

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

Rene Mays, Individually and as
Fiduciary of the Estate of
Galon Howard, Deceased, et al.

Court of Appeals No. L-13-1233

Trial Court No. CI0201204049

Appellant

v.

Toledo Hospital, et al.

DECISION AND JUDGMENT

Appellees

Decided: May 9, 2014

* * * * *

Rene Mays, pro se.

Kristen A. Connelly and Elizabeth E. Baer, for appellee The
Toledo Hospital.

Peter N. Lavalette, for appellee Mercy St. Anne Hospital.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This accelerated appeal is before the court following the September 19, 2013 judgment of the Lucas County Court of Common Pleas which dismissed plaintiff-appellant Rene Mays', individually, and on behalf of the Estate of Galon Howard, claims

for medical negligence and wrongful death. Because we find that the trial court did not err, we affirm.

{¶ 2} The facts of this case can be briefly summarized as follows. Galon Howard, appellant's brother, passed away on March 15, 2011. On April 19, 2011, appellant, pro se, commenced an action against appellees Toledo Hospital and Mercy St. Anne's Hospital in the Lucas County Court of Common Pleas for medical negligence and wrongful death. Appellant, as the "personal representative" of Galon Howard stated that she was pursuing the claim on behalf of the decedent's "next of kin." On July 27, 2011, after motions to dismiss were filed, the court dismissed the action, without prejudice, finding that the claims were required to be brought by an attorney and that the complaint lacked an affidavit of merit pursuant to Civ.R. 10(D)(2). Appellant appealed to this court.

{¶ 3} On June 28, 2012, appellant, pro se, refiled her action captioning it a "complaint for declaratory judgment" and requesting that the court "declare" that appellees were required to pay "special damages" in the sum of \$3,240,395.02 due to claims arising out of medical negligence, respondeat superior and wrongful death.

{¶ 4} Appellees again filed motions to dismiss arguing that appellant could not, in a pro se capacity, assert claims on behalf of the estate or others or maintain a claim for her own damages. Appellant filed a motion for summary judgment and for sanctions. On November 6, 2012, the trial court stayed its ruling because appellant's appeal on similar issues was pending. Appellant then dismissed her appeal.

{¶ 5} On September 19, 2013, the trial court granted appellees' motions to dismiss finding that appellant failed to file an affidavit of merit as required by Civ.R. 10(D)(2). The court further found that pursuant to R.C. 4705.01, appellant was prohibited from maintaining a pro se action.

{¶ 6} Appellant then filed a Civ.R. 60(B) motion for relief from judgment arguing that the probate court had already determined that appellant, as the administrator of the decedent's estate, had standing to file a wrongful death action in the general division of the common pleas court. Appellant further argued that her motion was filed within a reasonable time. The motion was opposed. On October 22, 2013, the trial court denied appellant's Civ.R. 60(B) motion.

{¶ 7} Appellant filed her notice of appeal on October 17, 2013, and raises the following assignment of error:

Assignment of Error No. 1: The trial court abused its discretion in denying inter alia Appellant's Rule 60(B) motion to vacate judgment entry of September 18, 2013, under the facts and circumstances of this case.

{¶ 8} In appellant's sole assignment of error, although she appealed the September 19, 2013 judgment, she argues that the trial court erred by denying her Civ.R. 60(B) motion for relief from judgment. Specifically, appellant contends that as the administrator of the estate, she was permitted by law to maintain the action, pro se; and that because appellees were in default under Civ.R. 55, for failing to file an answer, she was not required to submit an affidavit of merit under Civ.R. 10(D).

{¶ 9} In order to facilitate the appeal, we will address appellant’s Civ.R. 60(B) arguments. The Supreme Court of Ohio has determined that,

[t]o prevail on a motion brought under Civ.R. 60(B), 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. v. ARC Industries*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

If any one of the three *GTE* 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). A trial court’s decision on a motion for relief from judgment under Civ.R. 60(B) will not be reversed on appeal absent an abuse of discretion. *Griffey v. Rajan*, 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987).

{¶ 10} Appellant first argues that she was entitled to maintain the action, pro se, pursuant to R.C. 2113.21(A)(2), which provides a list of the powers of an administrator during a will contest. It is undisputed that the action against appellees was not a will contest so that section is inapplicable.

{¶ 11} Upon review, we agree with the trial court’s conclusion that R.C. 4705.01 prohibits appellant from litigating claims on behalf of the estate, pro se. *See Kinasz v.*

S.W. Gen. Health Ctr., 8th Dist. Cuyahoga No. 100182, 2014-Ohio-402, ¶ 13-14.

Accordingly, the court did not err by dismissing the complaint on this basis.

{¶ 12} Regarding appellant's failure to file an affidavit of merit, appellant claims that it was not required because appellees failed to file an answer and, thus, she was entitled to default judgment. We disagree. Under Civ.R. 12(B)(6), a party is entitled to file the motion prior to filing a responsive pleading because the motion tests the sufficiency of the complaint. *See Copeland v. Summit Cty. Probate Court*, 9th Dist. Summit No. 24648, 2009-Ohio-4860, ¶ 7. Thus, appellees were not in default under Civ.R. 55.

{¶ 13} Based on the foregoing, we find that the trial court did not abuse its discretion when it denied appellant's motion for relief pursuant to Civ.R. 60(B). We further find that the trial court did not err when it dismissed appellant's complaint. Appellant's assignment of error is not well-taken.

{¶ 14} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

Mays, Individually and as
Fiduciary of the Estate of
Howard v. Toledo Hosp.
C.A. No. L-13-1233

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

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.