[Cite as *Wolf-Sabatino v. Sabatino*, 2012-Ohio-6232.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Linda A. Wolf-Sabatino,	:	
Plaintiff-Appellant,	:	
		No. 12AP-307
v.	:	(C.P.C. No. 08DR-06-2610)
Philip R. Sabatino,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 31, 2012

Tyack, Blackmore, Liston & Nigh Co., L.P.A., Thomas M. Tyack, and *Margaret L. Blackmore*, for appellant.

Friedman & Mirman Co., LPA, Scott N. Friedman, and *Elizabeth A. Johnson*, for appellee.

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

FRENCH, J.

{¶ 1} Plaintiff-appellant, Linda A. Wolf-Sabatino ("Linda" or "appellant"), appeals the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, which denied her motion for a new trial pursuant to Civ.R. 59(A). For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} Linda initiated this action for a divorce from defendant-appellee, Philip Ronald Sabatino ("Ron" or "appellee"), on July 1, 2008. On August 12, 2010, the trial

court issued a Judgment Entry-Decree of Divorce ("Decree") granting a divorce and allocating marital assets, including the parties' UBS brokerage accounts and line of credit ("UBS accounts"). The Decree ordered the parties to effect the transfers required by the court's allocation of marital assets within 45 days. A supplemental judgment entry, filed December 10, 2010, affirmed the Decree and stated that the allocation of marital rights and responsibilities would remain as set forth in the Decree. Both parties appealed, but the trial court's judgment remained in effect because Linda did not post the $3 million supersedeas bond required for a stay. [1]

{¶ 3} While their appeals were pending in this court, the parties filed various post-judgment motions in the trial court. Of particular note, Ron filed a motion for contempt, based on Linda's refusal to provide written permission to UBS to distribute the UBS accounts. UBS' policy precluded it from distributing funds from the joint accounts without the written consent of both parties. Ron also filed motions to add UBS as a party to this action and to order UBS to distribute the parties' assets in accordance with the Decree. Linda, in response, filed her own motion to hold Ron in contempt and for attorney fees. In the meantime, the stock market fluctuated, and, as a result, UBS made several involuntary margin calls and other demands to reduce the parties' line of credit. Accordingly, the value of the UBS accounts fluctuated from the values stipulated at the time of the Decree.

{¶ 4} On June 14, 2011, the trial court held a hearing on the parties' post-judgment motions. No transcript exists of the June 14, 2011 proceedings, but it is undisputed that Ron, Linda, and UBS were present, along with their counsel, and financial experts. It is also undisputed that, at the conclusion of those proceedings, the trial court ordered the parties to submit memoranda setting forth their respective positions regarding the distribution of assets held by UBS. According to the trial court, each party presented the testimony of their financial experts, and counsel made arguments to the court. Both Linda and Ron filed memoranda on June 21, 2011, along with proposals as to how the trial court should allocate the UBS accounts.

---

[1] Although this court affirmed in part and reversed in part, our partial reversal does not affect the disposition of the accounts at issue in this appeal. *See Wolf-Sabatino v. Sabatino*, 10th Dist. No. 10AP-

{¶ 5} In her June 21, 2011 memorandum, Linda stated that, at the June 14, 2011 hearing, the court "heard arguments of counsel, parties and experts." Linda explained that she had refused to authorize distribution of the UBS accounts because of her concern over a $150,000 withdrawal by Ron. Linda also submitted, as an exhibit to her memorandum, her "proposed distribution of the UBS accounts now that all of the information has been obtained and an explanation given as to the $150,000 withdraw[al]." Linda's proposal set forth two methods for distributing the UBS accounts, either of which was acceptable to her. Her proposal, like Ron's, utilized UBS account balances as of mid-June 2011. Nowhere in her memorandum does Linda question the trial court's authority to reallocate the UBS accounts or the trial court's use of updated account values to do so.

