[Cite as *Mitchell v. W. Res. Area Agency on Aging*, 2009-Ohio-6632.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91546

LUANN MITCHELL, GUARDIAN FOR BERTHA WASHINGTON

PLAINTIFF-APPELLANT

vs.

WESTERN RESERVE AREA AGENCY ON AGING

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Probate Court Division
Case No. 2002 ADV0059296

BEFORE: McMonagle, P.J., Stewart, J., and Dyke, J.
RELEASED: December 17, 2009

JOURNALIZED: December 17, 2009

FOR APPELLANT

Luann Mitchell, pro se
P.O. Box 08531
Cleveland, OH 44108

ATTORNEYS FOR APPELLEE

Dale A. Nowak
Gerald B. Chattman
Buckingham, Doolittle & Burroughs
1375 East Ninth Street, Suite 1700
One Cleveland Center
Cleveland, OH 44114

ON RECONSIDERATION[1]

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Plaintiff-appellant, Luann Mitchell, guardian for Bertha Washington,[2] has filed a notice of appeal with four May 1, 2008 judgment entries from the probate court attached. Relevant to our consideration is the judgment denying Mitchell's motion for relief from judgment.

BACKGROUND

{¶ 2} The record before us, as established during years of protracted litigation, demonstrates the following. In 1999, Mitchell, an Ohio attorney,[3] was appointed by probate court as guardian of the person and estate of Washington. At the time Mitchell was appointed, Washington was in her 90's, lived at home, and was enrolled in Ohio's "PASSPORT" program. Defendant-appellee, the Western Reserve Area Agency on Aging (the "Agency"), was the company responsible for administering the PASSPORT program. According to the program's regulations, Washington was to be

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[1]The original announcement of decision, *Mitchell v. W. Res. Area Agency on Aging*, 2009-Ohio-5477, released October 15, 2009, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See App.R. 22(E); see, also, S.C.Prac.R. II, Section 2(A)(1).

[2]Mitchell was removed as guardian of Washington's estate in October 2003, but remained guardian of Washington's person until her death in November 2003.

[3]Mitchell's license was suspended for 18 months (with the final 12 months suspended on conditions) in April 2008 because of her conduct in this case. *Cleveland Bar Assn. v. Mitchell*, 118 Ohio St.3d 98, 2008-Ohio-1822, 886 N.E.2d 222.

afforded health-care benefits only while she resided at home; the benefits would terminate if she became confined to a nursing home or rehabilitation facility.

{¶ 3} Beginning in November 1999, Washington had to reside in a rehabilitation facility. In mid-December 1999, the Agency terminated her enrollment in PASSPORT. Mitchell filed an appeal of the Agency's termination; a state hearing officer subsequently determined that the Agency had lawfully terminated Washington from the program. The officer noted, however, that when a recipient of the program files a timely appeal, the Agency could not terminate her benefits until the state officer's decision.

{¶ 4} Mitchell then initiated another administrative appeal, again challenging Washington's termination in the program, and also asserting a new claim for reimbursement for benefits during the pendency of the appeal. Washington's termination in the program was upheld, but the Agency was ordered to reimburse her for health-care expenses she paid from February 5, 2000 (the date she was discharged from the rehabilitation facility) through March 28, 2000 (the date of the hearing officer's decision in the initial appeal).

{¶ 5} Beginning in July 2000, the Agency attempted to obtain documentation from Mitchell regarding Washington's health-care expenses

for the time covered in the reimbursement order. Its attempts were unsuccessful.

{¶ 6} In April 2001, Mitchell filed an ex-parte motion with the probate court seeking to have the court enforce the reimbursement order. Mitchell claimed that Washington had $31,527 in reimbursable expenses. During a hearing, Mitchell produced a one-page document listing expenditures for Washington's health care in the amount of $29,577. She did not provide documentation to corroborate the expenditures, or even names of the health care providers, and the one-page document was rejected as insufficient by the Ohio Department of Aging, the agency responsible for approving reimbursement. Further requests by the Agency to Mitchell for appropriate documentation were unsuccessful. The probate court dismissed the action for lack of jurisdiction in January 2002. Mitchell did not appeal.

