**[Cite as *Schottenstein, Zox & Dunn Co., L.P.A. v. Shutt,* 2009-Ohio-4870.]**

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

| | | |
|---|---|---|
| | | JUDGES: |
| SCHOTTENSTEIN, ZOX & DUNN COMPANY, LPA | : | Hon. W. Scott Gwin, P.J. |
| | : | Hon. William B. Hoffman, J. |
| | : | Hon. Patricia A. Delaney, J. |
| Plaintiff-Appellee | : | |
| | : | |
| -vs- | : | Case No. 2009-CA-15 |
| | : | |
| ROBERT SHUTT | : | |
| | : | O P I N I O N |
| Defendant-Appellant | | |

| | |
|---|---|
| CHARACTER OF PROCEEDING: | Civil appeal from the Knox County Court of Common Pleas, Case No. 08OT10-0646 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | September 16, 2009 |

APPEARANCES:

| For Plaintiff-Appellee | For Defendant-Appellant |
|---|---|
| ANNE C. LITTLE<br>Thomas & Thomas<br>#24 Huber Village Blvd.<br>Westerville, OH 43081 | ADAM B. LANDON<br>LUCAS K. PALMER<br>10 South Gay Street<br>Mount Vernon, OH 43050 |

*Gwin, P.J.*

**{¶1}** Defendant-appellant Robert Shutt appeals a judgment of the Court of Common Pleas of Knox County, Ohio, which overruled his motion to vacate a default judgment plaintiff-appellee Schottenstein, Zox & Dunn Company, LPA took against him. Appellant assigns a single error to the trial court:

**{¶2}** "I. THE TRIAL COURT ERRED IN DENYING ROBERT SHUTT'S MOTION TO VACATE DEFAULT JUDGMENT."

**{¶3}** The record indicates appellee began providing legal services to appellant in January, 2006, and handled at least four lawsuits simultaneously. However, the relationship between the parties deteriorated. Appellee withdrew from representing appellant in all the cases and appellant retained new counsel. Appellant contested the bills appellee presented, asserting some of the charges were redundant and necessary only because appellee assigned and re-assigned multiple associates to his cases.

**{¶4}** In June 2007, appellant retained Critchfield, Critchfield, & Johnson, LTD., and informed it appellee had been attempting to collect legal fees. New counsel communicated with appellee regarding the disputed fees, but reached no settlement.

**{¶5}** On October 29, 2008, appellee filed suit against appellant. Appellant was served with a complaint via certified mail on October 30, 2008.

**{¶6}** Appellant alleges he believed his new counsel was aware of the filing of the complaint, and never contacted his new counsel until January 12, 2009, when he received the default judgment entry granting appellee damages in the amount of $54,384.59 plus interest. Appellant notified new counsel, who filed a motion to vacate on January 20, 2009.

**{¶7}** Civ. R. 55 states in pertinent part:

**{¶8}** "(A) Entry of judgment

**{¶9}** **"**When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefore; but no judgment by default shall be entered against a minor or an incompetent person unless represented in the action by a guardian or other such representative who has appeared therein. 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.

**{¶10}** "(B) Setting aside default judgment

**{¶11}** **"**If a judgment by default has been entered, the court may set it aside in accordance with Rule 60(B)."***

**{¶12}** Civ. R. 60 (B) provides:

**{¶13}** "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."

**{¶14}** In *GTE Automatic Electric Company v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, the Ohio Supreme Court held to prevail on a motion brought pursuant to Civ. R. 60(B), the movant 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); 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 one year after the judgment, order, or proceeding was entered or taken.

**{¶15}** Our standard of reviewing a court's decision on a motion for relief from judgment is the abuse of discretion standard. *Wilson v. Lee,* 172 Ohio App. 3d 791, 2007-Ohio-4542. The Supreme Court has repeatedly held the term abuse of discretion implies the trial court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E. 2d 1140.

**{¶16}** Appellant cites us to *Colley v. Bazell* (1980), 64 Ohio St. 3d 243, 416 N.E. 2d 605, in which the court stated matters involving large sums of money should not be determined by default judgment if it can reasonably be avoided.

**{¶17}** Appellant argues he met all the requirements of Civ. R. 61 and *GTE.* The default judgment was entered December 17, 2008, and appellant filed his motion to vacate on January 20, 2009. Appellant urges that he filed his motion within a reasonable time, and that he alleged a meritorious defense, i.e. the dispute as to the amount owing. Appellant was not required to prove the merits of his defense, but only to allege a meritorious claim. *Volodkevich v. Volodkevich* (1988), 35 Ohio St. 3d 152, 518 N.E.2d 1208.

**{¶18}** Finally, appellant argues his failure to file a timely answer rose solely from excusable neglect and/or inadvertence, and not from a complete disregard for the judicial system. The Ohio Supreme Court has defined excusable neglect in the negative, finding the inaction of 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, 1996 -Ohio- 430 665 N.E.2d 1102.

**{¶19}** In *Colley,* supra, the Supreme Court set our certain factors a court may use to determine whether the movant's neglect was excusable under the circumstances of the case. Those factors include whether the defendant attempted to promptly notify the person who would be responsible for conducting the defense; the amount of time that elapsed between the last day for filing a timely answer and the granting of the default judgment; the amount of the judgment; and the experience and understanding of the defendant concerning litigation. Appellant urges if we apply the factors to the case

at bar, we will conclude the trial court abused its discretion in overruling his motion for relief from judgment.

**{¶20}** Appellee argues failure to act after being served with a complaint does not constitute excusable neglect, and the Supreme Court has held Civ. R. 60 (B) should not be used to emasculate the pleading rules and time limits. *Colley,* supra, citing *Griffey v. Rajan* (1987), 33 Ohio St. 3d 75, 514 N.E.2d 1122.

**{¶21}** Appellee notes appellant did not explain in his motion or affidavit why he did not report receiving the complaint to his new counsel, and did not determine whether his new counsel would be representing him on this issue. Appellant apparently has some experience with litigation, and does not explain why he believes it is reasonable to assume his lawyer would file an answer to a complaint without consulting him.

**{¶22}** Our review of the record leads us to conclude the trial court did not abuse its discretion in overruling the motion to vacate.

**{¶23}** The assignment of error is overruled.

**{¶24}** For the foregoing reasons, the judgment of the Court of Common Pleas of Knox County, Ohio, is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Delaney, J., concur

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. PATRICIA A. DELANEY

WSG:clw 0820

**[Cite as *Schottenstein, Zox & Dunn Co., L.P.A. v. Shutt,* 2009-Ohio-4870.]**

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

| | | |
|---|---|---|
| SCHOTTENSTEIN, ZOX & DUNN COMPANY, LPA | : | |
| Plaintiff-Appellee | : | |
| -vs- | : | JUDGMENT ENTRY |
| ROBERT SHUTT | : | |
| Defendant-Appellant | : | CASE NO. 2009-CA-15 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Knox County, Ohio, is affirmed. Costs to appellant.

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. PATRICIA A. DELANEY