[Cite as *Champlain Ents., L.L.C. v. Kuiper*, 2023-Ohio-3059.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CHAMPLAIN ENTERPRISES L.L.C. D.B.A. COMMUTAIR-UNITED EXPERIENCE, :

Plaintiff-Appellee, :

No. 112248

v. :

JACOB DANIEL KUIPER, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: August 31, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-20-936490

Appearances:

Ross, Brittain & Schonberg, Co., L.P.A., Evelyn P. Schonberg, and Sean S. Kelly; Andrew C. Vorhees, *for appellee*.

Carlin & Carlin, William A. Carlin, and Mark W. Biggerman, *for appellant*.

LISA B. FORBES, J.:

{¶ 1} Jacob Daniel Kuiper ("Kuiper") appeals from the trial court's judgment entry denying his motion to vacate judgment and for relief from judgment

in this breach-of-contract case. After reviewing the facts of the case and the pertinent law, we reverse the trial court's decision.

I. Facts and Procedural History

{¶ 2} On March 21, 2019, Kuiper entered into an agreement entitled "Conditional Offer of Employment and Commitment Letter for Pilot Applicant" (the "Agreement") with CommutAir/United Express ("CommutAir"). Under the terms of this agreement, and pertinent to this appeal, CommutAir paid Kuiper a $45,000 "pre-employment new hire pilot bonus" conditional upon, among other things, Kuiper's employment with CommutAir "as a pilot in active service for at least * * * 24 * * * months after the date [Kuiper] begin[s] training * * *."

{¶ 3} At some time prior to the end of the Agreement's 24-month commitment period, Kuiper left CommutAir's employ. According to Kuiper, he repaid CommutAir $22,900 of the $45,000 bonus.

{¶ 4} On August 27, 2020, Champlain Enterprises, L.L.C., d.b.a. CommutAir filed a complaint against Kuiper alleging that Kuiper "left [CommutAir's] employ before completing the required commitment period, requiring repayment of the pre-employment bonus" in the amount of $24,042.10, plus interest and costs. This complaint was sent to Kuiper at 1070 Iyanough Road, Hyannis, MA, 02601, which is the same address listed on the Agreement.[1] On

[1] Kuiper's address listed on the Agreement is 1070 Iyanough Road Rt 132, Hyannis, MA, 02601.

October 28, 2020, a docket entry shows that the "certified mail number 42422329 address to Jacob Kuiper * * * not returned by the U.S. Postal Service after 60 days."

{¶ 5} CommutAir sent the complaint by certified mail a second time on November 12, 2020, to 1070 Iyanough Road PMB 239 Hyannis, MA, 02601. A docket entry dated November 25, 2020, states, "USPS receipt No. 42991218 delivered by USPS 11/16/2020 Kuiper/Jacob * * *."

{¶ 6} On January 12, 2021, a docket entry shows that written correspondence from Kuiper was received and filed in the case at hand by the Cuyahoga County clerk of courts. The 29-page document includes various "exhibits," one of which appears to be a letter from Kuiper to CommutAir's counsel. This letter, which is dated September 24, 2020, and signed by Kuiper, includes the statement: "This is the proper Court by agreement." This 29-page document also includes a letter from Kuiper addressed to the trial court with a "CC" to CommutAir's counsel. In this letter, which is dated December 16, 2020, and signed by Kuiper, Kuiper opposed the breach-of-contract claim against him, denied liability, and responded to CommutAir's discovery interrogatories and requests. Both letters reference "summons No42422329," which is the number of the summons sent to Kuiper, along with the complaint, on August 27, 2020.

{¶ 7} On February 3, 2021, an attorney filed a notice of appearance on behalf of Kuiper. This attorney, along with CommutAir's counsel, participated in a telephonic case-management conference on February 19, 2021, at which the court granted Kuiper "leave to answer, motion, or otherwise respond to [CommutAir's]

complaint until 3/12/2021." The docket in the case at hand reflects that in March and April 2021, CommutAir again requested service of the complaint via certified mail to Kuiper. The docket also reflects that the complaint was delivered to Kuiper on March 17, 2021, and May 5, 2021.

{¶ 8} On June 29, 2021, CommutAir filed a motion for default judgment against Kuiper. On July 1, 2021, counsel for both parties participated in a pretrial. Kuiper was "granted until * * * 7/23/2021 to answer, motion, or otherwise respond to the complaint." It is undisputed that Kuiper's counsel did not file an answer, file a motion, or otherwise respond to the complaint. On January 11, 2022, the court granted default judgment in favor of CommutAir in the amount of $24,042.10, plus interest and costs.

{¶ 9} On July 19, 2022, Kuiper, acting through new counsel, filed a motion to vacate default judgment "due to a failure of service and/or notice upon Defendant" and for relief from judgment pursuant to Civ.R. 60(B). On November 22, 2022, the court denied Kuiper's motion stating, in part, as follows:

> Defendant has not presented a meritorious argument that requires the court to hold a hearing on this motion. Defendant personally corresponded with the court citing the summons number that he claims he never received and, in the same letter, listed his address as the same address to which the summons had been sent. Further, defendant hired an attorney who participated in court proceedings but then neglected to file an answer. The behavior of defendant's counsel as presented on the docket and in defendant's motion does not reach the level required by current case law to allow the court to vacate the judgment.

{¶ 10} It is from this order that Kuiper appeals, raising the following assignments of error:

> I. The trial court abused its discretion by failing to include all relevant facts, and applying the wrong legal standard, in its decision.
>
> II. The trial court abused its discretion by applying the wrong legal standard when refusing to grant Mr. Kuiper an evidentiary hearing to establish the failure of service in support [of] his motion to vacate.
>
> III. The trial court erred by failing to grant Mr. Kuiper's [Civ.R.] 60(B) motion for relief from judgment.
>
> IV. The trial court erred by failing to hold a hearing to give Mr. Kuiper the opportunity to support his [Civ.R.] 60(B) motion for relief from judgment.

II. Law and Analysis

{¶ 11} We address Kuiper's assignments of error out of order for ease of discussion.

A. First Assignment of Error — Adequacy of Journal Entry

{¶ 12} In Kuiper's first assignment of error, he argues that the "trial court abused its discretion by failing to include all relevant facts, and applying the wrong legal standard, in its decision." Kuiper asks this court to remand the case to the trial court because the journal entry denying his motion to vacate judgment and for relief from judgment "is insufficient [for] adequate review by a court of appeals." Specifically, Kuiper argues that the journal entry at issue "is unclear [and] fails to include all of the facts or conclusions of law to sufficiently allow proper review, let alone justify the court's determination."

{¶ 13} Civ.R. 52 requires trial courts to issue findings of fact and conclusions of law upon motion in certain limited circumstances. This court has held that Civ.R. 52 does not apply to Civ.R. 60(B) motions for relief from judgment, and trial courts are not required to issue findings of fact and conclusions of law when ruling on such motions. *Stafford & Stafford Co., L.P.A. v. Steele,* 8th Dist. Cuyahoga No. 99554, 2013-Ohio-4042, ¶ 23. Furthermore, Kuiper points to, and we find, no law that extends Civ.R. 52's mandate regarding findings of fact and conclusions of law to rulings on motions to vacate judgments.

{¶ 14} Kuiper's argument is not well-taken, and because we are able to meaningfully review the trial court's final appealable order, his first assignment of error is overruled.

B. Third Assignment of Error

{¶ 15} In his third assignment of error, Kuiper argues that the court erred by failing to grant his Civ.R. 60(B) motion for relief from judgment.

{¶ 16} We review a trial court's ruling on a Civ.R. 60(B) motion for relief from judgment under an abuse-of-discretion standard. *Render v. Belle*, 8th Dist. Cuyahoga No. 93181, 2010-Ohio-2344, ¶ 8. An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). *See also Johnson v. Abdullah,* 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.2d 436.

{¶ 17} To succeed on a Civ.R. 60(B) motion for relief from judgment,

> 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 Electric, Inc. v. ARC Industries, Inc., 47 Ohio St.2d 146, 150, 351 N.E.2d 113 (1976). "If any of these three requirements is not met, the motion should be overruled." *Rose Chevrolet v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988).

{¶ 18} Civ.R. 60(B) sets forth five reasons to support relieving a party from a final judgment:

> (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.

{¶ 19} Starting with the first prong of the *GTE* test, this court has held the following regarding what constitutes a "meritorious defense":

> [A] moving party need only allege a meritorious defense; it need not prove that it will prevail on that defense. * * * Although proof of success is not required, the moving party must support its alleged defense with operative facts that have enough specificity to allow the trial court to judge the merits of the defense. * * * A proffered defense is meritorious if it is not a sham and when, if true, it states a defense in part, or in whole, to the claims for relief set forth in complaint.

Home S&L of Youngstown v. Snowville Subdivision Joint Venture, 8th Dist. Cuyahoga No. 97985, 2012-Ohio-4594, ¶ 18. *See also Savage v. Delamore Elizabeth*

Place, L.P., 2d Dist. Montgomery No. 23147, 2009-Ohio-2772, ¶ 37 (finding that a party's meritorious claim was alleged in his "affidavit alone," because it "was sufficient evidence to establish that he could create genuine issues of material fact if permitted to respond to" summary judgment).

