[Cite as *Nkurunziza v. Nyamusevya*, 2011-Ohio-6133.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Consolata Nkurunziza,	:	
Petitioner-Appellee,	:	
		No. 11AP-222
v.	:	(C.P.C. No. 09DV-10-1603)
Leonard Nyamusevya,	:	(REGULAR CALENDAR)
Respondent-Appellant.	:	

D E C I S I O N

Rendered on November 29, 2011

Consolata Nkurunziza, pro se.

O'Keefe Law Office, and *James D. O'Keefe*; *McKinley Law Office*, and *Scott W. McKinley*, for appellant.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations.

DORRIAN, J.

{¶1} Respondent-appellant, Leonard Nyamusevya ("appellant"), appeals the February 8, 2011 judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, in which the trial court denied his motion for relief from judgment. For the following reasons, we affirm.

{¶2} On October 20, 2009, petitioner-appellee, Consolata Nkurunziza ("appellee"), filed a petition for a domestic violence civil protection order ("DVCPO"), pursuant to R.C. 3113.31, against appellant for a long history of domestic violence. *Nkurunziza v. Nyamusevya*, 10th Dist. No. 10AP-134, 2010-Ohio-5966, ¶2 ("*Nkurunziza I*"). That same day, the trial court granted appellee an ex parte DVCPO. On January 14,

2010, following a hearing, the trial court granted appellee a DVCPO "that restrained appellant from abusing appellee, required him to vacate the home, gave exclusive use of the home to appellee, and precluded appellant from having contact with appellee." Id. at ¶3. On February 12, 2010, appellant filed a timely notice of appeal.

{¶3} In *Nkurunziza I*, appellant argued that (1) the trial court erred in granting appellee's DVCPO because it was against the manifest weight of the evidence, and (2) the trial court violated his due process rights because the hearing was not recorded. Id. at ¶4. On December 7, 2010, this court affirmed the trial court's decision granting appellee's DVCPO. Further, on December 21, 2010, appellant filed a motion for reconsideration of our decision in *Nkurunziza I*. On January 20, 2011, we denied appellant's motion.

{¶4} On January 10, 2011, appellant filed a motion for relief from judgment pursuant to Civ. R. 60(B)(2), (3), and (5). In his motion, appellant argued that he was entitled to relief because of: (1) newly discovered evidence, (2) fraud, misrepresentation, or other misconduct, and (3) the trial judge's favoritism toward appellee and lack of impartiality toward appellant as other reasons justifying relief. (See Motion for Relief from Judgment.) In support of these arguments, appellant referenced 14 exhibits in his motion, including:

> (1.) A copy of records from case No. 2004 CR B 026216 and case No. 05CRX 50129 with a certification from the clerk of courts that they are true and accurate copies of the original record, including the sworn affidavit of appellee signed on January 27, 2005, stating that case No. 2004 CR B 026216 should be "expunged" because she fabricated the charges against appellant, and appellant did not commit any act of domestic violence.

(2.) A police report dated August 9, 2007, regarding threats of violence that appellant allegedly made against appellee at their residence.

(3.) A letter from Franklin County Children Services dated June 23, 2008, indicating that their investigation on June 12, 2008, resulted in the finding of unsubstantiated emotional maltreatment of the parties' minor children.

(4.) A police report dated September 19, 2009, reporting a domestic altercation between the parties.

(5.) A report from Franklin County Children Services dated May 25, 2010, finding "indicated physical abuse" instead of "substantiated physical abuse" of the parties' minor children.

(6.) The sworn affidavit of Robert T. Lee, M.D., FAAP, dated April 22, 2010, and the sworn affidavit of Catherine M. Jenkins, M.D., FAAP, dated April 26, 2010, both attesting that they have not observed any indication of abuse or suspicious injuries, respectively, while treating appellant's children.

(7.) Letter from Tonja A. Smith, R.N., B.S.N. dated December 15, 2009, stating that appellant's son has never been seen in the school nurse's office for bruises or serious injuries. In addition, the letter indicates that appellant's son stated that appellant has not abused him in the past two and a half years.

(8.) Medical record dated May 13, 2005, illustrating that appellant's 16-year-old son, L. K., attempted to commit suicide by ingesting bleach and penicillin tablets.

