[Cite as *Wottreng v. CBTM Elberon, L.L.C.*, 2023-Ohio-2207.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

JOHN J. WOTTRENG,	:	APPEAL NO. C-220357 TRIAL NO. A-1900011
Plaintiff-Appellant,	:	
	:	
vs.		*O P I N I O N.*
	:	
CBTM ELBERON, LLC,	:	
Defendant-Appellee,	:	
and	:	
JOHN DOE, et al.,	:	
Defendants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: June 30, 2023

Paul Croushore, for Plaintiff-Appellant,

Flagel & Papakirk LLC and *James Papakirk*, for Defendant-Appellee.

BERGERON, Judge.

{¶1} In early 2019, plaintiff-appellant John Wottreng filed a complaint against defendant-appellee CBTM Elberon, LLC, ("CBTM") and various John Does, alleging that his apartment roof collapsed, leaving him with extensive actual damages and lasting physical injuries. Although it initially answered the complaint, CBTM failed to defend itself after its lawyer withdrew, and the trial court ultimately awarded Mr. Wottreng a $1 million judgment. Over two years later, when CBTM claims it first learned of the judgment, it filed a motion to set aside the judgment, which the trial court granted. Mr. Wottreng presently appeals this decision, arguing that the trial court erred in granting CBTM's untimely motion to set aside the judgment. Because CBTM's actions fell under the category of excusable neglect, it was subject to a one-year time period under Civ.R. 60(B)(1). CBTM failed to meet this deadline, so the trial court abused its discretion in granting the requested relief. Therefore, we must sustain Mr. Wottreng's first assignment of error, reverse the trial court's judgment, and remand the matter for reinstatement of the original judgment.

I.

{¶1} Mr. Wottreng allegedly suffered extensive injuries when the roof of his apartment unit collapsed on him. He accrued hospital and recovery bills totaling $122,000 and sustained permanent injuries stemming from traumatic brain injury. In January 2019, he filed a complaint against CBTM—the company that owned and managed the apartment unit at issue—and assorted John Does, asserting a negligence claim and seeking monetary damages. He amended the complaint a few days later. CBTM received service through its statutory agent, and its counsel appeared and

secured an extension of time to answer. In March 2019, CBTM filed its answer, largely denying the substantive allegations contained in the complaint.

{¶2} A few months later, in May 2019, CBTM's counsel moved to withdraw, citing CBTM's failure to communicate with counsel or pay his invoices. He served his client notice of the hearing on the matter by ordinary and certified mail at its last known address. During the hearing, CBTM's counsel explained that he had been retained by CBTM, but CBTM failed to respond to his attempts at communication, which included sending letters (among them, a certified copy of his motion to withdraw) and various attempts to reach out by phone. The trial court ultimately granted defense counsel's motion to withdraw. No substitute lawyer appeared in his stead, and CBTM took no further steps to defend the litigation.

{¶3} The trial court eventually convened a hearing in January 2020, at which Mr. Wottreng testified to his injuries and damages. He explained that, as a result of his apartment roof collapsing, he had accrued medical bills in the amount of $122,000, spent a year and a half in a nursing home recovering from his injuries, suffered from ongoing symptoms associated with his traumatic brain injury, and would never be able to return to work. With all of this evidence uncontested, the trial court entered a $1 million judgment.

{¶4} Fast-forward over two years. In March 2022, CBTM sought to vacate the judgment, arguing that it lacked any knowledge of the judgment and mistakenly believed the case was resolved in its initial stages. CBTM claimed that it only learned of the judgment in October 2021 when it was served with a foreclosure action filed by Mr. Wottreng, through which he sought to collect on the judgment. Following briefing and a hearing on the matter, the trial court granted CBTM's motion to set aside the

judgment based on Civ.R. 60(B)(5). Mr. Wottreng now appeals that decision, raising two assignments of error.

II.

{¶5} In his first assignment of error, Mr. Wottreng insists that the trial court erred in vacating the judgment in this case. According to him, CBTM's actions constituted mistake, inadvertence, or excusable neglect, obligating it to bring its motion to set aside the judgment within a year after the entry of final judgment. *See* Civ.R. 60(B)(1). Because CBTM filed its motion over two years after final judgment, he argues, the trial court improperly set aside the judgment. We agree.

{¶6} Civ.R. 60(B) "allows a court to relieve a party from a final judgment for reasons such as mistake, newly discovered evidence, fraud, or a satisfied judgment." *Zwahlen v. Brown*, 1st Dist. Hamilton No. C-070263, 2008-Ohio-151, ¶ 12. "Before relief from judgment may be granted, the moving party must show that it (1) has a meritorious defense, (2) is entitled to relief under one of the grounds stated in Civ.R. 60(B), and (3) has moved for relief within a reasonable time." *Id.* The grounds for relief under Civ.R. 60(B) are: "(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence * * *; (3) fraud * * *, misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied * * *; or (5) any other reason justifying relief from the judgment." Civ.R. 60(B). While the rule specifies that a "reasonable time" under (1), (2), and (3) is "not more than one year after the judgment," the rule does not elucidate what constitutes a "reasonable time" for seeking relief under Civ.R. 60(B)(5). Civ.R. 60(B); *Zwahlen* at ¶ 12.

{¶7} In *Kay v. Marc Glassman*, 76 Ohio St.3d 18, 20, 665 N.E.2d 1102 (1996), the Ohio Supreme Court explained that "Civ.R. 60(B) is a remedial rule to be

liberally construed." And we review Civ.R. 60(B) rulings for an abuse of discretion. *Id.*; *see Zwahlen* at ¶ 13. We will thus not reverse the trial court's judgment unless the court has exercised its discretionary judgment over the matter in an unwarranted way or committed legal error. *See Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463, ¶ 35.

{¶8} Assuming, without deciding, that CBTM presented a meritorious defense, we proceed to consider whether it is entitled to relief under one of the grounds provided in Civ.R. 60(B). Mr. Wottreng maintains that CBTM's argument and affidavits support only a Civ.R. 60(B)(1) claim for mistake, inadvertence, surprise, or excusable neglect. Wary of the time deadline, CBTM, on the other hand, tries to fit its claim for relief within the confines of Civ.R. 60(B)(5), which entitles a court to relieve a party of final judgment for any other reason justifying relief.

{¶9} As an initial matter, Ohio law confirms that Civ.R. 60(B)(5) should not "be used as a substitute for any of the other more specific provisions of Civ.R. 60(B)." *Caruso-Ciresi, Inc. v. Lohman*, 5 Ohio St.3d 64, 66, 448 N.E.2d 1365 (1983); *see Selective Ins. Co. of Am. v. Bronco Excavating, Inc.*, 1st Dist. Hamilton No. C-220163, 2022-Ohio-3805, ¶ 15, quoting *Caruso-Ciresi* at 66 ("Civ.R. 60(B)(5) only applies when a more specific provision in Civ.R. 60(B)(1) through (4) does not apply, and where the grounds for granting relief are 'substantial.' "); *Young v. Spring Valley Sales*, 4th Dist. Highland No. 00CA15, 2001 Ohio App. LEXIS 5112, 14 (October 31, 2001) ("Civ.R. 60(B)(5) is unavailable when other provisions of Civ.R. 60(B) are applicable."). The reason for this rule is self-evident: if a party could recast a claim under Civ.R. 60(B)(1), (2), or (3) into a Civ.R. 60(B)(5) claim, it would render the time limitations under the former meaningless. Judgments would be open to attack in

perpetuity, and the Ohio Supreme Court, in reviewing Civ.R. 60(B) claims, has emphasized the value of finality in producing "certainty in the law and public confidence in the system's ability to resolve disputes." *Strack v. Pelton*, 70 Ohio St.3d 172, 175, 637 N.E.2d 914 (1994). Where one of the reasons justifying relief contained in Civ.R. 60(B)(1) – (4) specifically applies to a case, "there is no reason to invoke the less specific catchall provision, Civ.R. 60(B)(5)." *Cuyahoga Support Enforcement Agency v. Guthrie*, 84 Ohio St.3d 437, 440, 705 N.E.2d 318 (1999).

{¶10} This court has consistently categorized lack of notice as falling within Civ.R. 60(B)(1). In *Bronco Excavating*, for example, we reviewed a notice-related motion to set aside a default judgment for excusable neglect under Civ.R. 60(B)(1). *Bronco Excavating* at ¶ 8-9. Moreover, in *Claims Mgt. Servs. v. Tate*, 1st Dist. Hamilton No. C-000034, 2000 Ohio App. LEXIS 4474, 4-5 (Sept. 29, 2000), this court analyzed the defendant's lack of notice of a default judgment under Civ.R. 60(B)(1) for excusable neglect, ultimately concluding that the motion in that case—filed 14 months after the judgment was entered—was not timely. We went on to reject defendant's attempt to seek relief under Civ.R. 60(B)(5), explaining that Civ.R. 60(B)(5) "is not a substitute for the more specific provisions of Civ.R. 60(B)." *Id.* at 5.

{¶11} Similarly, here, Zennat Khwaja—a member of CBTM—admitted in her affidavit that she had notice of Mr. Wottreng's suit contemporaneously with it, but because she allegedly did not hear from CBTM's attorney, she believed the matter had been handled. Based on her admission that she knew of the lawsuit and her assumption that her attorney had matters under control, the issue falls squarely within the category of neglect under Civ.R. 60(B)(1). Relief under Civ.R. 60(B)(5) is therefore not available in this case. *See Bronco Excavating* at ¶ 15.

{¶12} In seeking to pigeonhole this claim within Civ.R. 60(B)(5), CBTM emphasizes a couple of cases applying that provision. CBTM is correct that "extraordinary or unusual circumstances creating a pattern of inequities may, taken together, justify relief under Civ.R. 60(B)(5)." *Schaefer v. Mazii*, 2019-Ohio-3808, 145 N.E.3d 1048, ¶ 19 (1st Dist.). In *Schaefer*, this court found that defendant's motion to set aside the judgment fell within the purview of Civ.R. 60(B)(5) where there was lack of notice as well as "a record chalked full of deception." *Id.* In the instant case, however, we are faced with a straightforward case where the corporate left hand allegedly didn't know what the right hand was doing (or more accurately, failing to do), with no extraordinary circumstances (like intentional deception) bearing on the issue.

{¶13} CBTM also points to *Sell v. Brockway*, 7th Dist. Columbiana No. 11 CO 30, 2012-Ohio-4552, ¶ 26-27, where the Seventh District concluded that "[t]he failure of counsel to receive notice of the hearing taken in conjunction with his suspension creates a somewhat extraordinary or unusual situation." In addition to lack of notice, defendant's attorney was suspended from the practice of law in the midst of the legal proceedings. *Id.* Here, CBTM's prior lawyer explained in his filings that he sought to contact the company both in writing and by phone, but it never responded. Again, we see no such extraordinary or unusual circumstances such as the suspension of a law license in the record before us. CBTM simply fails to establish that it is entitled to avail itself of Civ.R. 60(B)(5), and its attempts to skirt the one-year time limitation attendant to Civ.R. 60(B)(1) are unsuccessful.

{¶14} Because Civ.R. 60(B)(1) is the sole basis upon which CBTM would have been entitled to bring a motion to set aside the judgment, it was subject to a one-year

time limitation. Civ.R. 60(B). CBTM exceeded this period, filing its motion over two years after final judgment. Beyond CBTM's failure to file its motion within the required time frame, its delay in filing the motion even after it allegedly discovered the final judgment emphasizes its disregard for Civ.R. 60(B)'s timeliness provisions. CBTM claims it first found out about the final judgment in October 2021, but failed to file its motion to set aside the judgment until nearly five months later, in March 2022. CBTM offers no cogent explanation for why it took so long to alert the court to its lack of notice. Even if CBTM were subject to the more lenient "reasonable time" limit that accompanies Civ.R. 60(B)(5), this substantial and unexplained filing delay would raise serious questions concerning the diligence of its efforts.

{¶15} CBTM's Civ.R. 60(B) motion was not timely, so the court committed legal error in granting the motion and therefore abused its discretion. *See Johnson*, 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463, at ¶ 35. We accordingly sustain Mr. Wottreng's first assignment of error, which renders his second assignment of error (contesting the lack of a hearing) moot.

* * *

{¶16} In light of the foregoing analysis, we sustain Mr. Wottreng's first assignment of error. We reverse the trial court's judgment granting CBTM relief from judgment under Civ.R. 60(B)(5), and we remand the matter to the trial court to reinstate the original judgment.

Judgment reversed and cause remanded.

CROUSE, P.J., and **WINKLER, J.,** concur.

Please note:

The court has recorded its entry on the date of the release of this opinion.