{¶ 20} This case centers on a breach-of-contract claim. It is undisputed that Kuiper left CommutAir's employ prior to the end of the 24-month commitment period. It is also undisputed that Kuiper repaid a portion of his $45,000 bonus to CommutAir. However, what is disputed in this case is whether CommutAir is entitled to recover the balance of the bonus. Kuiper argues that he owes CommutAir no additional money. To support this argument, Kuiper points to the following language in the Agreement: "If you fail to successfully complete initial training as a Captain, you agree to partially repay the Bonus in the amount of [$22,900]." CommutAir, on the other hand, maintains that Kuiper owes the balance of the $45,000 bonus, because he "left [CommutAir's] employ before completing the required commitment period * * *." In fact, Kuiper argues he may have a counterclaim against CommutAir for breaching the Agreement "by failing to fulfill basic obligations under the contract," such as allegedly failing to conform to Federal Aviation Administration standards during Kuiper's training.

{¶ 21} Upon review, we find that Kuiper's argument that he repaid the correct amount of the bonus per the Agreement, if true, sets forth a defense to the breach-of-contract claim in the complaint. Without regard to a potential

counterclaim, Kuiper's meritorious defense is enough to meet the first prong of the *GTE* test.

{¶ 22} Turning to the second prong of the *GTE* test, this court has held that, when an attorney's conduct, or lack thereof, amounts to inexcusable neglect, this may warrant relief under Civ.R. 60(B)(5), which is often referred to as the "catch-all" provision. *See, e.g., Internatl. Total Servs. v. Nichols*, 8th Dist. Cuyahoga No. 105182, 2017-Ohio-9448. In *Nichols*, the defendant's counsel "misled him to believe that this matter was being properly handled"; "never notified him of the default hearing or the trial court's entry of default judgment against him"; "did not return Nichols's repeated attempts to contact him"; and "made an appearance, sought and was granted extensions of the answer deadline, but never filed an answer to the complaint." *Id.* at ¶ 26.

{¶ 23} The *Nichols* Court held that the attorney's "actions * * * amount to inexcusable neglect and are of the extraordinary nature that fall within the scope of Civ.R. 60(B)(5)." *Id.* at ¶ 27. The facts in the *Nichols* case and the facts in the case at hand, as sworn to in Kuiper's affidavit, are similar. Kuiper's affidavit states the following concerning his attorney's conduct, or lack thereof, in the trial court: Kuiper retained this attorney on January 28, 2021, in conjunction with the instant case; Kuiper paid this attorney "approximately $9,000.00"; this attorney never informed Kuiper "of any dates that he was required to respond to the Complaint by or the consequence of not responding to the Complaint"; this attorney never informed Kuiper "of the hearing on the Motion for Default Judgment or that a

default judgment was entered against him or the consequences of a default judgment"; this attorney engaged in "significantly decreasing contact" with Kuiper until July 2021, when this attorney failed to respond to Kuiper and "abandoned" him; and this attorney did not provide Kuiper his file after he requested it.

{¶ 24} In addition to Kuiper's affidavit, our review of the docket in the instant case shows that Kuiper's attorney filed a notice of appearance, failed to file an answer despite being granted two extensions of time, failed to oppose the default judgment motion filed against Kuiper, and failed to appear at the default judgment hearing. Furthermore, this attorney did not file a motion to withdraw as counsel and is, in fact, still listed as an attorney of record in this case.

{¶ 25} This court has found inexcusable neglect under Civ.R. 60(B)(5) in a number of other instances. In *CD Group, Inc. v. Hospitality, L.L.C.,* 8th Dist. Cuyahoga No. 93387, 2009-Ohio-6652, ¶ 22, the defendant "demonstrated through his affidavit * * * that his attorney[s] abandoned their representation of him." The *Hospitality* defendant "never received notices from anyone regarding deadlines to file responsive pleadings or notices of hearings for default judgment. Moreover, [the defendant] stated that his attorneys never notified him of the consequences of failing to respond to the complaint. Additionally, [the defendant] averred that he demanded copies of his files, but never received these documents." *Id*.

{¶ 26} The *Hospitality* Court found that the defendant "satisfied the three prongs of the *GTE* test, including the 'inexcusable neglect' standard[,]" and reversed the trial court's ruling denying relief from judgment. *Id.* at ¶ 28. *See also Parts Pro*

Auto. Warehouse v. Summers, 2013-Ohio-4795, 4 N.E.3d 1054, ¶ 24 (8th Dist.) (finding inexcusable neglect, "which rose to the level of abandonment," when the attorney failed to notify the defendant of court proceedings, failed to attend the final pretrial, which resulted in default judgment being granted against the defendant, and "failed to properly withdraw as counsel").

