

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

Janet Fors

Court of Appeals No. F-12-001

Appellee

Trial Court No. 11CV000200

v.

Theodore Beroske

**DECISION AND JUDGMENT**

Appellant

Decided: March 22, 2013

\* \* \* \* \*

Stewart W. Jones, for appellee.

Matthew D. Harper and Mark W. Sandretto, for appellant.

\* \* \* \* \*

**PIETRYKOWSKI, J.**

{¶ 1} Theodore Beroske appeals a January 11, 2012 judgment of the Fulton County Court of Common Pleas that denied appellant's Civ.R. 60(B) motion for relief from judgment. Appellant sought relief from a September 16, 2011 judgment in an action brought by Janet Fors, appellee, for partition of the parties' interests in a timeshare at a Mexican resort.

{¶ 2} The September 16, 2011 judgment ordered appellant to pay appellee the sum of \$6,500 for appellee's interest in the timeshare, \$500 for attorney fees, and court costs. The court awarded appellant all interest held by appellee in the timeshare and ordered appellant to pay and hold appellee harmless from any and all debts and obligations associated with a mortgage loan on the property, taxes, insurance, utilities, and other expenses.

{¶ 3} Fors filed her complaint against appellant on June 13, 2011. Appellant did not file an answer or otherwise respond to the complaint. On motion, the trial court awarded appellee default judgment against appellant on August 4, 2011, and scheduled the case for an assessment of damages hearing on September 6, 2011. Although appellant received notice of the hearing, he failed to appear at the assessment of damages hearing. The hearing proceeded in his absence. Afterwards, the trial court issued its September 16, 2011 judgment.

{¶ 4} Appellant filed a Civ.R. 60(B) motion for relief from the September 16, 2011 judgment on November 14, 2011. The trial court denied the motion in a judgment filed on January 11, 2012. Appellant filed a notice of appeal to this court of the January 11, 2012 judgment on February 9, 2012. We placed this appeal on the court's accelerated calendar pursuant to 6th Dist.App.R. 12 on February 24, 2012.

{¶ 5} Appellant asserts one assignment of error on appeal:

### **Assignment of Error**

The trial court erred by denying appellant Theodore Beroske's motion for relief from default judgment in a partition action where appellant demonstrated the requisite elements of Civ.R.60(B) and *GTE Automatic Electric, Inc. v. Arc Industries*, 47 Ohio St.2d 124 (1976). (Docket No. 16: Judgment Entry).

### **Motion for Relief from Judgment**

{¶ 6} Civ.R. 60(B) provides:

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: (1) mistake, inadvertence, surprise or excusable neglect; (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); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (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 (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.

{¶ 7} To prevail on a Civ.R. 60(B) motion for relief from judgment, 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.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

{¶ 8} Where a movant fails to demonstrate any of these three requirements for Civ.R. 60(B) relief, the motion is to be overruled. *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 637 N.E.2d 914 (1994); *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988). A trial court's judgment granting or denying a Civ.R. 60(B) motion for relief from judgment is reviewed on appeal under an abuse of discretion standard. *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987). An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 9} Appellant argues that he did not oppose the partition relief sought by appellee in her complaint and therefore did not appear or defend the action. Appellant

contends that the trial court, however, violated Civ.R. 54(C) by issuing a default judgment granting relief to appellee different in kind and in excess of the amount demanded in appellee's complaint. Appellant also argues that the trial court's judgment does not comply with statutory requirements in partition actions set forth in R.C. Chapter 5307.

{¶ 10} Appellant argues that these two claimed errors present meritorious defenses to the September 16, 2011 judgment and grounds for relief from judgment under Civ.R. 60(B)(5).

### **Meritorious Defense**

{¶ 11} Civ.R. 55 provides for default judgments and states that "[i]n all cases a judgment by default is subject to the limitations of Rule 54(C)." Civ.R. 55(C). Civ.R. 54(C) limits the relief that can be granted in a default judgment: "A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." Civ.R. 55(B) states that "[i]f a judgment by default has been entered, the court may set it aside in accordance with Rule 60(B)."

