

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

|                                      |   |                         |
|--------------------------------------|---|-------------------------|
| Social Psychological Services, Inc., | : |                         |
| Plaintiff-Appellant,                 | : | No. 10AP-326            |
| v.                                   | : | (C.P.C. No. 08CV-14622) |
| Magellan Behavioral Health, Inc.,    | : | (ACCELERATED CALENDAR)  |
| Defendant-Appellee.                  | : |                         |

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D E C I S I O N

Rendered on December 30, 2010

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*Duncan Law Firm, LLC, and Brian K. Duncan, for appellant.*

*Dinsmore & Shohl, LLP, Charles H. Brown, III, and Jennifer O. Mitchell, for appellee.*

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by plaintiff-appellant, Social Psychological Services, Inc., from a decision and entry of the Franklin County Court of Common Pleas denying appellant's motion for relief from judgment.

{¶2} On October 14, 2008, appellant filed a complaint against defendant-appellee, Magellan Behavioral Health, Inc., alleging that appellee had failed to reimburse appellant for certain mental and behavioral health services to patients under a provider agreement. Appellant asserted causes of action for breach of contract, breach of implied

covenant of good faith, quantum meruit, promissory estoppel, and violations of R.C. 1753.07(A) and (B).

{¶3} On November 14, 2008, appellee filed an answer. Appellee subsequently filed a motion to amend its answer to include a counterclaim, which the trial court granted. On July 20, 2009, appellee filed a motion for summary judgment, asserting that (1) the psychology services provided by appellant were not covered under Ohio Medicaid law, and that (2) appellant failed to obtain prior authorization as required under its provider agreement with appellee. Attached to the motion was the affidavit of Stephen R. Shirey. On August 17, 2009, appellant filed a memorandum in opposition to appellee's motion for summary judgment.

{¶4} On August 24, 2009, the trial court filed an entry granting appellee's motion for summary judgment as to appellant's claims, finding that "[a]fter consideration of said Motion, including the attached Affidavit of Stephen Shirey and the agreement attached to Plaintiff's Complaint, and the fact that Plaintiff submitted no opposition thereto, Defendant's Motion is found to be well-taken." The court's entry further noted that appellee's counterclaim remained pending.

{¶5} On August 27, 2009, appellee filed a reply in support of its motion for summary judgment. While noting that the trial court had granted its motion for summary judgment, appellee addressed arguments raised in appellant's memorandum in opposition to the motion for summary judgment, citing "an overabundance of caution, and without acquiescing to the late filing of Plaintiff's opposition \* \* \* [s]hould the Court decide to revisit its Order."

{¶6} On October 14, 2009, the parties filed an agreed order/entry dismissing appellee's counterclaim without prejudice. That entry provided in part:

This matter is before the Court at the request of Plaintiff \* \* \* and Defendant \* \* \* for an entry of dismissal without prejudice of Defendant's counterclaim against Plaintiff under Civil Rule 41(A)(2). The Court finds the request well taken \* \* \*. The Court's Order/Entry of August 24, 2009 granting Defendant's motion for summary judgment is now a final and appealable order.

{¶7} On January 20, 2010, appellant filed a motion for relief from judgment pursuant to Civ.R. 60(B). In its memorandum in support, appellant argued that its failure to file a response to appellee's motion for summary judgment within 14 days was due to an "inadvertent calendaring mistake" by counsel, resulting in counsel believing that the due date for a responsive filing was August 18, 2009. Attached to the motion was the affidavit of appellant's counsel, as well as the affidavit of George Serednesky.

{¶8} On February 1, 2010, appellee filed a memorandum in opposition to appellant's motion for relief from judgment. On March 10, 2010, the trial court filed a decision denying appellant's motion for relief from judgment. The decision of the trial court was journalized by entry filed March 23, 2010.

{¶9} On appeal, appellant sets forth the following two assignments of error for this court's review:

First Assignment of Error

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT UNDER CIV.R. 60(B) WHERE APPELLANT PRESENTED AFFIDAVIT EVIDENCE TO SHOW EXCUSABLE NEGLECT IN NOT FILING A TIMELY WRITTEN RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT, AND/OR IN FAILING TO CONSIDER THE

REMEDIAL NATURE OF CIV.R. 60(B) AND THE LONG-STANDING POLICY OF RESOLVING CASES ON THE MERITS, RATHER THAN PROCEDURAL DEFECTS.

Second Assignment of Error

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO AFFORD APPELLANT THE OPPORTUNITY TO PRESENT EVIDENCE IN SUPPORT OF ITS MOTION FOR RELIEF FROM JUDGMENT UNDER CIV.R. 60(B).

{¶10} Appellant's assignments of error are interrelated and will be considered together. Under these assignments of error, appellant argues that the trial court abused its discretion in denying its motion for relief from judgment and in failing to afford it a hearing in order to present evidence in support of the motion.

