

[Cite as *Dover W. Condominium Unit Owners' Assn. v. Carandang*, 2017-Ohio-9023.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105730

**DOVER WEST CONDOMINIUM
UNIT OWNERS' ASSOCIATION**

PLAINTIFF-APPELLEE

vs.

JOCELYN T. CARANDANG, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-840434

BEFORE: S. Gallagher, J., Kilbane, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: December 14, 2017

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SEAN C. GALLAGHER, J.:

{¶1} Defendant-appellant Jocelyn Carandang (“appellant”) appeals from the denial of a motion for relief from judgment. Upon review, we affirm the decision of the trial court.

{¶2} On February 13, 2015, plaintiff-appellee Dover West Condominium Unit Owners’ Association, Inc. (“the Association”), filed a complaint for preliminary and permanent injunction against appellant. The Association alleged in the complaint that appellant was in violation of the Association’s declaration and bylaws by engaging in nuisance behavior on the condominium property. The alleged nuisance behavior included and was not limited to “harassing other residents, filing false complaints against other residents * * *, making loud banging noises in her unit, slamming doors in her unit, yelling and screaming in her unit, throwing items down the stairs, leaving garbage in the hallway, [and] leaving notes on other residents’ doors[.]” The Association also alleged that appellant “bangs on other residents’ doors and tries to forcibly enter other units, while yelling and screaming and acting aggressively[.]” The Association further alleged that appellant had refused to abate the violation despite written demands. The Association sought to enforce its declaration and bylaws and to obtain injunctive relief pursuant to R.C. 5311.19. The Association also sought reimbursement of all costs, expenses, and attorney fees incurred with regard to the action, which enforcement costs were recoverable under the Association’s declaration and bylaws.

{¶3} Appellant appeared pro se at the proceedings in the matter, but did not file an answer. On October 6, 2015, the Association filed a motion for default judgment with a supporting affidavit attesting to the allegations in the complaint. Following an evidentiary hearing, the trial court granted the motion for default judgment and permanently enjoined appellant from creating a nuisance on the property. Further, the court recognized the Association was entitled to recoupment of its enforcement costs pursuant to the Association's declaration and bylaws. The court ordered appellant to reimburse the Association in the amount of costs and attorney fees incurred in the enforcement of the declaration in an amount to be determined. On February 9, 2016, the trial court entered a judgment in the amount of \$14,328.20 plus costs in favor of the Association and against Carandang. No direct appeal was filed.

{¶4} Just over one year later, on February 17, 2017, appellant filed a motion for relief from judgment. The trial court denied the motion. In its judgment entry, the trial court set forth the following facts:

This case was an action brought by a condominium association against one of its residents due to her ongoing disruptive and threatening conduct that created a nuisance for other residents in the building. Defendant appeared at all proceedings *pro se* but persistently refused to file an answer or retain counsel despite repeated warnings by the Court. * * *

On November 3, 2015, the Court held the hearing on Plaintiff's Motion for Default Judgment and allowed Plaintiff to present evidence supporting its request for injunctive relief. Defendant appeared late to the proceedings. The Court did not allow Defendant to cross examine the witness because her conduct was argumentative and digressed from the evidence at issue but permitted the Defendant to lodge arguments and objections directly to the Court. Notably, in doing so, Defendant fully admitted to repeatedly engaging in disruptive and threatening conduct.

Based on the evidence presented, including Defendant's own statements to the Court about her actions, the Court granted Plaintiff's Motion for Default Judgment on November 5, 2015. Pursuant to the condominium instruments and R.C. 5311.23, Plaintiff was entitled to recover its attorneys' fees which were granted by order dated February 9, 2016.

{¶5} The trial court proceeded to consider whether Civ.R. 60(B) relief was warranted. The court found that appellant had failed to present a meritorious defense; that her motion was untimely as to arguments raised under Civ.R. 60(B)(1), (2), or (3); that Civ.R. 60(B)(4) did not apply; and that her decision to proceed as a pro se litigant did not warrant relief under Civ.R. 60(B)(5). The trial court emphasized that appellant "was repeatedly cautioned about proceeding *pro se*, she was allowed more than ample time to respond or seek counsel yet she refused to do so" despite every possible allowance being afforded to her during the proceedings. The court also found that the evidence established the alleged facts and that appellant admitted to repeatedly engaging in disruptive and threatening conduct.

{¶6} As to the award of attorney fees, the trial court found that an affidavit in support of attorney fees was filed and that "Defendant failed to file any objection, argument in opposition, or defense to Plaintiff's Request for Attorney Fees." Thus, the trial court found: "There exists no reason under law or equity to vacate the judgments in this action."

{¶7} Appellant filed this appeal from the trial court's denial of her motion for relief from judgment. Under the sole assignment of error, appellant claims the trial court

erred in entering judgment against her and in denying her motion for relief from judgment.

