[Cite as *Underwood v. Durham*, 2018-Ohio-2940.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106497

EVELYN F. UNDERWOOD, ET AL.

PLAINTIFFS-APPELLEES

vs.

JOSEPH DURHAM, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-862372

BEFORE: Stewart, J., Kilbane, P.J., and Keough, J.

RELEASED AND JOURNALIZED: July 26, 2018

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MELODY J. STEWART, J.:

{¶1} The issue in this App.R. 11.1 accelerated calendar appeal is whether the court abused its discretion by granting plaintiff-appellee Evelyn F. Underwood relief under Civ.R. 60(B) from her own Civ.R. 41(A)(1) voluntary dismissal of her complaint with prejudice. Defendant-appellant Joseph Durham argues that the court erred by finding that Underwood's voluntary dismissal with prejudice, relying on assertions made in his motion to dismiss, was the product of excusable neglect.

{¶2} Underwood filed a complaint on October 29, 2014, seeking damages for automobile negligence, but dismissed it two days later because she was negotiating with Durham's insurance company. When those negotiations stalled, she refiled the complaint on April 25, 2016. Durham then filed a Civ.R. 12(B)(6) motion to dismiss on grounds that Underwood failed to refile her complaint within the one-year saving statute in R.C. 2305.19(A). Underwood's attorney "reviewed the Defendant's Motion to Dismiss, believed its representations of law and fact, noted that the date of refiling was indeed more than one year from the original dismissal, and concluded that the Motion to Dismiss had merit." Affidavit of Gay at ¶ 9. He dismissed the action with prejudice under Civ.R. 41(A)(1).

{¶3} In the motion for relief from judgment, Underwood's attorney stated that he relied entirely on the representations made in Durham's motion to dismiss that the second complaint had not been timely filed. He claimed to be unaware that the one-year time period of the saving statute applied to the commencement of a new action "within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits *or within the period of the original applicable statute of limitations*, whichever occurs later." (Emphasis added.) R.C. 2305.19(A). The accident occurred on September 8, 2014, so the second complaint filed on April 25, 2016, was easily within the R.C. 2305.10(A) two-year statute of limitations for negligence claims. The attorney's decision to dismiss the case was negligent. *Shue v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 16AP-432, 2017-Ohio-443, ¶ 12.

{¶4} But was it *excusable* neglect under Civ.R. 60(B)(1)? "Excusable neglect" is an elusive concept, *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 1996-Ohio-430, 665 N.E.2d 1102, but we have little difficulty finding that an attorney's decision to take an opponent's legal assertions at face value, without conducting independent review, constitutes inexcusable neglect.

{¶5} This is not a case where Durham pulled a fast one on Underwood. Underwood's attorney was obligated to represent his client by conducting independent research to determine the validity of Durham's motion to dismiss. The attorney's being uninformed of the law does not constitute excusable neglect. *Katko v. Modic*, 85 Ohio App.3d 834, 621 N.E.2d 809 (11th Dist.1993) (ignorance of law not excusable neglect); *Cincinnati Ins. Co. v. Schaub*, 2d Dist. Montgomery No. 22419, 2008-Ohio-4729, ¶ 41. This, too, is the rule for federal courts applying the similar provisions of Fed.R.Civ.P. 60(B), where it has been said that "no circuit that has considered the issue after *Pioneer* [*Inv. Servs. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)] has held that an attorney's failure to grasp the relevant procedural law is 'excusable neglect.'" *Advanced Estimating Sys. v. Riney*, 130 F.3d 996, 998 (11th Cir.1997), quoting *Commt. for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814 (9th Cir.1996). *See also Equilease Fin. Servs., Inc. v. Fincastle Leasing, Inc.*, 305 Fed.Appx. 291, 294-295 (7th Cir.2008) ("ignorance of the law is not a ground for a Rule 60(b) motion"); *In re Pettle*, 410 F.3d 189, 192 (5th Cir.2005); *Noah v. Bond Cold Storage*, 408 F.3d 1043, 1045 (8th Cir.2005).

{¶6} We are aware that in *Pioneer*, the United States Supreme Court held that "excusable neglect" can include omissions through "inadvertence, mistake, or carelessness." *Pioneer* at 388. But Underwood's attorney did not act through inadvertence, mistake, or carelessness. Underwood's attorney knew that Durham cited R.C. 2305.19(A) as a basis for the motion to dismiss, but it appears that the attorney must not have read the statute to determine the validity of the motion — his affidavit stated that he "believed" the representations of law and fact made in the motion. By accepting at face value a representation of law made by an opposing party in a dispositive pleading, the attorney admittedly abdicated his responsibility to his client.[1] As a matter of law, this was not excusable neglect.

{¶7} We also reject any assertion that the court could have granted relief from judgment under the catchall provision of Civ.R. 60(B)(5). Underwood's ten-page motion for relief from judgment devoted one sentence to seeking relief under Civ.R. 60(B)(5). And that sentence merely restated his claim of excusable neglect — that he relied on unsupported legal and factual arguments made in the motion to dismiss. The catchall provision of Civ.R. 60(B)(5) is not a substitute for another ground for relief. *Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64, 66, 448 N.E.2d 1365 (1983). In any event, the court made it clear that it was granting relief based on excusable neglect: "the Court finds that it was excusable neglect and finds that the motion is well-taken." Given the specificity of the court's holding, it erred by granting relief from judgment.

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[1] In the motion for relief from judgment, Underwood suggested that Durham's attorney violated Prof.Cond.R. 3.3(A) by making a false statement of law or fact and failing to disclose adverse, controlling legal authority in the motion to dismiss. However, Prof.Cond.R. 1.1 states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation *reasonably* necessary for the representation." (Emphasis sic.)

{¶8} Judgment reversed and remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee 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.

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MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR