

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Herlihy Moving and Storage, Inc. et al., :
Plaintiffs-Appellees, :
v. :
Shannon Nickison et al., : No. 09AP-831
(C.P.C. No. 08CVE10-14533)
Defendants-Appellees, : (REGULAR CALENDAR)
(William H. Nickison, III, :
Defendant-Appellant). :

D E C I S I O N

Rendered on December 30, 2010

Vorys, Sater, Seymour & Pease LLP, and Kimberly Weber Herlihy, for plaintiffs-appellees.

Shaw & Miller, and Mark J. Miller, for defendant-appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, William H. Nickison, III ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas denying his motion for relief

from judgment filed pursuant to Civ.R. 60(B). For the reasons that follow, we affirm the judgment of the trial court.

{¶2} On October 10, 2008, plaintiffs-appellees, Herlihy Moving and Storage, Inc., and Herlihy Logistics, Inc. (collectively referred to as "HMS"), filed a complaint against appellant, his wife Shannon Nickison ("Ms. Nickison"), and Charter One Financial¹ ("Charter One"). The complaint alleged that between July 2005 and June 2008, Ms. Nickison improperly diverted approximately \$200,000 in cash and checks from HMS to her personal bank account at Charter One. The complaint also set forth an unjust enrichment claim against appellant based on Ms. Nickison's actions.

{¶3} Because the Nickisons failed to file an answer, HMS moved for a default judgment against them on December 12, 2008. An entry granting default judgment in favor of HMS and against Ms. Nickison and appellant for \$203,284.65, plus court costs and post judgment interest, was filed on December 24, 2008. After garnishment proceedings were initiated against appellant's wages, both appellant and Ms. Nickison filed on March 30, 2009 individual requests for "reversal of judgment due to lack of due process." On April 6, 2009, appellant and Ms. Nickison filed a joint "motion" to have all money returned to them upon reversal of the judgment. On June 12, 2009, appellant filed a motion for relief from judgment pursuant to Civ.R. 60(B)(3). This motion alleged "[m]isconduct of adverse party," and stated, "[m]ail theft, [l]egal documents were taken from mail box preventing status of case notification, responses, management, and orders from the courts." (June 12, 2009 filing.) Thereafter, on July 8, 2009, appellant filed a

¹ Though named in the complaint as Charter One Financial, the record reflects the correct name of the entity is Charter One Bank, N.A.

"request for leave." This filing requested that appellant "be able to leave this [suit]" because Ms. Nickison was sentenced to eight and one-half years incarceration pursuant to the criminal case involving Ms. Nickison's actions at HMS. All of these filings were done pro se, and, in essence, amount to three separate requests of appellant to be excused from the judgment rendered against him.

{¶4} Because appellant's March 30, 2009 filing did not specify the rule pursuant to which it was being made, the trial court construed it as a Civ.R. 60(B) motion for relief from judgment. In reviewing this motion, the trial court found that service was perfected on appellant on October 18, 2008, and that appellant failed to file an answer within the allotted time frame. After consideration of Civ.R. 60(B)(1) through (5), the trial court found none of the provisions warranting relief from judgment were applicable, and, therefore, denied the motion for relief from judgment on July 21, 2009.

{¶5} On November 24, 2009, appellant filed, this time through counsel, a motion for relief from judgment pursuant to Civ.R. 60(B)(1). Specifically, appellant argued his failure to respond to the complaint constituted excusable neglect because he had no knowledge of this matter until March 2009 when his wages began being garnished. According to appellant, his wife admittedly signed for, and concealed from him, the complaint filed against them on October 10, 2008.

{¶6} On April 26, 2010, the trial court, finding that appellant's arguments could have been raised in his initial motion, denied the November motion for relief from judgment based on the doctrine of res judicata. The trial court went on to find, however, that even if not barred by res judicata, appellant was not entitled to relief from judgment because he not only failed to establish excusable neglect, but, also, failed to raise a

meritorious defense and failed to timely make the motion. Additionally, because the trial court found appellant failed to present operative facts to support his contentions, the trial court denied the motion without an evidentiary hearing.

{¶7} This appeal followed, and appellant brings the following three assignments of error for our review:

1. The trial court erred in holding that *res judicata* barred Appellant from raising his Motion for Relief From Default Judgment pursuant to Rule 60(B).
2. The trial court erred in denying Appellant's Motion for Relief From Default Judgment pursuant to Rule 60(B).
3. The trial court abused its discretion in denying Appellant's Motion for Relief From Default Judgment pursuant to Rule 60(B) without first holding an evidentiary hearing.

{¶8} For ease of discussion, we address appellant's assignments of error out of order. In his second assignment of error, appellant contends the trial court erred in denying his November 24, 2009 motion for relief from judgment because he had in fact satisfied the requirements of Civ.R. 60(B).

{¶9} "A motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion." *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. "The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Smith*, 10th Dist. No. 03AP-1157, 2004-Ohio-4786, ¶10, quoting *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157. An unreasonable decision is one that is unsupported by a sound reasoning process.

AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp. (1990), 50 Ohio St.3d 157, 161. An arbitrary attitude, on the other hand, is an attitude that is " 'without adequate determining principle; * * * not governed by any fixed rules or standard.' " *Dayton ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359, quoting Black's Law Dictionary (5th ed.1979). " 'Unconscionable' may be defined as 'affronting the sense of justice, decency, or reasonableness.' " *U.S. Bank Natl. Assn. v. Collier*, 10th Dist. No. 08AP-207, 2008-Ohio-6817, ¶19, quoting Black's Law Dictionary (8th ed.2004).

{¶10} When applying an abuse-of-discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169; *Stockdale v. Baba*, 153 Ohio App.3d 712, 2003-Ohio-4366, ¶54; *State v. Congrove*, 10th Dist. No. 06AP-1129, 2007-Ohio-3323, ¶9. " '[A]n abuse of discretion involves far more than a difference in * * * opinion * * *. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.' " *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, quoting *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222.

{¶11} Here, appellant sought relief from judgment, pursuant to Civ.R. 60(B), which provides, "[o]n 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; * * * The motion shall

be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken."

{¶12} "[T]o prevail on a Civ.R. 60(B) motion for relief from judgment, the movant must establish 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.'" *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151, 1996-Ohio-54, quoting *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. Relief under Civ.R. 60(B) "is improper if any one of the foregoing requirements is not satisfied." *State ex rel. Richard* at 151, citing *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174. See also *GTE Automatic Elec.* at 151 (finding that the requirements under Civ.R. 60(B) "are independent and in the conjunctive, not the disjunctive"); *McLoughlin v. McLoughlin*, 10th Dist. No. 05AP-621, 2006-Ohio-1530, ¶23, appeal not allowed, 110 Ohio St.3d 1465, 2006-Ohio-4288.

{¶13} In the instant case, the trial court denied appellant's November motion for several reasons: (1) appellant failed to establish excusable neglect; (2) appellant failed to raise a meritorious defense; and (3) the motion was not timely. Any one of these findings would preclude relief from judgment under Civ.R. 60(B)(1). *State ex rel. Richard*. Because it is dispositive, we will first address the timeliness of appellant's motion.

{¶14} Whether a Civ.R. 60(B) motion is filed within a reasonable time depends on the facts and circumstances of the particular case. *Scotland Yard Condominium Assn. v.*

Spencer, 10th Dist. No. 05AP-1046, 2007-Ohio-1239, ¶33. The movant bears the burden of submitting factual material which demonstrates the timeliness of the motion. *State ex rel. Minnis v. Lewis* (Dec. 30, 1993), 10th Dist. No. 93AP-812, citing *Youssefi v. Youssefi* (1991), 81 Ohio App.3d 49, 53. Appellant contends that because his November 2009 motion was filed less than one year from the date of judgment, and was filed a "mere four months" after the trial court denied his pro se filings, it was filed within a reasonable amount of time for purposes of Civ.R. 60(B). We disagree.

