

[Cite as *McFredericks, Inc. v. Strouse*, 2009-Ohio-6253.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MCFREDERICKS, INC. DBA OLDE
PARSONAGE

Plaintiff-Appellee

-vs-

MARK A. STROUSE, ET AL.

Defendants-Appellants

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. W. Scott Gwin, J.

Hon. Julie A. Edwards, J.

Case No. 09COA014

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 07CIV228

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

November 25, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendants-Appellants

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Farmer, P.J.

{¶1} On July 20, 2007, appellee, McFredericks, Inc. dba Olde Parsonage, filed a complaint against several defendants, alleging they purchased goods and materials from appellee and failed to pay for them. Because the defendants failed to answer, appellee filed a motion for default judgment on October 2, 2007. On October 19, 2007, appellant, William T. Adams, filed a motion for leave to plead and an answer. By judgment entry filed October 24, 2007, the trial court granted appellee's motion for default judgment. By judgment entry filed November 20, 2007, the trial court denied appellant's motion for leave to plead and struck appellant's answer from the record.

{¶2} On December 21, 2007, appellant filed a motion for relief from judgment pursuant to Civ.R. 60(B). A hearing before a magistrate was held on December 15, 2008. By decision filed December 17, 2008, the magistrate denied the motion. Appellant filed objections on December 30, 2008. By judgment entry filed March 26, 2009, the trial court overruled the objections.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED BY CLEARLY ABUSING ITS DISCRETION WHEN IT OVERRULED APPELLANT'S OBJECTIONS TO THE MAGISTRATE'S DECISION WHICH DENIED APPELLANT'S MOTION FOR RECONSIDERATION"

II

{¶5} "THE TRIAL COURT ERRED BY CLEARLY ABUSING ITS DISCRETION WHEN IT OVERRULED APPELLANT'S MOTION FOR LEAVE TO PLEAD AND STRUCK APPELLANT'S ANSWER FROM THE RECORD."

III

{¶6} "THE TRIAL COURT ERRED WHEN IT GRANTED DEFAULT JUDGMENT AGAINST APPELLANT, PERSONALLY, FOR A DEBT INCURRED BY THE CORPORATION."

IV

{¶7} "THE TRIAL COURT ERRED WHEN IT GRANTED DEFAULT JUDGMENT AGAINST APPELLANT, PERSONALLY, DUE TO HIS POSITION AS STATUTORY AGENT AND/OR THE MINOR CLERICAL DUTIES HE PERFORMED ON BEHALF OF THE CORPORATION."

I, II, III, IV

{¶8} All of these assignments challenge the trial court's decision in granting appellee default judgment and in denying appellant's motion from relief from judgment. Specifically, appellant claims he filed a timely motion for leave to plead, and set forth sufficient facts to establish excusable neglect and a meritorious defense. We agree.

{¶9} A motion for relief from judgment under Civ.R. 60(B) lies in the trial court's sound discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. In *GTE Automatic Electric Inc. v. ARC Industries*,

Inc. (1976), 47 Ohio St.2d 146, paragraph two of the syllabus, the Supreme Court of Ohio held the following:

{¶10} "To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has 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 a reasonable time, and, where the grounds of 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."

{¶11} In its March 26, 2009 judgment entry overruling appellant's objections, the trial court noted a transcript of the magistrate's hearing was not filed for review regarding factual findings as required under Civ.R. 53(D)(3)(b)(iii) which states the following in pertinent part:

{¶12} "*(iii) Objection to magistrate's factual finding; transcript or affidavit.* An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available."

{¶13} Therefore, in conducting an independent analysis, the trial court was left to determine if it would accept the magistrate's findings of fact as true and to determine whether there was an error of law or other defect. Absence of a transcript does not relieve the trial court of conducting an independent review of the magistrate's decision.

{¶14} On the issue of timeliness regarding appellant's motion for leave to plead, we find the motion was timely filed. Regular mail service on the complaint was filed on

August 29, 2007, thereby setting the answer date to be, at the latest, September 29, 2007 (twenty-eight days plus three for mailing). Appellee filed its motion for default judgment on October 2, 2007. The trial court's judgment entry granting default judgment was signed on October 9, 2007, but was not filed until October 24, 2007. Appellant's leave to plead was filed on October 19, 2007.

{¶15} Based upon the time sequence, appellant's motion for leave to plead was timely filed. Further, a review of appellant's proposed answer filed October 19, 2007 sets forth the defense that he was "not a proper party to the alleged contract." In his decision filed December 17, 2008, the magistrate found appellant performed "duties well beyond that of a statutory agent." The magistrate overlooked the defense of "not a proper party" to the contract.

{¶16} Attached to the complaint as Exhibit A is a mere statement of the outstanding invoices for goods and services provided by appellee to allegedly the named defendants. The magistrate found liability per se and disregarded the mandates of *GTE Automatic* regarding a meritorious defense. "****[I]n alleging a meritorious defense in a Civ.R. 60(B) motion, the movant need not establish that he or she will prevail on the defense.***Rather, the Civ.R. 60(B) movant is required to allege operative facts that allow the trial court to decide if a meritorious defense exists.***A meritorious defense exists 'if it is not a sham and when, if true, it states a defense in part, or in whole, to the claims for relief set forth in the complaint.'****" *Simmons Capital Advisors, Ltd. v. The Kendall Group, Ltd.*, Franklin App. No. 05AP-1087, 2006-Ohio-2272, ¶22. (Citations omitted.)

{¶17} Upon reviewing the complaint, we find a viable meritorious defense exists.

{¶18} Lastly, and most crucial, is whether appellant has established excusable neglect. In his affidavit attached to his motion for relief from judgment filed December 21, 2007, he averred the following in pertinent part:

{¶19} "3) That during the months of August and September, 2007, I was in Philadelphia and Detroit for several weeks performing software implementation at Hospital of University of Pennsylvania and Detroit Medical Center.

{¶20} "5) Due to personal reasons, my spouse and I have not communicated effectively for several months.

{¶21} "6) Mail sent to my home is processed by my spouse.

{¶22} "7) Mail addressed to me and sent to my home was withheld from my attention until September 27, 2007.

{¶23} "8) As soon as I became aware of the subject lawsuit, I sought legal counsel."

{¶24} Excusable neglect implies unusual or special circumstances. *Vanest v. Pillsbury Co.* (1997), 124 Ohio App.3d 525, 536, fn. 9. We find appellant's affidavit meets these requirements.

{¶25} We note "Civ.R. 60(B)(1) is a remedial rule 'to be liberally construed with a view for effecting a just result.' *State ex rel. Citizens for Responsible Taxation v. Scioto Cty. Bd. of Elections* (1993), 67 Ohio St.3d 134, 136, 616 N.E.2d 869. '[D]oubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits.' *GTE Automatic Elec.* at 151, 1 O.O.3d 86, 351 N.E.2d 113." *Banfield v. Brodell*, 169 Ohio App.3d 110, 2006-Ohio-5267, ¶17.

{¶26} Given the timeliness of appellant's leave to plead, his colorable meritorious defense, and his unrefuted affidavit, appellant should have been afforded relief from judgment.

{¶27} Assignments of Error I, II, III, and IV are granted. The default judgment against appellant is vacated. Appellant's answer filed on October 19, 2007 is of record.

{¶28} The judgment of the Court of Common Pleas of Ashland County, Ohio is hereby reversed and remanded.

By Farmer, P.J.

Gwin, J. and

Edwards, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ Julie A. Edwards

JUDGES

