[Cite as *Lewis v. Brzozowski*, 2009-Ohio-5841.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93413

WINSTON T. LEWIS, ET AL.

PLAINTIFFS-APPELLANTS

vs.

ASHLEY L. BRZOZOWSKI, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-668431

BEFORE: Boyle, J., Rocco, P.J., and Dyke, J.

RELEASED: November 5, 2009

JOURNALIZED:

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MARY J. BOYLE, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the record from the lower court, the briefs, and the oral arguments of counsel.

{¶ 2} Plaintiffs-appellants, Winston and Rachel Lewis and Irene M. Papadelis, appeal the trial court's denial of their Civ.R. 60(B) motion. After reviewing the record and the arguments of the parties, we affirm.

{¶ 3} On April 23, 2005, appellants were in an automobile collision with defendant-appellee, Ashley Brzozowski. On April 10, 2007, appellants filed a complaint against defendants-appellees, Ashley Brzozowski and Grange Insurance Companies, alleging that Brzozowski caused the accident. On October 26, 2007, appellants voluntarily dismissed their case pursuant to Civ.R. 41(A).

{¶ 4} Appellants refiled their case on August 21, 2008. The first case management conference ("CMC") was scheduled for December 11, 2008, but Brzozowski had not been served by then. After Brzozowski was served, the court reset the CMC for March 23, 2009. According to appellants' Civ.R. 60(B) motion, the CMC was "to be heard by phone," and appellants' attorney was responsible for initiating the telephone call.

{¶ 5} On March 24, 2009, the trial court issued a judgment entry stating that the case was called for a CMC and that plaintiffs' counsel failed to appear.

The trial court rescheduled the CMC for April 20, 2009 at 8:45 a.m. and ordered that "should plaintiff fail to appear, sanctions including the possibility of dismissal, may be imposed."

{¶ 6} On April 21, 2009, the trial court issued a judgment entry stating that the case was called for CMC and that plaintiffs' counsel failed to appear. The court then dismissed the case without prejudice.

{¶ 7} Appellants moved to vacate the dismissal under Civ.R. 60(B) on May 8, 2009, which the trial court denied five days later.

{¶ 8} Appellants appeal this denial of their Civ.R. 60(B) motion. They raise the following assignment of error for our review:

{¶ 9} "The trial court erred in denying plaintiffs-appellants' Rule 60(B) motion to vacate the trial court's previous order dismissing plaintiff[s]-appellant[s'] case without prejudice when plaintiffs-appellants' trial counsel failed to appear for a scheduled case management conference constitutes mistake, inadvertence or excusable neglect under [Civ.R. 60(B)(1)] or based upon the special circumstances contemplated under [Civ.R. 60(B)(5)]."

{¶ 10} To prevail on a Civ.R. 60(B) motion for relief from judgment, the movant must submit operative facts which demonstrate that (1) the motion is timely made; (2) the party is entitled to relief under Civ.R. 60(B)(1)-(5); and (3) the party has a meritorious claim or defense. See *GTE Auto. Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146. The trial court has discretion in determining whether the motion will be granted, and in the absence of a clear

showing of abuse of discretion, the decision of the trial court will not be reversed. If the material presented by the movant in support of his or her motion contains no operative facts or limited facts and conclusions of law, it will not be an abuse of discretion for the trial court to overrule the motion. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97.

{¶ 11} Upon review of the appellants' motion and affidavit, it is apparent that they have not alleged any operative facts under Civ.R. 60(B)(1) or Civ.R. 60(B)(5) demonstrating that they are entitled to relief from judgment. In their motion, they state that after service on a remaining defendant was accomplished, "the CMC was reset to be heard by phone on March 23, 2009 at 8:46 a.m. and was to be initiated by plaintiffs' counsel. Plaintiffs' counsel was unable to comply, inasmuch as on the same date, March 23, 2009, he was scheduled to appear in the United States Bankruptcy Court at 9:[00] a.m. in a case designated as number 09-11011, Daniel & Linda Leek, see Exhibit 'A' attached and at 9:30 a.m. in a case number 09-11022, Minnie Brown, see Exhibit 'B' attached."

{¶ 12} Further, in their Civ.R. 60(B) motion, they explain that "[t]hereafter, the court reset the CMC for April 20, 2009 at 8:45 a.m. On that date and time Plaintiff's [sic] counsel did <u>not</u> appear due to an oversight in his scheduling." (Emphasis in original.) Later, they state, "plaintiff's [sic] counsel again acknowledges that he missed [the] April 20th CMC due to a scheduling oversight." They assert that plaintiffs' counsel's failure to attend the April 20

conference "was due to 'excusable neglect' under Civ.R. 60(b)(1), or at the very least, to the extraordinary circumstances contemplated in Civ.R. 60(B)(5)."

{¶ 13} We cannot find that the trial court abused its discretion when it dismissed the case. Plaintiffs' counsel acknowledged that he was supposed to initiate the March 23 CMC by telephone. Although he explained that he was in bankruptcy court, he offered no reason why he did not inform the common pleas court that he had a scheduling conflict or request a continuance prior to the CMC. He then missed the second CMC almost a month later due to a "scheduling oversight," but again, he did not assert any operative facts explaining to the trial court how his scheduling oversight amounted to "excusable neglect" or "extraordinary circumstances."

{¶ 14} Civ.R. 41(B)(1) provides that "[w]here the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim." It is within the trial court's sound discretion to dismiss a complaint for failure to prosecute. *Fischer v. Greater Cleveland Regional Transit Auth.* (Dec. 19, 1991), 8th Dist. No. 59694; *Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 91.

{¶ 15} After the plaintiffs missed the first CMC, the trial court gave them notice, as required by Civ.R. 41(B)(1), that their case could be dismissed if they missed the second CMC. The trial court then, in its sound discretion, did just that. Under the facts of this case, we find no abuse of discretion.

Judgment affirmed.

It is ordered that appellees recover from appellants 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 common pleas court 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.

MARY J. BOYLE, JUDGE

KENNETH A. ROCCO, P.J., and
ANN DYKE, J., CONCUR