[Cite as *Toledo City School Dist. v. Burns*, 2014-Ohio-1310.]

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

Toledo City School District	Court of Appeals No. L-13-1132
Appellee	Trial Court No. CI201003864
v.	
Daniel Burns, et al.	**DECISION AND JUDGMENT**
Appellant	Decided: March 28, 2014

* * * * *

Anastasia K. Hanson and Lisa E. Pizza, for appellee.

Karin L. Coble, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶1} Appellant, Daniel Burns, appeals the judgment of the Lucas County Court of Common Pleas denying his Civ.R. 60(B) motion for relief. For the following reasons, we affirm.

{¶2} Daniel Burns is a former employee of appellee, Toledo City School District ("TCSD"). Following his retirement, it was discovered that during his employment, Burns stole approximately $660,000 from TCSD through a series of transactions carried out with his co-perpetrator, John Briggle. On May 7, 2010, TCSD initiated a civil lawsuit against Burns and Briggle that included a claim under R.C. 117.28, which provides a cause of action for when an audit report shows that public money has been illegally expended, not accounted for, misappropriated, or uncollected. Attached to the complaint was a state auditor's report indicating that Burns was jointly and severally liable with Briggle and two bonding companies.

{¶3} Subsequently, Burns was indicted on 25 counts relating to the same series of transactions. On December 13, 2010, Burns pleaded guilty to three of the counts, and was sentenced to pay restitution in the following amounts: $52,429 to the Toledo Board of Education, $180,613 to McNamara & McNamara Cincinnati Insurance ("Cincinnati"), and $425,386 to CNA Insurance ("CNA").[1] Cincinnati and CNA are the two companies that provided surety bonds to Burns during his employment with the school district as required by R.C. 3319.05. The amounts awarded to them represent their disbursements to the school district following Burns' theft.

{¶4} A garnishment hearing on the restitution order was held on March 29, 2011. At that hearing, TCSD submitted a Recovery Sharing Agreement ("RSA") between itself

[1] Burns' conviction and sentence were upheld in *State v. Burns*, 2012-Ohio-4191, 976 N.E.2d 969 (6th Dist.).

and Cincinnati and CNA, wherein the parties agreed that TCSD suffered a direct loss of $54,000, and any amount recovered in excess of that would be shared pro-rata between Cincinnati and CNA. Ultimately, the $54,000 owed to TCSD was garnished from Burns' pension.

{¶5} Thereafter, on May 26, 2011, in the civil case, TCSD moved for summary judgment against Burns on the R.C. 117.28 claim. Burns did not file an opposition. On July 7, 2011, the trial court granted the motion for summary judgment, and awarded TCSD $659,999. Burns did not appeal.

{¶6} A year later, on July 9, 2012, after retaining new counsel, Burns filed a Civ.R. 60(B) motion for relief from the summary judgment. The trial court denied Burns' motion without a hearing.[2] It is from that denial that Burns presently appeals, raising one assignment of error:

> The trial court abused its discretion in denying appellant's motion for relief from judgment.

II. Analysis

{¶7} We begin by noting that we review the denial of a Civ.R. 60(B) motion for an abuse of discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987). An abuse of discretion connotes that the trial court's attitude was unreasonable, arbitrary,

[2] The trial court did grant the motion for relief to the extent that it requested the court to find Burns and Briggle jointly and severally liable. This aspect of the judgment is not a subject of this appeal.

or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶8} In order to prevail on a Civ.R. 60(B) motion, 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 proceeding was entered or taken. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 150-151, 351 N.E.2d 113 (1976).

"If any of these three requirements is not met, the motion should be overruled." *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20, 520 N.E.2d 564 (1988).

{¶9} Because we find the second prong of the *GTE* test determinative, we will begin and end our analysis there. In his motion, Burns contends that he is entitled to relief under Civ.R. 60(B)(1), (3), (4), and (5). The trial court found otherwise. Based on our review, we cannot say that the trial court abused its discretion.

