

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

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| HPSC, INC., | : | OPINION |
| Plaintiff-Appellant, | : | |
| - vs - | : | CASE NO. 2009-L-176 |
| ESTATE OF RICARDO SCARSO, et al., | : | |
| Defendants-Appellees. | : | |

Civil Appeal from the Court of Common Pleas, Case No. 09 CV 000490.

Judgment: Affirmed.

Dale D. Cook and Mark J. Sheriff, Wiles, Boyle, Burkholder & Bringardner Co., L.P.A., 300 Spruce Street, 1st Floor, Columbus, OH 43215-1173 (For Plaintiff-Appellant).

Thomas J. Sacerich, Sacerich, O’Leary & Field, 8302 Yellowbrick Road, Mentor, OH 44060-4960 (For Defendants-Appellees).

TIMOTHY P. CANNON, J.

{¶1} Appellant, HPSC, Inc., appeals from the November 24, 2009 judgment entry of the Lake County Court of Common Pleas, denying its Civ.R. 60(B) motion to vacate the trial court’s June 23, 2009 judgment which granted judgment in appellant’s favor in the amount of zero dollars in damages.

{¶2} A corporation named Rinardo Scarso D.D.S., Inc. was dissolved on October 2, 2002. On March 4, 2003, appellant entered into a financing agreement with

Dr. Scarso for the purchase of dental x-ray equipment. Dr. Scarso died on January 23, 2007. Upon his death, an estate was not opened.

{¶3} On February 17, 2009, appellant filed a complaint against appellees, Estate of Ricardo Scarso and Rinardo Scarso D.D.S., Inc., demanding judgment in the amount of \$26,990.67 plus costs and interest at the rate of six percent from March 4, 2003.¹ Appellees did not file an answer, and no action was taken by appellant. Thus, on April 8, 2009, the trial court filed a notice of intent to dismiss for want of prosecution pursuant to Civ.R. 41, unless further action would be taken. On April 29, 2009, appellant filed a motion for an extension of time to respond to the trial court's notice, which was granted the following day.

{¶4} On May 29, 2009, appellant filed a motion for default judgment against appellees, which was granted by the trial court pursuant to Civ.R. 55(A) on June 4, 2009. On June 9, 2009, Phyllis Scarso, widow and sole heir of Dr. Scarso, filed an amicus brief in opposition to appellant's motion for default judgment and a request for relief from the trial court's June 4, 2009 judgment. A hearing on the issue of damages was held on June 18, 2009.² Pursuant to its June 23, 2009 judgment entry, the trial court rendered judgment in favor of appellant in the amount of zero dollars because appellant failed to provide evidence of damages. On June 29, 2009, appellant filed a motion for reconsideration of the June 23, 2009 entry, which was denied by the trial court on July 7, 2009.

1. We note that there appears to be a misspelling, as Dr. Scarso's first name is Rinardo, not Ricardo as indicated in the complaint, i.e., "Estate of Ricardo Scarso."

2. Due to an alleged failure to calendar the hearing date, appellant and appellant's counsel were not present.

{¶5} On September 4, 2009, appellant filed a notice of appeal, case No. 2009-L-110, from the trial court's June 23, 2009 and July 7, 2009 judgment entries. This court sua sponte dismissed that appeal for lack of a final, appealable order and untimeliness. *HPSC, Inc. v. Estate of Scarso*, 11th Dist. No. 2009-L-110, 2009-Ohio-6032.³

{¶6} While that appeal was pending, on September 30, 2009, appellant filed a motion to vacate the June 23, 2009 judgment pursuant to Civ.R. 60(B)(1) and (5).

{¶7} Pursuant to its November 24, 2009 judgment entry, the trial court denied appellant's motion to vacate the June 23, 2009 judgment, which granted judgment in appellant's favor in the amount of zero dollars in damages. It is from that judgment that appellant filed the present appeal, asserting the following assignments of error for our review:⁴

{¶8} “[1.] The trial court abused its discretion in denying HPSC's unopposed 60(B) motion without holding an evidentiary hearing.

{¶9} “[2.] The trial court abused its discretion in overruling HPSC's unopposed 60(B) motion.”

{¶10} In its first assignment of error, appellant argues that the trial court abused its discretion by denying its unopposed Civ.R. 60(B) motion without holding an evidentiary hearing.

3. On November 25, 2009, appellant filed an App.R. 26 motion for reconsideration with this court, which was overruled on January 8, 2010. Appellant also filed a discretionary appeal with the Supreme Court of Ohio; the Court did not accept the appeal for review. *HPSC, Inc. v. Estate of Scarso*, 124 Ohio St.3d 1509, 2010-Ohio-799.

4. On March 18, 2010, Mrs. Scarso, by and through her attorney, filed a motion with this court for leave pursuant to App.R. 17 to file an amicus curiae brief along with a brief in support of her motion. Appellant did not file a response. This court granted Mrs. Scarso's motion on April 23, 2010, and she filed her amicus brief on May 13, 2010.

{¶11} In its second assignment of error, appellant contends that the trial court abused its discretion by overruling its unopposed Civ.R. 60(B) motion.

{¶12} Because appellant's assignments of error are interrelated, and for ease of discussion, we will address them together.

