

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

TECHNICAL SERVICES CO., et al.

Appellants

v.

TRINITECH INTERNATIONAL, INC.

Appellee

C. A. No. 21648

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2001 05 1988

DECISION AND JOURNAL ENTRY

Dated: March 3, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Presiding Judge.

{¶1} Plaintiffs-Appellants Technical Services Co., Steven Casebolt and Joseph Casebolt have appealed from a decision of the Summit County Court of Common Pleas that denied their motion for relief from judgment. This Court affirms.

{¶2} On May 1, 2001, Technical Services, Co. filed suit against Defendant-Appellee Trinitech International Inc. for breach of contract and unjust enrichment. In its complaint, Technical Services alleged that in June 1996, it entered into an agreement with Appellee, whereby Technical Services would furnish certain tantalum sheet materials and other tantalum stock materials for use in Appellee's business. Technical Services further alleged that it complied with the terms of the contract by providing the goods and services to Appellee and that Appellee accepted the products without objection. Technical Services asserted that the approximate cost of the goods and services provided to Appellee was \$51,734.98, for which Appellee failed to pay. Technical Services claimed that Appellee breached its contract and Technical Services requested damages in the amount of \$51,734.98, with interest at a rate of ten percent per annum.

{¶3} Appellee filed both an answer to Technical Services' complaint and a counterclaim. In its counterclaim, Appellee brought actions for breach of contract and conversion. Appellee alleged that Technical Services breached its contract with Appellee by failing to deliver tantalum steel material and that Technical Services failed to return certain precious metals (i.e., ruthenium and iridium) Appellee delivered to Technical Services. Later, on January 22, 2002, Appellee filed a motion for joinder or substitution. In the motion, Appellee moved the "[c]ourt for an [o]rder requiring joinder and/or substitution of the real party in interest for the reason that the named Plaintiff, Technical Services Co., is not organized or existing as a corporation in the State of Colorado, nor authorized to do business in the State of Ohio and that the real parties in interest herein are the

promoters, Joe Casebolt and Steven Casebolt, who caused the filing of the within action.” The trial court granted Appellee’s motion and Joseph Casebolt and Steven Casebolt were joined as parties to the action.

{¶4} On February 4, 2002, the attorneys for Technical Services, Joseph Casebolt and his son Steven Casebolt (collectively “Appellants”) filed a motion to withdraw as counsel of record. The trial court granted the motion. A month later, on March 4, 2002, Appellee filed a motion to dismiss Appellants’ complaint and for judgment on its counterclaim. In the motion, Appellee maintained that Appellants failed to prosecute the matter and abide by the orders of the court. Specifically, Appellee maintained that Appellants failed to comply with discovery requests, attend mediation, and that “Steven Casebolt, an individual that was intimately involved in the transactions between the Colorado business and [Appellee], has now left the country, and is being sued by one or more government agencies.” On April 9, 2002, the trial court granted Appellee’s motion to dismiss the complaint for lack of prosecution. The trial court also entered default judgment against Appellants, stating:

“[N]o one on behalf of [Appellants] appeared for the previously scheduled mediation conference; [Appellants] have blatantly disregarded the Court’s Orders and have failed to respond to [Appellee’s] discovery requests; and, although filed over one month ago, [Appellants] have failed to respond to [Appellee’s] Motion for Dismissal of Complaint and for Judgment on Counterclaim. *** [T]he [c]ourt finds that judgment on [Appellee’s] Counterclaim is appropriate.”

{¶5} The trial court scheduled a hearing on damages. Before the hearing was held, Appellees filed a memorandum regarding damages. The purpose of the

memorandum was to assist the trial court in calculating the amount of damages Appellee suffered as a result of Appellants' breach of contract and conversion.

{¶6} On May 9, 2002, the magistrate found that Appellee suffered \$173,921.72 as actual out-of-pocket damages that it incurred as a result of having to go out on the open market and buy tantalum metal products. The magistrate further found that had Appellants provided the metal, Appellee would have recovered \$150,843.32 net profits on the joint venture project. Also, as a result of the instant action, Appellee incurred at least \$20,000 in legal fees and suffered a loss of business reputation which was valued at \$70,000. The magistrate concluded that Appellee was entitled to a total of \$414,765.04 as total damages on its counterclaim. Appellants, who were represented by counsel at the hearing, made no objections to the findings of the magistrate and thus the trial court adopted the magistrate's decision and ordered damages in the amount of \$414,765.04.

