[Cite as *Fugate-Walton v. Walton*, 2016-Ohio-1175.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

NANCY E. FUGATE-WALTON

Plaintiff-Appellant

-vs-

KEN W. WALTON, EXECUTOR

Defendant-Appellee

JUDGES:
Hon. John W. Wise, P. J.
Hon. Patricia A. Delaney, J.
Hon. Craig R. Baldwin, J.

Case No. 15 CAE 07 0053

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Plea, Case No. 14 CVH 06 0464
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 15, 2016

APPEARANCES:

For Plaintiff-Appellant

ROBERT K. HENDRIX
PETERSON AND PETERSON
87 South Progress Drive
Xenia, Ohio 45385

For Defendant-Appellee

JAMES M. DIETZ
175 South Sandusky Street
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Delaware, Ohio 43015

Wise, P. J.

{¶1} Plaintiff-Appellant Nancy E. Fugate-Wilson appeals the decision of the Court of Common Pleas, Delaware County, which denied her motion for relief from judgment subsequent to a dismissal, via summary judgment, of her action for a monetary judgment against Appellee Ken W. Walton, Executor of the Estate of Charles E. Walton, Sr. The relevant facts leading to this appeal are as follows.

{¶2} Appellant is the surviving spouse of Charles E. Walton, Sr., who passed away on August 3, 2013. Prior to their marriage, appellant and Charles purportedly entered into a prenuptial property agreement that remained in effect on the date of Charles' death. Allegedly included in the prenuptial agreement was a provision indicating Charles promised to allow a claim against his estate of $100,000.00 to appellant.

{¶3} On November 6, 2013, Robert K. Hendrix, attorney for appellant, sent a letter to James M. Dietz, attorney for the Estate of Charles E. Walton. In that letter, Mr. Hendrix wrote, *inter alia:* "As you are aware, these parties executed an antenuptial agreement which may be at odds with the terms of the will executed by Mr. Walton."

{¶4} No indication was thereafter given whether such "claim" would be allowed.

{¶5} Charles' estate was opened in the Delaware County Probate Court on November 7, 2013. Appellee Ken Walton was appointed executor of the estate on the same day.

{¶6} On April 14, 2014, appellant filed with the Delaware County Probate Court a notarized affidavit which included an attached copy of her claimed prenuptial property agreement. The affidavit states as follows:

> I have presented a claim against the Estate of Charles E. Walton, Sr., a.k.a. Charles Emery Walton, deceased, in the amount of One Hundred Thousand and 00/100 Dollars ($100,000.00) pursuant to Section I(A) of the Antenuptial Property Agreement, a copy of which is attached hereto, marked "Exhibit A", and incorporated herein by reference. *** I certify that the claim is justly due, that no payments have been made thereon, that there are no counterclaims against it to my knowledge, and that it is unsecured.

{¶7} On April 21, 2014, appellee filed and served a notice of rejection of the aforesaid claim.

{¶8} On June 20, 2014, Appellant Fugate-Walton filed a civil complaint in the Delaware County Court of Common Pleas against Appellee Walton, as executor, seeking judgment in the amount of $100,000.00, plus interest, court costs, and attorney fees. Appellee filed an answer on July 15, 2014.

{¶9} After an exchange of discovery, appellee filed a motion for summary judgment on November 13, 2014. Said motion includes a certificate of service by Attorney Dietz stating that Attorney Hendrix was served with a copy by regular U.S. mail at 87 South Progress Drive, Xenia, Ohio.

{¶10} Via judgment entry dated December 15, 2014, the trial court, noting in part that no response had been received from appellant, granted the motion for summary judgment in favor of appellee. The court therein also specifically found that “[appellant’s] November 6, 2013 communication does not constitute a claim under Ohio Revised Code

Section 2117.06 and [appellant's] April 14, 2014 claim is barred by the applicable statutes of limitations." Entry Granting Summary Judgment at 1.

{¶11} On January 6, 2015, appellant filed a motion to vacate the December 15, 2014 summary judgment entry, relying on Civ.R. 60(B)(1) and (B)(5). The motion sets forth the claim that counsel for appellant did not receive a copy of appellee's summary judgment motion. Appellee filed a memorandum in opposition on January 21, 2015.

{¶12} The trial court held a hearing on the matter on March 4, 2015. The court heard oral arguments from both parties and took the matter under advisement.

{¶13} Via judgment entry filed June 12, 2015, the trial court denied appellant's motion to vacate.

{¶14} On July 13, 2015, appellant filed a notice of appeal. She herein raises the following sole Assignment of Error:

{¶15} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY DETERMINING THAT APPELLANT DID NOT HAVE A MERITORIOUS CLAIM TO PRESENT IF THE MOTION TO VACATE WERE GRANTED."

I.

{¶16} In her sole Assignment of Error, appellant essentially contends the trial court erred in denying her motion to vacate. We disagree.