{¶13} The decision to grant or deny a Civ.R. 60(B) motion is entrusted to the sound discretion of the trial court. *In re Whitman* (1998), 81 Ohio St.3d 239, 242, citing *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. We review a trial court's decision whether to grant or deny a Civ.R. 60(B) motion for relief from judgment for abuse of discretion. *Ludlow v. Ludlow*, 11th Dist. No. 2006-G-2686, 2006-Ohio-6864, at ¶24. An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶14} Relief from judgment may be granted pursuant to Civ.R. 60(B), which states, in part:

{¶15} "On 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 (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."

{¶16} Regarding the moving party's obligations for a Civ.R. 60(B) motion, the Supreme Court of Ohio has held:

{¶17} "To 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 Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus.

{¶18} "Where the movant alleges inadvertence and excusable neglect as grounds for relief from judgment under Civ.R. 60(B)(1), but does not set forth any operative facts to assist the trial court in determining whether such grounds exist, the court does not abuse its discretion in denying the motion for relief from judgment." *QualChoice, Inc. v. Brennan*, 11th Dist. No. 2008-L-143, 2009-Ohio-2533, at ¶13, quoting *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, at syllabus.

{¶19} "As stated in Civ.R. 60(B)(5), relief is to be granted for 'any other reason justifying relief from the judgment.' Civ.R. 60(B)(5) is a catch-all provision, which reflects 'the inherent power of a court to relieve a person of the unjust operation of a judgment.'" *Collins Financial Serv. v. Murray*, 11th Dist. No. 2008-P-0095, 2009-Ohio-4619, at ¶24, quoting *Smith v. Smith*, 8th Dist. No. 83275, 2004-Ohio-5589, at ¶16.

{¶20} "The trial court's failure to hold a hearing [on a Civ.R. 60(B) motion] *** does not rise to the level of an abuse of discretion. To require such a hearing *** 'would not further the interests of justice, implement speedy litigation or encourage the decision of cases on the merits.' *Doddridge v. Fitzpatrick* (1978), 53 Ohio St.2d 9, 14, ***.

Additionally, the Civil Rules do not require the trial court to hold a hearing before its granting or dismissing of a Civ.R. 60(B) motion. *Adomeit v. Baltimore* [(1974)], 39 Ohio App.2d [97,] at 103.” *Murray*, supra, at ¶29. (Parallel citation omitted.)

{¶21} In the case at bar, there does not appear to be a meritorious claim on the face of appellant’s Civ.R. 60(B) motion, and there are no supporting affidavits attached to that motion. We note, however, that appellant did attach an affidavit to its June 26, 2009 memorandum contra to Mrs. Scarso’s amicus brief in opposition to appellant’s motion for default judgment. That affidavit, dated June 23, 2009, was from Stuart P. Brenner, an agent of SKO Brennen, a successor to appellant. In Mr. Brenner’s affidavit, he states that appellant “has billed [appellees] for amounts due and owing on a monthly basis *** subsequent to the death of Dr. Rinardo Scarso.”

{¶22} The record before us does not reveal that any assignment of interest was ever filed. Pursuant to Mr. Brenner’s affidavit, the real party in interest does not appear to be appellant, but rather SKO Brennen. If that is in fact the case, then appellant would not be the real party in interest. On the other hand, if the affidavit is improper, then there is no meritorious claim which would support the granting of a Civ.R. 60(B) motion.

{¶23} In addition, we again note that a corporation named Rinardo Scarso D.D.S., Inc. was dissolved on October 2, 2002. On March 4, 2003, appellant entered into a financing agreement with Dr. Scarso only for the purchase of dental x-ray equipment. Thus, Rinardo Scarso D.D.S., Inc. did not exist on March 4, 2003, the day the contract was entered into between appellant and Dr. Scarso. However, on February 17, 2009, appellant filed a complaint against appellees, Estate of “Ricardo” Scarso and Rinardo Scarso D.D.S., Inc., demanding judgment in the amount of \$26,990.67 plus costs and interest at the rate of six percent from March 4, 2003. Again, upon Dr.

Scarso's death, an estate was not opened. The presentation of claims against a decedent's estate is governed by R.C. Chapter 2117. It does not appear, based on the record before us, that appellant took any of the necessary steps required to pursue this claim properly against a duly-appointed executor or administrator.

{¶24} Further, appellant's and/or appellant's counsel's failure to appear at the June 18, 2009 hearing and prove damages does not amount to excusable neglect, as "calendar-related errors are 'frequently met with disdain by reviewing courts (***)'." *ALRI, Inc. v. Martin*, 11th Dist. No. 2007-A-0055, 2008-Ohio-3986, at ¶28. (Citations omitted.)

{¶25} As appellant did not set forth specific allegations of operative facts that would warrant relief, the trial court did not err by failing to conduct a hearing on appellant's Civ.R. 60(B) motion. See *State v. Jackson*, 11th Dist. No. 2008-T-0024, 2010-Ohio-1270, at ¶42. We determine that the trial court did not abuse its discretion in denying appellant's Civ.R. 60(B) motion to vacate the trial court's June 23, 2009 judgment.

{¶26} Appellant's first and second assignments of error are without merit.

{¶27} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDALL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.