{¶ 12} Ohio appellate courts have recognized that the limitations on default judgments set forth in Civ.R. 54(C) are intended to provide notice to defendants of potential liability in litigation so that they can make decisions on whether to defend a case. *Masny v. Vallo*, 8th Dist. No. 84983, 2005-Ohio-2178, ¶ 18; *National City Bank v. Shuman*, 9th Dist. No. 21484, 2003-Ohio-6116, ¶ 11; *White Oak Communities, Inc. v. Russell*, 10th Dist. No. 98AP-1563, 1999 WL 1009745, \*6 (Nov. 9, 1999). In *National*

*City Bank v. Shuman*, the Ninth District Court of Appeals described the purposes of the limitations on default judgment under Civ.R. 54(C) in these terms:

The primary purpose of Civ. R. 54(C)'s limitations on default judgments is to ensure that defendants are clearly notified of the maximum potential liability to which they are exposed, so that they may make an informed, rational choice to either: (1) enable a default judgment by not responding, or (2) invest the time and expense involved in defending an action. *See White Oak Communities v. Russell* (Nov. 9, 1999), 10th Dist. No. 98AP 1563. The plain language of Civ. R. 54(C) unequivocally requires this notification of the maximum potential liability to be communicated through a demand for judgment in the complaint. *Id.* at ¶ 11.

{¶ 13} The relief demanded by appellee in her complaint was for the court to partition the timeshare pursuant to statute, appoint a commissioner to facilitate sale of the property, and for the property to be appraised, advertised and sold. The complaint sought distribution of the proceeds of sale to the parties in accordance with their respective interests. Appellee also sought reimbursement for the cost of attorney fees and title work expenses incurred in bringing the action and court costs. The complaint did not assert any claim for monetary damages against appellant or any claim for indemnity.

{¶ 14} The trial court's judgment, however, ordered appellant to pay appellee \$6,500 and to indemnify and hold appellee harmless on any debts owed by appellee and

associated with appellee's mortgage obligation on the property, taxes, insurance, utilities and or other expense. Appellee was ordered to transfer her interest in the property to appellant. The court awarded attorney fees and costs.

{¶ 15} We agree with appellant that the relief accorded appellee in the September 16, 2011 judgment is markedly different in kind and amount from what appellee demanded in the complaint. Appellant was not placed on notice in the complaint that he would be subject to a claim for \$6,500 in damages and an obligation to defend and indemnify appellee on her obligations arising out of her purchase and ownership of the timeshare.

{¶ 16} In *Belmon v. Hicks*, 6th Dist. No. L-08-1066, 2009-Ohio-511, ¶ 21-22, this court held that Civ.R. 54(C) prohibited a default judgment ordering the defendant to pay monetary damages where the complaint did not demand any damages from the defendant. The Ninth District Court of Appeals came to the same result in *National City Bank v. Shuman* where the complaint contained no demand for judgment against the defendant. *National City Bank* at ¶ 11.

{¶ 17} In *Masny v. Vallo*, the plaintiff sought damages of \$600 in the complaint but submitted evidence of greater damages at the hearing on damages. The Eighth District Court of Appeals reversed a default judgment for \$3,275 in the case, because Civ.R. 54(C) prohibits default judgments in an amount in excess of the amount demanded in the complaint. *Masny*, 8th Dist. No. 84983, 2005-Ohio-2178, at ¶ 16.

{¶ 18} Here the complaint contained no demand for an award of any damages from appellant (other than for attorney fees, litigation expenses and costs) and did not seek any order providing indemnification from appellant for appellee on her obligations arising from her purchase or ownership of an interest in the timeshare. The relief granted was different in kind than the relief sought in the complaint, partition pursuant to R.C. 5307.01 et seq. The judgment awarded an amount in excess of the amount demanded in the complaint. The court ordered appellant to pay appellee the sum of \$6,500. Accordingly we conclude that appellant held a meritorious defense to the September 16, 2011 judgment as the judgment violated Civ.R. 54(C).

{¶ 19} The parties agree that the timeshare constitutes an interest in real property and that they are the joint owners of the property, having purchased it together. Appellee sought partition of their interests under R.C. 5307.01 et seq. and appointment of a commissioner. No commissioner was appointed. The record includes no determination on whether the timeshare could be divided and, if not, any appraisal. *See* R.C. 5307.09. The record does not demonstrate an election by either party to take the timeshare. *See* R.C. 5307.10. The court did not order sale of the timeshare at public auction. *See* R.C. 5307.11. We conclude that appellant held a meritorious defense to the default judgment based upon the trial court's failure to comply with statutory requirements for partition of the property.



