[Cite as *Egger v. Soltesz*, 2011-Ohio-1843.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Robert C. Egger, Guardian of the Estate of Edward I. Soltesz

Appellee

v.

Edward I. Soltesz, et al.

Appellant

Court of Appeals No. E-10-029

Trial Court No. 07-2-028 A

DECISION AND JUDGMENT

Decided: April 15, 2011

* * * * *

John F. Kirwan, for appellee Robert C. Egger.

D. Jeffery Rengel and Thomas R. Lucas, for appellee D. Jeffery Rengel.

E. Dean Soltesz, pro se.

* * * * *

YARBROUGH, J.

{¶ 1} This is an appeal from a judgment of the Probate Division of the Erie County Court of Common Pleas, denying appellant E. Dean Soltesz's ("Soltesz") various post judgment motions filed in response to the trial court's dismissal of his counter-cross-claim

against appellee D. Jeffery Rengel ("Rengel") for legal malpractice. Upon consideration of the assignments of error, we affirm.

{¶ 2} The relevant facts of this case are as follows. In April 2007, Soltesz and his sister, Diana Barrett ("Diana"), hired attorney Rengel to represent them in an action for the guardianship of Soltesz's father. At a meeting between the parties on April 11, 2007, Soltesz requested that Rengel contact a previous attorney who would have background information relevant to any guardianship proceeding which may follow. In a subsequent meeting on April 25, 2007, Soltesz inquired if Rengel had contacted the previous attorney; Rengel indicated that he had not. The date on which Rengel finally did make contact with the previous attorney is uncertain, occurring sometime between May 11, 2007 and May 26, 2007.

{¶ 3} On June 2, 2007, Diana sent letters to Rengel and Soltesz indicating that she was terminating Rengel's representation in the guardianship matter. Rengel subsequently filed a notice of withdrawal with regard to Diana; however, Rengel continued to represent Soltesz. On August 1, 2007, in the guardianship matter, the probate court declared Soltesz's father to be incompetent and assigned Diana as the personal and temporary financial guardian. In light of the resolution of the guardianship proceedings, Rengel sent a letter to Soltesz on September 29, 2007, terminating their attorney-client relationship.

{¶ 4} This appeal has its origins in a separate, but related, case. Following the August 1, 2007 order, attorney Robert Egger ("Egger") was appointed as the guardian of the estate of Soltesz's father. In that role, Egger filed a complaint to allow for the sale of

Soltesz's father's home. Among the named party defendants were Rengel, who claimed fees were owed to him from the estate, and Soltesz, who claimed he was entitled to proceeds from the sale. The present matter was initiated when Rengel, on June 3, 2009, filed a cross-claim against Soltesz for unpaid legal fees. In response, Soltesz, acting pro se, filed a 34 count counter-cross-claim against Rengel on July 1, 2009, alleging sundry violations of the Ohio Rules of Professional Conduct and local court rules. The alleged violations mostly concerned Rengel's billing practices and his failure to contact the previous attorney in a timely manner. On July 7, 2009, Rengel filed a motion to dismiss Soltesz's counter-cross-claim pursuant to Civ.R. 12(B)(6). Soltesz never responded. The trial court granted the motion to dismiss on September 25, 2009.

{¶ 5} On October 21, 2009 and November 4, 2009, Soltesz filed several motions with respect to the September 25, 2009 judgment, specifically: (1) a "Motion to Vacate Decision and Judgment Entry," (2) a "Motion for Hearing with Request for Record of Hearing," (3) a "Motion for Leave of Court to File Amended and Supplemental Pleadings," (4) a "Motion for Reconsideration," and (5) a "Motion to Vacate Decision and Motion for Leave to Amend and Supplement the Original Complaint." No action was taken on these motions until they were again brought to the court's attention at an April 28, 2010 hearing, at which time the court summarily announced that it would deny all such post judgment motions. Subsequently, in a judgment entry journalized June 14, 2010, the court formally denied all of Soltesz's motions.

{¶ 6} Soltesz now appeals from that June 14, 2010 judgment entry, and raises the following four assignments of error.

{¶ 7} 1. "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY DENYING APPELLANT'S POST-JUDGMENT MOTIONS FOR RELIEF OF JUDGMENT, WHICH INCLUDED A SUPPORTING AFFIDAVIT IN EXPLANATION, INCLUDING HIS MOTION FOR HEARING ON THE MOTIONS, AND ENTITLES HIM TO A HEARING *De Novo*."