{¶ 6} In September 2011, the trial court's staff attorney asked the parties to submit records regarding the value of the UBS accounts since June 2011. Neither party objected to the submission of updated statements, and UBS account statements, dated August 31, 2011, were provided to the trial court.

{¶ 7} On October 14, 2011, the trial court issued a judgment entry. Taking into account the overall increase in value of the UBS accounts, and considering the testimony and evidence presented, the trial court reallocated the distribution of the UBS accounts. Under the October 14, 2011 judgment entry, Linda was allocated $738 less from the UBS accounts than under the original Decree, while Ron was allocated approximately $256,000 more than under the original Decree. The parties agree that the October 14, 2011 judgment entry was a final, appealable order.

{¶ 8} Instead of appealing the trial court's October 14, 2011 judgment, Linda filed a motion for a new trial pursuant to Civ.R. 59(A). She argued that the trial court improperly relied upon the supplemental August 2011 financial records without a formal hearing or authentication and that the trial court improperly modified the allocation of marital assets using numbers other than those set forth in the Decree. She also argued that the court's decision did not take into account facts she would present at an evidentiary hearing on her motion for a new trial.

1161, 2011-Ohio-6819.

{¶ 9} The parties and their counsel again came before the trial court on February 7, 2012, and a transcript of those proceedings is part of the appellate record. On that date, Linda's counsel reiterated the argument that the trial court inappropriately relied on the financial information submitted in September 2011, which was not formally introduced as evidence, in rendering its judgment. In response, Ron's counsel agreed to stipulate to the financial numbers contained in the supplemental financial statements. Linda's counsel also attempted to raise additional errors in the following exchange with the court:

> MR. TYACK: What I am suggesting is, in fact, part of what went on, for example, Mr. Friedman, you submitted an order suggesting certain money was -- $150,000 was pulled and used to pay on underlying --
>
> THE COURT: Now, that we had an evidentiary hearing on.
>
> MR. TYACK: No. Basically --
>
> THE COURT: We had a hearing on that.
>
> MR. TYACK: Pursuant to your request, see attached date, margin line was paid down by UBS before Ms. Sabatino put a -- What he is saying, in reality, was the money that was pulled was pulled from an account, I understand it, it was a joint -- it was a marital account, but then you gave all of the payment credit to him as if it was done with nonmarital assets. That's part of what comes out of this.
>
> THE COURT: We had a hearing on that. We argued that. You all had witnesses here. You had experts on that.
>
> MR. TYACK: The issue, on that particular issue, Judge, that was back and forth, but I would suggest to you that that was these updated numbers and things you were talking about were not in evidence.
>
> THE COURT: I will tell you that we had a hearing, I heard from experts, I got updates, which is customary for me. * * * And I issued a decision. It is a final decision. And no, I am not going to open it up again for a new trial on the issue of that. I'm not. So no.

(Feb. 7, 2012 Tr. 16-17.) The trial court ultimately refused to hear additional testimony in support of appellant's motion for a new trial.

{¶ 10} On March 8, 2012, the trial court issued a judgment entry overruling Linda's motion for a new trial, and Linda filed a timely notice of appeal from that judgment.

II. ASSIGNMENTS OF ERROR

{¶ 11} Linda raises the following assignments of error:

> I. THE TRIAL COURT ERRED IN OVERRULING [LINDA'S] MOTION FOR A NEW TRIAL.
>
> II. THE TRIAL COURT ERR[ED] AS A MATTER OF LAW AS ITS DECISION OF OCTOBER 14, 2011 IS NOT BASED UPON COMPETENT AND CREDIBLE EVIDENCE, IT IS BASED UPON UNAUTHENTICATED EVIDENCE, THE TRIAL COURT REFUSED TO HEAR ORAL TESTIMONY UPON [LINDA'S] MOTION FOR A NEW TRIAL, AND MODIFIED ITS PREVIOUS ORDER AS TO DIVISION OF CERTAIN MARITAL ASSETS.