{¶ 27} Furthermore, other Ohio courts have similarly found that an attorney's abandonment of his or her client may give rise to relief from judgment under Civ.R. 60(B)(5). *See Whitt v. Bennett*, 82 Ohio App.3d 792, 797, 613 N.E.2d 667 (2d Dist.1992) (defining inexcusable neglect as "matter[s] different from the simple lapses and technical failures contemplated in" Civ.R. 60(B)(1). "They are matters of an extraordinary nature, which is the purview of Civ.R. 60(B)(5)."); *McClain v. Alexander*, 6th Dist. Lucas No. L-22-1268, 2023-Ohio-2007, ¶ 14 (acknowledging that "an attorney's failure to represent his client *may* constitute 'inexcusable neglect,' thereby entitling a party to relief under Civ.R. 60(B)(5)"). (Emphasis sic.)

{¶ 28} In following this court's precedent in *Nichols*, *Hospitality*, and *Parts Pro*, we find that Kuiper's trial counsel's extraordinary misconduct included a series of events that amounted to inexcusable neglect under Civ.R. 60(B)(5), which satisfies the second prong of the *GTE* test.

{¶ 29} Turning to the third and final prong of the *GTE* test, we find that Kuiper's motion for relief from judgment pursuant to Civ.R. 60(B) was filed within a reasonable time from when the court granted default judgment. *See* Civ.R. 60(B)

(stating that the "motion shall be made within a reasonable time"). Default judgment was granted against Kuiper on January 11, 2022, and Kuiper filed his motion for relief from judgment approximately six months later on July 19, 2022.

{¶ 30} This court has held that, regarding the timeliness of a motion for relief from judgment, the "movant has the burden of presenting evidentiary materials demonstrating that the motion was filed within a 'reasonable time.' * * * What constitutes a reasonable time is dependent upon the facts and circumstances of any particular case. * * * Timeliness is an issue that is left to the discretion of the trial court, and each case must be decided on its own merits." *Simmons v. Simmons*, 8th Dist. Cuyahoga No. 97975, 2012-Ohio-4164, ¶ 8, quoting *Youssefi v. Youssefi*, 81 Ohio App.3d 49, 53, 610 N.E.2d 455 (9th Dist.1991).

{¶ 31} According to Kuiper's affidavit, Kuiper "was appraised of the default judgment against him when he received correspondence from a debt collection law firm advising him of that fact * * *." Nothing in the record sets forth the date on which Kuiper "was appraised of the default judgment * * *." However, we acknowledge that Kuiper's attorney abandoned her representation of him, and under this circumstance, we cannot say that a six-month delay in filing the Civ.R. 60(B) motion for relief from judgment was unreasonable. *See, e.g., Kostoglou v. D&A Trucking & Excavating, Inc.*, 7th Dist. Mahoning No. 06-MA-77, 2007-Ohio-3399, ¶ 46 (finding that an eight-month delay between final judgment and a Civ.R. 60(B)(5) motion for relief from judgment was reasonable).

{¶ 32} Having found that Kuiper met all three prongs of the *GTE* test, we determine upon review that the court abused its discretion when it denied Kuiper's Civ.R. 60(B) motion for relief from judgment. Particularly, we note the trial court's statement in its journal entry that the "behavior of [Kuiper's] counsel as presented on the docket and in [Kuiper's] motion does not reach the level required by current case law to allow the court to vacate the judgment." As our review of Ohio case law shows, the behavior of Kuiper's counsel is substantially, if not precisely, similar to behavior deemed by courts as "inexcusable neglect" and subject to relief from judgment.

{¶ 33} Accordingly, Kuiper's third assignment of error is sustained. The trial court's judgment denying Kuiper's motion for relief from judgment pursuant to Civ.R. 60(B) is reversed.

C. Second and Fourth Assignments of Error — Failure to Hold a Hearing

{¶ 34} Kuiper's second and fourth assignments of error, which concern the trial court's failure to hold an evidentiary hearing on Kuiper's motion, are moot. *See* App.R. 12(A)(1)(c) ("Unless an assignment of error is made moot by a ruling on another assignment of error, [a court of appeals shall] decide each assignment of error and give reasons in writing for its decision.").

{¶ 35} Judgment reversed and case remanded to the trial court for proceedings consistent with this opinion.

It is ordered that appellant recover from 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.

LISA B. FORBES, JUDGE

EILEEN A. GALLAGHER, P.J., and
EMANUELLA D. GROVES, J., CONCUR