{¶ 7} In February 2002, Mitchell filed a complaint for declaratory judgment in probate court, again claiming $31,527 in reimbursable expenses on Washington's behalf. Attempts were again made by the Agency to obtain documentation from Mitchell in regard to Washington's expenses, but the attempts were again unsuccessful.

{¶ 8} In June 2002, while the declaratory judgment action was still pending in probate court, Mitchell filed an "emergency proceeding" in the General Division of the Cuyahoga County Common Pleas Court, seeking an

order reducing Washington's claim of $31,527 of reimbursable expenses to judgment. Two days later, Mitchell voluntarily dismissed the declaratory judgment action which had been pending in probate court. The general division trial court dismissed the "emergency proceeding" after a hearing.

{¶ 9} In July 2002, the Agency filed a motion in probate court for attorney fees and sanctions. The motion was denied in October 2003, without a hearing. Also denied was an application made by Mitchell for guardian and attorney fees for a collection action she had successfully litigated on behalf of Washington's estate.[4] The Agency and Mitchell both appealed, and this court reversed both judgments. *Mitchell v. W. Res. Area Agency on Aging*, Cuyahoga App. Nos. 83837 and 83877, 2004-Ohio-4353.

{¶ 10} A hearing on the Agency's motion was had on remand, and the Agency was awarded $42,815.79 in attorney fees and expenses as sanctions against Mitchell. Mitchell's application for guardian and attorney fees was granted, but her request for $5,000 was reduced to $1,525. Mitchell appealed, and this court reversed the $42,815.79 award to the Agency, but affirmed the $1,525 award to her. *Mitchell v. W. Res. Area Agency on Aging*, Cuyahoga App. No. 86708, 2006-Ohio-2475.

{¶ 11} On remand again, a hearing was held on November 9, 2006. Mitchell failed to appear for the hearing, and after the court determined that

[4]*Mitchell v. Anderson*, Probate Court Case No. 2000 ADV0037282.

notice of the hearing had been sent to her, the Agency presented evidence. In an entry dated November 22, 2006, the court awarded judgment in favor of the Agency and against Mitchell in the amount of $32,154.79. Mitchell appealed to this court, but the action was dismissed because of her failure to transmit the record. *Mitchell v. W. Res. Area Agency on Aging* (Feb. 16, 2007), Cuyahoga App. No. 89206. The Agency thereafter attempted to collect its judgment from Mitchell; Mitchell was found in contempt of court because she failed to provide discovery.

MOTION FOR RELIEF FROM JUDGMENT

{¶ 12} On November 26, 2007, Mitchell filed a motion for relief from the November 22, 2006 judgment, in which she contended that she never received notice of the November 9, 2006 hearing. A hearing was held on the motion on April 23, 2008, and Mitchell testified to the following: (1) she was living in Florida in November 2006; (2) she did not inform the court of a forwarding address in Florida because she did not have a "permanent" residence there; rather, she lived in various places, either house-sitting for people or temporarily staying with friends; (3) she maintained a post-office box in Cleveland while she was in Florida, and allowed two people (one of whose first name she did not even know) to have access to the box. She did not request either person to forward her mail to her–sometimes they were "gracious enough to send it," but it was "not something done on a regular or

consistent basis"; (4) she filed her motion for relief when she did because she needed time "to shop to find an attorney who [was] willing to volunteer their time and secretarial assistance to get something done on [her] behalf"; and (5) she did not file the motion herself, even though she was a licensed attorney at the time, because she was "not going to file any motions on [her] behalf when it comes to you [i.e., the Agency's attorney]."

{¶ 13} The court denied Mitchell's motion for relief and this appealed followed.

{¶ 14} We review Civ.R. 60(B) motions for relief from judgment upon an abuse of discretion standard. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20, 520 N.E.2d 564. "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.

{¶ 15} Civ.R. 60(B) allows a court to grant relief from a final judgment, order, or proceeding for the following reasons:

{¶ 16} "(1) mistake, inadvertence, surprise or excusable neglect;

{¶ 17} "(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial * * *;

{¶ 18} "(3) fraud * * *, misrepresentation or other misconduct of an adverse party;

{¶ 19} "(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

{¶ 20} "(5) any other reason justifying relief from judgment."

{¶ 21} The rule also provides that "[t]he 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." Civ.R. 60(B).

