[Cite as *717 Credit Union, Inc. v. Dickey*, 2009-Ohio-2946.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

SEVEN SEVENTEEN CREDIT UNION, INC.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-T-0107**
- vs -	:	
DAVID DICKEY,	:	
Defendant-Appellant.		

Civil Appeal from the Newton Falls Municipal Court, Case No. 2007 CVF 00189.

Judgment: Affirmed.

John J. Frank, Craig W. Relman Co., L.P.A., 26851 Miles Road, Suite 204, Cleveland, OH 44128 (For Plaintiff-Appellee).

Thomas N. Michaels, 839 Southwestern Run, Youngstown, OH 44514 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, David Dickey, appeals the judgment of the Newton Falls Municipal Court denying his motion for relief from judgment, pursuant to Civ.R. 60(B). The trial court granted appellee's motion for summary judgment and entered judgment in favor of appellee in the amount of $10,744.47, plus interest at 9.71% per annum and costs. Based on the following, the judgment of the Newton Falls Municipal Court is hereby affirmed.

{¶2} On August 31, 2004, Dickey purchased a 1999 GMC Suburban from Mark Thomas Ford. Dickey purchased the vehicle by obtaining financing from appellee. In order to obtain financing, Dickey was required to execute a promissory note and security agreement. Dickey offered the 1999 GMC Suburban as the security interest.

{¶3} The promissory note required Dickey to make fixed monthly payments in the amount of $344.18 and required the vehicle to be insured. Dickey defaulted on the terms of the agreement.

{¶4} On July 11, 2007, appellee filed suit against Dickey seeking a monetary judgment under the promissory note and security agreement in the amount of $10,744.47 together with accrued interest on the principal at 9.71% per annum from December 6, 2006, plus costs. Dickey, proceeding pro se, filed an answer disputing the amount owed.

{¶5} On October 22, 2007, appellee filed a motion for summary judgment. Appellee attached an affidavit of Mr. Tim Bebech, a recovery specialist. Dickey did not file a response.

{¶6} On November 8, 2007, the trial court granted appellee's motion for summary judgment and entered judgment in favor of appellee.

{¶7} On August 28, 2008, Dickey filed a motion for relief from judgment, which was denied by the trial court. It is from this judgment that Dickey filed a timely notice of appeal and asserts:

{¶8} "The trial court erred in denying appellant's motion to vacate judgment."

{¶9} "A reviewing court reviews a trial court's decision on a motion for relief from judgment to determine if the trial court abused its discretion." (Citations omitted.)

Bank One, NA v. SKRL Tool and Die, Inc., 11th Dist. No. 2003-L-048, 2004-Ohio-2602, at ¶15. See, also, *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 150. "'The term "abuse of discretion" connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" (Citations omitted.) *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} Relief from judgment may be granted pursuant to Civ.R. 60(B), which states, in part:

{¶11} "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 (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."

{¶12} Regarding the moving party's obligations for a Civ.R. 60(B) motion, the Supreme Court of Ohio has held:

{¶13} "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, 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 v. ARC Industries*, 47 Ohio St.2d 146, paragraph two of the syllabus.

{¶14} In the instant case, Dickey, acting in a pro se capacity, filed an answer to appellee's complaint on July 16, 2007. However, Dickey failed to respond to appellee's request for admissions, interrogatories, and request for production of documents which, according to appellee's motion for summary judgment, were served on Dickey on August 22, 2007 and filed with the trial court on October 22, 2007. Thereafter, appellee filed a motion for summary judgment on October 22, 2007, which was also served on Dickey in his pro se capacity. Again, Dickey failed to file a responsive pleading. The trial court granted appellee's motion for summary judgment on November 8, 2007. On August 28, 2008, Dickey, then represented by counsel, filed a motion for relief from judgment.

