[Cite as *Geico Gen. Ins. Co. v. Fleminster*, 2017-Ohio-9176.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105659

GEICO GENERAL INSURANCE COMPANY

PLAINTIFF-APPELLANT

vs.

RENEE N. FLEMINSTER, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-863751

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

RELEASED AND JOURNALIZED: December 21, 2017

ATTORNEY FOR APPELLANT

Daran P. Kiefer
Kreiner & Peters Co., L.P.A.
P.O. Box 6599
Cleveland, Ohio 44101

FOR APPELLEES

Phillip Clow, pro se
3631 West 47th Street
Cleveland, Ohio 44102

Renee Fleminster, pro se
5298 Tamarak Circle E.
Columbus, Ohio 43229

PATRICIA ANN BLACKMON, J.:

{¶1} Plaintiff-appellant Geico General Insurance Co. ("Geico Insurance") appeals from the order of the trial court vacating a default judgment entered against defendant-appellee Phillip Clow ("Clow") in Geico Insurance's subrogation action. Geico Insurance assigns the following errors for our review:

> I. The trial Court committed reversible error and abused its discretion granting [Clow's Civ.R. 60(B) motion as a substitute for an appeal].
>
> II. Alternatively, the trial court abused its discretion in granting [Clow's Civ.R. 60(B) motion] without actual testimony, facts or evidence submitted at the hearing by appellee Clow.

{¶2} Having reviewed the record and relevant law, we affirm the trial court's decision. The apposite facts follow.

{¶3} On May 24, 2016, Geico Insurance filed a complaint for subrogation against Clow and Renee Fleminster ("Fleminster") to recover $12,500 Geico paid to its insured, Henry Moore ("Moore"). Geico Insurance alleged that Clow negligently entrusted his vehicle to Fleminster, and that Fleminster negligently struck Moore while he was riding his bicycle in Cleveland.

{¶4} Fleminster and Clow were both served with summons but did not file answers to the complaint. The record further reflects that a default hearing as to Clow was scheduled for November 18, 2016. On that date, however, the court issued the following order:

> Plaintiff's counsel failed to appear for default hearing. Default hearing reset. Default hearing set for 12/15/16 at 1:45 p.m.

However, the court immediately issued a nunc pro tunc order reflecting that this order, setting a December 15, 2016 default hearing, had been issued in error and pertained to a different case.

{¶5} The court also corrected the record in the instant case to note that a default hearing actually took place in the instant matter on November 18, 2016 as scheduled:

> Default hearing held on 11/18/16 as to [Geico Insurance's] motion for default judgment as to defendant Phillip W. Clow. Upon application of [Geico Insurance] for judgment by default and upon the evidence presented, this court finds [Geico Insurance's] motion for default well taken. Judgment for [Geico Insurance] and against defendant Phillip W. Clow in the sum of $12,500 plus interest at the statutory rate from the date of judgment.

{¶6} On December 15, 2016, Clow, in apparent reliance upon the date listed in the erroneous journal entry, appeared for the default hearing. As explained by the trial court:

> Defendant Phillip Clow appeared for a default hearing that he believed was set for 12/15/16 as he received a postcard from the court with that date. Defendant Clow provided another name as the driver of the car and intends to seek the assistance of counsel to file a motion for relief from judgment. Notice issued.

{¶7} Several weeks later, Clow filed a motion for relief from the default judgment. In relevant part, Clow alleged that he failed to respond due to excusable neglect, and was not the owner or driver of the vehicle involved in the accident with Moore because he was "in the process of transferring the legal title to the real party of interest." The trial court held a hearing in the matter on April 4, 2017, and the following exchange occurred on the record:

> THE COURT: Mr. Clow, the Court understands that you had made an appearance earlier in the case and that a default hearing was set. And it looks like the docket mistakenly had December the 15th as the hearing date. And it was later corrected. You ended up showing up on December 15th, is that correct?
>
> MR. CLOW: Correct.
>
> THE COURT: And by that time, the default hearing had been concluded, and you did not appear, because it was originally set for November the 18th, is that right?
>
> MR. CLOW: Correct.
>
> THE COURT: * * * [W]hen you came on December 15th, were you prepared to defend the matter at that point?
>
> MR. CLOW: Well, if I have to obtain counsel to, you know, to assist me, I guess that's what I might have to do, but the only thing that I'm trying to clarify is that [Fleminster's sister owned the vehicle and was driving].

{¶8} Thereafter, the trial court granted Clow's Civ.R. 60(B) motion for relief from judgment. For the sake of convenience, we shall address Geico's assigned errors in reverse order.

Civ.R. 60(B) Motion for Relief From Judgment

{¶9} In its second assigned error, Geico Insurance argues that the trial court erred in granting Clow's motion for relief from judgment.

{¶10} We review a trial court's decision to grant or deny a Civ.R. 60(B) motion for an abuse of discretion. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988). An abuse of discretion standard requires a showing that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *In re Jane Doe 1*, 57 Ohio St.3d 135, 137, 566 N.E.2d 1181 (1991). When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993).

