[Cite as *Yuse v. Yuse*, 2007-Ohio-6198.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89213

DONALD R. YUSE

PLAINTIFF-APPELLANT

vs.

NICOLE G. YUSE

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-272170

BEFORE: Gallagher, J., Cooney, P.J., and Calabrese, J.

RELEASED: November 21, 2007

JOURNALIZED:

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SEAN C. GALLAGHER, J.:

{¶ 1} Appellant, Donald R. Yuse, appeals the judgment of the Cuyahoga County Court of Common Pleas, Division of Domestic Relations, that denied his motion to vacate and his motion to reinstate. For the reasons stated below, we affirm.

{¶ 2} This is a post-decree divorce case. Appellant was divorced from appellee, Nicole G. Yuse, by an agreed judgment entry issued on February 21, 2001. Pursuant to the divorce decree, appellant was ordered to pay child support. Various post-decree motions were filed, relating to appellant's child support obligation, including appellant's motion to modify support filed September 3, 2002.

{¶ 3} A hearing was eventually held on February 1, 2006, after which the trial court approved an order which provided in relevant part: "Counsel for the parties advised the undersigned Magistrate that all pending issues have been settled, and have requested fourteen (14) days to submit an Agreed Judgment Entry. * * * [T]he parties are hereby granted until February 17, 2006 to submit the judgment entry that disposes of the above motions. Failure to submit the entry shall result in dismissal of the above motion(s)."[1] [2]

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[1] Appellee states in her brief that a hearing on the matter was continued 19 times over the course of 3 1/2 years, before the court provided its warning of dismissal.

[2] The following motions were identified in the order: "#101360 - Motion to Modify Support Post Decree, #109819 - Motion to Modify Support Post Decree, #109820 - Motion for Attorney Fees, #160269 - Motion for Contempt Support Post Decree, #160270 - Motion for Attorney Fees."

{¶ 4} Although appellant states that the parties reached an oral understanding that the case would not be dismissed but rather would be set for a full evidentiary hearing if an agreement was not reached, this "understanding" was never reduced to writing, and there is nothing in the record before us supporting this assertion. The trial court's order of February 7, 2006 specifically provided that the failure to submit the entry would result in dismissal. Thereafter, appellant requested a 14-day extension in which to submit a proposed agreed judgment entry, which the trial court granted on February 24, 2006.

{¶ 5} No entry was submitted by the parties, and on March 21, 2006, the trial court dismissed the various motions, without prejudice, for want of prosecution. Appellant filed a notice of appeal in this court on April 21, 2006. This court dismissed the appeal as untimely.

{¶ 6} Appellant then filed a motion to vacate the order dismissing the parties' motions and a motion to reinstate the plaintiff's motions. As a basis for these motions, appellant asserted that "there was a clerical mistake which resulted in the Court's dismissal" and that "the court's judgment entry of February 24, 2006 failed to provide counsel for the parties that the motions pending before the court would be dismissed for failure to prosecute." Appellant also asserted that he had been prejudiced by the dismissal of his motions and that he had meritorious claims supporting modification of his child support. The trial court denied these motions. In its judgment entry, the trial court found that the motions did not include an analysis

under Civ.R. 60(B). The court further found that the February 7, 2006 order warned both parties that the motions would be dismissed and that the court did not need to reiterate the earlier warning in its February 24, 2006 journal entry.

{¶ 7} Appellant filed this appeal and has raised three assignments of error for our review that provide the following:

{¶ 8} "I. The trial court erred as a matter of law in denying the appellant's motion for relief from judgment without a hearing."

{¶ 9} "II. The trial court erred as a matter of law in denying the appellant's motion for relief from judgment and motion to reinstate the appellant's pending motions."

{¶ 10} "III. The trial court erred by dismissing the parties' pending motions as its February 24, 2006 judgment entry upon which the trial court relies does not contain any notice of the trial court's intention to dismiss the parties' pending motions and the trial court's February 24, 2006 judgment entry supersedes the trial court's February 7, 2006 judgment entry."