{¶ 8} 2. "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT AFTER CONSIDERING STATEMENTS MADE BY APPELLEE ATTORNEY THAT HE:

{¶ 9} "A) DID CONTACT PREVIOUS ATTORNEY FROM RELATED CASE, AS REQUESTED BY HIS CLIENT, WITH REGARD TO A PRIOR, RELATED CASE; AND, THEN STATED LATER IN A REPLY BRIEF IN OPPOSITION THAT HE:

{¶ 10} "B) FAILED TO CONTACT THE PREVIOUS ATTORNEY AS REQUESTED BY HIS CLIENT IN A TIMELY FASHION, INDICATING A MISLEADING STATEMENT MADE BEFORE THE TRIAL COURT ENTITLING THE CLIENT TO RELIEF FROM THE MOTION TO DISMISS."

{¶ 11} 3. "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY NOT GRANTING APPELLANT'S MOTION FOR HEARING, WHICH WOULD HAVE ALLOWED APPELLANT THE OPPORTUNITY TO

PRESENT WRITTEN EVIDENCE SHOWING THAT THE ATTORNEY AGREED TO AND THEN FAILED TO CARRY OUT SPECIFIC INSTRUCTIONS OF THE APPELLANT."

{¶ 12} 4. "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY HOLDING THE APPELLANT'S REMEDIAL MOTIONS TO A HIGHER STANDARD THAN APPELLEE'S 12(B)(6) MOTION, WHEN CONSTRUED WITH RULE 73(A)."

{¶ 13} Soltesz's assignments of error raise two issues: (1) whether the trial court erred in denying what was essentially a Civ.R. 60(B) motion for relief from judgment, and (2) whether the trial court erred by not holding a hearing before denying his motion for relief from judgment. The first issue is supported by Soltesz's first and second assignments of error, and the second issue is supported by his third assignment of error. The issues sought to be raised by Soltesz's fourth assignment of error are unclear; but, after examining his arguments in support, it is evident that Soltesz is simply re-emphasizing his earlier contentions that he is entitled to relief under Civ.R. 60(B), and that the trial court should have held a hearing before denying his motions.

{¶ 14} In addressing Soltesz's first and second assignments of error, we are asked to determine whether the trial court erred in denying his motion for relief from judgment. An appellate court applies an abuse of discretion standard in reviewing the trial court's ruling on a motion for relief from judgment under Civ.R. 60(B). *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion "connotes more than an error of law or of

judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In the present case, the trial court failed to provide any indication of the basis for its ruling. Nevertheless, based on the record before us, we hold that the trial court did not abuse its discretion when it denied Soltesz's motion for relief from judgment.

{¶ 15} To prevail under Civ.R. 60(B), the moving party must demonstrate: (1) a meritorious defense or claim to present if relief is granted, (2) that the party is entitled to relief under one of the grounds enumerated in Civ.R. 60(B)(1) through (5), and (3) that the motion is made within a reasonable time, and where the grounds for 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. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 150-51. These three requirements must be shown by "operative facts" demonstrating that the moving party is entitled to relief. *Black v. Pheils*, 6th Dist. No. WD-03-045, 2004-Ohio-4270, ¶ 68 (citing *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 21). Such operative facts should be supported by evidence in the form of "affidavits, depositions, written admissions, written stipulations, answers to interrogatories, or other sworn testimony." *East Ohio Gas Co. v. Walker* (1978), 59 Ohio App.2d 216, 221. In the present case, Soltesz fails to demonstrate both that he has a meritorious claim to present, and that he is entitled to relief under one of the grounds in Civ.R. 60(B)(1) through (5).

{¶ 16} To meet the first requirement of Civ.R. 60(B), Soltesz does not have to demonstrate that he will prevail on the underlying claim; he need only demonstrate that his claim is meritorious. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20. Here, Soltesz's motion for relief from judgment nonetheless fails because his underlying claim for legal malpractice is barred by the statute of limitations.

