

[Cite as *Tihansky v. Weston, Hurd, Fallon, Paisley & Howley, L.L.P.*, 2006-Ohio-1359.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86536

DENNIS P. TIHANSKY, M.D.,
PH.D., ET AL.

Plaintiff-Appellant

-vs-

WESTON, HURD, FALLON, PAISLEY
AND HOWLEY, L.L.P., ET AL.

Defendants-Appellees

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JOURNAL ENTRY

AND

OPINION

Date of Announcement
of Decision:

MARCH 23, 2006

Character of Proceeding:

Civil appeal from
Court of Common Pleas
Case No. CV-441741

Judgment:

Affirmed

Date of Journalization:

Appearances:

For Plaintiff-Appellant:

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For Defendants-Appellees:

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JAMES J. SWEENEY, J.:

{¶ 1} Plaintiff-appellant, Dennis P. Tihansky, M.D., Ph.D. ("Tihansky"), challenges the denial of his Civ.R. 60(B)(5) motion for relief from the December 1, 2004 judgment that denied his first motion for relief from judgment. For the reasons that follow, we affirm.

{¶ 2} In 2001, Tihansky filed a legal malpractice action that was settled mid-trial in June 2002. Tihansky maintained that his attorneys settled the lawsuit without his authority and that the official transcript contained "falsifications of his trial testimony."

{¶ 3} Two years after the settlement, Tihansky filed a motion for relief from the settlement Journal Entry dated June 7, 2002. The trial court denied Tihansky's Civ.R. 60(B) motion on December 1, 2004.

{¶ 4} Tihansky asserts that he was not served with the December 1, 2004 decision until February 17, 2005.¹ Yet, Tihansky filed his notice of appeal from that decision on February 10, 2005, which was assigned Case No. 85961. This Court sua sponte dismissed that appeal as untimely by order dated February 14, 2005. Tihansky filed a motion for reconsideration, which this Court denied by

¹The trial court granted Tihansky's motion for order to clerk to serve the December 1, 2004 order on his attorneys.

order dated March 7, 2005. Tihansky did not appeal this Court's decision in Case No. 85961.

{¶ 5} On May 5, 2005, Tihansky filed a second Civ.R. 60(B) motion seeking to vacate the December 1, 2004 judgment that denied his initial motion for relief from the settlement judgment entry of 2002. The trial court denied that motion and this is the subject of the instant appeal.

{¶ 6} Tihansky's sole assignment of error states as follows:

{¶ 7} "I. The trial court abused its discretion in overruling appellant's Civil Rule 60(B) motion for relief from judgment without first holding an evidentiary hearing."

{¶ 8} A motion for relief from judgment cannot be used as a substitute for a timely appeal. *State ex rel. Bragg v. Seidner*, 92 Ohio St.3d 87, 2001-Ohio-152, quoting *Key v. Mitchell*, 81 Ohio St.3d 89, 90-91, 1998-Ohio-643; see, also, *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 245.

{¶ 9} Tihansky's first motion for relief from judgment sought to vacate the June 2002 settlement journal entry. The trial court denied the motion on December 1, 2004 and Tihansky attempted to appeal that judgment in Case No. 85961. Notwithstanding his claims to the contrary, this Court determined that the appeal was untimely. This remains the law of the case.

{¶ 10} Thereafter, Tihansky attempted to attack the December 1, 2004 judgment by filing a second Civ.R. 60(B) motion with the trial court, this time seeking to vacate the December 1, 2004 order for

failure to hold an evidentiary hearing. This, however, was an error that should have been raised on a direct appeal of the December 1, 2004 order. If the trial court had granted the second motion for relief on that basis, it would have allowed Tihansky to utilize a motion for relief as a substitute for a timely appeal contrary to law. Therefore, Tihansky's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR. P.J., and
KENNETH A. ROCCO, J., CONCUR.

JAMES J. SWEENEY
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. 112, Section 2(A)(1).