[Cite as *Robinson v. Miller Hamilton Venture, L.L.C.*, 2011-Ohio-3017.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

LES ROBINSON,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-09-226
	:	O P I N I O N
- vs -		6/20/2011
	:	
MILLER HAMILTON VENTURE, LLC,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2009-05-2341

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HENDRICKSON, J.

{¶1} Plaintiff-appellant, Les Robinson, appeals a decision of the Butler County Court of Common Pleas granting a motion for relief from judgment filed by defendant-appellee, Miller Hamilton Venture, LLC ("Miller Hamilton"). For the reasons that follow, we affirm the decision of the trial court.

{¶2} On May 26, 2009, Robinson filed a multi-count complaint against Miller

Hamilton for breach of contract, violations of the Ohio Consumer Sales Practices Act, and fraudulent misrepresentation. Robinson's claims stemmed from his allegation that Miller Hamilton failed to properly repair and caused additional damage to his vehicle when he took it in for service in December of 2007.

{¶3} The record indicates that Miller Hamilton received service of the complaint and a summons on June 3, 2009. Attorney Robert Larson was retained thereafter to represent the company. Larson filed an answer on behalf of Miller Hamilton on July 7, 2009, six days out of time and without leave of court. In the interim, Robinson filed a motion for default judgment on July 6, which was granted by the trial court on July 16, 2009.

{¶4} On April 12, 2010, Miller Hamilton, through other counsel, filed a motion for relief from judgment pursuant to Civ.R. 60(B)(1) and (5). In his affidavit attached to the motion, Miller Hamilton's owner and statutory agent, William Miller, averred that he first learned that a default judgment had been entered against Miller Hamilton in February 2010 after receiving a judgment entry from the trial court regarding a contempt motion filed by Robinson as a result of Miller Hamilton's failure to appear at a judgment debtor examination. The court's entry also informed Miller that Larson had been suspended from the practice of law. According to Miller, in addition to Larson's failure to inform him of the default judgment, Larson further failed to notify Miller of the post-judgment proceedings initiated by Robinson.

{¶5} Miller further averred that after receiving the trial court's February 2010 entry, he "immediately" attempted to contact Larson, but his telephone calls were not returned. After searching for a period of approximately one month, Miller stated that he located Larson in his new employment as an automobile salesperson. Thereafter, Miller retrieved his file and met with other counsel on April 10, 2010.

{¶6} At the hearing on the motion, Miller Hamilton argued that it was entitled to relief under subsection (B)(5) of Civ.R. 60 because Larson had abandoned his representation of the company. In response, Robinson claimed that Larson's alleged neglect of the case should be imputed to Miller Hamilton. Robinson argued that Larson had not been suspended from the practice of law until several months after the default judgment was entered. He also claimed that Miller Hamilton had simply ignored its responsibility to protect its interest in the case. Robinson pointed to additional averments in Miller's affidavit that he had "little contact" with Larson after he was retained and that he had instructed an employee of the company to communicate with Larson on his behalf with regard to case matters.

{¶7} In its August 5, 2010 decision, the trial court construed Miller Hamilton's claim for relief as arising under Civ.R. 60(B)(5). The court granted Miller Hamilton relief from the default judgment after finding that Larson's neglect "should not be imputed to [Miller Hamilton] due to counsel's actions of failing to communicate with [Miller Hamilton] and abandoning its case."

{¶8} Robinson now appeals the trial court's decision, raising two assignments of error for our review. Both of his assignments challenge the propriety of the trial court's decision to grant Miller Hamilton's Civ.R. 60(B) motion. For purposes of discussion, we have elected to consolidate the assignments of error.

{¶9} Assignment of Error No. 1:

{¶10} "THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING DEFENDANT MILLER HAMILTON VENTURE'S MOTION FOR RELIEF FROM JUDGMENT; THE TRIAL [COURT] ERRED IN GRANTING THE RELIEF FROM JUDGMENT UNDER THE CATCHALL PROVISION OF CIV.R. 60(B)(5) AFTER DEFENDANT CONCEDED IT WAS NOT ENTITLED TO RELIEF UNDER THE

SPECIFIC PROVISION OF CIV.R. 60(B)(1)."

{¶11} Assignment of Error No. 2:

{¶12} "THE TRIAL COURT ERRED IN GRANTING RELIEF UNDER CIV.R. 60(B)(5) SINCE THE MOTION IS NOT TIMELY; APPELLEE BEARS THE BURDEN OF ALLEGING FACTS DEMONSTRATING THE TIMELINESS OF THE MOTION."

{¶13} Civ.R. 60(B) provides in part: "[o]n 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 * * *; (4) the judgment has been satisfied, released or discharged * * *; or (5) any other reason justifying relief from the judgment."

