

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

JEFF SCHULTZ,

Plaintiff-Appellee,

v.

JOHN BULLEN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0092

Civil Appeal from the
Struthers Municipal Court of Mahoning County, Ohio
Case No. 2016 CVF 560

BEFORE:

Gene Donofrio, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:

Affirmed

Atty. T. Bricker, T. Robert Bricker, LLC, 106 South Broad Street, Canfield, Ohio 44406, for Plaintiff-Appellee, and

Atty. A. Douglass, 755 Boardman-Canfield Road, Suite M-1, Youngstown, Ohio 44512, for Defendant-Appellant.

Dated:
June 18, 2019

Donofrio, J.

{¶1} Defendant-appellant, John Bullen, appeals from a Struthers Municipal Court judgment denying his Civ.R. 60(B) motion to vacate the default judgment against him.

{¶2} Plaintiff-appellee, Jeff Schultz, is in the business of automotive repair and the sale of auto parts. During 2015, appellee performed auto repair services for appellant on several occasions.

{¶3} On December 1, 2016, appellee filed a complaint against appellant. The complaint alleged appellant had failed to pay appellee for services rendered. Appellee alleged appellant had an outstanding bill of \$6,253.47. Appellee attached copies of several invoices to the complaint documenting the charges. Appellant was served with a copy of the complaint by certified mail.

{¶4} On July 3, 2017, appellee filed a motion for default judgment alleging appellant failed to plead or otherwise defend against the complaint.

{¶5} The trial court granted appellee's motion for default judgment on July 5, 2017. It found that appellant was served with the complaint by certified mail on December 9, 2016, and that appellant failed to answer or otherwise respond. Therefore, the court entered judgment in favor of appellee for \$6,253.47, plus interest.

{¶6} Approximately seven months later, on February 26, 2018, appellant filed a Civ.R. 60(B) motion to set aside the default judgment. In his motion, appellant asserted that he made substantial payment for appellee's services and that appellee was not entitled to further payment because he did not perform his services properly, causing damages to appellant. Additionally, appellant alleged that he relied on appellee's false representations that they would resolve this matter out of court.

{¶7} The trial court held a hearing on appellant's motion. Both parties appeared with counsel. The trial court subsequently overruled the motion.

{¶8} Appellant filed a timely notice of appeal on August 13, 2018. He now raises a single assignment of error.

{¶9} Appellant's sole assignment of error states:

THE TRIAL COURT'S JUDGMENT DENYING APPELLANT'S MOTION TO VACATE WAS AN ABUSE OF DISCRETION SINCE THE CASE WAS NOT DETERMINED ON THE MERITS.

{¶10} Appellant first points out that courts are to construe Civ.R. 60(B) liberally so that cases can be resolved on their merits. Appellant argues that he submitted substantial payment for appellee's services and that appellee is not entitled to further payment because appellee failed to properly perform his services. Additionally, appellant claims he did not respond to the lawsuit because he relied on appellee's false representations that the parties would resolve this matter outside of court and he need not respond to the lawsuit.

{¶11} We review a trial court's decision to grant or deny a Civ.R. 60(B) motion for abuse of discretion. *Capital, Inc. v. Rock N Horse, Inc.*, 9th Dist. Summit No. 21703, 2004-Ohio-2122, ¶ 9. Abuse of discretion connotes more than an error in judgment; it implies that the trial court's judgment is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶12} The Ohio Supreme Court set out the controlling test for Civ.R. 60(B) motions in *GTE Automatic Elec., Inc. v. Arc Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus:

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.

{¶13} If the movant fails to satisfy any of the above elements, the court shall deny relief. *Argo Plastic Products Co. v. Cleveland*, 15 Ohio St.3d 389, 391, 474 N.E.2d 328 (1984), citing *GTE*, at 151.

{¶14} The trial court did not give any reasons in support of its judgment. It simply denied the motion.

{¶15} Appellant failed to file a transcript of the hearing on his motion for our review. The appellant bears the burden of demonstrating error by reference to the record of the proceedings in the trial court, and it is the appellant's duty to provide the reviewing court with a transcript. App.R. 9(B). “When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings and affirm.” *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980).

{¶16} Given the lack of transcript of the hearing in this case, we can presume the validity of the trial court’s judgment and affirm. We can presume that the trial court concluded at the end of the hearing that appellant had failed to satisfy the elements of the *GTE* test.

{¶17} In any case, addressing the merits of appellant’s argument, leads us to reach the same result.

{¶18} As to the first element, appellant was required to demonstrate that he has a meritorious defense or claim to present if relief is granted. In his motion, appellant asserted that “substantial payment was made for services and that Plaintiff is not entitled to further payment since his services were not performed properly causing the Defendant to suffer harm and damages.”

{¶19} Appellant did not assert how much he paid of his outstanding balance or when he allegedly paid it. He did not attach a copy of a canceled check or a receipt for his payment. He did not assert how appellee’s services may have been performed improperly. And he did not assert what damages he may have suffered as a result. These are matters that he may have presented at the hearing. But without a transcript, we have no way of knowing what evidence appellant presented to the trial court. It is possible he did not present any support for his defense. Thus, appellant has not satisfied the first *GTE* element.

{¶20} The second *GTE* element requires that the moving party be entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5). The grounds for relief under Civ.R. 60(B) and the second *GTE* element are:

(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.

{¶21} In his motion, appellant asserted he was entitled to relief based upon Civ.R. 60(B)(3), (4), and (5). But appellant does not elaborate much on any of these grounds. From his brief memorandum in support of his motion, it seems that appellant was relying on an alleged misrepresentation by appellee that he did not need to respond to the complaint because the parties were going to resolve the issue outside of court, which would fall under Civ.R. 60(B)(3), and his allegation that he has already satisfied the judgment, which would fall under Civ.R. 60(B)(4). Appellant did not assert “any other reason justifying relief from judgment” as Civ.R. 60(B)(5) requires.

{¶22} While a movant is not required to support his motion with evidentiary materials, he must do more than make bare allegations that he is entitled to relief. *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 1996-Ohio-430, 665 N.E.2d 1102.

{¶23} Again, since appellant did not file the hearing transcript, we have no way of knowing what evidence he may have presented in support of his grounds for relief. Thus, appellant did not satisfy the second *GTE* element.

{¶24} As to the third *GTE* element, appellant had to demonstrate that he timely filed his motion. Appellant filed his Civ.R. 60(B) motion approximately seven months after the trial court entered default judgment. Appellant did argue that he believed he and appellee were going to settle the case out of court, which could explain the delay in filing

his motion. But again, appellant has not provided us with a transcript of the hearing, which could provide evidence supporting this element. In any event, a movant must establish all three *GTE* elements to be entitled to relief and appellant has not done so.

{¶25} In sum, without the benefit of the hearing transcript, we have no way of knowing what evidence, if any, appellant presented in support of his motion to vacate the default judgment. Thus, we cannot conclude that the trial court abused its discretion in denying the motion.

{¶26} Accordingly, appellant's sole assignment of error is without merit and is overruled.

{¶27} For the reasons stated above, the trial court's judgment is hereby affirmed.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the sole assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Struthers Municipal Court of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.