[Cite as *Primo Bedding Co., Inc. v. R. Acres Inc.*, 2009-Ohio-3971.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
PRIMO BEDDING CO., INC. Appellee v. R. ACRES, INC. Appellant	C.A. No. 24535 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2008 06 4404

DECISION AND JOURNAL ENTRY

Dated: August 12, 2009

DICKINSON, Judge.

INTRODUCTION

{¶1} Primo Bedding Co. Inc. sued R. Acres Inc., alleging R. Acres failed to pay it for goods. When R. Acres did not answer, the trial court entered a default judgment for Primo Bedding. R. Acres moved for relief from judgment under Rule 60(B) of the Ohio Rules of Civil Procedure, alleging excusable neglect. The court denied its motion, concluding that its failure to retain a lawyer or file an answer was inexcusable. R. Acres has appealed, assigning four errors. Because R. Acres failed to allege operative facts demonstrating that it was entitled to relief under Rule 60(B), this Court affirms.

MOTION FOR RELIEF FROM JUDGMENT

{¶2} Although R. Acres has assigned four errors, its arguments, essentially, are that the trial court incorrectly concluded that it was not entitled to relief under Rule 60(B) of the Ohio Rules of Civil Procedure and incorrectly denied its motion without holding a hearing. Civil Rule

60(B) provides that "the court may relieve a party . . . 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. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment . . . was entered or taken." Interpreting that rule, the Ohio Supreme Court has 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 . . . ." *GTE Automatic Elec. Inc. v. ARC Indus. Inc.*, 47 Ohio St. 2d 146, paragraph two of the syllabus (1976).

{¶3} R. Acres has argued that it "demonstrated multiple reasons for relief under [Rule 60(B)(1)] . . . due to inadvertence and/or excusable neglect . . . ." It has argued that it "made reasonable efforts to retain counsel prior to the notice of the . . . motion for default judgment, however, due to [its] inadvertence it was unable to retain counsel until September 23, 2008." It has also argued that, "[f]ollowing retention of counsel, two days prior to the entry of the Default Judgment, [it] filed and served its Answer to the Complaint less than two weeks thereafter."

{¶4} "[T]here is no bright line test for determining whether a party's reasons for failure to enter an appearance constitute mistake, inadvertence, or excusable neglect." *LaSalle Nat'l Bank v. Mesas*, 9th Dist. No. 02CA008028, 2002-Ohio-6117, at ¶13. This Court has held, however, that "[t]he neglect of an individual to seek legal assistance after being served with court papers is not excusable." *Id*. (quoting *Casalinova v. Solaro*, 9th Dist. No. 14052, 1989 WL 111942 at *5 (Sept. 27, 1989)).

{¶5} In its motion for relief from judgment, R. Acres argued that it "was not afforded legal counsel prior to the elapsing of the response period of pending action." It also argued that, once it obtained a lawyer, it submitted its answer within a reasonable amount of time. It further argued that Primo Bedding was not prejudiced by the delay.

{¶6} Primo Bedding filed its complaint on June 17, 2008. The trial court granted it a default judgment on August 21, 2008. R. Acres did not obtain a lawyer until September 23, 2008, more than a month after the default judgment was entered. In its motion for relief from judgment, it did not offer an explanation for why it was unable to obtain a lawyer sooner. It also did not submit any evidence to support its argument that its failure to file an answer on time was excusable neglect.

{¶7} "Although a movant is not required to support its motion with evidentiary materials, [it] must do more than make bare allegations that [it] is entitled to relief." *Kay v. Marc Glassman Inc.*, 76 Ohio St. 3d 18, 20 (1996). "[S]uch evidence is certainly advisable in most cases." *Rose Chevrolet Inc. v. Adams*, 36 Ohio St. 3d 17, 21 (1988). "[T]he least that can be required of the movant is to enlighten the court as to why relief should be granted. The burden is upon the movant to demonstrate that the interests of justice demand the setting aside of a judgment normally accorded finality. A mere allegation that [its] failure to file a timely answer was due to 'excusable neglect and inadvertence,' without any elucidation, cannot be expected to warrant relief." *Id*.

{¶8} This case is similar to *LaSalle Nat'l Bank v. Mesas*, 9th Dist. No. 02CA008028, 2002-Ohio-6117. In *LaSalle Nat'l Bank*, Mr. Mesas "acknowledged that he received the complaint but alleged . . . that he failed to answer LaSalle's complaint due to mistake, surprise and ignorance. He did not elaborate any further with regard to this assertion nor did he submit

any evidentiary support." *Id*. at ¶14. This Court noted that he had failed to take any "action until after default judgment was rendered against him," and concluded that his "conduct [did] not constitute mistake, inadvertence, surprise, or excusable neglect pursuant to Civ.R. 60(B)(1)." *Id*.

{¶9} R. Acres did not offer the trial court an explanation for why it failed to retain a lawyer until September 23, 2008. While it has now argued that the delay was because of "inadvertence," it has not elaborated on that issue or pointed to any evidence that supports its allegation. This Court, therefore, concludes that it has not established that its failure to file a timely answer was because of inadvertence or excusable neglect. See *LaSalle Nat'l Bank*, 2002-Ohio-6117, at ¶14. The trial court properly denied its motion for relief from judgment.

{¶10} R. Acres has also argued that the trial court should have held a hearing on its motion before deciding it. The Ohio Supreme Court has held that, if "a motion for relief from judgment . . . contains allegations of operative facts which would warrant relief under Civil Rule 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion." *Coulson v. Coulson*, 5 Ohio St. 3d 12, 16 (1983) (adopting *Adomeit v. Baltimore*, 39 Ohio App. 2d 97, 105 (1974)). Because R. Acres did not allege any operative facts to support its allegation of excusable neglect, however, the trial court properly decided its motion without a hearing. R. Acres' assignments of error are overruled.

CONCLUSION

{¶11} The trial court properly concluded that R. Acres failed to show that it was entitled to relief from judgment under Rule 60(B) of the Ohio Rules of Civil Procedure. The judgment of the Summit County Common Pleas 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 Court of Common Pleas, 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

MOORE, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

JOSEPH D. CARNEY and SEAN T. NEEDHAM, attorneys at law, for appellant.

SHAWN W. SCHLESINGER, attorney at law, for appellee.

JAMES REED FOOS, JR., attorney at law, for appellee.