III. DISCUSSION

{¶ 12} By her first assignment of error, Linda argues that the trial court erred by denying her motion for a new trial, pursuant to Civ.R. 59(A), which states, in pertinent part, as follows:

> A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:
>
> (1) Irregularity in the proceedings of the court, * * * or any order of the court * * *, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;
>
> * * *
>
> (6) The judgment is not sustained by the weight of the evidence; * * *
>
> (7) The judgment is contrary to law;
>
> * * *

> In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.
>
> * * *
>
> On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment.

As a general matter, Civ.R. 59 does not require the trial court to grant a new trial, but allows the court discretion to decide whether a new trial is appropriate. *Alderman v. Alderman*, 10th Dist. No. 10AP-1037, 2011-Ohio-3928, ¶ 11, citing *Frazier v. Swierkos*, 183 Ohio App.3d 77, 2009-Ohio-3353, ¶ 8 (7th Dist.). An appellate court will not reverse a decision whether to grant a new trial absent an abuse of discretion. *Thomas v. Columbia Sussex Corp.*, 10th Dist. No. 10AP-93, 2011-Ohio-17, ¶ 16.

{¶ 13} As an initial matter, we briefly consider whether the trial court, in fact, conducted a "trial" with respect to its October 14, 2011 judgment, because a motion for a new trial properly lies only after a trial. *See L.A. & D., Inc. v. Bd. of Lake Cty. Commrs.*, 67 Ohio St.2d 384, 387 (1981) ("Since a summary judgment proceeding is not a trial, a motion for a new trial does not properly lie."). Civ.R. 59 does not define "trial," but the Supreme Court of Ohio addressed the meaning of that term for purposes of Civ.R. 59 in *First Bank of Marietta v. Mascrete, Inc.*, 79 Ohio St.3d 503 (1997). There, the court held that a contempt hearing that resulted in a money judgment constituted a trial for purposes of Civ.R. 59(A).

{¶ 14} "A proceeding is considered a trial for purposes of Civ.R. 59 when the indicia of trial substantially predominate in the proceeding." *Mascrete* at 507. Relevant factors for courts to consider in determining whether a proceeding is a trial include the following:

> (1) [W]hether the proceeding was initiated by pleadings, (2) whether it took place in court, (3) whether it was held in the presence of a judge or magistrate, (4) whether the parties or their counsel were present, (5) whether evidence was

> introduced, (6) whether arguments were presented in court by counsel, (7) whether issues of fact were decided by the judge or magistrate, (8) whether the issues decided were central or ancillary to the primary dispute between the parties, (9) whether a judgment was rendered on the evidence.

Id. Applying those factors here, we conclude that the June 14, 2011 hearing contains sufficient indicia of trial. The hearing took place in court, in the presence of a judge, with the parties, their counsel, and their expert witnesses present. The parties' counsel presented arguments to the court. Linda, herself, admitted in her June 21, 2011 memorandum that the court heard arguments of counsel, parties, and experts. In addition, issues of fact were presented to and decided by the court. Despite her prior admission that the court heard from the parties and their experts, Linda now argues that the trial court took no evidence at the June 14, 2011 hearing. The trial court, however, states that it took evidence and expert testimony. In the absence of a record that affirmatively demonstrates otherwise, we must presume the regularity and validity of the proceedings in the trial court. *Perry v. Joseph*, 10th Dist. No. 07AP-359, 2008-Ohio-1107, ¶ 20, citing *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197 (1980). Accordingly, we presume that the trial court heard testimony from the parties' financial experts regarding the UBS accounts. Because substantial indicia of trial indicate that the June 14, 2011 hearing was a trial for purposes of Civ.R. 59(A), Linda's motion for a new trial was an appropriate vehicle by which to challenge the judgment.

{¶ 15} In her motion for a new trial, and again on appeal, Linda primarily argues that irregular procedure warranted a new trial under Civ.R. 59(A)(1). In particular, Linda argues irregularity based on the trial court's utilization of unauthenticated financial information submitted by the parties regarding the August 2011 value of the UBS accounts. To obtain a new trial on grounds of irregularity at trial, "the movant must establish the presence of serious irregularities in the proceedings that deprived the party of a fair trial, such as those that 'could have a material adverse effect on the character of and public confidence in judicial proceedings.' " *Gagliano v. Kaouk*, 8th Dist. No. 96914, 2012-Ohio-1047, ¶ 11, quoting *Wright v. Suzuki Motor Corp.*, 4th Dist.

No. 03CA2, 2005-Ohio-3494, ¶ 114. A litigant is entitled to a fair trial, not a perfect trial. *Gagliano* at ¶ 16, citing *Grundy v. Dhillon*, 120 Ohio St.3d 415, 2008-Ohio-6324, ¶ 30.

{¶ 16} Both Linda and Ron submitted proposed distributions to the trial court in June 2011. The parties agree that the value of the UBS accounts, as a whole, had increased since the court's Decree, due, in part, to fluctuations in the stock market. Both parties' proposals utilized UBS account balances as of June 2011. It does not appear from the record, however, that those values were before the court in properly authenticated, evidentiary form. Nevertheless, both parties relied on the June 2011 values of the UBS accounts and asked the court to reallocate the UBS accounts using those values. And, neither Linda nor Ron objected to the court's request for the August 2011 account statements at any time before the trial court issued its judgment.

{¶ 17} Appellate courts generally consider waived an evidentiary objection not brought to the trial court's attention at a time it could be remedied. *See, e.g., Robinson v. Springfield Local School Dist. Bd. of Edn.*, 9th Dist. No. 20606 (Mar. 27, 2002). Here, Linda did not object to submission of the August 2011 values before the trial court rendered its decision. She did, however, raise that issue before the trial court in her motion for a new trial.

{¶ 18} Even if waiver were not applicable in these circumstances, the invited-error doctrine applies. Under the doctrine of invited error, an appellant cannot attack a judgment based on error the appellant induced the court to commit or for which the appellant is actively responsible. *In re J.B.*, 10th Dist. No. 11AP-63, 2011-Ohio-3658, ¶ 10, citing *Daimler/Chrysler Truck Fin. v. Kimball*, 2d Dist No. 2007-CA-07, 2007-Ohio-6678, ¶ 40, citing 5 Ohio Jurisprudence 3d, Appellate Review, Section 448, at 170-71 (1999, Supp.2007). Under this principle, a party may not complain about an action taken by the court in accordance with the party's own suggestion or request. *Id.* To the extent that both parties invited the court to rely on the updated balances of the UBS accounts, neither party objected to the submission of the August 2011 statements, and neither party contested the accuracy of the August 2011 statements, we conclude that

Linda was not entitled to a new trial based on the trial court's reliance on the August 2011 account balances, despite the manner of their submission.

{¶ 19} In her motion for a new trial, Linda also argued that the trial court's refusal to permit evidence precluded her from proving "certain facts" she believes the trial court should have considered. For example, Linda argues that she would have demonstrated that the court failed to take into account the following:

> [T]hat subsequent to the original [Decree], [Ron] took $150,000 from the UBS account [ending] 6503 (which was an account to be divided between the parties) and transferred that $150,000 into [the] account [ending] 6618 on October 29, 2009[,] and that account was awarded 100% to [Ron]. Thus, a marital asset was inappropriately allocated directly to [Ron] because he took the money from a joint account and put it into an account that was awarded to him.

