[Cite as *State Alarm, Inc. v. Riley Indus. Servs.*, 2010-Ohio-900.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92760

STATE ALARM, INC.

PLAINTIFF-APPELLEE

vs.

RILEY INDUSTRIAL SERVICES, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Garfield Heights Municipal Court
Case No. CVF-0704564

BEFORE: Jones, J., Kilbane, P.J., and Cooney, J.

RELEASED: March 11, 2010

JOURNALIZED:

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LARRY A. JONES, J.:

{¶ 1} Defendants-appellants, Shannon Riley and Riley Industrial Services (collectively referred to as "Riley"), appeal the trial court's denial of the motion for relief from judgment Riley filed after the trial court granted plaintiff-appellee's, State Alarm, Inc.'s ("State Alarm") motion for default judgment. Finding no merit to the appeal, we affirm.

{¶ 2} In November 2007, State Alarm filed a complaint against Riley in Garfield Heights Municipal Court alleging Riley owed $15,000 for the purchase and installation of security equipment. State Alarm obtained service on Riley in December 2007. Riley failed to answer the complaint or otherwise plead, so State Alarm moved for default judgment on January 23, 2008. The trial court granted default judgment the next day. State Alarm then initiated collection proceedings against Riley.

{¶ 3} In October 2008, Riley's counsel filed a notice of appearance and a motion for relief from judgment, which 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: * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party * * *."

{¶ 4} In the motion for relief from judgment, Riley claimed that the trial court did not have jurisdiction because the contract he signed with State Alarm provided that any claim against the company was to be filed in Florida.

{¶ 5} State Alarm opposed Riley's motion and the trial court set a hearing. At the hearing, the trial court found that the transaction between State Alarm and Riley occurred within its jurisdiction and denied Riley's motion for relief from judgment.

{¶ 6} Riley appealed the trial court's decision. Although no transcript of the hearing was available, the court filed a statement of proceedings pursuant to App.R. 9(C).

{¶ 7} Riley raises two assignments of error for our review.

> "I. The trial court erred as a matter of law and abused its discretion by denying an evidentiary hearing on appellant's motion for relief from judgment and to vacate the January 24, 2008 judgment entry.
>
> "II. The trial court erred as a matter of law and abused its discretion by denying appellant's motion for relief from judgment and to vacate the January 24, 2008 judgment entry."

Evidentiary Hearing

{¶ 8} Riley first argues that the trial court erred in failing to hold an evidentiary hearing. For the reasons that follow, we disagree.

{¶ 9} Pursuant to Civ.R. 60(B), a trial court has the authority to vacate a final judgment due to: "(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 (whether heretofore denominated intrinsic or extrinsic), 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." Id.

{¶ 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. If a movant fails to satisfy any one of these requirements, the trial court should deny the motion. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20, 520 N.E.2d 564; *Svoboda v. Brunswick* (1983), 6 Ohio St.3d 348, 351, 453 N.E.2d 648.

{¶ 11} The *GTE* requirements must be shown by "operative facts" demonstrating 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. Although a movant is not required to

submit evidentiary material in support of the motion, a movant must do more than make bare allegations of entitlement to relief. *Your Financial 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.*, 76 Ohio St.3d 18, 20, 1996-Ohio-430, 665 N.E.2d 1102. The trial court has discretion in deciding a motion for relief from judgment under Civ.R. 60(B) and discretion in determining whether to hold an evidentiary hearing on a motion submitted. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77, 514 N.E.2d 1122. As to the requirement for a hearing, "[i]f 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." *McBroom v. McBroom*, Lucas App. No. L-03-1027, 2003-Ohio-5198, ¶39.

{¶ 12} The decision denying a Civ.R. 60(B) motion without holding an evidentiary hearing will not be disturbed on appeal absent an abuse of discretion. *Griffey*. An abuse of discretion is more than an error in judgment or a mistake of law; it connotes 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.

{¶ 13} In this case, Riley claims that a "formal evidentiary hearing" never took place. But a review of the docket and the App.R. 9(C) statement of proceedings indicates that a hearing on Riley's Civ.R. 60(B) motion took

place on December 30, 2008. At the hearing, the court denied the motion, finding that it had jurisdiction over the matter, and because Riley failed to answer the complaint or otherwise plead, he waived any affirmative defenses. Moreover, contrary to Riley's claims, there is no requirement that the trial court hold a hearing, formal or otherwise.

