[Cite as *McDermott v. Franklin*, 2009-Ohio-6708.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

SANDY McDERMOTT, et al.,	:	**O P I N I O N**
Plaintiffs-Appellees,	:	**CASE NO. 2009-G-2903**
- vs -	:	
PETER S. FRANKLIN, M.D., et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 04 P 000296.

Judgment: Affirmed.

Douglas S. Hunter, Hoffman Legal Group, LLC, 23230 Chagrin Boulevard, Suite 425, Cleveland, OH 44122 (For Plaintiffs-Appellees).

John B. Gibbons, 2000 Standard Building, 1370 Ontario Street, Cleveland, OH 44113 (For Defendants-Appellants).

TIMOTHY P. CANNON, J.

{¶1} Appellants, Peter S. Franklin, M.D. and Peter S. Franklin, M.D., Inc.,[1] appeal the judgment of the Geauga County Court of Common Pleas denying their motion to vacate a default judgment entered in favor of appellees, Sandy and James B. McDermott and Linda Rohrbaugh. For the following reasons, the judgment of the trial court is hereby affirmed.

1. While Sandra Franklin was a defendant at the trial court level, she was not specifically listed on the Notice of Appeal.

{¶2} The instant action arises from a complaint filed in which appellees sought a declaration[2] as to the validity of a document setting forth certain entitlements issued to them by Dr. Franklin as part of an employment contract (hereinafter referred to as the "Obligation"). Dr. Franklin operated a medical practice and maintained a medical office located at 15389 Kinsman Road, Middlefield, Ohio. The complaint alleged that Dr. Franklin created an Obligation in which he provided that, based upon the efforts of Sandy McDermott and Rohrbaugh, and in lieu of the fact that he was unable to fully compensate them for the amount of their efforts that he had previously provided, he would provide the greater of $2,000 per year or 2.5% per year of the value of the practice prorated to the number of years of employment for each of them. This compensation would occur at the time the practice was sold or liquidated.

{¶3} Appellants filed a motion for partial summary judgment. Appellees filed a cross-motion for declaratory judgment and a brief in opposition to appellants' motion for partial summary judgment. The trial court issued a June 14, 2005 judgment finding the Obligation issued by Dr. Franklin as part of the employment agreement with appellees valid and enforceable.

{¶4} Appellants filed a notice of appeal in this court. On September 6, 2005, this court issued a judgment entry dismissing the appeal for lack of a final, appealable order.

{¶5} On January 25, 2006, the parties stipulated that the remainder of the claims not addressed in the trial court's June 14, 2005 judgment entry were dismissed. Appellants then filed a notice of appeal in this court. On March 24, 2006, appellants

2. The complaint also asserted additional claims, but appellees voluntarily dismissed their other pending claims for relief, pursuant to Civ.R. 41(A)(1).

filed a motion to remand to the trial court to engage in a stipulated dismissal of the action, subject to an agreement. On March 31, 2006, this court issued a judgment entry remanding the matter to the trial court.

{¶6} Thereafter, the parties entered into an agreed entry dated May 15, 2006, whereby the parties stipulated that the Obligation was a valid and enforceable agreement. The parties stipulated that the Obligation would be enforceable upon the sale or liquidation of the subject practice under those terms stated in the Obligation. Appellants agreed to rescind the prior conveyance of the property at issue and to quitclaim it to Dr. Franklin. The parties also stipulated that appellees were not barred from bringing further action to enforce the terms of the Obligation.

{¶7} On April 22, 2009, appellees filed a motion to vacate judgment pursuant to Civ.R. 60(B)(5), which was denied by the trial court. It is from this judgment that appellants filed a timely notice of appeal and assert the following assignment of error:

{¶8} "The trial court erred and abused its discretion by overruling the Defendant-Appellants' Motion to Vacate Judgment pursuant to Rule 60(B)(5) of the Ohio Rules of Civil Procedure."

{¶9} The decision to grant or deny a Civ.R. 60(B) motion is entrusted to the sound discretion of the trial court. *In re Whitman* (1998), 81 Ohio St.3d 239, 242, citing *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. "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." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. (Citations omitted.)

{¶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 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."

{¶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* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus.

{¶14} As stated in Civ.R. 60(B)(5), relief is to be granted for "any other reason justifying relief from the judgment." Civ.R. 60(B)(5) is a catch-all provision, which

reflects “the inherent power of a court to relieve a person of the unjust operation of a judgment.” *Smith v. Smith*, 8th Dist. No. 83275, 2004-Ohio-5589, at ¶16.

{¶15} Under the first assignment of error, appellants present three issues for our review. First, appellants maintain that they have a “meritorious defense that the obligations in question were contrary to public policy as expressed by statute and therefore were invalid, unenforceable contracts.” Specifically, appellants argue that the contract is void, as the law prohibits ownership by nonprofessionals in a professional corporation. While appellants go to great lengths to make this argument, they have failed to cite to any case law to support this proposition.

