[Cite as *CB Group, Inc. v. Starboard Hospitality, L.L.C.*, 2009-Ohio-6652.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93387

CB GROUP, INC.

PLAINTIFF-APPELLEE

vs.

STARBOARD HOSPITALITY, L.L.C., ET AL.

DEFENDANTS

(Appeal By: Quirino S. DiPaolo, Jr.)

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-639473

BEFORE: Dyke, J., Kilbane, P.J., and Celebrezze, J.

RELEASED: December 17, 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 courts announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

{¶ 1} This appeal is before the Court on the accelerated docket pursuant to App.R. 11.1 and Loc.App.R. 11.1.

{¶ 2} Defendant-appellant, Quirino S. DiPaolo, Jr. ("DiPaolo"), appeals the trial court's denial of his motion to vacate judgment. For the reasons provided below, we reverse and remand for proceedings consistent with this opinion.

{¶ 3} On October 23, 2007, plaintiff-appellee, CB Group, Inc. ("plaintiff"), filed the instant action against defendants, Starboard Hospitality, L.L.C. ("Starboard"), and National Contractors and DiPaolo (collectively "defendants"), alleging breach of contract and other similar causes of action. On October 26, 2007, DiPaolo received the complaint.

{¶ 4} Starboard filed a timely answer and cross-claim to the complaint. Steven J. Miller, Esquire, on behalf of National Contractors and DiPaolo, filed two motions for continuances. The first, filed on December 3, 2007, requested an extension of time to file a response to the complaint. The second was filed on December 19, 2007 and requested a continuance to respond to Starboard's cross-claim. In each motion, Miller stated, "By this filing, undersigned counsel is not entering an appearance on behalf of [National Contractors and DiPaolo], but merely presenting this Motion to protect and preserve their right and opportunity to respond to the Complaint." Miller further provided beneath his signature, the following statement: "**On Behalf of But Not as Counsel for Defendants National Contractors and Quirino DiPaolo, Jr.**" The trial court granted both

continuances, extending the time for filing a response to the complaint until January 2, 2008 and the cross-claim until January 16, 2008. Despite these extensions, no pleadings were filed on behalf of DiPaolo in the matter.

{¶ 5} As a result, plaintiff filed a motion for default judgment on February 21, 2008 as to National Contractors and DiPaolo only. After conducting a hearing, the trial court granted plaintiff default judgment against National Contractors and DiPaolo in a judgment entry filed on February 29, 2008. On March 25, 2008, plaintiff voluntarily dismissed all claims against the remaining defendants in the case.

{¶ 6} DiPaolo then filed a motion to vacate the judgment on February 26, 2009, arguing that he never received any notice regarding the extensions of time to file the responsive pleading or notice of the default judgment hearing or damages hearing. He further maintained that he attempted to contact his attorney, Robert D. Schwartz, regarding the matter, who informed him he was working on it and never contacted him again. The trial court denied DiPaolo's motion on May 1, 2009.

{¶ 7} DiPaolo now appeals and presents one assignment of error for our review. His sole assignment states:

{¶ 8} "The trial court abused its discretion in denying appellant's motion for relief from judgment under Civ.R. 60(B) where the docket shows that appellant did not receive correct notice of the hearing on appellee's motion for default

judgment pursuant to Civ.R. 55 and where appellant presented affidavit evidence to show excusable neglect in not filing a written response to the motion for default judgment."

{¶ 9} In this case, DiPaolo sought relief from the trial court's default judgment under Civ.R. 60(B)(5). Civ.R. 55(B) states that "[i]f a judgment by default has been entered, the court may set it aside in accordance with Rule 60(B)." "Where timely relief is sought from a default judgment and the movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph three of the syllabus. After all, the purpose of Civ.R. 60 is to afford "relief in the interest of justice." *Blasco v. Mislik* (1982), 69 Ohio St.2d 684, 687-688, 433 N.E.2d 612.

{¶ 10} As an initial matter, we note that this court reviews the award or denial of Civ.R. 60(B) motions in accordance with an abuse-of-discretion standard. *Associated Estates Corp. v. Fellows* (1983), 11 Ohio App.3d 112, 117, 463 N.E.2d 417; *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 12, 371 N.E.2d 214. An abuse of discretion implies more than an error of law or judgment; it suggests that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 137, 566

N.E.2d 1181; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 11} Civ.R. 60(B) provides in relevant part:

{¶ 12} "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; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud * * * misrepresentation or other misconduct of an adverse party; (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 (5) any other reason justifying relief from the judgment. The 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."

{¶ 13} To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate the following:

{¶ 14} "(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." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus.

{¶ 15} All three of the elements enumerated in *GTE*, supra, must be established by the movant. If not, the trial court is required to deny the motion for relief from judgment. *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 1996-Ohio-54, 666 N.E.2d 1134.

{¶ 16} With regard to the first element of the *GTE* test, we find DiPaolo has a meritorious defense or claim. He maintains that the instant action arose from a contract entered into between plaintiff and defendant National Contractors. He further maintains that the complaint fails to present any facts or allegations that DiPaolo entered the contract in his individual capacity such that plaintiff should be permitted to "pierce the corporate veil," thereby disregarding the corporate entity and imposing individual liability upon DiPaolo.

{¶ 17} "A defense is meritorious if it is not a sham and when, if true, it states a defense in part or in whole to the cause of action set forth. *Brenner v. Shore* (1973), 34 Ohio App.2d 209, 215. The movant need not establish that his defense will ultimately be successful. *Morgan Adhesives Co. v. Sonicor Instrument Corp.* (1995), 107 Ohio App.3d 327, 334." *Rowe v. Metro. Property and Cas. Ins. Co.* (Apr. 29, 1999), Cuyahoga App. No. 73857.

{¶ 18} Here, DiPaolo presented a defense that is reasonable. Because it is irrelevant whether he can win, we find his defense meritorious under the first prong of the *GTE* test.

{¶ 19} Next, we disagree with the trial court, finding that DiPaolo has met the second part of the *GTE* test and is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5). In this regard, DiPaolo contends that attorney Schwartz or Miller's inactions were "excusable neglect" for purposes of subsection of Civ.R. 60(B)(1). DiPaolo argues that he was the victim of gross neglect of attorneys who abandoned his representation. Based on this argument, we find subsection Civ.R. 60(B)(5) more appropriate and reverse and remand based upon this subsection rather than (B)(1).

{¶ 20} Generally, "the neglect of a party's attorney will be imputed to the party for purposes of Civ.R. 60(B)(1)." *GTE Automatic Elec.*, supra at 152. In reaching this conclusion, courts have reasoned that the party, having "'voluntarily chos[en] this attorney as his representative in the action, * * * cannot * * * avoid the consequences of the acts or omissions of this freely selected agent.'" Id. Fault, however, is not automatically imputed when an attorney neglects his client's case and misleads his client to believe that his interests are being properly handled. *Whitt v. Bennett* (1992), 82 Ohio App.3d 792, 798, 613 N.E.2d 667.

{¶ 21} An attorney's failure to appear and represent his client is not an "excusable neglect" ground under Civ.R. 60(B)(1). In *Whitt*, the court explained that "excusable neglect," as used in Civ.R. 60(B)(1), are matters that concern simple lapses and technical failures. Id. at 797. Matters of the extraordinary nature are more accurately under the purview of Civ.R. 60(B)(5), which permits relief "for any other reasons justifying relief from judgment." Id. In *Whitt*, the defendants established through affidavits that their attorney abandoned his representation of them by failing to comply with an order compelling discovery even though he had the discovery materials in his possession and failing to attend a hearing on the motion to dismiss for failure to comply with the discovery order. Id. at 795-796. The court determined that such actions constituted "inexcusable neglect" and not "excusable neglect," thereby taking the motion out of Civ.R. 60(B)(1) and entitling defendants to relief under section Civ.R. 60(B)(5). Id. at 797. This court has adopted this rule in a number of cases. See *Stickler v. Ed Breuer Co.* (Feb. 24, 2000), Cuyahoga App. Nos. 75176, 75192, and 75206; *Rowes*, supra; *Hewitt v. Hewitt* (Nov. 5, 1998), Cuyahoga App. Nos. 71098 and 73448.

{¶ 22} In this case, DiPaolo demonstrated through his affidavit, which was attached to his motion to vacate judgment, that his attorney Schwartz, or in the least attorney Miller, abandoned their representation of him. DiPaolo averred that he believed he was represented by Schwartz, an attorney associated with

attorney Miller's law firm. DiPaolo had conversations with attorney Schwartz about the status of his case, and he instructed DiPaolo to "let the matter remain in the courts." DiPaolo further averred that, other than the summons and complaint, he never received notices from anyone regarding deadlines to file responsive pleadings or notices of hearings for default judgment. Moreover, DiPaolo stated that his attorneys never notified him of the consequences of failing to respond to the complaint. Additionally, DiPaolo averred that he demanded copies of his files, but never received these documents. At some point in time, Schwartz moved out of attorney Miller's office and never made DiPaolo aware of his new address.

