[Cite as *Kellstone, Inc. v. Laken Shipping Corp.*, 2011-Ohio-484.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95429

KELLSTONE, INC., ET AL.

PLAINTIFFS-APPELLANTS

vs.

LAKEN SHIPPING CORPORATION

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-645325

BEFORE: Celebrezze, J., Kilbane, A.J., and Cooney, J.

RELEASED AND JOURNALIZED: February 3, 2011

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records and briefs of counsel.

{¶ 2} Appellants, Kellstone, Inc. ("Kellstone") and Inland Bulk Transfer, Inc. ("Inland"), appeal the denial of their motion for relief from judgment without having the benefit of an evidentiary hearing. After a thorough review of the record and law, we affirm the denial of their Civ.R. 60(B) motion.

{¶ 3} On March 3, 2004, appellants entered into a Ship Sale Agreement (the "Agreement") with appellee, Laken Shipping Corp. ("Laken"), wherein

Laken agreed to purchase three tugboats and two barges for approximately $12 million dollars. One of the subject tugs, the Frank Palladino, Jr., was inspected by Laken prior to sale and found to be in working order. After inspection, but prior to sale, an engine on the tug seized up and required significant repair or replacement. Laken alleged that it was not told of the problems prior to sale, but discovered the condition of the engine soon after.

{¶ 4} Pursuant to the Agreement, Laken instituted an arbitration action in New York for damages related to the undisclosed engine failure. On September 25, 2007, a three-member arbitration panel issued its decision finding that appellants had breached the Agreement and awarded Laken $793,267.44 in damages.

{¶ 5} Instead of satisfying the arbitral award within 20 days, as directed by the panel, on December 21, 2007, appellants filed a complaint in Cuyahoga County common pleas court to vacate or modify the award. After Laken dismissed competing litigation in New York, the cause proceeded to a court-mandated settlement conference.

{¶ 6} On September 26, 2008, the trial court issued a sua sponte order scheduling a settlement conference for October 28, 2008. This order stated: "ALL PARTIES WITH AUTHORITY TO SETTLE MUST BE PRESENT IN PERSON." The October 28th conference was attended by Steven Rizzo, a

representative for appellants; Joseph Rutigliano and Ezio Listati, appellants' attorneys; and representatives for Laken.

{¶ 7} On October 30, 2008, the docket reflects that the parties reached a settlement and indicates the parties were required to file a more detailed dismissal entry setting forth the details of the settlement agreement. The court dismissed the case with prejudice. Appellants were to pay Laken $725,000 by December 19, 2008.[1] The settlement agreement was signed by Rutigliano on behalf of appellants. Appellants did not appeal from this order or the detailed judgment entry submitted by the parties and adopted by the court on December 12, 2008.

{¶ 8} After appellants failed to satisfy the terms of the settlement agreement, Laken obtained a consent judgment and then filed a certificate of judgment in Erie County, Ohio. On April 28, 2009, Laken sought foreclosure on appellants' property located therein.

{¶ 9} On December 11, 2009, appellants filed a motion for relief from judgment pursuant to Civ.R. 60(B), claiming that attorney Rutigliano had no authority to settle anything. Without holding an evidentiary hearing, the trial court denied appellants' motion. Appellants filed this timely appeal, citing two assignments of error.

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[1]Appellants agreed to pay Laken $725,000 by December 19, 2008 or $864,628.91 if payment was received after this date.

Law and Analysis

Relief from Judgment

{¶ 10} Appellants argue in their first assignment of error that "the trial court erred in denying * * * [their] motion to vacate the December 27, 2008 judgment because no authority existed to settle the claims or consent to judgment." Appellants now claim that the parties representing them at the settlement conference did not have authority to settle the claims.

{¶ 11} When reviewing the denial of a motion for relief from judgment, an appellate court applies an abuse of discretion standard of review. *Shuford v. Owens*, Franklin App. No. 07AP-1068, 2008-Ohio-6220, ¶15, citing *Natl. City Bank v. Rini*, 162 Ohio App.3d 662, 2005-Ohio-4041, 834 N.E.2d 836, ¶15. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 12} Appellants' motion was untimely. Civ.R. 60(B) provides that, "[o]n 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 (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. 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."