{¶7} Almost a year after the trial court entered judgment in favor of Appellee, Appellants filed a motion for relief from judgment on March 28, 2003. The trial court denied the motion on July 1, 2003. Appellants have timely appealed, asserting three assignments of error. We have rearranged Appellants' assignments of error to facilitate review.

II

Assignment of Error Number One

“THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ADDRESS THE GROUNDS FOR RELIEF ASSERTED BY APPELLANTS IN THEIR CIV.R. 60(B) MOTION, AND THEN DENYING APPELLANTS' MOTION FOR RELIEF FROM

JUDGMENT ON GROUNDS OTHER THAN THOSE ASSERTED
BY APPELLANTS.”

{¶8} In Appellants’ first assignment of error, they have argued that the trial court abused its discretion when it denied their motion for relief from judgment on grounds other than those asserted by Appellants. This Court disagrees.

{¶9} Civ.R. 60(B) governs motions for relief from judgment, and provides, 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: (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 [Civ.R 59(B)]; (3) fraud ***, 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.”

{¶10} Pursuant to Civ.R. 60(B), a movant must demonstrate three factors in order to obtain relief from judgment pursuant to Civ.R. 60(B): (1) a meritorious defense or claim if relief is granted; (2) entitlement to relief under Civ.R. 60(B)(1)-(5); and (3) that the motion was filed within a reasonable time, with a maximum time being one year from the entry of judgment if the movant alleges entitlement to relief under Civ.R. 60(B)(1)-(3). *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. These requirements are independent of one another and in the conjunctive. *Strack v.*

Pelton (1994), 70 Ohio St.3d 172, 174. Thus, if the movant fails to satisfy any one of these requirements, the trial court must deny the motion. *Id.*

{¶11} The standard of review used to evaluate the trial court’s decision to deny or grant a Civ.R. 60(B) motion is an abuse of discretion. *State ex rel. Russo v. Deters* (1997), 80 Ohio St.3d 152, 153. An abuse of discretion is more than an error in judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. The court abuses its discretion if it grants relief in a case where the movant has not demonstrated all three factors in its motion. *Mitchell v. Mill Creek Sparkle Market, Inc.* (June 29, 1999), 7th Dist. No. 97 CA 230, 1999 Ohio App LEXIS 3153, at *4, citing *Russo*, 80 Ohio St.3d at 154. If, however, the materials submitted by the parties clearly establish the movant is entitled to relief, then the motion should be granted. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 104 (“If the material submitted by the parties in support of and in opposition to the motion clearly establishes that the movant filed a timely motion, has stated valid reasons why he is entitled to relief under one of the provisions of [Civ.R. 60(B)(1)-(5)], and has a defense, the trial court should grant the motion for relief from judgment and overruling the motion would be an abuse of discretion.” (Emphasis omitted.)).

{¶12} In Appellants’ motion for relief from judgment, they asserted that they were entitled to relief pursuant to Civ.R. 60(B)(5). Appellants stated the following: “For grounds for relief from judgment under Civ.R. 60(B), Technical Services asserts the ground of (5) other reasons justifying relief from judgment.” Appellants further explained that:

“[T]he court should consider multiple factors. First, liability in this case was imposed by default, which is disfavored in law. Second, Technical Services has a strong argument that it would be entitled to summary judgment. Third, the judgment against Joseph and Steven Casebolt as individuals, jointly and severally, is substantial, to wit, \$414,765.04. Payment of this judgment would work a substantial hardship on both Casebolts, but, in particular, Joseph Casebolt, who is sixty-nine years old. Fourth, Steven Casebolt was an agent of Technical Services. By default, liability has been imposed on him as if he were an owner.”