{¶16} Although appellants cite R.C. 1785.02, 1785.03, and 1785.05, sections of the Ohio Revised Code governing professional associations, these statutes are inapposite to the instant situation. The terms of the Obligation are clear in that appellees were not to have a present interest in the professional corporation, but were to be provided with a form of deferred compensation. At best, appellees were to have a vested future interest in the proceeds of the sale payable only upon the availability of proceeds from the sale or liquidation of the business. This event has not yet occurred. As stated in the Obligation:

{¶17} “WHEREAS, it is unlikely that the purpose of legislation of the State of Ohio, which may forbid non-professional ownership of a professional corporation, was to prevent persons working in the office of a professional corporation and contributing to the growth of a professional practice from fully and fairly benefiting from that association, and,

{¶18} "WHEREAS, this obligation does not affect the ownership of Peter S. Franklin, M.D., Inc., which remains entirely under the ownership of Peter S. Franklin ***."

{¶19} The code sections cited to by appellants clearly do not apply to this scenario. First, R.C. 1785.02 simply indicates that similarly licensed professionals "*** may organize and become a shareholder or shareholders of a professional association ***." That did not occur in this case. R.C. 1785.03 is titled, "Persons authorized to render professional services; control of professional clinical judgment." There is no issue presented in this case that any party violated the limitations contained in this section. Finally, R.C. 1785.05 is simply a limitation that provides stock can be issued "*** only to persons who are duly licensed, certificated, or otherwise legally authorized to render within this state the same professional service as that for which the association was organized ***." The only evidence in the record with regard to stock indicates that Dr. Franklin was the sole shareholder at all times.

{¶20} Based on the terms outlined in the Obligation, this argument is without merit.

{¶21} Second, appellants claim the land was not part of the practice and, therefore, the prior orders must be vacated. Appellants maintain that the trial court ruled "that the land could not be separated from the building [the possible fixture]." A review of the record reveals that the trial court, in its June 14, 2005 judgment entry, stated:

{¶22} "If the transfer of the underlying realty was not a sale or liquidation of the practice, there is no duty to pay the compensation at this time. However, such transfer

does not mean that the obligation to pay the compensation is not ever owed. On eventual sale or liquidation, the compensation is owed."

{¶23} The June 14, 2005 judgment entry was in response to appellants' motion for partial summary judgment and appellees' cross-motion for declaratory judgment. Furthermore, a review of the June 14, 2005 judgment entry reveals the trial court, with respect to the declaratory judgment action, did not expand upon the terms of the Obligation, but stated that upon the sale or liquidation of the practice, compensation would be owed to appellees.

{¶24} After appellants filed a notice of appeal with this court, they filed a motion to remand to the trial court to engage in a stipulated dismissal of the action. After this court remanded the matter to the trial court, the parties entered into an agreement. The parties *agreed*, in a judgment entry dated May 16, 2006, "to rescind the prior conveyance of property located at 15389 Kinsman Road, Middlefield, Ohio, and Saundra [sic] Franklin, Trustee will quitclaim said property back to Defendant Peter S. Franklin, M.D., Inc." Consequently, the agreement of the parties in the instant case is controlling, and this argument is without merit.

{¶25} Third, appellants argue the trial court erred when it overruled their motion for relief from judgment under Civ.R. 60(B)(5), as appellants' trial counsel failed to raise meritorious defenses. We reject this argument.

{¶26} As this court has stated, "[i]t is well settled that the neglect of a party's attorney will be imputed to the party in a Civ.R. 60(B) motion for relief from judgment." *Schialdone v. Schialdone* (Apr. 21, 1995), 11th Dist. No. 93-T-5007, 1995 Ohio App. LEXIS 1647, at *8. (Citations omitted.) We further recognize that under the facts and

circumstances of the instant case, Civ.R. 60(B)(1) would have been the proper vehicle to grant relief from judgment, if counsel's actions represented "excusable neglect." *Mayor v. WCI Steel, Inc.* (Mar. 16, 2001), 11th Dist. No. 2000-T-0054, 2001 Ohio App. LEXIS 1241, at *8-10. While this court has noted that certain circumstances "of egregious conduct on the part of counsel" would render Civ.R. 60(B)(5) appropriate, such as abandonment of the client, the record in the case sub judice demonstrates that Civ.R. 60(B)(5) is not relevant. Id. As appellants have failed to satisfy the second and third prongs of the *GTE* test, their argument is without merit.

{¶27} Based on the opinion of this court, appellants' assignment of error is overruled, and the judgment of the Geauga County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.