[Cite as *Juriski v. Forbes*, 2009-Ohio-4919.]

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

Rick Juriski, et al.	Court of Appeals No. L-08-1376
Appellees	Trial Court No. CVG-06-11464
v.	
John Forbes, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: September 18, 2009

* * * * *

Joseph J. Urenovitch and Richard A. Coble, for appellees.

J. P. Smith, for appellants.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendants-appellants, John Forbes and Linda S. Hersha, appeal the September 23, 2008 judgment of the Toledo Municipal Court which denied their Civ.R. 60(B) motion for relief from judgment in a property line dispute case. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} On June 6, 2006, plaintiffs-appellees, Rick and Lisa Juriski, commenced the instant action against neighboring property owners, John Forbes and Linda Hersha, alleging that, inter alia, appellants wrongfully erected a fence on their property. The case proceeded to a bench trial where the parties presented the testimony of their respective surveyors. According to the parties, appellants' surveyor, Lewandowski, testified that the fence aligned with the property line. Appellees' surveyor, Hohenberger, concluded that the fence encroached on appellees' property by approximately 18 inches.

{¶ 3} On July 19, 2007, the trial court found appellees' surveyor's report more credible and held that appellants' fence was, indeed, encroaching on appellees' property. Appellants were ordered to remove the fence.

{¶ 4} On July 17, 2008, appellants filed a Civ.R. 60(B) motion for relief from judgment. In their motion, appellants contended that following appellees' surveyor re-surveying the property, they had an additional survey performed by Jones. According to appellants, the Jones survey "essentially ratified" the Lewandowski survey but that the Hohenberger surveys differed from one another. Appellants attached the Jones report and survey.

{¶ 5} In opposition, appellees argued that Hohenberger's second survey did not differ from his first; that the property line was re-surveyed because appellants removed the northeast property corner pin. Appellees also attached the affidavit of Hohenberger who stated that the property lines in his original survey were the "true boundary lines." Hohenberger further stated that: "I absolutely disagree with [appellants'] statements

regarding my surveys and their assertion that I have established or recognized a new or second boundary line."

{¶ 6} On September 23, 2008, the trial court denied appellants' motion; this appeal followed. Appellants have raised the following two assignments of error for our consideration:

{¶ 7} "First Assignment of Error: The trial court committed prejudicial error and abused its discretion by failed to grant plaintiffs' motion for relief from judgment.

{¶ 8} "Second Assignment of Error: The trial court committed prejudicial error and abuse of discretion in failing to grant a hearing upon the motion for relief from judgment, which contained allegations that would warrant relief under Civil Rule 60(B)."

{¶ 9} Although not delineated in their original Civ.R. 60(B) motion, on appeal appellants state that they requested relief under Civ.R. 60(B)(2): "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial * * *;" and the catch-all provision under (B)(5), "any other reason justifying relief from judgment."

{¶ 10} In *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus, the Supreme Court of Ohio outlined a three prong test to determine whether a Civ.R. 60(B) motion for relief from judgment should be granted:

{¶ 11} "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 was entered or taken."

{¶ 12} If any one of the three *GTE* requirements is not met, the motion should be overruled. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. A trial court's decision on a motion for relief from judgment under Civ.R. 60(B) will not be reversed on appeal absent an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77; *McGee v. Lynch*, 6th Dist. No. E-06-063, 2007-Ohio-3954, ¶ 29.

{¶ 13} Upon review, we must conclude that appellants' "newly discovered" Jones survey does not meet the *GTE* requirements. First, the survey could have been conducted at any time prior to the trial. Next, appellees' surveyor specifically refutes the allegations raised in appellants' Civ.R. 60(B) motion. Finally, as appellants state, the survey merely reiterates the Lewandowski findings that were rejected by the trial court. We further find that appellants failed to demonstrate any other reason for granting relief, Civ.R. 60(B)(5). Accordingly, the trial court did not abuse its discretion when it denied appellants' Civ.R. 60(B) motion for relief from judgment. Appellants' first assignment of error is not well-taken.

{¶ 14} In appellants' second assignment of error, they contend that the trial court should have, at minimum, conducted a hearing on appellants' motion. A trial court abuses its discretion by failing to conduct a hearing where the movant alleges operative facts which would warrant relief under Civ.R. 60(B). *Society Natl. Bank v. Val Halla*

Athletic Club & Recreation Ctr., Inc. (1989), 63 Ohio App.3d 413, 418, citing *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97.

{¶ 15} Upon review we find that because appellants failed to allege operative facts which would warrant relief from judgment, the trial court did not err when it denied appellants' motion without conducting a hearing. Appellants' second assignment of error is not well-taken.

{¶ 16} On consideration whereof, we find that substantial justice was done the parties complaining and the judgment of the Toledo Municipal Court is affirmed. Pursuant to App.R. 24, appellants are ordered to pay the costs of this appeal.

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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE