[Cite as *Hasch v. Hasch*, 2009-Ohio-6377.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

DEBRA J. HASCH,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-L-183**
- vs -	:	
STEVEN P. HASCH,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Domestic Relations Division, Case No. 07 DR 000109.

Judgment: Affirmed.

John W. Bosco, Paramount Building, 31805 Vine Street, Willowick, OH 44095 (For Plaintiff-Appellee).

John W. Hawkins, Center Plaza North, 35353 Curtis Boulevard, #441, Eastlake, OH 44095 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Steven P. Hasch, appeals the judgment of the Lake County Court of Common Pleas, Domestic Relations Division, denying his Civ.R. 60(B) motion for relief from the divorce decree awarded to appellee, Debra J. Hasch. He also appeals the trial court's judgment denying his motion for continuance of the hearing on his motion for relief from judgment. For the reasons that follow, we affirm.

{¶2} The parties were married in June 2003. In July 2003, they moved to California where they purchased their marital residence. The parties resided there until they separated in December 2005. Steven resided with his mother for a time in California and then moved to Indiana. On February 7, 2007, Debra filed a complaint for legal separation from Steven in the trial court, and served him at his residence in Indiana. Steven filed an answer to the complaint.

{¶3} The magistrate issued an order scheduling the case for trial on June 28, 2007. A copy of this order was mailed by the clerk to counsel for both parties.

{¶4} On May 14, 2007, the trial court granted the motion filed by Steven's attorney to withdraw as his attorney of record due to Steven's failure to cooperate with her. On that date, the clerk sent a copy of the court's order granting the motion to withdraw and notice of the June 28, 2007 trial date to Steven at his address of record.

{¶5} On June 7, 2007, Debra filed an amended complaint for divorce, which she served on Steven at his record address. According to Steven's affidavit, he was still residing at that address at that time. The matter came on for trial on June 28, 2007. While Steven was aware of the trial date, neither he nor counsel on his behalf attended. Following trial on the matter, the magistrate entered her decision granting Debra a divorce. The court found that Debra had sold the marital residence, and that the amount of the "net marital equity" in the property was $89,138.46. Further, the court awarded Steven roughly one-half that amount, i.e., $42,069.23, by way of property division. The clerk sent a copy of the magistrate's decision to Steven at his address of record.

{¶6} Steven failed to file objections to the magistrate's decision within 14 days of the filing of the decision, as required by Civ.R. 53. On July 17, 2007, the court filed two judgment entries, one adopting the magistrate's decision, and the other, the divorce decree. On July 19, 2007, the court issued a "notice of final appealable order" regarding the July 17, 2007 judgment entries and sent it to Steven at his address of record.

{¶7} Thereafter, on July 26, 2007, Steven, through his new counsel, filed a motion for an extension of time in which to file objections to the magistrate's decision. In support he argued he had moved from his address of record. Steven had not previously notified the court of a change of his address.

{¶8} While his motion for extension was pending, Steven appealed the trial court's judgment adopting the magistrate's decision, the divorce decree, and the court's denial of his motion for extension, although the court had not as yet ruled on the motion.

{¶9} We remanded the case to the trial court for a ruling on Steven's motion for extension, and that court denied his motion. In *Hasch v. Hasch*, 11th Dist. No. 2007-L-127, 2008-Ohio-1689 ("*Hasch I*"), we affirmed the divorce decree. We also affirmed the trial court's judgment denying Steven's motion for an extension because (1) the motion was filed after the trial court had entered final judgment of divorce; (2) Steven had failed to prove excusable neglect because he had more than two months advance notice of the trial and voluntarily chose not to attend; and (3) he never filed any proposed objections to the magistrate's decision in support of his motion for extension.

{¶10} On January 4, 2008, while *Hasch I* was pending on appeal, Steven filed in the trial court a motion for relief from the divorce decree pursuant to Civ.R. 60(B). It

was incorrectly titled a "motion for relief from default" because Civ.R. 55, which concerns default judgments, does not apply to divorce actions, see Civ.R. 75(F), and because the trial court did not enter the divorce decree by default. After this court issued its opinion in *Hasch I*, Steven refiled his motion for relief. He argued the amount of the sales proceeds was $124,138.46, so he was entitled to one-half that amount ($62,069.23), rather than the amount awarded to him by the trial court in the divorce decree ($42,069.23). Steven has already received $42,069.23, so the total amount of his claim is $20,000.

{¶11} As grounds for relief from judgment, Steven argued he failed to attend the trial due to "excusable neglect" because he did not believe it was necessary to attend since the parties had agreed to split the amount realized from the sale. He also argued that attending the trial would have been "extremely inconvenient" for him because he was in the process of moving back to California.

{¶12} The trial court set the matter for hearing on Steven's motion for relief from judgment on October 21, 2008, at 9:00 a.m. On October 15, 2008, one week prior to the hearing, Steven filed a motion to continue the hearing on the ground that a defense witness, Dennis Hughes, who resides in California, was scheduled for surgery on October 21, 2008. Steven did not file any affidavit concerning his need for a continuance or the witness' inability to attend. The trial court denied the motion on October 17, 2008 and the case proceeded to trial.

{¶13} Steven testified that in July 2003, Debra took title to the parties' marital residence in her maiden name as an unmarried woman because he had liens against him and he did not want them to encumber the property. In March 2005, the parties

refinanced the property. The property stayed in Debra's name, but, pursuant to a new deed prepared in connection with this refinance, the property was titled in the name of Debra Hasch, a married woman, as her sole and separate property. After the parties separated, in May 2006, they decided to sell their California real estate. Debra sold the house in January 2007, and, according to the escrow statement, the amount paid to Debra was $124,138.46.

{¶14} Steven testified he never signed a document surrendering his community interest in the property to Debra. His attorney identified a copy of an "interspousal transfer grant deed," which, according to Steven's attorney, is required to be recorded in California to surrender community property rights from one spouse to another. While this interspousal transfer grant deed indicates on its face that it was signed by Steven, witnessed, and recorded in California, Steven's counsel argued it was never recorded in California. However, there is no evidence in the record that this deed was not recorded.

{¶15} Debra testified that when the parties refinanced the property, Steven signed the interspousal transfer grant deed transferring his community interest in the property to her.

{¶16} On November 26, 2008, the trial court denied Steven's motion for relief from judgment. First, the court found that Steven's motion for relief was timely filed.

{¶17} Next, the court found that in the underlying divorce case, Debra had "disclosed the existence of the California real estate and proceeds she received from its sale." The court noted that in the divorce decree the trial court had found "the net marital equity was $89,138.46." The court further noted that the net marital equity was divided and distributed as part of the marital estate, and that Steven received a total

distribution of $42,069.23, which was approximately one-half the net marital equity in the property. The trial court found that Steven did not have a meritorious claim or any grounds for relief under Civ.R. 60(B).

{¶18} As to Steven's reliance on Debra's alleged fraud as a ground for relief from judgment, the trial court ruled it would not entertain a challenge in Ohio to the validity of the various transactions involving the parties' marital residence because it was located in California. The court ruled that any irregularities in the transactions regarding the property could only be asserted in an action in California, and Steven had never filed any such action there. As a result, the court ruled that the testimony of Dennis Hughes, for whom Steven sought to continue the hearing, was immaterial.

{¶19} In support of his claim of excusable neglect, Steven testified that in June 2007, while he was in the process of moving from Indiana back to California, he talked with Debra on the telephone about the disposition of their residence. Because she told him she would be fair with him, he decided it was unnecessary for him to continue to be represented by counsel or to attend the divorce trial. Consequently, he did not attend the trial. The trial court found that in light of our holding in *Hasch I*, Steven could not claim excusable neglect. In *Hasch I*, we held that Steven could not claim excusable neglect in support of his motion for extension because he had two months advance notice of the trial and simply chose not to attend. Id. at ¶32-34. The trial court also found that Steven could not claim excusable neglect because he was not entitled to rely on Debra's comment that she would be fair as an excuse for his failure to appear and defend his position at trial.

{¶20} Appellant asserts two assignments of error. For his first error, appellant alleges:

{¶21} "The Trial Court Erred to the Prejudice of the Defendant When the Trial Court Overruled His Motion for a Continuance."

{¶22} Appellant argues the trial court erred in denying his motion for continuance due to the absence of defense witness Dennis Hughes.