{¶17} As an initial matter, we find it incumbent to set forth the bounds of our analysis in the present appeal. Appellant's motion to vacate was primarily based on a "failure of notice" argument; *i.e.*, appellant's counsel asserted in the motion that he "was unaware of a filing for summary judgment by [appellee], resulting in [appellant] not filing a response." Motion to Vacate at 2. Appellee's memorandum contra the motion to vacate

neither concurs with nor refutes appellant's assertion of lack of notice of a pending summary judgment motion. Similarly, the trial court, in its judgment entry denying the motion to vacate (the subject of the present appeal), made only one brief reference to the notice issue, and instead focused on whether appellant would have a meritorious claim to present if summary judgment were to be vacated. Under these circumstances, in order to avoid piecemeal appeals, we will treat appellant's claimed lack of notice of the summary judgment motion as a stipulation by the parties, allowing us to proceed to the legal issues surrounding appellee's denial of appellant's "claim" against Charles' estate.

{¶18} Civ.R. 60(B) reads in pertinent part 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. ***.

{¶19} In order to prevail on a motion brought pursuant to Civ.R. 60(B), " * * * the movant must demonstrate that (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 (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 proceedings was entered or taken." *Argo Plastic Products Co. v. Cleveland* (1984), 15 Ohio St.3d 389, 391, 474 N.E.2d 328, citing *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus. If any prong of this requirement is not satisfied, relief shall be denied. *Argo* at 391, 474 N.E.2d 328.

{¶20} A motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court and a ruling will not be disturbed absent an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77, 514 N.E.2d 1122. An abuse of discretion connotes more than an error of law or judgment, it implies the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶21} R.C. 2117.06 states in pertinent part as follows:

> (A) All creditors having claims against an estate, including claims arising out of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated, shall present their claims in one of the following manners:

(1) After the appointment of an executor or administrator and prior to the filing of a final account or a certificate of termination, in one of the following manners:

(a) To the executor or administrator in a writing;

(b) To the executor or administrator in a writing, and to the probate court by filing a copy of the writing with it;

{¶22} ***.

{¶23} Appellant essentially contends that her motion to vacate summary judgment should have been granted, as she had a meritorious claim to present against Charles' estate in her lawsuit based on the letter her attorney sent the attorney of the estate on November 6, 2013, referencing the prenuptial agreement.[1]

{¶24} We recognize that a claim presented to the executor's attorney satisfies the statutory presentment requirements of R.C. 2117.06(A). *See Caldwell v. Brown*, 109 Ohio App.3d 609, 611, 672 N.E.2d 1037, 1038 (2nd Dist.1996), citing *Peoples Natl. Bank v. Treon* (1984), 16 Ohio App.3d 410, 16 OBR 480, 476 N.E.2d 372. However, we note the statutory provision in question clearly requires the presentation of claims "after the appointment of an executor or administrator." The letter in question in the case *sub judice* is dated and was faxed prior to the opening of Charles' estate and the appointment of appellee as executor. An appellate court must generally presume the General Assembly means what it says; thus, we cannot amend statutes to provide what we consider a more

[1] It appears undisputed that the more formal notice appellant filed and sent to appellee's counsel on or about April 14, 2014 was outside of the time limits for submission of a claim, pursuant to R.C. 2117.06(B). Analysis herein of that particular claim is thus unnecessary.

logical result. *See, e.g., Tuscarawas County CSEA v. Burger,* 5th Dist. Tuscarawas Nos. 2000AP120093, *et al.,* 2001–Ohio–1440, citing *State v. Virasayachack* (2000), 138 Ohio App.3d 570, 574, 741 N.E.2d 943. Moreover, while the form of a writing to an executor under R.C. 2117.06 need only provide sufficient information to put the executor on notice that the creditor intends to pursue a claim, such information should include the amount owed. *See H&R Accounts, Inc. v. Steel*, 2nd Dist. Montgomery No. 21213, 2006-Ohio-2331, ¶ 27. As revealed in our recitation of facts, the letter in question provides no such specificity. As we have previously recognized, courts should not impose upon the administrator or executor "the task of 'guessing' what sum a creditor of the estate is seeking." *Lowery v. Coshocton Cty. Mem. Hosp. Ass'n., Inc*., 5th Dist. Coshocton No. 93-CA-22, 1994 WL 369985, (July 1, 1994) (interpreting former R.C. 2117.06(B)).

{¶25} Accordingly, given the timing and vagueness concerns brought about by the nature of the November 6, 2013 letter to Attorney Dietz, we cannot conclude that the trial court acted in an unreasonable, arbitrary or unconscionable fashion in denying appellant's motion to vacate summary judgment under Civ.R. 60(B). Appellant's additional suggestion that appellee and/or Mr. Dietz would have been aware of the amounts involved in the claim based on alleged familiarity with the prenuptial agreement does not persuade us to conclude otherwise in this instance.

{¶26} Appellant's sole Assignment of Error is therefore overruled.

{¶27} For the reasons stated in the foregoing opinion, the decision of the Court of Common Pleas, Delaware County, is hereby affirmed.

By: Wise, P. J.

Delaney, J., and

Baldwin, J., concur.

JWW/d 0229