[Cite as *Derico v. Schimoler*, 2011-Ohio-615.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94935

VINCENT C. DERICO

PLAINTIFF-APPELLEE

vs.

STEPHEN SCHIMOLER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-699174

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

RELEASED AND JOURNALIZED: February 10, 2011

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MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Stephen Schimoler, appeals the decision of the Cuyahoga County Court of Common Pleas denying his motion for relief from judgment that sought to vacate a foreign judgment filed by plaintiff-appellee, Vincent Derico. For the reasons that follow, we affirm.

{¶ 2} On July 20, 2009, appellee filed a transfer of foreign judgment in the Cuyahoga County Court of Common Pleas, pursuant to R.C. 2329.021, et seq., certifying that he had taken judgment against appellant in the Washington Superior Court, Montpelier, Vermont, in the amount of $27,544.83, plus interest. Pursuant to R.C. 2329.023, the clerk of court filed a notice of foreign judgment on August 11, 2009. On December 11, 2009, after appellee had taken steps to execute on the judgment, appellant filed a motion, pursuant to Civ.R. 60(B)(5), seeking to vacate the judgment taken against him in Vermont. Appellee opposed the motion and argued that relief from the judgment could be sought only in Vermont, or alternatively, that appellant's Civ.R. 60(B) motion was not timely filed. The trial court denied appellant's motion on March 5, 2010. Appellant timely appeals raising two assignments of error for our review.

{¶ 3} In his first assignment of error, appellant argues that the trial court erred in extending full faith and credit to the Vermont judgment because that judgment was procured through the use of fraudulent evidence and the perpetration of a fraud upon the court.

{¶ 4} R.C. 2329.022 states:

{¶ 5} "A copy of any foreign judgment authenticated in accordance with Section 1738 of Title 28 of the United States Code, 62 Stat. 947 (1948), may be filed with the clerk of any court of common pleas. The clerk shall treat

the foreign judgment in the same manner as a judgment of a court of common pleas. A foreign judgment filed pursuant to this section has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a court of common pleas and may be enforced or satisfied in the same manner as a judgment of a court of common pleas."

{¶ 6} Relying on this statute, appellant moved to vacate the judgment under Civ.R. 60(B). In his motion, appellant asserted as reasons for vacating the judgment that: (1) his signature on the promissory note upon which the judgment was obtained was a forgery, (2) any money owed to appellee had been paid in full, and (3) he was not the real party in interest as appellant's claims were against his business and not him personally. Appellant claimed he was entitled to relief under the "catch-all" provision of Civ.R. 60(B)(5) because he had provided his attorney in Vermont the necessary information to timely appear and defend against the complaint and appellant believed the matter was being handled by his attorney. He also argued that he did not receive notice of the default motion, which he claims constituted additional grounds for relief from judgment. Finally, appellant asserted that his motion for relief from judgment was made within a reasonable time of discovering the judgment against him.

{¶ 7} Civ.R. 60(B) states:

{¶ 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: (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."

{¶ 9} 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 a Civ.R. 60(B) 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.

{¶ 10} The trial court has discretion in deciding a motion for relief from judgment under Civ.R. 60(B); therefore, its decision will not be disturbed on appeal absent an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 514 N.E.2d 1122. An abuse of discretion 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.

{¶ 11} Appellant claims an entitlement to relief under Civ.R. 60(B)(5) and argues that full faith and credit need not be given to the Vermont judgment because the judgment was obtained by a fraud upon the court. Appellant asserts that his signature on the promissory note attached to appellee's complaint is a forgery, and he argues that appellee's use of the fraudulent note constitutes a fraud upon the court.

{¶ 12} Relief may be sought under Civ.R. 60(B)(5) for fraud upon the court. *Savage v. Goda* (Oct. 26, 2000), 8th Dist. No. 77486. However, the term "fraud upon the court" has been narrowly construed to include only that

type of conduct which defiles the court itself, or fraud which is perpetrated by officers of the court so as to prevent the judicial system from functioning in the customary manner of deciding the cases presented in an impartial manner. *Hartford v. Hartford* (1977), 53 Ohio App.2d 79, 83-84, 371 N.E.2d 591. Fraud upon the court is applied where an officer of the court, e.g., an attorney, actively participates in defrauding the court. *Scholler v. Scholler* (1984), 10 Ohio St.3d 98, 106, 462 N.E.2d 158. Conduct that amounts to merely withholding information and alleging facts known to be untrue does not constitute a fraud upon the court. *Citi Fin. Servs., Inc. v. Lazzano* (Apr. 12, 1984), 8th Dist. No. 47401 (plaintiff's proceeding with action knowing the signatures were forged did not constitute a "fraud against the court").

{¶ 13} Similarly, under Vermont law a "fraud upon the court" is characterized by a "calculated, egregious 'defiling' of the adjudicative process." *Godin v. Godin* (1998), 168 Vt. 514, 725 A.2d 904, citing *Great Coastal Express, Inc. v. Internatl. Bhd. of Teamsters* (C.A.4, 1982), 675 F.2d 1349, 1356 (fraud upon the court must "defile the court itself").

