taken.

{¶ 27} Appellants' second assignment of error is rendered moot by our disposition of their first assignment of error.

{¶ 28} Appellants' third assignment of error alleges that the trial court abused its discretion by relying on improper evidence. Appellants maintain the copy they discovered was the "best evidence" and, by not relying on such evidence, the trial court's judgment was a miscarriage of justice. Conversely, appellee argues that Evid.R. 1004 is the applicable rule since appellants were in possession of the contested document, and, therefore, the trial court did not abuse its discretion by relying on a photocopied document.

{¶ 29} Appellants rely on Evid.R. 1002, which states, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio." Appellee argues that the "not in conflict" provision of this rule must be read against Evid.R. 1004, which states in pertinent portion:

{¶ 30} "[t]he original is not required, and other evidence of the contents of a writing, recording, or photography is admissible if * * * [a]t a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be subject of proof at the hearing, and that party does not produce the original at the hearing * * *"

{¶ 31} Assuming for the purpose of this assignment of error that the document presented by appellants is the original document, it was in appellants' possession and, therefore, they bore the duty of producing it once they were put on notice by the complaint that it would be required. Since appellants failed to do so, the trial court

properly allowed a photocopied version of the document to be used pursuant to Evid.R. 1004. Appellants' argument that the trial court abused its discretion is, as a consequence, without merit and their third assignment of error is found not well-taken.

{¶ 32} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE