

[Cite as *Grange Mut. Cas. Co. v. Palladino*, 2009-Ohio-6472.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93584

GRANGE MUTUAL CASUALTY CO., ET AL.

PLAINTIFFS-APPELLEES

vs.

JERRY PALLADINO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-672341

BEFORE: Cooney, A.J., Boyle, J., and Sweeney, J.

RELEASED: December 10, 2009

JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1.

{¶ 2} Defendant-appellant, Jerry Palladino (“Palladino”), appeals the trial court’s denial of his motion for relief from judgment. Finding no merit to the appeal, we affirm.

{¶ 3} In October 2008, plaintiff-appellee, Grange Mutual Casualty Co. (“Grange”) and plaintiff, Revere Builders, Inc. (“Revere”), (collectively referred to as “plaintiffs”), filed suit against Palladino seeking \$7,884.86 in damages.¹ Plaintiffs alleged that Palladino stole Revere’s personal property (construction equipment). Grange, as Revere’s insurer, sought to recover Revere’s deductible and the insurance proceeds it paid to Revere as a result of the theft. On October 8, 2008, the plaintiffs’ summons and complaint was sent by certified mail to Palladino at 5953 Richmond Road, Solon, Ohio. Service of this summons and complaint was returned to the clerk of court on November 17, 2008 as “unclaimed.” Subsequent service of the summons and complaint was sent by regular mail to Palladino at the same address on

¹Revere is not a party to this appeal.

November 25, 2008. Service by regular mail was not returned to the clerk of court.

{¶ 4} Since Palladino failed to answer the complaint, plaintiffs moved for default judgment in February 2009. The trial court granted plaintiffs' motion in March 2009. In May 2009, Palladino moved to vacate the default judgment under Civ.R. 60(B), arguing that he was not served with notice of the lawsuit at his current address in North Carolina and that he has meritorious defenses to plaintiffs' claims. The trial court denied Palladino's motion in June 2009.

{¶ 5} It is from this order that Palladino appeals, raising one assignment of error, in which he argues that the trial court erred and abused its discretion when it denied his motion for relief from judgment ("Civ.R. 60(B) motion").

{¶ 6} The decision whether to grant or deny a motion for relief from judgment under Civ.R. 60(B) is a matter within the sound discretion of the trial court and the court's ruling will not be reversed absent an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 514 N.E.2d 1122. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450

N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 7} To prevail on his Civ.R. 60(B) motion, Palladino “must demonstrate that: (1) he has a meritorious defense or claim to present if relief is granted; (2) he is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) his 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 judgment. See *GTE Automatic Elec. v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus. If any one of these three requirements is not met, the trial court should deny the motion. *Svoboda v. Brunswick* (1983), 6 Ohio St.3d 348, 351, 453 N.E.2d 648; *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20, 520 N.E.2d 564.

{¶ 8} We note that these requirements must be shown by “operative facts” which demonstrate the movant’s entitlement to relief. *Rose Chevrolet* at 21; see, also, *Coleman v. Cleveland School Dist. Bd. of Edn.*, Cuyahoga App. Nos. 84274 and 84505, 2004-Ohio-5854; *Black v. Pheils*, Wood App. No. WD-03-045, 2004-Ohio-4270. Although the movant is not required to submit evidentiary material in support of the motion, the movant must do more than make bare allegations of entitlement to relief. *Kay v. Marc Glassman, Inc.*,

76 Ohio St.3d 18, 20, 1996-Ohio-430, 665 N.E.2d 1102. “Moreover, if the material submitted by the movant does not provide operative facts which demonstrate that relief is warranted, the court may deny the motion without conducting a hearing.” *Black* at ¶68; *Kay* at 19.

{¶ 9} In the instant case, Palladino argues that he has meritorious defenses to plaintiffs’ claims and that his Civ.R. 60(B) motion was timely because it was made approximately ten weeks after the entry of default judgment by the court.² He also claims that his Civ.R. 60(B) motion should have been granted under Civ.R. 60(B)(1) and (5), which provide in pertinent part:

“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; * * * (5) any other reason justifying relief from the judgment.”

{¶ 10} Grange, however, argues the trial court did not abuse its discretion in denying Palladino’s Civ.R. 60(B) motion because he failed to satisfy the first and second prongs of the *GTE* test. We agree.

{¶ 11} In support of his “meritorious defenses” argument under the first prong of the *GTE* test, Palladino relies on paragraph five of his supporting affidavit, in which he stated: “I have meritorious defenses to the claims

²Grange concedes that Palladino satisfied the timeliness prong of the *GTE* test.

alleged in Plaintiff's Complaint." However, other than this bare allegation of meritorious defenses, Palladino fails to allege any operative facts in support of any defense.

{¶ 12} He further fails to demonstrate that he was entitled to relief under Civ.R. 60(B)(1) and (5) as required by the second prong of the *GTE* test.

In his affidavit filed with his Civ.R. 60(B) motion, he claimed that he "was never served with process of this lawsuit." He further stated that he has lived in North Carolina since September 15, 2008.³ A review of the docket reveals that the service sent by regular mail in November 2008 was never returned. The court could reasonably conclude that he received the summons and complaint sent by regular mail to the Solon address because it was not returned to the clerk of court. Thus, Palladino failed to demonstrate any showing of "mistake, inadvertence, surprise or excusable neglect" under Civ.R. 60(B)(1).

{¶ 13} Likewise, Palladino failed to allege operative facts to suggest that he is entitled to relief under Civ.R. 60(B)(5), which permits relief from judgment for "any other reason justifying relief from the judgment." Civ.R. 60(B)(5) is intended as a catch-all provision reflecting the inherent power of a

³ Palladino's April 4, 2009 affidavit actually states that he moved to North Carolina on September 15, 2009. It contains no statement about any forwarding order submitted to the post office or the means of receiving his mail from his prior address.

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 more specific provisions of Civ.R. 60(B). *Smith v. Smith*, Cuyahoga App. No. 83275, 2004-Ohio-5589, ¶16, citing *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, 448 N.E.2d 1365, paragraphs one and two of the syllabus. “Relief on this ground is to be granted only in extraordinary situations, where the interests of justice call for it.” *Salem v. Salem* (1988), 61 Ohio App.3d 243, 245-246, 572 N.E.2d 726. Here, Palladino has not demonstrated any “extraordinary circumstances” in this case to warrant the use of Civ.R. 60(B)(5).

{¶ 14} Because Palladino failed to allege operative facts demonstrating that he has a meritorious defense to present if relief is granted and failed to show he is entitled to relief under Civ.R. 60(B)(1) and (5), we find that he has not met the first and second prongs of the *GTE* test. Thus, the trial court did not abuse its discretion in denying his motion.

{¶ 15} Accordingly, the sole assignment of error is overruled.

{¶ 16} Judgment is affirmed.

It is ordered that appellee recover of appellant 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.

COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., and
JAMES J. SWEENEY, J., CONCUR