{¶10} Under Civ.R. 60(B)(1), which provides for relief based upon "mistake, inadvertence, surprise or excusable neglect," Burns argues that the trial court made a mistake when it failed to specify in the judgment that CNA and Cincinnati were also

jointly and severally liable. However, Civ.R. 60(B) "may not be used as a substitute for appeal." *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128, 131, 502 N.E.2d 605 (1986). "A mistake by the trial court in applying the law or finding of fact is not the type of 'mistake' contemplated by Civ.R. 60(B)(1) or any other section of Civ.R. 60(B), rather it is the basis for a timely appeal." *Morley v. Morley*, 6th Dist. Lucas No. L-04-1051, 2004-Ohio-5247, ¶ 10. Here, the issue of whether CNA and Cincinnati should have been made jointly and severally liable attacks the merits of the judgment. Thus, it is the proper subject of an appeal, not a Civ.R. 60(B) motion. As a result, we hold that the trial court did not abuse its discretion in finding that Burns did not demonstrate grounds for relief under Civ.R. 60(B)(1).

{¶11} Burns next argues that he is entitled to relief under Civ.R. 60(B)(3), which provides for relief based on "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." Burns contends that TCSD concealed a material fact when it failed to disclose to the trial court that it had been paid by jointly and severally liable parties, namely CNA and Cincinnati. We note that Burns appears to be arguing that TCSD perpetrated fraud upon the court, which would be grounds for relief under Civ.R. 60(B)(5), not fraud between the parties, which would fall under Civ.R. 60(B)(3). *See Coulson v. Coulson*, 5 Ohio St.3d 12, 15, 448 N.E.2d 809 (1983) (recognizing the elusive concept of "fraud upon the court," and

approving of the distinction between fraud, "inter partes," and "fraud upon the court"). Regardless, Burns has not demonstrated that he is entitled to relief under either theory.

{¶12} "In determining the existence of fraud of an opposing party for purposes of Civ.R. 60(B)(3), the movant must prove the elements of fraud." *Rettig v. Rettig*, 6th Dist. Wood No. WD-09-040, 2010-Ohio-2122, ¶ 25. The elements of fraud are:

> (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance. *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 169, 462 N.E.2d 407 (1984).

Here, Burns cannot claim that he justifiably relied upon the concealment since he knew as early as December 2010 at his plea hearing, and certainly by the restitution hearing in March 2011, that CNA and Cincinnati had already paid TCSD. Thus, Burns is not entitled to relief for fraud under Civ.R. 60(B)(3).

{¶13} As to fraud upon the court, that term is "narrowly construed to embrace only that type of conduct which defiles the court itself, or fraud which is perpetrated by officers of the court so as to prevent the judicial system from functioning in the

customary manner of deciding the cases presented in an impartial manner." *Hartford v. Hartford*, 53 Ohio App.2d 79, 84, 371 N.E.2d 591 (8th Dist.1977); *Coulson* at 15. "Perjury or misrepresentations to the court do not constitute a fraud on the court unless the adverse party was prevented from presenting a defense." *Hartford* at 85. Here, as noted above, Burns was aware of the payments by the bonding companies, and could have raised the issue prior to summary judgment. Therefore, even if TCSD's failure to notify the court of the payment from CNA and Cincinnati constituted a misrepresentation, it does not rise to the level of fraud upon the court for purposes of Civ.R. 60(B)(5) because Burns was not prevented from raising the issue during the proceedings.

{¶14} Accordingly, we hold that the trial court did not abuse its discretion when it found that Burns was not entitled to relief under Civ.R. 60(B) on the grounds of fraud.

