[Cite as *Allen v. P.E. Technologies, Inc.*, 2010-Ohio-3878.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93979

JOHN ALLEN

PLAINTIFF-APPELLANT

vs.

P.E. TECHNOLOGIES, INC.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-402271

BEFORE: McMonagle, P.J., Stewart, J., and Cooney, J.

RELEASED AND JOURNALIZED: August 19, 2010

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CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Plaintiff-appellant, John Allen, appeals the trial court's judgment denying his motion for relief from judgment. We affirm.

I

{¶ 2} Allen initiated this wrongful termination action against defendant-appellee, P.E. Technologies, Inc., in 2000.[1] In August 2000, Allen filed a "motion to add the name of P.E. Acquisition that succeeded P.E. Technologies in ownership and operation of the P.E. Technologies facility." The following day, P.E. Technologies, Inc. filed a notice that it had filed a

[1]Allen originally filed his action in March 1998, but voluntarily dismissed it in September 1999. (*John Allen v. P.E. Technologies, Inc.*, Case No. CV-350975.)

bankruptcy petition. The trial court stayed the case and ruled that Allen's motion to add the name of P.E. Acquisition was moot.

{¶ 3} In April 2001, the Chapter 7 trustee filed a "special report of no distribution." Based on the trustee's recommendation, the bankruptcy court entered an order approving the trustee's final account and finding that all of P.E. Technologies' assets were either exempt, overburdened by valid liens, or of inconsequential value.

{¶ 4} In December 2006, Allen filed a motion to reactivate the case and a motion for substitution of parties. On April 21, 2008, after a hearing on the motions, the trial court issued a decision and order with findings of fact and conclusions of law denying Allen's motions. Allen filed a notice of appeal with this court on May 23, 2008, but the appeal was dismissed as untimely.[2]

{¶ 5} On April 21, 2009, Allen filed a motion for relief from judgment under "Ohio Civil Rule 60(B)(2)(3)(5)." The motion was denied, and it is from that judgment that Allen now appeals raising four assignments of error for our review.

II

{¶ 6} 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, 117, 463 N.E.2d 417.

[2]Appeal No. 91494, motion no. 410229.

{¶ 7} Civ.R. 60(B) states in pertinent part:

{¶ 8} "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:

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

{¶ 10} "(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);

{¶ 11} "(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct by an adverse party;

{¶ 12} "* * *

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

{¶ 14} "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."

{¶ 15} 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.

{¶ 16} A Civ.R. 60(B) motion for relief from judgment cannot be used as a substitute for a timely appeal, even when the Civ.R. 60(B) motion is filed within the period for a timely appeal. *Blatt v. Meridia Health Sys.*, Cuyahoga App. No. 89074, 2008-Ohio-1818, ¶11. Any claims or arguments that were not raised in a timely appeal, but which could have been raised, are precluded from being raised in a subsequent Civ.R. 60(B) motion. *Key v. Mitchell*, 81 Ohio St.3d 89, 90-91, 1998-Ohio-643, 689 N.E.2d 548.

III

{¶ 17} A review of the history of this case demonstrates that Allen attempted to use his Civ.R. 60(B) motion as a substitute for his appeal, which was dismissed by this court because it was untimely. In particular, in August 2000, Allen filed a motion to add P.E. Acquisition as a defendant because it allegedly was a successor in interest to P.E. Technologies. The day after that motion was filed, P.E. Technologies filed a notice of bankruptcy proceedings, and the trial court stayed the case. The trial court ruled that Allen's motion to add P.E. Acquisition was moot.

{¶ 18} After the conclusion of the bankruptcy proceedings, Allen filed a motion to reactivate and a motion for substitution of parties. In these motions, Allen contended that through "various manipulations" P.E.

Technologies attempted to "escape, apparently fraudulently, one wrongful discharge claim[.]" Specifically, Allen challenged the succession of P.E. Technologies, and sought to substitute Enprotech, the successor in interest to P.E. Technologies, as the defendant.

{¶ 19} After a hearing, the court denied those motions in a decision and order dated April 21, 2008. In that decision and order, the trial court found, in relevant part, the following: "Plaintiff has failed to demonstrate any basis to overcome [the general rule that a purchaser of a corporation's assets is not liable for the debts and obligation of the seller corporation.] P.E. Acquisition did not agree to assume P.E. Technologies' liabilities to the Plaintiff, the asset sale was not a de facto merger of the two companies, P.E. Acquisition was not a mere continuation of P.E. Technologies, and there is no evidence that the asset sale was entered into fraudulently." The trial court concluded that "neither P.E. Acquisition nor Enprotech, its successor by merger, are liable for the debts or obligations of P.E. Technologies[,]" and found that there was "[n]o just reason for delay."