{¶15} In said motion, Dickey asserted he was entitled to relief from judgment since his answer disputed the amount owed to appellee. Further, Dickey maintained that, pursuant to Civ.R. 60(B)(1), his lack of response to both the request for admissions and appellee's motion for summary judgment was excusable neglect due to being hospitalized on four occasions. Dickey attached a self-serving affidavit to support his motion for relief from judgment.

{¶16} On appeal, Dickey further claims he is entitled to relief from judgment because he "has an additional affirmative defense concerning whether [appellee] wrongfully repossessed [his] vehicle because [he,] from the inception of the contract[,]

established a 'course of conduct' by regularly accepting late payments from the [a]ppellant." However, Dickey failed to assert this claim below and, thus, he is precluded from raising it on appeal. *Great Lakes Window, Inc. v. Resash, Inc*., 11th Dist. No. 2006-T-0114, 2007-Ohio-5378, at ¶24. (Citations omitted.)

{¶17} In addition, Dickey's assertion that he disputed the amount owed to appellee was not supported in his motion for relief from judgment. Moreover, this is a factual dispute that could have been raised if Dickey would have filed a response to appellee's motion for summary judgment.

{¶18} Consequently, we will review whether Dickey has satisfied "excusable neglect" under Civ.R. 60(B)(1). As stated, Dickey claimed that his lack of response to both the request for admissions and appellee's motion for summary judgment was "excusable neglect" due to being hospitalized on four occasions. Dickey attached a self-serving affidavit to his motion for relief from judgment, averring "[t]hat from the approximate time from July 2007 through November 2007 I was hospitalized on at least four [4] occasions for various ailments but not limited to a heart condition and injuries to my leg." The affidavit further averred "[t]hat as a result of the above referenced medical conditions I was unable to respond to Plaintiff's discovery requests and motion for summary judgment in the above captioned matter."

{¶19} We note that a movant is not required to attach evidentiary material to his motion for relief from judgment; however, he must allege more than bare assertions for which he is entitled to relief. *Thompson v. Dodson-Thompson*, 8th Dist. No. 90814, 2008-Ohio-4710, at ¶12. (Citations omitted.)

{¶20} "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 has 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." *Technical Servs. Co. v. Trinitech Internatl.*, *Inc*., 9th Dist. No. 21648, 2004-Ohio-965, at ¶18.

{¶21} As explained in *Ragan v. Akron Police Dept.* (Jan. 19, 1994), 9th Dist. No. 16200, 1994 Ohio App. LEXIS 137, at *7:

{¶22} "Acting *pro se* *** is neither excusable neglect nor any other reason justifying relief from judgment. A party has a right to represent himself, but if he does so, he is subject to the same rules and procedures as litigants with counsel. *** If the fact that a party chose not to be represented by counsel and was unsuccessful in pursuing his rights entitled that party to relief from judgment, every judgment adverse to

a *pro se* litigant could be vacated to permit a second attempt, this time with counsel. Such a circumstance would be unjust to the adverse party." (Internal citation omitted.)

{¶23} In the case at bar, it was Dickey's right to proceed without counsel. However, Dickey is presumed to have knowledge of the law and legal procedures. Although Dickey avers that he was hospitalized on four different occasions, he continuously disregarded the instant action for over four months. It was unreasonable for Dickey to believe that he could ignore the proceedings at issue without his actions affecting the outcome of the litigation. In fact, it was not until the trial court entered judgment in favor of appellee that Dickey obtained counsel and began defending the lawsuit.

{¶24} Therefore, after reviewing the record, this court cannot say that the trial court abused its discretion when it denied Dickey's motion for relief from judgment. It was within the trial court's discretion to determine whether Dickey's hospitalization satisfied the standard for "excusable neglect." Therefore, the trial court's denial of Dickey's motion for relief from judgment was not unreasonable, arbitrary, or unconscionable, and his assignment of error is without merit.

{¶25} The judgment of the Newton Falls Municipal Court is hereby affirmed.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDELL, J.,

concur.