Court of Appeals No. L-11-1071
COURT OF APPEALS OF OHIO SIXTH APPELLATE DISTRICT LUCAS COUNTY

Pheils v. Palmer

2012 Ohio 2676
Decided Jun 15, 2012

Court of Appeals No. L-11-1071 Court of Appeals No. L-11-1132 Court of Appeals No. L-11-1176 Trial Court No. CI0198800289

06-15-2012

David R. Pheils Jr. and Associates Appellee v. Ok Sun Palmer Defendant [David Palmer -Appellant]

Marshall D. Wisniewski and David R. Pheils, Jr., pro se, for appellee David Palmer, pro se, for appellant.

SINGER

DECISION AND JUDGMENT

Marshall D. Wisniewski and David R. Pheils, Jr., pro se, for appellee

David Palmer, pro se, for appellant.

SINGER , P.J.

{¶ 1} Appellant appeals an order of the Lucas County Court of Common Pleas, disbursing to appellee funds held in a court clerk's account and the court's subsequent *2 denial of appellant's Civ.R. 60(B) motion. Because we conclude that appellant is precluded from attacking the original judgment and he failed to raise a meritorious claim in his motion for relief from judgment, we affirm.

{¶ 2} This is the most recent chapter in a more than two-decade long legal dispute between appellee, attorney David R. Pheils, Jr., and a former client, appellant David Palmer. Appellant's wife, Ok Sun Palmer, was injured in a 1987 auto accident. Appellant and his wife retained appellee's law firm to represent them on their claim arising from this accident.

{¶ 3} In 1988, appellee sued appellant and his wife to collect legal fees that appellee alleged were due. The Palmers filed a countersuit for legal malpractice. The counterclaim was ostensibly resolved in a 1991 settlement agreement. The principal claim went to trial resulting in a verdict against the Palmers for $147,440. The agreement and the verdict were eventually set aside on appeal and a new trial ordered. *Pheils v. Palmer,* 6th Dist. No. L-91-426, 1993 WL 155641 (May 14, 1993), *Pheils v. Palmer,* 6th Dist. No. L-91-426, 1993 WL 419042 (Aug. 10, 1993).

{¶ 4} Prior to perfection of the appeal, however, appellee garnished Ok Sun Palmer's accounts to satisfy a portion of the judgment, seizing $16,960.14. In 1994, after the settlement agreement and judgment on the verdict were set aside by this court, the trial court ordered appellee to deposit in escrow the $16,960, which

with interest now totaled $21,626, with the court pending retrial. *See Pheils and Associates v. Palmer,* 6th Dist. No. L-96-176, 1997 WL 543051 (Aug. 29, 1997). *3

{¶ 5} In the 1996 retrial, the jury returned a verdict in favor of appellee and awarded him $160,000. The trial court entered judgment on the verdict in the amount of $143,039.86, the jury award less the principal of the amount already in court escrow. This judgment was affirmed on appeal. *Id., appeal not accepted,* 80 Ohio St.3d 1471, 687 N.E.2d 299 (1997). In 1998, appellee moved the court to release the funds. Shortly thereafter the proceedings became the subject of an automatic stay resulting from Ok Sun Palmer's bankruptcy. It appears that appellee's motion was never ruled upon.

{¶ 6} In 2008, following the conclusion of the bankruptcy proceeding, the Ohio Supreme Court appointed another judge to the case. The new judge ordered the parties to refile any pending motions or have them deemed withdrawn. In response, appellee refiled numerous motions, including the 1998 request to release funds. Appellant filed a memorandum in opposition, including a request that the funds in question be released to him. On September 27, 2010, the court granted appellee's motion to release the $21,626.97, plus accumulated interest, to him.

{¶ 7} On April 4, 2011, appellant filed a Civ.R. 60(B) motion for relief from the September judgment. The following day he appealed the same order. On April 21, 2011, this court sua sponte remanded appellant's case to the trial court so that it might consider his Civ.R. 60(B) motion.

{¶ 8} On May 12, 2011, the court rejected appellant's motion for relief from judgment concluding that (1) appellant is not a party to the case, (2) his motion was untimely, (3) the motion is now moot, and (4) appellant failed to provide sufficient *4 grounds to merit relief. On June 8, 2011, appellant appealed that judgment. On July 7, 2011, appellant again appealed the September 2010 judgment releasing the funds. This court consolidated the three appeals. Appellant sets forth the following five assignments of error:

> I. Trial court erred in awarding appellees $21,085.39 in additional attorney fees 13-years after their 4/11/96 judgment was paid in full on 12/19/97 [.]
> II. Trial court erred when it denied appellants [sic] constitutional due process rights of notice [.]
> III. Trial court erred when it denied appellants [sic] rule 60(B)(4) motion proving appellees [sic] 04/11/96 judgment had been satisfied, released or discharged [.]
> IV. Trial court erred when it ruled appellant's rule 60(B) motion failed to provide sufficient grounds for relief [.]
> V. Trial court erred in ruling appellant lacked standing and/or was not a party to instant action [.]

I. Timeliness of Appeal

{¶ 9} We may not consider a direct attack on the trial court's judgment of September 2010. App.R. 4(A) requires a party in a civil matter to file a notice of appeal within 30 days of a notice of judgment and its entry if service is not made within three days. This requirement is jurisdictional and may not be enlarged by the appeals court. *State ex rel. Pendell v. Adams Cty. Bd. of Elections,* 40 Ohio St.3d 58, 60, 531 N.E.2d *5 713 (1988), App.R. 14(B). Appellant filed his notice of appeal of the September 2010 entry on April 4, 2011, at the same time he filed his motion for relief for judgment. This is well outside the 30 days provided in the rule. Thus, our consideration is limited to the propriety of the trial court's denial of appellant's motion for relief from judgment which was timely filed.

{¶ 10} Accordingly, appellant's first assignment of error, which only challenges the September 2010 judgment, is not well-taken.

II. Relief from Judgment

{¶ 11} Appellant's remaining assignments of error relate to the trial court's denial of his motion for relief from judgment.

{¶ 12} Civ.R. 60(B) provides:

> 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
> 6 *6 equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment.

{¶ 13} In order 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 Industries, Inc.,* 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus; *Covert Options, Inc. v. R.L. Young & Assocs., Inc.,* 2d Dist. No. 20011, 2004-Ohio-67, ¶ 7. All three elements must be established, and "the test is not fulfilled if any one of the requirements is not met." *Strack v. Pelton,* 70 Ohio St.3d 172, 174, 637 N.E.2d 914 (1994); *Fifth Third Bank of W. Ohio v. Shepard Grain Co., Inc.,* 2d Dist. No. 2003 CA 40, 2004-Ohio-1816, ¶ 10. On review, an appellate court may reverse a court's ruling on a Civ.R. 60(B) motion only on a showing of an abuse of discretion. *Griffey v. Rajan,* 33 Ohio St.3d 75, 77, 514 N.E.2d 1122 (1987). An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 14} Appellant's argument fails on multiple levels. He is no longer a party to the underlying suit. His was
7 dismissed years ago. He insists, nonetheless, that he has an *7 interest in the money by virtue of an assignment of Ok Sun Palmer of her interest in the money to him. Yet, there is no record of such assignment presented. Since appellant is no longer a party and there is no suggestion in the record that he has an independent interest in the account at issue, he cannot claim a lack of notice. Accordingly, his second assignment of error is not well-taken.

{¶ 15} Moreover, appellant has not presented a meritorious claim on the account at issue. He alleges, without support in the record, that somehow appellee fraudulently persuaded Ok Sun Palmer to open a joint account which appellee then raided. The record reflects that, after the initial verdict/settlement in appellee's favor, appellee executed garnishment on Ok Sun Palmer's accounts, the result of which was seizure of the money at issue.

{¶ 16} When the initial verdict/settlement was vacated on appeal, the trial court ordered the money deposited with the court pending proceedings on remand. When a second jury found in appellee's favor, the court deducted the principal amount of the court held fund from the award when it entered judgment. Had Ok Sun Palmer prevailed in the second trial, she would have been entitled to reclaim the money. She, however, did not prevail and the account, of right, then belonged to appellee. Appellant never had a claim on the account and Ok Sun Palmer's interest was extinguished with the judgment entry on the second verdict. Accordingly, appellant did not allege a meritorious claim in his Civ.R. 60(B) motion and the trial court did not abuse its discretion in
8 denying him *8 relief from judgment. The remainder of appellant's assignments of error are not well-taken.

{¶ 17} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

Thomas J. Osowik, J.

Stephen A. Yarbrough, J.

CONCUR.

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JUDGE

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JUDGE