{¶15} A motion to vacate a default judgment, which is filed nearly seven months after actual notice of the action and more than four months after default judgment was entered, does not, on its face, satisfy the reasonable time requirement; in the absence of any evidence explaining the delay, the movant has failed to demonstrate the timeliness of the motion. *Mt. Olive Baptist Church v. Pipkins Paints & Home Improvement Ctr., Inc.* (1979), 64 Ohio App.2d 285, paragraph two of the syllabus; *Angel v. Angel* (Feb. 18, 1993), 4th Dist. No. 92CA2071. In other words, an unexplained or unjustified delay in making the motion after discovering a ground for relief may put the motion beyond the pale of a reasonable time. *Minnis*, citing 2 Browne, Klein & Murtaugh, Baldwin's Ohio Civil Practice (1988) 118, T. 53.05; *Fouts v. Weiss-Carson* (1991), 77 Ohio App.3d 563, 567; *Sec. Fed. S. & L. Assn. of Cleveland v. Keyes* (June 29, 1990), 11th Dist. No. 89-G-1524 (trial court's granting of a Civ.R. 60(B) motion held to be an abuse of discretion where appellee failed to offer any explanation for an 18-week delay in filing his motion to vacate the default judgment rendered against him).

{¶16} Undisputedly, this complaint was filed on October 10, 2008, service was perfected on October 18, 2008, and default judgment was granted against appellant on

December 24, 2008 for his failure to timely answer the complaint. Further undisputed is the fact that appellant was aware of these proceedings no later than March 2009. Despite these facts, appellant suggests his November 24, 2009 motion for relief from judgment is timely because it was not until this time that he retained counsel and filed a "proper" motion, and he did not actually "receive" a copy of the complaint until July 9, 2009, when he found it hidden in a closet.

{¶17} Though appellant suggests he did not receive the complaint until July 2009, the record is clear and undisputed, as evidenced by appellant's own filings, that he was aware of these proceedings in March 2009. In fact, appellant filed his first pro se request for relief from judgment on March 30, 2009. Thus, even if appellant did not see the actual complaint that was served at his residence until July 2009, such fact is irrelevant because clearly he was aware of and had access to the file and complaint as early as March 2009.

{¶18} Similarly irrelevant is the fact that appellant did not retain counsel until November 2009 to file a "proper" Civ.R. 60(B) motion. It is well established that pro se litigants are bound by the same rules and procedures as litigants with counsel. *White v. Fifth Third Bank*, 10th Dist. No. 10AP-236, 2010-Ohio-4611, ¶13, citing *Zukowski v. Brunner*, 125 Ohio St.3d 53, 2010-Ohio-1652. A litigant proceeding pro se can neither expect nor request special treatment. *Kessler v. Kessler*, 10th Dist. No. 09AP-740, 2010-Ohio-2369. " 'If the courts treat *pro se* litigants differently, the court begins to depart from its duty of impartiality and prejudices the handling of the case as it relates to other litigants represented by counsel.' " *U.S. Bank Natl. Assn. v. Lapierre*, 10th Dist. No. 09AP-990, 2010-Ohio-4125, ¶11, quoting *Justice v. Lutheran Social Servs.* (Apr. 8, 1993), 10th Dist.

No. 92AP-1153. Therefore, the mere fact that appellant waited until his fourth request for relief from judgment to retain counsel does not make his fourth motion timely.