{¶ 13} "To prevail on his motion under Civ.R. 60(B), the movant must demonstrate that: (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, 150-51, 351 N.E.2d 113.

{¶ 14} Here, appellants assert that they are entitled to relief from judgment under Civ.R. 60(B)(5). "[W]e note 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." *Harrison v. Doerner*, Cuyahoga App. No. 94270, 2010-Ohio-4682, ¶18.

{¶ 15} Under this rule, the motion must be "made within a reasonable time." Appellants waited over a year from the time the settlement agreement was reached on October 28, 2008 before filing for relief from that judgment entered on the record October 30, 2008. Appellants failed to allege a reason for the delay other than the termination of their attorneys one month prior to the filing of the motion. This does not offer an explanation for the significant period of delay between the time notice of settlement was issued to the parties on October 30, 2008, or the delay from the time the settlement agreement was finalized with the court and notice issued to the parties on December 12, 2008. Appellants also received notice of the settlement agreement when Laken filed its foreclosure action in Erie County on April 28, 2009. This six-month delay is also unexplained.

{¶ 16} In *Mt. Olive Baptist Church v. Pipkins Paints & Home Imp. Ctr., Inc.* (1979), 64 Ohio App.2d 285, 289, 413 N.E.2d 850, this court held that "[a] motion to vacate a default judgment which is filed nearly seven months after actual notice of the action and more than four months after default judgment was entered is not, on its face, a reasonable time within which to file the

motion pursuant to Civ. R. 60(B)(5)." This court found the delay unreasonable given the lack of any explanation in the record. Id. Similarly, we are faced with a significant period of delay from actual or constructive notice, with no real explanation before us in the record. Appellants' motion merely states that it was filed within one year of judgment. That is not sufficient.

{¶ 17} Appellants argue that the decision of the Ohio Supreme Court in *Morr v. Crouch* (1969), 19 Ohio St.2d 24, 249 N.E.2d 780, is dispositive of the issue when affidavits were included with the motion disavowing that Rutigliano had authority to settle. In *Morr*, the court noted that "a decree may be vacated, even after term [19 months], for irregularity in its procurement. We hold that the lack of consent to the 'journal entry-settlement' is an irregularity which should have compelled the Probate Court to vacate" the consent judgment. (Internal citations omitted.) Id. at 30. However, this case is distinguishable on its facts. The *Morr* court noted that "the rule in Ohio and elsewhere is that an attorney who is without specific authorization has no implied power by virtue of his general retainer to compromise and settle his client's claim or cause of action." Id. at 27. Here, there is more than implied authority. Appellants sent representatives to a settlement conference where an agreement was reached. This is noted in the court's docket on October 30, 2008. These representatives, including

Rutigliano, had authority according to appellants' representations to Laken and the trial court when the trial court mandated that "PARTIES WITH AUTHORITY TO SETTLE MUST BE PRESENT IN PERSON."

Failure to Hold an Evidentiary Hearing

{¶ 18} Appellants also claim the trial court erred when it denied their motion without holding an evidentiary hearing.[2] However, the motion failed, on its face, to set forth an adequate explanation for appellants' delay in filing their motion for relief from judgment. A trial court need not hold an evidentiary hearing when the materials submitted do not demonstrate that the movant is entitled to relief. *State Alarm, Inc. v. Riley Indus. Servs.,* Cuyahoga App. No. 92760, 2010-Ohio-900, ¶11; *McBroom v. McBroom*, Lucas App. No. L-03-1027, 2003-Ohio-5198, ¶39. We review this decision for an abuse of discretion. Id. at ¶12.

{¶ 19} As explained above, appellants' motion was untimely. Therefore, the trial court did not abuse its discretion when denying their motion without holding an evidentiary hearing.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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[2]This assigned error states, "[t]he trial [sic] erred when it failed to hold an evidentiary hearing on appellants' motion to vacate."

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.

FRANK D. CELEBREZZE, JR., JUDGE

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