[Cite as *Little v. First Am. Title Ins. Co.*, 2015-Ohio-4700.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102733

SHARON D. LITTLE

PLAINTIFF-APPELLANT

vs.

FIRST AMERICAN TITLE INSURANCE CO.

DEFENDANT-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-09-687927

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

RELEASED AND JOURNALIZED: November 12, 2015

ATTORNEY FOR APPELLANT

Ronald P. Friedberg
Meyers, Roman, Friedberg & Lewis
28601 Chagrin Blvd.
Suite 500
Cleveland, Ohio 44122

ATTORNEYS FOR APPELLEES

Michael J. Sikora
Sikora Law L.L.C.
8532 Mentor Avenue
Mentor, Ohio 44060

Bryan T. Kostura
James W. Sandy
McGlinchey Stafford, P.L.L.C.
25550 Chagrin Boulevard
Suite 406
Cleveland, Ohio 44122-4640

Gloria Gordon
21501 Franklin Road
Maple Heights, Ohio 44137

FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Appellant, Sharon D. Little, appeals the trial court's decision granting a motion for relief from default judgment filed by appellee, Fairbanks Capital Corporation, now known as Select Portfolio Servicing, Inc. ("SPS"). Little claims that the court erred in granting the motion where SPS failed to fulfill any of the requirements for relief under Civ.R. 60(B). After a thorough review of the record and law, this court reverses and remands.

I. Factual and Procedural History

{¶2} Little filed suit against several parties included SPS on March 9, 2009. She alleged that when she purchased a home in Cleveland, Ohio, an existing mortgage loan serviced by SPS that was supposed to be paid off at closing was not discharged. As a result of this failure, the mortgagee, Bank of New York, now known as Bank of New York Mellon ("BNY"), filed a foreclosure action that eventually resulted in the loss of her home. On April 29, 2009, the complaint was served on SPS's office in Utah by certified mail. SPS acknowledges that someone from its mail department signed for and received the summons and complaint. However, SPS asserts that the employee failed to properly forward the mailing to the appropriate employees within SPS, and as a result, SPS was not notified of the pending litigation.[1]

{¶3} After SPS failed to respond, Little sought default judgment against it and other unresponsive parties. The trial court held separate default and damages hearings, and on August 12, 2010, issued a judgment entry finding that several defaulting defendants, including SPS and BNY, were jointly and severally liable for $76,306.67.

[1] SPS does not mention any of the other notices it likely received regarding the case that the docket indicates were sent to it by the court.

{¶4} In March 2014, BNY filed a motion to vacate void judgment arguing it was not properly served by Little. It alleged that Little did not attempt service via any of the proper methods of serving a corporation — through its statutory agent, at its usual place of business, or through an officer or manager. The record discloses that Little attempted to serve BNY at the same address as SPS because SPS had a limited power of attorney granted by BNY to service the mortgage loan and institute foreclosure proceedings. The trial court granted BNY Mellon's motion for relief from judgment, which prompted Little to dismiss her claims against it in August 2014.

{¶5} On October 21, 2014, SPS filed a motion for relief from judgment. SPS's motions indicate that its policies regarding accepting service of process broke down and it was not informed of the suit against it. SPS argued that certified mail service failed, but it acknowledged that the complaint was received by an employee at its usual place of business. The trial court granted the motion without hearing. Little then filed a notice of appeal arguing "the trial court abused its discretion in granting [SPS's] motion for relief from judgment."

II. Law and Analysis

A. Relief from Default Judgment

{¶6} Civ.R. 60(B) provides an avenue for relief from a valid, final judgment of a court. The grounds for relief are set forth in the rule:

> (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.

{¶7} "To prevail on a motion brought 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 * * *" as set forth in the rule. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus. The reasonableness of the time within which a motion is filed differs based on the facts of each case and under which provision of Civ.R. 60(B) the motion relies. The rule sets forth that such a 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." Civ.R. 60(B).

{¶8} This court reviews a decision granting or denying a motion for relief from judgment for an abuse of discretion. *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 637 N.E.2d 914 (1994). An abuse of discretion is evident where a court's judgment is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶9} Little's strongest argument is that SPS's motion was untimely under the rule. She asserts that SPS's motion was founded on excusable neglect under Civ.R. 60(B)(1) and as such, must have been filed within one year of the 2010 judgment. SPS argues its motion for relief from judgment was premised on Civ.R. 60(B)(5), and that it was filed within a reasonable time of its discovery of the 2010 judgment.

{¶10} In its motion, SPS asserted that in light of the service issues highlighted in the affidavit attached to its motion, it would be inequitable to hold it to answer for a large judgment where Little's complaint did not properly assert a cause of action against it. It further argued a

complete failure of service as the proper party within its organization did not receive notice. The affidavit provides in relevant part:

> 3. I am employed as a Document Control Officer. I make this affidavit based upon my personal knowledge from my review of the above-described business records and duties as an SPS employee.
>
> 4. On April 27, 2009, Paulette Baretsky ("Ms. Baretsky") received the summons sand complaint served by the Plaintiff Sharon Little in this action. See Exhibit A. At the time these documents were received, Ms. Baretsky was employed as a mailroom clerk for SPS. Her job duties entailed processing loan level correspondence including period payments. As a clerical employee in the mailroom, Ms. Baretsky's job responsibilities did not include accepting service of process on behalf of SPS.
>
> 5. Additionally, Ms. Baretsky did not have general signing authority to execute documents on behalf of SPS at the time she signed for the summons and complaint. See the Certificate of Authority, a true and accurate copy of which is attached as Exhibit B.
>
> 6. The practice relating to accepting service of process on behalf of SPS was not followed in this case. The SPS Corporate Legal Department was not made aware of this lawsuit and as a result SPS never made an appearance in this case or otherwise defended the lawsuit.
>
> 7. SPS became aware of this lawsuit when it was contacted by the Bank of New York Mellon, fka the Bank of New York in late January 2014 concerning a default judgment that had been entered against it. Thereafter, SPS investigated what happened it [sic] determined that its practice for accepting service of process was not complied with which explained why it had no knowledge of this lawsuit until that time.

Affidavit of Suzanne Johnston.

{¶11} SPS asserted that a clerk in its mailroom did not have authority to execute documents on behalf of SPS and was not supposed to sign for certified mailings. This contention does not vitiate the presumption of proper service. "Service of process upon a corporation at an address reasonably anticipated to reach the intended recipient is effective, provided the certified mail receipt is signed and returned, even if it is not delivered to the

defendant or a person authorized to receive service of process." *Bowling v. Grange Mut. Cas. Co.*, 10th Dist. Franklin No. 05AP-51, 2005-Ohio-5924, ¶ 32, citing *Samson Sales, Inc. v. Honeywell, Inc.*, 66 Ohio St.2d 290, 421 N.E.2d 522 (1981); *T.S. Expediting Servs., Inc. v. Mexican Ind., Inc.*, 6th Dist. Wood No. WD-01-060, 2002-Ohio-2268.

{¶12} Civ.R. 4.2(F) provides the method for serving a corporate defendant. One of those methods is via certified mail to the company's usual place of business. As service reached an SPS employee at its regular place of business, the failure of the proper party within SPS to receive notice is fairly classified as an internal corporate error.

{¶13} SPS claims its motion is based on Civ.R. 60(B)(5), but SPS's arguments for satisfaction of this provision all involve a failure of service based on mistake, inadvertence, and excusable neglect. Those arguments are properly asserted under Civ.R. 60(B)(1). SPS's argument that it never received service is belied by the record and the affidavit it supplied with its motion. There, it admitted service was properly delivered to its business address by certified mail.

{¶14} In *Bowling*, the Tenth District faced a situation where an internal corporate error resulted in a default judgment. The court first rejected the argument that an affidavit asserting that the proper party within the corporation never received service constituted sufficient evidence of failure of service. *Id*. at ¶ 29. There, a suit was filed against a corporate defendant, Kemper Insurance Company ("Kemper"). Kemper employed a messenger service to ferry mail from the post office to its place of business. The messenger service delivered the mail to Kemper's mailroom where it was sorted and delivered by Kemper employees. That court reversed the trial court's grant of Kemper's motion for relief from judgment, finding there was no failure of service and Kemper failed to show excusable neglect under Civ.R. 60(B)(1). *Id*. at ¶ 56.

{¶15} When other courts have addressed this situation, it has been under the rubric of Civ.R. 60(B)(1), where, through inadvertence or excusable neglect, a corporate defendant failed to timely answer a complaint because the proper party within the company did not receive the summons and complaint. *WFMJ TV, Inc. v. AT&T Fed. Sys.*, 7th Dist. Mahoning No. 01 CA 69, 2002-Ohio-3013, ¶ 19 (collecting cases). That subsection of the rule has a temporal limitation for good reason; excusable neglect is only excusable for so long. *Winona Holdings, Inc. v. Duffey*, 10th Dist. Franklin No. 10AP-1006, 2011-Ohio-3163, ¶ 14.

{¶16} SPS couched its motion under Civ.R. 60(B)(5) because there is no strict time limitation under that subsection. However, Civ.R. 60(B)(5) is available only when the arguments raised are not premised on those enumerated in Civ.R. 60(B)(1) through (4). *Bank of N.Y. v. Elliot*, 8th Dist. Cuyahoga Nos. 97506 and 98179, 2012-Ohio-5285, ¶ 32 ("Civ.R. 60(B)(5) is intended as a catchall provision reflecting the inherent power of a court to relieve a person from the unjust operation of a judgment, but it is not to be used as a substitute for one of the more specific provisions of Civ.R. 60(B)."). All of SPS's arguments go to excusable neglect. Civ.R. 60(B) indicates motions premised on excusable neglect must be filed within one year of the adverse judgment. SPS's motion is therefore untimely.

III. Conclusion

{¶17} The trial court erred in granting SPS's motion for relief from judgment. Where certified mail service is delivered to a company's usual place of business and it is signed for by an employee, service is perfected. Relief from a default judgment in such a case is properly granted under Civ.R. 60(B)(1) where the company is able to show excusable neglect. However, SPS's motion was filed approximately four years after the entry of default judgment and is therefore untimely.

{¶18} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee 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.

_____

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

KATHLEEN ANN KEOUGH, J., and
MARY EILEEN KILBANE, J., CONCUR