

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

JOHNNY L. SAVAGE	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23147
v.	:	T.C. NO. 07 CV 6820
	:	
DELAMORE ELIZABETH PLACE, L.P., et al.	:	(Civil appeal from Common Pleas Court)
	:	
Defendants-Appellants	:	

OPINION

Rendered on the 12th day of June, 2009.

CHRIST THEODOR, Atty. Reg. No. 0020042, 20 King Avenue, P. O. Box 610, Xenia, Ohio 45385

Attorney for Plaintiff-Appellee

CHARLES E. TICKNOR, III, Atty. Reg. No. 0042559, JENNIE K. FERGUSON, Atty. Reg. No. 0081086, and GREGORY P. MATHEWS, Atty. Reg. No. 0078276, 191 West Nationwide Blvd., Suite 300, Columbus, Ohio 43215

Attorneys for Defendants-Appellants

FROELICH, J.

{¶ 1} Delamore Elizabeth Place, LP, Delamore Elizabeth Place, LLC (a California corporation), and Delamore Elizabeth Place, LLC (a Delaware corporation) (collectively, “Delamore”) and its employees, Michael Conley, Willard Hall, and Steven Anderson

(collectively, “the security guards”), appeal from a judgment of the Montgomery County Court of Common Pleas, which granted Johnny L. Savage’s motion for relief from judgment, pursuant to Civ.R. 60(B). For the following reasons, the trial court’s judgment will be affirmed.

I

{¶ 2} According to Savage’s amended complaint, Savage is a disabled Vietnam veteran with post-traumatic stress disorder, for which he receives therapy provided by the Veterans Readjustment Counseling Center (“Vet Center”) on the sixth floor of the East Medical Plaza of One Elizabeth Place, located at 627 Edwin C. Moses Boulevard in Dayton, Ohio. One Elizabeth Place is owned, operated, and managed by Delamore. Delamore Elizabeth Place, LP, employs Conley, Hall, Anderson, and Craig Dowell as security guards for One Elizabeth Place.

{¶ 3} On July 17, 2007,¹ Savage’s therapist was called from the room where Savage and others were attending a group therapy session. Shortly thereafter, Conley, Hall, Anderson, and/or Dowell “rushed into the room in an aggressive, threatening and menacing manner,” threw Savage against the wall, and searched him, without permission. The security guards then searched the room and other participants in the group. Nothing illegal was located.

{¶ 4} After “being set upon” by the security guards, Savage began to suffer an emotional breakdown, and he pleaded to speak to his therapist. The security guards repeatedly refused him access to his therapist and prevented his therapist from assisting him.

{¶ 5} After the search, Savage was taken into custody and removed, against his will,

¹Although the amended complaint and Savage’s affidavit in support of his Civ.R. 60(B) motion state that the incident occurred on July 17, 2007, Delamore’s and the security guards’ evidence in support of their motion for summary judgment indicates that the incident took place on July 19, 2007.

from the Vet Center portion of the building. Conley, Hall, Anderson and Dowell “perp marched” him to an office in a separate facility, past members of the public and others present in the building. Once in the other facility, the security guards took Savage’s identification and photographed him, without his consent. Savage alleged that the security guards’ actions “severely, if not entirely, destroyed a lengthy course of therapy, resulting in heightened anxiety, nervousness, mental and emotional distress affecting [Savage] and his family.”

{¶ 6} In August 2007, Savage brought this lawsuit against Delamore and various John Does, alleging false arrest, false imprisonment, assault, and battery, and seeking compensatory damages, punitive damages and attorney fees. (Savage also sued Delamore Property Management, Inc., which was subsequently dismissed from the action.) In a March 2008 amended complaint, Savage named Hall, Conley, Anderson, and Dowell as the “John Doe” defendants.

{¶ 7} On September 12, 2008, Delamore, Hall, Conley and Anderson² moved for summary judgment on all of Savage’s claims. Delamore and its employees asserted that Savage had consented to the security guards’ requests to conduct a search of his person, to walk to the lobby of Elizabeth Place and file a report, and to produce his identification and have his photograph taken. They stated that Savage had not been arrested or confined, had not been “placed in fear for his life or subject to a willful threat or an attempt to harm,” and that their actions were justified. They supported their motion with affidavits, photographs, and Savage’s

²At this juncture, Dowell was no longer represented by Attorneys Charles Ticknor, Jennie Ferguson, and David Abromowitz (formerly of Buckingham, Doolittle & Burroughs, LLP, and currently with Dinsmore & Shohl, LLP), who remained counsel for Delamore, Conley, Hall, and Anderson. Accordingly, Dowell was not a party to the motion for summary judgment, and he is not a party to this appeal.

victim's report, in which Savage had stated that the security guards had acted professionally and courteously.³ The certificate of service stated that Savage was served with the motion by regular mail on September 11, 2008.

