

[Cite as *Render v. Belle*, 2010-Ohio-2344.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93181

KENNETH J. RENDER

PLAINTIFF-APPELLANT

vs.

SHERRI E. BELLE, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-631227

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

RELEASED: May 27, 2010

**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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

MARY EILEEN KILBANE, P.J.:

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

{¶ 2} Appellant, Kenneth Render (“Render”), appeals the judgment of the trial court that denied his Civ.R. 60(B) motion to vacate its previous order dismissing his claims with prejudice. Render argues that his counsel’s failures in the trial court were the result of mistake, inadvertence, or excusable neglect under Civ.R. 60(B)(1), or in the alternative, that they were the result of gross misconduct that should not be imputed to him under Civ.R. 60(B)(5). After reviewing the facts and law, we agree and reverse the decision of the trial court.

Factual and Procedural History

{¶ 3} On July 30, 2007, Render filed suit in the Cuyahoga County Court of Common Pleas seeking damages for injuries related to a motor vehicle accident. Render asserts that his counsel failed to communicate with him, engage in discovery, and to appear at any court hearings, including the case management conference and settlement conference, despite receiving notice.

{¶ 4} On March 12, 2008, the trial court entered an order dismissing Render’s case with prejudice based upon his counsel’s failure to participate in the case.

{¶ 5} On March 9, 2009, Render, through new counsel, filed a motion requesting that the trial court vacate its previous order of dismissal with prejudice.

{¶ 6} On March 30, 2009, the trial court denied this motion.

{¶ 7} On April 22, 2009, Render filed the instant appeal. Render's sole assignment of error states:

“The trial court erred in denying plaintiff-appellant’s Rule 60(B) motion to vacate the trial court’s previous order dismissing plaintiff-appellant’s case with prejudice when plaintiff-appellant’s former counsel failed to appear at the scheduled case management conference and settlement conference and failure to file a response to defendants-appellees’ motion to compel discovery responses which constituted mistake, inadvertence or excusable neglect under Ohio R. Civ. P. 60(B)(1) or gross misconduct which should not be imputed to plaintiff-appellant under Ohio R. Civ. P. 60(B)(5).”

Standard of Review

{¶ 8} We review appeals from the award or denial of Civ.R. 60(B) motions under an abuse of discretion standard. *Associated Estates Corp. v. Fellows* (1983), 11 Ohio App.3d 112, 463 N.E.2d 417; *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 371 N.E.2d 214. An abuse of discretion connotes an attitude by the court that is arbitrary, unconscionable, or unreasonable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 9} Civ.R. 60(B) states 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. 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. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.”

{¶ 10} In order to prevail on a motion for relief from judgment under Civ.R. 60(B), the movant must demonstrate: “(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 for 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.

{¶ 11} In its March 30, 2009 journal entry denying Render’s Civ.R. 60(B) motion, the trial court engaged in the three-prong test set forth in *GTE*. In doing so, it acknowledged that Render satisfies the first prong of the test when it stated: “A review of the pleadings indicates plaintiff has provided evidence

of a meritorious claim.” According to the trial court’s own entry, Render meets the first prong of the test outlined in *GTE*.

{¶ 12} We turn now to the second prong of the test — whether Render can show facts that entitle him to relief under any of the grounds enumerated in Civ.R. 60(B)(1)-(5). Render can demonstrate that he is entitled to relief under any of the subsections of Civ.R. 60(B) if he can show “operative facts” demonstrating entitlement to relief. *Rose Chevrolet Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20, 520 N.E.2d 564. See, also, *Coleman v. Cleveland School Dist. Bd. of Edn.*, Cuyahoga App. Nos. 84274 and 84505, 2004-Ohio-5854. Although Render is not required to submit evidentiary material in support of the motion, he must do more than make bare allegations of entitlement to relief. *Your Fin. Community of Ohio, Inc. v. Emerick* (1997), 123 Ohio App.3d 601, 607, 704 N.E.2d 1265. See, also, *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20, 665, N.E.2d 1102.

{¶ 13} In this case, since the conduct of Render’s former counsel goes beyond mere mistake, inadvertence or excusable neglect, Render cannot state sufficient grounds for relief under Civ.R. 60(B)(1). However, as stated above, Render also seeks relief under Civ.R. 60(B)(5).

{¶ 14} Civ.R. 60(B)(5) is a catch-all provision that reflects the inherent power of a court to relieve a person from the unjust operation of a judgment. *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, 448 N.E.2d 1365,

paragraph one of the syllabus. The grounds for relief must be substantial. *Id.* It is to be used only in extraordinary and unusual cases when the interests of justice warrant it. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 316 N.E.2d 469. The provision is not to be used as a substitute for any of the more specific provisions of Civ.R. 60(B). *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 637 N.E.2d 914. See, also, *Savage v. Goda* (Oct. 26, 2000), 8th Dist. Nos. 77473 and 77486.