(9.) Entry of voluntary dismissal, effective July 13, 2010, in mandamus action filed against the Honorable Kim Browne (case No. 10AP-429).

(10.) The parties' Shared Parenting Plan filed October 1, 2010, in Case No. 09 DR 05 1832.

(11.) Appellee's Temporary Order Affidavit, filed October 20, 2009.

(12.) Police report regarding appellant delivering Christmas gifts to his minor children.

> (13.) Evidence regarding appellee denying appellant parenting time.
>
> (14.) Document dated January 4, 1996, indicating that appellant and his family are refugees.

{¶5} On February 8, 2011, the trial court journalized its decision and entry denying appellant's motion for relief from judgment.

{¶6} On March 7, 2011, appellant filed a timely notice of appeal setting forth the following assignments of error for our consideration:

> [1.] The trial court abused its discretion when it denied respondent's Civ.R. 60(B) Motion without holding a hearing to determine whether Respondent's evidence demonstrated operative facts which, if true, would have warranted relief from judgment.
>
> [2.] The trial court committed reversible error when it considered respondent's dismissed criminal matter in its issuance of a domestic relations civil protection order pursuant to R.C. 3113.31 and then failed to hold a hearing as to respondent's evidence that the dismissed criminal matter was sealed pursuant to R.C. 2953.52.
>
> [3.] The trial court committed reversible error when it refused to hear respondent's evidence of the sealing of his criminal matter prior to ruling on his Civ.R. 60(B) motion, thereby violating respondents [sic] right to privacy under R.C. 2953.52 and the Fifth and Fourteenth Amendments to the U.S. Constitution.
>
> [4.] The trial court committed reversible error when it failed to hold a hearing to review respondent's evidence brought pursuant to Civ.R. 60(B)(2), (3) and (4), prior to overruling respondent's motion for relief from judgment.
>
> [5.] The trial court committed reversible error when it determined, without hearing, that respondent lacked a meritorious claim or met the factors of Civ.R. 60(B)(1)-(5) for relief from judgment.

{¶7} Civ.R. 60(B) states, in relevant part, that:

> 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 equitable that the judgment should have prospective application; 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, order or proceeding was entered or taken. * * *

It is well-settled that, in order to prevail upon a motion pursuant to Civ.R. 60(B), a movant must demonstrate the following: "(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.* (1976), 47 Ohio St.2d 146, paragraph two of syllabus.

{¶8} Further, "[t]he decision to grant or deny a Civ.R. 60(B) motion is left to the sound discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion." *Richardson v. Richardson*, 10th Dist. No. 07AP-287, 2007-Ohio-6642, ¶7. "An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable." *Classic Bar & Billiards, Inc. v. Samaan*, 10th Dist. No. 08AP-210, 2008-Ohio-5759, ¶10, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶9} Additionally, "if the Civ.R. 60(B) motion contains allegations of operative facts that would warrant relief from judgment, the trial court should grant a hearing to take evidence to verify those facts before it rules on the motion." *Mattingly v. Deveaux*, 10th Dist. No. 03AP-793, 2004-Ohio-2506, ¶7. "Conversely, an evidentiary hearing is not required where the motion and attached evidentiary material do not contain allegations of operative facts that would warrant relief under Civ.R. 60(B)." Id.

{¶10} For ease of discussion, we will address appellant's assignments of error out of order. We begin our discussion by addressing appellant's second and third assignments of error together because they are barred by the principle of res judicata.

{¶11} In his second assignment of error, appellant contends that the trial court erred in considering Franklin County Municipal Court criminal case No. 2004 CR B 026216, with respect to the granting of appellee's DVCPO, because the case had been previously dismissed, and the record had been sealed. In his third assignment of error, appellant contends that the trial court violated his right to privacy by refusing to hear evidence regarding the sealing of the record in case No. 2004 CR B 026216, prior to ruling on his motion for relief from judgment. (Appellant's brief, 4, 8.) In support of his arguments, appellant asserts that "[f]indings No. 3 and 7 of the Judgment Entry filed May 26, 2010 clearly establish that the dismissed sealed criminal case was the reason the court found a pattern of domestic violence." (Appellant's brief, 5.)

