

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

LNV CORPORATION,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-10-190
- vs -	:	<u>OPINION</u>
	:	4/30/2012
MARTIN R. EDGAR, JR.,	:	
Defendant-Appellant.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
Case No. CV2009-06-2518

Lynn A. Busch-Heyman, P.O. Box 165028, Columbus, Ohio 43216, for plaintiff-appellee  
Martin R. Edgar, Jr., 3187 Radabaugh Road, Trenton, Ohio 45067, defendant-appellant, pro se

**HENDRICKSON, P.J.**

{¶ 1} Defendant-appellant, Martin Edgar, appeals a decision of the Butler County Court of Common Pleas granting plaintiff-appellee, LNV Corporation, relief from judgment under Civ.R. 60(B).<sup>1</sup>

{¶ 2} On June 5, 2009, LNV filed a complaint in foreclosure against Edgar, alleging

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1. Pursuant to Loc.R. 6(A), we have sua sponte removed this case from the accelerated calendar.

that he was in default on a note secured by a mortgage on property located at 3187 Radabaugh Road, Trenton, Ohio 45067. LNV sought judgment for the full balance of \$140,164.06 due on the note, plus interest and unpaid advances. Edgar answered on August 6, 2009, and denied all liability to LNV. A one-day bench trial was scheduled for April 30, 2010.

{¶ 3} One day before trial, the parties reached a settlement agreement wherein Edgar would execute a deed in lieu of foreclosure, and in exchange, LNV would release Edgar from personal liability on the note. On May 6, 2010, the trial court filed a settlement entry, dismissing the foreclosure action with prejudice. However, the entry provided that either party could request further court action if the settlement was not consummated within 60 days.

{¶ 4} Pursuant to their agreement, LNV sent Edgar the settlement documents, but Edgar failed to return them as requested. LNV subsequently attempted to contact Edgar by telephone, but Edgar did not return messages left for him, even though he continued to occupy the property. On September 15, 2011, after 16 months of failed communications, LNV moved for relief from the settlement entry. On September 26, 2011, the trial court granted LNV's motion and modified the May 6, 2010 order so that the dismissal was without prejudice.

{¶ 5} However, on October 3, 2011, Edgar filed his memorandum in opposition to LNV's motion for relief. In an entry dated October 11, 2011, the trial court stated it had considered Edgar's arguments, but chose to affirm its decision granting relief to LNV.

{¶ 6} Edgar timely appeals pro se, raising three assignments of error for review.

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT ERRED BY DENYING APPELLANT REASONABLE [sic] TIME TO RESPOND AND FILE HIS MEMORANDUM IN OPPOSITION[.]

{¶ 9} In his first assignment of error, Edgar argues the trial court erred by granting LNV's Civ.R. 60(B) motion before his time to file a response had lapsed under the local rules of procedure. See Loc.R. 4.09(D).

{¶ 10} Edgar correctly notes that when he filed his response to LNV's motion on October 3, 2011, the trial court had already issued an order granting LNV relief from judgment. However, on October 11, 2011, the trial court issued a judgment entry in which it specifically stated it had considered Edgar's arguments, but chose to affirm its prior order.

{¶ 11} We fail to see how Edgar was prejudiced by these events, when the trial court clearly considered his timely filed memorandum in opposition prior to rendering its final decision on the matter. See Loc.R. 4.09(D). "It is an elementary proposition of law that an appellant, in order to secure reversal of a judgment against him, must not only show some error but must also show that that error was prejudicial to him." *Smith v. Flesher*, 12 Ohio St.2d 107, 110 (1967).

{¶ 12} Edgar's first assignment of error is overruled.

{¶ 13} Assignment of Error No. 2:

{¶ 14} THE TRIAL COURT ERRED BY GRANTING APELLEE'S [sic] MOTION FOR RELIEF FROM ORDER.

{¶ 15} Edgar next argues the trial court erred by granting LNV's Civ.R. 60(B) motion, as it was untimely filed.

{¶ 16} An appellate court will not disturb a trial court's decision regarding a Civ.R. 60(B) motion absent a showing of an abuse of discretion. *Bank of New York v. Blanton*, 12th Dist. No. CA2011-03-019, 2012-Ohio-1597, ¶ 12. An abuse of discretion occurs when the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 17} Civ.R. 60(B) provides in 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; (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.

{¶ 18} To prevail on a Civ.R. 60(B) motion, 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 Elec., Inc. v. ARC Indus., Inc.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. The moving party fails the *GTE* test by not meeting any one of the three requirements. *Blanton*, 2012-Ohio-1597 at ¶ 14.

{¶ 19} In granting LNV's motion for relief, the trial court found that the prospective application of the dismissal with prejudice was no longer equitable. See Civ.R. 60(B)(4). It also found that LNV's continued efforts to negotiate with Edgar, together with a dismissal with prejudice, was a "substantial and extraordinary reason for relief." See Civ.R. 60(B)(5). Lastly, the court found that in light of Edgar's refusal to consummate the settlement agreement, taken together with LNV's continued efforts to persuade Edgar to do so, 16 months was a reasonable time within which to file the motion.

