[Cite as *Espino v. Siladi*, 2009-Ohio-3005.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

BONNIE ESPINO Appellee v. DALE A. SILADI Appellant	C. A. No. 24441 APPEAL FROM JUDGMENT ENTERED IN THE BARBERTON MUNICIPAL COURT COUNTY OF SUMMIT, OHIO CASE No. 07 CVI 2767

DECISION AND JOURNAL ENTRY

Dated: June 24, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Bonnie Espino sued Dale Siladi in small claims court, but failed to appear for trial. The trial court overruled her objection to the magistrate's recommendation and entered judgment for Mr. Siladi on Ms. Espino's claim as well as judgment in his favor for $3000 plus interest and costs on his counterclaim. Later, the trial court granted Ms. Espino's motion for relief from judgment and reset the case on the small claims docket. Mr. Siladi has appealed, arguing that the trial court incorrectly granted Ms. Espino's motion without sufficient grounds. This Court affirms the trial court's judgment because Ms. Espino timely moved for relief from judgment, demonstrating excusable neglect and a meritorious claim.

BACKGROUND

{¶2} Ms. Espino sued Mr. Siladi for $3000, claiming that he refused to return some of her "personal belongings." After she filed suit in Barberton Municipal Court, Mr. Siladi

counterclaimed for the same amount of damages, claiming money owed for storage fees, cell phone bills, harassment, and "250.00 for stopping prosecution at check cashing place."

{¶3} After Ms. Espino failed to appear for trial, the magistrate recommended that the trial court dismiss her complaint and award judgment to Mr. Siladi on his counterclaim. Ms. Espino objected, indicating that she had been out of state at the time of the trial due to the death of her fiancé. In a judgment entry dated August 28, 2008, the trial court overruled her objection, adopted the recommendation of the magistrate, dismissed Ms. Espino's complaint, and entered judgment against her in the amount of $3000 plus costs and interest. Eight days later, the trial court sua sponte scheduled a hearing on the matter.

{¶4} According to the docket, the trial court scheduled a hearing for September 18, 2008. On September 19, 2008, the trial court issued a judgment entry providing that, "[u]pon oral motion to vacate judgment and for good cause shown the Judgment Entry dated 08/28/2008 is hereby vacated." The trial court reset the case on the small claims docket, but did not include any explanation for its decision. Mr. Siladi has appealed that judgment, arguing that the trial court incorrectly granted Ms. Espino's motion to vacate without demanding she meet the requirements for relief from judgment under Rule 60(B) of the Ohio Rules of Civil Procedure.

{¶5} The parties have both represented to this Court that the September hearing was not recorded. Thus, this Court must rely on the substitute statements of fact as approved by the trial court and filed with this Court under Rule 9 of the Ohio Rules of Appellate Procedure. Both parties have submitted materials, including affidavits, regarding the hearing at issue in this case. Although neither is in the form of a summary of the events, both purport to be Appellate Rule 9(C) statements.

{¶6} Both parties agree that, at the September hearing, Ms. Espino orally moved the court to vacate the judgment against her, claiming that, due to her fiancé's death, she had been in West Virginia at the time of the trial. According to affidavits incorporated into Mr. Siladi's statement, at the hearing, Ms. Espino submitted nothing more than the same arguments she had included in her objection to the magistrate's decision previously filed with the trial court. Mr. Siladi asserted that Ms. Espino had offered "[n]o evidence or proof . . . that she would have any affirmative defense to the Counterclaim filed against her . . . in the event that the Court granted her pending oral motion."

{¶7} According to Ms. Espino's "Rule 9(C)" statement, the trial court "inquired as to some of the merits in this case" by asking Mr. Siladi "if he had [her] furniture and other personal belongings in his home" and "Mr. Siladi acknowledged that he did." Ms. Espino's "Rule 9(C)" statement also provides that she was not represented by counsel when Mr. Siladi submitted his Rule 9(C) statement to the trial court and that that court issued an order approving Mr. Siladi's statement the very next day.

APPELLATE RULE 9 STATEMENTS

{¶8} Mr. Siladi has argued that Ms. Espino's Rule 9 statement should not have been included as part of the record on appeal because she did not adhere to the dictates of Appellate Rule 9(C) in submitting it. This Court cannot review the merits of Mr. Siladi's argument without first deciding whether the parties' Rule 9 statements were properly included as part of the record.

{¶9} Rule 9(C) of the Ohio Rules of Appellate Procedure allows an "appellant [to] prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection" when transcripts of trial court proceedings are not available. The appellee is given ten days to object or propose amendments before the statement is submitted to

the trial court for "settlement and approval." App. R. 9(C). "[A]s settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal." *Id*. This process is to be completed by the deadline for transmission of the record to the clerk of the appellate court. *Id*.

{¶10} Under Rule 9(E) of the Ohio Rules of Appellate Procedure, "[i]f any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth." Subpart E further provides that, "[i]f anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted." App. R. 9(E).

{¶11} "Appellate Rules 9(C), (D), and (E) clearly state that if there are any objections, proposed amendments, or disagreements as to the proper contents of the statements of evidence or proceedings . . . these differences shall be submitted to and settled by the court." *State v. Schiebel*, 55 Ohio St. 3d 71, 81 (1990) (quoting *Joiner v. Illuminating Co.*, 55 Ohio App. 2d 187, 195 (1978)). Although an appellate court can order correction or supplementation of the record if the parties agree to the proposed change, "the court of appeals cannot resolve disputes about the trial court's record in the course of an appeal." *Id*. at 82 (citing *Associated Estates Corp. v. Fellows*, 11 Ohio App. 3d 112, 114 (1983)).

{¶12} "[T]he trial court must first determine the accuracy and truthfulness of a proposed statement of the evidence or proceedings or an agreed statement and then approve it and sign it. This gives the trial judge the responsibility, duty, and authority to delete, add, or otherwise

modify portions of a proposed statement so that it will conform to the truth and be accurate before he approves it." *Id*. at 81-82 (quoting *Joiner*, 55 Ohio App. 2d at 195-96). If a dispute arises, the end result of the trial court's evaluation should be a separate document intended to recite or accurately summarize the evidence that was taken and the relevant procedure that occurred in the trial court. *Seals v. Hal Artz Lincoln-Mercury Inc.*, 8th Dist. No. 57953, 1991 WL 30255 at *3 (Mar. 7, 1991).

{¶13} In this case, the trial court considered the parties' competing "statements" purporting to conform to Appellate Rule 9(C). Regardless of whether either submission was properly offered under Rule 9(C), neither contained a summary of the relevant events that could be signed by the trial court judge. Both parties offered affidavits, and Mr. Siladi included a death certificate and a letter purporting to have been written by a clerk of court in West Virginia. The trial court initially approved Mr. Siladi's submission. Later, the trial court also approved Ms. Espino's submission, noting that it would "adopt[ ] both" statements because "they do not appear to be conflicting." The trial court did not create a separate document accurately summarizing the evidence and procedure relevant to the appeal.

{¶14} Mr. Siladi has argued that Ms. Espino's submission should not be considered by this Court as part of the record on appeal because she did not timely supplement the record under the schedule outlined in Appellate Rule 9(C). Subpart C addresses the duty of the appellant to prepare a statement of the evidence or proceedings and serve it on the appellee prior to presenting it to the trial court. App. R. 9(C). Mr. Siladi failed to do that. Instead, according to his certificate of service, he filed his statement with the trial court on the same day that he claims to have served it on Ms. Espino, "via facsimile, hand-delivery, and/or regular U.S. [m]ail" service. Regardless of whether it was ever served on Ms. Espino by any means, the trial court

approved the proposed statement the next day and Mr. Siladi filed it with this Court the day after that. Mr. Siladi did not give Ms. Espino ten days to object or propose amendments before presenting the statement to the trial court for settlement and approval.

{¶15} Ms. Espino later attempted to correct deficiencies she perceived in the record by submitting to the trial court two affidavits that she referred to as "Appellee's Appellate Rule 9(C) Statement." Subpart C of Appellate Rule 9 refers only to statements authored by appellants, not appellees. Regardless of its title, in the interest of justice, this Court will construe Ms. Espino's submission as a request for the trial court to correct or modify the record under Appellate Rule 9(E). Subpart E of Rule 9 does not include a timeline, except to say that the trial court "may direct that [an] omission or misstatement be corrected" "either before or after the record is transmitted to the court of appeals."

{¶16} After the trial court approved her submission, Ms. Espino moved for and obtained leave from this Court to supplement the record. It is notable that Mr. Siladi has not attacked the veracity of Ms. Espino's Rule 9 statement. He has attacked only the timing of its submission. Despite the deficiencies in the procedure, both parties substantially complied with Rule 9 and obtained leave from this Court to supplement the record. Therefore, this Court will consider both parties' submissions as part of the record on appeal.

RELIEF FROM JUDGMENT

{¶17} Mr. Siladi's sole assignment of error is that the trial court incorrectly granted Ms. Espino's oral motion to vacate judgment in the absence of sufficient grounds as required by Civil Rule 60(B) and the Ohio Supreme Court. Specifically, he has argued that Ms. Espino failed to present any evidence that she had either a meritorious claim against him or a meritorious defense

to his counterclaim and that she failed to demonstrate that she was entitled to relief under one of the grounds stated in Rule 60(B)(1) through (5).

{¶18} In order to be entitled to relief under Rule 60(B) of the Ohio Rules of Civil Procedure, a moving party must satisfy each of the three prongs of the test established by the Ohio Supreme Court in *GTE Automatic Elec. Inc. v. ARC Indus.*, 47 Ohio St. 2d 146, paragraph two of the syllabus (1976). The Supreme Court held that, "[t]o 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)(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 judgment, order or proceeding was entered or taken." *Id.*

CIVIL RULE 60(B)(1)

{¶19} Mr. Siladi's argument addresses only the first and second prongs of the *GTE* test. He has not argued that Ms. Espino's motion was untimely. He has argued that Ms. Espino did not present the trial court with any circumstances corresponding to the grounds for relief from judgment under Rule 60(B)(1) through (5). Under Rule 60(B)(1), a trial court "may relieve a party . . . from a final judgment . . . for . . . mistake, inadvertence, surprise or excusable neglect." Neglect is not excusable when the conduct demonstrates a "complete disregard for the judicial system and the rights of the [opposing party]." *GTE Automatic Elec. Inc.*, 47 Ohio St. 2d at 153.

{¶20} According to her Rule 9 statement, Ms. Espino was not present at trial because her fiancé had recently died in another state. Mr. Siladi has argued that this circumstance was not sufficient to merit relief under Civil Rule 60(B) because her "alleged fiancé" died ten days before the scheduled trial date.

{¶21} There is nothing in the record to suggest that Ms. Espino had not received the trial court's notice scheduling trial. Ms. Espino was not represented by a lawyer at the time of the scheduled trial or the hearing during which she moved the court for relief from judgment. Within days of the magistrate's decision being issued, Ms. Espino objected to the recommendation that judgment be rendered in favor of Mr. Siladi. Ms. Espino explained in her written objection that she "could not appear in court d[ue] to a death in the family." According to the Rule 9 statements adopted by the trial court, Ms. Espino explained at the hearing that she was unable to appear for trial because she was in West Virginia dealing with her fiancé's death. Ms. Espino had also attached a death certificate to her objection to the magistrate's decision.

{¶22} Ms. Espino should have requested a continuance of the trial date, but her conduct is not indicative of an utter disregard for the judicial system or for Mr. Siladi's rights. She did not delay in objecting to the first notice she received that the trial court was considering an award of judgment to Mr. Siladi. The trial court may have reasonably concluded that Ms. Espino's absence on the date of trial was due to either inadvertence or excusable neglect. Therefore, Ms. Espino met the second requirement of the *GTE* test.

MERITORIOUS CLAIM OR DEFENSE

{¶23} Mr. Siladi has argued that Ms. Espino failed to demonstrate that she had a meritorious claim or defense to present. A party moving under Civil Rule 60(B) "is only required to allege a meritorious [claim or] defense, [s]he is not required to prove that [s]he will prevail on [it]." *State Farm Ins. Co. v. Valentino*, 7th Dist. No. 02-CA-119, 2003-Ohio-3487, at ¶18 (citing *Rose Chevrolet Inc. v. Adams*, 36 Ohio St. 3d 17, 20 (1988)). "Furthermore, Civ.R. 60(B) is a remedial rule to be liberally construed so that the ends of justice may be served." *Id*.

(citing *Kay v. Marc Glassman Inc.*, 76 Ohio St. 3d 18, 20 (1996); *Colley v. Bazell*, 64 Ohio St. 2d 243, 249 (1980)).

{¶24} Ms. Espino's claim against Mr. Siladi involved $3000 worth of "personal belongings" that Mr. Siladi refused to return to her. Her complaint alleged that her "belongings are now in [Mr. Siladi's] front yard." According to the Rule 9 statements adopted by the trial court, at the hearing, the judge asked Mr. Siladi if he had Ms. Espino's "furniture and other personal belongings" and he admitted that he did. In fact, in his counterclaim, Mr. Siladi accused Ms. Espino of "[d]esertion of [her] personal belongings" and requested "storage fees." In addition, Ms. Espino submitted a photograph purporting to show her furniture and other personal belongings covered with tarps in Mr. Siladi's yard, as her complaint had alleged.

{¶25} These circumstances provided a sufficient basis for the trial court to determine that Ms. Espino had a meritorious claim against Mr. Siladi as well as a meritorious defense to his counterclaim, at least to the extent it related to "storage fees" for the personal belongings he claimed she had deserted. The trial court's decision to grant Ms. Espino relief from judgment was supported by sufficient grounds as required by Rule 60(B) of the Ohio Rules of Civil Procedure and *GTE Automatic Elec. Inc. v. ARC Indus.*, 47 Ohio St. 2d 146, paragraph two of the syllabus (1976). Mr. Siladi's assignment of error is overruled.

CONCLUSION

{¶26} The trial court correctly granted Ms. Espino's motion because she timely moved for relief from judgment, her circumstances suggested inadvertence or excusable neglect, and she presented a meritorious claim. See *GTE Automatic Elec. Inc. v. ARC Indus.*, 47 Ohio St. 2d 146,

paragraph two of the syllabus (1976). The judgment of the Barberton Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Barberton Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
CONCURS

CARR, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶27} I concur in the judgment reached by the majority, albeit for a different reason. First, I do not believe that substantial compliance with the directives of App.R. 9(C) is sufficient.

Rather, I believe the rule requires strict compliance. Since the requirements of App.R. 9(C) were not met, I would not consider either statement as part of the record.

{¶28} Second, "[t]his Court has repeatedly held that it is the duty of the appellant to ensure that the record on appeal is complete." *Lunato v. Stevens Painton Corp.*, 9th Dist. No. 08CA009318, 2008-Ohio-3206, at ¶11, citing *Ruf v. Ruf*, 9th Dist. No. 23813, 2008-Ohio-663, at ¶6, quoting Loc.R. 5(A). "Where the record is incomplete because of appellant's failure to meet his burden of providing the necessary record, this Court must presume regularity of the proceedings and affirm the decision of the trial court." *State v. Jones*, 9th Dist. No. 22701, 2006-Ohio-2278, at ¶39. Accordingly, I would affirm the decision of the trial court on that basis.

APPEARANCES:

JOHN LYSENKO, attorney at law, for appellant.

SCOT STEVENSON, attorney at law, for appellee.