

[Cite as *Rodgers v. Pahoundis*, 2009-Ohio-4468.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CYNTHIA M. RODGERS,
ADMINISTRATRIX OF THE ESTATE
JOHN DANIEL PAHOUNDIS, SR.

Plaintiff-Appellant

-vs-

GEORGE D. PAHOUNDIS, ET AL.

Defendants-Appellees

JUDGES:

Hon. Sheila G. Farmer, P.J.
Hon. Julie A. Edwards, J.
Hon. Patricia A. Delaney, J.

Case No. 08CA0018

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 05CI375

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

August 24, 2009

APPEARANCES:

For Plaintiff-Appellant

For Defendants-Appellees

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JAMES R. SKELTON
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Farmer, P.J.

{¶1} On July 24, 2003, John Pahoundis, Sr. died intestate. His daughter, appellant, Cynthia Rodgers, is the administratrix of his estate. On November 2, 2004, appellant filed an action in the Probate Division against appellees, her uncle George Pahoundis, Sr. and the Pahoundis Family Trust, seeking declaratory judgment and claiming unjust enrichment, constructive trust, resulting trust, breach of fiduciary duty, and adverse possession over a dispute involving an 80-acre tract of farmland.

{¶2} The action was subsequently transferred to the General Division. A bench trial commenced on November 28, 2006. By judgment entry filed February 8, 2007 and nunc pro tunc judgment entry filed February 22, 2007, the trial court found in favor of appellees and dismissed appellant's action. This court affirmed the decision. See, *Rodgers v. Pahoundis*, 178 Ohio App.3d 229, 2008-Ohio-4468.

{¶3} On February 7, 2008, appellant filed a motion for new trial. By judgment entry filed September 8, 2008, the trial court denied the motion.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE COSHOCTON COUNTY COMMON PLEAS COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT DETERMINED, AS A MATTER OF LAW, THAT NO HEARING WAS REQUIRED ON DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT FILED PURSUANT TO RULE 60 OF THE OHIO RULES OF CIVIL PROCEDURE. THERE IS NO EVIDENTIARY HEARING HELD ACCORDING TO THE RECORD."

II

{¶6} "THE COSHOCTON COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANTS IN THAT ITS DECISION IS UNREASONABLE, ARBITRARY, CAPRICIOUS, EXCEEDS ITS POWER, AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE. THERE IS NO EVIDENTIARY HEARING HELD ACCORDING TO THE RECORD. RODGERS AFFIDAVIT WAS CREDIBLE AND SUPPORTED BY CERTIFIED PUBLIC RECORDS AND AFFIDAVITS."

III

{¶7} "THE COSHOCTON COUNTY COURT OF COMMON PLEAS ERRED TO THE PREJUDICE OF APPELLANT IN THAT ITS DECISION IS AN ABUSE OF ITS DISCRETION. THERE IS NO EVIDENTIARY HEARING HELD ACCORDING TO THE RECORD AND ONE IS NEEDED TO DETERMINE IF THERE IS CAUSE FOR A NEW TRIAL."

I, II, III

{¶8} Appellant claims the trial court erred in not conducting a hearing and in denying her motion for relief from judgment filed pursuant to Civ.R. 60(B)(3). We disagree.

{¶9} A motion for relief from judgment under Civ.R. 60(B) lies in the trial court's sound discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶10} Appellant based her Civ.R. 60(B) motion on "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." Civ.R. 60(B)(3). In her motion filed February 7, 2008, appellant argued she was entitled to the requested relief because of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (B) which concerns fraud, misrepresentation and misconduct of a Defendant."

{¶11} In *GTE Automatic Electric Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus, the Supreme Court of Ohio held the following:

{¶12} "To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has 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."

{¶13} The standard for when an evidentiary hearing on a Civ.R. 60(B) motion is necessary is set forth in *Cogswell v. Cardio Clinic of Stark County, Inc.* (October 21, 1991), Stark App. No. CA-8553. In *Cogswell*, this court held under Civ.R. 60(B), a hearing is not required unless there exist issues supported by evidentiary quality affidavits. A trial court must hold an evidentiary hearing when the motion and supporting evidence contain sufficient allegations of operative facts which would support a meritorious defense to the judgment. *Cogswell; BancOhio National Bank v. Schiesswohl* (1988), 51 Ohio App.3d 130.

{¶14} Attached to appellant's motion are appellant's affidavit containing 152 paragraphs and supporting legal documents. All of the supporting legal documents (save the Affidavit of Fact Relating to Title of Real Estate dated August 1, 2007 and a Real Property Tax Document for the 1st Half of 2007) were of record prior to the November 28, 2006 trial and were therefore available for trial.

{¶15} All of the documents taken as true and uncontested do not meet the threshold to establish that they could not have been discovered at the time of the 2006 trial date, nor do they establish a meritorious defense or claim to present if relief was granted.

{¶16} Upon review, we conclude the trial court did not err in not conducting a hearing and did not err in denying the requested relief.

{¶17} Assignments of Error I, II, and III are denied.

{¶18} The judgment of the Court of Common Pleas of Coshocton County, Ohio
is hereby affirmed.

By Farmer, P.J.

Edwards, J. and

Delaney, J. concur.

s/Sheila G. Farmer

s/ Julie A. Edwards

s/ Patricia A. Delaney

JUDGES

SGF/jpb 0723