{¶ 11} We begin by addressing appellant's claim that the trial court's order of February 24, 2006 contained a clerical mistake and failed to provide notice that dismissal of the pending motions could result. The February 24, 2006 order was an order that granted an extension of time to comply with the trial court's order of February 7, 2006, which instructed the parties to submit an agreed judgment entry

by February 17, 2006 or various pending motions would be dismissed.

{¶ 12} Appellant states that the trial court's entry of February 24, 2006, which granted the extension, contained a clerical mistake in that it stated the "defendant" is granted a 14-day extension to provide an agreed judgment entry to the court. Nevertheless, it was the "plaintiff," appellant herein, who requested the extension. Appellant states that this mistake effectively prevented him from complying with the court's order. Appellant further states that the February 24, 2006 entry failed to provide notice that the failure to submit an agreed judgment entry would result in a dismissal of the pending motions.

{¶ 13} We cannot find merit in appellant's claims as appellant's counsel submitted the proposed entry. In fact, his counsel, in executing the proposed entry, signed as "Attorney for *defendant*, Donald Yuse." (Emphasis added.) It was obvious to the court and the parties that appellant requested the extension and was granted the same. Further, appellant was requesting an extension of time to comply with the trial court's February 7, 2006 order. The February 7, 2006 order clearly instructed the parties to submit an agreed judgment entry by February 17, 2006 and advised the parties that the failure to do so would result in a dismissal of the various motions. Accordingly, appellant was fully aware of the court's order that he was seeking an extension of time with which to comply, and he clearly received notice that a failure to comply would result in a dismissal of the motions.

{¶ 14} Also, we find that insofar as appellant's counsel prepared the proposed

entry containing the error, appellant is prohibited from taking advantage of the invited error. It is well established that a court will not permit a party to take advantage of such "invited error." See *State ex rel. The V. Cos. v. Marshall*, 81 Ohio St.3d 467, 471, 1998-Ohio-329. Under the invited error doctrine, a party may not take advantage of an alleged error that the party induced or invited the trial court to make. *State v. Woodruff* (1983), 10 Ohio App.3d 326, 327. The invited error doctrine is applied when counsel is "actively responsible" for the trial court's error. *State v. Campbell*, 90 Ohio St.3d 320, 324, 2000-Ohio-183. Moreover, "a litigant cannot be permitted, either intentionally or unintentionally to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible." *Lester v. Leuck* (1943), 142 Ohio St. 91, 93. Because the claimed mistake in the February 24, 2006 order, which granted the extension of time, was an invited error, we find appellant's argument lacks any merit.

{¶ 15} We also recognize that appellant improperly used Civ.R. 60(B) to challenge a non-final order. Civ.R. 60(B) states in part that "[o]n 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 * * *." Thus, relief from judgment only applies to final judgments, as a court within its inherent discretion always has power to modify or revise interlocutory orders. *Justice v. Sears, Roebuck & Co.* (Sept. 4, 1984), Montgomery App. No. 8658.

{¶ 16} In this case, appellant sought to vacate the trial court's March 21, 2006

order dismissing the parties' motions. However, the trial court's order was "without prejudice," and therefore, the entry was not a final order that could be subject to Civ.R. 60(B) relief. The appropriate course of action would have been to file a motion for reconsideration. See *Vanest v. Pillsbury Co.* (1997), 124 Ohio App.3d 525, 532. Finally, even if a final order had existed, it is well recognized that Civ.R. 60(B) relief is not available as a substitute for the failure to file a timely appeal. E.g., *State ex rel. Bragg v. Seidner*, 92 Ohio St.3d 87, 2001-Ohio-152; *Key v. Mitchell*, 81 Ohio St.3d 89, 90-91, 1998-Ohio-643.

{¶ 17} For all of the foregoing reasons, we find that the trial court's decision in declining to hold an evidentiary hearing and in denying appellant's motions was not unreasonable, arbitrary, or unconscionable.

{¶ 18} Appellant's assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

COLLEEN CONWAY COONEY, P.J., and
ANTHONY O. CALABRESE, JR., J., CONCUR