{¶14} 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 Electric, Inc. v. ARC Indus., Inc*., 47 Ohio St.2d 146, paragraph two of the syllabus. The moving party must establish all three requirements in order for the motion to be granted. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20; *Fitzwater v. Woodruff*, Preble App. No. CA2006-01-001, 2006-Ohio-7040, ¶10. Where timely relief is sought and the movant has established a meritorious defense, doubt, if any, "should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits." *GTE* at paragraph

three of the syllabus. The policy in Ohio is to afford Civ.R. 60(B) relief where equitable. *Southern Ohio Coal Co. v. Kidney* (1995), 100 Ohio App.3d 661, 668.

{¶15} As this court has previously noted, a trial court has ample discretion in ruling on a Civ.R. 60(B) motion. *Fitzwater* at ¶9. An appellate court will not disturb a trial court's decision regarding such a motion absent a showing of an abuse of discretion. *Veidt v. Cook*, Butler App. No. CA2003-08-209, 2004-Ohio-3170, ¶14, citing *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 1994-Ohio-107. A trial court abuses its discretion only if its decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶16} At the outset, we note that at no time during the pendency of the trial court proceedings did Robinson dispute whether Miller Hamilton had presented a meritorious defense to the claims raised in his complaint. In its motion, Miller Hamilton asserted that a meritorious defense was available because Robinson's averment that it had improperly installed spark plugs in the vehicle constituted a "physical impossibility." Robinson did not contest the validity of this claim in its memorandum in opposition or at the hearing on the motion, or otherwise argue that Miller Hamilton failed to establish the first requirement of Civ.R. 60(B). In addition, Robinson has not challenged the trial court's determination that Miller Hamilton presented a meritorious defense in his brief on appeal. We will therefore focus our inquiry on the second and third requirements of Civ.R. 60(B).

{¶17} Robinson initially challenges the trial court's determination that Miller Hamilton was entitled to relief under Civ.R. 60(B)(5) after conceding in its motion that it did not meet the requirements for excusable neglect under subsection (B)(1). The Ohio Supreme Court has held that Civ.R. 60(B)(5) is considered a "catch-all" provision that "reflects the inherent power of a court to relieve a person from the unjust operation of a

judgment." *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, paragraph one of the syllabus. The grounds for invoking this provision must be substantial, and the court has cautioned that it is not to be used as a substitute for any of the more specific provisions of Civ.R. 60(B). Id. at paragraphs one and two of the syllabus. Consequently, Civ.R. 60(B)(5) relief is to be granted only in unusual or extraordinary circumstances, and will not operate to relieve a party who "ignores its duty to take legal steps to protect its interest." *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 105; *Mount Olive Baptist Church v. Pipkins Paints & Home Improvement Ctr.,* (1979), 64 Ohio App.2d 285, 288.

{¶18} As Robinson correctly points out, Miller Hamilton conceded in its motion that relief under the excusable neglect standard in Civ.R. 60(B)(1) was inapplicable because Larson's neglect in this case was *inexcusable*, and would be imputed to Miller Hamilton. Indeed, the neglect of a party's attorney, whether simple or gross, will generally be imputed to the party for purposes of Civ.R. 60(B)(1). *GTE*, 47 Ohio St.2d 146 at paragraph four of the syllabus; *Argo Plastics Products Co. v. Cleveland* (1984), 15 Ohio St.3d 389, 393; *Mayor v. WCI Steel, Inc*. (Mar. 16, 2001), Trumbull App. No. 2000-T-0054, 2001 WL 276976 at 3. In order to prevail under Civ.R. 60(B)(5), Miller Hamilton was required to demonstrate that it was not using that provision in place of subsection (B)(1). See *Taylor v. Haven* (Dec. 6, 1993), 91 Ohio App.3d 846, 849. Although Civ.R. 60(B)(5) cannot be used as a substitute for any of the other more specific grounds outlined in the rule, this requirement "does not preclude the use of Civ.R. 60(B)(5) on the basis of operative facts different from and/or in addition to those contemplated by Civ.R. 60(B)(1)." *Whitt v. Bennett* (1992), 82 Ohio App.3d 792, 797. The grounds for relief in Civ.R. 60 (B)(1) through (5) are "in the disjunctive." Id., quoting *GTE* at 153.