{¶15} Next, Civ.R. 60(B)(4) provides grounds for relief where "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." Under this provision, Burns argues that he is entitled to relief because the judgment has already been paid to TCSD by his bonding companies. However, "[r]elief under Civ.R. 60(B)(4) must be based on events occurring subsequent to the entry of judgment in question." *Marquis v. Marquis*, 6th Dist. Lucas No. L-98-1185, 1999 WL 289054, *3 (Jan. 8, 1999), citing *Youssefi v. Youssefi*, 81 Ohio App.3d

49, 52, 610 N.E.2d 455 (9th Dist.1991). "Events which occurred prior to judgment cannot be relied upon as grounds to vacate the judgment pursuant to Civ.R. 60(B)(4)." *Youssefi* at 52-53. Here, the payments from CNA and Cincinnati occurred well before the motion for summary judgment was filed. Therefore, Burns is not entitled to relief pursuant to Civ.R. 60(B)(4), and the trial court did not abuse its discretion in so finding.

{¶16} Lastly, Burns argues that he is entitled to relief under the catchall provision of Civ.R. 60(B)(5), which includes "any other reason justifying relief from the judgment." In particular, Burns asserts that he is entitled to relief because he was "abandoned" by his trial counsel. Generally, the neglect of a party's attorney will be imputed to that party for purposes of Civ.R. 60(B)(1). *GTE Automatic*, 47 Ohio St.2d 146, 351 N.E.2d 113 at paragraph four of the syllabus. Nevertheless, "fault should not automatically be imputed when an attorney has grossly neglected a diligent client's case and misleads the client to believe that his interests are being properly handled." *Tonti v. Birch*, 6th Dist. Wood No. WD-95-005, 1995 WL 680007, *5 (Nov. 17, 1995), quoting *Whitt v. Bennett*, 82 Ohio App.3d 792, 797-798, 613 N.E.2d 667 (2d Dist.1992). Thus, under certain circumstances, an attorney's gross neglect will entitle a party to relief under Civ.R. 60(B)(5).

{¶17} Burns first raised the issue of counsel's abandonment in his reply brief in support of his motion for relief from judgment. In that reply, Burns stated that counsel raised no affirmative defenses in the answer, did not file anything after the answer, and

abandoned Burns after the judgment in the criminal case. In *Mayor v. WCI Steel, Inc.*, 11th Dist. Trumbull No. 2000-T-0054, 2001 WL 276976, *3 (Mar. 16, 2001), the court stated, "Abandonment would occur if the attorney were prohibited from practicing law by a disciplinary committee, or if the attorney refused to respond to communications from his client and failed to perform any work on behalf of his client, in which case the client would be without scienter." Similarly, in *Robinson v. Miller Hamilton Venture, LLC*, 12th Dist. Butler No. CA2010-09-226, 2011-Ohio-3017, ¶ 20, the court found abandonment when the attorney did not keep the client informed as to the status of the case, failed to return the client's phone calls after a default judgment was entered, and was the subject of a disciplinary action. Here, the trial court found that Burns' allegations were not sufficiently egregious to warrant relief under Civ.R. 60(B)(5). Specifically, the trial court noted that Burns did not allege that counsel's decisions were made without his knowledge, nor did he allege that he was misled by his counsel. In light of the foregoing, we cannot say that the trial court abused its discretion in finding that Burns was not entitled to relief under Civ.R. 60(B)(5) for trial counsel's alleged abandonment.

{¶18} Having separately determined that the trial court did not abuse its discretion in finding that Burns was not entitled to relief under any of the Civ.R. 60(B)(1) through (5) grounds, we need not address whether he has presented a meritorious defense or whether his motion was timely.

{¶19} As a final matter, although Burns' focus is that the trial court should have granted him relief from judgment, he argues alternatively that, at the least, he should be entitled to a hearing on his motion. "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*, 39 Ohio App.2d 97, 103, 316 N.E.2d 469 (8th Dist.1974). But, "[i]f the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under Civil Rule 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion." *Coulson v. Coulson*, 5 Ohio St.3d 12, 16, 448 N.E.2d 809 (1983). Here, we have examined Burns' motion, and have determined that Burns is not entitled to relief under the facts that he has alleged. Therefore, we hold that the trial court did not abuse its discretion in denying Burns' motion without a hearing.

{¶20} Accordingly, Burns' assignment of error is not well-taken.

III. Conclusion

{¶21} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Burns is ordered to pay the costs of this appeal 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.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE