

[Cite as *TPI Asset Mgt., L.L.C. v. Benjamin*, 2011-Ohio-6389.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

TPI Asset Management, LLC,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-334 (M.C. No. 2009CVF-19469)
Maryse Benjamin,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 13, 2011

Bryan B. Johnson, for appellee.

The Legal Aid Society of Columbus, and *Jacqueline Gutter*,
for appellant.

APPEAL from the Franklin County Municipal Court.

SADLER, J.

{¶1} Appellant, Maryse Benjamin, appeals from a judgment of the Franklin County Municipal Court denying her motion for relief from judgment filed pursuant to Civ.R. 60(B). For the following reasons, we affirm.

{¶2} On May 6, 2009, appellee, TPI Asset Management, LLC, filed a complaint against appellant in Franklin County Municipal Court, case No. 2009 CVF 019469,

seeking damages based on appellant's alleged default on a credit card account. Service of the complaint was perfected by certified mail on May 9, 2009.

{¶3} Because appellant failed to answer or otherwise respond to the complaint within the permitted time, appellee moved for default judgment pursuant to Civ.R. 55(A) on June 26, 2009. The trial court granted appellee's motion on June 30, 2009 and ordered default judgment against her in the amount of \$13,263.74, plus costs and interest.

{¶4} Appellee's counsel mailed a letter to appellant on July 13, 2009, informing her of the default judgment and advising her that appellee was seeking a judgment lien against her real estate. (Plaintiff's Exhibit B-1.) The letter also presented appellant a settlement offer and provided her until July 24, 2009 to accept the offer.

{¶5} Appellant never responded to the settlement offer, and, on March 3, 2010, appellee filed an action to foreclose its judgment lien in the Franklin County Court of Common Pleas, case No. 10CV-3145. Appellant did not timely answer or respond to the complaint; however, on September 28, 2010, an attorney contacted appellee's counsel on appellant's behalf to request an extension of time to file an answer in the foreclosure case. Appellee's counsel agreed via email that same day. Although appellant requested the extension through an attorney, she filed the answer acting pro se on October 7, 2010.

{¶6} On January 21, 2011, appellant, through a different attorney, moved for relief from the default judgment entered against her in the municipal court case pursuant to Civ.R. 60(B). Appellant requested relief under the "any other reason" provision in

Civ.R. 60(B)(5), claiming that she was unable to timely respond to the complaint due to various health problems. In an accompanying affidavit, appellant averred that she had very little recollection of the facts surrounding the credit card, did not recall receiving notice of the judgment, and would never purposefully ignore a lawsuit. Also attached to the motion was an affidavit from appellant's daughter, Joan Benjamin, who had resided with appellant for three years. Joan averred that her mother had various physical ailments and that her mother "is elderly and has some difficulty remembering everything she receives."

{¶7} The trial court overruled appellant's motion for relief from judgment on March 8, 2011. In its entry, the trial court determined that appellant failed to satisfy any of the three requirements for relief from judgment as set forth in *GTE Automatic Elec. v. ARC Industries* (1976), 47 Ohio St.2d 146.

{¶8} Appellant now appeals from the trial court's decision, presenting the following assignment of error for our consideration:

THE TRIAL COURT ABUSED ITS DISCRETION BY NOT GRANTING MS. BENJAMIN'S 60(B) MOTION TO VACATE THE DEFAULT JUDGMENT GRANTED ON JUNE 30, 2009.

{¶9} In her sole assignment of error, appellant argues that the trial court abused its discretion by denying her motion for relief from judgment pursuant to Civ.R. 60(B). We disagree.

{¶10} Civ.R. 60(B) provides that a trial court may relieve a party 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.

The rule requires the motion to 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." *Id.*

{¶11} "A motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion." *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. "The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157. When applying an abuse-of-discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶12} To prevail under Civ.R. 60(B), the movant must show that: (1) the movant has a meritorious defense or claim to present if relief is granted; (2) the movant 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. *GTE* at paragraph two of the syllabus. The movant must satisfy all three of these requirements to obtain relief. *State ex rel.*

Richard v. Seidner, 76 Ohio St.3d 149, 151, 1996-Ohio-54; see also *GTE* at 151 (finding that the requirements under Civ.R. 60(B) "are independent and in the conjunctive, not the disjunctive").