{¶13} Although the trial court concluded that Appellants’ motion was timely filed, it denied their motion because the trial court found that, assuming Appellants alleged a meritorious defense which would entitle them to relief, Appellants failed to demonstrate that they were entitled to relief under the any of the grounds set forth in Civ.R. 60(B)(1)-(5). The trial court specifically noted that although Appellants’ motion was brought under Civ.R. 60(B)(5), their motion “essentially allege[d] ‘excusable neglect’ under Civ.R. 60(B)(1).” The trial court further found that Appellants’ assertion that they were entitled to relief pursuant to Civ.R.60(B)(5) because “they were not aware of the particulars of this case and assumed that this case was a mere collection matter” without merit. The trial court explained:

“Due diligence would have made [Appellants] aware of the particulars of this litigation. Court orders were sent to [Appellants], yet they chose not to respond. *** [Appellants] made no attempt whatsoever to protect their rights until over eleven (11) months after learning that default judgment had been rendered against them. [Appellants] failed to establish that they are entitled to relief from judgment under Civ.R. 60(B).”

{¶14} On appeal, Appellants have argued that the trial court abused its discretion in applying the standard of “excusable neglect” pursuant to Civ.R. 60(B)(1), rather than reviewing their motion under Civ.R. 60(B)(5). In their brief,

Appellants argued that they “were fully aware of the existence of ‘excusable neglect’ as a potential ground for relief from judgment. Appellants chose not to assert [Civ.R. 60(B)(1)] due to their evaluation, with which both Appellee and the Trial Court agree, that the actions of Joseph Casebolt, in spite of his disabilities, may not amount to excusable neglect.” Appellants have maintained that the main reasons for which relief should be granted has nothing to do with “excuse.”¹ It appears that Appellants were attempting to argue in their motion for relief from judgment, and now on appeal, that the “other reason justifying relief from judgment” was that the judgment was unjust and should be reversed on that basis alone. Civ.R. 60(B)(5) This Court must therefore determine whether Appellants’ argument that the judgment was unjust falls under the scope of Civ.R. 60(B)(5).

{¶15} “Matters of an extraordinary nature fall within the purview of Civ.R. 60(B)(5).” *Dailey v. Associated Estates* (June 22, 2000), 8th Dist. No. 77311, 2000 Ohio App. LEXIS 2752, at *10. The Ohio Supreme Court in *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, further explained that:

“Civ. R. 60(B)(5) is intended as a catch-all provision reflecting the inherent power of a court to relieve a person from the unjust operation of a judgment. However, the grounds for invoking said provision should be substantial. Nor should Civ. R. 60(B)(5) be used as a substitute for any of the other more specific provisions of Civ. R. 60(B).” (Citations omitted.) *Caruso-Ciresi*, 5 Ohio St.3d at 66; see, also, *Cuyahoga Child Support Agency v. Guthrie* (1999), 84 Ohio St.3d 437, 441.

¹ This argument flies in the face of the statements Appellants made in their response to Appellee’s reply to the motion for relief from judgment. In their response, Appellants stated: “In any case, while the facts and circumstances surrounding Joe Casebolt’s involvement may not amount to excusable neglect, that is not the case with respect to Steven Casebolt.” Such a statement indicates that Appellants were attempting to argue that Steven Casebolt should be relieved from judgment pursuant to Civ.R. 60(B)(1).

{¶16} Other appellate courts have also addressed a party's attempt to employ Civ.R. 60(B)(5) instead of the more specific provisions listed in Civ.R. 60(B). The defaulting parties' in *Browning v. Oakwood Management Company*, 10th Dist. No. 02AP-1136, 2003-Ohio-2142, brought a motion for relief from judgment pursuant to Civ.R. 60(B)(1) and (B)(5). The appellate court, however, disregarded the defaulting parties' argument brought pursuant to Civ.R. 60(B)(5) because "the basis for their claim for relief is excusable neglect which is specifically governed by Civ.R. 60(B)(1). Civ.R. 60(B)(5) is a catchall provision which reflects the inherent power of a court to relieve a person from the unjust operation of a judgment. It is not, however, to be used where a more specific ground for relief is available." (Citations omitted.) *Browning*, 2003-Ohio-2142, at ¶13.