(Motion at 3.) Ron's alleged withdrawal or redistribution of funds from the UBS accounts predates the June 14, 2011 hearing and Linda brought those facts to the trial court's attention at that time. Linda also incorporated those facts into her subsequent memoranda and proposed allocation, filed June 21, 2011. The appreciation realized between June and August 2011 does not affect the arguments regarding the supposed $150,000 withdrawal, which the court eventually found was an involuntary margin call by UBS. The trial court heard, at least, argument from counsel and the parties' financial experts regarding all issues except the specific account balances as of August 2011. Accordingly, we conclude that the trial court did not act unreasonably when it refused to take further evidence or entertain further argument on these issues.

{¶ 20} On appeal, Linda now also argues that the trial court's refusal of her request for an oral hearing to present evidence in support of her motion for a new trial deprived her of due process of law. Procedural due process requires notice and an opportunity to be heard. *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Assn.*, 28 Ohio St.3d 118, 125 (1986). Nevertheless, a hearing on the merits is not required to satisfy due process in all circumstances. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). In this case, we discern no deprivation of due process.

{¶ 21} Civ.R. 59 does not require an oral hearing on a motion for a new trial in all instances. Rather, "[t]he only instance in which Civ.R. 59 mandates an oral hearing is when, under section (D), the trial court grants a new trial on its own initiative." *Corbin v. Dailey*, 10th Dist. No. 08AP-802, 2009-Ohio-881, ¶ 13, citing *Marsilio v. Brian Bennett Constr.*, 7th Dist. No. 06 MA 180, 2008-Ohio-5049, ¶ 20. *Accord Ulrich v. Mercedes-Benz USA, L.L.C.*, 187 Ohio App.3d 154, 2010-Ohio-348, ¶ 28 (9th Dist.).

{¶ 22} Here, Linda filed her written motion for a new trial, along with her accompanying memorandum in support. Linda received notice of the trial court's February 7, 2012 proceedings and appeared, along with her counsel. Linda's counsel argued on her behalf, but the trial court concluded that the arguments stemmed from facts already before the court, as a result of the June 14, 2011 hearing. The trial court did not deny Linda an opportunity to be heard, either with respect to her motion for a new trial or with respect to the underlying judgment. Accordingly, we conclude that the trial court did not abuse its discretion or violate Linda's due process rights by denying her request for an evidentiary hearing on her motion for a new trial. For these reasons, we conclude that the trial court did not abuse its discretion by overruling Linda's motion for a new trial. Accordingly, we overrule Linda's first assignment of error.

{¶ 23} Linda's arguments in this appeal, specifically under her second assignment of error, reach well beyond the denial of her motion for new trial and attack the trial court's underlying October 14, 2011 judgment. Linda's counsel admitted, at oral argument, that the October 14 judgment entry was a final order from which she could have appealed, but Linda chose, instead, to move for a new trial. Because Linda's notice of appeal mentions only the trial court's judgment overruling her motion for a new trial, we must consider whether we possess jurisdiction to entertain her arguments stemming from the underlying judgment. Although Ron does not raise it, we consider this jurisdictional issue sua sponte. *See State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 544 (1997).

{¶ 24} Pursuant to App.R. 4(B)(2)(b), if a party files a timely and appropriate motion for a new trial under Civ.R. 59, the time for filing a notice of appeal from the judgment in question begins to run only when the trial court enters an order resolving

the motion for a new trial. Because we have determined that Linda was entitled to file her timely motion for a new trial, her time to appeal the October 14, 2011 judgment did not begin to run until the trial court denied her motion, on March 8, 2012. Appellant filed her notice of appeal within 30 days of that date and, thereby, conferred jurisdiction upon this court to consider the validity of that judgment. Her notice of appeal, however, does not list the trial court's October 14, 2011 judgment entry.