### **Grounds for Relief under Civ.R. 60(B)**

{¶ 20} The second element under *GTE* is for the movant to demonstrate that he is entitled to relief under one of the grounds set forth in Civ.R. 60(B)(1) through (5). *GTE*, 47 Ohio St.2d 146, 351 N.E.2d 113, at paragraph two of the syllabus. In both the trial court and on appeal, appellant has argued that he is entitled to relief from judgment under Civ.R. 60(B)(5). Civ.R. 60(B)(5) authorizes relief under Civ.R. 60(B) for “(5) any other reason justifying relief from the judgment.”

{¶ 21} The Ohio Supreme Court has recognized:

1. Civ.R. 60(B)(5) is intended as a catch-all provision reflecting the inherent power of a court to relieve a person from the unjust operation of a judgment, but it is not to be used as a substitute for any of the other more specific provisions of Civ.R. 60(B).

2. The grounds for invoking Civ.R. 60(B)(5) should be substantial.

*Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64, 448 N.E.2d 1365 (1983) at paragraphs one and two of the syllabus.

{¶ 22} Appellant argues that the fact a default judgment grants relief prohibited under Civ.R. 54(C) is a basis for relief from judgment under Civ. R. 60(B), citing the decision of the Eight District Court of Appeals in *Masny v. Vallo*. As we discussed earlier in this decision, the court in *Masny* held that a default judgment awarding damages in excess of those sought in the complaint violated Civ.R. 54(C). The court also

held that the violation constituted a basis for relief from judgment under Civ.R. 60(B)(5). *Masny*, 8th Dist. No. 84983, 2005-Ohio-2178, at ¶ 20.

{¶ 23} Appellee argues that appellant willfully and deliberately chose to ignore the complaint and not to file a timely answer. Appellee contends that such a failure does not constitute a basis for Civ.R. 60(B) relief, citing the Ohio Supreme Court decision in *Blasco v. Mislik*, 69 Ohio St.2d 684, 433 N.E.2d 612 (1982) and of the Eighth District Court of Appeals in *Mount Olive Baptist Church v. Pipkins Paints and Home Improvement Ctr., Inc.*, 64 Ohio App.2d 285, 413 N.E.2d 850 (8th Dist.1979). Both these decisions are distinguishable. Neither decision involved a default judgment providing relief prohibited under Civ.R. 54(C).

{¶ 24} In *Blasco* the defendants “simply disregarded or ignored their obligation under the Civil Rules to timely present their defenses.” *Blasco* at 686. In *Mount Olive Baptist Church*, the defendant received the complaint and threw it away. *Mount Olive Baptist Church* at 288. The court concluded that the defendant had deliberately chosen to ignore the complaint and the defendant stated no other reason for failing to defend the action. *Id.* at 288.

{¶ 25} In *Masny*, the court recognized that the limitations on default judgments in Civ.R. 54(C) protect defendants from being subjected to unpled liability as a consequence of failing to answer a complaint and that the primary purpose of the rule is to afford parties notice of potential liability so they may determine whether to defend a case. *Masny*, 8th Dist. No. 84983, 2005-Ohio-2178, at ¶ 18. In our view, providing relief from

such judgments under Civ.R. 60(B)(5) operates to promote the protections afforded under Civ.R. 54(C) and to present a means to relieve litigants from unjust operation of judgments violating the rule. We agree with the Eighth District's decision in *Masny* that a violation of Civ.R. 54(C) presents a basis for relief from judgment under Civ.R. 60(B)(5).

### **Reasonable Time**

{¶ 26} The third requirement to grant relief from judgment under Civ.R. 60(B) is a showing that the motion was made within a reasonable time. Here, appellant filed his motion for relief from judgment within 60 days of the date default judgment was entered against him. Under the circumstances, we hold that the motion was filed within a reasonable time.

{¶ 27} Accordingly, we conclude that appellant's motion met the requirements for Civ.R. 60(B) relief under *GTE Electric, Inc. v. Arc Industries*. In view of the fact that the September 16, 2011 judgment violated Civ.R. 54(C), we conclude the trial court abused its discretion in denying appellant's Civ.R. 60(B)(5) motion for relief from the judgment.

{¶ 28} We find appellant's assignment of error well-taken.

{¶ 29} We reverse the January 11, 2012 judgment of the Fulton County Court of Common Pleas that denied appellant's Civ.R. 60(B)(5) motion for relief from judgment. We vacate the September 16, 2011 default judgment and remand this case to the Fulton

County Court of Common Pleas for further proceedings. We order appellee to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

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.

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JUDGE

Thomas J. Osowik, J.

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JUDGE

Stephen A. Yarbrough, J.  
CONCUR.

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JUDGE

<p>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: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
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