{¶8} Civ.R. 60(B) provides as follows:

On 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} We review a decision on a Civ.R. 60(B) motion for an abuse of discretion.

See Rose Chevrolet, Inc. v. Adams, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988). To constitute an abuse of discretion, the trial court's ruling must be "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶10} In order to prevail on a motion for relief from judgment pursuant to Civ.R. 60(B), the movant must demonstrate (1) a meritorious defense or claim to present if relief is granted; (2) entitlement to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the timeliness of the motion. *GTE Automatic Elec., Inc. v. ARC Industries*, 47 Ohio St.2d 146, 150-151, 351 N.E.2d 113 (1976). The failure to establish

any one of these requirements will result in the denial of the motion. *See Rose Chevrolet, Inc.* at 20.

{¶11} The trial court correctly determined that the motion for relief from judgment was untimely as to arguments raised under Civ.R. 60(B)(1), (2), or (3) because the motion was filed more than one year after judgment was entered in the case. Thus, the trial court proceeded to consider whether grounds for relief had been presented under Civ.R. 60(B)(4) or (5).

{¶12} The trial court determined that appellant presented no evidence to establish that Civ.R. 60(B)(4) applied. The trial court also recognized that appellant's arguments under Civ.R. 60(B)(5) appeared to be based on appellant's dissatisfaction with her pro se representation. The trial court cited to authority establishing that acting pro se is not excusable neglect and that pro se litigants are presumed to have knowledge of the law and legal procedures and are held to the same standard as litigants who are represented by counsel. *See Dayton Power & Light v. Holdren*, 4th Dist. Highland No. 07CA21, 2008-Ohio-5121, ¶ 12; *see also DJL, Inc. v. Massingille*, 8th Dist. Cuyahoga No. 96644, 2011-Ohio-6281, ¶ 24.

{¶13} We recognize that appellant is challenging the manner in which the default hearing was conducted. She argues that she actively participated in the litigation and that the trial court refused to allow her to defend herself, to present any evidence, or to cross-examine witnesses at the default hearing, which she claims was conducted as a trial.

{¶14} The record reflects that although appellant appeared for the court proceedings, she did not file an answer or obtain counsel to do so, despite repeated warnings by the court. Pursuant to Civ.R. 55(A), if the party against whom judgment by default is sought has appeared in the action, that party must be served with written notice of the motion for judgment at least seven days prior to the hearing, and the rule provides the trial court with discretion to determine whether a hearing on the motion is necessary. Civ.R. 55(A) states in relevant part:

If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties.

Civ.R. 55(A).

{¶15} The record reflects that the motion for default judgment was filed with the court on October 6, 2015, and was served on appellant by ordinary mail. The trial court conducted an evidentiary hearing on the motion on November 3, 2015, with all parties present. The trial court clearly indicated that the matter was before the court for a determination of a default judgment. The court stated that it was not allowing appellant to present a defense because she was in default, but afforded her the opportunity to address the court. The transcript reflects that the Association presented evidence of appellant's disruptive and threatening conduct, supporting the averments in the complaint.

Also, appellant was permitted to address the court and conceded engaging in certain behavior. Upon this record, we find that appellant was provided the requisite notice and that the trial court acted within its discretion in conducting the evidentiary hearing on the motion for default judgment pursuant to Civ.R. 55(A).

{¶16} In considering whether appellant had presented grounds for relief from judgment, the trial court found that “[i]t is not a meritorious defense that Defendant chose to proceed *pro se* and is now dissatisfied with the results.” The court further found that no meritorious defense had been presented and that “[t]he evidence presented to the Court, including Defendant’s own admissions, * * * established facts alleged in Plaintiff’s Complaint and entitled [Plaintiff] to injunctive relief as requested.” We find no abuse of discretion by the trial court.

{¶17} Appellant further challenges the trial court’s award of attorney fees, which she argues was determined from an affidavit and without a hearing. In the trial court’s default judgment entry filed November 5, 2015, in addition to granting the motion for default judgment and permanently enjoining appellant from creating a nuisance on the property, the court determined the Association was entitled to recover all costs and expenses, including attorney fees, incurred in bringing the action in an amount to be determined by further motion or hearing. The court quoted Section 17, Item C, as amended of the Association’s declaration and bylaws, which entitled the Association to obtain recoupment of enforcement costs. No objection was raised by appellant.

Thereafter, the Association filed an affidavit in support of attorney fees with attached invoices reflecting legal fees and costs incurred in the amount of \$14,328.20.

{¶18} On February 9, 2009, the trial court issued its final order finding that “upon the uncontroverted evidence presented and for good cause shown, * * * plaintiff is entitled to the sum of \$14,328.20 from defendant for enforcement costs in this action.” Appellant did not file an appeal from the trial court’s award. “It is well established that a Civ.R. 60(B) motion cannot be used as a substitute for an appeal and that the doctrine of res judicata applies to such a motion.” *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 16.

{¶19} 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 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.

SEAN C. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR