[Cite as *Byers v. Dearth*, 2010-Ohio-1988.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

JERALD A. BYERS, TREASURER OF ROSS COUNTY, OHIO,	:	Case No. 09CA3117
Plaintiff-Appellee,	:	**Released: April 29, 2010**
vs.	:	
CHARLES E. DEARTH, et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellants.	:	

APPEARANCES:

Joseph P. Sulzer, Chillicothe, Ohio, for Appellant, Charles E. Dearth.

Michael A. Ater, Ross County Prosecuting Attorney, and Judith Heimerl Brown, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for Appellee.

McFarland, P.J.:

{¶1} Appellant, Charles E. Dearth, appeals the decision of the Ross County Court of Common Pleas denying his motion for relief from judgment brought pursuant to Civ.R. 60(B). Appellant contends that the trial court abused its discretion and denied him due process of law by denying his motion for relief from judgment, which he claims was a "meritorious contesting of the erroneous summary judgment rendered by the trial court." Because we find that Appellant failed to demonstrate he had a

meritorious defense or claim to present if the motion was granted, we conclude that the trial court did not abuse its discretion in denying Appellant's motion for relief from judgment. Accordingly, Appellant's sole assignment of error is overruled and the judgment of the trial court is affirmed.

FACTS

{¶2} Appellee, Treasurer of Ross County, initiated the proceedings giving rise to this matter with the filing of a complaint in foreclosure against Appellants on September 11, 2008. The complaint alleged that Appellants owed $44,660.04 in delinquent real estate taxes, penalties and interest, and requested that the court order the property at issue to be sold at Sheriff's sale if the amount due was not paid within a reasonable amount of time. Answers were filed by all defendants, including Appellant, Charles E. Dearth, who admitted ownership of the real estate but generally denied the remaining allegations of the complaint.

{¶3} Thereafter, on December 19, 2008, Appellee filed a motion for summary judgment. The certificate of service on the motion stated that Appellant and/or his attorney were served with a copy of the document by regular U.S. mail on December 17, 2008. The trial court subsequently issued an entry granting Appellee's motion for summary judgment, noting in

the entry that Appellant had failed to respond to the motion.[1] Soon after, on March 5, 2009, the trial court issued an entry of foreclosure. Appellant claims that it was only upon receiving these two entries by the trial court that he became aware that Appellee had filed a motion for summary judgment. Appellant contends that neither he, nor his counsel received a copy of Appellee's motion.

{¶4} As a result, Appellant filed a motion for relief from judgment on March 9, 2009. In his motion, Appellant argued that he was entitled to relief from judgment based upon the fact that he did not receive a copy of Appellant's motion. The only materials or evidence attached to Appellant's motion was an affidavit by his counsel's secretary, which stated that a search of the office had failed to yield a copy of Appellee's motion. A hearing on the motion for relief from judgment was held on April 21, 2009. At the hearing, Appellant again simply argued that he was entitled to relief from judgment based upon his failure to receive a copy of the motion for summary judgment. He did not advance any defenses to the complaint in foreclosure.

{¶5} At the conclusion of the hearing, the trial court denied Appellant's motion for relief from judgment, reasoning that he had failed to

[1] The docket sheet appearing in the record indicates that this entry was filed by the trial court on February 3, 2009, and was later journalized in the clerk's office on March 3, 2009.

demonstrate a meritorious claim or defense to the complaint in foreclosure. It is from the trial court's June 4, 2009, denial of his motion for relief from judgment that Appellant brings his appeal, assigning a single error for our review.

ASSIGNMENT OF ERROR

"I. THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED APPELLANT DUE PROCESS OF LAW BY DENYING THE DEFENDANT-APPELLANT RELIEF FROM JUDGMENT THAT WAS A MERITORIOUS CONTESTING OF THE ERRONEOUS SUMMARY JUDGMENT RENDERED BY THE TRIAL COURT."

LEGAL ANALYSIS

{¶6} In his sole assignment of error, Appellant contends that the trial court erred in denying his Civ.R. 60(B) motion for relief from judgment. Thus, we pause to address the appropriate standard of review. Civ.R. 60(B) provides 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. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation"

{¶7} In order to prevail on a Civ.R. 60(B) motion, the moving party 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 proceeding was entered or taken. *GTE Automatic Electric v. ARC Industries, Inc*. (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus. Each requirement is independent of the others, and, therefore, the moving party must separately establish all three requirements of the " *GTE* test," or the Civ.R. 60(B) motion will be denied.

{¶8} "The decision to grant or deny a Civ.R. 60(B) motion lies within the trial court's discretion, and the decision will be reversed only for an abuse of discretion." *Sain v. Roo*, Franklin App. No. 02AP-448, 2003-Ohio-626, at ¶ 11, citing *Oberkonz v. Gosha*, Franklin App. No. 02AP-237, 2002-Ohio-5572, at ¶ 12. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶9} We will address the three prongs of the *GTE* test in reverse order for ease of analysis. There is no question regarding the timeliness of Appellant's motion for relief from judgment and Appellee does not contend that the motion was untimely filed. Therefore, Appellant met the third prong of the *GTE* test. With regard to the second prong, in his motion for relief from judgment, Appellant argued that he did not receive a copy of Appellee's motion for summary judgment. He argued that because he did not receive a copy and was thus unable to respond to the motion, the trial court's grant of summary judgment was in error.

{¶10} At the hearing on the motion for relief from judgment, the trial court stated that it was reviewing the motion as a Civ.R. 60(B)(5) motion, which allows a party to be relieved from judgment "for any other reason justifying relief from the judgment." The trial court further stated that "[i]f we assume that in fact Mr. Sulzer's office was not served with a copy or for whatever reason did not receive a copy, I don't want to say was not served – for whatever reason didn't receive a copy, that would be sufficient grounds under one through five." Thus, the trial court concluded that Appellant met the second prong of the *GTE* test.

{¶11} However, a review of the hearing transcript, as well as the trial court's entry denying the motion for relief from judgment, indicates that the

trial court concluded that Appellant had failed to demonstrate he had a meritorious defense to present if relief was granted. As such, the trial court concluded that Appellant did not meet the first prong of the *GTE* test, and therefore denied the motion. In support of its decision, the trial court reasoned as follows during the hearing:

"* * * there's absolutely nothing in any of the materials filed by – filed by Mr. Dearth indicating that he has a meritorious claim or defense to present in this matter. I mean these are taxes, they're either owed or they're not. Quite frankly, people often file answers seeking to delay the payment of taxes but there's nothing from which I can conclude that this defendant has a meritorious claim or defense to present in this matter to the, to the allegations of the complaint."

Upon our review of the record, we agree with the trial court's reasoning and decision.

{¶12} As provided under the first prong of the *GTE* test, to prevail on a motion for relief from judgment, the moving party must establish that it has a meritorious defense or claim to present if relief is granted. This requires the moving party to allege operative facts "with enough specificity to allow the trial court to decide whether he or she has met that test." *Syphard v. Vrable* (2001), 141 Ohio App.3d 460, 463, 751 N.E.2d 564. In this case, Appellant simply argued that he was entitled to relief from judgment because he did not receive a copy of the motion for summary judgment and therefore was unable to file a memorandum in opposition.

Appellant did not allege what claims or defenses to the complaint in foreclosure he would have asserted in his memorandum in opposition had he been permitted to respond. Thus, Appellant failed to demonstrate in his motion that he had a meritorious claim or defense to present if such relief was granted.

{¶13} In his brief, Appellant asks us to assume "in the instant matter that Appellant's Motion for Relief from Judgment was pursuant to Civil Rule 60(B)(1) the Appellant has in fact filed a meritorious defense with its Civil Rule 60(B) Motion." While we are not exactly clear as to the nature of Appellant's argument here, it appears that Appellant is arguing his failure to file a responsive motion to Appellee's motion for summary judgment was excusable neglect, under Civ.R. 60(B)(1), rather than falling under the Civ.R. 60(B)(5) catch-all provision, as concluded by the trial court. Appellant further seems to be arguing that the filing of his motion for relief from judgment in some way constitutes a defense, in and of itself. We believe, based upon the logic advanced in Appellant's brief, that Appellant misunderstands requirements for obtaining relief from judgment under Civ.R. 60(B).

{¶14} As we explained in *Spaulding-Buescher, et al. v. Skaggs Masonry, Inc.*:

" * * * to prevail on a motion for relief from judgment, the moving party must establish that it has a meritorious defense or claim to present if relief is granted. 'The movant's burden is to allege a meritorious defense, not to prevail with respect to the truth of the meritorious defense.' *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 247, fn. 3, 416 N.E.2d 605. This requires the moving party to allege operative facts 'with enough specificity to allow the trial court to decide whether he or she has met that test.' *Syphard v. Vrable* (2001), 141 Ohio App.3d 460, 463, 751 N.E.2d 564. Ultimately, a proffered defense is meritorious 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. Amzee Corp. v. Comerica Bank-Midwest*, Franklin App. No. 01AP-465, 2002-Ohio-3084, at ¶ 20." Hocking App. No. 08CA1, 2008-Ohio-6272, ¶10. (Emphasis added).

As set forth in *Spaulding-Buescher*, Appellant was required to demonstrate, in his motion for relief from judgment, that he had a meritorious claim or defense to the claims contained in the complaint. His motion contained no claims or defenses to the complaint whatsoever. Even on appeal, Appellant advances no substantive claims or defenses to the claims contained in the complaint in foreclosure which was filed against him.

{¶15} As a result, we agree with the trial court's conclusion that Appellant failed to meet the first prong of the *GTE* test. Because of this, we cannot conclude that the trial court abused its discretion in denying Appellant's motion for relief from judgment. Thus, Appellant's sole assignment of error is overruled and we affirm the decision of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Harsha, J.: Concurs in Judgment and Opinion.
Abele, J.: Concurs in Judgment Only.

For the Court,

BY: _____
Matthew W. McFarland
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.