

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Flagstar Bank, FSB,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 12AP-679
v.	:	(C.P.C. No. 09CVE-06-8369)
	:	
Wanda L. Hairston,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 26, 2013

Thompson Hine LLP, Scott A. King and Terrance A. Mebane,
for appellee.

Doucet & Associates, LLC, Troy J. Doucet and Audra Lepi
Tidball, for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, Wanda L. Hairston, appeals from a judgment of the Franklin County Court of Common Pleas denying appellant's motion for relief from judgment ("motion for relief") in favor of plaintiff-appellee, Flagstar Bank, FSB. Because we conclude that the trial court did not err in denying relief from that judgment, we affirm.

{¶ 2} On June 4, 2009, appellee filed a complaint asserting that appellant was in default on a promissory note that was secured by a mortgage on real property located at 6320 Birkewood Street, Columbus, Ohio 43229. Appellant was served with the complaint by certified mail on June 10, 2009 and was served personally on June 11, 2009. She did not file an answer. On July 27, 2009, appellee filed a motion for default judgment. Appellant was served with the motion by ordinary mail. Without the assistance of a

lawyer and, thus, pro se, appellant filed a motion to stay and request for an additional 90 days to file an answer to the complaint and motion for default judgment. More than 14 days passed from the date appellant was served with the motion for default judgment, and the trial court had not ruled on her request for a stay and additional time to answer. Appellant did not file an answer or a memorandum contra the motion for default judgment. Subsequently, however, the trial court was informed of appellant's pending bankruptcy petition. On September 16, 2009, the trial court stayed the case due to bankruptcy and placed it on the inactive docket.

{¶ 3} On or about March 29, 2012, appellee filed a motion to vacate the bankruptcy stay ("motion to vacate stay") and return the case to the active docket. Appellant was served with a copy of said motion to vacate stay and attempted to fax it to a lawyer whom she had recently hired.¹ Apparently she faxed the notice to an incorrect fax number, and it was never received by her attorney. She presumed, however, that her attorney received the notice because the fax machine returned to her a transmission verification report indicating the result was "ok." On April 12, 2012, the trial court vacated the bankruptcy stay and returned the case to the active docket. Appellant was served with notice of the trial court's entry. The court's entry indicated that trial was set for September 19, 2012, and dispositive motions were due by July 24, 2012.

{¶ 4} Appellant still did not file an answer. On April 18, 2012, appellee filed a second motion for default judgment. The motion was served on appellant, and appellant did nothing. On May 3, 2012, the trial court granted appellee's motion for default judgment, and appellant was served with a copy of the default judgment. She then forwarded the copy to her attorney. Thereafter, on May 22, 2012, appellant filed a motion for relief arguing that she made an honest mistake in entering an incorrect fax number for her attorney and therefore engaged in excusable neglect under Civ.R. 60(B)(1). On August 15, 2012, the trial court denied appellant's motion for relief.

{¶ 5} Appellant appeals from the denial of her motion for relief and raises the following two assignments of error for our review:

¹ Although appellant avers that she had hired an attorney, there is no indication in the record that the attorney, or any attorney, had made an appearance on her behalf in the case until after default judgment was entered.

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MS. HAIRSTON'S MOTION FOR RELIEF FROM JUDGMENT UNDER CIV.R. 60(B)(1) BECAUSE MS. HAIRSTON SET FORTH OPERATIVE FACTS DEMONSTRATING EXCUSABLE NEGLIGENCE AND MERITORIOUS DEFENSES.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MS. HAIRSTON'S MOTION FOR RELIEF FROM JUDGMENT WITHOUT CONDUCTING AN EVIDENTIARY HEARING AS MS. HAIRSTON SET FORTH OPERATIVE FACTS WARRANTING RELIEF FROM JUDGMENT UNDER CIV.R. 60(B)(1).

{¶ 6} Appellant moved for relief from judgment pursuant to Civ.R. 60(B), which provides that, under certain circumstances, a court may relieve a party from a final judgment. We review a trial court's decision to grant or deny a motion for relief under Civ.R. 60(B) for abuse of discretion. *Winona Holdings, Inc. v. Duffey*, 10th Dist. No. 10AP-1006, 2011-Ohio-3163, ¶ 12. An abuse of discretion occurs where a trial court's decision is "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 7} A party seeking relief from judgment under Civ.R. 60(B) "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 (1976), paragraph two of the syllabus. The movant must establish all three of the requirements to obtain relief from judgment. *Duffey* at ¶ 13. See *Bank of Am., N.A. v. Malone*, 10th Dist. No. 11AP-860, 2012-Ohio-3585.