{¶ 8} Savage's responsive memorandum was due fourteen days from the filing of the motion, i.e., September 26, 2008. However, Savage did not respond to the summary judgment motion. On October 10, 2008, the trial court granted the unopposed motion for summary judgment.

{¶ 9} On October 14, 2008, Savage moved for relief from judgment, pursuant to Civ.R. 60(B). He stated: "Counsel's office received a copy of Defendant's Motion for Summary Judgment on September 12, 2008. Counsel was on vacation and out of the State of Ohio during the first one-half of September, and was not in the office when the motion arrived. At some point after arrival, the motion was placed in the file and did not get responded to in a timely fashion. Counsel discovered the error on October 13, 2008, and immediately placed calls to Defense Counsel requesting an agreed extension for time to respond. On October 14, 2008, Counsel learned from the Court's Docket on the Internet that the Court had entered Judgment on October 10, 2008." Counsel argued that to deny Savage an opportunity to present his case due to a brief delay would be "harsh and not in the interests of justice." Counsel noted that

³The evidence included statements regarding Savage's prior behavior at the Vet Center. Patricia Crain, the office manager at the Vet Center, had reported to Conley, the Director of Security at One Elizabeth Place, that Savage had exhibited "bizarre behavior" and had a history of bringing weapons to the Vet Center. On July 5, 2007, Savage had brought a dead groundhog that he had shot, wrapped in a blanket, to show his therapist. On July 19, Crain informed Conley that Savage had brought a large knife to the premises and that he had previously brought a gun to the Vet Center in a black bag. The security guards entered Savage's therapist's office in response to Crain's report.

scheduled mediation and trial dates had not yet passed.

{¶ 10} Delamore, Hall, Conley, and Anderson opposed Savage's motion for relief from judgment. They argued that Savage's counsel had acknowledged during a September 18, 2008, mediation status call that he was aware of the summary judgment motion and would be filing a response. They asserted that Savage had failed to demonstrate both excusable neglect and that he had a meritorious claim if relief were granted.

{¶ 11} Savage replied that his failure to file his response to the summary judgment motion was due to excusable neglect. His counsel reiterated in an affidavit that he was on vacation during the first-half of September, and he returned on the day that a severe windstorm left many parts of Greene County, including his office, without power for several days. Counsel explained in an affidavit that the confluence of the power outage and "the crush that usually greets an attorney upon return from an absence" resulted in the motion being inadvertently placed in the file. Counsel stated that this was an isolated incident, which had not occurred in thirty years of practice and that it was unlikely to reoccur. Counsel was unable to confirm or deny that he had discussed the summary judgment motion during the September 18 status conference.

{¶ 12} Savage also asserted that he could demonstrate a meritorious claim, and he filed an affidavit, stating that he was falsely arrested without probable cause, falsely detained without his consent, and assaulted by Delamore's employees. Savage further averred that Delamore and its employees refused to allow him to speak with his therapist before, during, and after his removal from the therapy session, and that he has witnesses to substantiate the claims that he set forth in his complaint.

{¶ 13} The trial court granted Savage’s motion for relief from judgment on November 18, 2008. The court reasoned, in part:

{¶ 14} “First, the Plaintiff has demonstrated that it [sic] has a meritorious claim if relief is granted. The *Complaint* sets forth allegations of a meritorious claim. The Court is not persuaded by the Defendants’ argument that the Court considered the evidence and found Defendants were entitled to judgment. While the Court did grant summary judgment, this was only after viewing the Plaintiff’s [sic] *Motion for Summary Judgment* and attached evidence. The Court was never given an opportunity to view the Defendants’ [sic] arguments and evidence in opposition to the *Motion for Summary Judgment*, even though the Defendant [sic] was at fault in failing to file a timely response.

{¶ 15} “Second, Plaintiff has demonstrated that he acted with ‘excusable neglect’ in failing to respond to the *Motion for Summary Judgment*. The Court finds that Plaintiff’s counsel’s actions do not amount to ‘a complete disregard of the judicial system.’ The motion was mistakenly placed in the Plaintiff’s counsel’s file for this case either while he was on vacation or after a debilitating storm that left his office without power for three days. Moreover, the Court finds it very persuasive that Plaintiff’s counsel averred in his affidavit, ‘this is an isolated incident, as it is the first time that this has happened in thirty years of the practice of law’ and that he ‘has never been found by this Court or any other to have a “complete disregard for the judicial system.”’ *Theodor Affidavit* at ¶8.

{¶ 16} “Third, the Plaintiff’s Motion was filed within a reasonable time. The Court filed its *Entry Granting Summary Judgment* on October 10, 2008. The Plaintiff filed his *Motion for Relief from Judgment* on October 14, four days after the Court granted summary judgment.”

{¶ 17} Delamore and the security guards appeal from the granting of Savage’s motion for relief from judgment.

II

{¶ 18} In their sole assignment of error, Delamore and the security guards claim that the trial court erred in granting Savage’s Civ.R. 60(B) motion, because he did not present operative facts demonstrating that he had a meritorious claim and his failure to respond to their motion for summary judgment was not due to excusable neglect.

{¶ 19} Civ.R. 60(B) permits trial courts to relieve parties from a final judgment for the following reasons: (1) “mistake, inadvertence, surprise or excusable neglect;” (2) newly discovered evidence; (3) fraud, misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged; or (5) any other reason justifying relief from the judgment. Savage sought relief under Civ.R. 60(B)(1).

{¶ 20} 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), and (3) the motion is made within a reasonable time. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus. All of these requirements must be satisfied, and the motion should be denied if any one of the requirements is not met. *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 1994-Ohio-107; *Cincinnati Ins. Co. v. Schaub*, Montgomery App. No. 22419, 2008-Ohio-4729, at ¶15.

{¶ 21} We review the trial court’s determination of a Civ. R. 60(B) motion for an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion is ““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.

{¶ 22} First, Delamore and the security guards claim that Savage did not meet the requirement that he set forth a meritorious claim. They argue that the trial court abused its discretion in finding that Savage had satisfied his burden based on the fact that his complaint set forth allegations of a meritorious claim. They claim that Savage failed to identify those portions of the record that demonstrated that genuine issues of material fact remained regarding the essential elements of his claims, as required when the judgment to be vacated is based on a summary judgment motion to which Savage did not respond.

{¶ 23} In order to establish a meritorious claim or defense under Civ.R. 60(B), the movant is required to allege a meritorious claim or defense, not to prove that he will prevail on such claim or defense. See *State v. Yount*, 175 Ohio App.3d 733, 2008-Ohio-1155, at ¶10. "In order to satisfy that requirement[,] the motion and/or affidavit submitted in support of the motion must set out operative facts which, if true, constitute a prima facie showing of the claim or defense concerned. A prima facie showing is one which is '[s]ufficient to establish a fact or raise a presumption unless disapproved or rebutted.' Black's Law Dictionary." *Stewart v. Heard*, Montgomery App. No. 20787, 2005-Ohio-5241, at ¶24.

{¶ 24} Where the movant is seeking relief from the granting of a motion for summary judgment to which he did not respond, "the party seeking relief must show that it could make an adequate response, demonstrating the existence of a genuine issue of material fact, pursuant to *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264, if it had the opportunity to

respond.” *Dysert v. State Auto Mut. Ins. Co.* (Apr. 23, 1999), Miami App. No. 98-CA-46. See, also, *Schaub* at ¶46.

{¶ 25} In his reply memorandum in support of his motion for relief from judgment, Savage stated:

{¶ 26} “As to the first test, a party requesting relief must demonstrate that he has a meritorious claim to present, if relief is to be granted. The Complaint filed by Plaintiff on August 17, 2007, contains numerous claims as to the actions of the employees of Defendants Delamore. Plaintiff claimed that, while in a therapy session with his therapist at the Veterans Center in Dayton, Ohio, he was illegally searched and taken into custody by employees of Defendants Delamore. That he was taken into custody, denied the opportunity to speak to his therapist and paraded before the public in an embarrassing manner. All of these things were done without probable cause. Once taken into custody, he was photographed without his consent. These actions resulted in heightened anxiety, nervousness, mental and emotional distress, all for which he was being treated at the Vet Center. Plaintiff’s Affidavit attached hereto as Exhibit ‘2’ establishes these claims.”

{¶ 27} Savage’s attached affidavit consisted of nine paragraphs, which read:

{¶ 28} “1. That I am the Plaintiff in the above captioned case.

{¶ 29} “2. That I filed the Complaint in this case, based upon actions taken by the individual Defendants in this case in their employ for Defendants Delamore, on July 17, 2007, at the Veterans Re-adjustment Counseling Center in Dayton, Ohio.

