[Cite as *Crown Auto Sales, Inc. v. Copart of Connecticut, Inc.*, 2016-Ohio-7896.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104366

CROWN AUTO SALES, INC.

PLAINTIFF-APPELLEE

vs.

COPART OF CONNECTICUT, INC., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Parma Municipal Court
Case No. 2015 CVF 1059

BEFORE: Keough, P.J., Boyle, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: November 23, 2016

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. The purpose of an accelerated appeal is to allow this court to render a brief and conclusory opinion. *State v. Johnson*, 8th Dist. Cuyahoga No. 98594, 2013-Ohio-1788, ¶ 1, citing *Crawford v. Eastland Shopping Mall Assn.*, 11 Ohio App.3d 158, 463 N.E.2d 655 (10th Dist.1983); App.R. 11.1(E).

{¶2} Defendant-appellant, Copart of Connecticut, Inc. ("Copart"), appeals the trial court's denial of his motion to vacate default judgment. Finding no merit to the appeal, we affirm.

{¶3} In April 2014, Copart listed a 2003 Toyota Camry for sale on Copart's online auction. The listing provided that the vehicle's odometer read 97,244 miles and that the vehicle had an Ohio title. Crown Auto ultimately was the highest bidder and purchased the advertised vehicle. After paying to ship the vehicle, and making all the repairs, Crown Auto was finally able to obtain the vehicle title from Copart. The title indicated that the vehicle was owned by Barami U.S. Auto Sales, L.L.C. ("Barami") and the vehicle's odometer actually read 281,314 miles. Based on the discrepancy in mileage, Crown Auto attempted to return the vehicle to Copart or, in the alternative, renegotiate the purchase price with Copart. No resolution was reached.

{¶4} In April 2015, Crown Auto filed suit against Copart and Barami alleging fraudulent misrepresentation. Service was perfected on Copart on April 8, 2015, by certified mail at its Brookhaven, New York address. This was the address of the office

from where the vehicle was shipped and the title was sent. Service was perfected on Barami by regular U.S. mail. On December 7, 2015, and after the answer deadline passed and both Copart and Barami failed to answer the complaint, the court set a default hearing date and Crown Auto moved for default judgment.

{¶5} On January 29, 2016 and upon finding that Copart and Barami had been duly served and failed to plea or appear, the trial court entered a default judgment in favor of Crown Auto and against Copart and Barami in the amount of $5,625 in actual damages plus the costs and interest.

{¶6} On February 29, 2016, Copart moved to vacate the default judgment on the grounds that (1) it has a meritorious defense or claim to present; (2) it is entitled to relief because of mistake, inadvertence, or excusable neglect; and (3) the motion was made within a reasonable time. Crown Auto did not file a brief in opposition. Nevertheless, the trial court summarily denied Copart's motion.

{¶7} Copart now appeals raising as its sole assignment of error that the trial court erred in denying its motion to vacate default judgment.[1]

{¶8} We first note that instead of filing a timely direct appeal from the trial court's grant of default judgment, Crown Auto moved for a Civ.R. 60(B) motion to vacate judgment. It is axiomatic that "[a] party many not use a Civ.R. 60(B) motion as a substitute for a timely appeal." *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128, 502 N.E.2d 605 (1986), paragraph two of the syllabus. Crown Auto filed its Civ.R.

[1]Barami is not a party to this appeal.

60(B) motion within 30 days of the trial court's judgment; thus, Crown Auto should have instead filed a direct appeal. For this reason alone, this court can overrule the assignment of error and affirm the trial court's decision. Nevertheless, the merits of the appeal will be addressed.

{¶9} Civ.R. 55(B) provides that a default judgment may be set aside in accordance with Civ.R. 60(B). A reviewing court will not disturb a trial court's decision regarding a Civ.R. 60(B) motion absent an abuse of discretion. *State ex rel. Russo v. Deters*, 80 Ohio St.3d 152, 153, 684 N.E.2d 1237 (1997). To prevail on a Civ.R. 60(B) motion for relief from judgment, the moving party must demonstrate (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 (B)(5)[2] and (3) the motion is made within a reasonable time, and where the grounds for relief are Civ.R. 60(B)(1), (2), or (3), not more than an year after judgment was entered. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus. If any of these three requirements is not met, the motion should be denied. *Svoboda v. Brunswick*, 6 Ohio St.3d 348, 351, 453 N.E.2d 648 (1983).

{¶10} There is no question that Copart has satisfied the first and third prongs of the three-part test announced in *GTE*. Under the first prong, Copart alleged a meritorious

[2]Those grounds are: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial under Civ.R. 59(B); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged; and (5) any other reason justifying relief from the judgment.

defense by arguing that it disclaimed all warranties and liablity for odometer readings on vehicles. *See, e.g., Stringer v. Boardman Nissan*, 7th Dist. Mahoning No. 05 MA 86, 2006-Ohio-672, ¶ 25. Copart has also satisfied the third prong of *GTE* by filing its Civ.R. 60(B) motion approximately 30 days after discovering that a default judgment had been granted to Crown Auto. The remaining question is whether Copart is entitled to relief under Civ.R. 60(B)(1), mistake, inadvertence, surprise, or excusable neglect.