{¶23} An appellate court will not reverse a trial court's decision denying a motion for continuance unless the trial court abuses its discretion. *In re Kangas*, 11th Dist. No. 2006-A-0010, 2006-Ohio-3433, at ¶24. An abuse of discretion connotes more than an error of law or judgment; it implies the court's judgment was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶24} First, we note that, while Steven filed an unsigned e-mail message from the witness' doctor regarding the witness' surgery being scheduled, Steven failed to file any affidavits in support of his motion for continuance as required by local rule. Rule 3.01(D) of the Rules of the Lake County Court of Common Pleas, Domestic Relations Division, provides: "All motions shall be *in writing* and *supported by* *** *affidavit* where appropriate." (Emphasis added.) Rule III D.1. of the Rules of the Lake County Court of Common Pleas, General Division, provides: "If the motion requires consideration of facts not appearing of record, the movant shall *** file *** affidavits *** in support of the motion." Since Steven failed to file any affidavits in support of his motion for continuance, it was not well taken.

{¶25} However, even if Steven had filed affidavits in support, his motion for continuance would have lacked merit. In his motion, Steven failed to indicate the

substance or even the subject matter of the witness' testimony. As a result, Steven failed to provide the trial court with information necessary to determine the relevance of the witness' testimony and whether prejudice would result from his absence. In addition, he did not provide a date certain for the continued hearing, but simply stated the witness could not "travel comfortably" for four to six weeks. Further, Steven did not indicate why a deposition in lieu of live testimony could not be taken prior to the hearing.

{¶26} We note that after Steven rested his case, his counsel made a proffer of Mr. Hughes' testimony. He said that if permitted to testify, Mr. Hughes would say that he reviewed the chain of title of the property, and he did not find that Steven's interspousal transfer grant deed had been recorded. Since this information was not part of Steven's written motion for continuance and was only proffered *after* the court had ruled on his motion, the proffer was not before the court when it ruled on Steven's motion. Moreover, Steven did not renew his motion for continuance after making the proffer. For this additional reason, the motion was not well taken.

{¶27} However, even if Mr. Hughes' testimony had been summarized in Steven's written motion, it would not have been well taken. The trial court ruled in its judgment denying Steven's motion for relief from judgment that it would not entertain any challenge to the transfers of the parties' marital residence because it is located in California. As a result, the court ruled that Mr. Hughes' testimony would be immaterial. Steven has not assigned error concerning either ruling on appeal. As a result, on remand he would be precluded by res judicata from challenging the validity of any transfer, including the sale, of the property. *State ex rel. G&M Tanglewood, Inc. v. Desiderio*, 11th Dist. No. 2003-G-2497, 2004-Ohio-5309, at ¶24, citing *Grava v.*

Parkman Twp., 73 Ohio St.3d 379, 380, 1995-Ohio-331. Therefore, even if we were to rule the trial court abused its discretion in denying Steven's request for continuance, on remand Mr. Hughes would not be permitted to testify concerning any irregularity in the deed. Steven was therefore not prejudiced by the trial court's ruling denying his request for continuance.

{¶28} We observe that while Steven argues the interspousal transfer grant deed is invalid, on appeal he concedes that he agreed to sell the property and does not argue the alleged irregularities in this deed invalidated the sale. In fact, he acquiesced in the sale by accepting his share of the net marital equity in the property and by demanding more of the sales proceeds on appeal. His argument is therefore not germane.

{¶29} For the foregoing reasons, we hold the trial court did not abuse its discretion in denying Steven's motion for continuance.

{¶30} For his second assignment of error, Steven contends:

{¶31} "The Trial Court Erred to the Prejudice of the Appellant When It Directed a Verdict Against Appellant's Motion for Relief from Default."

{¶32} Steven argues he was entitled to one-half the proceeds from the sale of the parties' marital residence. He argues that while Debra testified at the motion hearing she received $124,138.46 in "sales proceeds," she lied at the divorce trial and "told" the magistrate that she received $89,138.46. The sole basis of this argument is that the divorce decree indicates the "net marital equity" in the property is $89,138.46. He argues this constituted "fraud of an adverse party" under Civ.R.60 (B)(3), entitling him to relief from judgment.

