

[Cite as *Bonde v. Bonde*, 2009-Ohio-2135.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91633

ROBERT H. BONDE

PLAINTIFF-APPELLEE

vs.

MINDI BONDE

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-282226

BEFORE: Gallagher, P.J., Rocco, J., and Stewart, J.

RELEASED: May 7, 2009

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellant, Mindi Bonde, appeals the judgment of the Cuyahoga County Court of Common Pleas, Division of Domestic Relations, that granted the motion for relief from judgment of appellee, Robert H. Bonde. For the reasons stated herein, we reverse the decision of the trial court.

{¶ 2} In this divorce action, the parties reached an “in court” settlement as to all pending issues on April 1, 2006. The agreement was memorialized by an in-court, hand-written agreement, which both parties executed. Thereafter, pursuant to local rule, counsel for Mindi prepared a proposed judgment entry of divorce, memorializing the parties’ in-court agreement. Robert filed a “rejection of defendant’s submission and proposed corrections to judgment entry” on August 7, 2006 (hereafter “rejection and proposed corrections”). The trial court judge signed the judgment entry, without the requested corrections, and issued a final divorce decree on August 10, 2006.

{¶ 3} Thereafter, Robert filed a notice of appeal and a motion for relief from judgment. This court remanded the matter to the trial court, and on January 24, 2007, by agreement of counsel, the appeal was dismissed with prejudice.

{¶ 4} The motion for relief from judgment was assigned to a new judge. As acknowledged in the trial court's judgment entry on the motion for relief, "it is apparent that [Robert] objected to the identical issues in his submission to the trial court and his motion for relief from judgment." Nevertheless, the trial court granted Robert's motion for relief from judgment on May 13, 2008.

{¶ 5} Mindi timely filed this appeal, raising four assignments of error for our review. We address only her first and fourth assignments of error, which are dispositive of the matter. The assignments of error provide as follows:

"I. The trial court erred and abused its discretion by granting the appellee's motion for relief from judgment."

"IV. The trial court erred and abused its discretion by granting the appellee's motion for relief from judgment, where the appellee's motion was used as a substitute for a direct appeal; and the matters raised in the appellee's motion for relief from judgment were already ruled upon by [the trial court] * * *."

{¶ 6} In ruling on the motion for relief from judgment, the trial court acknowledged that the issues raised therein were the same as those that had been submitted to the trial court in Robert's rejection and proposed corrections. In both pleadings, Robert argued that the judgment entry of divorce should be corrected with respect to (1) the division and cash values of various life insurance policies, (2) the erroneous allocation of bank accounts belonging to the parties' minor children as custodian accounts, and (3) the resulting division of

bank accounts between the parties. These arguments were rejected by the trial court when it entered the judgment entry of divorce on August 10, 2006. As set forth below, the issues should not have been reconsidered by the reassigned judge in ruling on the motion for relief from judgment.

{¶ 7} It is well settled that “[a] Civ.R. 60(B) motion for relief from judgment cannot be used as a substitute for a timely appeal * * *.” *Key v. Mitchell*, 81 Ohio St.3d 89, 90-91, 1998-Ohio-643. In seeking relief under Civ.R. 60(B), the movant must allege new grounds and may not rely on arguments it lost under the judgment to justify relief from that judgment. *Elyria Twp. Bd. of Trustees v. Kerstetter* (1993), 91 Ohio App.3d 599, 602. Moreover, any claims or arguments that could have been raised in a timely appeal are precluded from being raised in a subsequent Civ.R. 60(B) motion. *Garrett v. Gortz*, Cuyahoga App. No. 90625, 2008-Ohio-4369.

{¶ 8} Here, Robert initially appealed the trial court’s judgment entry of divorce. However, he dismissed that appeal and proceeded on his Civ.R. 60(B) motion. Through his Civ.R. 60(B) motion, Robert sought review of the same arguments that had already been presented to, and rejected by, the trial court. A Civ.R. 60(B) motion must not be used merely to reiterate arguments concerning the merits of the case that could have been raised on appeal. *Boardman Canfield Ctr., Inc. v. Baer*, Mahoning App. No. 06 MA 80, 2007-Ohio-

2609; *Wohlabaugh v. Salem Communications Corp.*, Cuyahoga App. No. 84822, 2005-Ohio-1189.

{¶ 9} Insofar as Robert asserts that a mistake regarding accurate information or an inadvertent calculation constitutes grounds for relief from judgment, a “‘mistake’ as contemplated by Civ.R. 60(B)(1) does not mean a mistake or error in the trial court’s ruling that amounts to nothing more than a decision adverse to the moving party.” *Mokrytzky v. Job Shop Network*, Cuyahoga App. No. 88530, 2007-Ohio-2232. In this case, the arguments presented in Robert’s motion for relief were presented to the trial court in his rejection and proposed corrections. Thus, Robert attempted to use a Civ.R. 60(B) motion to challenge the merits of the trial court’s August 10, 2006 decision, which did not accept his proposed corrections. His motion for relief was an attempt to argue that the trial court wrongly decided the issues. Such arguments are appropriate for a direct appeal, but not for a motion for relief from judgment.

