

[Cite as *Bohannon v. Pipino, Inc.*, 2009-Ohio-3469.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92325

MADELYN BOHANNON

PLAINTIFF-APPELLANT

vs.

GALLAGHER PIPINO, INC., ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-583693

BEFORE: Sweeney, J., Rocco, P.J., and McMonagle, J.

RELEASED: July 16, 2009

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Plaintiff-appellant, Madelyn Bohannon (“plaintiff”), appeals the trial court’s denial of her Civ.R. 60(B) motion for relief from judgment. After reviewing the facts of the case and pertinent law, we reverse and remand.

{¶ 2} On February 8, 2006, plaintiff filed a negligence action against defendants-appellees, Gallagher Pipino, Inc., and Simon Property Group, Inc., (“Gallagher Pipino”). On September 6, 2007, Gallagher Pipino filed a motion for leave to file a motion for summary judgment *instanter*. On September 12, 2007, Gallagher Pipino filed its motion for summary judgment. On September 17, 2007, plaintiff filed an opposition to Gallagher Pipino’s motion for leave. Plaintiff did not oppose Gallagher Pipino’s motion for summary judgment.

{¶ 3} On October 24, 2007, the trial court granted Gallagher Pipino’s motion for leave and its motion for summary judgment. On November 26, 2007, plaintiff filed a Civ.R. 60(B) motion for relief from judgment, arguing that it was error for the court to grant summary judgment without first ruling on the motion for leave, thus denying her due process rights and an opportunity to substantively respond to Gallagher Pipino’s summary judgment motion. On September 30, 2008, the trial court denied plaintiff’s motion for relief from judgment.

{¶ 4} Plaintiff now appeals, raising two assignments of error for our review, which will be analyzed together.

{¶ 5} “I. The trial court erred to the substantial prejudice of the appellant, when it overruled the appellant[’s] 60[B] motion to vacate judgment that was meritorious contesting an untimely and erroneous summary judgment rendered by the trial court when the court did not rule on the motion for leave to file the summary judgment *instanter* and the appellant timely opposed the motion.

{¶ 6} “II. The trial court erred to the substantial prejudice of the appellant, when it failed to give the appellant the proper notice and hearing prior to granting the appellees’ motion for summary judgment when it failed to rule on the request for leave to plead or the motion in opposition thereto filed by appellant, thereby denying appellant due process of law.”

{¶ 7} We review a trial court’s ruling on a Civ.R. 60(B) motion for relief from judgment for an abuse of discretion. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17. “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.

{¶ 8} Civ.R. 60(B) provides as follows: “[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; (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. 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. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.”

{¶ 9} In *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150, the Ohio Supreme Court stated that a party must demonstrate the following to prevail on a Civ.R. 60(B) motion: “(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” the time frame delineated in the rule. Additionally, we note that a motion for relief from judgment may not be used as a substitute for a direct appeal. See *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 245.

{¶ 10} Plaintiff argues that the court should have ruled on Gallagher Pipino’s motion for leave before it ruled on its summary judgment motion, so she would have notice of the proper time within which to oppose summary judgment. See *Capital One Bank v. Toney*, Jefferson App. No. 06 JE 28, 2007-Ohio-1571 (holding that “appellant had no obligation to respond to the merits of the summary judgment

motion until the trial court granted Capital One leave to file such motion”); *Hooten v. Safe Auto Ins. Co.*, 100 Ohio St.3d 8, 12, 2003-Ohio-4829 (holding that Civ.R. 56 and the notion of due process require that the nonmoving party to a summary judgment motion “receive notice of the deadline date for [responding] to the summary judgment motion or of the date on which the motion is deemed submitted for decision”); *Donovan v. Mushkat* (Dec. 6, 1995), Summit App. No. 17262 (opining that “[i]t would be unreasonable to require the nonmoving party to bear the expense of fully responding to an untimely motion for summary judgment when the court has not determined that it will even allow the motion”); Cuyahoga County Common Pleas Loc.R. 11(I)(1) (stating that “a party opposing a motion for summary judgment *** may file a brief in opposition *** within thirty (30) days of service of the motion”).

{¶ 11} Gallagher Pipino, on the other hand, argues that plaintiff “was served with and had knowledge that” it filed a summary judgment motion, but failed to oppose the merits of it or to request additional time to conduct discovery pursuant to Civ.R. 56(F). See Civ.R. 56(B) (stating that “[i]f the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court”); *Juergens v. Strang, Klubnik & Assocs.* (1994), 96 Ohio App.3d 223, 234 (holding that “the court has the discretion of allowing motions after the time allowed for their filing. Since the acceptance of the motion is by the grace of the court, the decision to accept, therefore, is itself ‘by leave of court’ and thus satisfies the requirement of Civ. R. 56 ***”); *Stewart v. Cleveland Clinic Found.* (1999), 136 Ohio App.3d 244,

255 (concluding that the court's failure to rule on the plaintiffs' motion to strike was not an abuse of discretion "because the motions for summary judgment were filed far enough in advance of the scheduled trial date as to permit the plaintiffs to file opposition briefs to the motions in writing without causing a continuance of the scheduled trial date." Thus, "plaintiffs can point to no prejudice ***"); *Maple St. Living Trust v. Spada*, Summit App. Nos. 20736, 20737, 2002-Ohio-3173 (holding that "[w]hen a party has moved for summary judgment at a time when that motion may only be filed by leave of court *** the nonmoving party must preserve his or her rights by timely filing either a motion to strike or a response to the summary judgment motion").

