[Cite as *Wireless Resource L.L.C. v. Garner*, 2012-Ohio-2080.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Wireless Resource LLC,	:	
Plaintiff-Appellee,	:	
v.	:	
Traci Garner et al.,	:	No. 11AP-1038 (C.P.C. No. 10CVH12-17897)
Defendants-Appellees,	:	(ACCELERATED CALENDAR)
Tower Wireless, Ltd.,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 10, 2012

Onda, LaBuhn, Rankin & Boggs Co., *Patrick H. Boggs*, and *Timothy S. Rankin*, for appellee Wireless Resource LLC.

Ice Miller LLP, and *Kevin L. Murch*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Appellant, Tower Wireless, Ltd., appeals from a judgment of the Franklin County Court of Common Pleas denying its motion to set aside default judgment filed pursuant to Civ.R. 60(B). For the following reasons, we affirm.

{¶ 2} On December 7, 2010, appellee, Wireless Resource LLC, filed a complaint against Traci Garner, Anh Nguyen, and appellant, asserting claims including tortious

interference with employment and business relations, breach of contract, violations of covenants not to compete, and misappropriation of trade secrets and confidential proprietary information. The complaint alleged that Garner and Nguyen were employed by appellee before they began working for appellant. According to the complaint, Garner and Nguyen solicited business from appellee's clients and contacted employees of appellee to persuade them to work for appellant.

{¶ 3} Appellant was served with the complaint via certified mail on December 14, 2010, but did not answer or otherwise respond. On April 22, 2011, appellee moved for default judgment against appellant and Garner. The trial court granted the motion on April 27, 2011 and, on that same day, scheduled a damages hearing to be heard by a magistrate on June 7, 2011. Before the damages hearing, appellee filed a motion for default judgment against Nguyen, which the trial court granted on May 11, 2011.

{¶ 4} None of the defendants appeared at the damages hearing. After hearing testimony from Christopher Kish, appellee's CEO, the magistrate took the matter under advisement. The magistrate rendered a decision on July 6, 2011, finding that appellee was entitled to recover damages against Garner and appellants in the amount of $31,203 plus costs.

{¶ 5} On July 27, 2011, appellant filed a motion to set aside the default judgment. Appellant alleged the existence of meritorious defenses and sought relief under the "any other reason" provision in Civ.R. 60(B)(5) or, alternatively, the "excusable neglect" provision in Civ.R. 60(B)(1). Based on the attached affidavit of Pat LaSusa, appellant's vice president, appellant acknowledged receiving the complaint on December 14, 2010, but maintained that a subsequent phone conversation between LaSusa and Kish led LaSusa to believe that appellee would not pursue the case. Specifically, LaSusa averred that Kish indicated a willingness to resolve the matter and indicated that he would need to speak with appellee's attorney. According to LaSusa, he did not hear back from Kish, but based on their conversation, LaSusa was "comfortable Wireless Resource had no intention of moving forward with the litigation." (LaSusa Affidavit, ¶ 10.)

{¶ 6} After the filing of appellee's memorandum contra and appellant's reply, the trial court overruled appellant's motion in a decision and entry filed September 15, 2011.

The trial court reasoned that appellant failed to demonstrate excusable neglect under Civ.R. 60(B)(1) or "any other reason" for relief under Civ.R. 60(B)(5).

{¶ 7} Appellant filed objections to the magistrate's July 6, 2011 decision regarding damages. In an entry filed November 2, 2011, the trial court denied the objections, adopted the magistrate's decision, and rendered its final judgment terminating the case.

{¶ 8} Appellant now appeals, advancing the following assignment of error for our consideration:

> The Trial Court erred in refusing to grant Tower Wireless' Motion to Set Aside Default Judgment.

{¶ 9} Appellant's sole assignment of error challenges the denial of its motion to set aside default judgment. "A motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion." *Griffey v. Rajan*, 33 Ohio St.3d 75, 77 (1987). " 'The term "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*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). When applying an abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Berk v. Matthews*, 53 Ohio St.3d 161, 169 (1990).

{¶ 10} Civ.R. 60(B) provides that a trial court may relieve a party 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 rule requires the motion to 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."

{¶ 11} To prevail under Civ.R. 60(B), the movant must show that: (1) the movant has a meritorious defense or claim to present if relief is granted, (2) the movant 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. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. The movant must satisfy all three of these requirements to obtain relief. *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151 (1996); *see also GTE* at 151 (finding that the requirements under Civ.R. 60(B) "are independent and in the conjunctive, not the disjunctive").