{¶ 25} The Supreme Court of Ohio addressed this issue in *Maritime Mfrs., Inc. v. Hi-Skipper Marina*, 70 Ohio St.2d 257 (1982). There, like here, the appellants filed a notice of appeal from the trial court's judgment overruling a motion for a new trial, but they proposed assignments of error stemming from the trial court's underlying decision on the merits. The court of appeals determined that it lacked jurisdiction to consider the assignments of error dealing with the underlying judgment, but the Supreme Court reversed. The court stated that it "has consistently adhered to the policy of exercising all proper means to prevent the loss of valuable rights when the validity of a notice of appeal is challenged solely on technical, procedural grounds." *Id*. at 258-59. The purpose of a notice of appeal is to apprise the opposite party of the taking of an appeal. *Id*. at 259, citing *Capital Loan & Sav. Co. v. Biery*, 134 Ohio St. 333, 339 (1938). The court rejected any notion that the notice of appeal in *Maritime Mfrs.* could have misled either the appellee or the appellate court as to what the appellants sought to appeal. Accordingly, the court held that "any mistake in appealing from the order denying the motion for new trial rather than from the judgment should be treated as harmless error and that the appeal should be treated as if arising from the final judgment." *Maritime Mfrs.* at 260.

{¶ 26} Reversing a judgment for the same reasons in *Barksdale v. Van's Auto Sales, Inc.*, 38 Ohio St.3d 127, 128 (1988), the Supreme Court emphasized that its decision "reflects a basic tenet of Ohio jurisprudence that cases should be determined on their merits and not on mere procedural technicalities." *See also Doody v. Centerior Energy Corp.*, 137 Ohio App.3d 673 (11th Dist.2000), fn. 2, citing Weissenberger's *Ohio Civil Procedure 2000 Litigation Manual* 402 (1999) ("Although appellant filed a notice of appeal from the judgment denying his motion for a new trial, his appeal is from the

judgment granting appellees' motion for a directed verdict."). Based on these authorities, we conclude that this court possesses jurisdiction to consider appellant's arguments regarding error in the trial court's underlying October 14, 2011 judgment.

{¶ 27} Under her second assignment of error, Linda argues that the underlying judgment is contrary to law and was not based on competent, credible evidence. Linda specifically argues that the division of property was not subject to revision as a matter of law. She also argues that the trial court failed to take into account Ron's alleged withdrawal of $150,000 from a joint UBS account, transfer of that money into a UBS account awarded solely to him, and use of that money to pay down a joint debt. The parties raised and argued those factual issues in the June 14, 2011 hearing, in their June 21, 2011 memoranda, and in their proposals for reallocation of the UBS accounts.

{¶ 28} To the extent Linda's arguments under this assignment of error mirror arguments we have already rejected under her first assignment of error, we again reject them. Linda had the opportunity to object to the trial court's procedure, either in her June 21, 2011 memorandum or in a written motion for an evidentiary hearing. Linda, however, did neither. Rather, she submitted a proposed distribution of the UBS account for the trial court's consideration and asked the court to reallocate the UBS accounts, using updated account values, according to one of two proposed methods of reallocation. To the extent Linda now argues that any reallocation was contrary to law, we hold that appellant waived that argument by inviting the court to reallocate the UBS accounts. Linda encouraged the court to reallocate those accounts and to use updated values in doing so. She may not now complain about the trial court's process, simply because she disagrees with the trial court's result.

{¶ 29} A trial court has broad discretion in the allocation of marital property, and an appellate court will not reverse an allocation absent an abuse of discretion. *Newman v. Newman*, 10th Dist. No. 11AP-373, 2012-Ohio-2467, ¶ 16. The trial court stated that it considered the testimony and evidence presented in reallocating the UBS accounts. The trial court considered Linda's arguments regarding the $150,000 withdrawal, but found Linda's use of the withdrawal as an excuse for her delay in acquiescing to the original allocation unconvincing. Upon review, we conclude that Linda has not

demonstrated an abuse of discretion in the court's reallocation of the UBS accounts. For these reasons, we overrule Linda's second assignment of error.

IV. CONCLUSION

{¶ 30} Having overruled both of Linda's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.