{¶ 12} In the instant case, the following dates are of importance: On October 16, 2006, the court set April 27, 2007 as the deadline for filing dispositive motions, including motions for summary judgment. The parties did not comply with this date, and on July 17, 2007, the court set the new deadline for filing dispositive motions as August 1, 2007. The court also set a trial date for December 5, 2007. On September 6, 2007, after the August 1, 2007 deadline, Gallagher Pipino filed a motion for leave to file summary judgment *instanter* and six days later, on September 12, 2007, it filed its summary judgment motion.

{¶ 13} On September 17, 2007, plaintiff filed a response to Gallagher Pipino's motion for leave, arguing that the court should deny the motion because she could not properly reply to summary judgment without further discovery. While the term

“motion to strike” was not expressly included in plaintiff’s September 17, 2007 response, nor did plaintiff specifically reference Civ.R. 56(F) in her quest for continued discovery, we note, without deciding, that this may be a matter of semantics.

{¶ 14} In analyzing the parties’ arguments and pertinent facts under the *GTE* standard for Civ.R. 60(B) relief from judgment, we determine the following:

{¶ 15} As to the first prong of the *GTE* test, the “meritorious defense” is plaintiff’s argument that she was not given 30 days to respond to a properly filed summary judgment motion, as mandated by Loc.R. 11(I)(1), *supra*.

{¶ 16} As to the third *GTE* prong, plaintiff filed her motion for relief from judgment 32 days after the court granted summary judgment. This falls within Civ.R. 60(B)’s “reasonable time” of one year after judgment for motions filed under Civ.R. 60(B)(1).

{¶ 17} As to the second *GTE* prong, plaintiff asserts that she is entitled to relief from judgment under Civ.R. 60(B)(1), Civ.R. 60(B)(4), and Civ.R. 60(B)(5). Allegations that the trial court erred procedurally in granting Gallagher Pipino’s summary judgment motion are properly challenged on appeal and do not fall within Civ.R. 60(B)’s realm. However, the notion that it is “excusable neglect” under Civ.R. 60(B)(1) for a party to fail to oppose summary judgment because it is unclear whether the summary judgment motion is properly before the court is an issue appropriate for relief from judgment.

{¶ 18} Thus, the crux of this case is whether plaintiff's inaction is excusable neglect. In reviewing the record, we find that plaintiff was made aware that the court granted Gallagher Pipino's request for leave to file summary judgment - thus triggering the 30 days within which plaintiff had a right to oppose the motion - on the same day the court granted the summary judgment motion. As stated earlier, whether the court erred in granting summary judgment is properly decided on appeal and we do not reach a conclusion on that issue. Rather, we address the court's denial of plaintiff's motion for relief from judgment and analyze whether the court abused its discretion because plaintiff's neglect in failing to oppose summary judgment was excusable.

{¶ 19} In *Beauty Max LLC v. WBUY TV*, Cuyahoga App. No. 88664, 2007-Ohio-4831, at ¶32, we stated the following regarding excusable neglect:

{¶ 20} "The interpretation of 'excusable neglect' must be performed in keeping with the proposition that Civ.R. 60(B)(1) is a remedial rule to be liberally construed. *Colley*, supra, at 248. There is no bright-line test to determine whether a party's neglect was excusable or inexcusable, but instead the analysis will turn on the facts and circumstances presented in each case. *Id.* at 249. The Ohio Supreme Court, however, has 'defined "excusable neglect" in the negative and has stated that the inaction of a defendant is not "excusable neglect" if it can be labeled as a "complete disregard for the judicial system."' *Kay [v. Marc Glassman, Inc. (1996)*, 76 Ohio St.3d 18, 20], quoting *GTE*, supra, at 153. Further, in making this determination, we are

mindful that Civ.R. 60(B) constitutes an attempt to ‘strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done.’ *Id.* at 248.”

{¶ 21} Keeping in mind that Civ.R. 60(B) is a remedial rule and any doubts should be resolved in favor of deciding cases on their merits, we find that the court abused its discretion in denying plaintiff’s motion for relief from judgment. See *Maddox v. Ward*, Cuyahoga App. No. 87090, 2006-Ohio-4099, at ¶26 (holding that the court abused its discretion by denying a Civ. R. 60(B)(1) motion based on excusable neglect when counsel failed to appear at a pretrial due to a scheduling error, because this “did not exhibit a deliberate act of ignoring a judicial directive such as would constitute inexcusable neglect”).

{¶ 22} In finding that the trial court erred by denying plaintiff’s Civ.R. 60(B) motion for relief from judgment, we sustain plaintiff’s first assignment of error and overrule her second assignment of error.

Judgment reversed and remanded.

It is ordered that appellant recover of appellees her costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

KENNETH A. ROCCO, P.J., and
CHRISTINE T. McMONAGLE, J., CONCUR