{¶ 15} Although a party is not entitled to use Civ.R. 60(B)(5) as a substitute for any of the other provisions of Civ. R. 60(B), there are circumstances that entitle a party to relief under the rule. See *Argo Plastic v. Cleveland* (1984), 15 Ohio St.3d 389, 474 N.E.2d 328; *Whitt v. Bennet* (1992), 82 Ohio App.3d 792, 613 N.E.2d 667 (holding, inter alia, that an attorney's failure to comply with a discovery order when he is in possession of discoverable materials and his failure to attend a hearing on a motion to dismiss after proper notice is inexcusable neglect and therefore falls under Civ.R. 60(B)(5)). Render relies on *Whitt* in support of his argument that he is entitled to relief under Civ.R. 60(B)(5).

{¶ 16} Both in his appellate brief and in his motion in the trial court, Render submitted affidavits outlining the extent of his former attorney's lack of representation. He states, in part, that his attorney never notified him of any court dates, discovery deadlines, or any developments in the case. He

states that he was unaware that his attorney failed to attend any court dates or respond to any discovery requests or motions, including a motion to compel. While the conduct of Render's attorney is imputable to him under Civ.R. 60(B)(5), we believe that the interests of justice warrant reversal in this case. *Adomeit*, supra.

{¶ 17} This case is distinguishable from other recent cases in this jurisdiction upholding the denial of relief under Civ.R. 60(B), where less drastic measures, such as dismissal without prejudice, were undertaken by the trial court, or where appellants did not allege sufficient operative facts to warrant relief. See, e.g., *Lewis v. Brzozowski*, 8th Dist. No. 93413, 2009-Ohio-5841; *Grange Mut. Cas. Co. v. Palladino*, 8th Dist. No. 93584, 2009-Ohio-6472. By contrast, the trial court in the instant case dismissed Render's cause of action with prejudice after it had been on the court's active docket for only seven months. In so doing, it effectively denied him the right to pursue a cause of action that the court acknowledged was meritorious.

{¶ 18} Finally, we note that it was unreasonable for the trial court to dismiss Render's motion as untimely, as he meets the one-year requirement of Civ.R. 60(B)(1), and the "reasonable time" requirement of Civ.R. 60(B)(5). See Civ.R. 60(B); *GTE*; and *Savage*, supra, at 6, stating: "[a]lthough a Civ.R. 60(B)(5) motion is not subject to the rule that it be brought within one year

after entry of final judgment, the motion still must be made within a reasonable time.”

{¶ 19} In this case, the trial court denied Render relief in part because “nearly a year” had passed since the trial court entered judgment. Savage filed his Civ.R. 60(B) motion on March 9, 2009. The trial court entered an order dismissing the case on March 12, 2008. His motion was therefore timely for purposes of both Civ.R. 60(B)(1) and 60(B)(5). Savage has satisfied the third prong of the test under Civ.R. 60(B), and is therefore entitled to relief from the trial court’s judgment.

{¶ 20} The trial court abused its discretion in denying Render relief under Civ.R. 60(B). He has a meritorious claim under the rule, which the trial court acknowledged. He has alleged sufficient operative facts entitling him to relief, based upon his former counsel’s inaction and dilatory conduct. Contrary to the trial court’s determination, Render also filed his Civ.R. 60(B) motion within the one-year time frame contemplated in the rule. He thus meets all the requirements for relief set out in Civ.R. 60(B) and *GTE*, supra.

{¶ 21} If the trial court had dismissed Render’s cause of action without prejudice our decision might be different. “Although reviewing courts espouse an ordinary ‘abuse of discretion’ standard of review for dismissals with prejudice, that standard is actually heightened when reviewing decisions that forever deny a plaintiff a review of a claim’s merits.” *Autovest L.L.C. v.*

Swanson, 8th Dist. No. 88803, 2007-Ohio-3921, quoting *Jones v. Hartranft* (1997), 78 Ohio St.3d 368, 372, 678 N.E.2d 530. In this case, the trial court's dismissal of Render's cause of action with prejudice after only seven months and its subsequent denial of relief to Render contravenes the "basic tenet of Ohio jurisprudence that cases should be decided on their merits." *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, 3, 454 N.E.2d 951.

{¶ 22} In *Willis v. RCA Corp.* (1983), 12 Ohio App.3d 1, 465 N.E.2d 924, this court held that "[t]he power of the trial court to prevent undue delays and to control its calendars must be weighed against the policy which favors disposition of litigation on the merits." *Id.* at 3. In *Willis*, we held, inter alia, where the case was dismissed with prejudice after counsel repeatedly failed to appear, such circumstances in and of themselves "did not justify an order that plaintiff should forever lose his day in court." *Id.* Such is the case here.

{¶ 23} The judgment of the trial court denying Render's motion to vacate under Civ.R. 60(B) is reversed. The judgment of the trial court dismissing Render's case is reversed. We remand this case for further proceedings consistent with this opinion.

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

The court finds there were reasonable grounds for this appeal.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

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