{¶ 22} To prevail on a motion for relief from judgment, the movant must demonstrate that: "(1) the party has a meritorious defense or claim to present if the relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1)-(5); and (3) the motion is made within a reasonable time * * *." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150, 351 N.E.2d 113. If any of these requirements are not met, the trial court must overrule the Civ.R. 60(B) motion. *Rose Chevrolet* at 20.

{¶ 23} The trial court denied the motion because it found that it was not made within a reasonable period of time as required by Civ.R. 60(B). Upon review, we hold that the trial court did not abuse its discretion by denying the motion.

{¶ 24} Mitchell did not state in her motion upon which of the enumerated grounds under Civ.R. 60(B)(1)-(5) it was based, but her attorney argued excusable neglect (Civ.R. 60(B)(1)) at the hearing. Motions filed pursuant to Civ.R. 60(B)(1), (2) or (3) must not only be filed within one year of the judgment, but also within a reasonable time, and courts have found Civ.R. 60(B) motions untimely even though they were filed within one year of judgment. See *Walnut Equip. Leasing Co., Inc. v. Saah* (Feb. 21, 2001), Lorain App. No. 00CA007600*; Hughes v. Ohio Energy Cincinnati, Inc.* (June 29, 2001), Greene App. No. 2001-CA-13; *Stickler v. Ed Breuer Co.* (Feb. 24, 2000), Cuyahoga App. Nos. 75176, 75192 and 75206; and *Morgan v. Dye* (Dec. 10, 1998), Franklin App. No. 98AP-414, citing *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 316 N.E.2d 469.

{¶ 25} In this case, Mitchell's motion was filed over a year from the date of the judgment from which she sought relief. Thus, to the extent that Mitchell's motion was based on Civ.R. 60 (B)(1-3), it was untimely. Moreover, to the extent that the motion was based on Civ.R. 60(B)(4) or (5), it was also untimely. The record indicates that Mitchell was aware of the judgment against her soon after it was entered on November 22, 2006, because she filed a notice of appeal on December 22, 2006 (the case was dismissed in February 2007 because she failed to transmit the record). Mitchell's delay in filing the motion for relief because she had to find an

attorney who would volunteer his time because she did not want to deal with the Agency's attorney did not qualify as a ground for granting relief. In particular, the record demonstrates that at various times in this extensive litigation Mitchell acted without other counsel (in instances that personally implicated her) against the same attorney, even as recent as when she filed her December 22 notice of appeal.

{¶ 26} Moreover, Mitchell's claim that she did not receive notice of the hearing date did not qualify as a ground for relief. It goes without citation that attorneys (and pro se parties) are obligated to inform a court before which they have a case or cases pending of any change of address, and keep themselves apprised of the proceedings. Mitchell did neither. She moved to Florida without providing the court a forwarding address, and did not have a system in place for receiving her mail from her Cleveland post-office box. ("If the party or her attorney could have controlled or guarded against the happening of the particular failure at issue, the neglect is not excusable." *Vanest v. Pillsbury Co.* (1997), 124 Ohio App.3d 525, 536, 706 N.E.2d 825.)

{¶ 27} Finally, Mitchell did not demonstrate that she had a meritorious defense or claim to present if relief was granted. Mitchell's statement that "she may have been able to present evidence to the court that the amount that the court ultimately awarded on November 9th was incorrect," was insufficient to demonstrate a meritorious defense.

{¶ 28} In light of the above, the first assignment of error is overruled.

NOVEMBER 22, 2006 JUDGMENT

{¶ 29} For her second assignment of error, Mitchell argues that the trial court failed to follow the instructions of this court upon remand in 2006, which resulted in the November 9 hearing and November 22 judgment. We are without jurisdiction to consider the argument.

{¶ 30} As already mentioned, Mitchell filed an appeal of the November 22 judgment, but it was dismissed because she failed to transmit the trial court record. *Mitchell*, Cuyahoga App. No. 89206. Mitchell did not appeal the dismissal to the Ohio Supreme Court. As such, her argument in this appeal relative to the November 22 judgment is untimely and we are without jurisdiction to consider it. Accordingly, the second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

Based upon the briefs in this appeal and after the hearing on appellee's motion for sanctions, we reconsider and find that there were no reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

MELODY J. STEWART, J., and
ANN DYKE, J., CONCUR