{¶ 17} R.C. 2305.11(A) provides that an action for legal malpractice "shall be commenced within one year after the cause of action accrued." When a cause of action accrues is determined by a two-pronged test, taking the later of either "when there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney," or "when the attorney-client relationship for that particular transaction or undertaking terminates." *Zimmie v. Calfee, Halter and Griswold* (1989), 43 Ohio St.3d 54, syllabus.

{¶ 18} Addressing the termination of the attorney-client relationship prong first, we note that "the date of termination of the attorney-client relationship for purposes of R.C. 2305.11 is determined by the actions of the parties." *Smith v. Conley* (2006), 109 Ohio St.3d 141, 145, 2006-Ohio-856, ¶ 12. Here, Rengel sent a letter terminating the attorney-client relationship on or about September 29, 2007. In addition, Soltesz does not argue, and the record does not show, that Rengel performed any legal services for Soltesz after the September 29, 2007 termination letter. Thus, for the purposes of the *Zimmie* test, the attorney-client relationship in this case terminated on or about September 29,

2007. See *Smith*, supra, at ¶ 10 (attorney-client relationship terminated when attorney clearly informed client he could no longer represent him and would not file further actions on his behalf).

{¶ 19} Turning to the cognizable event prong, the general rule is that the running of the statute of limitations begins when the claimant has "*constructive* knowledge of facts, rather than *actual* knowledge of their legal significance." (Emphasis added.) *Flowers v. Walker* (1992), 63 Ohio St.3d 546, 549. In the present situation, the gravamen of Soltesz's counter-cross-claim against Rengel is that (1) Rengel allegedly committed legal malpractice by failing to comply with the Ohio Rules of Professional Conduct by, among other things, failing to timely adhere to Soltesz's instruction to call the previous attorney, and (2) Rengel allegedly committed legal malpractice by billing Soltesz in contravention of the local rules of the Erie County Court of Common Pleas.

{¶ 20} Under the first claim, the cognizable event would have occurred when Soltesz had knowledge of the facts showing that Rengel failed to comply with the Ohio Rules of Professional Conduct. Soltesz alleges that Rengel committed numerous violations, all of which occurred in the course of the attorney-client relationship, and all of which centered on Rengel not complying with Soltesz's requests and proposed courses of action. Because we have concluded that the attorney-client relationship terminated on or about September 29, 2007, and because Soltesz has at no time argued that he learned of Rengel's alleged failure to comply with the requests after the attorney-client

relationship ended, the cognizable event for any of them must have occurred, at the latest, by September 29, 2007.

{¶ 21} As to the claim for legal malpractice based on Rengel's billing practices, Soltesz alleges several different ways that Rengel violated the local court rules. In light of Soltesz's claims, the cognizable event may have occurred on April 25, 2007, when Rengel requested a $1,000 retainer purportedly in violation of the local court rules. Alternatively, the cognizable event may have occurred on or about May 1, 2007, when Soltesz received the first billing statement from Rengel, which contained a charge for fees allegedly in violation of the local court rules. At the very latest, however, the cognizable event occurred on April 29, 2008, when—in an email attached as an exhibit to Soltesz's complaint—Soltesz disputed the amount that he owed to Rengel, stating "[t]his [dispute] needs to be addressed by a neutral and independent authority." On that date, Soltesz was expressly aware of facts that show his alleged injury was due to the acts of Rengel, specifically the billing practices, and Soltesz had notice of his need to pursue possible remedies against Rengel.

{¶ 22} In his complaint, Soltesz indicates that he did not learn of the local court rules concerning billing until November 11, 2008. However, the date that Soltesz became aware of the local rule is irrelevant to determining when the cognizable event occurred. See *Hershberger v. Akron City Hosp.* (1987), 34 Ohio St.3d 1, 5 (It is the knowledge of facts, not legal theories, which starts the running of the statute of limitations.); *Lynch v. Dial Finance Co. of Ohio No. 1, Inc.* (1995), 101 Ohio App.3d

742, 748 ("[I]gnorance of the law does not toll the statute of limitations.") Here, Soltesz had knowledge of the facts pertaining to the billing issues at the very latest on April 29, 2008, when he disputed the amount owed.