{¶11} "A trial court does not abuse its discretion in overruling a Civ.R. 60(B)(1) motion for relief from a default judgment on the grounds of excusable neglect, if it is evident from all the facts and circumstances in the case that the conduct of the defendant, combined with the conduct of those persons whose conduct is imputed to the defendant, exhibited a disregard for the judicial system and the rights of the plaintiff." *Griffey v. Rajan*, 33 Ohio St.3d 75, 514 N.E.2d 1122 (1987), syllabus. "'What constitutes excusable neglect is determined from all the surrounding facts and circumstances.'" *Boston v. Parks-Boston*, 10th Dist. Franklin No. 02AP-1031, 2003-Ohio-4263, ¶ 8, quoting *Stuller v. Price*, 10th Dist. Franklin No. 02AP-29, 2003-Ohio-583, ¶ 12.

{¶12} It is undisputed that service of the complaint was perfected on Copart at its Brookhaven, New York office on April 8, 2015. This location was the office that Crown Auto was communicating with regarding the shipment of the vehicle, receipt of the title, and negotiating the return of the vehicle or refund of the purchase price after the discrepancy in the odometer was discovered. Most importantly, the vehicle's title, depicting the actual mileage, was sent to Crown Auto from Copart's Brookhaven address.

Therefore, it is Copart's burden to establish that its failure to respond to the complaint was the result of mistake, inadvertence, or excusable neglect.

{¶13} The only statements Copart makes in its motion to vacate to support its Civ.R. 60(B) burden is that failure to respond was "due to an internal administrative error" and that Copart "has been unable to determine the reason for the mistake." Moreover, in the affidavit of Aaron Bath, litigation manager for Copart, Bath states that "[s]omehow, the Complaint in this case did not reach my desk notwithstanding Copart's intention to defend against the claim."

{¶14} In its motion to vacate default judgment, Copart could not explain why the complaint or any of the case filings were not forwarded to Copart's legal department. Copart failed to allege any operative facts in its motion to vacate to support its contention that its failure to timely answer the complaint was the result of inadvertence, mistake, or excusable neglect. No affidavit was provided by the individual who signed for the complaint on behalf of Copart at its Brookhaven office explaining the mistake or inadvertence on his or her part to forward the complaint to the appropriate individual.

{¶15} This information is necessary for Copart to satisfy its burden of alleging sufficient operative facts tending to show "excusable neglect"under the *GTE* test. *See Kay v. Marc Glassman*, 76 Ohio St.3d 18, 21, 665 N.E.2d 1102 (1996). Although a movant is not required to submit evidentiary material in support of the motion, a movant must do more than make bare allegations of entitlement to relief. *Black v. Pheils,* 6th Dist. Wood No. WD-03-045, 2004-Ohio-4270, ¶ 68, citing *Your Fin. Community of Ohio,*

Inc. v. Emerick, 123 Ohio App.3d 601, 607, 704 N.E.2d 1265 (10th Dist.1997). Without any justification, the court is left to assume that Copart disregarded the legal documents received; thus, disregarding the judicial system. Coincidentally, we note that the default judgment was produced to the legal department fairly quickly considering the motion to vacate was filed approximately 30 days after default was entered.

{¶16} Copart cites in its appellate brief a litany of cases that found excusable neglect in failing to timely file an answer where an employee of a company fails to follow procedures and forward the summons and complaint to the appropriate person. *See, e.g., Third Fed. S&L Assn. v. Johnson*, 8th Dist. Cuyahoga No. 68549, 1995 Ohio App. LEXIS 3450 (Aug. 24, 1995); *Ondrejcak v. Jelly Rolls*, 8th Dist. Cuyahoga No. 73997, 1998 Ohio App. LEXIS 4102 (Sept. 3, 1998); *Clark v. Marc Glassman*, 8th Dist. Cuyahoga No. 78640, 2001 Ohio App. LEXIS 3826 (Aug. 30, 2001). However, in these cases, the movant provided some sufficient operative facts explaining or justifying its mistake, inadvertence, or excusable neglect in failing to timely answer the complaint. In this case, Copart presented no operative facts to the trial court explaining what occurred after the Brookhaven office accepted service of the complaint.

{¶17} Finally, we note that Copart now argues on appeal that the complaint was not handled in accordance with internal procedures, and that Crown Auto did not properly serve the complaint, and that Copart did not receive notice of default, the default hearing, or any other court notices. These arguments were not made below with the trial court. It is well established that a party cannot raise arguments and issues for the first time on

appeal that he or she failed to raise before the trial court. *See, e.g., Mosley v. Cuyahoga Cty. Bd. of Mental Retardation*, 8th Dist. Cuyahoga No. 96070, 2011-Ohio-3072, ¶ 55, citing *Dolan v. Dolan*, 11th Dist. Trumbull Nos. 2000-T-0154 and 2001-T-0003, 2002-Ohio-2440, ¶ 7, citing *Stores Realty Co. v. Cleveland*, 41 Ohio St.2d 41, 322 N.E.2d 629 (1975).

{¶18} In its motion to vacate, Copart admitted that its Brookhaven, New York office was served with the complaint. Why the complaint was not forwarded to the litigation manager or legal department has not been explained or even attempted to be explained; thus failing to withstand its burden under Civ.R. 60(B). Further, Copart did not raise with the trial court any defect in the default notice or notice of default hearing.

{¶19} Based on the trial court record before this court and applying the law to the facts contained herein, the trial court properly considered all the surrounding facts and circumstances, and did not abuse its discretion in denying Copart's motion to vacate default judgment. Accordingly, the assignment of error is overruled and the trial court's decision is affirmed.

{¶20} Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

MARY J. BOYLE, J., and
ANITA LASTER MAYS, J., CONCUR