{¶ 14} Therefore, the first assignment of error is overruled.

Motion for Relief from Judgment

{¶ 15} In the second assignment of error, Riley argues that the trial court abused its discretion when it denied his motion for relief from judgment.

{¶ 16} In the case at bar, Riley argues that he satisfied all three prongs of the *GTE* test. Riley claims that State Alarm's complaint failed to state a claim against Riley personally. Riley further contends that the contract he had with State Alarm provided that the agreement was governed by Florida law and exclusive jurisdiction existed in Broward County, Florida. Therefore, he argues, the trial court did not have jurisdiction to hear the case.

{¶ 17} Again, Riley filed his motion pursuant to Civ.R. 60(B)(3), alleging that State Alarm committed fraud. But Riley argues that the fraud State Alarm committed was fraud on the court, not fraud against him or his company. Riley alleges that State Alarm acted fraudulently by attempting to advance its claim without telling the court: (1) that Riley executed the contract only as an agent of his company, (2) about jurisdiction and venue as set forth

in the contract, and (3) that Riley had already returned all of the security equipment to State Alarm

{¶ 18} Riley cites our decision in *Zaubi v. Caluya* (Oct. 10, 1991), Cuyahoga App. No. 61308, to support his claim that a motion for relief from judgment that involves a misrepresentation by an adverse party is properly brought under Civ.R. 60(B)(3).

{¶ 19} It is true that in *Zaubi* we stated that when a Civ.R. 60(B) motion involves a misrepresentation made by an adverse party, it is properly brought pursuant to Civ.R. 60(B)(3). But "[w]here the motion involves a misrepresentation made by an officer of the court, e.g., an attorney, which misrepresentation perpetrates a fraud upon the court, the motion is properly brought pursuant to Civ.R. 60(B)(5)." Id. at 2.

{¶ 20} Riley does not allege that State Alarm induced him into signing the purchase agreements; rather, he alleges that State Alarm's misrepresentations to the trial court allowed the company to improperly advance its claim and obtain default judgment. Therefore, in reality, Riley should be seeking relief under the "catch-all" provision of Civ.R. 60(B)(5), which provides relief for "any other reason." But Riley specifically argued that he was entitled to relief pursuant only to Civ.R. 60(B)(3).

{¶ 21} Moreover, even if Riley had properly pled, we do not find that he satisfied the *GTE* test. In *Zaubi*, we stated that "misrepresentations to the

court do not constitute a fraud on the court unless the adverse party was prevented from presenting a defense." Id., quoting *Hartford v. Hartford* (1977), 53 Ohio App.3d 79, 85, 371 N.E.2d 529. Since service was perfected on Riley and he chose not to answer or have counsel enter an appearance in the case before the motion for default judgment was filed, he cannot now successfully argue that he was somehow prevented from presenting a defense.

{¶ 22} Finally, Civ.R. 60(B) requires that the motion be filed within a reasonable time. "Contrary to [defendant's] argument to the trial court, therefore, the fact that it filed its motion within one year after entry of the default judgment did not satisfy the third prong of the *GTE Automatic* test. It was still required to demonstrate that it had moved for relief within a reasonable time." *Lakemore v. SN Servicing Corp.*, 9th Dist. App. No. 23575, 2007-Ohio-4650, ¶14. See, also, *Wolfe v. Cahill*, Cuyahoga App. No. 88368, 2007-Ohio-638, ¶17-19.

{¶ 23} The default judgment occurred in January 2008, and defendants failed to move for relief from judgment until October 2008. They made no statement in their motion explaining why nine months is a "reasonable time."

{¶ 24} Inasmuch as Riley did not even suggest to the trial court why nine months was reasonable, he has not satisfied the third prong of the *GTE* test. Therefore, the trial court did not abuse its discretion when it denied Riley's motion for relief from judgment. The second assignment of error is overruled.

{¶ 25} Accordingly, 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 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.

LARRY A. JONES, JUDGE

MARY EILEEN KILBANE, P.J., and
COLLEEN CONWAY COONEY, CONCUR