{¶12} It is well-settled that "a party may not use a Civ.R. 60(B) motion as a substitute for an appeal." *Caron v. Manfresca* (Sept. 23, 1999), 10th Dist. No. 98AP-1399, citing *Doe v. Trumbull Cty. Children Servs. Bd*. (1986), 28 Ohio St.3d 128, paragraph two of syllabus. "If a Civ.R. 60(B) motion is premised upon issues which could

have been raised on appeal, a trial court does not abuse its discretion by denying such motion." Id., citing *Justice v. Lutheran Social Serv. of Cent. Ohio* (1992), 79 Ohio App.3d 439, 442.

{¶13} Further, " '[w]here an argument could have been raised on an initial appeal, res judicata dictates that it is inappropriate to consider that same argument on a second appeal following remand.' " *In re Estate of Barnett-Clardy*, 10th Dist. No. 08AP-386, 2008-Ohio-6126, ¶15, quoting *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, ¶37. "Thus, the doctrine of res judicata precludes a party who has had his day in court from seeking a second chance to litigate an issue that he could have raised earlier. *Barnett-Clardy*, citing *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶18. "Application of the doctrine of res judicata in this instance prevents endless litigation of an issue on which a party has already received a full and fair opportunity to be heard." Id.

{¶14} In the present matter, appellant's exhibit 1 attached to his Civ.R. 60(B) motion, indicates that, on April 18, 2005, the trial court journalized an entry sealing appellant's record in criminal case No. 2004 CR B 026216. On February 12, 2010, approximately five years later, appellant filed a notice of appeal in *Nkurunziza I,* regarding the granting of appellee's DVCPO. See generally *Nkurunziza I*. However, in *Nkurunziza I*, appellant failed to raise any argument pertaining to the sealing of his criminal record, or to the violation of his right to privacy. (See appellant's brief, case No. 10AP-134.) Rather, appellant argued that the trial court could not consider the incident because it was too remote in time from the date of the DVCPO hearing. Whereas, here, appellant argues that the trial court cannot consider the same incident because his record was sealed in case No. 2004 CR B 026216. In *Nkurunziza I*, we stated that the trial court "did not rely

on the 2004 incident alone to find a pattern of abuse during [the parties'] marriage," and that "[t]he entry refers to multiple threats by appellant to establish a pattern of abuse, which the [trial] court found included the 2004 incident." Id.

{¶15} Because appellant did not raise the issues regarding (1) the sealing of his criminal record and/or (2) violations of his right to privacy in *Nkurunziza I*, he cannot presently substitute his Civ.R. 60(B) motion for a direct appeal on those issues. In addition, the doctrine of res judicata bars appellant from currently raising these issues because he could have raised them in *Nkurunziza I*. Therefore, the trial court did not abuse its discretion in denying appellant's motion for relief from judgment.

{¶16} Appellant's second and third assignments of error are overruled.

{¶17} We now discuss appellant's first, fourth, and fifth assignments of error together because they are interrelated.

{¶18} In his first, fourth, and fifth assignments of error, appellant contends that the trial court erred in denying his motion for relief from judgment prior to holding an evidentiary hearing in order to determine whether appellant had presented operative facts of a meritorious defense pursuant to Civ.R. 60(B)(1) through (5). (Appellant's brief, 3, 10, 17.)

{¶19} As stated above, "if the Civ.R. 60(B) motion contains allegations of operative facts that would warrant relief from judgment, the trial court should grant a hearing to take evidence to verify those facts before it rules on the motion." *Mattingly* at ¶7. "Conversely, an evidentiary hearing is not required where the motion and attached evidentiary material do not contain allegations of operative facts that would warrant relief under Civ.R. 60(B)." Id. In *Oberkonz v. Gosha*, 10th Dist. No. 02AP-237, 2002-Ohio-

5572, ¶16, quoting *Masters Tuxedo Charleston, Inc. v. Krainock*, 7th Dist. No. 02 CA 80, 2002-Ohio-5235, ¶8, this court stated that "[i]n order to fulfill the requirement of presenting a meritorious defense, 'a movant need only allege a meritorious defense, not prove that he will prevail on that defense.' " However, "[t]he movant must allege operative facts with *enough specificity* to allow the trial court to decide whether he or she has met that test." (Emphasis added.) *Oberkonz* citing *Syphard v. Vrable*, 141 Ohio App.3d 460, 463, 2001-Ohio-3229.