{¶33} "The decision to grant or deny a motion for relief from judgment is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion." *Lopshire v. Lopshire*, 11th Dist. No. 2008-P-0034, 2008-Ohio-5946, at ¶14, citing *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. As noted supra, an abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore,* supra.

{¶34} In order to prevail on a motion for relief from judgment pursuant to Civ.R. 60(B), the movant must show: "'*** (1) the party has a meritorious *** 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.'" *Lopshire*, supra, at ¶13, quoting *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, at paragraph two of the syllabus. "Failure to satisfy any one of the three prongs of the *GTE* decision is fatal to a motion for relief from judgment." *Len-Ran, Inc. v. Erie Ins. Group*, 11th Dist. No. 2006-P-0025, 2007-Ohio-4763, at ¶20, citing *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20.

{¶35} It is well-settled that relief from judgment pursuant to Civ.R. 60(B) is not available as a substitute for an appeal. *Gursky v. Gursky*, 11th Dist. No. 2003-P-0010, 2003-Ohio-5697, at ¶19, citing *Blasco v. Mislik* (1982), 69 Ohio St.2d 684, 686; *Doe v. Trumbull County Children Services Bd*. (1986), 28 Ohio St.3d 128, at paragraph two of the syllabus. In *Blasco*, supra, the Supreme Court of Ohio held that where the movant's "contentions merely challenge the correctness of the court's decision on the merits and

could have been raised on appeal," they may not be asserted in a motion for relief from judgment. Id. The Court further held that by including such contentions in his motion, the defendants disregarded or ignored their obligation under the Civil Rules to timely present their defenses. Id.

{¶36} If Steven had attended the trial, he could have testified to the amount to which he believed he was entitled. If he did not agree with the property division in the divorce decree, he could have appealed it. In fact, Steven did appeal, but failed to challenge: (1) the trial court's finding "[t]hat the net marital equity was $89,138.46" and (2) the court's property division awarding him approximately one-half this amount. His present contentions merely challenge the correctness of the court's decision on the merits and could have been raised in his appeal of the divorce decree. As a result, he cannot rely on Civ.R. 60(B) as a substitute for an appeal of the trial court's finding and award. Id.

{¶37} However, even if Steven was entitled to assert these challenges in his motion to vacate the divorce decree, he failed to make a proper showing below that he had a meritorious claim. In order to demonstrate that one has a meritorious claim to present if relief is granted, the movant must present evidentiary materials which present "operative facts" and not mere general allegations or conclusions. *Youssefi v. Youssefi* (1991), 81 Ohio App.3d 49, 53; *East Ohio Gas Co. v. Walker* (1978), 59 Ohio App.2d 216, 220; *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 105. If the material submitted by the movant in support of a motion for relief from judgment contains no operative facts or meager and limited facts and conclusions of law, it will not be an abuse of discretion for the trial court to overrule the motion. *Adomeit*, supra. In

Youssefi, the husband, in asserting fraud as a ground for relief from judgment, testified his former wife had made false representations at a hearing at which he was not present concerning her financial condition and assets. The Ninth District held that such evidence did not rise to the level of operative facts, and that as a result, the husband failed to demonstrate he had a meritorious claim.

{¶38} In the instant case, Steven stated in his affidavit that Debra misrepresented to the magistrate the amount of proceeds she received from the sale of their property. However, at the hearing, he failed to present any evidence in support of this allegation. Specifically, he did not present any evidence that she told the magistrate she had received $89,138.46 in sales proceeds. Steven simply assumes that because the magistrate found that $89,138.46 was the net marital equity in the home, Debra must have testified at trial that this was the amount of sales proceeds she received. However, there is no evidence in the record that the magistrate based her finding concerning the net marital equity solely on the amount of proceeds realized. In fact, there is no evidence in the record that Debra said anything to the magistrate at the trial. Pursuant to *Youssefi*, the information provided by Steven in support of his motion for relief from judgment did not rise to the level of operative facts, and we hold that Steven failed to demonstrate he had a meritorious claim.