{¶19} Consequently, we find no abuse of discretion in the trial court's determination that appellant's motion for relief from judgment, pursuant to Civ.R. 60(B)(1), was not made within a reasonable time. *Mt. Olive; Fouts; Keyes*. See also *Lewis v. Connors*, 10th Dist. No. 02AP-607, 2003-Ohio-632 (though a nine-month interval between a judgment and Civ.R. 60(B) motion may result in a determination that the motion was filed within a reasonable time, given the facts, there was no abuse of discretion in the trial court's finding to the contrary); *Binion v. Makis* (Dec. 11, 1998), 11th Dist. No. 98-T-0020 (no abuse of discretion in the trial court's determination that a motion for relief from judgment made within three months of judgment was untimely where the appellant failed to provide a reason for the delay); *Hall v. Paragon Steakhouse* (July 26, 2000), 9th Dist. No. 99CA007443 (no abuse of discretion in trial court's finding that appellant's motion, pursuant to Civ.R. 60(B)(1), made seven months after judgment was entered was not made within a reasonable time). Because we find no abuse of discretion in the trial court's determination that his motion was untimely, we need not address appellant's arguments that the trial court erred in finding that he failed to establish excusable neglect and a meritorious defense. Accordingly, appellant's second assignment of error is overruled.

{¶20} By his third assignment of error, appellant contends the trial court abused its discretion by failing to hold an evidentiary hearing concerning his Civ.R. 60(B) motion.

{¶21} "[I]f the Civ.R. 60(B) motion contains allegations of operative facts which would warrant relief from judgment, the trial court should grant a hearing to take evidence

to verify those facts before it rules on the motion." *State ex rel. Richard* at 151, citing *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 1996-Ohio-430; *Coulson v. Coulson* (1983), 5 Ohio St.3d 12, 16. "Conversely, an evidentiary hearing is not required where the motion and attached evidentiary material do not contain allegations of operative facts which would warrant relief under Civ.R. 60(B)." *State ex rel. Richard* at 151, citing *S. Ohio Coal Co. v. Kidney* (1995), 100 Ohio App.3d 661, 667, appeal not allowed, 72 Ohio St.3d 1530. See also *Gaines & Stern Co., L.P.A. v. Schwarzwald, Robiner, Wolf & Rock Co., L.P.A.* (1990), 70 Ohio App.3d 643, 646, dismissed (1991), 59 Ohio St.3d 718, rehearing denied, 60 Ohio St.3d 720. "Operative facts are those facts which if proven would give rise to a meritorious defense or support the alleged grounds for relief from judgment." *Prinz v. Horvat* (Mar. 1, 1989), 9th Dist. No. 13708, citing *BancOhio Natl. Bank v. Schiesswohl* (1988), 51 Ohio App.3d 130.

{¶22} A "trial court abuses its discretion in denying a hearing where grounds for relief from judgment are sufficiently alleged and are supported with evidence which would warrant relief from judgment." *Kay* at 19-20, citing *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 103. Such a holding "is in accord with the underlying policies governing Civ.R. 60(B) and, in particular, the fact that Civ.R. 60(B) is a remedial rule to be liberally construed so that the ends of justice may be served." *Kay* at 20.

{¶23} Our review reveals appellant's November 24, 2009 motion for relief from judgment failed to allege operative facts, which, if proven, would give rise to a finding that the trial court abused its discretion in determining that under the facts presented here appellant's motion was not made within a reasonable time. As discussed under appellant's second assignment of error, even taken as true, the facts asserted by

appellant do not satisfy the reasonable time requirement in this case. Under such circumstances, we cannot find the trial court abused its discretion by failing to hold an evidentiary hearing to consider the November 2009 motion made, pursuant to Civ.R. 60(B), and we overrule appellant's third assignment of error.

{¶24} Given our disposition of appellant's second and third assignments of error, appellant's first assignment of error is overruled as moot, and we need not address appellant's arguments that the trial court erred in denying his Civ.R. 60(B) motion on the basis of res judicata.

{¶25} In conclusion, appellant's second and third assignments of error are overruled, appellant's first assignment of error is overruled as moot, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK, P.J., and BRYANT, J., concur.