{¶ 14} In the instant case, there is nothing in the record to indicate that the foreign judgment was procured through a fraud on the court. Even if appellant's allegation that the signature on the document is a forgery is true, that allegation represents a defense to the complaint that could have been raised in the Vermont action. It does not rise to the level of conduct that

"defiles the court itself" and necessitates us vacating the judgment of a sister state.

{¶ 15} Moreover, appellant's motion was not timely. Although 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. The Vermont court entered the default judgment on March 5, 2008. Appellant filed his Civ.R. 60(B)(5) motion almost two years later on December 11, 2009.

{¶ 16} Appellant claims the default judgment was the result of his attorney filing the answer late. He argues the judgment should be vacated because the court did not give him notice of the default hearing or the judgment, and he did not learn of the judgment until September 2009. He acknowledged that the court's docket showed it had served him notice of the judgment on July 30, 2008, but contends that he had moved in June 2008 and did not receive the court's notice.

{¶ 17} The record reflects that appellant was personally served with the complaint in the Vermont action in January 2008 and faxed a copy of his answer on January 17, 2008 to Vermont attorney Brice C. Simon, who appellant "understood would be representing him." Simon did not file the answer until March 17, 2008, after the default judgment had been granted. According to Vermont Civ.R. 55 (b), because appellant had not made an

appearance in the action, no notice or hearing was required before granting default judgment. Thus, the judgment is valid under Vermont law.

{¶ 18} Additionally, while appellant claims he "understood" Simon would be representing him because he had done business with him before, the record reflects that Simon did not agree to represent appellant and did not file the answer as appellant's counsel. Simon informed the court by letter dated March12, 2008 that appellant had faxed the answer to him in letter form, but, because he had represented both parties in the past and there was a possible conflict of interest, he could not represent appellant at that time. Simon told the court he was forwarding the answer appellant had sent to him and advised the court that appellant was proceeding as a pro se defendant. As a result of Simon's letter, the court's docket reflects an appearance by appellant, pro se, and the filing of the appellant's answer, pro se, on March 17, 2008. Simon's letter indicates that a copy of the letter and attachments were sent to appellant and to appellee's counsel. Therefore, according to the record, appellant knew Simon was not representing his interests.

{¶ 19} A court speaks through its docket and parties are expected to keep themselves informed of the progress of their case. *Savage v. Goda*, supra, citing *Weaver v. Colwell Financial Corp.* (1992), 73 Ohio App.3d 139, 144, 596 N.E.2d 617. Appellant knew he was a defendant in a civil action in Vermont. He admitted receiving personal service of process. Therefore,

while his failure to timely answer may properly be attributed to excusable neglect based upon Simon's untimely forwarding of appellant's answer, appellant offers no explanation for his own failure to keep informed of the progress of the case against him after being notified that Simon was not representing him.

{¶ 20} Additionally, appellant's claim that he did not receive notice of the judgment from the court is not grounds for relief from judgment. There is no provision in Ohio law or rule of civil procedure that requires a party be given actual notice of the filing of a judgment entry. *Johnson v. Meridia Euclid Hosp.*, 8th Dist. No. 80072, 2002-Ohio-1402. Rather, notice shall be deemed to have been provided once the clerk has served notice of the entry and made the appropriate notation on the docket. Id., citing *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 523 N.E.2d 851, paragraph 2(c) of the syllabus. Appellant cites no Vermont law or rule requiring such notice. Moreover, had appellant advised either the court or Simon of his new address in June 2008, he presumably would have discovered the judgment against him sooner than September 2009.

{¶ 21} Accordingly, because appellant has not complied with the requirements of Civ.R. 60(B), the trial court did not abuse its discretion when it denied his motion to vacate the Vermont judgment. The first assignment of error is overruled.

{¶ 22} In his second assignment of error, appellant reasserts his claim that the judgment was procured through fraud. He further argues that because the note upon which judgment was issued was a forgery, the note was therefore not executed in Vermont or in connection with any contact he had with that state and, as a result, the Vermont court lacked personal jurisdiction over him.

{¶ 23} "[I]n order to render a valid personal judgment, a court must have personal jurisdiction over the defendant. This may be acquired either by service of process upon the defendant, the voluntary appearance and submission of the defendant or his legal representative, or by certain acts of the defendant or his legal representative which constitute an involuntary submission to the jurisdiction of the court." *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156, 464 N.E.2d 538. Appellant did not raise the issue of personal jurisdiction in his motion for relief from judgment in the trial court. Unlike subject matter jurisdiction, a party may not raise the issue of personal jurisdiction for the first time on appeal. *Sec. Ins. Co. v. Regional Transit Auth.* (1982), 4 Ohio App.3d 24, 28, 446 N.E.2d 220. Additionally, appellant admits to receiving service of process and he voluntarily appeared in the action by answering the complaint, albeit in an untimely manner through no fault of his own. Accordingly, appellant's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, PRESIDING JUDGE

COLLEEN CONWAY COONEY, J., and
KATHLEEN ANN KEOUGH, J., CONCUR