{¶13} In this case, appellant sought relief under the "any other reason" provision in Civ.R. 60(B)(5); however, the trial court denied her motion on the grounds that she failed to satisfy any of the three requirements set forth in *GTE*. Specifically, the trial court found that appellant failed to (1) present a meritorious defense; (2) satisfy any of the grounds for relief in Civ.R. 60(B)(1) through (5); and (3) file the motion within a reasonable time. Because any one of these reasons would justify the denial of appellant's motion, we will address the trial court's timeliness determination, which we find to be dispositive. *Herlihy Moving & Storage, Inc. v. Nickison*, 10th Dist. No. 09AP-831, 2010-Ohio-6525, ¶13.

{¶14} Although motions for relief under Civ.R. 60(B)(5) are not governed by a fixed time limit, they must still be brought within a reasonable time after entry of judgment. Civ.R. 60(B). Whether a Civ.R. 60(B) motion is filed within a reasonable time depends on the facts and circumstances of the particular case. *Herlihy* at ¶14, citing *Scotland Yard Condominium Assn. v. Spencer*, 10th Dist. No. 05AP-1046, 2007-Ohio-1239, ¶33. The movant bears the burden of submitting factual material that demonstrates the timeliness of the motion. *Herlihy* at ¶14, citing *State ex rel. Minnis v. Lewis* (Dec. 30, 1993), 10th Dist. No. 93AP-812, citing *Youssefi v. Youssefi* (1991), 81 Ohio App.3d 49, 53.

{¶15} A motion to vacate a default judgment, which is filed nearly seven months after actual notice of the action and more than four months after default judgment was

entered, does not, on its face, satisfy the reasonable time requirement; in the absence of any evidence explaining the delay, the movant has failed to demonstrate the timeliness of the motion. *Mt. Olive Baptist Church v. Pipkins Paints & Home Improvement Ctr., Inc.* (1979), 64 Ohio App.2d 285, paragraph two of the syllabus. "In other words, an unexplained or unjustified delay in making the motion after discovering a ground for relief may put the motion beyond the pale of a reasonable time." *Herlihy* at ¶15 (citations omitted).

{¶16} Here, appellant moved for relief from judgment on January 21, 2011—over 16 months after the entry of judgment and over 20 months after she was served with the complaint. During the time between the entry of judgment and the filing of appellant's Civ.R. 60(B) motion, appellee mailed appellant a settlement offer and served her with a complaint in the related foreclosure action. Though appellant does not acknowledge receipt of either document, it is undisputed that she consulted an attorney about the foreclosure action by no later than September 28, 2010, when her first attorney contacted appellee's counsel to request an extension of time to file an answer in the foreclosure suit. Appellant's attorney never filed an appearance in the foreclosure action; however, appellant filed a detailed answer in that case on October 7, 2010, asserting affirmative defenses and a cross-claim. These facts indicate that appellant was aware of the action and actively participated in the related foreclosure suit at least four months before she contacted the second attorney and moved for relief under Civ.R. 60(B).

{¶17} Notwithstanding the above, appellant argues that the over-16-month delay was reasonable given the significant health issues described in the affidavits

accompanying her motion. While this court does not doubt the gravity of those health problems, it is unclear how they prevented appellant from seeking relief from judgment in this case while allowing her to participate in the foreclosure litigation months earlier. Appellant did not specify when she learned of the default judgment or discovered a ground for relief—in fact, she denied having any knowledge of the default-judgment entry and merely stated that she would never purposely ignore a lawsuit. While her daughter averred that appellant "has some difficulty remembering everything she receives", appellant presented nothing to show exactly when appellant learned of the lawsuit or default judgment entered against her. (Appellant's 60(B) Motion for Relief from Judgment, Exhibit B.) Under these circumstances, we find that the trial court did not abuse its discretion in finding that appellant failed to prove that her motion was filed within a reasonable time.

{¶18} Because we find no abuse of discretion in the trial court's timeliness determination, we need not address appellant's arguments that the trial court erred in finding that she failed to present a meritorious defense and that she did not establish relief under the "any other reason" provision in Civ.R. 60(B)(5). See *Herlihy* at ¶19. Accordingly, appellant's assignment of error is overruled.

{¶19} We now turn to appellee's motion to strike legal arguments contained in appellant's brief. Appellee argues that one of the arguments used to support appellant's meritorious-defense claim was not raised below and that this court should strike and disregard that argument. However, we need not determine this issue because, as explained above, our resolution of the timeliness requirement renders the meritorious-defense issue moot. Accordingly, appellee's motion is denied.

{¶20} Having overruled appellant's sole assignment of error, we affirm the judgment of the Franklin County Municipal Court.

*Motion to strike denied;
judgment affirmed.*

BRYANT, P.J., and KLATT, J., concur.