{¶19} Miller Hamilton claims that it was entitled to relief under Civ.R. 60(B)(5)

because Larson's conduct rose to the level of abandonment, constituting an "extraordinary circumstance" not contemplated by the excusable neglect standard in subsection (B)(1). This court and others have recognized that certain circumstances of egregious conduct on the part of counsel, such as the abandonment of a client's case, *may* remove a motion from the purview of Civ.R. 60(B)(1) and entitle a party to relief under subsection (B)(5). See *Postler v. Central Trust Co., N.A. of Cincinnati* (July 26, 1993), Warren App. No. CA92-11-103, at 6 (a trial court may grant relief from judgment pursuant to Civ.R. 60[B][5] under circumstances involving an attorney's gross negligence or abandonment of a client); *Pence v. Smith* (Nov. 7, 1994), Madison App. No. CA93-11-031, at 5 (noting that under certain circumstances, such as abandonment, an attorney's conduct should not be imputed to his client); See, also, *Mayor*, 2001 WL 276976 at 3 (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"). Fault should not automatically be imputed to a party when an attorney has grossly neglected a client's case and misleads the client into believing that his interests are being properly handled. See *C.B. Group, Inc. v. Starboard Hospitality, L.L.C.*, Cuyahoga App. No. 93387, 2009-Ohio-6652, ¶20, citing *Whitt* at 797-798.

{¶20} In this case, there was evidence before the trial court that Larson had not kept Miller Hamilton informed as to the status of the case, and failed to return William Miller's telephone calls after he learned of the default judgment in February 2010. Although he was not under suspension at the time the default judgment was entered, during the pendency of the case, Larson was the subject of disciplinary action. On December 30, 2009, he was suspended from the practice of law for a two-year period, with 18 months stayed on several conditions. See *Cincinnati Bar Assn. v. Larson*, 124 Ohio St.3d 249, 2009-Ohio-6766.

{¶21} At the hearing on the motion, Miller testified that Larson was retained approximately two weeks after Miller Hamilton was served with the summons and complaint. According to Miller, Larson came to his repair shop to pick up documents relating to the case and to collect his fee. Upon giving him paperwork related to the case, Larson told him, "[d]on't worry about it. I'll handle it." Larson also told him that he would "take care of the case for [Miller]." Although Robinson claims that Miller's testimony regarding his communications with Larson was not credible, he was subject to cross-examination as well as examination by the trial court regarding his statements.

{¶22} The trial court was certainly faced with competing interests in ruling on Miller Hamilton's motion for relief from judgment. As we have previously observed, "[o]n one hand is the principle of finality of judgment and the non-moving party's right to have his judgment enforced. On the other is the principle that cases should be decided on their merits and the right of all parties to be heard." *Pence*, Madison App. No. CA93-11-031 at 5. The trial court was in the best position to balance these competing interests. Based on the facts and circumstances of this case, we do not find that the court abused its discretion in finding that Larson's conduct rose to the level of abandonment, and as a result, Miller Hamilton was entitled to relief from judgment under Civ.R. 60(B)(5).

{¶23} Robinson also contends that Miller Hamilton failed to establish the third requirement of Civ.R. 60(B) that its motion was made timely. As discussed above, in order to prevail under the rule, the movant has the burden of presenting "'allegations of operative facts to demonstrate that he is filing his motion within a reasonable period of time.'" *Lebanon Auto Parts v. Dracakis* (Apr. 17, 2000), Warren App. No. CA99-09-110 at 5-6, quoting *Adomeit*, 39 Ohio App.2d at 103. The determination as to what constitutes reasonable time is for the trial court to determine in the exercise of its sound discretion. See *In re K.R.J.*, Clermont App. No. CA2010-01-012, 2010-Ohio-3953, ¶41.

{¶24} Robinson claims that Miller Hamilton "made no effort" to establish that its motion was filed within a reasonable period of time. We disagree with this contention. In his affidavit, William Miller averred that he first learned of the default judgment in the trial court's February 2010 entry regarding Robinson's contempt motion.[1] According to Miller, he immediately attempted to contact Larson, but his telephone calls were not returned. Miller claimed that it took him approximately one month to locate Larson, and after he retained his file, he met with new counsel on Saturday, April 10, 2010. The motion for relief from judgment was filed two days later on April 12.

{¶25} In its decision, the trial court noted that although Miller Hamilton's motion was filed nine months after the entry of default, the filing was made within approximately two months of learning that a default judgment was entered against the company. The court concluded, "[a]fter considering all the facts and circumstances of this case and the conduct of defendant's counsel and defendant's inability to locate counsel the [c]ourt finds that [d]efendant's motion was filed within a reasonable time[ ] under Civ.R. 60(B)."

{¶26} Upon review of the record and in light of the evidence presented for the trial court's consideration, we find that Robinson has failed to establish that the court's conclusion that Miller Hamilton's Civ.R. 60(B) motion was made within a reasonable time constituted an abuse of its discretion.

{¶27} Based on the foregoing, Robinson's first and second assignments of error are overruled.

{¶28} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.

1. Upon review of the entry, we note that the trial court found that there was no record that Miller Hamilton had received notice of the contempt hearing or judgment debtor examination.