{¶11} In order to prevail on a Civ.R. 60(B) motion to vacate judgment, the moving party must demonstrate the following: (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) that include, inter alia, "mistake, inadvertence, surprise or excusable neglect," and "any other reason justifying relief from the judgment"; 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. v. ARC Industries*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

{¶12} The moving party "has the burden of proof, [and] must present sufficient factual information to warrant a hearing on the motion." *Adomeit v. Baltimore* 39 Ohio App.2d 97, 103, 316 N.E.2d 469 (8th Dist.1974). The evidentiary materials must present

operative facts and not mere general allegations to justify relief. *Hornyak v. Brooks*, 16 Ohio App.3d 105, 106, 474 N.E.2d 676 (8th Dist.1984)*; see also Rose Chevrolet, Inc*., 36 Ohio St.3d at 20. If the movant has a meritorious defense, then doubt, if any, should be resolved in favor of the motion to set aside the judgment so that the case may be decided on their merits. *GTE*, at paragraph three of the syllabus.

A. Meritorious Defense

{¶13} In this matter, Clow asserted that he does not own the vehicle that struck Moore. Similar allegations setting forth denials of ownership were found to constitute a meritorious defense in *Wilson v. Lee*, 172 Ohio App.3d 791, 2007-Ohio-4542, 876 N.E.2d 1312 (2d Dist.), ¶ 15; *Kostoglou v. D&A Trucking & Excavating Inc*., 7th Dist. Mahoning No. 06-MA-77, 2007-Ohio-3399, ¶ 45.

B. Timeliness

{¶14} In this matter, the record demonstrates that Clow filed his motion for relief from judgment less than two months after the trial court entered default judgment against him. Geico does not dispute that it is a reasonable time within which to file the motion, and case law from this court indicates that this time period is reasonable. *See Bankers Trust Co. of California v. Munoz*, 142 Ohio App.3d 103, 109, 754 N.E.2d 265 (8th Dist.2001) (four months is a reasonable time within which to file a motion for relief from judgment).

C. Grounds for Relief Under Civ.R. 60(B)

{¶15} Court errors and omissions are reasons that may justify relief under Civ.R. 60(B)(5). *State ex rel. Gyurcsik v. Angelotta*, 50 Ohio St.2d 345, 346, 364 N.E.2d 284 (1977). This rule permits a court to vacate a judgment where such action is appropriate to accomplish justice. *Id*. Civ.R. 60(B)(5) reflects the inherent power of a court to relieve a person from the unjust operation of a judgment. *Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64, 448 N.E.2d 1365 (1983), paragraph one of the syllabus.

{¶16} In this matter, the record clearly indicates that the trial court issued a journal entry that incorrectly advised Clow that the default hearing would be scheduled on December 15, 2016. The record also indicates that Clow, in reliance on this erroneous notice, appeared on December 15, 2016. During its subsequent hearing, the trial court agreed that Clow had been misinformed and that he relied upon the misinformation. Moreover, as the trial court clearly recognized, no additional evidence or testimony was required to establish Clow's asserted basis for relief from judgment. Therefore, we conclude that the trial court acted well within its discretion in vacating the default judgment. That is, based upon the record before us, the trial court could conclude that it was necessary to vacate the default judgment in order to accomplish justice and relieve Clow of the unjust operation of the default judgment.

{¶17} Geico Insurance insists that since Clow did not make an appearance in the matter, he was not entitled to notice as set forth in Civ.R. 55. However, the court's authority to grant relief under Civ.R. 60(B) in order to correct court errors and omissions is within the court's inherent power. *Gyurcsik,* 50 Ohio St.2d at 346.

{¶18} For the foregoing reasons, the trial court acted within its discretion in granting Clow's motion for relief from judgment. The second assigned error is without merit.

Civ.R. 60(B) Not a Substitute for an Appeal

{¶19} In its first assigned error, Geico Insurance argues that the trial court improperly permitted Clow to use the motion as a substitute for an appeal.

{¶20} Geico Insurance notes that Civ.R. 60(B) should not be used as a substitute for an appeal. *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128, 502 N.E.2d 605 (1986), paragraph two of the syllabus.

{¶21} However, the record in this case demonstrates that Clow appeared for the December 15, 2016 hearing, as indicated in the erroneous entry, and he informed the court that he had relied upon the mistaken information. The court held a follow-up hearing several months later, then vacated the default judgment. At that point, Clow was outside the time limit for filing a notice of appeal. App.R. 4(A)(1). Therefore, Civ.R. 60(B) was the only avenue through which Clow could assert his claim to relief. *Accord W. Res. Cas. v. Glagola*, 5th Dist. Stark No. 2005CA00225, 2006-Ohio-6013, ¶ 47. Accordingly, this matter does not involve the improper use of Civ.R. 60(B) relief as a substitute for an appeal.

{¶22} The first assigned error is without merit.

{¶23} Judgment is affirmed.

It is ordered that appellees 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.

PATRICIA ANN BLACKMON, JUDGE

KATHLEEN ANN KEOUGH, A.J., CONCURS;
FRANK D. CELEBREZZE, JR., J., CONCURS
IN JUDGMENT ONLY