{¶ 20} Upon review, we find the trial court did not abuse its discretion in granting LNV's motion for relief. First, LNV alleged operative facts demonstrating a "meritorious claim," in that if relief was granted, it could file a new foreclosure action to enforce its valid first lien on

the property. See *Fifth Third Bank v. Schoessler's Supply Room, L.L.C.*, 190 Ohio App.3d 1, 2010-Ohio-4074, ¶ 13 (12th Dist.). There does not appear to be a dispute as to this element of the *GTE* test.

{¶ 21} Secondly, the facts alleged in LNV's supporting affidavit were sufficient to justify relief under Civ.R. 60(B)(4), where it was no longer equitable that the with-prejudice dismissal should have prospective application. *Id.* Civ.R. 60(B)(4) "was designed to provide relief to those who have been prospectively subjected to circumstances which they had no opportunity to foresee or control." *Pumper v. Pumper*, 8th Dist. No. 93916, 2010-Ohio-4131, ¶ 15. Here, LNV had no opportunity to foresee or control Edgar's refusal to consummate what was previously a mutually agreed upon settlement offer. Further, due to Edgar's noncompliance, the with-prejudice dismissal effectively deprived LNV of any legal remedy to recover for Edgar's breach under the terms of the note and mortgage, all while LNV continued to incur damages, including property taxes, in order to maintain its priority lien status. Finally, there is nothing in the record to suggest that granting the relief sought would work a hardship upon any other person or create a significant problem with the administration of justice. *Wurzelbacher v. Kroeger*, 40 Ohio St.2d 90, 93 (1974). Under these circumstances, we cannot say the trial court abused its discretion in relying on the ramifications of Edgar's conduct as grounds to grant LNV relief under Civ.R. 60(B)(4).

{¶ 22} Lastly, we find LNV's motion was made within a reasonable time. See Civ.R. 60(B)(4). What constitutes a reasonable time depends on the particular facts of the case.

{¶ 23} In support of its motion, LNV provided an affidavit from Mary K. Przybyla, an authorized signor of LNV, who averred that Edgar had refused to communicate with LNV for over one year since the with-prejudice dismissal, despite LNV's numerous phone calls and messages for Edgar. The trial court found that in light of LNV's efforts and Edgar's refusal to cooperate, 16 months was a reasonable time within which to file the Civ.R. 60(B) motion.

{¶ 24} Edgar now argues that LNV did not, in fact, attempt to contact him over those 16 months, and that LNV was solely responsible for the delay in filing the motion. However, the trial court elected to believe LNV's sworn affidavit over Edgar's unsubstantiated claims. We find no abuse of discretion in this regard.

{¶ 25} Accordingly, we find the trial court did not abuse its discretion when it granted LNV's motion for relief from judgment pursuant to Civ.R. 60(B)(4).

{¶ 26} Edgar's second assignment of error is overruled.

{¶ 27} Assignment of Error No. 3:

{¶ 28} THE TRIAL COURT ERRED BY GRANTING APELLEE'S [sic] REQUEST TO MODIFY ORDER IN THEIR MOTION FOR RELIEF FROM ORDER.

{¶ 29} In his final assignment of error, Edgar argues LNV was not entitled to a modification of the May 6, 2010 order to a dismissal without prejudice. Edgar contends this was a matter that should have been raised in a direct appeal, rather than a Civ.R. 60(B) motion.

{¶ 30} It is well settled that a Civ.R. 60(B) motion for relief from judgment cannot be used as a substitute for a timely appeal. See *Key v. Mitchell*, 81 Ohio St.3d 89, 90-91 (1988). Any claims or arguments that could have been raised in a timely appeal are precluded from being raised in a subsequent Civ.R. 60(B) motion. *Id.* at 91.

{¶ 31} Edgar contends that LNV cannot use Civ.R. 60(B) to achieve relief that was available through a direct appeal of the May 6, 2010 order that dismissed the case with prejudice. Conversely, LNV argues that this issue could not have been raised in a timely direct appeal, as it did not become apparent that Edgar planned to renege on the settlement agreement until much later. We agree with LNV.

{¶ 32} On May 6, 2010, the trial court dismissed LNV's foreclosure action with prejudice, but provided that "any of the parties may, upon good cause shown, within sixty

days, request further Court action if settlement is not consummated." However, during the next 30 days when LNV could have timely appealed the order, neither party indicated that a breakdown in communication had occurred. See App.R. 4. Instead, the first signs of Edgar's uncooperativeness surfaced months later in October 2010, when he failed to return the settlement documents to LNV to complete the agreement.

{¶ 33} From this, it is clear that the basis for LNV's Civ.R. 60(B) motion, namely, Edgar's refusal to complete the settlement agreement, was not known at the time of the settlement entry, or even in the time for a direct appeal. Because LNV could not have raised this issue in a direct appeal, we find LNV properly raised it in a Civ.R. 60(B) motion.

{¶ 34} Having already found no abuse of discretion in the trial court's decision to grant LNV's motion for relief from judgment pursuant to Civ.R. 60(B)(4), we find LNV was entitled to modification of the order, as it was the specific relief sought.

{¶ 35} Edgar's third assignment of error is overruled.

{¶ 36} Judgment affirmed.

PIPER and HUTZEL, JJ., concur.