{¶ 23} Although several possibilities exist for when the cognizable event occurred with regard to the billing practices, for the purpose of this analysis we will assume, without deciding, that it occurred on the latest possible date of April 29, 2008. Nevertheless, applying the *Zimmie* test to the present situation, Soltesz's claim still is barred by the statute of limitations. The one-year statute of limitations began to run as of the later date of the termination of the attorney-client relationship or the occurrence of the cognizable event. Soltesz's counter-cross-claim was filed on July 1, 2009. Even if we assume that the cognizable event did not occur until April 29, 2008, well after the termination of the attorney-client relationship, Soltesz would still have filed his claim beyond the deadline of April 29, 2009. Therefore, because his claim is barred by the statute of limitations, Soltesz fails to meet the first requirement under Civ.R. 60(B) requiring the existence of a meritorious claim.

{¶ 24} The second requirement under Civ.R. 60(B) is that a party must demonstrate that he or she is entitled to relief on one of the grounds listed in Civ.R. 60(B)(1)-(5). Here, Soltesz argues that he is entitled to relief under Civ.R. 60(B)(1) ("mistake, inadvertence, surprise or excusable neglect"), Civ.R. 60(B)(3) ("fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other

misconduct of an adverse party"), or Civ.R. 60(B)(5) ("any other reason justifying relief from the judgment"). We disagree.

{¶ 25} Soltesz first argues that his failure to obtain an attorney constitutes excusable neglect. The operative fact put forth by Soltesz in his affidavit supporting his motion for relief from judgment is "[s]ince receiving a copy of [Rengel's] Motion to Dismiss my Counter-Cross-Claim against [him], on or about July 9th of 2009, I have been attempting to find an attorney to represent me in the Cross-Claim which attorney Rengel has filed against me in which Attorney Rengel [sic] alleged that I owe him fees for services he rendered to me * * *." Ignoring the fact that Soltesz's statement asserts only that he was looking for an attorney to defend him in the cross-claim filed by Rengel, and not that he was looking for an attorney with regard to his counter-cross-claim or the motion to dismiss, we do not think that this reason is sufficient to demonstrate a showing of excusable neglect.

{¶ 26} Under Civ.R. 60(B)(1), the determination of whether neglect was excusable or inexcusable "must of necessity take into consideration all the surrounding facts and circumstances." *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 249. Here, Soltesz's alleged inability to respond to the motion to dismiss because he was searching for an attorney stands in stark contrast to the fact that earlier, acting pro se, he filed an answer to Egger's complaint for the sale of Soltesz's father's home, and filed an answer and a counter-claim to Rengel's cross-claim for attorney's fees.

{¶ 27} In addition, the length of time in which Soltesz had to respond, and his subsequent failure to do so, support the conclusion that his neglect was not excusable. Rengel filed his Civ.R. 12(B)(6) motion to dismiss on July 7, 2009. The trial court did not grant the dismissal until September 25, 2009. Thus, Soltesz had approximately two and one-half months to respond in some manner, more than twice the amount of time that he took to respond to the initial complaint and to Rengel's cross-claim. Despite this, Soltesz did not take any action until October 21, 2009, when he filed the motions for relief from judgment.

{¶ 28} Certainly, proceeding with an attorney is the preferred course of action. However, given Soltesz's previous participation in the case as a pro se litigant, and the amount of time during which he failed to respond, we cannot say that his inability to obtain an attorney constitutes excusable neglect such that he should be entitled to relief from judgment. See *Bonnieville Towers Condominium Owners Assn. v. Andrews*, 8th Dist. No. 86868, 2006-Ohio-2219, ¶ 10 (appellant who had a long delay between default judgment and motion for relief, and who had faxed request for continuance of default hearing could not claim failure to obtain counsel as excusable neglect).

{¶ 29} Alternatively, Soltesz argues that he is entitled to relief under Civ.R. 60(B)(3) or Civ.R. 60(B)(5) based on fraud or misrepresentation, in that Rengel allegedly made two conflicting statements to the court regarding whether he had contacted the previous attorney. Of the two statements at issue, one was made in Rengel's motion to dismiss, which reads, "[r]egardless whether Defendant Rengel spoke with [the previous

attorney] (which Rengel did), Soltesz must allege that Rengel's handling of the representation of Soltesz fell below the knowledge, skill and ability ordinarily exercised by attorneys similarly situated." The second is from Rengel's brief in opposition to Soltesz's motion to vacate, and says, "[d]efendant Soltesz has made no allegation that the standard of care has been breached by, even if true which it is not, a failure to make one telephone call as promptly as the client demanded." Soltesz argues that these two statements are inconsistent with one another, and thus constitute a fraud or misrepresentation. We disagree.

