

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

K. Ronald Bailey & Associates Co.

Court of Appeals No. E-08-057

Appellant

Trial Court No. 2007-CV-493

v.

James Kirby Martin, et al.

DECISION AND JUDGMENT

Appellees

Decided: June 19, 2009

* * * * *

K. Ronald Bailey, for appellant.

James Kirby Martin, pro se.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, K. Ronald Bailey & Associates, L.P.A. ("Bailey"), represented appellee, James Kirby Martin ("Martin"), as his attorney in defense of criminal charges brought against Martin in Seneca County. The representation was pursuant to a "Criminal Defense Fee Agreement" executed by the parties that included a listing of

charges for legal services. Zloro D. Johnson ("Johnson") was a guarantor of Martin's performance under the agreement.

{¶ 2} In this appeal, Bailey asserts that the Erie County Court of Common Pleas erred in vacating default judgment that Bailey secured against Martin in an action for fees owed under the contract. Appellant asserts one assignment of error on appeal:

{¶ 3} "I. The trial court abused its discretion in vacating the default judgment against the defendant, James Kirby Martin."

{¶ 4} Bailey filed suit against both Martin and Johnson in the Erie County Court of Common Pleas on June 5, 2007. Martin, appearing pro se, filed motions for 28 day extensions of time to answer on July 5, 2007, and on August 10, 2007. Bailey filed a motion for default judgment on August 13, 2007. Bailey also opposed the motion for a second extension of time. The trial court granted a 28 day extension of time to answer in an order filed on August 21, 2007.

{¶ 5} Bailey filed a "renewed motion for default judgment" on October 16, 2008, arguing that any extension of time to answer had expired and that both Martin and Johnson had failed to answer the complaint. The trial court granted Bailey default judgment against both Martin and Johnson in an order filed on October 25, 2007. The judgment awarded damages in the amount of \$32,380.99.¹ After default judgment was

¹The trial court also filed an identical judgment entry on June 3, 2008.

rendered against Martin, he filed an answer to the complaint on November 1, 2007, without leave of court.

{¶ 6} On May 30, 2008, appellee filed a pro se motion to vacate default judgment pursuant to Civ.R. 60(B). Appellant opposed the motion. In a judgment filed on June 11, 2008, the trial court vacated both the October 25, 2007 judgment, as well as, the duplicative judgment of June 3, 2008. The June 11, 2008 judgment did not state the grounds on which the motion for relief from judgment was granted.

{¶ 7} On July, 11, 2008, appellant filed a notice of appeal of the judgment to this court.²

{¶ 8} In *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of syllabus, the Supreme Court of Ohio outlined a three prong test to determine whether a Civ.R. 60(B) motion for relief from judgment should be granted:

{¶ 9} "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

²We remanded the case to the trial court in a Decision and Judgment issued on August 4, 2008, at appellant's request, to allow modification of the June 11, 2008 judgment to permit correction of a clerical mistake. The judgment was corrected on remand to leave appellant's judgment against Zloro D. Johnson in effect and to limit the order to vacate judgment to claims against appellee alone. Subsequently, we reinstated this appeal.

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."

{¶ 10} If any one of the three *GTE* requirements is not met, the motion should be overruled. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. A trial court's decision on a motion for relief from judgment under Civ.R. 60(B) will not be reversed on appeal absent an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77; *McGee v. Lynch*, 6th Dist. No. E-06-063, 2007-Ohio-3954, ¶ 29.

{¶ 11} Appellee was not represented by counsel on the motion to vacate default judgment. He argued in his brief that he lacked an attorney and could not afford one. Appellee had filed motions for extensions of time to answer but did not file an answer within the additional time granted by the trial court. We interpret appellee's argument to claim excusable neglect as grounds for relief under Civ.R. 60(B)(1).

{¶ 12} Civ.R. 60(B) provides that motions under Civ.R. 60(B)(1) must be filed within a "reasonable time" and not more than one year after the judgment from which relief is sought. Appellee filed his motion to vacate default judgment less than eight months after default judgment was rendered against him.

{¶ 13} In *Traveler's Indemnity Co. v. Bates*, 6th Dist. No. WD-04-047, 2004-Ohio-6317, we considered the issue of excusable neglect in motions of pro se litigants for relief from default judgments. We held that a trial court did not abuse its discretion in finding excusable neglect in circumstances where a trial court could conclude that the pro se

defendant had not exhibited a "complete disregard for the judicial system." *Id.* at ¶ 17, quoting *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20.

{¶ 14} We do not reach the issue here. Even if we were to rule that the trial court did not abuse its discretion in determining that appellee's motion was brought within a reasonable time and that appellee would otherwise be entitled to relief from judgment under the grounds of excusable neglect under Civ.R. 60(B)(1), appellee, nevertheless, clearly failed to demonstrate the existence of a meritorious defense to appellant's claims.

{¶ 15} To show the existence of a meritorious defense under Civ.R. 60(B), the movant need not establish ultimate success on the merits. *Natl. City Bank v. Mulinex*, 6th Dist. No. L-05-1066, 2005-Ohio-5460, ¶ 13; *Fouts v. Weiss-Carson* (1991), 77 Ohio App.3d 563, 565. Rather, "the movant must provide the trial court with operative facts that would constitute a meritorious defense if found to be true." *Natl. City Bank v. Mulinex* at ¶13, citing *Fouts v. Weiss-Carson* at 565. The operative facts must be alleged "with enough specificity to allow the trial court to decide whether he or she has met that test." *Syphard v. Vrable* (2001), 141 Ohio App.3d 460, 463.

{¶ 16} No defense of any kind was asserted by appellee in his motion to vacate default judgment. Appellee did not allege any operative facts from which a trial court could determine the existence of a meritorious defense. Appellee submitted no evidentiary material in support of his motion from which operative facts could be

gleaned. The issue of whether a meritorious defense existed was simply not addressed in the motion to vacate default judgment.

{¶ 17} Accordingly, we conclude that appellee failed to meet the requirements under *GTE* to vacate default judgment in this case and that the trial court abused its discretion in granting appellee's motion to vacate default judgment. Appellant's Assignment of Error No. I is well-taken.

{¶ 18} On consideration whereof, we find that substantial justice was not done the party complaining and the judgment of the Erie County Court of Common Pleas is reversed. The matter is remanded to the trial court for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.