{¶ 8} The trial court denied appellant's motion for relief on the grounds that she failed to satisfy the first and second prongs of the *GTE* test. The second prong requires appellant to establish that she is entitled to relief under one of the grounds stated in Civ.R.

60(B)(1) through (5). Appellant asserts that she is entitled to relief under Civ.R. 60(B)(1) due to "excusable neglect." In determining whether neglect is "excusable," we must consider all of the surrounding facts and circumstances. *Duffey* at ¶ 14. "The term 'excusable neglect' is an elusive concept which has been difficult to define and to apply." *Kay v. Marc Glassman, Inc.*, 76 Ohio St.3d 18, 20 (1996). The Supreme Court of Ohio has stated that "the inaction of a defendant is not 'excusable neglect' if it can be labeled as a 'complete disregard for the judicial system.'" *Id.*, quoting *GTE Automatic Elec.* at 153. We have previously held that excusable neglect is not present if the party could have prevented the circumstances from occurring. *Porter, Wright, Morris & Arthur, LLP v. Frutta Del Mondo, Ltd.*, 10th Dist. No. 08AP-69, 2008-Ohio-3567, ¶ 22. The Supreme Court has also stated that "the concept of 'excusable neglect' must be construed in keeping with the proposition that Civ.R. 60(B)(1) is a remedial rule to be liberally construed, while bearing in mind that Civ.R. 60(B) constitutes an attempt to 'strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done.'" *Colley v. Bazell*, 64 Ohio St.2d 243, 248 (1980), quoting *Doddridge v. Fitzpatrick*, 53 Ohio St.2d 9, 12 (1978), quoting 11 Wright & Miller, Federal Practice & Procedure 140, Section 2851.

{¶ 9} In this case, appellant had two opportunities to file an answer or request leave to file an answer and one opportunity to oppose vacation of a stay and return to the active docket and two opportunities to oppose a motion for default judgment. She provides only an explanation for why she did not oppose vacation of a stay and reactivation to the docket. She does not address, however, why she failed to file an answer. She also does not address why she failed to request leave to file an answer when she was served with a copy of the trial court's notice that the bankruptcy stay was vacated and the case had been returned to the active docket. Finally, appellant does not address why she failed to file a memorandum contra to appellee's motion for default judgment. There is no evidence that appellant made any efforts to fax or somehow communicate to her attorney the entry returning the case to the active docket or the second motion for default judgment. Appellant's failure to file an answer or request leave to file an answer and failure to file a memorandum contra the motion for default judgment does not constitute "excusable neglect" because she could have prevented the default judgment by

filing an answer or requesting leave to file an answer at one of the two opportunities and/or filing a memorandum contra to the motion for default judgment. Furthermore, by the time she received the entry returning the case to the active docket, and therefore her second opportunity to file an answer or request leave to answer, she had already engaged counsel and could have notified him of the same. There is no evidence that she did. Nor did she notify counsel of the second motion for default judgment. Therefore, we cannot find that the trial court abused its discretion in finding no excusable neglect and in denying the motion for relief.

{¶ 10} Because we find no error with regard to the trial court's finding of no excusable neglect, it is not necessary to address the trial court's findings regarding the first prong of the *GTE* test and meritorious defenses.

{¶ 11} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶ 12} In her second assignment of error, appellant asserts that the trial court erred by failing to conduct a hearing on her motion for relief. "[I]f the Civ.R. 60(B) motion contains allegations of operative facts which would warrant relief from judgment, the trial court should grant a hearing to take evidence to verify those facts before it rules on the motion." *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151 (1996). "Conversely, an evidentiary hearing is not required where the motion and attached evidentiary material do not contain allegations of operative facts which would warrant relief under Civ.R. 60(B)." *Id.* As explained above, appellant's motion failed to allege sufficient operative facts to warrant relief under Civ.R. 60(B). Because the motion lacked allegations of sufficient operative facts, the trial court did not abuse its discretion by denying appellant's motion for relief without conducting a hearing.

{¶ 13} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶ 14} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT, P.J., and CONNOR, J., concur.