{¶11} Civ.R. 60(B) states in relevant part:

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; \* \* \* or (5) any other reason justifying relief from the judgment. The motion shall 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. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

{¶12} In order to prevail on a Civ.R. 60(B) motion, the movant must demonstrate (1) a meritorious defense or claim to present if relief is granted; (2) entitlement to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) a timely motion, i.e., "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.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. The *GTE* requirements "are independent and

in the conjunctive," and thus "the test is not fulfilled if any one of the requirements is not met." *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 1994-Ohio-107. An appellate court reviews a trial court's decision on a Civ.R. 60(B) motion under an abuse of discretion standard. *Id.*

{¶13} In the present case, the trial court denied appellant's Civ.R. 60(B) motion on the grounds that (1) appellant failed to show that its motion was filed within a reasonable time, and (2) that counsel's decision to sign the October 14, 2009 agreed entry, dismissing appellee's counterclaim and declaring the August 24, 2009 entry granting appellee's motion for summary judgment to be a final appealable order, was not an "inadvertent mistake" under Civ.R. 60(B)(1). With respect to the issue of timeliness, the trial court noted:

The summary-judgment entry was filed August 24, 2009. Even if the time period is calculated from the time the agreed order/entry was filed October 14, plaintiff did not file its Rule 60(B) motion until January 20, 2010—more than three months later—and plaintiff has failed to give any reason for not seeking relief from judgment sooner. As such, plaintiff has failed to show that its motion for relief from judgment was filed within a "reasonable time."

{¶14} As to the remaining basis for the trial court's denial, the court noted that, although appellant's counsel argued that he missed the deadline for filing the memorandum contra appellee's motion for summary judgment due to an "inadvertent calendaring mistake," counsel's agreement to sign the October 14, 2009 agreed entry "was not such an inadvertent mistake." The court further found that appellant "provides no explanation" as to why the agreed order/entry should be deemed an inadvertent mistake.

{¶15} On appeal, appellant similarly argues that its counsel failed to file a timely memorandum in opposition to summary judgment based upon a calendaring error. Appellant further argues that its counsel "probably committed further excusable neglect by executing the subsequent 'agreed' Judgment Entry."

{¶16} In denying appellant's motion for relief from judgment, the trial court focused upon the latter decision by counsel (i.e., signing the agreed judgment entry) in finding that counsel's conduct was intentional and not the result of excusable neglect. We agree with the trial court that the decision by appellant's counsel to sign the agreed entry, dismissing without prejudice appellee's counterclaim and declaring that the court's earlier grant of summary judgment in favor of appellee "is now a final and appealable order," was an intentional, affirmative act which does not constitute excusable neglect under Civ.R. 60(B)(1). See *Len-Ran, Inc. v. Erie Ins. Group*, 11th Dist. No. 2006-P-0025, 2007-Ohio-4763, ¶30 ("[t]ypically, 'excusable neglect' results from counsel's omission to do an act, whereas here the notice of dismissal was an affirmative act of preparing a pleading that counsel presumably read before filing it with the trial court"). See also *Moses v. ER Solutions* (N.D.Okla.2009), No. 09-CV-439-GKF-FHM ("plaintiff's decision to dismiss his claims without prejudice was a voluntary, affirmative tactical decision which does not rise to the level of 'mistake, inadvertence, surprise, or excusable neglect' warranting relief under Rule 60(b)(1)"). We further note that no appeal was filed from that entry; rather, appellant waited several more months prior to filing a motion for relief from judgment. Under the circumstances of this case, the trial court did not abuse its discretion in denying appellant's motion for relief from judgment on the basis that appellant failed to show a right to relief under Civ.R. 60(B)(1).

{¶17} Appellant's contention that it was also entitled to relief under Civ.R. 60(B)(5) is not persuasive. Under Ohio law, "Civ.R. 60(B)(5) applies only when a more specific provision does not apply." *Strack* at 174, citing *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, 66. Further, Civ.R. 60(B)(5) is only to be utilized "in an extraordinary and unusual case when the interests of justice warrants it." *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 105. Here, appellant's proffered reason in its motion for relief was an "inadvertent calendaring mistake" which, appellant asserted, constituted "excusable neglect." Because appellant's request for relief fell under one of the more specific provisions of the rule, i.e., Civ.R. 60(B)(1), the trial court did not err in failing to grant relief under Civ.R. 60(B)(5).

{¶18} Finally, we find no merit to appellant's contention that it was entitled to a hearing on its Civ.R. 60(B) motion. In order to be entitled to a hearing on a motion for relief from judgment, a movant "must demonstrate why he is entitled to a hearing on the motion, and must allege operative facts which would warrant relief under Civ.R. 60(B)." *Cunningham v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-330, 2008-Ohio-6911, ¶37. In the instant case, appellant did not set forth operative facts demonstrating excusable neglect, and thus the trial court did not abuse its discretion in denying appellant's Civ.R. 60(B) motion without holding an evidentiary hearing. *Id.* See also *Columbus v. Triplett* (Nov. 16, 2000), 10th Dist. No. 00AP-339 ("because appellant has failed to allege operative facts demonstrating excusable neglect, the trial court did not abuse its discretion in overruling appellant's Civ.R. 60(B) motion without a hearing").

{¶19} Based upon the foregoing, appellant's first and second assignments of error are without merit and are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

*Judgment affirmed.*

TYACK, P.J., and KLATT, J., concur.

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