{¶20} Here, the record indicates that appellant attached 14 exhibits to his motion for relief from judgment. (See generally Motion for Relief from Judgment.) Appellant contends that, pursuant to Civ.R. 60(B)(2), exhibits 3, 5, 6, and 7 constitute "newly discovered" evidence, and that, pursuant to Civ.R. 60(B)(3), the remaining exhibits constitute evidence of appellee's misrepresentations to the trial court during the DVCPO hearing on January 14, 2010. (Appellant's brief, 17.) In its decision, the trial court specifically addressed appellant's evidence, stating:

> Respondent alleges repeatedly that Petitioner was untruthful in obtaining her Civil Protection Order. However, both this Court and the Tenth District Court of Appeals for Franklin County have rejected Respondent's allegation as unavailing. Respondent has no further recourse, and his motion pursuant to Civil Rule 60(B) is sorely misplaced. Respondent has not provided the Court with any newly discovered evidence nor has he a meritorious defense or claim to present. His exhibits 1-8 predate the *granting* of the Civil Protection Order. His other exhibits refer to events in the parties' divorce case before another judge of this Court.

(See Decision and Entry, 2.) Upon review, we agree that appellant's exhibits 3, 5, 6, and 7 do not constitute "newly discovered" evidence. Pursuant to Civ.R. 60(B)(2), newly discovered evidence "by due diligence could not have been discovered in time to move

for a new trial under Rule 59(B)." *Caron v. Manfresca* (Dec. 3, 1998), 10th Dist. No. 98AP-369. Here, exhibits 3, 5, 6, and 7 all relate to the parties' minor children. Exhibits 3 and 5 are reports from Franklin County Children Services, dated June 23, 2008, and May 25, 2010, respectively, finding unsubstantiated emotional maltreatment and indicated physical abuse of the parties' minor children. Exhibit 6 consists of affidavits from Robert T. Lee, M.D., FAAP, and Catherine M. Jenkins, M.D., FAAP, dated April 22 and April 26, 2010, respectively, both attesting that they have not observed any indications of abuse or suspicious injuries while treating appellant's children. Exhibit 7 is a letter from Tonja A. Smith, R.N., B.S.N., dated December 15, 2009, stating that appellant's son has never been seen in the school nurse's office for bruises or serious injuries and that appellant's son stated that appellant has not abused him in the past two and one-half years.

{¶21} First, we note that exhibits 3, 5, 6, and 7 are not relevant to the present matter because appellee is the only protected party named in the DVCPO, and, therefore, evidence regarding the parties' minor children would not assist appellant in formulating a meritorious defense to the DVCPO. Second, although appellant contends that exhibits 3, 5, 6, and 7 are "newly discovered" evidence, he does not explain why exhibits 3, 6, and 7 could not have been discovered, with due diligence, prior to the DVCPO hearing on January 14, 2010. Finally, exhibit 5, issued May 25, 2010, became available to appellant subsequent to the January 14, 2010 DVCPO hearing. However, because exhibit 5 relates solely to Franklin County Children Services' investigation regarding the alleged abuse of appellant's minor children, appellant was not prejudiced by not having exhibit 5 prior to his hearing because the DVCPO did not include the minor children.

{¶22} Appellant also argues that, pursuant to Civ.R. 60(B)(3), exhibits 1, 2, 4, 6, 7, and 8 constitute evidence of appellee's misrepresentation and fraud. (Appellant's brief, 6.) As discussed above, appellant's argument relating to exhibit 1 is barred by the doctrine of res judicata. In addition, exhibits 2, 4, and 8 are also barred by the doctrine of res judicata because they are dated August 9, 2007, September 19, 2009, and May 13, 2005, respectively, and could have been raised at an earlier time. Finally, exhibits 6 and 7 are not relevant to the present matter because they only relate to the parties' minor children and, as previously stated, the DVCPO does not include the parties' minor children as protected parties.

{¶23} Accordingly, appellant did not set forth evidentiary material containing allegations of operative facts that would warrant relief under Civ.R. 60(B). Therefore, the trial court did not abuse its discretion in ruling upon appellant's motion for relief from judgment without first holding an evidentiary hearing. See *Mattingly* at ¶7.

{¶24} Appellant's first, fourth, and fifth assignments of error are overruled.

{¶25} For the foregoing reasons, all five of appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.

Judgment affirmed.

KLATT and FRENCH, JJ., concur.

_____