{¶ 20} Allen appealed, but this court dismissed the appeal because it was untimely. He filed his motion for relief from the April 21, 2008 decision and order one year later, on April 21, 2009. In his motion, Allen contended that: (1) newly discovered evidence demonstrated that Enprotech was a mere continuation of P.E. Technologies; and (2) P.E. Technologies and/or

Enprotech engaged in fraud to escape liability for his claims. Allen also sought relief from judgment under the catch-all provision of Civ.R. 60(B)(5).

{¶ 21} "A Civ.R. 60(B) motion must not be used merely to reiterate arguments concerning the merits of the case that could have been raised on appeal." *Bonde v. Bonde*, Cuyahoga App. No. 91633, 2009-Ohio-2135, ¶8, citing *Boardman Canfield Ctr., Inc. v. Baer*, Mahoning App. No. 06 MA 80, 2007-Ohio-2609; *Wohlabaugh v. Salem Communications Corp.*, Cuyahoga App. No. 84822, 2005-Ohio-1189. That is what Allen did. Nevertheless, the trial court did not abuse its discretion in denying the motion for relief from judgment.

{¶ 22} In his first assignment of error, Allen contends that the trial court abused its discretion by denying him relief on the grounds of mistake, inadvertence, surprise, or excusable neglect under Civ.R. 60(B)(1). In his second assignment of error, Allen contends that the trial court abused its discretion denying him relief on the grounds of newly discovered evidence.

{¶ 23} Allen waived all but plain error in regard to relief on the grounds of mistake, inadvertence, surprise, or excusable neglect because he did not raise those grounds in his motion. A party who raises an issue for the first time on appeal waives all but plain error. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 1997-Ohio-401, 679 N.E.2d 1099. "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the

extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process and thereby challenges the legitimacy of the underlying judicial process itself." *Schwartz v. Alltel Corp.*, Cuyahoga App. No. 86810, 2006-Ohio-3353, ¶45, citing *Goldfuss* at syllabus.

{¶ 24} We do not find plain error here. Allen contends that, given the succession history in this case, it was excusable neglect that he did not name Enprotech as a defendant. But, as the trial court found, Enprotech would not have been liable to him. Thus, there was no plain error in the trial court's denial of Allen's motion based on excusable failure of not naming Enprotech as a defendant. The first assignment of error is therefore overruled.

{¶ 25} The "newly discovered" evidence that Allen relied on in support of his motion for relief from judgment included a certificate of merger and a news release and excerpt from Enprotech's website. The certificate of merger was not new; it was filed with the Ohio Secretary of State in December 2004. Further, at least one of the website excerpts has a copyright date of 2006. Allen has not demonstrated why this information could not have been discovered with due diligence. On this record, the evidence that

Allen contends was "new" was in fact, not, and the second assignment of error is overruled.

{¶ 26} For his third assigned error, Allen contends that "the trial court abused its discretion in finding that P.E. Acquisition and New P.E. Technologies were neither a 'mere continuation' of old P.E. Technologies nor was the asset sale between the old P.E. Technologies and P.E. Acquisition a de facto merger." For his fourth assigned error, Allen contends that "the trial court abused its discretion in finding that Enprotech, as the successor by merger with new P.E. Technologies, is free from liability for old P.E. Technologies' debts or obligations."

{¶ 27} But the bankruptcy proceeding rendered these arguments moot. Specifically, the bankruptcy court entered an order approving the trustee's final account and finding that all of P.E. Technologies' assets were either exempt, overburdened by valid liens, or of inconsequential value.

{¶ 28} Finally, Allen has not demonstrated that his Civ.R. 60(B) motion was filed within a reasonable period of time. A Civ.R. 60(B) motion can be untimely, even though filed within a one-year time period allowed by the rule, if it is not filed within a reasonable period of time after final judgment. *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 249-250, 416 N.E.2d 605. For example, in *Drongowski v. Salvatore*, Cuyahoga App. No. 61081, 1992-Ohio-5027, this court held that an 11-month delay in filing Civ.R. 60(B)

motion was untimely because the movant failed to provide any explanation for the delay. Similarly, Allen has not offered an explanation as to why it took him one year to file his motion for relief from judgment. The delay therefore was unreasonable.

{¶ 29} On this record, the trial court did not abuse its discretion in denying Allen's Civ.R. 60(B) motion.

Judgment affirmed.

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

The court finds there were 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
COLLEEN CONWAY COONEY, J., CONCUR