{¶ 30} Simplifying the statements, the first one—"[r]egardless whether Defendant Rengel spoke with [the previous attorney] (which Rengel did)"—proposes that Rengel did speak with the previous attorney. The second one—"no allegation that the standard of care has been breached by, even if true which it is not, a failure to make one telephone call as promptly as the client demanded"— essentially means that Rengel denies that he failed to call the previous attorney as promptly as Soltesz demanded; or restated, that Rengel argues he did call the previous attorney as promptly as Soltesz demanded. Both statements make the same point, that Rengel called the previous attorney. They are not inconsistent with one another merely because the second statement addresses whether the call was made in a timely manner. Thus, because no conflicting statements exist, Soltesz's argument that he is entitled to relief from judgment based on Rengel's fraud or misrepresentation is without merit. Therefore, Soltesz fails to satisfy the second

requirement under Civ.R. 60(B) as he has not demonstrated that he is entitled to relief for any of the reasons enumerated in Civ.R. 60(B)(1) through (5).

{¶ 31} Finally, as to the third requirement under Civ.R. 60(B), the record demonstrates that Soltesz filed his motion for relief from judgment less than one month after the court granted Rengel's Civ.R. 12(B)(6) motion to dismiss. However, because the parties do not raise the issue, and because we have concluded that Soltesz's motion is insufficient under the first two requirements of Civ.R. 60(B), we decline to address whether the motion was made within a reasonable time.

{¶ 32} Under the foregoing analysis, Soltesz has failed to satisfy all of the requirements under Civ.R. 60(B). Consequently, the trial court did not abuse its discretion in denying his motion for relief from the September 25, 2009 judgment. Accordingly, Soltesz's first and second assignments of error are not well-taken.

{¶ 33} In his third assignment of error, Soltesz argues that the trial court erred by not holding a hearing before denying his post judgment motions for relief. The settled rule is that "[a] person filing a motion for relief from judgment under [Civ.R. 60(B)] is not automatically entitled to such relief nor to a hearing on the motion." *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 103. Nevertheless, a trial court "abuses its discretion in denying a hearing where grounds for relief from judgment are sufficiently alleged and are supported with evidence which would warrant relief from judgment." *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 19. However, where sufficient grounds for relief are not alleged or supported by evidence, the trial court does not abuse

its discretion in denying a hearing. *Bates & Springer, Inc. v. Stallworth* (1978), 56 Ohio App.2d 223, 228.

{¶ 34} As discussed above, Soltesz has failed to demonstrate that he has a meritorious claim to present because his action for legal malpractice is barred by the statute of limitations. Further, Soltesz has not demonstrated that he is entitled to relief based on his own excusable neglect or on the fraud or misrepresentation of Rengel. Therefore, because Soltesz has failed to allege any operative facts which would entitle him to relief under Civ.R. 60(B), the trial court did not abuse its discretion in denying his motion without first holding a hearing.

{¶ 35} Soltesz argues that at such a hearing he would have been able to show that Rengel breached a professional duty by failing to carry out, in any manner, Soltesz's instructions with regard to the representation. Soltesz, however, fails to address the fatal fact—that his claim against Rengel is barred by the statute of limitations. The time for addressing the merits of Soltesz's claim, whatever they may be, has run out. Accordingly, Soltesz's third assignment of error is not well-taken.

{¶ 36} Finally, Soltesz argues in support of his fourth assignment of error that he has evidence showing that Rengel committed legal malpractice, that his affidavit was sufficient to prove excusable neglect, and that the trial court should have held a hearing to allow him to present evidence showing that Rengel failed to carry out his specific instructions. Because we have held that Soltesz's claims are barred by the statute of limitations, that his failure to obtain an attorney did not constitute excusable neglect, and

that the trial court did not abuse its discretion by not holding a hearing before denying his motion for relief from judgment, Soltesz's arguments are without merit. Accordingly, Soltesz's fourth assignment of error is not well-taken.

{¶ 37} For the foregoing reasons, the judgment of the Probate Division of the Erie County Court of Common Pleas is affirmed. Costs are assessed to appellant pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE