

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| State of Ohio, Bureau of Workers' Compensation, | : | |
| | : | |
| Plaintiff-Appellant, | : | No. 11AP-1122 |
| v. | : | (C.P.C. No. 11JG-02-7617) |
| | : | |
| Daily Services, LLC, dba Talocity, | : | (ACCELERATED CALENDAR) |
| | : | |
| Defendant-Appellee. | : | |

D E C I S I O N

Rendered on September 18, 2012

Cooke, Demers & Gleason, Adam J. Bennett, and Andrew P. Cooke, for appellant.

James E. Arnold & Associates, LPA, W. Evan Price, II, Gerhardt A. Gosnell, and Damion M. Clifford, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Appellant, Ohio Bureau of Workers' Compensation ("BWC"), appeals from a judgment of the Franklin County Court of Common Pleas granting relief from judgment, pursuant to Civ.R. 60(B), to appellee, Daily Services, LLC ("Daily Services"). For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} This case arises from BWC's attempt to obtain a judgment against Daily Services for unpaid workers' compensation insurance premiums. Daily Services is owned and operated by Ryan Mason, who owns another staffing company named I-Force, LLC

("I-Force"). Daily Services and I-Force both provide temporary employment staffing services.

{¶ 3} In June 2009, BWC filed a judgment against I-Force for over \$3.8 million in unpaid premiums; however, BWC later filed a release and satisfaction in October 2009, which discharged its judgment against I-Force. In September 2009, BWC filed an action against Daily Services in Franklin County Common Pleas case No. 09CVH-09-13229, seeking an amount equal to the I-Force debt. During the pendency of the common pleas action, a BWC adjudicating committee issued a decision in October 2009, ordering that Daily Services' future premiums would be calculated based on an "experience" combination between Daily Services and I-Force (the "experience decision"). In May 2009, BWC voluntarily dismissed its action in common pleas court.

{¶ 4} In November 2009, BWC obtained a judgment for over \$54 million against Daily Services in Franklin County Common Pleas case No. 09JG-11-46435. In July 2010, BWC filed another judgment against Daily Services for over \$3.1 million in case No. 10JG-07-26568; however, that judgment was later vacated based on BWC's failure to properly serve Daily Services with an assessment. Daily Services moved to vacate the \$54 million judgment in case No. 09JG-11-46435, arguing that BWC failed to provide written notice of the assessments underlying those judgments in accordance with R.C. 4123.37.

{¶ 5} While the motion to vacate was pending, BWC issued another assessment against Daily Services for over \$3.1 million in unpaid premiums. Again, BWC failed to serve the assessment to Daily Services via certified mail; however, Daily Services waived service, and the adjudicating committee held a hearing on the assessment in January 2011. On February 8, 2011, before the adjudicating committee rendered a decision, the trial court vacated the \$54 million judgment in case No. 09JG-11-46435, finding that BWC obtained the judgment in violation of Daily Services' due process rights. The trial court also rejected BWC's argument that the adjudicating committee's experience decision found Daily Services to be a successor in interest to I-Force.

{¶ 6} The next day, February 9, 2011, the adjudicating committee issued a decision upholding the \$3.1 million assessment, which stated that the October 15, 2009 experience decision did transfer I-Force's debt and liabilities to Daily Services. Daily Services appealed the committee's decision to the administrator the following day.

{¶ 7} On February 18, 2011, while Daily Services' administrative appeal was pending, BWC filed a judgment in Franklin County Common Pleas case No. 11JG-02-7617 (the present case). Daily Services moved to vacate the judgment on March 9, 2011, arguing that BWC obtained the judgment prematurely without allowing Daily Services to exhaust its administrative remedies under R.C. 4123.37 and 4123.291. Daily Services claimed that BWC's actions represented a violation of due process.

{¶ 8} The trial court granted appellee's motion for relief in a decision and entry filed November 21, 2011. The trial court found that the motion was filed within a reasonable time, that BWC's failure to comply with R.C. 4123.37 and 4123.291 constituted a meritorious defense, and that Daily Services' due process violations warranted relief under Civ.R. 60(B)(5).

II. ASSIGNMENTS OF ERROR

{¶ 9} BWC now appeals, advancing the following three assignments of error for our review:

[I.] The Trial Court erred in finding that the Bureau was not authorized to take a judgment after an assessment against an employer, hearing, and decision from the Adjudicating Committee.

[II.] The Trial Court erred in allowing the Appellee to collaterally attack the judgment via a 60(B) motion, instead of an appeal to the Common Pleas court which is mandated by R.C. 4123.37 and would address the merits of the assessment and resulting judgment.

[III.] The Trial Court erred in finding that the Appellee had asserted meritorious defenses to the judgment lien taken by the Bureau.

{¶ 10} All three of BWC's assignments of error challenge the trial court's decision granting Daily Services' motion for relief from the February 18, 2011 judgment in case No. 11JG-02-7617. Because the assignments of error are interrelated, we will address them together for ease of discussion.

A. Standard of Review

{¶ 11} "A motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion." *Griffey v. Rajan*, 33 Ohio St.3d 75, 77 (1987). "The term "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 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). When applying an abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Berk v. Matthews*, 53 Ohio St.3d 161, 169 (1990).

{¶ 12} Civ.R. 60(B) provides that a trial court may relieve a party 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 equitable that the judgment should have prospective application; or
- (5) any other reason justifying relief from the judgment.

The rule requires the motion to be made "within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken." Civ.R. 60(B).

{¶ 13} To prevail under Civ.R. 60(B), the movant must show that: (1) the movant has a meritorious defense or claim to present if relief is granted, (2) the movant 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 Industries, Inc.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. The movant must satisfy all three of these requirements to obtain relief. *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151 (1996); see also *GTE Automatic Elec.* at 151 (finding that the requirements under Civ.R. 60(B) "are independent and in the conjunctive, not the disjunctive").

{¶ 14} BWC does not dispute whether Daily Services' motion was filed within a reasonable time, nor does it argue that Daily Services failed to establish an entitlement to relief under Civ.R. 60(B)(5). Instead, BWC's first and third assignments of error challenge the trial court's determination that several meritorious defenses supported Daily Services' motion, and BWC's second assignment of error claims Civ.R. 60(B) relief was inappropriate because Daily Services had an administrative remedy available under R.C. 4123.37. As stated below, we find these arguments unpersuasive.

B. Meritorious Defense

{¶ 15} "Under Civ.R. 60(B), a movant's burden is only to allege a meritorious defense, not to prove that he will prevail on that defense." *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 20 (1988), citing *Moore v. Emmanuel Family Training Ctr., Inc.*, 18 Ohio St.3d 64, 67 (1985). "[A] proffered defense is meritorious if it is not a sham and when, if true, it states a defense in part, or in whole, to the claims for relief set forth in the complaint." *Amzee Corp. v. Comerica Bank-Midwest*, 10th Dist. No. 01AP-465, 2002-Ohio-3084, ¶ 20, citing *The Pool Man, Inc. v. Rea*, 10th Dist. No. 95APG04-438 (Oct. 17, 1995).

{¶ 16} BWC's first assignment of error challenges the trial court's conclusion that Daily Services presented a meritorious defense "by way of the BWC's failure to follow the requirements of R.C. §4123.37 and R.C. §4123.291 in filing a precipe [sic] for judgment prior to said judgment having become final." (Decision and Entry, 17.) For the following reasons, we find no abuse of discretion in this determination.

{¶ 17} When an employer amenable to workers' compensation law fails to pay the required premium, R.C. 4123.37 mandates that the administrator make an assessment of the premium due and mail a written notice of the assessment by certified mail to the employer's residence or usual place of business. The assessment will become conclusive unless the employer files a written petition objecting to the assessment within 20 days after receipt thereof. R.C. 4123.37. Upon the filing of such a petition, the BWC must schedule a hearing and notify the petitioner by certified mail. R.C. 4123.37. The statute affords an employer the following remedy when an assessment becomes final:

[T]he assessment made by the administrator shall become due and payable ten days after notice of the finding made at

the hearing has been sent by certified mail to the party assessed. An appeal may be taken from any finding to the court of common pleas of Franklin county upon the execution by the party assessed of a bond to the state in double the amount found due and ordered paid by the bureau conditioned that the party will pay any judgment and costs rendered against it for the premium.

R.C. 4123.37.

{¶ 18} R.C. 4123.37 also outlines the manner by which BWC can obtain a judgment for an unpaid assessment. In relevant part, the statute provides:

When no petition objecting to an assessment is filed or when a finding is made affirming or modifying an assessment after hearing, a certified copy of the assessment as affirmed or modified may be filed by the administrator in the office of the clerk of the court of common pleas in any county in which the employer has property or in which the employer has a place of business. The clerk, immediately upon the filing of the assessment, shall enter a judgment for the state against the employer in the amount shown on the assessment.

(Emphasis added.)

{¶ 19} The portion of R.C. 4123.37 at issue in this case is the language allowing BWC to obtain a judgment in a court of common pleas after "a finding is made affirming or modifying an assessment after hearing." BWC argues that the adjudicating committee's February 8, 2011 decision constituted such a finding and permitted BWC to obtain a judgment in the trial court on February 18, 2011—even though Daily Services had appealed from the committee's decision on February 9, 2011 and even though that appeal had not been heard or decided by the administrator. We disagree.

{¶ 20} Although R.C. 4123.291 authorizes the administrator to appoint an adjudicating committee to hear an employer's petition objecting to the assessment of a premium, the statute expressly allows an "adversely affected" employer to appeal such decisions "to the administrator or the administrator's designee." R.C. 4123.291(B); *see also* Ohio Adm.Code 4123-14-02(E) and 4123-14-06(F)(3). The appeal must be filed within 30 days after the employer receives the adjudicating committee's decision, and the administrator or designee "shall hear the appeal and hold a hearing." R.C. 4123.291(B).

While the committee's decision ordinarily constitutes the decision of the administrator, *see* Ohio Adm.Code. 4123-14-06(E), this is not so where an employer's appeal from that decision remains pending under R.C. 4123.291(B). This statutory and administrative framework confirms that BWC cannot obtain a judgment for unpaid premiums based on an adjudicating committee's decision if that decision remains pending on appeal to the administrator under R.C. 4123.291.

{¶ 21} BWC maintains that there are public policy reasons for why R.C. 4123.37 allows a judgment lien to exist while an employer seeks judicial review of an assessment. According to BWC, a judgment lien prevents unscrupulous employers from avoiding their payment obligations by dissipating business assets, selling business assets or transferring business assets to insiders. These concerns are not implicated here. Contrary to BWC's view, R.C. 4123.37 *does* allow BWC to obtain a judgment while an employer seeks *judicial* review; the statute authorizes an appeal from "any finding" to the Franklin County Court of Common Pleas. R.C. 4123.37 does not, however, allow a judgment lien to exist while an employer seeks *administrative* review of an adjudicating committee's decision pursuant to R.C. 4123.291(B). To hold otherwise would conflict with the plain language of those statutes as well as settled principles governing exhaustion of administrative remedies:

Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.

State ex rel. Teamsters Local Union No. 436 v. Cuyahoga Cty. Bd. of Commrs., 132 Ohio St.3d 47, 2012-Ohio-1861, ¶ 19, quoting *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

{¶ 22} The Fourth District has recognized that a meritorious defense exists where BWC prematurely obtains a judgment in contravention of R.C. 4123.37. *Bur. of Workers' Comp. v. C.W. Fletcher, Inc.*, 4th Dist. No. 96CA32 (Mar. 13, 1997). In *Fletcher*, BWC assessed the employer for \$820,871.58 in unpaid premiums, and the employer filed a petition objecting to the assessment in accordance with R.C. 4123.37. *Id.* BWC did not, however, hold a hearing or address the petition; instead, it obtained a judgment in the Pickaway County Court of Common Pleas.

{¶ 23} The Fourth District affirmed the trial court's decision to grant relief from judgment, pursuant to Civ.R. 60(B), holding that BWC's failure to comply with R.C. 4123.37 constituted a meritorious defense under Civ.R. 60(B) and warranted relief under Civ.R. 60(B)(5). Because BWC's failure to address the petition "left the matter pending, thus precluding a judgment," the Fourth District found that BWC "possessed no statutory authority to seek a judgment." *Id.* The court added, "if the BWC wishes to avail itself of the enforcement powers provided by the Revised Code, then it must itself comply with the appropriate Revised Code provision for obtaining a judgment." *Id.*

{¶ 24} We find the Fourth District's rationale persuasive. Because BWC obtained its judgment prematurely in contravention of R.C. 4123.37 and 4123.291, the trial court did not abuse its discretion by finding that Daily Services presented a meritorious defense necessary for relief under Civ.R. 60(B). Accordingly, BWC's first assignment of error is overruled.

{¶ 25} Our resolution of the first assignment of error renders moot BWC's third assignment of error, which challenges the trial court's finding that two additional meritorious defenses supported Daily Services' motion. Because we have already found that a meritorious defense exists, Daily Services' motion satisfies the first prong of the standard articulated in *GTE Automatic Elec.*, making the remaining defenses identified by the trial court irrelevant to our analysis.

C. Possibility of Relief Under Civ.R. 60(B)

{¶ 26} Finally, we turn to BWC's second assignment of error challenging the trial court's ability to entertain Daily Services' Civ.R. 60(B) motion. According to BWC, the only vehicle by which an employer may challenge an assessment is governed by R.C. 4123.37, which permits employers to appeal assessments to the Franklin County Court of Common Pleas.

{¶ 27} While we agree that Civ.R. 60(B) cannot be used to substitute the administrative appeal authorized by R.C. 4123.37, we do not find that Daily Services employed the rule as a substitute for its other administrative remedies. As stated above, Daily Services appealed the adjudicating committee's February 8, 2011 decision, and BWC obtained its judgment while that appeal was still pending. Daily Services could not use the administrative remedies in R.C. 4123.37 to seek relief from the judgment; only Civ.R.

60(B) permitted such an attack. While BWC claims that appellee should have appealed to the common pleas court, it could not do so until the administrator held a hearing in its appeal from the adjudicating committee's decision. We agree with the Fourth District's rationale in *Fletcher*, which specifically found Civ.R. 60(B) to be appropriate in similar circumstances. *Id.* Therefore, we find no abuse of discretion in the trial court's decision to entertain Daily Services' motion for relief filed pursuant to Civ.R. 60(B).

{¶ 28} Therefore, BWC's second assignment of error is overruled.

III. CONCLUSION

{¶ 29} Having overruled BWC's first and second assignments of error and rendering the third assignment of error moot, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and TYACK, JJ., concur.
