In the Court of Common Pleas
Cuyahoga County, Ohio

ANNE T. CORRIGAN,

Plaintiff,

v.

SCHOONOVER, ANDREWS & ROSENTHAL, LLC,

Defendant.

Case No. CV 10-733480

Judge Robert C. McClelland

Opinion and Order on Motion for Relief from Judgment

Plaintiff Anne T. Corrigan asks this Court to grant her relief from the February 4, 2011 order dismissing her action when she failed to file an amended complaint that better apprised defendants of the claims against them. Plaintiff argues that she is entitled to relief from judgment under Civ.R. 60(B) because of "mistake, inadvertence, surprise or neglect."

Defendants Schoonover, Andrews & Rosenthal, LLC, Michael J. Connick, and Connick & Associates filed a motion for more definite statement on December 1, 2010. Fourteen days later, on December 15, 2010, this Court's predecessor granted the motion. Plaintiff's counsel asserts that on December 22, 2010 he received a post card indicting that the court had granted Defendants' motion (Motion, Ex. A (Affidavit) at ¶3).

On January 5, 2011, Defendants filed their motion to dismiss plaintiff's complaint. Under Cuyahoga L.R. 11(C) and Civ.R. 6(E), the response would have been due by January 17, 2011.

Plaintiff's counsel avers that he did not receive service of the motion to dismiss (Affidavit at ¶10-11). Counsel does indicate, however, that he "at least attempted to file[] a Motion for Extension of Time within which to file an Amended Complaint responsive to Defendants' Motion for More Definite Statement," which he mailed "on or about January 12, 2011" (Affidavit at ¶4 & 6.) Although counsel forward copies of the motion (along with a self-addressed envelope) to the clerk for filing and for return, the file-stamped copy never was returned and counsel did not notice that it had not been returned (Motion, p. 2.). Plaintiff did not provide a copy of her motion for extension of time for this

Court's review,[1] but she does assert in her brief that that her counsel had moved the court for an extension of time through February 9, 2011 (Motion, p. 2).

This Court's predecessor granted Defendant's motion to dismiss 18 days after a responsive brief would have been due. Counsel maintains, however, that he did not receive notice that the court had granted the motion to dismiss on February 4, 2011 (Affidavit at ¶10.) The docket indicates that the clerk issued notice.

Counsel indicates that he first learned on March 23, 2011, when he "researched a collateral issue on the Clerk's' docket site," that his motion for extension of time had not been filed (Affidavit at ¶7). Plaintiff does not explain, however, why her counsel did not file the amended complaint by the extended date she identified in her motion, February 9, 2011.

Relief from Judgment under Civil Rule 60(B)

To prevail on a motion for relief from judgment under Civ.R. 60(B), the movant must demonstrate: (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); (3) 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 proceeding was entered or taken. *GTE Automatic Elec. Inc. v. ARC Indus., Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus. "[T]he test is not fulfilled if any one of the requirements is not met." *Stack v. Pelton*, 70 Ohio St.3d 172, 174, 1994-Ohio-107, 637 N.E.2d 914.

The movant need not submit evidence in support of a Civ.R. 60(B) motion, but it is advisable because the movant has the burden to demonstrate that a factual basis exists such "that the interests of justice demand the setting aside of a judgment." *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20-21, 520 N.E.2d 564. As the Eighth District explained in *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 105, 316 N.E.2d 469, "[i]f the material submitted by the movant in support of its motion contains no operative facts or meager and limited facts and conclusions of law, it will not be an abuse of discretion for the trial court to refuse to grant a hearing and overrule the motion." Moreover, a party cannot use a Civ.R. 60(B) motion as a substitute for a timely appeal. *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, 846 N.E.2d 43, ¶9; *Key v. Mitchell*, 81 Ohio St.3d 89, 90, 1998-Ohio-643, 689 N.E.2d 548.

[1] Nor did Defendants' counsel receive service of the motion for extension of time (Opposition Brief, Ex. B, ¶7 (Affidavit of T. Brick)).

Plaintiff cannot satisfy the Civ.R. 60(B) standard

1. Plaintiff has not satisfied this Court that she has a meritorious claim.

With regard to the first prong of the *GTE Automatic* test, Plaintiff did not explain in her brief why she has a meritorious claim; instead, she attaches her proposed amended complaint. At oral argument, she did argue that she has a meritorious claim but argued only the allegations in her proposed amended complaint. But deciding whether a plaintiff has *stated* a claim is not the standard to determine whether a party has a meritorious claim "to present if relief is granted." *GTE Automatic*, 47 Ohio St.2d 146, at paragraph two of the syllabus.

Rather, as the Eighth District discussed in *Adomeit*, "[t]he rigid requirements of Civil Rule 56 regarding the documents and other material the parties should submit in support of and in opposition to a motion for summary judgment are excellent guides and a commendable procedure to be followed in seeking relief or in opposing relief under Civil Rule 60(B)." 39 Ohio App.2d at 104. Plaintiff has neither identified operative facts nor submitted material that supports those operative facts. As such, this Court cannot say that Plaintiff has one or more valid claims.

2. Plaintiff has not satisfied this court that she is entitled to relief because of mistake, inadvertence, surprise or excusable neglect.

Plaintiff also cannot satisfy the second prong of the *GTE Automatic* test: i.e., that she is entitled to relief because of mistake, inadvertence, surprise, or excusable neglect. It is "incumbent on counsel to check the docket," *State Farm Mut. Auto. Ins. Co. v. Pellar* (8th Dist. 1989), 63 Ohio App.3d 357, 359, 578 N.E.2d 874, just as the parties "are expected to keep themselves informed of the progress of their case," *Reis Flooring Co., Inc. v. Dileno Constr. Co.* (8th Dist. 1977), 53 Ohio App.2d 255, 259, 373 N.E.2d 1266.

It was incumbent upon Plaintiff's counsel to determine the status of her motion for extension of time (that he thought he had filed) sometime before February 9, 2011, especially since Plaintiff's counsel received no notice that the court had ruled upon the motion. Counsel then would have learned that the clerk did not docket the motion. In any event, counsel did not file the amended answer within the time requested (which would have given some credence to Plaintiff's present position). Rather, counsel tells this Court that he learned of the dismissal 42 days after the date he says he had promised to file her amended complaint (Affidavit at ¶7).

Regardless, once Plaintiff's counsel received notice that the court had granted Defendants' request for more definite statement, counsel did not "attempt to file" the motion for extension of time within the 17-day time frame

allowed under Civil Rules 12(E) and 6(E). The Supreme Court of Ohio has determined that a trial court abuses its discretion when it allows a party to file a late pleading under Civ.R. 6(B) without first requiring that party to file a motion for leave that demonstrates "excusable neglect." *Miller v. Lint* (1980), 62 Ohio St.2d 209, 214, 404 N.E.2d 752. When determining whether neglect under Civ.R. 6(B) is excusable or inexcusable, a court must consider "all the surrounding facts and circumstances." *Davis v. Immediate Med. Serv., Inc.*, 80 Ohio St.3d 10, 14, 684 N.E.2d 292. Because Plaintiff has not submitted a signed, dated copy of the prepared motion for extension of time with the affidavit, this Court is not in a position to consider whether Plaintiff could demonstrate excusable neglect that would warrant leave to file a belated amended complaint.

Moreover, the failure to receive a postcard notice of the court's disposition on the motion to dismiss is not "excusable neglect" under Civ.R. 60(B). "While practitioners have come to rely on receipt of Civ.R. 58(B) notices to trigger further action, the vicissitudes of mail service mandate regular inspection of the electronic docket because the case law is quite unforgiving on this point." *Griesmer v. Allstate Ins. Co.*, 8th Dist. No. 91194, 2009-Ohio-725, ¶14. Indeed, "[o]nce the clerk has served notice of the entry and entered the appropriate notation in the docket, the notice shall be deemed to have been served. The failure of any party to receive such notice shall not affect the validity of the judgment or the running of the time for appeal." *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 523 N.E.2d 851, paragraph 2(C) of the syllabus.

This Court cannot say that the evidence or argument presented in this case is that type of excusable neglect that would require relief from judgment.

Order

Plaintiff's motion for relief from judgment is denied. Final.

Judge Robert C. McClelland

Date 6/14/11