{¶39} Further, because Steven's fraud claim is based entirely on what Debra allegedly "told" the magistrate at the divorce trial, Steven was obligated to file the trial transcript, a suitable alternative, or other evidence of what Debra told the magistrate. However, there is no evidence of any kind in the record concerning what, if anything, she said at the trial. "In determining the existence of error, an appellate court is limited

to a review of the record." *State v. Dudas*, 11th Dist. Nos. 2007-L-189 and 2007-L-190, 2008-Ohio-6983, at ¶18, citing *Schick v. Cincinnati* (1927), 116 Ohio St. 16, at paragraph three of the syllabus. On appeal it is the appellant's responsibility to support his argument by evidence in the record that supports his assigned errors. *Columbus v. Hodge* (1987), 37 Ohio App.3d 68. Because there is no evidence in the record concerning what, if anything, Debra told the magistrate at the divorce trial, this assigned error lacks merit.

{¶40} Steven argues that at the motion hearing, the trial court erred in not applying California law in determining the amount to which he was entitled. However, Steven could have appealed such ruling in his appeal of the divorce decree, but failed to do so. He cannot now use a motion for relief as a substitute for an appeal. *Gursky*, supra; *Blasco*, supra. In any event, by awarding Steven approximately one-half the amount of the net marital equity in the divorce decree, the trial court's ruling was consistent with California's community property law. Thus, Steven was not prejudiced by the decree. For this additional reason, Steven failed to demonstrate he had a meritorious claim.

{¶41} Further, in his motion for relief from judgment, Steven relied primarily on excusable neglect under Civ.R. 60(B)(1) as his grounds for relief. He argued that Debra had "lulled" him into believing his attendance at trial was not necessary because she had told him on the phone she would be fair. As a result, he argued below that his failure to appear and defend was the result of excusable neglect. On appeal Steven abandons this argument and now relies exclusively on Civ.R. 60(B)(3), i.e., "fraud *** of an adverse party." He argues in his appellate brief that because Debra received

$124,138.46 in sales proceeds, but allegedly "told the court" she had received $89,138.46, the trial court relied on her fraud and "incorporated that lie in the judgment of divorce."

{¶42} In determining the existence of fraud of an adverse party for purposes of Civ.R. 60(B), the movant must prove the elements of fraud. *Cefaratti v. Cefaratti*, 11th Dist. No. 2004-L-091, 2005-Ohio-6895, at ¶28. In an action for fraud, the plaintiff must prove *each of the following elements*: (a) a representation, which (b) is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation, and (f) a resulting injury proximately caused by the reliance. *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 169.

{¶43} Based on our review of the record, Steven failed to present any evidence that Debra made a material misrepresentation at the divorce trial. While Debra testified at the motion hearing that she received $124,138.46 in sales proceeds, there is no evidence she testified otherwise at the divorce trial. The fact that the trial court found in the divorce decree that $89,138.46 was the "net marital equity" in the property does not imply that Debra testified the amount of sales proceeds she received was $89,138.46. While Steven failed to present any evidence as to how the trial court arrived at this amount as the net marital equity in the property, we note that "net marital equity" and "sales proceeds" are not synonymous. "Net marital equity" suggests that the difference between $124.138.46 and $89,138.46 was used to pay off marital debt. Since Steven failed to prove that Debra offered testimony at the divorce trial that contradicted her hearing testimony, he failed to show she made a material misrepresentation.

{¶44} Further, in *Seibert v. Murphy*, 4th Dist. No. 02CA2825, 2002-Ohio-6454, appeal denied at 2003-Ohio-1572, 2003 Ohio LEXIS 817, the court held that in order to prove fraud as a result of the false testimony of an adverse party under Civ.R. 60(B)(3), the movant must demonstrate that he was taken by surprise when false testimony was given and that he was unable to meet it or did not know of its falsity until after trial. Id. at ¶34. Steven does not assert surprise or that he did not know of the alleged falsity of Debra's testimony until after trial. To the contrary, according to Steven's motion for relief from judgment, he believed he was entitled to $62,069 before the divorce trial. If he had attended trial, he would have been able to advance this position. However, by failing to attend, he did not present his claim until after the trial. For this additional reason, Steven has failed to prove fraud as a result of false testimony.

{¶45} For the reasons outlined above, we hold the trial court did not abuse its discretion in denying Steven's motion for relief from judgment.

{¶46} For the reasons stated in the Opinion of this court, the assignments of error are not well taken. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas, Domestic Relations Division, is affirmed.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.