



*Delaney, J.*

{¶1} Plaintiff-Appellant Seniah Corporation appeals the December 7, 2015 judgment entry of the Stark County Court of Common Pleas.

### **FACTS AND PROCEDURAL HISTORY**

{¶2} On April 15, 2015, Plaintiff–Appellant Seniah Corporation refiled its complaint in the Stark County Court of Common Pleas naming Buckingham, Doolittle & Burroughs, LLP and Patrick J. Keating as Defendants. Defendant-Appellee Patrick J. Keating was an attorney with the law firm of Buckingham, Doolittle, & Burroughs, LLP. The complaint alleged Keating committed legal malpractice relating to his representation of Seniah Corporation during a foreclosure action and a Chapter 11 Bankruptcy proceeding.

{¶3} Buckingham, Doolittle & Burroughs, LLP and Keating filed answers to the complaint.

{¶4} On August 10, 2015, Keating filed a motion for summary judgment. Keating’s sole argument in its motion for summary judgment was that Seniah’s claim for legal malpractice was time-barred by the statute of limitations. Keating raised no argument in the motion for summary judgment as to the merits of Seniah’s underlying claim for legal malpractice.

{¶5} Pursuant to the trial court’s pre-trial order, a response to a dispositive motion was due 28 days from the date the motion was filed. Accordingly, Seniah’s response to the motion for summary judgment was due on September 7, 2015.

{¶6} Seniah did not file a response to the motion for summary judgment by September 7, 2015. The trial court went forward with the non-oral hearing on the motion

for summary judgment on September 15, 2016. On September 16, 2015, the trial court issued its judgment entry finding there were no genuine issues of material fact and Keating was entitled to judgment as a matter of law. The judgment entry, however, did not dispose of all the pending claims. Seniah's claims against Buckingham were still pending before the trial court.

{¶7} On October 21, 2015, Seniah filed a motion for relief from judgment from the September 16, 2015 judgment entry. Seniah argued in the motion that the entry granting summary judgment in favor of Buckingham should be vacated pursuant to Civ.R. 60(B) due to mistake, inadvertence, and excusable neglect. In its motion, Seniah stated that after it received Buckingham's motion for summary judgment, counsel for Seniah emailed counsel for Buckingham to request dates to conduct the discovery deposition of Patrick Keating. Keating was available for deposition on October 26 or 27, 2015. Seniah's counsel asked if Buckingham would stipulate to an extension to file a response to the motion for summary judgment after it conducted Keating's deposition. Seniah provided an email from Buckingham's counsel indicating she agreed to stipulate to an extension. Counsel for Seniah stated he instructed his assistant to prepare the stipulation and deposition notice and then submit them to Buckingham for counsel's signature.

{¶8} Seniah's counsel next stated he was out of the office for a two-week period and he did not follow-up on the stipulation or deposition notice. He became aware the stipulation was not filed when he received the September 16, 2015 judgment entry granting summary judgment.

{¶9} Buckingham filed its motion for summary judgment on October 28, 2015. In its motion, Buckingham argued Seniah's claims against Buckingham were barred by res

judicata and law of the case based on Seniah's failure to appeal the trial court's prior decision in January 2014 granting Buckingham's motion for judgment on the pleadings.

{¶10} Buckingham responded to the Civ.R. 60(B) motion on November 2, 2015. Buckingham argued that Seniah failed to meet the elements necessary to be granted relief from judgment. It first contended that Civ.R. 60(B) was inappropriate because the September 16, 2015 judgment entry was not a final judgment because the claims against Buckingham were still pending. It next argued that Seniah had no likelihood of success on the merits because Seniah failed to identify any expert witness by the trial court's deadline to support its claim for legal malpractice. The pre-trial order required Seniah to identify its expert by October 1, 2015 and Seniah did not identify an expert by that date or file a motion for extension to identify an expert. Without an expert, Buckingham argued Seniah could not meet its burden to demonstrate legal malpractice; therefore, it had no meritorious defense or claim. Buckingham finally argued that the motion for relief from judgment was not filed within a reasonable time.

{¶11} Seniah filed a response to Buckingham's motion for summary judgment on November 25, 2015.

{¶12} On December 7, 2015, the trial court denied Seniah's motion for relief from judgment. The trial court found it could be reasonably argued that Seniah's failure to respond was mistake or inadvertence, based on a discussion between the parties regarding a stipulation for extension. The trial court determined, however, that Seniah failed to show a likelihood of success on the merits because it failed to identify an expert to support its claim for legal malpractice.

{¶13} On January 27, 2016, the trial court granted Buckingham's motion for summary judgment.

{¶14} It is from the December 7, 2015 judgment entry that Seniah now appeals.

### **ASSIGNMENT OF ERROR**

{¶15} Seniah raises one Assignment of Error:

{¶16} "THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT."

### **ANALYSIS**

{¶17} Seniah argues in its sole Assignment of Error that the trial court abused its discretion by denying its motion for relief from judgment. We disagree.

#### **Was Civ.R. 60(B) the Correct Procedural Remedy?**

{¶18} The first issue we discuss is whether Civ.R. 60(B) was the proper procedural device Seniah should have utilized when seeking relief from the September 16, 2015 judgment entry. Buckingham raised this matter in its response to the motion for reconsideration.

{¶19} The defendants in this case are Buckingham and Keating. Seniah alleged a claim of legal malpractice against Buckingham and Keating. On August 10, 2015, Keating filed a motion for summary judgment. Keating's sole argument in its motion for summary judgment was that Seniah's claim for legal malpractice was time-barred by the statute of limitations. The trial court granted Keating's motion for summary judgment on September 16, 2015. Seniah's claims against Buckingham were not resolved by the September 16, 2015 judgment entry. The trial court did not include Civ.R. 54(B) language in the judgment entry designating the entry as a final judgment.

{¶20} When Seniah filed its motion for relief from the September 16, 2015 judgment, the claims against Buckingham were still pending before the trial court. Civ.R. 60(B), by its own terms, applies only to a final judgment, order, or proceeding. *Faraj v. Qasem*, 8th Dist. Cuyahoga No. 103374, 2016-Ohio-3261, ¶ 7. The Civil Rule states, “[o]n 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 \* \* \*.” Ohio Civ.R. 60. Accordingly, the September 16, 2015 judgment entry was not a final judgment but an interlocutory order.

{¶21} Because the judgment Seniah sought to vacate was not a final judgment, Seniah’s motion purporting to request relief from judgment pursuant to Civ.R. 60(B) should have been construed as a motion for reconsideration. *Settlers Bank v. Burton*, 4th Dist. Washington Nos. 12CA36 & 12CA38, 2014-Ohio-335, ¶ 37-38; *Fifth Third Bank v. Rose*, 4th Dist. Gallia Nos. 07CA8 & 07CA9, 2008-Ohio-3919, ¶ 12. As such, we review the trial court’s December 7, 2015 judgment entry to deny Seniah’s motion for relief from judgment as a denial of a motion for reconsideration.

### **Standards for Considering a Motion for Reconsideration**

{¶22} The decision whether to grant a motion for relief from judgment under Civ.R. 60(B) lies within the trial court's sound discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75, 514 N.E.2d 1122 (1987). In order to find abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). The same abuse of discretion standard applies in reviewing trial court decisions on motions for reconsideration of interlocutory decisions. *Settlers Bank v. Burton*, 4th Dist. Washington Nos. 12CA36 &

12CA38, 2014-Ohio-335, ¶ 19 citing *Vanest v. Pillsbury Co.*, 124 Ohio App.3d 525, 535, 706 N.E.2d 825 (4th Dist.Jackson).

{¶23} When considering a motion for reconsideration, it has been stated the analysis is somewhat similar to a motion for relief from judgment:

[a] trial court has plenary power in ruling on a motion for reconsideration, and we will not reverse such rulings absent an abuse of discretion. [*Groza–Vance v. Vance*, 162 Ohio App.3d 510, 834 N.E.2d 15, 2005–Ohio–3815, ¶ 53 (10th Dist.)], [citing *Hundsrucker v. Perlman*, Lucas App. No. L–03–1293, 2004-Ohio-4851, 2004 WL 2035398, ¶ 25, citing *Vanest v. Pillsbury Co.* (1997), 124 Ohio App.3d 525, 535, 706 N.E.2d 825]. \* \* \* “ ‘It is suggested that when an interlocutory order is modified or vacated the standard for a common law motion for reconsideration, the “apparent justice” standard, ought to apply, though the court should also be guided by Civ.R. 60(B) standards, albeit applied less rigorously.’ “ *Vance* at ¶ 53, quoting *Baker v. Schuler*, 2d Dist. No. 02CA0020, 2002–Ohio–5386, ¶ 22, citing Klein/Darling, Ohio Civil Practice, Baldwin (1997 Ed.), Section AT 54–3.

*Mindlin v. Zell*, 10th Dist. Franklin No. 11AP-983, 2012-Ohio-3543, ¶ 23.

{¶24} With that instruction, we consider whether it was error for the trial court to deny Seniah’s motion for relief from judgment.

