

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

Paul W. Carroll

Court of Appeals No. L-10-1076

Appellant

Trial Court No. CI0200802032

v.

Kenneth W. Hudnall

DECISION AND JUDGMENT

Appellee

Decided: December 10, 2010

* * * * *

John G. Rust, for appellant.

Douglas A. Wilkins, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Paul W. Carroll, appeals from a judgment of the Lucas County Court of Common Pleas, wherein that court granted summary judgment to appellee, Kenneth Hudnall. The relevant facts of this case are as follows.

{¶ 2} Kenneth Hudnall had a sister, Joyce, who was married to Paul Carroll. During the course of the marriage, Nellie Hudnall, the mother of Joyce and Kenneth, bequeathed a one-half interest each in four rental homes to her two children. Joyce died on December 29, 2006, leaving her one-half interest in these homes to Paul. According to appellee, Paul agreed to transfer this one-half interest in those properties to Kenneth as a gift. This transfer was accomplished on July 31, 2007.

{¶ 3} On February 14, 2008, appellant filed a complaint asserting that appellee fraudulently obtained all interest in the four rental properties. He further alleged that appellee failed to provide appellant with an accounting of all rents, income received, and expenses incurred. Appellee filed an answer in which he denied Carroll's claims.

{¶ 4} On September 8, 2009, appellee filed a motion for summary judgment. The motion was supported by the affidavit of Larry G. Calmuggio, the attorney who facilitated the transfer of the one-half interest in the four rental properties from appellant to appellee. According to Attorney Calmuggio's affidavit, he was retained by appellant solely for this purpose. Calmuggio averred that due to the lack of consideration for the transfer, he made sure that Paul understood that he was making a gift of a one-half interest in the rental properties to Kenneth. The lawyer further swore that he made sure his client was not under any duress or undue influence and that he was competent to transfer his interest in these properties to his brother-in-law.

{¶ 5} Subsequently, appellant filed at least four continuances asking the trial court to provide him with extra time in which to engage in discovery before filing his

memorandum in opposition to appellee's motion for summary judgment. The trial court granted each of these motions. On December 4, 2009, appellant filed another motion for a continuance, claiming that he still needed to take the deposition of Larry Calmuggio.

{¶ 6} On December 12, 2009, the trial judge granted appellant's motion, but ordered appellant to respond to appellee's motion for summary judgment and file the deposition on or before December 14, 2009. Nonetheless, appellant filed two more motions for an extension—one on December 11, 2009, and the other on December 21, 2009. On December 31, 2009, the court below granted appellant's motion(s) for another extension of time in which to file his response to appellee's motion for summary judgment and to file Calmuggio's deposition. Yet another extension was granted on January 6, 2010. The deadline for appellant's filing of the response to appellee's motion for summary judgment and the aforementioned deposition was January 21, 2010. Appellant did not, however, comply with this order.

{¶ 7} On February 3, 2010, the trial court granted appellee's motion for summary judgment, and dismissed appellant's complaint with prejudice. This entry was journalized on February 8, 2010. On March 9, 2010, appellant filed a Civ.R. 60(B)(1) motion for relief from judgment based upon excusable neglect. On March 10, 2010, appellant filed his notice of appeal from the trial court's grant of summary judgment. Carroll asserts the following assignment of error¹:

¹While captioned as "Argument," this is the only averment in appellant's brief resembling an assignment of error.

{¶ 8} "THE TRIAL COURT PREJUDICIALLY ERRED BY NOT GRANTING PLAINTIFF'S 60B (sic) MOTION, FILED MARCH 9, 2010 WHICH CONTAINED SUFFICIENT AFFIDAVITS, ESTABLISHING PROOF BY THE RULE 60B (sic) AFFIDAVITS THAT DEFENDANT BY HIS FRAUDULENT ACTS BECAME LIABLE FOR THE RULE 60B (sic) RELIEF SOUGHT, BASED ON THE RULE 60B (sic), WHICH SHOWED PLAINTIFF WAS ENTITLED TO A DENIAL OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, BASED ON THE ALLEGATIONS IN PLAINTIFF'S COMPLAINT, PARAGRAPHS 4 THROUGH 10, AND THE RULE 60B (sic) AFFIDAVIT OF PLAINTIFF, THIS COUNSEL, AND THE EXPERT OPINION OF ANNE LEPLA, SPECIAL SERVICES DIRECTOR, WEST TOLEDO HEALTH CENTER, WHO OPINED THAT PLAINTIFF DID NOT HAVE THE MENTAL CAPACITY ON JULY 31, 2007 TO TRANSFER ALL HE HAD INHERITED FROM HIS WIFE JOYCE, THROUGH THE PROBATE COURT PROCESSES AND FILINGS; AND ANNE LEPLA ALSO SWORE THAT THE WEST TOLEDO HEALTH CENTER, MEDICAL RECORDS ALSO SUPPORTED HER OPINION AND THE ALLEGATIONS IN PLAINTIFF'S COMPLAINT, CALLING FOR THE TRIAL COURT TO DENY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT." (Emphasis in the original.)

{¶ 9} Appellant first asks this court to grant his Civ.R. 60(B) motion for relief from judgment. We are only permitted to "[r]eview and affirm, modify, or reverse the judgment or final order appealed from an inferior court." See App.R. 12(A)(1). See,

also, Section 3(B)(2), Article IV, Ohio Constitution. Appellant filed his notice of appeal in this case before the trial court was able to enter any final judgment on his Civ.R. 60(B) motion. Consequently, we lack the jurisdiction to address the merits of that motion.

{¶ 10} Next, appellant apparently argues that the affidavits filed with his Civ.R. 60(B) motion, which was filed one day before his notice of appeal was filed, but after the trial judge granted summary judgment to Hudnall, contain sufficient facts to withstand the grant of appellee's motion for summary judgment. In essence, appellant is attempting to bootstrap his Civ.R. 60(B) motion for relief from judgment into an untimely response to appellee's motion for summary judgment. See *National City Bank v. Abundant Life Apostolic*, 9th Dist. No. C.A. 04CA008447, 2004-Ohio-5372, ¶ 22, fn. 1. Thus, we find that the trial court was not required to, in essence, reconsider its grant of summary judgment based upon any affidavits filed in support of appellant's motion for relief from judgment.

{¶ 11} Finally, appellant's trial counsel alleges that he did not receive a copy of the trial court's February 3, 2010 judgment and, therefore, "thought that signified the court would give our [sic] time to respond to the Defendant's motion for summary judgment." The entry granting summary judgment indicates that copies of this judgment were sent to appellant's attorney and to his opposing counsel at the address to which each of the court's prior rulings and opposing counsel's filings were mailed. In addition, trial counsel must have had some notice of the trial court's decision in order to file a motion for relief from judgment. Moreover, we reject the proposition that the trial court's purported

silence signified that it was extending the time for the filing of appellant's response to appellee's motion for summary judgment.

{¶ 12} For all of the foregoing reasons, appellant's sole assignment of error is found not well-taken. The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24(A).

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

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.