{¶17} Similarly, in *Dailey*, supra, the appellate court rejected a party's assertion that he should be granted relief pursuant to Civ.R. 60(B)(5). In *Dailey*, the moving party argued that he was entitled to relief pursuant to Civ.R. 60(B)(5). In rejecting the movant's arguments, the *Dailey* court explained that if a motion for relief from judgment "should have been brought under one of the more specific provisions of Civ.R. 60(B), [Civ.R. 60(B)(5)] does not apply unless the movant can show operative facts different from and/or in addition to those contemplated by one of the more specific provisions." *Dailey*, 2000 Ohio App. LEXIS 2752, at *10, citing *Whitt v. Bennett* (1992), 82 Ohio App.3d 792. Although the moving party in *Dailey* claimed relief pursuant to Civ.R. 60(B)(5), the court concluded that the "facts look more like the provisions under Civ.R. 60(B)(1). However, [the moving party] has not shown operative facts different from and/or in addition to

those contemplated under Civ.R. 60(B)(1). Consequently, we conclude Civ.R. 60(B)(5) is inapplicable.” *Dailey*, 2000 Ohio App. LEXIS 2752, at *10.

{¶18} This Court finds, as did the courts in *Browning* and *Dailey*, that a more specific provision existed because the basis of Appellants’ claim for relief was “excusable neglect.” In Appellants’ motion, Appellants claimed that “Technical Services defaulted in this matter due to a sequence of unfortunate circumstances.” The list of “unfortunate circumstances” included Steven Casebolt’s disassociation from Technical Services and his move to Costa Rica in July 2001; the fact that “Joseph Casebolt had little knowledge regarding the particulars of this lawsuit”; the failure of Wayne Ratner’s, Steven Casebolt’s agent, to keep Steven Casebolt properly briefed on the pending litigation and his failure to communicate with the attorney handling the instant litigation; Joseph Casebolt’s age; an automobile accident that Joseph Casebolt was involved in on March 12, 2002, and in which he suffered two breaks in his hip, severe bruising, and mental disorientation; and the subsequent withdrawal of trial counsel.² These arguments smack of “excusable neglect” and thus, we find that there was no reason to invoke the less specific catchall provision, Civ.R. 60(B)(5). Furthermore, we find that Appellants attempted to camouflage an argument that clearly fell within the scope of Civ.R. 60(B)(1) by using terms like “unjust” rather

² Appellants also intimated in their Civ.R. 60(B) motion and appellate brief that Appellee’s memorandum for damages was not properly served on Technical Services. Appellants have not argued, however, that they did not receive notice of the damages hearing. Furthermore, this Court notes that Appellants never objected to the magistrate’s use of the memorandum at the damages hearing nor did they file Civ.R. 53(E) objections to the magistrate’s decision challenging the use of the memorandum.

than “excusable neglect.” As such, we find that the trial court did not abuse its discretion in reviewing Appellants’ arguments pursuant to Civ.R. 60(B)(1). Because we find that Civ.R. 60(B)(1) applies to the instant matter, we must next determine whether the trial court abused its discretion when it concluded that Appellants failed to demonstrate “excusable neglect.”

{¶19} The term “excusable neglect” is an elusive concept and has not been sufficiently defined. *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20. Consequently, there is no clear and established standard as to what constitutes “excusable neglect” and therefore it is a determination left to the discretion of the trial court. *Lewis v. Auto. Techs.*, 2nd Dist. No. 19423, 2003-Ohio-1263, at ¶10. The Ohio Supreme Court, however, has “defined ‘excusable neglect’ in the negative and ha[s] stated that the inaction of a defendant is not ‘excusable neglect’ if it can be labeled as a ‘complete disregard for the judicial system.’” *Kay*, 76 Ohio St.3d at 20, quoting *GTE*, 47 Ohio St.2d at 153. Additionally, “[a] trial court does not abuse its discretion in overruling a Civ.R. 60(B)(1) motion for relief from a default judgment on the grounds of excusable neglect, if it is evident from all of the facts and circumstances in the case that the conduct of the defendant, combined with the conduct of those persons whose conduct is imputable to the defendant, exhibited a disregard for the judicial system and the rights of the plaintiff.” *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, syllabus.