{¶ 12} Our analysis will focus on the second prong of the *GTE* test, i.e., entitlement to relief under Civ.R. 60(B)(1) through (5), as it was the basis for the trial court's decision. Appellant sought relief under the "excusable neglect" provision in Civ.R. 60(B)(1) and the "any other reason" provision in Civ.R. 60(B)(5) based on the argument that appellee expressed a willingness to resolve the matter. As explained below, such circumstances do not satisfy the grounds for relief in Civ.R. 60(B)(1) or (5).

{¶ 13} First, to determine whether neglect is "excusable" or "inexcusable" under Civ.R. 60(B)(1), a court must consider all of the surrounding facts and circumstances. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 21 (1988). Although "excusable neglect" is an elusive concept that courts often find difficult to define and to apply, the Supreme Court of Ohio has stated that a defendant's inaction is inexcusable where it amounts to a "complete disregard for the judicial system." *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20 (1996), citing GTE *Automatic Elec.* at 153. A disregard for the judicial system "does not necessarily mean an *intentional* disregard." (Emphasis sic.) *Griffey* at 80.

{¶ 14} Generally, "a party's failure 'to plead or respond after admittedly receiving a copy of a court document is not "excusable neglect." ' " *PHH Mtge. Corp. v. Northrup*, 4th Dist. No. 11CA6, 2011-Ohio-6814, ¶ 16 (citing cases). After receiving the summons and a copy of the complaint, a party has "an affirmative duty to respond to the complaint in a timely manner." *Natl. City Bank v. Kessler*, 10th Dist. No. 03AP-312, 2003-Ohio-6938, ¶ 16, citing *Miami Valley Hosp. v. Martin*, 12th Dist. No. CA96-03-029 (Aug. 26,

1996). "[E]xcusable neglect does not exist if the party or his attorney could have controlled or guarded against the event that led to the untimely answer." *Hillman v. Edwards*, 10th Dist. No. 10AP-58, 2010-Ohio-3524, ¶ 10, citing *Scarefactory, Inc. v. D & B Imports, Ltd.*, 10th Dist. No. 01AP-607, 2002-Ohio-200.

{¶ 15} Here, appellant admits receiving the complaint but maintains that its failure to file an answer should be excused by statements made by appellee's CEO, Kish, to appellant's vice president, LaSusa, shortly after the complaint was filed. We disagree. According to LaSusa's affidavit, Kish merely indicated that appellee "may" not pursue the matter but planned to consult with an attorney. (LaSusa Affidavit, ¶ 10.) This statement was far from an assurance that the complaint would be dismissed, especially when LaSusa never received any subsequent phone call from Kish or appellee's attorney. LaSusa failed to take any further steps to resume discussions or participate in the proceedings. Under these circumstances, appellant's inaction was inexcusable, and the trial court properly rejected its claim for relief under Civ.R. 60(B)(1).

{¶ 16} Nor did appellant's arguments establish relief under Civ.R. 60(B)(5). "Civ.R. 60(B)(5) is intended as a catch-all provision reflecting the inherent power of a court to relieve a person from the unjust operation of a judgment, but it is not to 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 (1983), paragraph one of the syllabus. The grounds for invoking this provision should be substantial. *Id*. at paragraph two of the syllabus. As explained above, appellant intentionally disregarded the complaint without a justifiable reason for doing so. Even if we were to construe the single phone conversation that occurred between LaSusa and Kish to constitute settlement negotiations, appellant would have still been obligated to comply with the Rules of Civil Procedure. *See Discover Bank v. Doran*, 10th Dist. No. 10AP-496, 2011-Ohio-205, ¶ 6 (recognizing that pro se litigants are held to the same rules, procedures, and standards as litigants represented by counsel). Appellant was well aware of the pendency of the action, and because nothing prevented appellant from filing an answer, the trial court did not abuse its discretion in denying appellant's request for relief under Civ.R. 60(B)(5).

{¶ 17} Because the failure to satisfy any of the grounds in Civ.R. 60(B)(1) through (5) is dispositive, we find that the trial court properly denied appellant's motion to set aside the default judgment. Accordingly, appellant's assignment of error is overruled.

{¶ 18} Having overruled appellant's sole assignment of error, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN, P.J., and FRENCH, J., concur.
