[Cite as *State Farm Fire & Cas. Co. v. Laviena*, 2005-Ohio-6601.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE FARM FIRE AND CASUALTY COMPANY,	)	
PLAINTIFF-APPELLANT,	)	CASE NO. 04-MA-176
VS.	)	
	)	OPINION
JOSE LAVIENA,	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court Case No. 01CV1269

JUDGMENT: Affirmed

APPEARANCES:

For Plaintiff-Appellant

Attorney David L. Lester
Attorney Gary S. Greenlee
Ulmer & Berne, LLP
1300 East 9th Street, Suite 900
Cleveland, Ohio 44114-1583

For Defendant-Appellee

Attorney Adam L. Sperling
Anzellotti, Sperling, Pazol & Small, Co., LPA
21 North Wickliffe Circle
Youngstown, Ohio 44515

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: December 7, 2005

DONOFRIO, J.

{¶1} Plaintiff-appellant, State Farm Fire and Casualty Insurance, appeals from a Mahoning County Common Pleas Court judgment granting a motion for relief from judgment in favor of intervenors-appellees, Nancy, Jessica, Julie, and Joey Ortiz, and defendant Jose Laviena, thereby vacating a declaratory judgment entered in favor of appellant.

{¶2} On June 20, 1997, Laviena allegedly shot and injured appellee Jessica Ortiz. Appellees subsequently filed a personal injury lawsuit against Laviena. Laviena had a homeowner's insurance policy with appellant. Consequently, Laviena tendered defense of the lawsuit to appellant.

{¶3} Appellant subsequently filed a complaint against Laviena seeking a declaratory judgment that it had no duty to defend or indemnify him as to claims arising from the alleged shooting. Appellant asserted that because Laviena acted intentionally, he was excluded from coverage under the insurance policy. Appellant then filed a motion for default judgment after Laviena failed to answer the complaint.

{¶4} The trial court granted the motion for default judgment on October 15, 2001. At the time the trial courted granted default judgment, appellees were not a party to this action. Upon learning of the default judgment, appellees subsequently filed a motion to intervene and a Civ.R. 60(B) motion for relief from judgment on October 25, 2001. A magistrate held a hearing on the motion. However, he did not issue a decision until April 23, 2004. The magistrate determined that appellees should be permitted to intervene but that their motion for relief from judgment should be denied.

{¶5} Appellees filed objections to the magistrate's decision. On July 15, 2004, the trial court granted appellees' Civ.R. 60(B) motion. In doing so, the trial court vacated its prior declaratory judgment entry. Appellant timely appealed the judgment.

{¶6} Appellant raises one assignment of error, which states:

{¶7} "BECAUSE APPELLEES FAILED TO DEMONSTRATE IN THEIR 'MOTION FOR RELIEF UNDER CIVIL RULE 60(B)' THAT THEY HAD A MERITORIOUS DEFENSE TO PRESENT IF RELIEF WAS GRANTED, THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED APPELLEES' CIV.R. 60(B) MOTION."

{¶8} Appellant argues that appellees were required to allege operative facts that, if believed, would constitute a meritorious defense to its declaratory judgment claims. It contends that appellee failed to allege any operative facts at all that would constitute a meritorious defense. Appellant further argues that appellees' contention that they are exempt from the "meritorious defense" requirement due to their "procedural context" is unsupported by authority. Therefore, appellant contends that the trial court abused its discretion in granting appellees' Civ.R. 60(B) motion.

{¶9} An appellate court will not reverse a trial court's ruling on a Civ.R. 60(B) motion absent a showing of abuse of discretion. *State ex rel. Russo v. Deters* (1997), 80 Ohio St.3d 152, 153, 684 N.E.2d 1237. Abuse of discretion connotes more than an error in judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶10} The Ohio Supreme Court set out the controlling test for Civ.R. 60(B) motions in *GTE Automatic Elec., Inc. v. Arc Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113. The court stated:

{¶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." Id. at paragraph two of the syllabus.

{¶12} A trial court abuses its discretion if it grants relief to a movant who has not demonstrated all three *GTE* factors. *Russo*, 80 Ohio St.3d at 154.

{¶13} While the movant must satisfy all three requirements, the first prong is the focus of this appeal and will be discussed below. However, we will briefly address the second and third elements.

{¶14} Appellees satisfied the second *GTE* requirement. Appellees alleged they were entitled to relief from judgment under Civ.R. 60(B)(5), the catch-all provision, which provides for relief for "any other reason justifying relief from the judgment." The declaratory judgment entered in favor of appellant relieved it from a duty to defend or indemnify Laviena in appellees' claim against him. Appellees had an interest in the case. However, they were not joined as parties. Thus, they were not informed when appellant filed the motion for default judgment and, consequently, could not assert their rights. After learning of the default judgment, appellees were permitted to intervene and were then able to assert their rights. Appellees had no basis to protect their interest on the issue of Laviena's insurance coverage until they learned of the default judgment and were permitted to intervene. This constitutes a reason justifying relief from judgment pursuant to Civ.R. 60(B)(5).

{¶15} Turning to the third *GTE* requirement, appellees filed their motion for relief on October 25, 2001, ten days after the trial court granted appellant's motion for default judgment. Therefore, appellees satisfied the timeliness requirement because filing within ten days was certainly timely.

{¶16} Thus, this case turns on whether appellees satisfied the first *GTE* requirement.

{¶17} The movant in a Civ.R. 60(B) motion is not required to prove that it will prevail at trial after the court grants the motion for relief, but it must allege operative facts that, if believed, would constitute a meritorious claim or defense. *Moore v. Emmanuel Family Training Center, Inc.* (1985), 18 Ohio St.3d 64, 67, 479 N.E.2d 879. The movant, however, must allege operative facts with enough specificity to

allow the trial court to determine whether the movant has met the test. *Syphard v. Vrable* (2001), 141 Ohio App.3d 460, 463, 751 N.E.2d 564.

{¶18} While examining appellees' Civ.R. 60(B) motion alone, it would seem that they failed to allege operative facts that would constitute a valid defense to appellant's claims. But our review does not end here.

{¶19} Simultaneously with their Civ.R. 60(B) motion, appellees filed a motion to intervene. In that motion, they referenced their complaint in the underlying tort action against Laviena. They also attached that complaint to the motion. The complaint specifically alleges that Laviena "negligently discharged a gun and negligently struck Plaintiff with a bullet." (Complaint ¶4). These facts raise a defense to appellant's claim that Laviena's act was intentional and/or the results of his act were expected. Appellant's argument in support of why it should not be required to provide insurance coverage to Laviena under his policy was based on its allegation that Laviena's act was intentional and/or the results of his act were expected, which would void coverage.

{¶20} In their Civ.R. 60(B) motion, appellees specifically refer the court to their motion to intervene for a complete discussion of the facts and procedural history. Consequently, appellees referred the court to also review the complaint in the tort action.

{¶21} When construing appellees' Civ.R. 60(B) motion in conjunction with their motion to intervene, as the trial court did, we are able to find that they asserted facts that, if believed, would constitute a meritorious defense to appellant's claim that it is not required to provide insurance coverage to Laviena. We must review the trial court's judgment for an abuse of discretion. *Russo*, 80 Ohio St.3d at 153. By examining the motion to intervene along with the Civ.R. 60(B) motion, we can find that appellees met the first *GTE* requirement. Therefore, we cannot conclude that the trial court acted unreasonably, arbitrarily, or unconscionably in granting appellees' motion.

{¶22} Our decision is further supported by the policy underlying Civ.R. 60(B). Civ.R. 60(B) is a remedial rule based on the premise that cases should be resolved on their merits whenever possible. *WFMJ Television, Inc. v. AT & T Federal Systems CSC*, 7th Dist. No. 01-CA-69, 2002-Ohio-3013, at ¶21; *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20, 665 N.E.2d 1102. It is to "be liberally construed with a view for effecting a just result." *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections* (1993), 67 Ohio St.3d 134, 67, 616 N.E.2d 869. In this case, appellees' status as intervenors would practically be rendered moot if they were not permitted an opportunity to argue why appellant should be required to provide insurance coverage to Laviena. Since Laviena did not respond in any way or defend against the lawsuit appellant filed against him, the merits of appellant's claim regarding a duty to provide insurance coverage to Laviena have never been addressed. Thus, in the interest of effecting a just result and resolving this case on its merits, we again cannot conclude that the trial court abused is discretion in granting appellees' Civ.R. 60(B) motion.

{¶23} Accordingly, appellant's assignment of error is without merit.

{¶24} For the reasons stated above, the trial court's judgment is hereby affirmed.

Vukovich, J., concurs
DeGenaro, J., concurs