{¶20} After reviewing the record, this Court cannot say that the trial court abused its discretion when it denied Appellants’ motion for relief from judgment because of their failure to show “excusable neglect.” As previously stated, Appellants argued that the trial court’s judgment should be vacated because of

certain “unfortunate circumstances.” It was within the trial court’s discretion to find that such “unfortunate circumstances” did not satisfy the standard for “excusable neglect.” As such, we find that Appellants failed to satisfy all three prongs of the *GTE* test. Therefore, we conclude that the trial court’s decision denying Appellants’ motion for relief from judgment was not unreasonable, arbitrary, or unconscionable. Appellants’ first assignment of error is not well taken.

Assignment of Error Number Three

“THE TRIAL COURT ERRED IN DENYING APPELLANTS MOTION FOR RELIEF FROM JUDGMENT WITHOUT CONDUCTING A HEARING, DUE TO THE EXISTENCE OF OPERATIVE FACTS THAT WARRANT RELIEF FROM JUDGMENT.”

{¶21} In Appellant’s third assignment of error, they have argued that the trial court erred when it denied their motion for relief from judgment without a hearing. This Court disagrees.

{¶22} Ohio courts have previously held that: “If the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under [Civ.R 60(B)], the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion.” *Adomeit*, 39 Ohio App.2d at 105. If a movant alleges such operative facts that would warrant relief from judgment and the trial court refuses to grant a hearing, such a decision is an abuse of discretion. *Kay*, 76 Ohio St.3d at 19 (stating that a “trial court abuses its discretion in denying a hearing where grounds for relief from judgment are sufficiently alleged and are supported with evidence which would warrant relief from judgment.”) On the other hand, if the movant fails to allege operative facts

that justify relief from judgment the court is not required to grant an evidentiary hearing. *Architectural Interior Products, Inc. v. Freeman Doors*, 10th Dist. No. 03AP-265, 2004 Ohio App. LEXIS 593, at *4 (stating that “an evidentiary hearing is not required where the motion and any attachments lack allegations of operative facts justifying relief from judgment.”) Thus, a moving party must demonstrate all three elements of the *GTE* test to warrant an evidentiary hearing. *Id.*, at *4; *Yanky v. Yanky*, 8th Dist. No. 83020, 2004-Ohio-489, at ¶11, citing *Kay*, 76 Ohio St.3d at 18.

{¶23} In our discussion of Appellants’ first assignment of error, we concluded that Appellants failed to satisfy the second prong of the *GTE* test. Because Appellants failed to satisfy the *GTE* test, the trial court was not required to hold an evidentiary hearing. See *Architectural Interior Products, Inc.*, 2004 Ohio App. LEXIS 593, at *4; *Yanky*, 2004-Ohio-489, at ¶11. Consequently, we find that that the trial court did not abuse when it failed to hold a hearing before it denied Appellants’ motion for relief from judgment. Appellants’ third assignment of error lacks merit.

Assignment of Error Number Two

“THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT[S’] MOTION FOR RELIEF FROM JUDGMENT WHEN APPELLANTS HAD DEMONSTRATED EACH OF THE THREE NECESSARY FACTORS ENTITLING APPELLANTS TO RELIEF FROM JUDGMENT UNDER CIV.R. 60(B).”

{¶24} In Appellant’s second assignment of error, they have argued that the trial court abused its discretion when it denied their motion for relief from judgment. Specifically, Appellants have argued that they demonstrated each

prong of the three part *GTE* test. Because this Court has previously addressed the merits of Appellants' Civ.R. 60(B) motion, we decline to address their second assignment of error. See App.R. 12(A)(1)(c).

III

{¶25} Appellants' first and third assignments of error are overruled; we decline to address their second assignment of error. The judgment of the trial court is affirmed.

Judgment affirmed.

BETH WHITMORE
FOR THE COURT

BAIRD, J.
BATCHELDER, J.
CONCUR

APPEARANCES:

ERIC R. WAITE, Attorney at Law, 520 South Main Street, Suite 500, Akron, Ohio 44311, for Appellants

TERRENCE J. STEELE, Attorney at Law, 50 Public Square, Suite 1414, Cleveland, Ohio 44113, for Appellee.