{¶ 23} The two motions for extensions of time filed by attorney Miller support the conclusion that attorneys Miller's and Schwartz's representations amounted to "inexcusable neglect." In the least, attorney Miller was aware that a problem regarding representation of DiPaolo existed, and nevertheless, failed to resolve this issue before abandoning DiPaolo.

{¶ 24} In the motions for extensions, Miller stated that "By this filing, undersigned counsel is not entering an appearance on behalf of [National Contractors and DiPaolo], but merely presenting this Motion to protect and preserve their right and opportunity to respond to the Complaint." Miller further provided beneath his signature, the following statement: "**On Behalf of But Not as Counsel for Defendants National Contractors and Quirino DiPaolo, Jr.**"

{¶ 25} By filing these motions, Miller initially assumed a limited role of responsibility. This limited role, however, was short lived, and he made no other attempts to protect DiPaolo's interest. Furthermore, Miller never formally dissolved his assumed role in the case.

{¶ 26} In light of the foregoing evidence, both Miller's and Schwartz's actions constitute "inexcusable neglect" and not "excusable neglect" as utilized in Civ.R. 60(B). Such matters are of an extraordinary nature and therefore within the purview of Civ.R. 60(B)(5). Therefore, we find DiPaolo has satisfied the second prong of the *GTE* test.

{¶ 27} Finally, we find that DiPaolo's motion to vacate was timely. The judgment entry from the court was filed on February 29, 2008. Appellant filed his motion to vacate the judgment on February 26, 2009, less than one year from judgment. Therefore, the motion was timely filed under any of the grounds of relief listed in Civ.R. 60(B).

{¶ 28} Accordingly, we conclude that DiPaolo satisfied the three prongs of the *GTE* test, including the "inexcusable neglect" standard. Accordingly, we reverse the trial court's ruling denying DiPaolo relief from judgment and remand for proceedings consistent with this opinion.

{¶ 29} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellees his costs herein.

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.

ANN DYKE, JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS
MARY EILEEN KILBANE, P.J., DISSENTS. (SEE ATTACHED DISSENTING OPINION.)

MARY EILEEN KILBANE, P.J., DISSENTING:

{¶ 30} I respectfully dissent from the majority opinion that concluded that the trial court abused its discretion in denying DiPaolo's Civ.R. 60(B) motion to vacate the judgment against him. I conclude that DiPaolo failed to establish that he was entitled to relief based on the criteria outlined in Civ.R. 60(B)(1) through (5). Therefore, I would affirm.

{¶ 31} The majority correctly reasons that the failure to file an answer, coupled with the failure to appear for a scheduled default hearing, amounts to inexcusable neglect, which is properly addressed pursuant to Civ.R. 60(B)(5), a catch-all provision, which affords relief from judgment for any other appropriate reason.

{¶ 32} In support of its contention, the majority relies on *Whitt v. Bennett* (1992), 82 Ohio App.3d 792, 613 N.E.2d 667, for the proposition that an attorney's unprofessional conduct should not always be imputed to the client as a bar to relief from judgment. However, this court previously analyzed the applicability of *Whitt* in a factually similar case, *Jo-Rene Corp. v. Jastrzebski*, Cuyahoga App. Nos. 79933, 80310, 2002-Ohio-1550. In *Jo-Rene Corp.*, this court discussed *Whitt* and determined that, although defense counsel's representation may have been deficient, relief from judgment was not warranted pursuant to Civ.R. 60(B)(5), because the defendant had constructive notice of the hearing through the trial court's docket.

{¶ 33} Further, while DiPaolo maintains that it was his attorney's misconduct that resulted in default judgment being rendered against him, a review of the docket indicates that no attorney ever filed a notice of appearance on behalf of DiPaolo. DiPaolo did have an attorney file two requests for extensions, but the attorney specifically limited his representation to those two motions.

{¶ 34} Although DiPaolo was acting pro se and may not have realized the consequences of failing to file an answer or failing to appear for the default hearing, this court has consistently held pro se litigants to the same

standards as litigants who are represented by counsel. *Rhoades v. Greater Cleveland Regional Transit Auth.*, Cuyahoga App. No. 92024, 2009-Ohio-2483, at ¶10, citing *Tisdale v. Javitch, Block & Rathbone*, Cuyahoga App. No. 83119, 2003-Ohio-6883. Parties have the duty to reference the court's docket and keep themselves apprised of the progress of their case. *Jo-Rene Corp.*, supra. The default hearing was properly listed on the docket; therefore, DiPaolo was on constructive notice of the hearing.

{¶ 35} I cannot conclude that the trial court abused its discretion in denying DiPaolo's motion to vacate the judgment against him. I would affirm the decision of the trial court.