{¶ 30} “3. I have alleged and continue to allege that I was illegally and inappropriately detained, without probable cause and publicly humiliated by Defendants in this case.

{¶ 31} “4. That the Defendants falsely arrested me without probable cause.

{¶ 32} “5. That the Defendants falsely imprisoned me detaining me without my consent.

{¶ 33} “6. That the individual Defendants as employees of Defendants Delamore assaulted me during the incident.

{¶ 34} “7. That I was in the process of receiving therapy at the time of the incident for mental and emotional psychiatric conditions, including posttraumatic stress disorder.

{¶ 35} “8. That the Defendants refused to allow me to speak to my therapist before, during and after they removed me from the therapy session.

{¶ 36} “9. That I have alleged these incidents in the Complaint and am prepared to go forward with witnesses substantiating these claims.”

{¶ 37} Although the statements in Savage’s affidavit are mostly conclusory, Savage verified the allegations in his complaint, which detailed that the security guards had entered the room, thrown Savage against a wall, and searched him, all without his consent. By adopting the allegations in his complaint, the affidavit further substantiated the allegations that the security guards had taken him into custody, although their search had revealed “nothing illegal.” Although Savage’s affidavit was self-serving and he did not provide the evidence of his supporting witnesses, Savage’s affidavit alone was sufficient evidence to establish that he could create genuine issues of material fact if permitted to respond to Delamore’s and its employees’ motion for summary judgment. Savage thus established, for the purposes of his Civ.R. 60(B) motion, that he had a meritorious claim if relief from judgment were granted.

{¶ 38} Second, Delamore and the security guards claim that the trial court abused its

discretion and erred in concluding that Savage's failure to file his responsive memorandum to the motion for summary judgment was due to excusable neglect. We disagree.

{¶ 39} “An act is one of ‘neglect’ when it constitutes an omission or failure to do a thing that can be done, but it may also import a failure of care or attention in the doing or omission of a given act. ‘Excusable neglect’ in the context of a Civ.R. 60(B)(1) motion generally means the failure to take the proper steps at the proper time, not in consequence of the party’s own carelessness, inattention, or willful disregard of the processes of the court, but in consequence of some unavoidable or unexpected hinderance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party.” *Griffin v. Dream House Mtge. Corp.*, Greene App. No. 08-CA-45, 2009-Ohio-2178, at ¶29, quoting *Federal Natl. Mtge. Assn. v. Banks* (Dec. 6, 1991), Montgomery App. No. 12692.

{¶ 40} Savage's counsel stated in his affidavit that he was out of the state between August 31, 2008, and September 14, 2008, and that the motion for summary judgment arrived at his office during that time. Upon his return to Ohio, a windstorm occurred that resulted in a three-day power outage in the City of Xenia and his office. Counsel indicated that the “crush” of work due to his two-week absence, coupled with the power outage, resulted in the summary judgment motion being inadvertently placed in the file. Counsel could not confirm or deny, based on his notes, whether the motion had been discussed during a September 18, 2008, status conference. Counsel indicated that “this is an isolated incident, as it is the first time that this has happened in 30 years of the practice of law and is unlikely to reoccur.” He further stated that he had never been found by any court to have “a complete disregard for the judicial system.” Based on these facts, the trial court could have reasonably concluded that counsel's failure to

file a responsive memorandum to the summary judgment motion was an unusual and isolated incident, which resulted from the unexpected confluence of counsel's return from his vacation and the multi-day power outage. The trial court did not abuse its discretion when it concluded that the failure to respond to the motion for summary judgment was due to excusable neglect.

{¶ 41} Delamore and its employees do not argue that Savage's Civ.R. 60(B) motion was untimely, and considering that the motion was filed four days after the granting of summary judgment,⁴ Savage has clearly satisfied the third requirement for relief from judgment.

{¶ 42} Upon review of the record, we are not persuaded that the trial court abused its discretion in granting Savage's Civ.R. 60(B) motion. The assignment of error is overruled.

III

{¶ 43} The judgment of the trial court will be affirmed.

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DONOVAN, P.J. and GRADY, J., concur.

Copies mailed to:

Christ Theodor
 Charles E. Ticknor, III
 Jennie K. Ferguson
 Gregory P. Mathews
 Hon. Dennis J. Langer

⁴In fact, Savage filed his Civ.R. 60(B) motion on the first day possible. The motion for summary judgment was granted on a Friday (the 10th), and the following Monday (the 13th, on which Savage's counsel had called opposing counsel to request an extension to respond to the summary judgment motion) was Columbus Day and the courts were closed.