**A Less Rigorous Application of Civ.R. 60(B)**

{¶25} The primary basis for Seniah’s claim for relief from judgment was that its failure to respond to the motion for summary judgment was because of excusable neglect. The Ohio Supreme Court has yet to develop a definitive definition of excusable neglect. However, it has described it in the negative stating, “the inaction of a defendant is not ‘excusable neglect’ if it can be labeled as a ‘complete disregard for the judicial system.’” *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996), quoting *GTE Automatic Elec., Inc.*, 47 Ohio St.2d at 153, 351 N.E.2d 113. The determination of whether neglect is excusable or inexcusable must take into consideration all the surrounding facts and circumstances, and courts must be mindful that cases should be decided on their merits, where possible, rather than procedural grounds. *Griffey v. Rajan*, 33 Ohio St.3d 75, 79–81, 514 N.E.2d 1122 (1987).

{¶26} Buckingham did not argue in its response to Seniah’s motion for relief from judgment that Seniah’s inaction was not excusable neglect. In its judgment entry, the trial court held:

The Court also believes that it can be reasonably argued that Plaintiff’s failure to respond was a matter of mistake or inadvertence, as there appears to have been some discussion between the parties about an extension of time for Plaintiff to respond until after Defendant Keating’s deposition could be taken.

(Judgment Entry, December 7, 2015).

{¶27} The trial court denied Seniah’s motion for relief from judgment because Seniah failed to identify its expert witness by the date set in the trial court’s pre-trial order.

The trial court found that without a legal expert, Seniah would be unable to establish the duty and breach of duty elements of a legal malpractice claim. (Judgment Entry, December 7, 2015). “In all but a few cases, expert testimony is required to support allegations of legal malpractice.” *Bates v. Meranda*, 5th Dist. Licking No. 16-CA-28, 2016-Ohio-5749, ¶ 18 quoting *Brunstetter v. Keating*, 11th Dist. Trumbull No.2002–T–0057, 2003–Ohio–3270, ¶ 16. The trial court found that without an expert, Seniah had no meritorious defense or claim. A party seeking relief from judgment pursuant to Civ.R. 60(B) must show: “(1) a meritorious defense or claim to present if relief is granted; (2) entitlement to relief under one of the grounds set forth in Civ.R. 60(B)(1)-(5); and (3) the motion must be timely filed.” *GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus. A failure to establish any one of the three requirements will cause the motion to be overruled. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988); *Argo Plastic Prod. Co. v. Cleveland*, 15 Ohio St.3d 389, 391, 474 N.E.2d 328 (1984).

{¶28} The matter giving rise to Seniah’s motion for relief from judgment was its failure to respond to Keating’s motion for summary judgment. In Keating’s motion for summary judgment, he argued Seniah’s legal malpractice claim was filed after the expiration of the applicable statute of limitations and was thus time-barred. Keating contended his representation of Seniah was terminated more than one year before Seniah filed its complaint for legal malpractice. He further argued Seniah’s complaint stated two cognizable events whereby Seniah could have discovered the legal malpractice. Those events, however, were beyond the one-year statute of limitations. Keating anticipated Seniah would argue that a Tolling Agreement entered into between

Seniah and Buckingham on October 3, 2012 would toll the statute of limitations for its claims against Buckingham and Keating. Keating contended the Tolling Agreement only tolled the statute of limitations for claims against Buckingham, not Keating.

{¶29} A review of Keating's motion for summary judgment shows he did not raise any argument as to the merits of Seniah's legal malpractice claim. Keating argued only that Seniah's legal malpractice claim was barred by the statute of limitations. In the trial court's judgment entry, however, the trial court found Seniah could not demonstrate success on the merits of its claim for legal malpractice because it did not identify an expert witness.

{¶30} Upon review of Keating's motion for summary judgment, we find the trial court's determination that Seniah could not present a meritorious claim or defense against Keating on its legal malpractice claim was premature. The issue raised in Keating's motion for summary judgment was whether Seniah's legal malpractice claim was barred by the statute of limitations. There was no argument in the motion for summary judgment on the merits of Seniah's claim for legal malpractice against Keating.

{¶31} The motion before the trial court was not a motion for relief from judgment, but a common law motion for reconsideration. Accordingly, the trial court should be guided by the requirements of Civ.R. 60(B) when considering the motion, but the application of the rules should be less rigorous. Under this lessened standard, we find the trial court abused its discretion when it found Seniah could not present a meritorious claim or defense on the basis that Seniah failed to identify an expert witness to support its claim for legal malpractice. At that stage in the court proceedings, the issue of legal malpractice was not yet before the trial court. We further find there was no dispute among the parties

or trial court that Seniah's failure to respond to the motion for summary judgment was excusable neglect.

{¶32} Accordingly, we sustain Seniah's sole Assignment of Error.

**CONCLUSION**

{¶33} The December 7, 2015 judgment of the Stark County Court of Common Pleas is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion and law.

By: Delaney, J.,

Gwin, P.J. and

Hoffman, J., concur.