[Cite as *Smith v. Smith*, 2009-Ohio-3978.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JULIAN A. SMITH, JR.	:	JUDGES:
	:	Sheila G. Farmer, P.J.
Petitioner-Appellant	:	William B. Hoffman, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. 2008 CA 00030
JILL H. SMITH (nka HORN)	:	
	:	
Petitioner-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal From Fairfield County Court Of Common Pleas, Domestic Relations Division, Case No. 96 DS 126
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	August 3, 2009
APPEARANCES:	
For Petitioner-Appellant	For Petitioner-Appellee
ELIZABETH N. GABA 1231 East Broad Street Columbus, Ohio 43205	RANDY L. HAPPENEY 144 E. Main Street P.O. Box 667 Lancaster, Ohio 43130

Edwards, J.

{¶1} Petitioner-appellant, Julian Smith, appeals from the April 11, 2008, Judgment Entry of the Fairfield County Court of Common Pleas, Domestic Relations Division, overruling his motion to set aside the dismissal entry of March 10, 2008.

STATEMENT OF THE FACTS AND CASE

{¶2} On June 19, 1996, a Decree of Dissolution was filed in the case sub judice. As part of the Decree, the parties entered into a shared parenting plan with respect to their four minor children. Pursuant to the terms of the plan, appellee was the residential parent of the children and appellant was ordered to pay child support.

{¶3} Pursuant to an Agreed Entry filed on August 25, 1997, appellant was named sole residential parent of Anthony, one of the minor children. The Agreed Entry provided that appellee would remain as residential parent for the other three minor children.

{¶4} Subsequently, on December 1, 2004, appellant filed a motion for ex parte emergency custody seeking sole custody of Nicholas and Katherine, the parties' two other remaining minor children. An Entry granting such motion and designating appellant the sole residential parent and legal custodian of the two was filed on December 1, 2004. As memorialized in an Agreed Entry filed on February 7, 2005, appellant was named sole residential parent and legal custodian of Nicholas and Katherine. The parties agreed that, due to financial hardship, appellee would not pay any child support to appellant. At the time, appellee was attending nursing school.

{¶5} Thereafter, on May 4, 2006, appellee filed a Motion to Reallocate Parental Rights and Responsibilities, asking that she be named residential parent and legal

custodian of Katherine. Appellee, in a motion filed the same day, asked that a Guardian Ad Litem be appointed for Katherine. On August 9, 2006, appellee filed a Motion to Compel, seeking an order from the trial court compelling appellant to comply with discovery that was filed on May 4, 2006, and served on appellant on June 14, 2006. Via an Entry filed on August 9, 2006, the trial court sustained appellee's Motion to Compel and ordered appellant to produce the discovery requested within seven (7) days of the filing date of such Entry.

{¶6} As memorialized in an Entry filed on September 6, 2006, Attorney Kenneth Millisor was designated the Guardian Ad Litem for Katherine. Appellee, on September 28, 2006, filed a Notice dismissing her Motion to Reallocate Parental Rights and Responsibilities without prejudice.

{¶7} On November 13, 2006, appellant filed a Motion to Recalculate Child Support. Appellant, in his motion, noted that appellee had completed nursing school in June of 2006 and was a licensed practical nurse who, he believed, was employed full-time at a nursing home. On March 7, 2007, appellee filed another Motion to Compel, asking the trial court to order appellant to produce documents that appellee had requested in discovery that was served upon appellant on December 4, 2006. Pursuant to an Entry filed on March 7, 2007, the trial court sustained appellee's Motion to Compel and ordered appellant to produce the discovery requested within seven (7) days of the filing date of such Entry.

{¶8} A pretrial was scheduled for August 6, 2007, and, upon appellant's request, was continued to November 8, 2007.

{¶9} On September 6, 2007, appellee filed a Motion for Contempt against appellant due to his failure to comply with the trial court's March 7, 2007 order to provide the requested discovery materials to appellee. A show cause hearing was scheduled for November 8, 2007. On November 9, 2007, the trial court issued a notice scheduling an oral hearing on appellee's Motion for Contempt for January 8, 2008.

{¶10} Thereafter, appellee, on November 27, 2007, filed a motion requesting that appellant's Motion for Recalculation of Child Support be dismissed pursuant to Civ.R. 37(B). Appellee, in her motion, stated, in relevant part, as follows:

{¶11} "Defendant submits that Plaintiff's motion should be dismissed under Ohio Civil Rule 37(B) for Plaintiff's failure to comply with the Order of this Court on March 7, 2007 to produce all material requested by the Defendant in her Request for Production of Documents within seven days. Prior to filing Motion to Compel against Plaintiff, Defendant's attorney had written three letters dated December 4, 2006, January 5, 2007 and February 28, 2007 requesting that Plaintiff voluntarily reply to Defendant's discovery request."

{¶12} On January 7, 2008, appellant filed a motion for a continuance of the oral hearing on the "parties respective motions" that was scheduled for January 8, 2008. Appellant, in his motion, indicated that his counsel had a contested divorce trial in Franklin County on the same day. As memorialized in an Entry filed on January 15, 2008, the trial court continued the hearing until March 10, 2008.

{¶13} Thereafter, on March 10, 2008, appellant filed a motion for a reasonable continuance of the hearing scheduled for that day. Appellant, in his motion, indicated that his "previously existing condition of severe blood clotting had flared up" and that he

was in an extreme amount of pain as a result and could not attend the hearing. Appellant's counsel, in such motion, indicated that she believed that appellant was in the hospital at that time.

{¶14} Via an Entry of Dismissal filed on March 10, 2008, the trial court dismissed appellant's Motion to Recalculate Child Support. The trial court, in its Entry, stated, in relevant part, as follows:

{¶15} "The court finds that this matter has been continued several times and that the Defendant has submitted the appropriate payroll information.

{¶16} "This case is hereby dismissed and the matter may be resubmitted through the Fairfield County Child Support Enforcement Agency."

{¶17} Thereafter, on March 11, 2008, appellant filed a "Motion to Set Aside Entry of Dismissal and To Reinstate Petitioner-Father's Motion for Child Support." Appellant, in his motion, stated that appellee's counsel had told appellant's counsel that appellee would dismiss or withdraw her Motion to Dismiss appellant's Motion to Recalculate Child Support once appellant submitted the requested discovery and that the parties would then calculate appellee's child support obligation. Appellant stated that he had mailed the discovery responses to appellee on February 27, 2008. Appellant, in his motion, further argued that appellee's attorney, Kenneth Millisor, had a conflict of interest because he had been named Katherine's Guardian Ad Litem on September 6, 2006. Appellant also alleged, in his motion, that his counsel, after being advised that appellant was unavailable for the March 10, 2008 hearing due to his health problems, contacted the trial court at least five times beginning at 8:15 a.m. on March 10, 2008

and was told to wait for a return phone call from the court "with further instructions as to how the Court wished to proceed" before she left Columbus to drive to the hearing.

{¶18} As memorialized in a Judgment Entry filed on April 11, 2008, the trial court overruled appellant's motion stating, in relevant part, as follows:

{¶19} "The reason this case was dismissed was because of the failure of the Plaintiff to provide discovery requested by the Defendant. There were several requests for discovery as well as a motion in contempt for failure to provide items in discovery.

{¶20} "The motion to dismiss was filed by Attorney Maley on November 27, 2007 for the Plaintiff's repeated failure to provide his income information.

{¶21} "The Court does not believe that Attorney Millisor, as guardian Ad Litem and now attorney of record of the Defendant, affects anything as to what the Plaintiff did not do.

{¶22} "The court finds that the Plaintiff's failure to proceed and provide discovery on a repeated basis was intentional and deliberate and there is no reason to reopen this case."

{¶23} On May 7, 2008, appellant filed a Notice of Appeal from the trial court's April 11, 2008 Judgment Entry, raising the following assignments of error on appeal:

{¶24} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW, AND THUS ABUSED ITS DISCRETION, BY GRANTING APPELLEE'S MOTION TO DISMISS UNDER 37(B) ABSENT EVIDENCE OF WILLFULNESS, BAD FAITH, OR ANY FAULT BY APPELLANT.

{¶25} "II. THE COURT ERRED AS A MATTER OF LAW WHEN THE COURT ALLOWED MR. MILLISOR TO REPRESENT APPELLEE AT THE HEARING EVEN

THOUGH HE WAS PRECLUDED BY RULES 1.7 AND 1.9 OF THE OHIO RULES OF PROFESSIONAL CONDUCT.

{¶26} "III. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN THE COURT DISMISSED APPELLANT'S MOTION SUBSEQUENT TO EX PARTE COMMUNICATION WHEN THE HEARING WAS SET FOR A BILATERAL ORAL HEARING.

{¶27} "IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DETERMINING APPELLEE'S MOTION TO DISMISS WITHOUT AN EVIDENTIARY HEARING WHERE THERE WAS NO NOTICE OF A DISPOSITIVE HEARING ON THE MERITS, AND WHERE THE PARTIES DID NOT SIGN A WRITTEN ENTRY WAIVING AN EVIDENTIARY HEARING.

{¶28} "V. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY DENYING APPELLANT'S REQUEST TO SET ASIDE THE DISMISSAL AND TO REINSTATE THE CASE BECAUSE SUCH DENIAL WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I, II, III, IV

{¶29} Appellant, in his first four assignments of error, argues that the trial court erred in granting appellee's November 27, 2008, motion requesting that appellant's Motion for Recalculation of Child Support be dismissed pursuant to Civ.R. 37(B). As is stated above, the trial court granted such motion via an Entry of Dismissal filed on March 10, 2008.

{¶30} The first issue for consideration is whether the trial court's March 10, 2008 Entry dismissing appellant's motion was a final, appealable order.

{¶31} R.C. 2505.02(B) defines final orders, in relevant part, as follows:

{¶32} "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶33} "(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶34} "(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

{¶35} "(3) An order that vacates or sets aside a judgment or grants a new trial;

{¶36} "(4) An order that grants or denies a provisional remedy and to which both of the following apply:

{¶37} "(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

{¶38} "(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action…"

{¶39} In *Lippus v. Lippus,* Erie App. No. E-07-003, 2007-Ohio-6886, the Sixth District Court of Appeals addressed the issue of whether a dismissal for want of prosecution was a final, appealable order. In *Lippus,* initially the appellate court dismissed the appellant's timely appeal from the trial court's dismissal of her divorce action for want of prosecution, finding that the order of dismissal for want of prosecution was not a final, appealable order. The appellant then filed a motion for reconsideration of the appellate court's ruling, arguing that the cases upon which the court relied could

be distinguished from her case in one important respect. The appellant argued that, in the cases relied upon by the reviewing court, the parties were able to re-file their cases without giving up any of their rights. The appellant argued that in her case, if the original divorce action were dismissed for want of prosecution and she had to re-file the action, she would lose her right to collect the ordered but not paid child support and spousal support payments that had accumulated during the pendency of the divorce.

{¶40} Upon appellant's motion for reconsideration, the *Lippus* court stated, as follows: "We find that where a party's case is involuntarily dismissed by the trial court, and because of the [involuntary] dismissal any rights of the party are extinguished and will not be able to be reasserted in a refiled case, that party has the right to appeal the dismissal pursuant to R .C. 2505.02(B)(1) because it is '[a]n order that affects a substantial right in an action that in effect determines the action and prevents judgment.'" Id. at paragraph 12. The *Lippus* court proceeded to grant the motion to reconsider and reinstated the appeal. *Lippus* at paragraph 19.

{¶41} We find that the trial court's March 10, 2008, Entry involuntarily dismissing appellant's motion was a final, appealable order. Appellant, in such motion, requested a modification of child support. An order modifying child support cannot be retroactive beyond the date that a motion for modification of child support is made. *Tobens v. Brill* (1993), 89 Ohio App.3d 298, 304, 624 N.E.2d 265. Thus, while appellant may be able to refile his Motion for Child Support, he will only be entitled to child support from the date of the filing of the new motion forward. Appellant's right to child support from November 13, 2006, the date that he initially filed his child support motion,

until the date any new motion is filed, therefore, was extinguished and could not be reasserted.

{¶42} However, we find that appellant's appeal from the trial court's March 10, 2008 Entry of Dismissal was untimely. App.R. 4(A) states: "A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day rule period in Rule 58(B) of the Ohio Rules of Civil Procedure." Appellant did not file his Notice of Appeal until May 7, 2008. We note that appellant, on March 11, 2008, filed a "Motion to Set Aside Entry of Dismissal and To Reinstate Petitioner-Father's Motion for Child Support" and then filed an appeal from the overruling of such motion. However, a party may not use a Civ.R. 60(B) motion as a substitute for a timely appeal or to extend the time for perfecting an appeal from the original judgment. *Key v. Mitchell*, 81 Ohio St.3d 89, 90-91, 1998-Ohio-643, 689 N.E.2d 548. Appellant, therefore, could not extend his time for appealing by filing his Motion to Set Aside.

{¶43} As such, we dismiss appellant's appeal from the trial court's March 10, 2008, Entry, based on the fact that it was untimely filed.

{¶44} Appellant's first four assignments of error are, therefore, overruled as untimely appealed.

V

{¶45} Appellant, in his fifth assignment of error, argues that the trial court erred in denying his "Motion to Set Aside Entry of Dismissal and To Reinstate Petitioner-Father's Motion for Child Support."[1]

{¶46} We note that appellant's motion did not reference any Civil Rule or statute. However, appellant's motion is, in essence, a motion to vacate pursuant to Civ. R. 60(B).

{¶47} Civ.R. 60(B) states, in relevant part, as follows: "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."

{¶48} In *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 150-151, the Ohio Supreme Court set forth the factors necessary to recover under Civ.R. 60(B). "[T]he 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

[1] We find that appellant timely appealed from the denial of such motion. While the trial court's Judgment Entry denying such motion was filed on April 11, 2008, the Notice of Appeal was filed on May 7, 2008.

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." Where any one of the foregoing requirements is not satisfied, Civ.R. 60(B) relief is improper. *State ex rel. Richard v. Seidner,* 76 Ohio St.3d 149, 151, 1996-Ohio-54, 666 N.E.2d 1134.

{¶49} Moreover, if a Civ.R. 60(B) motion contains allegations of operative facts which would warrant relief, the trial court should grant a hearing to take evidence to verify those facts before it rules on the motion. *Seidner,* supra, citing *Coulson v. Coulson* (1983), 5 Ohio St.3d 12, 16, 448 N.E.2d 809.

{¶50} Appellant's motion to vacate appears to rely either on Civ.R. 60(B)(1) which permits vacation based on mistake, inadvertence, surprise or excusable neglect or Civ.R. 60(B)(5), which concerns vacation for any other reason justifying relief. We find that such motion was timely filed because it was filed one day after the dismissal entry.

{¶51} We further find that appellant, in his motion, alleged sufficient operative facts so as to be entitled to an evidentiary hearing on his motion. As is stated above, appellant, in his motion, alleged, in part, that he did not appear for the March 10, 2008, hearing based on his counsel's expectation that appellee would withdraw the Motion to Dismiss based on "[appellant's counsel's] submission of discovery, per counsel's prior agreement…" Appellant further noted that he was unable to appear at the hearing due to a painful blood clot in his right leg and both lungs and that his counsel, after advising the court of her client's unavailability, was told to wait to hear from the trial court before she left Columbus for the hearing.

{¶52} We note that appellant did not submit a sworn affidavit or evidentiary materials in support of his motion to vacate/set aside. However, in *Rose Chevrolet v. Adams* (1988), 36 Ohio St.3d 17, 520 N.E.2d 564, the Ohio Supreme Court held that operative facts do not necessarily have to be presented by way of a sworn affidavit. Specifically, the court held that "neither Civ.R. 60(B) itself nor any decision by this Court has required the movant to submit evidence, in the form of affidavits or otherwise, in support of the motion, although such evidence is certainly advisable in most cases. But the least that can be required of the movant is to enlighten the court as to why relief should be granted." Id., 36 Ohio St.3d at 20-21. In *Fed. Natl. Mtg. Assn. v. Hull*, 161 Ohio App. 3d 438, 2005-Ohio-2490, 830 N.E.2d 1203, the court stated that the *Rose* language suggests that when an "attorney submitting the memorandum also asserts his or her own responsibility for the mistake or neglect at issue, the memorandum operates as an affidavit substitute." Id. at paragraph 18.

{¶53} Under the circumstances of this case, we hold the trial court abused its discretion in denying appellant's 60(B) motion absent an evidentiary hearing.

{¶54} Appellant's fifth assignment of error is, therefore, sustained.

{¶55} Accordingly, the judgment of the Fairfield County Court of Common Pleas, Domestic Relations Division, is hereby reversed and remanded for further proceedings consistent with this opinion, with directions to conduct an evidentiary hearing on appellant's motion to set aside judgment.

By: Edwards, J.

Farmer, P.J. and

Hoffman, J. concur

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JUDGES

JAE/d0325

[Cite as *Smith v. Smith*, 2009-Ohio-3978.]

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JULIAN A. SMITH, JR.	:	
Petitioner-Appellant	:	
-vs-	:	JUDGMENT ENTRY
JILL H. SMITH (nka HORN)	:	
Petitioner-Appellee	:	CASE NO. 2008 CA 00030

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas, Domestic Relations Divisions, is reversed and remanded to the trial court for further proceedings, with directions to conduct an evidentiary hearing on appellant's motion to set aside judgment. Costs assessed to appellee.

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JUDGES