{¶ 10} Even assuming, for the sake of argument, that Robert’s motion for relief was properly filed pursuant to Civ.R. 60(B), we find that he failed to establish entitlement to relief thereunder. The judgment entry was consistent with the parties’ in-court settlement agreement. Robert has not set forth any reason justifying his failure to account for the claimed discrepancies at issue

prior to entering the agreement, absent his own mistake or neglect. It is well settled that these grounds do not justify relief from judgment. *Mamula v. Mamula*, Trumbull App. No. 2005-T-0148, 2006-Ohio-4176. We also find that Robert failed to establish any “extraordinary circumstances” in this case to warrant the use of Civ.R. 60(B)(5).

{¶ 11} “Ohio law favors the enforcement of an in-court settlement agreement voluntarily reached between the parties * * *. Indeed, neither a change of heart nor poor legal advice is a reason to set aside a settlement agreement.” (Internal citations and quotations omitted.) *Thompson v. Dodson-Thompson*, Cuyahoga App. No. 90814, 2008-Ohio-4710. Furthermore, “[c]ourts must be wary and ensure that relief under Civ.R. 60(B) is justified, not merely a tool used ‘to circumvent the terms of a settlement agreement simply because, with hindsight, [the moving party] has thought better of the agreement which was entered into voluntarily and deliberately.’” *McLoughlin v. McLoughlin*, Franklin App. No. 05AP-621, 2006-Ohio-1530, citing *Biscardi v. Biscardi* (1999), 133 Ohio App.3d 288, 292.

{¶ 12} In this matter, Robert inappropriately used Civ.R. 60(B) to relitigate issues presented to the trial court. Because the issues raised in Robert’s motion for relief could have been raised in a direct appeal, his motion should have been denied. Accordingly, we find that the trial court erred in granting Robert’s motion for relief from judgment. We sustain appellant’s first and fourth assignments of error and find the remaining issues are moot.

Judgment reversed.

It is ordered that appellant recover from appellee 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, PRESIDING JUDGE

KENNETH A. ROCCO, J., CONCURS;
MELODY J. STEWART, J., DISSENTS
(WITH SEPARATE OPINION)

MELODY J. STEWART, J., DISSENTING:

{¶ 13} I respectfully dissent from the majority's conclusion that Robert Bonde cannot challenge defects in his divorce decree by way of a motion for relief from judgment under Civ.R. 60(B) because he dismissed a direct appeal from that judgment in order to proceed on the motion for relief from judgment.

{¶ 14} Any infirmities with Mr. Bonde's appeal in Case No. 88718 are simply not at issue in this appeal in Case No. 91633 by Mindi Bonde from the court's decision to grant relief from judgment. Instead of deciding the only issue before us in this appeal – whether the court abused its discretion by vacating

part of the divorce decree – the majority reviews the circumstances surrounding an appeal that was dismissed more than two years ago.

{¶ 15} Assuming for the sake of argument that the majority is correct in reviewing the circumstances of Mr. Bonde’s appeal in Case No. 88718, a review of that case plainly shows that Mr. Bonde did not use a Civ.R. 60(B) motion for relief from judgment as a substitute for an untimely appeal. Robert timely appealed from the divorce decree and filed his motion for relief from judgment on the same day. While both the appeal and motion for relief from judgment were pending, we remanded the case on Mr. Bonde’s motion, presumably made under Loc.App.R. 4(A), which states: “If a motion for relief from judgment or order under Civ.R. 60(B) is pending in the trial court and an appeal from the same judgment is also pending, a party may move this court, for good cause, to remand the matter to the trial court for a ruling on the motion for relief from judgment.”

See, also, *Majnaric v. Majnaric* (1975), 46 Ohio App.2d 157. Robert thereafter tried to dismiss the appeal, but we denied that motion. One week later, we issued an order stating that “by agreement of counsel and upon the recommendation of the conference attorney, this appeal is dismissed with prejudice at appellant’s costs.”

{¶ 16} The facts of this case offer no basis for the application of the rule that a motion for relief from judgment cannot be used as a *substitute* for a timely

appeal. See *Bosco v. Euclid* (1974), 38 Ohio App.2d 40. Mr. Bonde did file a timely appeal and, following a remand for consideration of his motion for relief from judgment, we dismissed the appeal on the concurrence of the parties and this court's conference attorney. This dismissal is of a kind that regularly issues in like cases where the parties wish to pursue the issues by way of the motion for relief from judgment. Given the substantial role played by this court in brokering a dismissal of the appeal (it results in one less case on this court's docket), it is disingenuous to apply the rule in *Bosco*. Moreover, apart from our active role in prompting the dismissal, it must be noted that Mrs. Bonde concurred in the dismissal. Having done so, she has no basis for raising that dismissal as a bar to the court's subsequent consideration of the pending motion for relief from judgment.

{¶ 17} Finally, I would find that the court did not abuse its discretion by granting relief from judgment. Despite the majority's assertion that Mr. Bonde did not establish proper grounds for relief from judgment, there was an undeniable error in the judgment entry because it did not list the net cash value of the insurance policies. That error arose from a proposed judgment entry prepared by Mindi Bonde that Mr. Bonde claimed, in his objections to that proposed judgment entry, did not accurately reflect the agreement of the parties. Given these facts, it is unclear to me why the majority concludes that Mr. Bonde

“failed to account for the claimed discrepancies at issue prior to entering into the agreement[.]” Robert’s objections to the proposed judgment entry were a manifestly proper basis for seeking a vacation of the divorce decree and those objections were substantiated by the evidence. I would affirm the trial court in all respects.