

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

MATTHEWS INTERNATIONAL CORP.,

Plaintiff-Appellee,

v.

TROY VANDENBERG DBA CONLEY AND VANDENBERG FUNERAL
HOME,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 23 MA 0042

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2021 CV 00626

BEFORE:

Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:

Affirmed.

Atty. Roy J. Schechter, Weltman, Weinberg & Reis, Co., LPA, 965 Keynote Circle,
Cleveland, Ohio 44131, for Plaintiff-Appellee

Atty. David L. Engler, Engler Law Firm, 181 Elm Road, N.E., Warren, Ohio 44483, for
Defendant-Appellant

Dated: December 20, 2023

WAITE, J.

{¶1} Appellant Troy Vanderberg appeals a February 21, 2023 judgment entry of the Mahoning County Court of Common Pleas denying his motion for relief from judgment pursuant to Civ.R. 60(B) after the court previously granted summary judgment in favor of Appellee Matthew International Corporation. Appellant argues the trial court erroneously denied the motion, as the matter should be heard on its merits rather than a procedural defect. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} The record on appeal is limited due to the failure of Appellant to respond to request for admissions and to a motion for summary judgment before the trial court. Essentially, this matter involves a dispute regarding the failure of a funeral home (Appellant) to pay for coffins ordered from Appellee.

{¶3} On April 4, 2021, Appellee filed a complaint against Appellant for the failure to pay for coffins were ordered by, and delivered to, Appellant. Appellee later filed a motion for summary judgment which was withdrawn after discovering a problem with service. Before the court recognized the motion was withdrawn, Appellant responded to the motion, requesting it be denied, and sought an opportunity to respond to the complaint, ten months after it was filed.

{¶4} On February 3, 2022, Appellant filed an answer to the complaint consisting of thirty-eight affirmative defenses. On May 16, 2022, the magistrate held a preliminary conference where the motion schedule was set. It appears Appellant participated in this conference. Thereafter, Appellee sought answers to its request for admissions for

approximately six months without any response from Appellant. Appellee filed a motion for summary judgment on August 25, 2022. Appellant failed to respond to this, as well. On November 1, 2022, the court granted Appellee's motion for summary judgment. No appeal was taken.

{15} On November 29, 2022, Appellant filed a motion for relief from judgment. On February 21, 2023, the court denied the motion, finding that Appellant had two months to file a response to the motion for summary judgment, waited one month to file the motion for relief, provided no explanation for the lack of timeliness, and determining the matter had been decided on its merits, as Appellee produced unrebutted evidence supporting its claims.

ASSIGNMENT OF ERROR

Vandenberg assigns one error. Vandenberg asserts that the Trial Court erred in overruling Vandenberg's Motion For Relief From Judgment pursuant to Rule 60(b)(5), Ohio Rules of Civil Procedure.

{16} Appellant argues that less than thirty days have passed since the court's judgment, thus the motion is timely. He asserts that he has a valid defense and attached an affidavit to the motion for relief contending that he never ordered or received the coffins at issue. Relying solely on the "catch-all provision" of the rule, he argues broadly that cases should be decided on their merits rather than on procedural deficiencies.

{17} In response, Appellee claims the motion for relief was filed as a substitute for an appeal which Appellant failed to file at the appropriate time. Even so, Appellee contends that Appellant has provided no real support showing that he meets the standard contained in the catch-all provision of Civ.R. 60(B). Appellee points out that no facts or

explanations have been provided to excuse Appellant's untimeliness. Appellee also cites to law providing that failure to timely respond to a request for admissions results in the conclusion that matters contained in the request are deemed to be admitted for purposes of summary judgment. See Civ.R. 36(A); *J.P. Morgan Chase Bank v. Macejko*, 7th Dist. Mahoning No. 07-MA-148, 2010-Ohio-3152.

{¶8} Civ.R. 60(B) sets out five grounds for relieving a party of 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.

{¶9} The fifth ground, at issue here, "must be substantial and this provision is only to be utilized in extraordinary and unusual cases when the interest of justice warrants relief be granted." *State v. Watkins*, 7th Dist. Mahoning No. 19 MA 0024, 2020-Ohio-1366, ¶ 33, citing *Sell v. Brockway*, 7th Dist. Columbiana No. 11 CO 30, 2012-Ohio-4552, ¶ 25, *Adomeit v. Baltimore*, 39 Ohio App.2d 97, 316 N.E.2d 469 (8th Dist.1974.)

{¶10} The Ohio Supreme Court outlined the law regarding 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).

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.

Id. at paragraph two of the syllabus.

{¶11} This record shows that Appellant timely filed his motion for relief. While the “meritorious defense” aspect was supported by only a self-serving affidavit, it may have been sufficient to meet the demands of the *GTE* test. However, Appellant’s filing is otherwise sadly deficient in its compliance with Civ.R. 60(B).

{¶12} As pointed out by Appellee, even if we were inclined to view Appellant’s motion for relief as a motion appropriately filed under Civ.R. 60(B), Appellant has not met the final *GTE* element. Appellant only asserts, in broad terms, that this case should be decided on the merits. This broad assertion is insufficient to provide relief under Civ.R. 60(B)(5). We reiterate that the fifth Civ.R. 60(B) factor is reserved for extraordinary and usual grounds, which are not present, here. Appellant has provided no excuse or justification whatsoever for the failure either to answer the request for admissions or to respond to the motion for summary judgment despite having participated in the case prior to that point.

{¶13} There is no evidence that Appellant was absent from the May 16, 2022 preliminary conference where scheduling was provided. There is no claim that Appellant

did not receive the motion for summary judgment, which he knew would be filed within the timeframe set at the preliminary conference. Importantly, Appellant presents no excuses or justifications for the failure to respond to Appellee’s properly filed motion for summary judgment.

{¶14} Appellant failed to respond to the request for admissions, so these were deemed admitted pursuant to Civ.R. 36(A). These admissions provide the factual basis for the decision in this matter. The trial court considered the evidence produced by Appellee in its motion for summary judgment, including these admissions, and entered a decision based on the merits. Appellant has provided no reason for relief from this judgment other than its vague and general assertion that cases should be decided on the merits. This is insufficient on its face, and certainly presents no extraordinary or unusual scenario. As such, Appellant’s sole assignment of error is without merit and is overruled.

Conclusion

{¶15} Appellant argues that the trial court erroneously denied the motion as the matter should be heard on its merits rather than on a procedural defect. Appellant, however, completely failed to respond to the request for admissions and then to the motion for summary judgment, and can provide no valid reason for these failures. As the facts are deemed to be admitted by Appellant and summary judgment was based on these facts, summary judgment was appropriate. Appellant’s arguments are without merit and the judgment of the trial court is affirmed.

Robb, J. concurs.

D’Apolito, P.J. concurs.

For the reasons stated in the Opinion rendered herein, Appellant's assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas 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.